SOUTH AUSTRALIA

FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

EVIDENCE ACT, 1929-1968

and the

CHILDREN'S PROTECTION ACT, 1936-1961

1969

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. ACTING JUSTICE ZELLING, *Chairman.*
W. A. N. WELLS, Q.C., Solicitor-General.
S. J. JACOBS, Q.C.
K. P. LYNCH.
D. ST.L. KELLY.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court Department, Adelaide, South Australia.

FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable R. R. Millhouse, M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to forward herewith your Law Reform Committee's first report on subjects referred to it by you for consideration and recommendation.

2. The Report contains recommendations for bringing the Evidence Act more into conformity with modern requirements and to deal with certain specific problems that have arisen from the everyday work of the courts.

3. The Report is unanimous save for one aspect of the recommendations relating to the so-called "battered baby cases". We refer, in particular, to placitum IV of subclause (2) of clause 6a of the suggested amendment. That placitum, as it stands, would preclude the practitioner's report from being tendered in evidence except where tendered by the practitioner in answer to a charge of a criminal offence or of professional misconduct. The Chairman is of the opinion that the exception should include a passage in virtue of which the report could be tendered *against* the practitioner on a charge of an alleged criminal offence: others would go further and add that it could *also* be tendered against the practitioner on a charge of professional misconduct. Your Committee regards the resolution of this issue as one of policy.

4. Your Committee desires to add that although the Report contains recommendations with respect to section 18, there are other aspects of this controversial section which your Committee feels should be the subject of further consideration. That consideration, however, would involve an examination of fundamental features of the section, would be lengthy, and would perhaps warrant invitations to outside experts to proffer their views. Your Committee has, therefore, deemed it advisable to submit this Report now rather than defer several worthwhile amendments for a substantial time.

We have the honour to be

HOWARD ZELLING.
W. A. N. WELLS.
S. J. JACOBS.
K. P. LYNCH.
D. ST.L. KELLY.

Law Reform Committee of South Australia.

REPORT OF THE LAW REFORM COMMITTEE

Suggested amendment to Section 8 of the Evidence Act, 1929-1968

The attached letter suggests two ways in which section 8 should be amended to bring it into conformity with modern requirements. The first suggestion was that section 8 should be amended by removing the obligation on the objecting person to state the ground of his objection. The second suggestion was that, if the section retains its present form a paragraph (*c*) in the form stated in the letter should be added to the section.

Your Committee is of the opinion that it should do nothing to lesson the importance of the formal oath in Court proceedings and therefore recommends that section 8 be amended by—

(1) deleting the word "or" in the third line of the section;

(2) deleting the comma at the end of paragraph (*b*) of subsection (1) and substituting "; or"; and

(3) adding a paragraph (*c*) to subsection (1) in the following terms—

"(*c*) Such other ground of objection as shall seem to the Court to be sufficient,".

The amendment would enable the Court to do justice in a case where a witness was really in a state of confusion as to his religious beliefs.

Judges' Chambers,
Supreme Court,
Adelaide.
7th February, 1969.

The Secretary,
The Law Reform Committee of S.A.,
Mr. H. G. Edwards,
c/o Adelaide Magistrates Court Department,
Adelaide, S.A. 5000.

Dear Mr. Edwards,

Evidence Act Amendments

I suggest for the consideration of the Committee that section 8 of the Evidence Act should be amended by omitting the obligation for the objecting person to state the ground of his objection.

I do not think that the sanction of an oath will prevent any dishonest person nowadays from telling an untruth. The penalties for giving dishonest evidence apply in just the same way in respect of evidence given on oath or not on oath.

There is another objection to the section in its present form, although this could be cured by adding subparagraph (*c*) "Such other ground of objection as shall seem to the Court to be sufficient". I encountered this difficulty some time ago when a person of Hindu faith appeared as a witness before me. He could not state that he had no religious belief, and it was not contrary to his religious belief or to his conscience to take an oath, but it was incomprehensible to him either to swear an oath on the Vedas or to swear an oath by reference to a Hindu god. There are other religions or religious philosophies to which the same objection would apply.

