LAW REFORM COMMISSIONER
VICTORIA

Report No. 11

UNSWORN STATEMENTS IN CRIMINAL TRIALS

MELBOURNE
1981

LAW REFORM COMMISSIONER
VICTORIA

Report No. 11

UNSWORN STATEMENTS IN CRIMINAL TRIALS

MELBOURNE
1981

PREFACE

On the 23rd October 1979 The Honourable the Attorney-General requested me to investigate and report to him

(a) upon the necessity for reforming the law relating to the right of an accused person on trial to make an unsworn statement, and

(b) should I recommend that that right remain also on the necessity for reform of the law relating to the limitation of the right to comment on the fact that the accused has made an unsworn statement.

I now submit this Report to the Attorney-General for consideration.

The procedure has varied from that usually followed in that the Report was not preceded by a Working Paper. The subject matter is not one which has excited interest in the community at large dealing as it does with a little-discussed aspect of criminal procedure. However it has been a matter of interest (waxing and waning in intensity over the years) amongst lawyers familiar with the criminal law and of growing concern at the present time amongst judges of the County Court — a concern generated by the increase in the use of unsworn statements in recent times. So it was thought a more useful course to have a questionnaire prepared and distributed amongst those most familiar with, concerned in, and affected by this aspect of criminal procedure.

With the consent of The Honourable the Chief Justice and His Honour the Chief Judge of the County Court, a copy of the questionnaire was sent to every judge of both the Supreme and County Courts. Copies were also sent to the Solicitor-General, Crown Counsel and the Crown Prosecutors, to members of the Criminal Bar Association Committee and the Criminal Law Section of the Law Institute, to the Chief Commissioner of Police, to the Legal Committee of the Magistrates Association, the Royal Victorian Association of Honorary Justices, and to the Public Solicitor.

The general response was most helpful and I am particularly indebted to the many members of the judiciary who took the time and trouble to reply to the questionnaire. As might be expected there was a diversity of views, reference to which will be made where necessary, in the text of the Report. In addition I have had many informal discussions with judges and practitioners.

The questionnaire was neither framed nor intended to permit a statistical presentation or analysis of answers. Such generalisations on views expressed as have been made in the Report are, it is hoped, a fair summary.

I should add that I took the opportunity when attending a Conference in Sydney to discuss the unsworn statement with a number of members of the New South Wales judiciary and the legal profession. The Chief Judge at Common Law, the Hon. Mr. Justice Nagle, was good enough to arrange an informal discussion with Supreme Court judges of great experience in the criminal law. His Honour Judge Cameron Smith was similarly helpful

in arranging a meeting with some District Court judges. Discussions were also held with the Senior Public Defender, Mr. H. F. Purnell Q.C., the Senior Crown Prosecutor, Mr. R. W. Job Q.C., and also with the Clerk of the Peace, Mr. John Hogan.

I desire also to express thanks to the members of the Law Reform Advisory Council for their interest in and comments on this Report when in draft form, to my legal assistant, Mr. George Ryan, for his assistance both in research and in the preparation of Appendix B, and to Ms. Elizabeth Russell and Mrs. Margaret McHutchison for their assiduous and patient secretarial assistance.

160 Queen Street,
Melbourne.
16th June, 1981

JOHN MINOGUE
LAW REFORM COMMISSIONER

UNSWORN STATEMENTS IN CRIMINAL TRIALS

CONTENTS

UNSWORN STATEMENTS IN CRIMINAL TRIALS

PART 1 INTRODUCTION

1.01 The right of an accused person on trial for an offence to make an unsworn statement has provoked a good deal of discussion and argument, some heat, and what would appear to be an intractable polarity of views. This Report will recommend that the right be retained, that where it is availed of the prosecution have a limited right of comment on the failure to give evidence on oath, and that some minor anomalies in the relevant legislation be corrected. Recommendations will also be made affecting the contents of the statement and concerning the disclosure of the previous criminal history of the accused person making an unsworn statement. As the decision to make an unsworn statement can depend in some circumstances on the extent of the cross-examination permitted, it has also seemed proper to recommend some amendments to the law relating to cross-examination of accused persons giving evidence on oath. The Report will of necessity have to examine the content and nature of the exercise of this right. That exercise is so bound up with the course of the criminal trial that at the outset something must be said of the nature and conduct of such a trial.

Indictable and Summary Offences

1.02 In relation to their method of trial criminal offences are divided into indictable and summary offences. The former are generally the more serious and the latter the less, although this is not to say that the division is clearcut and immutable. As with all generalisations many exceptions can be found but the division is satisfactory enough for the purposes of this Report. Indictable offences are those tried before a judge and jury, summary offences usually before a justice of the peace or magistrate, and in some cases before a judge, although the great bulk are dealt with in the lower courts.

Two Major Principles

1.03 In the criminal law there are two longstanding principles which are of prime importance. They are —

1. That every sane person facing a criminal charge is presumed to be innocent until proved beyond reasonable doubt to be guilty, and
2. That no person should be compelled to incriminate himself.

1.04 In the case of indictable offences it can be said that these principles have weathered the centuries. But increasing inroads into their application have been and are being made in the case of summary offences created by statute to regulate human behaviour in the growing complexity of human affairs. There are many such offences where the onus of proof has been reversed and a defendant has to convince a court of his innocence, and there are areas in which, if not in court at least in the investigation of some types of conduct, there is legislative compulsion to answer questions. Instances are to be found of the latter in the taxation and company law fields.

1.05 It will be convenient to deal in the first place with indictable offences and later with summary offences.

1.06 As to the nature of a criminal trial all that need be said is that such a trial is not a search for absolute truth but a mechanism to determine whether the prosecution has produced sufficient evidence to satisfy a jury beyond reasonable doubt of the guilt of a person accused.

That is an onus which remains on the prosecution throughout the whole of the proceedings (except in the special case of a defence of insanity — about which it is unnecessary to say anything in this Report).

PART 2 THE TRIAL OF INDICTABLE OFFENCES

The Prosecution Case

2.01 At the trial the Prosecutor for the Queen has the right to, and usually does, open the case for the prosecution. This means that he tells the judge and jury what the charge is and how he intends to prove that charge, i.e. what the tenor of the oral evidence will be, and the documentary and other evidence which he intends to produce.

2.02 Each witness is then called and examined by the prosecutor. This is called examination-in-chief. Counsel for the accused person, or that person himself if unrepresented, may then cross-examine the witness (if he sees the necessity for this) to test the truth of what the witness says and to bring out any relevant facts in his favour. The witness may be asked questions directed to showing that he is of bad character and should not be believed on that account, but he may refuse to answer any question tending to show that he is guilty of any criminal offence in respect of which he has not been charged and dealt with or indemnified against punishment — he cannot be compelled to incriminate himself. The Prosecutor then has the right to re-examine the witness if he thinks it necessary to clarify any of his answers or to re-establish his credit as a witness if that has been bruised by the cross-examination. During the course of the trial exhibits may be tendered and become part of the evidence, e.g. the murder weapon, a confessional statement in writing, a victim's clothing, implements said to be housebreaking instruments, etc.

2.03 When all of the foregoing is completed the prosecutor announces the close of the case for the Crown.

Previous Misconduct

2.04 One further matter should be mentioned in this brief description. Evidence of an accused's misconduct on other occasions is not allowed in a criminal trial if the only reason for its admission is that it shows a disposition towards wrongdoing in general or towards the commission of the particular crime with which that person is charged.[1]

2.05 Fairness and justice demand a realisation that merely because a person has erred in the past, and his earlier error may raise suspicions against him, it ought not be brought to light in considering a new criminal charge against him of which he is in reality innocent. The law appreciates the danger that an inference may all too readily be drawn from evidence suggesting that someone may have a particular disposition, to the conclusion that he acted in accordance with it.[2]

---

[1] Gobbo, Byrne and Heydon, *Cross on Evidence*, 2nd Australian Edition (1979), p. 341.
[2] However there are some cases where a person so stamps his trademark, as it were, on a particular criminal act that it is recognised as his from previous like acts proved to have been performed by him. In such cases it is allowable to describe that past conduct to a tribunal in order to attribute the current act or conduct charged to the person accused. It is easy to realise that this kind of evidence is highly prejudicial and the courts are commanded to take great care in assessing the similarity of the conduct before admitting it for the jury's consideration.

Options Open to the Accused

2.06 When the Crown case is concluded a submission may be made that there is no case for the accused to answer because, for example, no sufficient evidence has been led by the Crown for a reasonable jury to convict. If the judge rules against this submission then there are three options open to the accused.

Standing Mute

2.07 The first is to remain mute and in effect to say to the prosecution: "You have chosen to bring me here and charge me with a crime. I have no need to prove my innocence. It is up to you to prove my guilt." There was a time in the 17th century when a person charged could be compelled to give evidence, to answer questions, and to suffer torture upon a refusal. Horror at such a possibility has perhaps blotted out the consciousness that this ever happened and at the same time has ingrained the present right so strongly that Lord Devlin, when charging a jury in the case of *Dr. Bodkin Adams* in 1957, felt impelled to speak of the right to remain silent thus:—

> "You sit to answer one direct question: has the prosecution satisfied you beyond reasonable doubt that Dr. Adams murdered Mrs. M.? On that question he stands upon his rights and does not speak. I have made it clear — have I not? — that I am not criticising that: I do not criticise it at all. I hope the day will never come when that right is denied to any Englishman. It is not a refuge of technicality . . . the law on the matter reflects the natural thought of England. *So great is and always has been our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth that we grant to everyone suspected or accused of crime at the beginning, at every stage and until the very end the right to say, 'Ask me no questions. I shall answer none. Prove your case.'* "[3]

Making an Unsworn Statement

2.08 The second option is to make an unsworn statement setting out his version of the facts. This right is the subject of this Report, and is a right of long standing in Victoria — over 120 years in fact. In the *Evidence Act* of 1860 (Act. No. 100), section X read as follows:—

> "It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or an offence punishable on summary conviction (whether such person shall or shall not make his answer or defence thereto by counsel or attorney) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf."

