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STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS

EVIDENCE LAW

Eighteenth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pendal, MLA
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on Wednesday 13 November 1996.

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TERMS OF REFERENCE

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;

2. when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;

3. the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly;

4. each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;

5. no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;

6. when a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;

7. the Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;

8. if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and

9. in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

This Report considers whether Western Australia should adopt uniform statutory provisions for evidence, and if so, the manner in which this might be best achieved.

In 1995, a major step was taken towards uniform evidence legislation in Australia with the Commonwealth, New South Wales and the Australian Capital Territory enacting evidence legislation containing virtually identical provisions. These Acts provided a model which was designed to be suitable for enactment throughout Australia.

The model legislation not only standardises the scope and formulation of the statutory provisions in operation in the various jurisdictions but also expands and significantly reforms the law of evidence.

The Report examines the origins of the model legislation which began in 1977 with the Senate Standing Committee on Constitutional and Legal Affairs recommending that the Australian Law Reform Commission (ALRC) review the law of evidence with a view to producing a wholly comprehensive code.

The Standing Committee of Attorneys General agreed in 1995 to take into account the benefits of substantially uniform laws of evidence.

The Report considers the current disadvantages for Western Australia of non-uniformity of laws of evidence and investigates the reaction to the model evidence laws. It points out that while the model Acts have received consistent praise there is continuing debate on favoured approaches to certain provisions of evidence law.

The Report also outlines the improvements to evidence law in this State offered by the uniform Acts. The Committee has taken the unusual step of recommending substantial adoption of the uniform model legislation but with the addition of those sections of the current Western Australian Evidence Act which it believes should not be lost.

The Report also considers legislative structures that might be adopted in Western Australia and sets out options which may be considered to enact model evidence laws in this State.

I am especially grateful for the input into this report to consultant Dr Neil McLeod, Associate Professor of Law at Murdoch University, whose advice has meant the delivery to Parliament of an excellent report. I am also grateful for the work of our Clerk, Mr Keith Kendrick, and our Legal/Research Officer, Ms Melina Newnan who continue to serve the Committee in a most professional and highly enthusiastic manner.

PHILLIP PENDAL, MLA
CHAIRMAN

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CHAPTER ONE

INTRODUCTION

1.1 The Law of Evidence - Common Law and Statute

The law of Evidence regulates the kind of evidence which may be brought before a court, and the manner in which it may be so brought.

In Western Australia, the bulk of the law of evidence consists of judicially recognised principles (common law). These judge-made principles are supplemented by statutory provisions, to be found primarily in the *Evidence Act 1906* (Western Australia).

The common law principles are virtually identical across Australian jurisdictions. But the scope and formulation of statutory provisions dealing with evidence differs from State to State.

This Report considers whether Western Australia should adopt uniform statutory provisions for evidence, and if so, the manner in which this might be best achieved.

1.2 Uniform Legislation - New South Wales, the Commonwealth and the Australian Capital Territory

In 1995, a major step was taken towards uniform evidence legislation in Australia. The *Evidence Act 1995* (Commonwealth) and the *Evidence Act 1995* (New South Wales) contain virtually identical provisions. The *Evidence Act 1995* (Commonwealth) has also been adopted as the law in the Australian Capital Territory.

These uniform Acts provide a model which was designed to be suitable for enactment throughout Australia.

This model legislation does much more than standardise the scope and formulation of the statutory provisions in operation in the various jurisdictions. The scope of the legislation has been greatly expanded, and the law has been significantly reformed. This is the essence of the model evidence legislation: it is comprehensive, and it is reformist.

1.3 The Expanded Scope of the Model Legislation

The model legislation codifies almost all of the common law principles governing the admissibility and presentation of evidence. This means that under the model legislation, the rules of evidence are primarily to be found in statute rather than in case law. The additional common law areas covered by the model legislation are summarised in the third column of the table in Appendix 1.

1.4 The Reformist Nature of the Model Legislation

The Commonwealth's *Evidence Act 1995*, and its New South Wales counterpart, were designed to simplify and shorten legal proceedings, and to bring the law up to date with the realities of late twentieth century Australia. The provisions recognising the storage of business records on disk are an example of the latter attribute.

This simplification and updating of the law of evidence was achieved in three ways:

(1) reorganisation of the statutory regime, including the structure, layout and expression of statutory provisions;
(2) the clarification of uncertainties existing in most areas of the law of evidence; and
(3) the implementation of far-reaching reforms.

Correspondingly, the Commonwealth's *Evidence Act 1995* offers three kinds of improvement on the existing *Evidence Act 1906* (Western Australia). These are:

(1) superior formulation of existing statutory provisions,
(2) the inclusion of almost all of the law previously governed by common law rules; and, in the process,
(3) the reform of unsatisfactory aspects of the common law.

Examples from each category are set out in Chapter Seven.

The result was intended to be an Act which is at once more comprehensive and more comprehensible.

CHAPTER TWO

THE ORIGINS OF THE MODEL LEGISLATION

2.1 The ALRC Report and Draft Legislation

In 1977 the Senate Standing Committee on Constitutional and Legal Affairs recommended that the Australian Law Reform Commission ("ALRC") should review the law of evidence with a view

> to producing a wholly comprehensive code of evidence based on concepts appropriate to the present day.[1]

The matter was referred to the ALRC in 1979.

The ALRC produced an Interim Report in 1985,[2] and a Final Report in 1987.[3] These reports included draft legislation.

In 1988 the New South Wales Law Reform Commission recommended the implementation of the bulk of the ALRC proposals.[4]

2.2 *The Evidence Bill 1991* (Commonwealth) and the *Evidence Bill 1991* (New South Wales)

In 1991, Evidence Bills were introduced in Federal Parliament and in the New South Wales Parliament. Both Bills were based on the ALRC's draft legislation, but there were a number of significant differences between them.

The 1991 Commonwealth and New South Wales Bills were considered by the Standing Committee of Attorneys General in October 1991. The Attorneys agreed to give in principle support to the adoption of substantially uniform evidence laws throughout Australia.

However, the scrutiny of the 1991 Bills by the various States led to the identification of a number of imperfections in them.

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1 Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993*, Interim Report (The Senate, Canberra, 1994), at p.2 citing Senate Standing Committee on Constitutional and Legal Affairs, *The Evidence (Australian Capital Territories) Bill 1972*, November 1977, p.7.

2 Australian Law Reform Commission, *Evidence*, Report No.26, Vols 1 and 2 (AGPS, Canberra, 1985).

3 Australian Law Reform Commission, *Evidence*, Report No.38 (AGPS, Canberra, 1987).

4 New South Wales Law Reform Commission, *Evidence Report*, LRC 56 (June 1988).

2.3 The *Evidence Bill 1993* (Commonwealth) and the *Evidence Bill 1993* (New South Wales)

Following consultation between them, the Commonwealth and New South Wales introduced new Bills in 1993. These were now virtually identical. The new Bills also took into account the comments arising from the reviews conducted by the various Attorneys General of the 1991 Bills. A number of the reservations expressed by Western Australian judges and lawyers were met by the redrafted Bills.[5]

2.4 The *Evidence Act 1995* (Commonwealth) and the *Evidence Act 1995* (New South Wales)

The 1993 Bills passed into law as the *Evidence Act 1995* (Commonwealth), which applied from 18 April 1995 and the *Evidence Act 1995* (New South Wales), which applied from 1 September 1995.