To me it seems better simply to confer a right on a witness and to allow him to claim the right if so disposed.

Yours faithfully,

C. H. BRIGHT

Suggested amendments to sections 9, 10, 11, 13 and 14 of the Evidence Act, 1929-1968

Your Committee has considered the fasciculus of sections 9, 10, 11, 13 and 14 designed originally to deal with the problem of the aboriginal native summoned to give evidence in a Court of Law. The present policy of the legislature appears to be to avoid as far as possible giving the impression that the law in general (as contrasted with a particular ruling in a particular case) places the aboriginal native in a special category: see for instance the recent amendment to the penalties for perjury, previously imposed by section 14. On the other hand, the problem of the person who appears not to understand the obligation of an oath remains. Individual cases of such person (whatever their race, or origin) may still occur and accordingly your Committee recommends the following amendments to the Evidence Act:—

1. That subsection (1) of section 9 be amended by—
   (*a*) deleting from it the words "aboriginal native of Australia, whether of full blood or half-caste, or mixed breed who is uncivilised and appears on examination not to believe either in a God or a further state of reward or punishment, and who further" and inserting in their place the words "person who"; and
   (*b*) inserting between the word "appears" in the penultimate line, and the words "not to understand" the words "on examination by the judge".

2. That subsection (2) of section 9 be amended by deleting from it the word "uncivilised".

3. That subsection (3) of section 9 be amended by deleting from it the word "uncivilised" twice occurring.

4. That subsection (4) of section 9 be amended by deleting from it the word "uncivilised".

5. That section 10 be amended by deleting from it the word "aboriginal" and substituting the word "person".

6. That section 11 be amended by deleting from it the word "aboriginal" and substituting the words "person of the class referred to in subsection (1) of section 9".

7. That subsection (1) of section 13 be amended by deleting from it the words "of an aboriginal or a child" and substituting for them the words "given in pursuance of section 9, 11 or 12".

8. That section 14 be amended by deleting from it the words "uncivilised person mentioned in section 9" and substituting for them the words "person of the class referred to in subsection (1) of section 9".

9. That the Second Schedule be amended by—
   (*a*) deleting from it the words "an aboriginal and uncivilised native of South Australia" and substituting for them the words "a person who appeared to me not to understand the obligation of an oath"; and
   (*b*) deleting from the eighth line of the Schedule the word "native".

REPORT BY THE LAW REFORM COMMITTEE

Suggested Redrafting of Section 18 VI (a) of the Evidence Act, 1929-1968

Paragraph (*a*) of placitum VI of section 18 in its present form is, in your Committee's opinion, badly drafted: it involves a logical non-sequitur; its syntax is doubtful; and it has caused much judicial anguish. The only thing one can be sure of is that, in their every day working, courts have, on the whole, made paragraph (*a*) mean what the redrafted version (recommended below) provides. The rule in the Criminal Courts has for a long time been that evidence that is relevant and is of some appreciable weight will not be excluded merely because it also has one or more of the proscribed tendencies. That rule applies whether the question eliciting the disputed evidence are asked in examination-in-chief or in cross-examination.

The redrafted version recommended by your Committee is, it is believed, clear, fair, comprehensive—and logically and syntactically sound.

It is necessary, in your Committee's opinion, to confirm the judicial attitude to evidence under section 18 VI (*a*) whereby if the evidentiary weight of a piece of evidence is slight but its adverse effect on the character of the defendant may well be disproportionately grave, the presiding Judge may, where a Jury is the tribunal of fact, exclude it in his discretion. Accordingly, your Committee recommends that a section 17 be reinserted in the terms indicated below.

Your Committee recommends the following amendments:—

1. Paragraph (*a*) of placitum VI of section 18 should be redrafted to read—

> "(*a*) the testimony to be elicited by the question is admissible to prove that he is guilty of the offence wherewith he is then charged."