That section with the substitution of the words "does" for "shall" and "solicitor" for "attorney" in the clause in parenthesis is identical with section 25 of the *Evidence Act* 1958 which is in force today. Section X was enacted at a time when a person charged with a criminal offence (with very few exceptions) could not make answer on oath to the charge. The accused cannot be cross-examined on the statement permitted by the section.

[3] See General Council of the Bar of England and Wales, *Evidence in Criminal Cases: Memorandum on the 11th Report of The Criminal Law Revision Committee, Evidence (General)* (1973), p. 13.

Giving Sworn Evidence

2.09 Thirdly the accused may choose to enter the witness box and make answer on oath to a charge. This right was first given in Victoria in 1891[4] and predates the *Criminal Evidence Act* 1898[5] of England which has provided the pattern for modern legislation. In 1915 the Victorian law was brought more into line with the English Act.[6]

2.10 At the time of this considerable change in the conduct of a criminal trial there was great debate as to the wisdom of giving accused persons this right and general fears expressed that it would promote perjury. More importantly, there was concern that the granting of the right would compel an accused person to give evidence on oath and so subject himself to cross-examination wherein he might be forced to incriminate himself. To counter this fear the legislation specifically enacted that the right to make an unsworn statement should remain and that the failure of a person charged to give evidence (i.e. to give evidence on oath) should not be made the subject of any comment by the prosecution.[7] The 1915 Act went further and prevented comment by the judge or justice on the failure to give evidence unless the accused person elected to make a statement not on oath.[8] More will be said about this later. Suffice it here to say that such comment could point out the options open to the accused and in particular his right to give evidence on oath and be subject to cross-examination.[9]

2.11 Today the law says that every person charged with an offence shall be a competent witness for the defence, but shall only be called as a witness upon his own application. If so called, the law goes on to withdraw his privilege against self-incrimination. However the failure to exercise this right to give evidence on oath cannot be made the subject of any comment by the prosecution, nor (unless the accused person has elected to make a statement not on oath) by the judge or justice.[10]

The Accused's Character

2.12 The relevant section of the *Crimes Act* further provides that a person charged and called as a witness (i.e. on his own application) shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been convicted of or charged with any offence other than that on which he is before the court, or that he is of bad character.[11]

2.13 There are three exceptions to this prohibition. The first is where the proof that he has committed or been convicted of such other offence is

[4] *Crimes Act* 1891 (No. 1231) s. 34 (Victoria).
[5] 61 & 62 Vict. c. 36 (1898).
[6] *Crimes Act (No. 2)* 1915 (No. 2789) (Victoria).
[7] *Crimes Act* 1891 s. 38 and s. 34 respectively.
[8] *Crimes Act (No. 2)* 1915 s. 2 (2).
[9] There may be yet a further option for, as will be observed from the section (para 6.11) the accused may make an unsworn statement in addition to any evidence on his behalf.
[10] *Crimes Act* 1958 (No. 6231), s. 399.
[11] *Crimes Act* 1958, s. 399 (5).

admissible evidence to show that he is guilty of the offence for which he is being tried.[12]

2.14 The second exception arises when the accused person has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecution or the witnesses for the prosecution. The permission of the judge must first be obtained before questions can be asked under this second exception.

2.15 The disclosure of bad character can always be prejudicial, and in many if not most cases, will prove fatal to a plea of 'not guilty'.

2.16 The third exception is when an accused has given evidence against any other person charged with the same offence.

Difficulty of Choice of Options

2.17 Where an accused person has a criminal record or it is alleged that he has committed other similar offences, the way in which he handles a criminal trial is beset with difficulty, particularly if he is innocent of the crime with which he is charged. There is a fine line between a defence which in the opinion of the judge presiding at the trial involves imputations on the character of a witness for the prosecution and one which does not. Although the law appears to be in Victoria that a judge should not permit questions in cross-examination as to other offences save in exceptional circumstances,[13] what are exceptional circumstances can appear differently to different judges.

2.18 The question as to whether an accused should enter the witness box can be one of agonizing concern to both the accused and his counsel, and the existence of a right to make an unsworn statement has been strongly urged as providing some relief in situations where without it, there would be a real possibility of justice not being achieved.

Defence Case

2.19 If the accused person decides to make a statement or to give evidence on oath and to call no other evidence then he makes his statement or enters the witness box without further ado. If on the other hand, he wishes to tender other evidence then he or his counsel may open the case in relation to the other evidence. The law is not entirely clear as to whether the contents of his own statement or of his sworn evidence may also be opened and this a matter about which a recommendation will later be made. Witnesses for the defence are subjected to the same procedure of examination in chief, cross-examination and re-examination as are the witnesses for the prosecution.

[12] *Supra*, note 2.

[13] See *R. v. Brown* [1960] V.R. 392 and *Dawson v. The Queen* (1961) 106 C.L.R. 1.

Final Addresses

2.20 After the close of the evidence for the defence the prosecutor then addresses the jury followed by the accused or his counsel if he is represented, and the judge instructs the jury on the law applicable to the case and sums up the facts and makes such comment on them as to him seems helpful to the jury. It will be remembered that if the accused stands mute and gives no evidence or makes no statement neither the prosecutor nor the judge is permitted to comment on his failure to give evidence on oath. If he makes an unsworn statement then the judge can comment in the way which will be dealt with hereunder in paragraphs 4.12 and 4.13.

PART 3 UNSWORN STATEMENTS IN OTHER JURISDICTIONS

3.01 Before dealing in detail with the question of the abolition of the right to make an unsworn statement in Victoria, mention should be made of the situation in England and other common law countries where legislation has been modelled upon the English *Criminal Evidence Act*. As will be apparent the right has had a chequered history.

3.02 **England.** In England the right to make an unsworn statement was specifically preserved by the *Criminal Evidence Act* of 1898.[14] Its abolition was recommended by the English Criminal Law Revision Committee in 1972.[15] This recommendation was allied with other recommendations generally making inroads into the right to silence and the opposition was such that it has not been accepted by the Parliament and the 1898 Act remains in full force. However, the recent Royal Commission enquiring into the investigation and prosecution of Criminal Offences in England and Wales has recommended that the right to make an unsworn statement be abolished, although so far no parliamentary attitude to the recommendation has emerged.

3.03 **Canada.** Legislation along the lines of the English *Criminal Evidence Act* of 1898 giving the accused the right to testify was enacted in Canada[16] but that legislation did not expressly reserve the right to make an unsworn statement as did the English Act and it has there been held that the right to make such a statement was impliedly destroyed.[17]

3.04 **New Zealand.** The right to give unsworn evidence was abolished in this country in 1966.[18] The accused has the right to remain silent, and comment on his exercising this right is forbidden to anyone apart from the accused, his counsel or the Judge.[19]

The Australian States:

3.05 **Western Australia.** Although it was decided in 1975 that there was no right to make an unsworn statement in the Court of Petty Sessions the Supreme Court in a judgement so deciding referred without disapproval to the right of an accused person on trial before a jury to take such a course.[20] However a recent amendment of 1976 to the *Evidence Act* of that State enacts that in any criminal proceeding no accused person shall be entitled to make a statement of fact at his trial otherwise than by way of admission of the fact alleged against him so as to dispense with proof of that fact or unless such statement is made by him as a witness.[21]

---

[14] 61 & 62 Vict. c. 36 s. 1 (h).
[15] Criminal Law Revision Committee, *11th Report* 1972, (Cmnd 4991) para. 104.
[16] *Canada Evidence Act* 1893.
[17] *R. v. Krafchenko* (1914) 17 D.L.R. 244.
[18] *Crimes Amendment Act* 1966 s. 5, and now see *Crimes Act* 1961 s. 366A (New Zealand). In relation to summary proceedings, the right was abolished in 1973 by the *Summary Proceedings Amendment Act* 1973, s. 3.
[19] *Crimes Act* 1961, s. 366 (New Zealand).
[20] *Jennings v. Robertson* [1976] W.A.R. 43.
[21] *Evidence Act* 1906-1976 s. 97 (2) (Western Australia). Witness here means a witness who has taken an oath to tell the truth.