At its 14 July 1995 meeting, the Standing Committee of Attorneys General agreed to take into account the benefits that would result from substantially uniform evidence laws in considering whether to adopt the reforms contained in the Commonwealth and New South Wales legislation.

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5 For example, by the substitution of a "dominant purpose" test for the "sole purpose test" as the basis for legal professional privilege, and the inclusion of the power to compel a witness to a new South Wales incriminating questions . (See now *Evidence Act 1995* (Commonwealth), sections 118, 128(5) respectively).

CHAPTER THREE

CURRENT DISADVANTAGES FOR WESTERN AUSTRALIA OF NON-UNIFORMITY

3.1 State/Federal Jurisdictional Differences

Prior to the enactment of the *Evidence Act 1995* (Commonwealth), federal courts adopted the rules of evidence which applied in the State or Territory in which they were sitting. However, the *Evidence Act 1995* (Commonwealth) applies to all federal courts, no matter where they are sitting. There are now two distinct 'laws of evidence' being applied in Western Australia; the State law in State courts and the new Commonwealth law in federal courts. This produces an extra level of complexity for Western Australian lawyers working in both court systems.

The President of the Criminal Lawyers Association of Western Australia has indicated to the Standing Committee that the current situation is

> causing difficulties and confusion for counsel, litigants and judiciary.[6]

The President of the Western Australian Bar Association has indicated that

> there are obvious efficiencies and a general desirability in achieving a position where the law of evidence is the same whether the litigation is being conducted in a State or a Federal Court.[7]

Furthermore, as the Chief Justice of the Supreme Court pointed out in his written response to this Standing Committee, the current division of the law in Western Australia has

> the potential to cause major difficulties where a person is charged with an offence under both State and Commonwealth law, such as importation of drugs contrary to the *Customs Act 1901* (Commonwealth) and possession of drugs contrary to the *Misuse of Drugs Act 1981* (Western Australia).[8]

The Standing Committee understands that the problems presented by the co-existence of two laws of evidence have played a large part in the decision in the Northern Territory to move towards adopting legislation along the lines of the Commonwealth model.

Were the law of evidence to be essentially uniform throughout Australia, there might be expected to be further savings in terms of reduced complexity and attendant reductions in costs. Furthermore, each jurisdiction would be able to benefit directly from the jurisprudence developed in the courts of other jurisdictions as they would be interpreting essentially the same piece of legislation. Uniformity might also assist in making the law more easily accessible and comprehensible to Australians in general.

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6 Response of 12 September 1996, p.1.

7 Response of 19 September 1996, p.1.

8 Response of 21 August 1996, p .2.

3.2 Forum Shopping

The ALRC considered that one of the advantages of uniform evidence legislation would be that it would discourage 'forum shopping'. 'Forum shopping' is the process by which proceedings are initiated in, or transferred to, a particular State on the basis of the particular statutory provisions in operation there. Now that the *Evidence Act 1995* (Commonwealth) applies in all federal courts, there is no longer any scope for selecting a favourable evidence regime for federal offences.

The possibility of forum shopping in cases covered by State law still remains. However, it is unlikely that a reduction in forum shopping will be a significant dividend of uniform evidence legislation. Differences in the procedural rules of evidence are far less likely to provide the motivation for forum shopping than differences in the substantive law which defines the crime or civil action in question.[9] Forum shopping, then, is not a consideration of any great moment in the debate as to whether Western Australia should adopt the model evidence legislation.

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9 In its evidence to the Senate Standing Committee on Legal and Constitutional Affairs, the New South Wales Bar Association did not think that non-uniformity of evidence laws contributed in any significant way to forum shopping. See, Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993*, Interim Report (The Senate, Canberra, 1994) at p.6.

CHAPTER FOUR

REACTION TO THE MODEL ACTS

4.1 The Generally Favourable Reaction

The Commonwealth and New South Wales Acts are the end product of around 15 years of thorough and detailed analysis of the requirements of modern evidence legislation in Australia. That effort has produced model legislation which seeks to bring clarity to a range of common law dilemmas, a goal which the courts themselves had long found elusive. Given the controversial nature of many areas of the pre-existing law, it is really quite remarkable that the solutions proposed initially by the ALRC, and worked on subsequently by the New South Wales and Commonwealth draftsmen, have met with such a high level of contentment and such a low level of contention. Peter Waight, a leading academic expert on the law of evidence, has described the new statutory regime as

> a massive advance which simplifies the law considerably.[10]

The Commonwealth's Evidence Act monitoring committee keeps the operation of the Commonwealth Act throughout Australia under review and reports no problems with it so far. In addition, the Commonwealth Attorney-General's Department has advised the Standing Committee that it has written to the Law Council of Australian and all State and Territory Law Societies and Bar Associations, inviting them and their members to advise the Commonwealth of any problems experienced with the operation of the Act. No problems have been reported to date.

4.2 Resistance to Enshrining the Common Law in Statute

The model legislation was not without its critics, however. One argument was raised against the extension of the scope of the legislation to include the bulk of the law of evidence previously governed solely by judge-made common law. It was suggested that the reduction of common law principle to a single authoritative written expression would render it less flexible and therefore less serviceable. Interestingly, the ALRC had considered whether radical simplification of the law could best be achieved by further enlarging judicial discretion. But in the end it opted for the clear articulation of binding rules.[11]

However, this argument seemed to over-estimate the concrete certainty of the written word, under-estimate the flexibility of judicial canons of statutory interpretation, and to ignore the fact that judges themselves had long been calling for Parliaments to reform unsatisfactory aspects of

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10 Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993*, Interim Report (The Senate, Canberra, 1994) at p.6.

11 Justice Michael Kirby's foreword to P Sutherland's *Annotated New South Wales Evidence Act* (LBC Information Services, 1996) at p.viii.

the law of evidence which were beyond the power of the common law, with its piecemeal, case by case approach to adequately reform. The most notorious example of the latter is the judgement of the House of Lords in DPP v Myers[12] with regard to the common law rule against hearsay. In that case, Lord Reid said

> [i]f we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations ... The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. The policy of make do and mend is no longer adequate.

