1978. It is now nearly 7 years since the Criminal Law Revision Committee recommended that "experiments should be made in order to see how far use of tape recording would be helpful". The Home Office was accused of "the last ditch of prevarication" in delaying implementation of the proposal.

Meantime, Sir David McKee, the Metropolitan Chief Commissioner in London, urged the Royal Commission to give police wide new powers including greatly increased powers of searching, fingerprinting, photography, arrest and questioning. Specifically, the power is sought for police to be entitled to detain an arrested suspect for 72 hours before charging him. Only if the police wanted to keep the person for longer than 72 hours before laying a charge, should they have to obtain authorization from a magistrate. Sir David also urges the removal of the "right to silence" and provision that the court can draw an inference from failure to answer questions.

Reaction of the Royal Commission is not yet known. The National Council for Civil Liberties in Britain condemned the proposals as posing a "grave attack on the very high standards which this country rightly sets itself for the protection of civil liberties". *The Times* under an editorial "Sir David Asks Too Much" (4 August 1978) said:

> "The abolition of the right to silence can be countenanced only if the police can be trusted utterly to note and subsequently relate truthfully exactly what the suspect has said under interrogation and to use no unscrupulous methods against him. Unfortunately, experience has shown that in too many cases, such confidence cannot be placed in the police's behaviour and veracity . . . Introduction of tape recording of police interrogation has been suggested to meet these points and it is regrettable that Sir David has come down against the idea, particularly as it can do so much to protect the police against malicious allegations as help the suspect."

In the 1978 Alfred Deakin lecture, the *Dilemma of the Law in an Age of Violence*, the A.L.R.C. Chairman, Mr. Justice Kirby, pointed to the increasing vulnerability of society because of the advances of science and technology and the developments of world-wide and organised terror. He asked the question "Can democracy cope?"

> "Why in a time of terrorism and criminality, is there so much talk about individual rights? Why enact a Criminal Investigation Bill? . . . [I]t is vital to preserve the open and tolerant society which we have inherited, fortified by the law and upheld by the constitutional machinery in which all can take a part. The effective and acceptable way to diminish violence, and the way which (with few exceptions) it has been traditional amongst English-speaking people to do it, has not been by a resort to authoritarianism. It has been by guarding individual rights, and by encouraging participation in, and association with, society and by securing the acceptance of the view that if things are not satisfactory, they can and will be changed by the processes of orderly reform . . . Even in an age of violence it is vital that our legal system should not lose sight of its tolerant and liberal traditions. We must resist violence, crime and terrorism. But we must equally resist the temptation to over-react. Otherwise enthusiasts will persuade us that it is necessary to have an unrestricted power to tap telephones or that it is vital to forbid the traditional rights of peaceful protest and dissent . . . When this happens we are on the slippery path."

Reform of the Hearsay Rule

> "Little to do, and plenty to get, I suppose?" said Serjeant Buzfuz, with jocularity.
> "Oh, quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.
> "You must not tell us what the soldier, or any other man, said, sir," interposed the judge; "it's not evidence."
>
> C. Dickens, *Pickwick Papers.*

The N.S.W.L.R.C. has presented a major report recommending a thoroughgoing reform and substantial codification of the law of evidence dealing with hearsay evidence and related matters. The Commission comments that the law in this area has not advanced much since Dickens' day, and continues to cause harassment to witnesses and frustration to litigants and interruption to the continuity of cross examination and the substantially oral trial.

The Commission considered the total abolition of rules against hearsay, a course which had some distinguished advocates. In the end it chose a less drastic course, and although it does recommend a formal abolition of the hearsay rule, it recommends its replacement by a new set of rules. Its view is that this is likely to achieve more results than simple

abolition, as, in the absence of rules, ingrained habits might cause old rules to surface as matters going to discretion, weight or relevance.

The Commission has recommended substantial codification, although the common law has been preserved in a few areas — notably in relation to criminal confessions, the use of reputation as evidence of disposition, and some aspects of civil admissions. These areas are put aside as requiring further work, and, in the case of criminal confessions, work in a broader context than the Commission's Reference on Evidence.

The N.S.W.L.R.C. report says that its proposed rules will allow the courts to receive a very much wider range of evidence and will make unnecessary much of the interruptions of witnesses that presently goes on. The new rules are based on a reasonably consistent set of principles which are easy to understand and remember. The basic approach has been to let the court have as much reasonably reliable evidence as possible, but at the same time to preserve the opportunity of testing by cross-examination wherever it is practicable to do so.

"Reliability" has two aspects — the reliability of the original statement, and the reliability of the process by which it is relayed to the court. To secure the first kind of reliability, it is recommended that a statement should only be repeated to the court if the person who originally made it out of court had knowledge which was based on his own observations of what he was talking about. To secure the second kind of reliability, the statement must either be repeated to the court by a witness who himself observed it being made, or be in a document or record, or chain of documents or records, made in a reliable way.

The Commission's draft Bill defines what "immediate" or "remote" records are acceptable. Some methods of mechanical copying allow a long chain of copying to occur without loss of accuracy. Even where there is human intervention, the circumstances may inspire confidence that one document is a true copy of, or a fair extract from or a fair summary of, another document. Hence although the Commission's main proposal for extensive admissibility is limited in the case of oral evidence to firsthand hearsay, in the case of documentary evidence it applies no matter how many links there are in the chain of copies (or fair extracts or summaries), so long as the chain goes back to a reliable source.