3.06 **Queensland.** Formerly the Queensland Criminal Code contained a provision directing that an accused person be asked whether he intended to adduce evidence in his defence or whether he desired to make a statement to the jury and it provided that an accused person may be allowed by the court to make a statement to the jury. It appears that permission was almost invariably granted to make such a statement[22] but the right was withdrawn in 1975 and the accused person must now either remain mute or give evidence on oath.[23]

3.07 **South Australia.** In South Australia the accused person has a right to make a statement without being sworn and is given protection both from comment by the prosecution and from cross-examination as to other offences like that provided in the English Act.[24] The Criminal Law and Penal Methods Reform Committee of that State has recommended abolition of the right and a Bill for that purpose was introduced into the Parliament in August 1980.[25]

3.08 The Attorney-General in moving the second reading of the Bill referred to the increasing criticism in recent years of the unsworn statement, and in particular remarked that many observers feel it to be particularly unpleasant in cases involving sexual offences that while the prosecutrix (the victim) is invariably subjected to a searching and embarrassing cross-examination the accused is permitted to make an unsworn statement containing the wildest allegations and the most obnoxious imputations on her character without exposing himself to any risk.[26]

3.09 The Bill expressly states that a person charged with an offence is not entitled at his trial for that offence to make an unsworn statement of fact in his defence. Seemingly as a concession for the loss of this right it provides for his protection from cross-examination as to his past criminal conduct when he alleges that statements (of facts pointing towards guilt) he is alleged to have made were made under duress or induced by other improper means. The proposed amendments contain a number of obvious difficulties and have provoked strong opposition and debate. The Bill lapsed in the Legislative Council and has been referred to a Select Committee which is not expected to report before June 1981.

3.10 **Tasmania.** In Tasmania the *Criminal Code Act* of 1924 permits the accused person to make an unsworn statement either verbally or in writing and if in writing it directs the statement to be put in evidence.[27] The *Evidence Act* of 1910 forbids comment by the prosecution upon the failure of any person charged with an offence or that person's wife or husband to give

---

[22] See *R. v. McKenna* [1951] St. R. Qd. 299 at 305. In Queensland, both the prosecutor and the judge were permitted to comment on the failure of the accused to give evidence.
[23] See now *Criminal Code of Queensland*, s. 618.
[24] *Evidence Act* 1929 s. 18 VIII and s. 18 II (South Australia).
[25] *Evidence Act Amendment Bill* 1980.
[26] *Parliamentary Debates*, Legislative Council (South Australia) 6th August 1980, p. 92.
[27] *Criminal Code Act* 1924 s. 371 (f) (Tasmania).

evidence and provides for protection against cross-examination as to other offences in the same way as does the English Act.[28]

3.11 **New South Wales.** The right of a person charged with an indictable offence to make an unsworn statement in his defence has long existed and was first given statutory recognition in 1883.[29] It now appears in the *Crimes Act 1900*, section 405 (1) of which reads:—

> "Every accused person on his trial, whether defended by counsel or not, may make any statement at the close of the case for the prosecution, and before calling any witness in his defence, without being liable to examination thereupon by counsel for the Crown, or by the Court, and may thereafter, personally or by his counsel, address the jury."

3.12 The right does not extend to persons being tried for summary offences.[30]

3.13 In 1891 the right of an accused person to give evidence on oath was granted to persons charged with indictable offences (it having previously been allowed to persons charged with an offence punishable on summary conviction in 1882).[31] Section 407 of the *Crimes Act* 1900 which together with sections 413A and 413B state the law presently applicable, provides that no person charged with an indictable offence shall be liable to be called as a witness on behalf of the prosecution and further that the failure of an accused person or the wife or husband of such a person to give evidence shall not be made the subject of any comment by the judge or by counsel for the Crown. It is also provided that where two or more persons are being tried together and comment is made by or on behalf of any of them upon the failure of any of them to give evidence, then the judge has a discretion to make such observations to the jury in regard to such comment or such failure to give evidence as he thinks fit.

3.14 Sir Garfield Barwick, when Chief Justice of the High Court, stated it to be of importance that the presiding judge should not call attention, particularly in his summing up, directly or indirectly, to the fact that the accused has not submitted himself to cross-examination.[32] Nearly 50 years earlier the High Court had considered a direction to the jury in the following terms:

> "[The unsworn] statement is something which the law requires you to take into consideration together with the evidence but it is not in itself evidence in the same sense as the statement of a witness given upon oath. It is not subject in any way to test by cross-examination."[33]

[28] *Evidence Act* 1910, s. 85 (1) (c) (Tasmania).
[29] *Criminal Law Amendment Act* 1883, s. 470 (New South Wales).
[30] *Ex parte Holland* (1912) 12 S.R. (N.S.W.) 337.
[31] See *Criminal Law and Evidence Amendment Act* 1891 s. 6 and *Evidence in Summary Convictions Act* 1882 s. 1 (New South Wales) respectively.
[32] *Bridge v. The Queen* (1968-1969) 118 C.L.R. 600 at 605.
[33] *Ibid.*, at 617 referring to *Jackson v. The King* (1918) 25 C.L.R. 113 at 114.

This direction the court regarded as not infringing the prohibition against judicial comment on the accused's failure to give evidence and it has since been regarded as a formula to be adhered to.

3.15 In 1974 a strong attack was mounted on the right to make an unsworn statement and the government of the day brought forward a Bill which included provision for its abolition. At the same time and perhaps to make the idea of giving evidence on oath less daunting, rules were proposed to safeguard an accused giving evidence from being forced to disclose his prior criminal history. The right to make an unsworn statement was vigorously debated and although the clause providing for its abolition was passed in the Legislative Assembly, it was defeated by one vote in the Legislative Council and the provision was not enacted.[34]

3.16 However, rules as to cross-examination of an accused became law and now appear as section 413A and 413B of the *Crimes Act*, 1900. Section 413A bears some resemblance to section 399 of the Victorian *Crimes Act* 1958 in substance but is expressed with somewhat more precision. Generally it serves to protect from cross-examination as to past misconduct an accused who wishes to assert that any confession he might have been said to have made was fabricated, or that he was forced in some way or another to make such a confession. The sections are set out in Appendix A.

3.17 Discussion with New South Wales judges and counsel leads to the view that the issue is not a live one at present in that State. Nonetheless the Law Reform Commission of New South Wales distributed a Discussion Paper on Unsworn Statements in May 1980 acknowledging the contentiousness of the subject, but hinting at a recommendation if a strong enough response should be made to the Paper.

3.18 It would appear that there is a widely held view amongst the District Court judges that the rule should be abolished, whilst several senior judges of the Supreme Court see merit in its retention, but of these some would prefer the ambit of comment to be widened, and the giving of a general right of comment both to a judge and prosecution.

[34] See *Crimes & Others Acts (Amendment) Bill* 1974 cl. 8 and *Parliamentary Debates*, Legislative Council (N.S.W.) 27th March 1974 at p. 2021.

PART 4 THE UNSWORN STATEMENT IN VICTORIA

4.01 To return now to the position in Victoria every accused person has a right to make a statement of facts (not on oath) in his defence. For convenience section 25 of the *Evidence Act* 1958 is set out again hereunder.

> " **25.** It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction (whether such person does or does not make his answer or defence thereto by counsel or solicitor) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf."

Legislative Changes in Manner of Exercise

4.02 The manner of exercise of the right has changed somewhat. As a result of recommendations made by the Law Reform Commissioner in 1974[35] amending legislation was enacted in 1976.[36] Now if the accused gives his version of the facts, whether on oath or not, and has no other witnesses, he is called as a witness or makes his statement immediately after the close of the case for the prosecution. If he calls witnesses he is able to make his statement or give evidence upon oath at such time as he sees fit.

4.03 Where witnesses are called in defence the accused or his counsel is able to open, i.e. to relate to the jury what the effect of their evidence will be, but neither is permitted to include in that opening what the accused himself will say. This seems to be an anomaly probably resulting from an oversight when the amending legislation was being drafted in 1976 and will need correction. **It is recommended** that where witnesses are to be called in support of the defence the accused or his counsel shall be entitled to open to the jury all evidence to be called including (where counsel opens) any unsworn statement of the accused.

4.04 The accused or his counsel now has the right of reply in every case, i.e. to address the jury after the prosecutor. The Victorian procedure thus has been brought into line with that existing both in Scotland and England where in both countries long experience had been had of the operation of such a procedure. It seems fair and proper that a person on trial for a criminal offence should have this right so that he can make answer to every allegation made against him in the course of the trial and in the closing address made by the prosecutor.

4.05 Since the passage of the 1976 amending legislation there has been a marked increase in the number of accused making unsworn statements. It has risen by at least 70 per cent. The significance (if any) of the increase will be discussed later in this Report (in paras 5.10 to 5.17).

4.06 It is also provided that if in the closing speech by or on behalf of the accused, relevant facts are asserted which are not supported by any

[35] Report No. 2 *Criminal Procedure (Miscellaneous Reforms)*.
[36] *Crimes Act* 1976 (No. 8870) s. 5 (1) and now see *Crimes Act* 1958 s. 418 (Victoria).

sworn evidence or unsworn statement that is before the jury, the presiding judge may grant leave to counsel for the prosecution to make a supplementary submission to the jury confined to replying to that assertion.[37]

Practice

4.07 The statement can be read from a prepared document and it should be confined to relevant matter. This is sometimes difficult to control as the judge usually has no idea of what it will contain and irrelevant matter can be uttered before he is able to stop it. Further, the danger exists that interruption of the accused's statement, or more particularly, frequent interruption by a judge may tend to create an impression of unfairness. Something will be said hereafter as to the responsibility of counsel with regard to unsworn statements and it is understood that since the publication by the Bar Council of Victoria of its Rulings on Practices Relating to Unsworn Statements, the presentation of irrelevant material is no longer of great incidence. A practice is developing of counsel submitting a statement to the judge when in doubt as to any material included and the accused being advised by counsel after judicial perusal and comment.