2. A new section 17 should be inserted in the Act in the following terms:

> "17. (1) Where a person charged with an offence is being tried otherwise than by a Judge or Magistrate sitting alone, the discretion of the Judge to exclude evidence of the kind referred to in paragraph (*a*) of placitum VI of section 18 shall be exercised in accordance with subsection (2) of this section.
>
> (2) A Judge may exclude the evidence where, because—
>
> (*a*) the probative weight of the evidence would be slight; and
>
> (*b*) inferences gravely adverse to the character of the person charged could be drawn from the evidence,
>
> the admission of the evidence would, in the opinion of the Judge, be unfair."

Your Committee has also discussed placitum VI (*b*) with the object of seeing whether its fundamental purpose could be better expressed. We have come to the conclusion, however, that the task of redrafting that placitum would be a very lengthy one, and that it would be wrong to delay for so long the other amendments here recommended. Your Committee has decided that it will devote a separate and subsequent paper to the placitum.

REPORT OF LAW REFORM COMMITTEE

Battered Baby Syndrome: Suggested Associated Amendments to Children's Protection Act, 1936-1961, and Section 21 of the Evidence Act, 1929-1968.

Over the last year or two the battered baby syndrome has become tragically well known to medical and even dental practitioners and prosecutions for those offences have increased in number. But the number of cases where babies are suspected of having been ill-treated by those having custody very greatly exceeds those where even a charge is laid and exceeds even more those where a prosecution succeeds. There are two great obstacles to proper law-enforcement in such cases:—

1. Medical and dental practitioners (now to be referred to simply as practitioners) fear that, if they report their suspicions but that they turn out to be without foundation or at least cannot be shown to have been based on adequate foundation, they run the risk of—

(*a*) being charged with unprofessional conduct;

(*b*) being sued for defamation;

(*c*) being sued for malicious prosecution or conspiracy;

(*d*) being obliged to reveal a report given in confidence in a public court or other tribunal.

2. Usually the only direct evidence of "battering" can be given by the spouse or partner in whose joint custody the baby has been living and the common law prohibition in relation to one spouse's giving evidence against the other usually precludes that evidence for being given. It seems to your Committee outrageous that while a wife could (against the wishes of a defendant husband) give evidence of an assault against herself, she could not give evidence of an assault against a baby in her arms (where the husband was charged with ill-treating the baby). Speaking generally, it seems to your Committee that a law designed to promote family unity by preserving the sanctity of the marriage relationship should not be applied in circumstances where the consequence of its application would be to withdraw the protection of the law from the child of the marriage or a child in the custody of either or both spouses.

Your Committee therefore recommends two amendments:

1. (*a*) That there be added to section 21 of the Evidence Act, 1929-1968, a subsection (3) in the following terms:—

"(3) The wife or husband of a person charged with an offence mentioned in the fifth schedule may be called as a witness either for the prosecution or for the defence, and without the consent of the person charged, and shall be competent and compellable to give evidence generally in the case."

(*b*) That there be added to the Act a fifth schedule in the following terms:—

"FIFTH SCHEDULE

1. An offence against sections 5 or 11 of the Children's Protection Act, where the child concerned is a child of the wife and husband or is a child in the care, custody or control of either the wife or the husband or both.

2. (*a*) An offence against any of the sections of the Criminal Law Consolidation Act, 1935-1966, mentioned in subparagraph (*b*) of this paragraph where the person against or in respect of whom the offence is alleged to have been committed is under the age of sixteen years and is the child of the wife and husband or is a child in the care, custody or control of either the wife or the husband or both.

(*b*) The sections of the Criminal Law Consolidation Act, 1935-1966 referred to in subparagraph (*a*) of this paragraph are sections 11, 12, 13, 18, 19, 20, 21, 23, 25, 26, 27, 29, 30, 31, 32, 39, 40, 47, 48, 49, 50, 51, 52, 55, 56, 57(*b*), 69, 70, 72."