The opportunity to cross-examine depends on the person who made the statement being called as a witness. If he is, a statement which satisfied the reliability test will be admissible as evidence, whether it supports the evidence he gives in court, contradicts it, or fills in a gap resulting from lapse of memory or other cause. If he is not to be a witness, a party who wishes to put his statement in evidence will have to show justification for not calling him. The draft Bill spells out what is "sufficient justification".

The existing law of admissions is not well adapted to present conditions, where the principal party to many transactions, or the person responsible for activities which injure another, is frequently a company or other remote employer with whom the public has no direct contact. All dealings are with employees, but unless it can be proved that an employee was authorised by the employer to make statements, what he says cannot be used as evidence in a case against the employer.

The recommendations provide a new category of statements "affecting a party", which may be used against him. Even if an employee or agent did not have authority to make a statement, what he says will be admissible against his employer or principal if —

- he appeared to have authority to make it;
- it related to a matter within the scope of his employment or agency, and was based on personal knowledge;
- it related to a matter of which he had superintendence; or
- it related to a matter which it was within the scope of his employment or agency to discuss with a person to whom he made the statement.

Most of the common law exceptions to the rule against hearsay are made unnecessary by the width of the Commission's main recommendation, but some are retained in a clarified or extended form. These include rules about the admissibility of evidence given by expert witnesses, and of reputation as evidence of certain matters. They also allow the use

of works of authority, published compilations, and many public documents. Arguments about the admissibility of telephone books, street directories, electoral rolls and bus timetables should be put to rest.

Under the proposals, the court would in every case, civil or criminal, have a discretion to admit a statement if there were reasonable grounds for thinking it might be reliable, notwithstanding that it was hearsay and not admissible through any other gateway. On the other hand, there would be a discretion to reject evidence in certain circumstances.

These discretions, and particularly the discretion to admit reliable evidence, are seen as not only providing relief in exceptional cases, but as allowing the courts to continue the development of the law, without the need for intervention by Parliament. Precedents can be established by judicial decision for the admission of certain classes of hearsay evidence which come to be recognised as reliable, whether as a result of technological progress or any other reason.

This is the Commission's second report within its general reference on Evidence. It has had the satisfaction of seeing its first, on business records, not only adopted by the N.S.W. Parliament in 1976, but copied by the Federal Parliament in 1978.

Privy Council Besieged

> "London, that great cesspool into which all the loungers of the Empire are irresistably drained."
> Sir Arthur Conan Doyle,
> *A Study in Scarlet*, 1887.

The controversy about the future role of the Judicial Committee of the Privy Council in the hierarchy of Australian Courts is gathering momentum. It is not a new debate, as the cover of the last issue of *Reform*, taken from the *Bulletin* in 1895, indicates. In the same Alfred Deakin lecture, the A.L.R.C. Chairman drew attention to the efforts of the Founders of the Australian Federation, including Alfred Deakin, to avoid entrenching the Privy Council in our Constitution. Their negotiations in London in 1900 were only partly successful. But they did preserve the ability of the High Court to limit appeals in certain constitutional cases and the Federal Parliament to limit other appeals. Now, only certain appeals from State courts, direct to London, continue. Will this last? In *Viro v. the Queen* (1978) 18 *A.L.R.* 257, the High Court has drawn attention to the unsatisfactory position arising in a country where there are two ultimate courts of appeal. The difficulty of subordinate judicial officers, faced with conflicting authority, is not an academic one. It arose in *Viro* and it has arisen since. Quite apart from confusion of judges, the dualism lends to abuse. The Deakin Lecture again:

> "Faced by conflicting authority such as is bound on occasions to occur . . . litigants in great areas of the private law of Australia are now permitted an option at their choosing to take litigation to a court of their choosing. Clearly this is taking the doctrine of 'selecting a lawyer of your choice' too far. If litigants are permitted to make self-advantaging decisions, likely to affect the outcome of a case, by their choice of venue of appeal, the whole fabric of impartial and, as far as possible, certain justice under the law, is severely shaken."

In July 1978 in *National Mutual v. Waind* the Court of Appeal in N.S.W. held, subject to certain reservations, that N.S.W. courts should now prefer decisions of the High Court to those of the Privy Council in the case of conflict. Probably in no future instance could an opinion be formed necessary to permit the grant of leave to appeal to the Privy Council from courts of N.S.W. In that case, leave to appeal to the Privy Council to test an important and recent decision of the High Court relating to legal professional privilege was declined. The Court of Appeal, of 5 judges, was unanimous in its decision. It represents the first statement in a State Supreme Court of the principle that would be applied in its granting leave appeal.

In *Attorney-General v. T. & G. Mutual Life Society Ltd.* (1978) the High Court dealt with an application by the Commonwealth for an injunction against a party asking special leave to appeal to the Privy Council from a decision of the Court. Although the injunction was refused, a declaration was made that since the *Privy Council (Appeals from the High Court) Act* 1975, the defendant was not permitted to ask special leave to appeal. The defendant had contended that the constitutional power to "limit" appeals did not extend to "abolishing" them. This argument was rejected.