4.08 If the accused refers to his good character in the course of making his statement he is liable to have evidence of his bad character in the shape of convictions and offences led against him. And it is thought also that if in the course of making his statement he asserts facts relevant to the charge against him, the assertion of which facts could not have been reasonably foreseen by the prosecution, the judge may give leave to reopen the prosecution case and lead evidence in rebuttal.[38]

4.09 The accused is not subject to cross-examination on his statement.

Prohibition of Comment

4.10 Both the prosecution and the judge are forbidden to comment on the failure of any person charged with an offence or of the wife or husband (as the case may be) of the person so charged to give evidence.[39] They can, of course, make such comments as they think fit on the contents of an unsworn statement, i.e. on the inconsistencies appearing therein and the credibility of its contents.

4.11 What is forbidden is bringing to the jury's attention the alternative courses open to the accused and criticising his failure to give evidence on oath and to face cross-examination.[40] But where an unsworn statement is made the judge is permitted to comment on the failure to give sworn evidence.

The Judge's Comment

4.12 There has been a good deal of difference of opinion as to how far

[37] *Crimes Act* 1958 s. 417 (3) (Victoria).
[38] See *R. v. Chantler* (1891) 12 L.R. (N.S.W.) 116 and *R. v. Macecek* [1960] Qd.R. 247.
[39] *Crimes Act* 1958, s. 399 (3).
[40] See *R. v. Barron* [1975] V.R. 496.

judicial comment can be made and as to what can be said about the quality of the statement as compared with sworn testimony. In 1911 the High Court held that when a prisoner makes a statement of facts as permitted by the Victorian *Evidence Act*, the jury should be directed to take the statement as prima facie a possible version of the facts, and to consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts established by evidence.[41]

4.13 This direction has been amplified and extended and it is now clear that in this State the judge can advise the jury of the accused's options (i.e. remain silent, make an unsworn statement or give evidence on oath), and at the same time explain the difference between the latter two. How he can do this can best be illustrated by a recent trial in 1979 in which the Full Court approved of the following remarks of the judge:

> "The accused has given his evidence by way of an unsworn statement from the dock. That has two consequences. The first is that the testimony that was given, unlike the rest of the evidence given in the case, is unsworn, that is, it is not given under the sanctity or sanction of an oath. The second consequence is that by giving his evidence from the dock instead of the witness box, as he has a perfect right to do if he so wishes, the accused does not thereby expose himself to cross-examination by counsel for the Crown. He becomes immune from questioning. The result has been, as you have seen, that the accused, by giving his evidence in the way he has elected to do, has not been asked any questions by way of cross-examination by the learned Crown prosecutor. I say little more about it than that, but I mention these matters to you since it is for you to determine the force and persuasiveness of the evidence of the accused in those circumstances, and to determine the weight and reliance which you are prepared to place upon the evidence that he has given in the form of an unsworn statement to you from the dock, particularly as one of the most significant indications of the reliability and honesty of a witness is to watch his reactions and judge his demeanour when asked his or her evidence in question and answer form and when subjected to cross-examination. This occurred with witnesses of the Crown and those of the defence, but you have not seen the accused cross-examined. Because he has chosen not to go into the witness box you have not had a like opportunity with regard to him."[42]

The judge had earlier told the jury of the options open to the accused man and his final words to them were:

> "I remind you finally that the burden of proving that the accused murdered K.C., from first to last, rests on the Crown. The accused has to prove nothing. He is under no obligation to say or do anything. The burden is entirely on the Crown, and that burden of proof which is on the Crown and which I pointed out to you at the outset of my charge is one that must be discharged beyond reasonable doubt."[43]

---

[41] *Peacock v. The King* (1911-1912) 13 C.L.R. 619 at pp. 640-1.
[42] *R. v. Simic* [1979] V.R. 497 at 499.
[43] *Ibid.*, at 500.

Previous Inquiries into Necessity for Unsworn Statements

4.14 The right to make an unsworn statement has come under the scrutiny in Victoria both of the Chief Justice's Law Reform Committee in 1970 and of the Statute Law Revision Committee in 1972. The Chief Justice's Committee approved of a strong Report by its Sub-Committee under the Chairmanship of Mr. Justice Starke to the effect that that Sub-Committee was unanimously and emphatically of opinion that an accused person's right to make an unsworn statement on his trial should be retained. In its opinion the real question at issue was whether the community still regarded the criminal onus of proof as the golden thread of the criminal law (see para. 1.03). And it felt that one remaining safeguard other than the jury system itself for the fair trial of an accused person was that onus, i.e. proof beyond reasonable doubt, imposed on the prosecution. It regarded the abolition of his right to make an unsworn statement as bringing with it as a matter of reality, the requirement of giving evidence and being subjected to cross-examination: in other words the abolition of the right would tend to compel a man to give evidence on oath wherein he might well incriminate himself.

4.15 The Statute Law Revision Committee in 1972 recommended that the right of a person to make an unsworn statement be retained, but that the prosecution be given the right to comment unreservedly on the fact that the accused made an unsworn statement and on the contents of the statement.

4.16 Debate still continues and strong criticisms of the existence of the right and of its exercise persist.

PART 5 ARGUMENTS FOR AND AGAINST ABOLITION

The Test of Cross-examination

5.01 The main argument for abolition of the right to make an unsworn statement centres upon the proposition that all factual material put before a jury should be able to be tested by cross-examination. Cross-examination is directed along two lines — the first, questioning directed to ascertain the facts whether they be the physical acts and happenings involved in the crime charged or the motives or intentions behind those acts, and the second, questioning directed to test the truth of the witness's evidence, to disclose a motive for lying and so on. Questions of the latter type may range far outside the facts of the case and probe into past dishonourable conduct and criminal acts — in short into anything which may be reasonably thought to affect the credibility of the witness.

5.02 It is generally thought that this is the best test yet devised both to assess truth in statement and to deter lying. In all probabiliy this is so and logically it would seem that all witnesses should be subject to cross-examination. It has been further argued that this is particularly important in the case of the person accused because if guilty he has the strongest motive for lying. This is not to say that the test of cross-examination is infallible. No one experienced in the criminal jurisdiction would deny that glib and plausible liars make their appearance in the witness box, nor that the fear of cross-examination does not deter many an experienced or professional criminal from pledging his oath.

5.03 In favour of retention of the right, it is argued forcibly and correctly that not all persons charged with criminal offences are guilty, and amongst the innocent as amongst the guilty there are those who dread cross-examination, who suffer from a sense of inadequacy in the face of a skilled exponent of the art, or who have something shameful to hide unconnected with the charge but which they might fear being brought to light in an attack on their credit. As was said by Mr. Justice Isaacs as long ago as 1907 when referring to the accused person's reasons for making an unsworn statement:

> "Reasons other than a sense of guilt such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from availing himself of [the right to give evidence on oath]."[44]

5.04 And speaking of both innocent and guilty alike a retired Supreme Court judge of long experience has asserted that in a great number of criminal trials the accused is in his teens or early twenties, has a limited education and a poor command of English, and has no experience or skill in the handling of hostile questioning.

[44] *Bataillard v. The King* (1907) 4 C.L.R. 1282 at 1290-1.

The Accused with a Criminal Past

5.05 Whilst cross-examination can be a powerful tool in eliciting truth and unmasking the lie, fear of its use can sometimes result in providing a cloak for the abuse of power and of the machinery of justice. This can and sometimes does happen when a false confession of guilt is manufactured and asserted to have been made by an accused person who happens to have a criminal record or is an associate of criminals.

5.06 Informers are useful and necessary aids in police investigation and solution of crime. Information from a "trusted source" may often lead an investigator to believe in the guilt of an accused. Should he deny guilt or participation in the criminal offence, to some it can seem justifiable to "doctor" the written record of a conversation with the accused to include (sometimes with circumstantial detail) an admission of guilt. Again to some it may seem the right thing to do to threaten harsh consequences if an admission of guilt be not made. Where an accused has a record of criminal behaviour, and investigation into a crime is proving apparently fruitless, the temptation to fabricate must be strong and it is not surprising that sometimes it prevails and evidence is fabricated.

5.07 For such an accused to allege in the witness box such a fabrication is undoubtedly to make imputations on the character of the police witness who has given evidence of the making of the confession and so to risk liability, in the words of section 399 (5) of the *Crimes Act*, to be asked and required to answer any question "tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character", and if so questioned to put himself in danger of almost certain conviction.

5.08 It needs repeating that our system of criminal justice concerns itself not only with clearing the innocent but also with ensuring that the guilty are convicted only by proper means. If a confession, even by a person who is guilty, is fabricated and conviction depends upon the acceptance of that confession, it seems wrong and conducive to the ultimate corruption of a police force if that sort of evidence is allowed to be put before the court. And so, in such circumstances, it seems proper that an accused person should be able to give his story from the dock without oath and without liability to cross-examination in which, because of his allegations against the perfidy of the police officers concerned, he is liable to have his own criminal past thrown in his face with the strong probability that he would not be believed on his oath.