Some commentators doubted whether certain fundamental principles of evidence, such as the notion of 'inadmissible hearsay', were capable of a definitive description in words, however the judicial pronouncements in which this common law notion is to be discovered are themselves in writing. In this context, undue currency appears to have been given to a criticism made of the definition of 'hearsay' contained in section 59(1) of the model legislation. No doubt, this is largely due to the eminence of the man who first raised the criticism, Andrew Wells QC; a former justice of the Supreme Court of South Australia. Section 59(1) states that:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

Mr Wells has argued that:

> this is just wrong. The speaker's or writer's intention is not the critical factor; it is the proposal to make a testimonial use of the statement that is the crux of the matter.[13]

The obvious reply to this criticism would seem to be that the crux of section 59(1) is the testimonial use of the statement, the representation is:

> not admissible to prove the existence of [the] fact.[14]

A related complaint made against the legislation at the Bill stage was largely stylistic rather than substantive. This was that the proposed model legislation did not make explicit the logical structure of the law of evidence, which has as its foundations the fundamental principle that evidence must be relevant to the facts in issue if it is to be admissible. Upon such foundational principles are built the turrets and towers of other rules designed for increasingly more particular cases. It was complained, for example, that the rule as to relevance appeared in the middle of the

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12 [1965] AC 1001

13 Volume 2 of the Submissions to the Senate Standing Committee of Legal and Constitutional Affairs (Evidence Bill 1993) at p.400.

14 Mr Wells' further points, that "a speaker may make what is outwardly a statement of fact but his intention may be quite different', seems beside the point in this contest. Such a statement would be inadmissible as evidence of the fact asserted only apparently, since it would be irrelevant on that score. The purpose of the words "intended to assert" in section 59(1) seems to be rather that they are sufficient to cover both implied and express assertions. An involuntary physical response may well constitute a representation of fact the maker considered to be true, but had not intended to make: this would still be relevant and admissible. (See ALRC 26, Vol 1, para 684 and the definition of 'representation' in the model Acts). Conceivably, were a statement which is blurted out, or constitutes a 'Freudian slip', to be treated as sufficiently involuntary as to be 'unintended', it too would not be excluded by section 59(1).

proposed model legislation, bounded by lesser rules, with no grand treatment marking out its pre-eminence. The result might be that judges might neglect the importance of this fundamental principle as a touchstone when interpreting other sections in the legislation.[15] However, from the time of the ALRC draft legislation, the section dealing with the rule as to relevance has always been given pre-eminence as the opening section in the Chapter on "Admissibility". Furthermore, in the model legislation as enacted, it is preceded by a flow chart which sets out precisely its fundamental position in the logical flow of the provisions which follow it.

In contrast, it should be pointed out, of course, that the legislation which the model Acts are intended to replace doesn't mention fundamental principles such as relevance or hearsay at all. And yet judges have had no trouble in keeping the position of such principles in mind while interpreting the provisions of this earlier legislation. While it is sometimes asserted that the model Acts form a code which totally replaces the common law, leaving it unavailable to inform the interpretation of the Acts, this is not in fact the case. The model legislation is not a code, and so far as it does not modify the common law, or other statutory provisions, those rules still apply.[16] Indeed, in some areas the model Acts sketch out merely the briefest framework.[17] The detailed application of those provisions will still need to draw heavily on the established principles of the common law.

4.3 The Response in Other States and Territories

The Standing Committee understands that in the Northern Territory the current policy is very much in favour of a move to adopt the model evidence legislation. That legislation is seen as the fruit of an exhaustive and successful independent review of the law of evidence which incorporates a large number of valuable reforms. It is believed that the adoption of the model legislation will relieve the Northern Territory of the problems arising from the fact that Territory legislation operates in Territory matters, but the Commonwealth Act now operates in federal matters heard in the Territory. It is also anticipated that the move will enrich the field of relevant case-law available to Territory judges when ruling on matters of evidence that arise within the Territory's own jurisdiction. It is thought that a Bill in terms very similar to the Commonwealth model, but possibly with some additions, will be introduced as early as the first half of 1997.

In Victoria, the question of adopting the model legislation is under active consideration with the matter currently before a Parliamentary Committee.

In Tasmania, the State Law Reform Commission has just completed a favourable review of the model legislation. The Standing Committee understands that the recommendation in Tasmania is that the model legislation will be adopted, but that certain additional provisions currently found in the *Tasmanian Evidence Act 1910* will be grafted onto it.

On the other hand, the Standing Committee understands that the whole issue of the law of evidence has been referred to the Queensland Law Reform Commission following a report from

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15 See, for example, the letter from the Western Australia barrister which appears in volume 1 of the Submissions to the Senate Standing Committee of Legal and Constitutional Affairs, *Evidence Bill 1993*, at p.16.

16 See section 9 in each of the model Acts.

17 For example, the law relating to expert evidence.

the Queensland Litigation Reform Commission. The current view is that it is most unlikely that Queensland will be adopting the Commonwealth model legislation in the foreseeable future.

It is understood that in South Australia a move towards the model legislation is not currently under active consideration.

4.4 Current Views in Western Australia

The Chief Justice of the Supreme Court of Western Australia[18] is generally in favour of the Commonwealth and New South Wales legislation. However, some reservations remain and these are discussed later in Chapter Five. The Western Australian Bar Association has told the Standing Committee that it thinks it unlikely that the Commonwealth Act is either significantly better or worse than the current State Act, but on balance would support a move towards uniformity. The President of the Criminal Lawyers' Association of Western Australia has indicated to the Standing Committee that his members' views vary widely on the relative merits of the Commonwealth legislation.

[18] Response of 21 August 96, p.1.

CHAPTER FIVE

REMAINING CONCERNS AS TO PARTICULAR PROVISIONS

It should be recognised that a great deal of debate has preceded the formulation of the Commonwealth's and the New South Wales' *Evidence Act 1995*, and the Evidence Bill 1991 which preceded it, together with the ALRC Reports. The legislative reforms adopted in each of these documents necessarily favoured some approaches over others. It is therefore remarkable that the Act has achieved as much consistent praise as it has. Nor would it be surprising if there continued to be some debate as to whether certain provisions of the 'uniform' Act represent the definitive solution to the issues they are intended to address.

It may be relevant to give one example to illustrate this continuing room for intelligent disagreement. Under section 60 of the model Acts, once evidence of a statement is admitted for any purpose, it may then be used as evidence of the truth of its contents. This is so even if the statement would be inadmissible hearsay as to its truth were that its only relevance. The criticism made of this approach is that it is inconsistent to shield a jury from 'unreliable' hearsay evidence in most circumstances, only to invite them to make a hearsay use of such evidence once it is admitted for some other, unconnected purpose. While there is much to be said for this line of reasoning, the ALRC's more pragmatic approach, which is adopted in the model Acts, has a great deal to recommend it. The problem is that it is very doubtful that juries can adequately grasp the notion that a statement may be admissible for some purposes but not others. For example, under the common law approach, evidence that a witness has previously given a different, more plausible, explanation of an event is relevant to show that his or her current testimony may be untrue, but not to show that the previous more plausible explanation has any credence.

It is equally true to say that it would be most surprising if the Act did indeed represent the final word in evidence law. Quite apart from the fact that the law will need to keep pace with changes in technology and in society, experience may show that further reform is necessary to fully match the 'uniform' Acts to present needs. Both the Commonwealth and New South Wales Acts are being kept under review by Monitoring Committees.[19]

In particular, the following provisions of the uniform *Evidence Act 1995* have raised concerns.