2. That the Children's Protection Act, 1936-1961, be amended by adding to it a new section, section 6a, in the following terms:—

"6a (1) If a medical or a dental practitioner (in this section referred to as "practitioner")—

(*a*) reasonably suspects that a child under the age of 12 years is being ill-treated or neglected or has been abandoned by the person in whose custody or control he is, or is being exposed by that person to unjustifiable risk of injury to health; or

(*b*) finds evidence on or in a child under the age of 12 years of bodily harm that, in the circumstances believed by him to exist, leads him reasonably to suspect that harm was caused by—

(i) ill-treatment, neglect or abandonment on the part of the person in whose custody or control he is; or

(ii) exposure by that person to unjustifiable risk of injury to health,

the practitioner shall, as soon as reasonably practicable report his observations and opinions, with reasonable particularity, to a police officer.

(2) Where a report has been made under subsection (1) of this section the following provisions shall apply to, and with respect to, the report:—

I. The practitioner shall not, by reason only of his having made the report render himself liable to be proceeded against in, or summoned to appear before, a court or tribunal (whether domestic or otherwise) to answer for an alleged breach of professional etiquette or ethics, or a departure from the accepted standards of professional conduct;

II. The practitioner shall have, with respect to any proceedings (civil or criminal) commenced against him for defamation founded upon the publication of the report, the defence of absolute privilege;

III. For the purpose of any civil proceedings for malicious prosecution or conspiracy commenced against the practitioner, the making of the report shall not of itself constitute a prosecution, or the causing or procuring of a

prosecution, of any person who is prosecuted on a charge with respect to the child founded, in whole or in part, on the conduct that is described or referred to in the report.

iv. Without derogating from the right of the practitioner or any other person to give evidence of, or relevant to, the facts, events and opinions that are contained in the report, the report itself (including, where the report is in writing, all copies of the report) and the contents of the report, as such, shall not be admissible in evidence in any Court, tribunal or commission for any purpose whatever, except where it is, or its contents are, tendered by the practitioner in answer to a charge against him either of a criminal offence or of conduct of the kind referred to in placitum i of this subsection.

v. Where a practitioner is being examined as a witness on oath in proceedings of any kind he may claim to be privileged from disclosing the report (including, where the report is in writing, all copies of the report and the contents of the report as such) and that claim shall be upheld.

"Medical practitioner" means a person who is, under and by virtue of the Medical Practitioners Act, 1919-1966, or any other corresponding legislation in force in any State or Territory of Australia, entitled to carry on the practice of medicine.

"Dental practitioner" means a person who is, under and by virtue of the Dental Practitioners Act, 1931-1966 or any other corresponding legislation in force in any State or Territory of Australia, entitled to carry on the practice of a dentist."

REPORT OF THE LAW REFORM COMMITTEE

Suggested Extension of Section 45 of the Evidence Act, 1929-1968

The above section in its present form has proved an invaluable aid in those cases where it could be invoked, but its purview is, in this decade, anachronistically limited: it applies to movement of property but not to movements of persons; and it applies to movements by rail and ship but not to movements by aircraft and road transport.

Some research in the transport industry was carried out to provide a basis for the redraft and, as far as possible, the redrafted section would, in your Committee's opinion, seem to meet the needs of our present-day Australian community which relies so heavily and continuously on all forms of transport.

The redrafted section is set out in full.

"45. (1) Any apparently genuine document that purports to be a Bill of Lading, and to relate to any property that is, or has been, shipped or to any person who is, or has been, travelling by the mode of transport to which that document relates or apparently relates, shall be—

(*a*) admissible in evidence on production without further proof;

(*b*) evidence that the ownership of any property referred to in the document is in the consignee named in the document or his assignee; and

(*c*) evidence of the particular facts, stated in, referred to in, or to be inferred from the document.