Acquittal of the Guilty and Harm to Reputation of the Innocent

5.09 There are many who oppose the retention of the unsworn statement because in their view retention achieves nothing except to secure the acquittal of some guilty persons because of their successful and unchecked lying, and to damage the reputation of innocent persons. The latter can be brought about by scurrilous and damaging assertions which cannot be prevented by the threat of cross-examination as to character or by evidence of

bad character. An example of less than even-handed justice is given of an unfortunate victim of a pack rape being cross-examined unmercifully for a great length of time by a succession of counsel while each of the accused makes a short unsworn statement alleging consent or an absence of knowledge of the lack of consent.

Statistics

5.10 The assertion that too many guilty persons are acquitted because of their freedom from cross-examination does not seem to be borne out by such statistics as there are.

5.11 The Crown Law Department has kept statistics since 1972 of persons charged in the County Court with criminal offences. The percentage of those being convicted (either following on a plea of guilty or after a trial by jury) has remained remarkably consistent over the last 8 years. In 1972 this percentage was 88 per cent, rose to 89 per cent in 1974, dropped to 83 per cent in 1977, and is back again at 88 per cent in 1980.

5.12 In 1977 the Crown Prosecutors began to keep statistics of those electing to give evidence on oath, to make unsworn statements and to remain silent in the County and Supreme Courts at Melbourne. This was in the year following the legislation giving persons accused the right both to make an unsworn statement (where other evidence was called), at such time as they chose during the course of evidence for the defence and also to make the last speech to the jury. In that year the percentage of those making unsworn statements rose significantly to 38% of all persons standing trial, from a previous lower level estimated to have been between 4% and 10%. After reaching 40% in 1978, this figure had fallen to 35% by 1980. It is understood that the same percentages are thought to be applicable to trials elsewhere than in Melbourne.

5.13 Statistics kept by the Crown Law Department indicate that the ratio of defended trials to the total persons charged and proceeded against has increased since 1972. (However the increase predates the 1977 changes to the law affecting unsworn statements, reached a peak in 1976, and has declined since then to remain for the past two years at the level pertaining in 1975.)

5.14 With the increase in the number of unsworn statements being made after 1977, there has been a marginal increase in the conviction rate for defendants standing trial. Between 1972 and 1977, the conviction rate at trial fluctuated around the low 50% mark. In 1978 it rose to 59%, dropped to 54% in 1979 and rose again to 58% in 1980. Data supplied by the Crown Prosecutors is also supportive of a stable conviction rate. It also reveals that those electing to make an unsworn statement have come off less well than those giving sworn evidence in the years 1977, 1978 and 1979. In 1980 their success rate had diminished substantially but as yet it is not possible to assess the permanency of this change.

5.15 So overall the position seems to be that there has been no noticeable change in the conviction rate by reason of the growth of unsworn statements

nor any attributable increase in the number of defended trials. Furthermore, the person who makes an unsworn statement has no better chance of an acquittal than he who gives sworn evidence and if 1980 is indicative of a new trend, a substantially less chance. It may be speculated that a jury is more ready to convict a defendant who fails to give sworn evidence. For those who remain mute, the numbers are too small to attempt any conclusion, although here again the conviction rate appears slightly higher than the acquittal rate.

5.16 Of more concern to the criminal justice system in the context of this Report, are those *guilty* accused who succeed in being acquitted, after making an unsworn statement. While it is not possible to quantify the number of such persons, it is possible to give an upper limit of such cases. The percentage of defendants standing trial who successfully made an unsworn statement in 1977 was 14%. The corresponding figures for 1978, 1979 and 1980 were 11%, 13% and 9% respectively. This is the maximum proportion of defendants who could have successfully misused the right to make an unsworn statement. It may be more meaningful to express this upper limit of abuse in terms of the total number of persons standing trial and pleading, in which case the percentages were between 3 and 4%.

5.17 There are no methods at present known of actually assessing whether juries acquit because of a positive belief in innocence or because of a failure to be satisfied with the prosecution case, but it is a reasonable assumption that both amongst those who give evidence on oath and those who make statements from the dock, there are those who truthfully assert their innocence. In Appendix B are set out more fully the statistics discussed in the preceding paragraphs.

Injury to Reputation of the Innocent

5.18 With regard to scurrilous and damaging assertions, these had become most evident and most complained of in unsworn statements in trials for rape. Several judges have expressed outrage at this type of conduct of a defence — outrage fuelled by the searching persistent and repetitive cross-examination of the alleged victim of the rape. However the position appears to have improved considerably since the amendment of the *Evidence Act* 1958 in 1976 which severely restricts the right to cross-examine the victim as to her past sexual conduct other than with the accused and as to her general reputation for chastity.[45] Nonetheless attacks of the nature forbidden in cross-examination still occur (though not so frequently) in unsworn statements. I am indebted to the Hon. T. W. Smith Q.C., former Law Reform Commissioner for suggesting a provision to meet tactics of this kind. It is as follows:—

> "In every trial before a jury if the accused, in the course of a statement not on oath, asserts his own good character or puts forward a defence the nature of which involves imputations upon the character of the prosecutor or the witnesses for the prosecution, application may be made to the judge, in the absence of the jury, for permission to call evidence that the accused has prior convictions or is of bad character."

[45] *Rape Offences (Proceedings) Act* 1976 and now see *Evidence Act* 1958 s. 37A (Victoria).

5.19 If such a provision were to be introduced then in order to avoid uncertainty and argument an explanatory provision would seem to be necessary in the following terms:

> "An application for permission under this section or under sec. 399 (6) shall not be granted unless the judge is satisfied that there are exceptional circumstances making it desirable in the interests of justice for him to do so; and the application for such permission may not be supported by reference to any denial, however emphatic, of matters alleged by the prosecution or by any witness."[46]

5.20 Such a provision would also have the effect of putting beyond doubt that the judge's discretion (to permit cross-examination of the accused as to his past record) is exercisable only in exceptional cases and would provide an incentive for an accused to give evidence on oath in cases where he was alleging a fabrication of evidence against him. **It is recommended that** section 399 of the *Crimes Act* 1958 be amended by the addition of sub-sections in the foregoing terms.

5.21 In rape cases where identity or the performance of the act is not in question cross-examination is usually directed to establishing conduct on the part of the victim which would tend to show consent or to the formation on the part of the accused of a belief that consent existed. Where this type of cross-examination is of the persistent nature spoken of previously, a judicial technique used is to time the length of the cross-examination and the statement or statements of the accused and in the course of summing up thus illustrate the testing of his or their stories which the accused have avoided.

Further Criticisms of Unsworn Statements

5.22 Further criticisms suggest that the unsworn statement provides the accused with too much scope for abuse in the following respects:—

(a) They can include hearsay and inadmissible remarks in their unsworn statements.
(Hearsay evidence consists of oral or written statements of persons other than the witness who is testifying as to their making, and the general rule is that such evidence is inadmissible as evidence of the truth of what is asserted. The basic reason for the rule is that this type of evidence cannot be tested by cross-examination.)

(b) They are liable to wander in their statements and to include or digress into irrelevancies.

(c) They are less daunted in telling lies in unsworn statements than they would be if giving evidence on oath.

Hearsay and Irrelevancy

5.23 With regard to the first two of these suggested abuses it is true that they have occurred and can occur. Judges can to some extent control the contents of a statement in that the right to make a statement does not carry

[46] This provision would apply the principles laid down in *Dawson v. The Queen* (1961) 106 C.L.R. 1.

with it a right to talk about matters which have nothing to do with the case in hand and which do not bear on the guilt of the accused,[47] and the judge with his ability to control the course of the trial, can prevent this kind of aberration. However it must be admitted that the judge is in a somewhat difficult and unenviable position because if he feels called upon to interrupt frequently he is in danger of giving an impression to the jury that he is being unfair to the accused. In any event a certain latitude can be allowed to the accused who cannot be expected to have a fine knowledge of what is legally relevant and what is not.

5.24 Further, from conversations with several County Court judges it appears that the quality of unsworn statements, so far as relevance is concerned, has improved in recent times. This is probably due to a Ruling formulated by the Victorian Bar Council and promulgated in June 1979 to members of the Bar. It is thought to be pertinent and proper to include this Ruling in this Report. It is as follows:—

> "Members of the Bar are advised that the following ruling has been adopted as the rule applicable to statements of facts without oath:—
>
> **Statements from the Dock**
>
> 1. It should be recognized that the right to make an unsworn statement is an entrenched right enabling the accused to make answer to a charge in his own words. Accordingly the client where possible should be asked to produce his own written statement of his own construction dealing with specific factual matters. Counsel is not entitled to draft it for him.
>
> 2. In the event of a client not requiring any written document to read or to refresh his memory while making his unsworn statement, counsel may discuss the statement with his client and advise on the matters to be dealt with. He may not suggest to his client that any irrelevant matter be dealt with, and he should be aware in general of the statement which his client intends to make so that he may advise that irrelevant matters should not be included in the statement.
>
> 3. In the event of a client requiring a written document to read or refresh his memory while making his unsworn statement, counsel may advise his client (in writing if necessary) on the topics to be dealt with in the statement. For example, he may list the points of the Crown case which require answers. The client should then produce his own statement — the language and treatment should be that of the client and not that of counsel.
>
> 4. Counsel should look at any document produced for the purpose mentioned in the previous paragraph and should advise that any irrelevant matters be omitted. He may also advise that relevant

[47] *R. v. Wyatt* [1972] V.R. 902.

matters omitted be included or that matters included should receive more space or emphasis in the written statement or that matters contained therein be presented in a certain logical sequence, or that certain phrases and words be altered so as to effectively express the client's instructions, but he should not rewrite the statement.