5.1 Compellability of Spouse of Accused: Section 18

Under section 9 of the *Evidence Act 1906* (Western Australia), the spouse of an accused person may not be compelled to testify for the Crown, unless the offence is one of those set out in the Second Schedule to the Act (see Appendix 3).

In the model legislation, the counterpart of the Second Schedule to the Western Australia Act

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[19] The chairperson of the Commonwealth's monitoring committee is Lindenmayer J of the Family Court of Australia and its secretary is Peter Meibusch of the Commonwealth Attorney-General's Department. Ms C Wheeler of the Perth Bar is a member of the committee. The New South Wales Evidence Monitoring Committee is contactable via Ms Fiona Cameron, Senior Policy Officer, Legislation and Policy Division, Attorney-General's Department, Box 6 GPO, Sydney, New South Wales 2001.

(Appendix 3) is section 19, which also lists offences of a kind that warrant the compelling of a spouse. Since it derives from statutory offences legislated against in the particular jurisdiction, section 19 will necessarily need to be tailored for Western Australia were the model legislation to be adopted here. Section 19 is one of the cases in which the New South Wales provision differs from the Commonwealth provision.

However, the position of the spouse with regard to all other offences is different under the model legislation to that currently existing in Western Australia. In Western Australia the spouse is not compellable for the Crown. But under section 18 of the model legislation, the spouse, or a direct lineal relation, of an accused person is generally compellable, but may be excused from giving evidence against the accused if the trial judge considers the desirability of hearing the evidence would be outweighed by the likelihood of harm to the witness, or to their relationship with the accused. This will be a difficult balancing act at the best of times, and may involve the court in a protracted investigation of this collateral issue. However the provisions of the model legislation are similar to existing provisions in South Australia and Victoria.

The reservations expressed in Western Australia are not that section 18 goes too far in removing the kind of protection from compulsion found in the *Evidence Act 1906* (Western Australia). Rather the reservation is that section 18 does not go far enough. Rather than requiring a judicial balancing act between harm to the spouse and the interests of justice, such spouses, and lineal relations, should be compellable.[20] The result would be that there would be no need for section 19 of the model legislation.

In support of this contention, it should be borne in mind that the list of offences currently set out in the Second Schedule of the *Evidence Act 1906* is very extensive, containing one hundred offences involving drugs, violence, threats, sexual crimes, and other offences to the person or which endanger the safety of persons, criminal damage and destruction of property, and road traffic offences. It should also be borne in mind that the rationale for providing for the compulsion of a spouse in such cases is not just that the interests of justice demand it, but that otherwise the spouse may be subjected to intolerable pressure not to testify, especially where the accused is of a violent disposition.[21]

Furthermore, it may be that section 18 effectively removes spousal non-compellability, even though on its face it allows for non-compellability where the arguments in favour of it outweigh the court's interest in hearing the spouse's evidence. The Senate Standing Committee on Legal and Constitutional Affairs noted that the Queensland Law Society and the Law Council of Australia were concerned that this discretion would, in practice, always be exercised in favour of compelling the spouse to testify.[22]

It should be noted that Western Australia has itself recently addressed the issue of spousal compellability. Section 9 of the *Evidence Act 1906* (Western Australia) and its Second Schedule

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20 Page 3 of letter of 17 January 1992 from the Chief Justice of the Supreme Court, attached to his written response to the Standing Committee dated 21 August 1996.

21 In 1988 the Domestic Violence Task Force supported the Western Australian Law Reform Commissions recommendations as to spousal compellability in cases involving personal harm.

22 *Evidence Bill 1993*, Interim Report The Senate, Canberra, 1994 p.15.

were inserted in 1991, following a consideration of the 1977 Western Australian Law Reform Commission's report on the subject of the competence and compellability of spouses in criminal proceedings. It should be noted that these 1991 amendments moved away from the common law position that spouses were non-compellable. Section 18 of the model legislation represents a further move away from that common law position. Some believe that the final step, that of treating spouses no differently from other witnesses, is warranted.[23] It would still, of course, be open to the DPP not to call a spouse as a witness in the face of exceptional circumstances.

There is no change in the model legislation to the non-compellability of the spouses of parties in civil cases.

5.2 Marital Communications: Section 18

Section 18 of the model legislation also enables the spouse or a lineal relation of the accused who does testify under that section to withhold testimony about any communications they may have had with the accused. This provision is the model legislation's version of the common law view that communications between husband and wife were sacrosanct, so that the interests of justice were subordinated to any desire of the spouse to protect them from scrutiny. Once again, section 18 enables the judge to review the balance between the interests of justice and those of familial relations.

The common law protection of marital communications is also found in section 18 of the *Evidence Act 1906* (Western Australia). The Western Australian Law Reform Commission considered that since the protection in section 18 was stated to be "subject to section 9", it would therefore be unavailable in cases covered by the Second Schedule.[24] Similar issues arise to those discussed under the previous heading.

5.3 Police Notes: Section 33

Section 32 of the model legislation requires witnesses to testify from memory, rather than from notes, unless the court gives them leave to refresh their memory from the notes. But section 33 allows police officers to read from notes they made at the time, or soon thereafter, without first obtaining such leave. This provision did not form part of the ALRC's draft legislation, nor the 1991 Commonwealth Bill. It had its origin in section 418 of the *Crimes Act 1900* (New South Wales). Its presence in the New South Wales Evidence Bill 1991 was viewed by the Western Australian Bar Association at the time as providing an inappropriate model, but was supported by the Western Australian Chief Justice.[25]

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[23] Note, however, that there were some reservations expressed at the time of the 1991 amendments to the *Evidence Act 1906* (Western Australia) that further incremental steps might be taken without properly bearing in mind whether the interest of marital privacy should be overridden by the interest of the criminal law in protecting society. See Western Australia, Parliamentary Debates, Hansard, 15 October 1991, p.5325.

[24] Project 31, at paragraphs 4.25 and 7.38 (though note paragraph 5.4). Whether this is a necessary conclusion from these provisions is another matter.

[25] Page 3 of letter of 24 October 1991, attached to the Chief Justice's response to the Standing Committee dated 21 August 1996.

The ability to read from notes might give police evidence an air of certainty it might not otherwise have. On the other hand, the likelihood that a police officer has investigating a number of incidents since the offence was committed might give the officer's oral testimony an air of confusion it might not deserve.

The Chief Justice pointed out that the certainty of a witness's testimony is best tested on cross-examination, and that section 33 requires the notes used by the police officer to have been made available to the defence in advance.

However, the same sort of arguments might be made in the case of other witnesses, especially given the delays that regularly occur before matters are brought to trial. It may be that serious thought should be given to whether police witnesses are in such a peculiar position as to warrant this special treatment, and how that sits with the special protection that the criminal justice system is designed to afford to an accused person.