(2) Evidence of the description of any property that has been shipped, or of any writing, printing, or mark upon any such property or on any package containing the same shall be receivable (without producing the original writing, printing or mark, or requiring production thereof by notice or otherwise) for the purpose of raising an inference as to the identity of such property with that referred to in the document.

(3) For the purpose of this section regard shall be had to any relevant circumstances including the source from which the document is produced, and the circumstances of its receipt or custody by the person producing it or by any person from whom it has been obtained for the purposes of production.

(4) In this section—"Bill of Lading" includes—

(*a*) manifest, shipping receipt, consignment note, way-bill, delivery order, delivery sheet or register, road manifest, invoice, passenger list or register, baggage receipt or check, and any other like document, and any specification, schedule, list, coupon or ticket annexed thereto or referred to or incorporated by reference therein; and

(*b*) any document declared by proclamation to be a document to which this section applies; and

"Shipped" means shipped or carried, or received for shipment or carriage, by water, air, road or rail (or by any two or more of those modes of shipment or carriage) to any port, airport, depot, railway station or other place in the Commonwealth from any other place whether in or outside the Commonwealth, or from any port, airport, depot, railway station or other place in the Commonwealth or any other place, whether in or outside the Commonwealth."

REPORT OF LAW REFORM COMMITTEE

Suggested Amendment to Evidence Act, 1929-1968, to Enable Proper Use to be Made of Records Kept by Modern Methods: Suggested New Section 45a.

The last two decades have seen an enormous growth in the methods by which records are made and kept. All sorts of highly accurate and reliable copying methods are now used but the old common law restricts the use of such records to the original document and proof of its execution to the maker or some other person capable of giving proper evidence of execution. This state of the law defeats the reasonable expectations of business men especially where microfilms or other modern accurate copying methods are used.

Accordingly, your Committee recommends that a new section 45a be added to the Evidence Act. The aim of this section is to empower Courts to make reasonable use of records kept by modern methods (subject to compliance with the basic safeguards set out in paragraphs (*a*) and (*b*) of subsection (1)) without hindrance from the technicalities of the old common law. No account is taken of computers which, in your Committee's view, should be governed by separate and special legislation. The suggested amendment shares a common heritage with section 45. A recommended draft is attached.

Suggested New Section 45a of the Evidence Act.

(1) Except as provided in this section, a document that is apparently genuine and contains a memorandum or record or what purports to be a memorandum or record of any act, omission, matter or event, shall, notwithstanding any rule that would, but for this section, render that document inadmissible in evidence, be admissible in evidence on production thereof to prove all or any of the facts stated or referred to in that memorandum or record or purported memorandum or record, if it appears to the judge or the court before whom or which the admissibility or otherwise of the document is in question that—

(*a*) the memorandum or record, or purported memorandum or record, was made at or about the time of the act, omission, matter, or event in the ordinary and regular course of the carrying on of a business; and

(*b*) the information and, where applicable, the sources of information relied on or apparently relied on by the maker of the memorandum or record, or the purported memorandum or record, in the making thereof, and the method and the time of its making, were such as to indicate its trustworthiness.

(2) Nothing in this section shall require any document to be admitted in evidence, if it appears to the judge or the court before whom or which the admissibility of the document is in question that the person who made the memorandum or record, or purported memorandum or record, can and should be called to prove all or any of the facts stated or referred to in the memorandum or record or purported memorandum or record, or that, for any other reason, the interests of justice would not be served by admitting the document in evidence.

(3) For the purposes of this section, regard shall be had to all relevant circumstances, including the source from which the document is produced, and the circumstances of its receipt and custody by the person producing it, or by any person from whom it has been obtained for the purposes of production.

(4) In the exercise of any power or authority vested by this section in a judge or court, whether expressly or by implication, it shall not be incumbent on the judge or court to receive formal testimony, but the judge or court may inform his or its mind in any way that he or it thinks fit, and in particular by the affidavit, solemn affirmation, or certificate of any person who professes to speak to any of the matters relevant to the exercise of that power or authority.