5. Where a client is incapable of producing his own written statement of his own construction, counsel may take instructions from his client point by point and have the resulting document typed.

At all times it must be borne in mind that the language must essentially be the client's, and the difference between the making of an unsworn statement embodying the client's answer to the charge on the one hand and the taking of a proof of evidence on the other hand must be borne in mind along with the cardinal principle that counsel shall not draft his client's unsworn statement."

5.25 Adherence to these guidelines together with the submission to judicial scrutiny of statements about which some doubt is felt by counsel should be sufficient to reduce these abuses to negligible significance.

5.26 It is to be noted that as the law stands the judge can point out to the jury that hearsay evidence cannot be tested by cross-examination and so they might think its weight as proof could be affected. Some judges do not regard either the inclusion of hearsay or irrelevant evidence as presenting a real problem beyond some waste of time. Some express great concern at the prolixity and length of cross-examination.

Encouragement of Lying

5.27 The claim that accused are less daunted in telling lies in their unsworn statements rests on the belief in the efficacy of cross-examination to prevent lying or rather attempting to lie and perhaps in part on a belief that some will be deterred by the administration of an oath from breaching its sanctity. One can be somewhat sceptical in this day and age of the deterrence of the oath because of its sanctity, particularly where liberty is at stake. As to the efficacy of cross-examination to daunt attempted lying opinions will differ. Such statistics as there are would seem to show that perhaps juries come to the conclusion that more accused who elect to make an unsworn statement lie than tell the truth[48] but of those who elect to give evidence on oath over half are apparently disbelieved and it could be assumed that juries regard them as lying. The argument is an emotive one and seems of little consequence in assessing this issue.

[48] See Appendix B.

PART 6 RECOMMENDATIONS IN REGARD TO INDICTABLE TRIALS

Recommendation to Retain the Unsworn Statement

6.01 For many an accused the ability to tell his story in his own words and his own way is beset with difficulty. Often before he is interrogated the investigating police officer will have been made aware of his supposed participation in the criminal offence being investigated, by an informer or by other material which seems to point to the accused. What the officer hears or discovers will be sufficient for him to make up his mind as to probable guilt. Then either by guile or by pressures psychological and sometimes physical, an attempt will have been made to get an accused to admit to his guilt.

6.02 To prepare a Record of Interview in which police questions and the accused's answers are written out or typed is standard procedure. This document will oft times have been preceded by an apparently casual and informal off the record "chat". Information acquired in the course of this "chat" will be moulded into the Record of Interview. Perusal of many of these Records breeds the frequent suspicion that the questioning has been carefully steered into channels in which the interrogator wishes them to flow and that in many cases the language used is not that of the accused.

6.03 Not all of the foregoing is necessarily unlawful. But the uneducated and slow-witted accused, the accused who is unfamiliar with the English language, the frightened accused may well be manoeuvred into admitting facts which he would wish either not to have admitted or to have explained or denied. When he finds himself eventually on trial he at last has a truly unfettered choice of saying what he wishes to say without harassment. That there are others well able to handle interrogation and to generally look after themselves is unquestionable as is the fact that some guilty accused avail themselves of the right to make an unsworn statement.

6.04 But for those innocent individuals who made unsworn statements and who form whatever may be the proportion of the 13% of defendants acquitted after making unsworn statements in 1979 and the 9% in 1980, it is submitted that these statements have had a rightful place in criminal procedure and that the right to make them deserves retention. It is submitted also to be proper that that right should be able to be availed of even by those who although guilty have had the evidence of their guilt manufactured by methods which should not be tolerated in a society aiming to maintain honesty in the community and a police force deserving of its trust.

6.05 Accordingly **it is recommended** that the right to make an unsworn statement be retained.

Joint Trials

6.06 In making this recommendation the difficulties sometimes occasioned in joint trials where one or more accused gives evidence on oath and another or others makes unsworn statements have not been overlooked. The maker

of an unsworn statement may seek to place the blame on his co-accused. In such a case insofar as his statement can be seen to contain facts in the case against him it is allowed and its weight in relation to that case is to be assessed by the jury. However so far as concerns the case against a co-accused, like any other evidence in *that* case (except from the co-accused himself) it must follow the rules and be given on oath from the witness box so that it can be tested by cross-examination. The unsworn statement is in the same position as statements made out of court before the trial whether oral or in records of interview or otherwise in writing (all hearsay) containing incriminatory material against a co-accused. They are not allowable in evidence against that co-accused for the same basic reason, i.e. they cannot be tested in cross-examination.[49] With the statement out of court it is sometimes possible to excise the incriminatory material. This is sometimes possible too, in the case of the unsworn statement in court, but can be more difficult. What the judge has to do is to instruct the jury to exclude this material from their minds (which is virtually an impossibility) — or to completely disregard it as against the co-accused. Abolition of the unsworn statement would no doubt dissolve one difficulty but could not affect the tendering of statements out of court before a trial in which statements containing incriminatory material against a co-accused are inextricably mixed with other admissible statements.

6.07 Judges of long experience in the criminal law with whom this matter has been discussed, take the view that in most cases a jury can be adequately instructed so as to ensure a fair trial. However there can be cases where a judge sees a clear likelihood of the jury being unable to comply with the judge's direction to disregard the unsworn statement of one accused when determining the issues as between the Crown and a co-accused, and in such rare cases the only solution is to grant a separate trial of the charge against the co-accused who has been incriminated by the unsworn statement.

6.08 It remains to be said that an unsworn statement exculpatory of a co-accused should not be made and if made calls for a direction to the jury to disregard it.[50]

Exhibits

6.09 Some concern has been expressed about the position where the maker of an unsworn statement seeks to tender to the jury documents or other material which he claims to support his case. Where such material is relevant and tendered by a witness giving evidence on oath, it is marked as an exhibit and is available for the jury during its deliberations.

6.10 The *Evidence Act* permits only the making of a statement of facts if an oath to give true evidence is not taken. The Supreme Court in 1972 made it clear that any other material e.g. letters or other documents and physical objects could not be regarded as facts which were permitted to be stated.[51] However the court went on to point out that an accused person may be permitted by way of indulgence to tender these types of material and

[49] See *R. v. Simpson* [1956] V.L.R. 490; *R. v. Evans* [1962] S.A.S.R. 303; *Frost v. R.* [1969] Tas. S.R. 172.

[50] See *R. v. Kelly* (1946) 46 S.R. (N.S.W.) 344.

[51] *R. v. Wyatt* [1972] V.R. 902 at 907 et seq.

expressed the view that it was not difficult to conceive of cases in which a refusal of permission to so tender material would be unreasonable. The law is clearly stated; and there seems to be no reason for any statutory formulation of what is a matter of judicial discretion.

Amendment of Section 25 *Evidence Act* 1958

6.11 It will be remembered that the right to make an unsworn statement is expressed as being given in lieu of *or in addition to* any evidence on his (the accused's) behalf. Of all those questioned no one has any recollection or knowledge of an accused in Victoria having both made a statement and given evidence on oath. It is difficult to imagine occasions on which use of such a procedure would be sought. The section was first enacted before the right to give evidence on oath was conferred upon the accused, so that at that time it could not have been regarded as giving him an alternative method of relating such facts as he wished to convey to the court. It seems desirable that it should be made clear that the accused has an alternative course of action open to himself and not a cumulative one and **accordingly it is so recommended.**

The Right to Comment

6.12 There remains the vexed question of comment on the failure of an accused to give evidence. Comment is an integral and important part of the criminal trial. At the close of all the evidence the prosecution and the defence address the jury. Where the accused is represented by counsel (which is usually the case these days) counsel addresses; if not, this is done by the accused himself. Each of these addresses can be described as comment on the case — the prosecutor commenting in detail on the sufficiency of the Crown case and the weakness of the defence and the defence in like vein in relation to its own case. Gaps and inconsistencies are pointed out, and the credibility of witnesses may be attacked. The defence may point up the failure to call evidence which could be said to be available or procurable to support the Crown case and similarly the prosecution may criticise the failure of the defence to call evidence which the circumstances would show to be available.

6.13 But in Victoria there is one comment or criticism which the prosecution cannot make, i.e. on the failure of the accused to give evidence on oath whether it be by remaining silent or by making an unsworn statement, nor in the case of silence can the presiding judge make any observations. This prohibition arises from what Sir Victor Windeyer, a former Judge of the High Court, calls "the traditional repugnance aroused by any form of compulsory self incrimination"[52] which has led to the development of the policy of the law that the accused must be under no compulsion at any time either on the part of the prosecution or the court, to give evidence.

6.14 Without some form of comment on the unsworn statement, juries could be left in a state of puzzlement or could make wrong assumptions. Their observation of Crown witnesses being rigorously cross-examined and

[52] *Bridge v. The Queen* (1968-1969) 118 C.L.R. 600 at 614.

the accused being left unquestioned, could not but cause wonder at the seemingly unusual procedure and in some jurors, speculation that the accused was not permitted to give evidence on oath. And so comments by the judge were permitted when the legislation was amended in 1915 and over the years the limits of comment were settled by the judges (see para. 4.13 *supra*). It will be observed that care is taken to inform the jury what options are open to an accused and that in making an unsworn statement he is exercising a right given to him by law and that the law does not require them to assume guilt because the accused has not gone into the witness box.