5.4 Evidence of Prior Convictions: Section 97

Under section 97 of the model legislation:

> evidence of the character, reputation or conduct of a person ... is not admissible ... if ... the party adducing the evidence has not given reasonable notice ... to each other party ... or ... the evidence would not ... have significant probative value.

It is occasionally suggested that this significantly weakens the protection as to evidence of an accused's prior convictions which is currently found in section 8(1)(e)(I) of the *Evidence Act 1906* (Western Australia).[26] This concern may be more a reflection of the power of negative language to confuse, rather than section 97's logical substance. *Reasonable notice* alone is not enough to make such evidence admissible.

It is unlikely that the courts will interpret *significant probative value* in a way that will lead to any change in the admissibility of an accused's prior convictions. Perhaps it might have been helpful if the phrase *character, reputation or conduct* had included the phrase *including that of any prior conviction*.

5.5 Religious Confessions: Section 127

Section 127 of the model legislation enables members of the clergy to protect the confidentiality of evidence divulged to them as a religious confession.

There are many groups in society who believe that the confidentiality inherent in their role ought to be recognised as affording confidences passed to them the privilege of protection from the prying ears of the court. In the Northern Territory, Tasmania and Victoria, medical practitioners enjoy such a privilege in civil cases. A case for privilege has been put forward by journalists. No

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[26] Evidence of the accused's convictions is not admissible unless it constitutes evidence of guilt of the crime charged, ie., is probative of the facts in issue.

doubt other sections of society, for instance, accountants, therapists and social workers, might consider they too constitute a special case. However, given the amelioration of the privilege with regard to marital communications discussed above, it is questionable whether privileges of this kind ought to be extended any further. Nor is section 127 of the model legislation based on the ALRC's recommendations, which rejected a blanket privilege for sacramental confessions[27], it is merely a carry-over of section 10 of the *Evidence Act 1898* (New South Wales). However, a similar immunity for clerics in receipt of confessional confidences currently exists in Tasmania, the Northern Territory and Victoria.

There is very little case-law on the operation of confessional privilege in the jurisdictions where it currently exists. It is unlikely that the issue of privilege will arise with much frequency. The fact that there is likely to be little need for the privilege should be weighed together with the incentive the existence of the privilege offers to others in society who think that their confidences, too, should form a special case. On balance, section 127 is a provision Western Australia might prefer to omit from any version of the model legislation it chooses to enact.

5.6 Matters of State: Section 130

Section 130 of the model legislation is intended to encapsulate the common law with respect to public interest immunity. Where the public interest in preserving the secrecy of certain matters outweighs the interest in having access to such matters in court, such evidence is immune from the normal rules requiring disclosure. While the public interest in maintaining secrecy is usually invoked in regard to information in the keeping of government, the immunity goes further and can apply to non-government bodies fulfilling public roles. It has occasionally been suggested that section 130 of the model legislation, in referring to "matters of state" is inadequate to capture the full extent of the immunity. But a close reading of the section suggests that is not the case. While it is true that the examples in subsection (4) of documents that may involve the immunity are all matters in keeping of government, those examples are provided with the express proviso that they are to be read

> without limiting the circumstances in which information or a document may be taken ... to relate to matters of State.

Given the express intent of the ALRC, on whose provision section 130 is based, to preserve the ambit of the common law immunity, there seems little risk that the courts will give the section a new, narrow reading.

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27 Report No.38, Evidence, at para 205.

5.7 Presence of Jury during the *Voir Dire*: Section 189

Given that the model legislation was intended, in part, to simplify the laws of evidence, one aspect of section 189 seems to be unduly cumbersome. Subsections 189(4) and (5) involve the court in exercising a complexly described discretion to allow the jury to remain during legal argument on non-prejudicial points of law. While there must be great sympathy for the jury which finds itself being constantly sent in and out of the courtroom as points of law arise, it is not likely that this section will reduce their journeys very much, since much legal argument refers to prejudicial matter. What these subsections are more likely to produce is unnecessary cost to the court in terms of regularly considering a complex set of extra rules.

CHAPTER SIX

RETENTION OF CERTAIN WESTERN AUSTRALIAN PROVISIONS

6.1 Subsequent Advances in Western Australian Legislation

Subsequent to the presentation of the ALRC's report on Evidence and the drafting of the 1991 Commonwealth and New South Wales Bills, significant reforms to the law of evidence were legislated in this State. These innovations are not represented in the current Commonwealth and New South Wales uniform Acts.

The major reforms were those to the *hearsay rule* and those concerning the provision of the televised testimony of vulnerable witnesses.

6.2 Hearsay

While the hearsay reforms contained in sections 79B-79G of the *Evidence Act 1906* (Western Australia) were a laudable advance on the common law, there is a strong consensus that the provisions of the model Acts, which have an entirely different basis, are much better (See the discussion in Chapter Seven).

6.3 Questioning of Complainants in Sexual Offences

Provisions protecting complainants in sexual offence cases from irrelevant questioning as to their sexual history were introduced into the *Evidence Act 1906* (Western Australia) in 1985 and amended in 1992. There is no such specific protection afforded in the model legislation.

Section 97 of the model legislation disallows:

> evidence of the character, reputation or conduct of a person unless it has significant probative value.

Section 103 prevents the asking of questions that are relevant only to credit worthiness unless the evidence sought is substantially probative on the issue of credit worthiness.[28]

These sections should be compared with section 36BC of the *Evidence Act 1906* (Western Australia) which requires that a question as to a complainant's sexual experience must not only have "substantial relevance" but that its probative power must be weighed against the distress which the question may cause the complainant. While it is likely that sections 97 and 103 of the Commonwealth Act would, if applied with due vigilance and sensitivity, prevent the admission of the questions going to sexual reputation or sexual disposition which are currently impermissible

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[28] Section 41 of the model legislation contains a general power to disallow any question that is harassing or offensive. Cf section 26 of the *Evidence Act 1906 (Western Australia)*; such provisions have in the past proved inadequate to protect complainants from a minute examination of their sexual history, though it is arguable that they should have been sufficient for the purpose.

in Western Australia, it may be thought preferable to retain the outright rejection of such evidence currently found in sections 36B and 36BA of the *Evidence Act 1906* (Western Australia).

In this context, it should be borne in mind that New South Wales does not have specific provisions dealing with the sexual history of a complainant. They are located in section 409B of the *Crimes Act 1900* (New South Wales). This provides the explanation for the absence of such provisions in the model evidence legislation. In Western Australia the provisions are found, perhaps more helpfully, in our evidence legislation and it is arguable that steps would be taken to retain them there.

Section 36C of the *Evidence Act 1906* (Western Australia) prevents publication of material likely to enable the public to identify the complainant.