(5) In this section—

(*a*) "business" includes every kind of business, profession, occupation, trade or calling and every hospital, utility, undertaking or other activity, whether governmental or not;

(*b*) "document" means—

(i) original document and

(ii) any reproduction of the original document by photographic, lithographic, or photostatic process or by any other approved process.

(*c*) "memorandum of record" includes a memorandum or record that takes the form of a map, plan, photograph or drawing.

(*d*) "process" means a process whereby a facsimile reproduction is made directly of an original document or derivatively by or through an intermediate process.

(*e*) "approved" in relation to a process, means approved by a proclamation, published in the *Government Gazette*, declaring that the process described in the proclamation is approved for the purposes of this section.

REPORT OF LAW REFORM COMMITTEE

Suggested Amendments to Part VI of the Evidence Act, 1929-1968

In your Committee's opinion, Part VI of the Evidence Act is uncomfortably out of step with the present Commonwealth Post and Telegraphs Act, and modern communication systems. In particular, the relevant definitions in section 4 need redrafting. There is, moreover, now no reason, in your Committee's opinion why its provisions should not apply to Criminal Causes or matters. Effect is given to these views in the amendments below.

Your committee recommends the following amendments:—

"1. Amend section 4 as follows:—

Strike out the definition of "electric telegraph" and substitute "means any line, channel or other link of telecommunication within the Commonwealth that is used and controlled by the Post Master General or other approved authority".

Strike out "telegraphic message" and its definition, and substitute—"telegram" means any message or communication

(i) sent to or delivered at a telegraph office or post office for transmission by electric telegraph for delivery, or

(ii) issued from a telegraph office or post office for delivery as a message or communication transmitted by electric telegraph.

Strike out "telegraph station" and its definition and substitute—"telegraph office" means a house, building, room or other place or structure used or occupied by or under the authority of the Post Master General or other approved

authority and under his or its control for the purpose of working an electric telegraph or for the receipt and delivery of telegrams.

Insert a further definition as follows—"telecommunication" means communication at a distance by cable, telegraph, telephone, teleprinter, wireless-telegraphy, radio-telegraphy or other means of communication at a distance of any kind whatever.

Insert at the end of section 4 the folowing paragraph—In this section "approved authority" means any public authority Minister of the Crown (State or Commonwealth), or instrumentality of the Crown (State or Commonwealth) declared by proclamation to be an approved authority for the purposes of this section.

2. Amend subsection (1) of section 53 by—
   (*a*) striking out the words "other than criminal proceedings" in lines one and two;
   (*b*) striking out the words "telegraphic message" in lines four and five and substituting "telegram";
   (*c*) striking out the word "station" twice occurring in line six and substituting in each case "telegraph office".

3. Amend section 54 by—
   (*a*) striking out the words "telegraphic message" in line two and substituting the word "telegram";
   (*b*) striking out the words "telegraph station" appearing in line four and substituting the words "telegraph office";

4. Amend section 55 by—
   (*a*) striking out the words "other than criminal proceedings" in lines one and two;
   (*b*) striking out the words "telegraphic message" in line two and substituting the word "telegram";
   (*c*) striking out the words "telegraph station" in line five and substituting the words "telegraph office".

5. Amend subsection (1) of section 56 by—
   (*a*) striking out the words "telegraph station" in line two of placitum I and substituting the words "telegraph office";
   (*b*) striking out the word "message" in line six in placitum II and substituting the word "telegram".

6. Amend subsection (2) of section 56 by inserting immediately after the words "the Under-Treasurer" appearing in lines two and three the words "the Solicitor-General".

7. Amend section 58 by—
   (*a*) striking out the words "telegraph station" appearing in lines two and three and substituting the words "telegraph office";
   (*b*) striking out the word "telegraph" appearing in line five and substituting the words "electric telegraph".

A. B. JAMES, GOVERNMENT PRINTER, SOUTH AUSTRALIA 200—1.76