6.15 However, there is a preponderant and strong body of opinion amongst the County Court judges that the power to comment should not be reserved to them alone. This is a view also held by almost all the Supreme Court judges with whom this matter has been raised. The basis of this opinion is that the judge commenting at the end of the trial when he speaks to the jury for the first time and sums up the case is put into a false position and is in danger of seeming to be not an impartial judge holding the scales of justice, but rather a participant entering the contest to support the prosecution. It is unquestionable that the judge should preserve and be seen to preserve a balance between the Crown and the accused, and that he should be alert to prevent any unfairness on the part of the prosecution.

6.16 The opinion has been widely expressed that the Prosecutor should be given the right to comment upon the fact that the defendant has chosen to make an unsworn statement rather than to give evidence on oath, and upon the associated facts that by reason of that choice, the assertions of fact contained in the statement have not been subjected to the test of cross-examination nor has his demeanour in answering such cross-examination been able to be observed by the jury. Should the Prosecutor overstep the bounds of fairness (as could sometimes happen in the heat of argument), the judge can intervene or redress the balance in his charge to the jury. This view is supported by the Solicitor-General, unanimously by the Crown Prosecutors, and by the Chief Commissioner of Police speaking for himself and his Department. On the other hand senior members of the Criminal Bar Association generally take the opposite view although some see merit in the argument for change. The Public Solicitor who acts for the majority of accused represented in criminal trials argues for the present procedure to remain.

6.17 In a matter which so closely and clearly affects them, the views of the judges must be given very great weight. The problem remains that all that can be done should be done to ensure that no pressure, no matter how subtle, should be brought to bear upon the accused to give evidence on oath and face cross-examination if he does not wish to. At the same time it is desirable that the jury be informed fairly and dispassionately of the courses open to an accused. If this is to be done by the prosecutor, in the course of so doing he should not use the defendant's absence from the witness box as an instrument for attacking the credibility of the defendant's case. As the law gives the defendant the right to make this choice and expects the prosecution to be able to prove its case beyond reasonable doubt

without the assistance of the accused, it would be wrong for the prosecutor to suggest or infer to a jury that the accused's guilt follows from his failure to enter the witness box.

6.18 **Accordingly it is recommended that** where an accused makes an unsworn statement at his trial a right of comment on his failure to give evidence on oath be vested in both the prosecution and the presiding judge, although it be limited in the manner set out in the case of *Simic* (see para. 4.13) and that it be made clear during the course of comment that the accused has every right in law to take the course which he has chosen.

PART 7 THE TRIAL OF SUMMARY OFFENCES

7.01 There remains for consideration the question of unsworn statements in Courts of Summary Jurisdiction. This can be disposed of within a comparatively short compass. To do so is not to decry the courts in which so many persons are charged with criminal offences, but is rather to recognise the ability of magistrates in these courts (who in effect are both judge and jury) to recognise and deal with the problem adequately.

7.02 I have had the advantage of considering a carefully thought out submission by the Magistrates' Legal Committee from which it appears that somewhere about 10 per cent of defendants in criminal matters make unsworn statements. Invariably, it is stated, these are made by unrepresented defendants.

Procedure in Magistrates' Courts

7.03 Trial of an offence in a Magistrates' Court follows the same pattern as trials in superior courts in that the prosecution case is presented and tested in cross-examination. Submissions of no case to answer may be made at the conclusion of that case. The defendant, assuming the magistrate rules that there is a case to answer, is faced with the same three options of remaining silent, making an unsworn statement, or giving evidence on oath. He is at the same risk of cross-examination as to his criminal past as he is in a superior court.[53]

7.04 If the defendant is unrepresented either a card or document is handed to him at the close of the prosecution case informing him of the options that he has or the magistrate will briefly orally advise him. It is not surprising that in many cases the defendant in the strange environment of the court and bewildered with having to make a sudden decision, attempts from where he stands both to tell his story and at the same time in some fashion argue his case. As the magistrates point out, those educationally and socially disadvantaged are prone to make unsworn statements partly from general fear felt in the environment, and from a feeling of apprehension of leaving the safety of their position in the court to cross the floor and enter the witness box. To them, many fail to appreciate the difference between "tested" sworn evidence and "untested" unsworn statements. In actuality what this kind of defendant does can be regarded as making a statement not on oath, and this mixture of statement and argument or plea can be called his defence.

7.05 Where the defendant is represented by counsel the procedure is usually shorter than in the superior courts in that very rarely does either prosecution or the defence open its case. The procedure adopted is much more in the discretion of the presiding magistrate although the defendant or his counsel can always present a submission on the law and on some occasions may be allowed to sum up upon the facts. The same prohibition as to the prosecution commenting on the failure of the defendant to give evidence on oath applies in this court.

[53] i.e. s. 399 *Crimes Act* 1958 applies.

Recommendation

7.06 Stipendiary magistrates are all persons qualified in those branches of the law which they are called upon to administer and they are trained to distinguish and discard hearsay and irrelevancies. Views have been expressed favouring the retention of the right because it plays an important role in efficiently and effectively disposing of summary cases. Also it is recognised that a defendant may not wish to enter the witness box for reasons other than guilt. The magistrates submit that if the right to make an unsworn statement is removed or statutory restrictions placed upon its contents, the operation of the Magistrates' Courts would be affected. In their view delay would be caused which is a serious matter in courts which have a very heavy daily workload of cases. As they point out, much of that which Magistrates' Courts have to consider in reaching a decision is said from the floor of the court by the defendant personally or from the bar table by his legal representative. In their view the system operates successfully and magistrates as tribunals of law and fact develop a real ability to sift the relevant from the irrelevant. They see no serious problems in relation to abuse of the unsworn statement and favour its retention.

7.07 **It is recommended** that in trials for offences in Courts of Summary Jurisdiction the right to make an unsworn statement remain.

PART 8 SUMMARY OF RECOMMENDATIONS

It is recommended that:—

1. The right of an accused person on trial to make an unsworn statement be retained. [paras 6.05 and 7.07]

2. When a person charged makes an unsworn statement a right of comment on the failure to give evidence on oath be vested in both the prosecution and the presiding judge although it be limited in the manner set out in the case of *R. v. Simic* and that it be made clear during the course of comment that the accused has every right in law to take the course which he has chosen. [para. 6.18]

3. (a) Section 399 of the *Crimes Act* 1958 be amended to allow application to be made to the trial judge in the absence of the jury for permission to call evidence that the accused has prior convictions or is of bad character where the accused in an unsworn statement asserts his own good character or puts forward a defence the nature of which involves imputations on the character of the prosecutor or the prosecution witnesses.

   (b) That such permission and permission under s. 399 (6) of the *Crimes Act* 1958 be only granted in exceptional circumstances; and the application for such permission may not be supported by reference to any denial, however emphatic, of matters alleged by the prosecution or by any witness. [paras 5.18 to 5.20]

4. Where witnesses are to be called in support of the defence the accused or his counsel shall be entitled to open to the jury all evidence to be called including (where counsel opens) any unsworn statement of the accused. [para. 4.03]

5. It should be made clear that the accused's rights to make an unsworn statement and to give evidence on oath are not cumulative rights but alternative courses of action available to him. [para. 6.11]

---

[53] i.e. s. 399 of the *Crimes Act* 1958 applies

APPENDIX A

Sections 413A and 413B of the Crimes Act 1900 (New South Wales)

413A. (1) Subject to this section and section 413B, where in any proceedings an accused person gives evidence he shall not in cross-examination be asked, and if asked shall not be required to answer, any question tending to reveal to the Court or jury —

(a) the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged; or

(b) the fact that he is generally or in a particular respect a person of bad disposition or reputation.

(2) Subsection (1) shall not apply to a question tending to reveal to the Court or jury any fact such as is mentioned in subsection (1) (a) or (b) if evidence of that fact is admissible for the purpose of proving the commission by the accused of the offence charged.

(3) Where, in any proceedings in which two or more persons are jointly charged, any of the accused persons gives evidence, subsection (1) shall not in his case apply to any question tending to reveal to the Court or jury a fact about him such as is mentioned in subsection (1) (a) or (b) if evidence of that fact is admissible for the purpose of showing any other of the accused to be not guilty of the offence with which that other is charged.

(4) Subsection (1) shall not apply if —

(a) the accused person has personally or by his counsel asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion (other than his conduct in the activities or circumstances giving rise to the charge or his conduct during the trial or in the activities, circumstances or proceeding giving rise to the trial) or as to whether the witness has committed, or has been charged with or convicted or acquitted of, any offence; and

(b) the Court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility,

but the Court shall not permit a question falling within subsection (1) to be put to an accused person by virtue of this subsection unless it is of the opinion that the question is relevant to his credibility as a witness and that in the interests of justice and in the circumstances of the case it is proper to permit the question to be put.

(5) Subsection (1) shall not apply where the accused person has given evidence against any person jointly charged with him in the same proceedings.

413B. (1) In any proceedings an accused person may —

(a) personally or by his counsel ask questions of any witness with a view to establishing directly or by implication that the accused is generally or in a particular respect a person of good disposition or reputation;

(b) himself give evidence tending to establish directly or by implication that the accused is generally or in a particular respect such a person; or

(c) call a witness to give any such evidence,

but where any of these things has been done, the prosecution may call, and any person jointly charged with the accused person may call, or himself give, evidence to establish that the accused person is a person of bad disposition or reputation, and the prosecution or any person so charged may in cross-examining any witness (including, where he gives evidence, the accused person) ask him questions with a view to establishing that fact.