Where the credit of a complainant is attacked by reference to a delay in making, or a failure to make, a complaint in regard to the alleged sexual offence, section 36BD of the Western Australian Act requires a judge to warn a jury that such delay or failure is not necessarily evidence that the offence did not take place. Because delay or failure in reporting a sexual attack is indeed quite common, it is likely that such evidence would be inadmissible under section 103 of the Commonwealth Act in any event. Similarly, under the Commonwealth Act, evidence that a timely complaint was made would no longer be admissible as relevant to credit, though the complaint would itself be evidence of the facts under section 66. The admissibility of timely complaint as a matter going relevance to bolster the credit of a complainant is a reflex of precisely the same ill-conceived prejudice that section 36BD is designed to remedy. On balance it may be that the Commonwealth approach to prior complaint is preferable.

6.4 Vulnerable Witnesses

Significant amendments to the *Evidence Act 1906* (WA) were made in relation to the televised and pre-recorded evidence of children and special witnesses in 1992 sections 106A to 106S. The Chief Justice of the Supreme Court considers that:

> [i]t would be important to ensure that these provisions were not weakened in any way in pursuit of uniformity.[29]

The Criminal Lawyers' Association is also in favour of continuing the use of closed circuit television in the presentation of the evidence of vulnerable witnesses during a trial. It does, however, have some reservations about the current provisions. At the moment, there appears to be no room for judicial discretion with regard to the provision of closed circuit evidence for a child under the age of 18 years who falls within one of the relevant categories outlined in Schedule 7 of the Act. This should be contrasted with section 106R which enables a judge to make an order with similar effect for other vulnerable witnesses. That order may be made on application or of the Court's own motion, and the pertinent grounds for such an order are spelled out.

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[29] Response of 21 August, 1996, p. 2.

The Criminal Lawyers' Association also has concerns about the provisions which deal with pre-recorded evidence.[30] The Association points out that recorded pre-trial questioning may take place out of context, without the scene being set by the Crown's opening address. This presents two problems for defence counsel: it makes cross-examination problematic, and it leaves open the possibility that the Crown will be able to tailor its opening at trial to take account of the way in which the pre-trail questioning has gone. The use of recordings at a subsequent retrial is also problematic, not least given the possible change in counsel now conducting the case.

If a decision is made to incorporate the current provisions for vulnerable witnesses into any future uniform evidence regime, that may well provide a suitable opportunity for these concerns to be addressed. In New South Wales, provisions covering the use of closed circuit television and vulnerable witnesses are included in the *Crimes Act 1900* sections 405D-405F.

30 Response, 12 Sept 1996, p.1.

CHAPTER SEVEN

IMPROVEMENTS OFFERED BY THE MODEL ACTS

The model legislation offers three kinds of improvement on the existing *Evidence Act 1906* (Western Australia). These are:

- superior formulation of existing statutory provisions;
- the inclusion of almost all of the law previously governed by the common law and, in the process; and
- the reform of unsatisfactory aspects of the common law.

Examples of each are set out below:

7.1 Superior Formulation of Existing Statutory Provisions

Self-incrimination. Under section 11 of the *Evidence Act 1906* (Western Australia), a judge may compel a witness to answer a question even though the witness objects that to do so may leave the witness open to criminal prosecution. In such cases the judge may grant the witness a certificate rendering his or her answer inadmissible as evidence in criminal proceedings against him or her (other than for perjury). Similar provisions are found in section 128 of the model legislation, but they are more thorough. Section 128 also covers answers which might expose a witness to civil liability, and it recognises that a certificate will not protect a witness who is exposed to prosecution or liability under foreign law.

The Chief Justice of the Supreme Court of Western Australia has identified a further problem with section 11 of the Western Australia Act. The grant of a certificate under that section is dependant upon the witness who is giving self-incriminating evidence doing so in a "satisfactory manner". This may have the paradoxical effect of making such witnesses more reticent. They cannot be sure until they have concluded their evidence that they will be granted a certificate. Under the model legislation the grant of a certificate is not dependant on the witness answering questions in a "satisfactory manner".

Hostile Witnesses. Sections 20 and 21 of the *Evidence Act 1906* (Western Australia) deal with the questioning of witnesses who prove hostile to the party calling them. Section 20 derives from section 22 of the *Common Law Procedure Act 1854* (Eng), the drafting of which is notorious for its ambiguity and imprecision. Section 21 deals only with the proof of prior inconsistent statements by a hostile witness, leaving unanswered the common law dilemma as to how far a party may go in discrediting a witness who proves hostile. The treatment in section 38 of the model legislation is much more comprehensive. It also extends the law to cover witnesses whose evidence in chief is not the result of deliberate falsehood or evasion, but is nevertheless sufficiently unsatisfactory as to justify further probing by the party calling them.

Documentary Evidence. The admissibility of documentary evidence has long been an area in which common law principles have proved inadequate. Statutory exceptions to deal with business records were included in most early Evidence Acts, but these themselves were soon superseded by advances in what has now become the age of information technology. Provisions dealing with the reproduction of documents were introduced into the Western Australian legislation in 1966 (*Evidence Act 1906* (Western Australia), sections 73A to 73CV). However, the approach adopted in the model legislation is arguably superior. That approach includes the fundamental step of abolishing the original document rule altogether : [see sections 47 to 51.]

The rule against hearsay. Documentary evidence also involves consideration of the hearsay rule. This fundamental area of the law of evidence has been the subject of a string of recent High Court cases. Those cases failed to provide a definitive restatement of the common law rule, but seem rather to have strained the rule almost to breaking point in an effort to avoid reshaping it. Faced with the apparent inability (and the express unwillingness) of the courts to reform this area of the law, Western Australia introduced its own major reform of the hearsay rule, in so far as it applies to documents, in 1987 *(Evidence Act 1906* (Western Australia), sections 79B to 79G). The provisions of the model legislation go much further, effectively abolishing the hearsay rule in all cases of first-hand hearsay, whether documentary or oral. The basis of this reform, that the evidence is no more than one step removed from direct testimony, is also to be contrasted with the current Western Australia approach which accepts any documentary statement derived ultimately from personal knowledge, no matter how indirect and uncertain the chain of communication. There seems to be a general consensus that the model provisions represent a superior solution.

7.2 Codification of Common Law Rules

At the moment in Western Australia, the bulk of the rules of evidence are to be found only after an examination of the case law. Even once located, many important areas of the common law are contentious. Continuing uncertainty about the scope of those principles constitutes an obstacle to the efficient administration of justice. By codifying the vast bulk of existing common law principles, the model legislation has enabled a single authoritative statement to replace the various interpretations arguable on the cases. Some examples of the sorts of rules now codified in the model legislation are set out below.

Similar Fact Evidence. Evidence that a person accused of an offence happens to have committed similar offences in the past is generally inadmissible at common law. It is believed that such evidence would operate in an unduly prejudicial fashion on the minds of jurors. The exceptions to this general rule represent a sophisticated body of principles. These principles have been the subject of numerous appellate court decisions. Neither the rule nor the exceptions to it are currently found in the *Evidence Act 1906* (Western Australia). But they are now codified in the model legislation, (sections 94 to 101), in a form which the Chief Justice of the Supreme Court of Western Australia has described as commendable.

Suppression of disallowed questions. Section 195 of the model legislation prohibits the publication of questions which have been disallowed as offensive, or as constituting an irrelevant attack on the character of a witness. Western Australian courts rely on their inherent power to

suppress such publication, so that the exercise of that power can sometimes be a matter of controversy.

7.3 Reform of Unsatisfactory Common Law Rules

We have already noted that in reformulating statutory exceptions to the documentary evidence rule and the hearsay rule, the model legislation has fundamentally altered the common law principles on which they were based. Further examples of changes to the common law foundations of the law of evidence are set out below.

Identification Evidence. Considerable research in recent decades has highlighted the dangers associated with identification evidence, especially where such identification has been prompted by an unscientific use of *mug shots* and identification parades. Sections 114 and 115 of the model legislation have met with general favour as a welcome example of the law of evidence bringing itself up to speed with the fruits of such research.

Calling For and Inspecting Documents. One unsatisfactory feature of the common law in civil trials is that a document which would otherwise be inadmissible, for example, as hearsay, may become admissible merely by virtue of the fact that the other side asks to see it and inspects it. Section 35 of the model legislation changes the law so that merely calling for and inspecting a document does not expose the inspector to the tender of it.

Collateral Evidence Rule. Generally, evidence cannot be led where it is relevant only to the credibility of the testimony of some other witness. It has always been far from clear whether matters going to the limits of a witness's physical perception or awareness fall within this rule. Section 106(d) of the model legislation extricates such evidence from the confines of the rule.

CHAPTER EIGHT

STRUCTURES THAT MIGHT BE ADOPTED

8.1 Structures Identified by the Standing Committee

The Standing Committee has so far identified and classified eight legislative structures which are used to promote varying degrees of uniformity in legislation. A brief description of each is provided in Appendix 3.

8.2 The Relationship between the Commonwealth and New South Wales Evidence Acts

The relationship between the Commonwealth and New South Wales Acts seems to fall within Structure 2, Complimentary or Mirror legislation. While Mirror legislation often arises where there is uncertainty about the distribution of constitutional powers as between the Commonwealth and the States, in this case the motivation is rather the adoption of *best practice* in evidence law following protracted efforts aimed at encapsulating such practice in model legislation.

The New South Wales and Commonwealth Acts are very close indeed, much more so than might normally be expected of Mirror legislation. This is largely due to the fact that there was considerable cooperation and compromise between the Commonwealth and New South Wales in redrafting their divergent 1991 Bills.

8.3 Differences between the Commonwealth and New South Wales Evidence Acts

There are, of course, some minor differences between the Commonwealth and New South Wales Acts.[31] Most of these are due to constitutional and technical considerations and would have their counterparts in any model evidence legislation which was passed in Western Australia. Thus, section 4 of the model legislation deals with the courts to which the legislation applies. The Commonwealth version of section 4 deals with the legislation's application in the federal courts and the courts of the ACT. The New South Wales version of section 4 deals, naturally enough, with the application of the New South Wales Act in New South Wales courts.

However, some few minor divergences of substance do exist between the New South Wales and Commonwealth Acts. The two Acts contain quite distinct versions of section 9, the section designed to ensure the model legislation is not misconstrued as a code. The New South Wales legislation risks undermining the model legislation itself. Section 25 of the Commonwealth Act preserves any pre-existing right in the accused to make an unsworn statement. This section is not

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[31] Differences are to be found in the following sections: 3(3), 4, 5, 6, 7, 8, 9, 25, 70(2), 105, 110(4), 129(5)(a), 151, 154, 155, 158, 163, 169(3), 182, 185, 186, 194, 196 and the following terms in the Dictionary: ACT court, Governor, Governor-General, New South Wales court, federal court.

reproduced in the New South Wales Act, where there is no longer any such right.[32] Section 185 of the Commonwealth Act requires full faith and credit to be given to public acts, records and judicial proceedings, section 186 provides for the swearing of affidavits for use in court proceedings without the issue of a commission for taking affidavits. Neither provision is found in the New South Wales Act. However, the section numbers appear in that Act, together with a note recording the existence and effect of the Commonwealth provisions.) Likewise, the New South Wales Act contains some provisions not found in the Commonwealth Act. In section 194, the New South Wales Act provides for witnesses who fail to attend proceedings. In the case of the Commonwealth, this matter is dealt with in the federal court rules. Section 196 provides for offences under the New South Wales Act to be heard summarily.

8.4 Options for Western Australia

States such as Western Australia which may wish to embrace the new legislative framework will not have that same initial opportunity for consultation and compromise in shaping the model legislation that New South Wales and the Commonwealth enjoyed. It follows that it is likely that any new jurisdictions coming on board will enact legislation which is less perfectly convergent than that of the Commonwealth and New South Wales. We can expect some minor jurisdictional variation, not least because of peculiar problems which may present themselves in some jurisdictions.

It would be possible, in theory at least, for Western Australia, or any other jurisdiction, to tie their adoption of the model legislation to a new round of consultation, compromise and redrafting. This process would be designed to iron out any differences with New South Wales and the Commonwealth and produce a new set of highly uniform Acts. This is hardly likely to be the swiftest or easiest course of action, however, and would require equal enthusiasm and energy from the Commonwealth and New South Wales. It would also anticipate further elaborate and expensive rounds of redrafting to precede the entry of each of the other five jurisdictions into the uniform regime.

The Western Australian Bar Association favours the adoption of the Commonwealth Act largely on the basis of the desirability of uniformity, rather than any conviction that the Commonwealth Act is superior. It follows that their view is that any adoption of such legislation in Western Australia should strive for the minimum possible variation from the New South Wales and Commonwealth Acts.

The main problem facing Western Australia is that there are a number of provisions in the existing *Evidence Act 1906* which are not found in the model legislation which it would make sense to preserve. In large measure these are provisions which are not found in the model legislation because they are located in other pieces of legislation in the Commonwealth and in New South Wales. We have already noted, for example, that while the model legislation does not contain sections dealing specifically with the sexual reputation of a complainant, or the televised

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[32] There is no such right in Western Australia either. In fact, the only place the right survives is Norfolk Island. It is perhaps regrettable that the Commonwealth preserved the right at all, but that is not a matter that any Western Australia version of the legislation can address.

presentation of evidence, these are provided for in the *Crimes Act 1990* (New South Wales). The provisions in sections 115-118C of the *Evidence Act 1906* (Western Australia), covering the examination of witnesses for other courts, find their counterpart in the *Evidence on Commission Act 1995* (New South Wales).

8.5 Uniform Act Plus Separate Act

One solution would be to pass an Evidence Act which closely mirrors the model legislation, and to place the additional provisions currently found in the *Evidence Act 1906* (Western Australia) into a single separate piece of legislation. Alternatively, some of these additional provisions could be relocated to the *Criminal Code*.

While this would result in an Evidence Act which was much closer to the model legislation than would otherwise be the case, the result would be largely cosmetic. The truth would be that many provisions which needed to be taken into account in defining the law of evidence in Western Australia would lie hidden in other legislation. It is the hidden nature of those other provisions which would provide the greatest argument against this model. It is probably best to keep all provisions relating to the presentation of evidence together in the one place.