(2) Where by virtue of this section a party is entitled —

(a) to call evidence to establish that the accused person is a person of bad disposition or reputation, that party may call evidence of his previous convictions, if any, whether or not the party calls any other evidence for that purpose; or

(b) in cross-examining the accused to ask him questions with a view to establishing that he is such a person section 413A (1) shall not apply in relation to his cross-examination by that party.

APPENDIX B

Statistics Relating to Unsworn Statements

Since 1977, the Crown Prosecutors have kept records of the number of persons standing trial in the Supreme and County Courts at Melbourne. These records have included a dissection of the courses taken by the defendant and the resulting outcome of the trial. More general data kept by the Law Department with respect to the County Court spans the period 1972-1980. This data provides information on,

(a) Number of Defendants charged in the County Court.

(b) Number of such Defendants choosing to either plead guilty or stand trial.

(c) Number of Defendants convicted and acquitted at their trial.

1. PROPORTION OF DEFENDANTS MAKING UNSWORN STATEMENTS

Table 1. Incidence of Unsworn Statements per Trial

	1977	1978	1979	1980
Number of Unsworn Statements made in completed trials	106	139	100	67
Total completed Trials	282	350	304	194
Proportion of Defendants making an unsworn statement at trial	38%	40%	33%	35%

Notes on Calculations

(i) This table was compiled from information supplied by the Crown prosecutors.

(ii) These results are based only on trials held in the Supreme and County Courts at Melbourne. However the prosecutors advise that they have not noticed any perceptible difference between practices adopted by defendants at Melbourne and those tried on circuit.

(iii) These results are based on those completed trials that have produced either a conviction or an acquittal. Mistrials and disagreements have been excluded although the trial may well have progressed to a stage where the defendant was obliged to choose the course of his defence.

(iv) The Crown Prosecutors' data for 1977 and 1980 is incomplete, with figures for four months being unavailable in both years.

(v) The estimate of the incidence of unsworn statements being made at trials before 1977 obtained from practitioners involved in criminal trials at that time, is between 4% and 10%.

Table 2. Incidence of Successful Unsworn Statements

	1977	1978	1979	1980
Number of Acquittals in completed trials where defendants made an unsworn statement (Source — C.P.)	40	38	38	17
Total Completed Trials (Source — C.P.)	282	350	304	194
Total Persons Charged (Source — L.D.)		1056	1153	
Incidence of acquittals (per defended trial) where Unsworn Statements made	14%	11%	13%	9%
Incidence of acquittals (per total persons charged) where Unsworn Statements made		4%	3%	

Notes on Calculations

(i) The number of acquittals following an unsworn statement, and the number of completed trials have been based on data from the Crown Prosecutors, while the figure for the Total Persons Charged has been derived from statistics kept by the Law Department. In this and other tables, the abbreviations used when disclosing the source of the statistics are:

C.P. = Crown Prosecutors' statistics, and

L.D. = Law Department statistics.

(ii) The trial unit employed in these tables refers to persons, so that a joint trial, for instance, would count as two trials. The term 'Persons Charged' and similar expressions when used in these tables means those persons standing trial, or pleading and being convicted. The various categories of discontinued proceedings have been omitted.

(iii) The incidence of acquittals (per total persons charged) where an unsworn statement was made, could not be calculated for 1977 and 1980 on account of the lack of data on the making of unsworn statements for four months in each of these years. In addition, the Law Department did not keep records of the Supreme Court business on a persons basis before 1978.

(iv) By considering the total number of unsworn statements made in 1978 and 1979 (See Table 1) and the total persons charged as set out in Table 2, the incidence of unsworn statements per person charged can be estimated for those two years as 13% and 9% respectively.

(v) In assessing the results set out in these tables it would seem appropriate to bear in mind the likely range of error in the primary data. It was only possible to compare the information supplied from the Law Department with that given by the Crown Prosecutors in regard to the total number of Melbourne trials and the total convictions and acquittals, and this for 1978 and 1979 only. Such a comparison reveals discrepancies between the two sources of the order of 10%.

2. THE PROPORTION OF DEFENDED TRIALS

Statistics kept by the Law Department on the County Court enable the proportion of Defended Trials to Total Business processed in the court to be calculated.

Table 3. Proportion of Defended Trials

	1972	1973	1974	1975	1976	1977	1978	1979	1980
Completed Trials	497	472	407	510	570	483	379	384	390
Total Persons Charged	2000	2038	1813	1710	1648	1349	1232	1320	1346
Ratio of Trials to Total Persons Charged	25%	23%	22%	30%	35%	36%	31%	29%	29%

These results show that the proportion of defended trials to total persons charged rose between 1972 and 1977, but has dropped slightly since. The increased trend occurred before the procedural amendments, which affected the making of unsworn statements, came into operation in 1977.

3. SUCCESS RATES FOR DEFENDANTS MAKING UNSWORN STATEMENTS

The data kept by the Crown Prosecutors enable acquittal rates to be calculated for defendants choosing to make an unsworn statement and for defendants choosing to give sworn evidence.

Table 4. ACQUITTAL RATES FOR UNSWORN STATEMENTS, SWORN EVIDENCE AND STANDING MUTE

	1977	1978	1979	1980
Number of acquittals where Unsworn Statements made	40	38	38	17
Total number of Unsworn Statements made	106	139	100	67
Acquittal rate	38%	27%	38%	25%
Number of acquittals where defendants gave sworn evidence	73	71	66	55
Total Number of Defendants giving sworn evidence	164	197	171	112
Acquittal Rate for Defendants giving sworn evidence	45%	36%	39%	49%
Number of successful persons standing mute	5	6	13	4
Total number of persons standing mute	12	14	33	15
Success rate for Defendants standing mute	42%	43%	39%	27%

Notes on Calculations

(i) The difference between the successful defendants in each category and the total number of defendants for each category gives the number of persons convicted. The total number of persons standing trial in Melbourne in each of the four years, and the total number of convictions in each of these years are also given in Table 5.

(ii) The variation in the numerical data is partly explained by the omission of results for four months in both 1977 and 1980.

(iii) These results tentatively indicate that defendants who decided to make an unsworn statement, faced a lesser chance of acquittal than defendants giving sworn evidence. It is helpful however to test the significance of the difference in the results of the three courses before drawing conclusions. This can be done by testing the independence of the two criteria used in the preparation of the Table, — viz., mode of defence and the resulting verdict. If these two criteria were independent, the chance of conviction or acquittal would be the same whatever the manner of presentation of the defence. However, some random variation between the actual and expected results can be anticipated. A statistical test such as χ^2 permits a conclusion to be arrived at, whether this deviation is significant. The χ^2 results are as follows: 1977, 1.2; 1978, 3.5; 1979, 0.02; and 1980, 11. All years except 1980 are well within the commonly chosen 5% significance level (= 5.99 for two degrees of freedom). This suggests that for all years apart from 1980 there was no significant difference in the proportion of defendants being acquitted from any of the three courses. The incompleteness of the data already noted for 1980, may have had some influence on the uncharacteristic result for that year.

4. TRENDS IN CONVICTION RATES

Data from the Law Department spanning the interval from 1972 to 1980 provides information on the overall conviction rate and the conviction rate per defended trial. These results for the County Court are set out below. Combined results for the Supreme and County Courts at Melbourne based on data supplied by the Crown prosecutors are also set out from 1977.

Table 5. **Conviction Rates — County Court, Victoria**

	1972	1973	1974	1975	1976	1977	1978	1979	1980
Guilty Plea	1503	1566	1416	1200	1078	866	853	936	956
Guilty by Conviction	248	233	210	274	306	255	223	206	225
Total Guilty	1751	1799	1626	1474	1384	1121	1076	1142	1181
Total Persons Charged	2000	2038	1823	1710	1648	1349	1232	1320	1346
Overall Acquittal Rate	12%	12%	11%	14%	16%	17%	13%	13%	12%
Overal Conviction Rate	88%	88%	89%	86%	84%	83%	87%	87%	88%
Completed Trials	497	472	407	510	570	483	379	384	390
Conviction Rate for Defendants Standing Trial	50%	49%	52%	54%	54%	53%	59%	54%	58%

Source — Law Department

Conviction Rates at Trial—Supreme & County Courts at Melbourne

	1977	1978	1979	1980
Convictions at Trial — Melbourne Supreme and County Courts	164	235	187	118
Completed Trials — Melbourne Supreme and County Courts	282	350	304	194
Conviction Rate for Defendants Standing Trial	58%	67%	67%	61%

Source — Crown Prosecutors

Notes on Calculations

(i) The figures for completed trials have excluded mistrials and jury disagreements. Likewise the "total persons charged" has excluded cases of *nolle prosequi*, persons found unfit to plead and those persons who have absconded.

(ii) The figures of the Crown Prosecutors have been included for completeness, but again it is to be noted that for four months in both 1977 and 1980 no analysis of trials was kept. It has not been possible to discover the reasons for the difference between the conviction rates of defendants standing trial in the County Court throughout Victoria and those standing trial in the County and Supreme Courts in Melbourne.

END