8.6 "Mirror" Uniform Act with Additional Western Australian Provisions

A large number of the sections in the *Evidence Act 1906* (Western Australia) which have no counterpart in the model legislation deal with purely procedural matters in regard to the production of imprisoned witnesses, collecting evidence from sick witnesses or those outside the State, witness fees, and the examination of witnesses for other courts. (See Appendix 1.)

These provisions could readily be grouped together as an additional Part at the end of any model evidence legislation enacted in Western Australia. It is likely that the model legislation being considered in the Northern Territory will include provisions with regard to the collection of evidence in remote areas.

With regard to provisions in the *Evidence Act 1906* (Western Australia) which actually depart in substance from those found in the model legislation, these should be incorporated into the model Act in the position where the model provisions currently occur. In keeping with the current lay-out of the model Act, these would be accompanied by a note explaining that the version set out was peculiar to Western Australia and perhaps noting the effect of the provisions in the other model jurisdictions.

8.7 Preserving Uniformity

Over time, new reforms to the model legislation are bound to be proposed. It is most likely that these will tend to be enacted in some jurisdictions earlier than in others. It can be expected that the initial level of uniformity, even as between the Commonwealth and New South Wales, will be subject to drift over time.

The Senate Standing Committee on Legal and Constitutional Affairs[33] noted the need for caution in making amendments given the advantages of uniformity. However, from a practical point of view, this approach seems as undesirable as the idea that Western Australia should hold off enacting the model legislation until it can be re-negotiated into a new, entirely uniform form which accommodates any of the concerns we may have. If a reform becomes desirable, then its enactment in one jurisdiction may in fact speed up the process of similar and, in this context, perhaps uniform, reform elsewhere. To wait for all jurisdictions to agree, even those whose inclination is to reject untried experimentation, is to resort to the *"slowest common denominator"*. In this context, an interesting analogy is provided by the impetus that the passing of the New South Wales and Commonwealth Acts have given to the uniformity process in the first place.

8.8 Recommendations

The Committee recommends that:

Western Australia enact a new Evidence Act which would include -

(1) the Commonwealth Model Evidence Act in the form of mirror legislation but subject to the Commonwealth Model forming Part A of the new Act; and

(2) incorporating those sections of the current Western Australian Act thought to be worthy of retention and discussed in this report as Part B of the Act .

The Committee alerts Members to the fact that in adopting the model legislation, Western Australia will be making provisions for the protection of religious confessions, the right for police to read automatically from notes, for a jury to remain present during some legal argument and for some further reduction of marital privilege at the judge's discretion. The Committee makes no judgement on the merits or otherwise of these issues.

Parliamentary Direction

In accordance with Standing Order 378(c) of the Legislative Assembly of Western Australia, this Standing Committee directs that the responsible Minister be required within not more than three months, or at the earliest opportunity after that time if Parliament is in adjournment or recess, to report to the House as to the action, if any, proposed to be taken by the Government with respect to the recommendations of this report.

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33 *Evidence Bill 1993*, Interim Report, The Senate, Canberra, 1994, at p.11.

APPENDIX 1

COMPARISON OF THE CONTENTS OF THE ACTS

Contents of *Evidence Act 1906* (Western Australia) and *Evidence Act 1995* (Commonwealth) compared

This appendix sets out, in summary form, a comparison of the contents of the current *Evidence Act 1906* (Western Australia) and *Evidence Act 1995* (Commonwealth). The numbers in the first column refer to the provisions of *Evidence Act 1906* (Western Australia). The numbers in the second column refer to corresponding provisions in the *Evidence Act 1995* (Commonwealth), though these are often quite different in substance. The numbers in the third column refer to provisions in the Commonwealth Act which deal with aspects of the law of evidence which are not treated of in the Western Australian Act.

Evidence Act 1906 (WA)	***Evidence Act 1906* (Cth) Corresponding provisions**	***Evidence Act 1906* (Cth) Additional topics**
Application and Definitions 1-5	1-11	*Legal and Religious Privilege* 117-127, 132
Competence, Compellability, Marital Privilege and Self-incrimination 6-19, Schedules 2 and 7	12-20, 36, 128, 187	*Examination of Witnesses and Refreshing Memory* 27-35, 37, 39-40, 42, 44, 46
Evidence as to Credit Worthiness 20-27	26, 38, 41, 43, 102-108, 178-180,	*Character of Accused* 109-112
Miscellaneous Rules of Evidence 28-32A	149, 184, 190-193, 197	*Views* 52-54
Rules in Particular Cases 35-50: Schedule 6		*Relevance* 55-58
Evidence of Witnesses in Prison 51-52		*Opinion Evidence* *76-80, 177*
Judicial Notice 53-56	143-151	*Admissions* 81-90
Official & Foreign Documents 57-73; Schedules 4 and 5	174-176, 182-183, 188	*Evidence of Verdicts* 91-93
Reproduction of Documents 73A-73V	47-51, 152	*Similar Fact Evidence* 94-101
Official Acts and Incorporation 74-79A	153-156, 158-159	*Identification Evidence* 113-116

Evidence Act 1906 (WA)	***Evidence Act 1906* (Cth) Corresponding provisions**
Hearsay 79B-79G	59-75
Proof of Judicial Proceedings 80-81	157, 181, 185
Telegraphic Messages 82-88	160-163,
Bankers Books 89-96	(59-75 above, especially 69)
Oaths, Affirmations and Affidavits 97-106	
Vulnerable Witnesses 106A-106S	
Depositions 107-108	
Examination of Witnesses outside the State 109-114	
Examination of Witnesses for other Courts 115-118C	
Fees for Witnesses and Interpreters 119	

***Evidence Act 1906* (Cth) Additional topics**
Discretions to Exclude 129- 131, 133-139
Standard of Proof 140-142
Corroboration and Warnings 164-165
Ancillary Provisions 166-173
The Voir Dire 189
Waiver 190-191

APPENDIX 2

PREVIOUSLY IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The Standing Committee has so far identified and classified eight legislative structures relevant to the issue of uniformity in legislation. A brief description of each is provided below. (A fuller account of these models can be found in Annexure 1 to the Standing Committee's Censorship Bill Report, tabled 28 November 1995).

Structure 1: *Complementary Commonwealth-State* or *Co-operative legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's Constitutional powers.

Structure 2: *Complementary or Mirror legislation*. For matters which involve dual, overlapping, or uncertain division, of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Cooperative, Applied or Adopted Complementary legislation*. Here one jurisdiction enacts the main piece of legislation, with the others passing Acts which do not replicate, but merely adopt that Act, and subsequent amendments, as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51(xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. For example, where goods or services which comply with the legislation in their jurisdiction of origin need not comply with inconsistent requirements otherwise operable in a second jurisdiction into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* Where one jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 3

EVIDENCE ACT 1906 (WESTERN AUSTRALIA)
SECOND SCHEDULE