Penal Methods Committee of South Australia, it was rejected by the Canadian LRC five years later. The standard concern was expressed by Gibbs J (as he then was) with whom Mason and Jacobs JJ agreed) in *Driscoll v R* (1977) 137 CLR 517, 541–2 in the context of the record of interview – 'by its very availability [it] may have an influence upon their deliberations which is out of all proportion to its real weight'. Selective availability of transcripts allows the possibility of misestimation by reason of selectivity while general accessibility of transcripts carries with it the danger that jurors will become preoccupied with the written versions of evidence. On the other hand, it is arguable that from a psychological point of view many of the same problems exist when a judge reads out only those parts of a transcript requested by the jury, leaving full rein for distortion and the operation of mistaken memory in the long and/or complex case. The NSWLRC invites submissions on the different policy issues.

The Commission goes on to propose that instead of the foreman simply delivering the verdict of the jury, each member of a jury in a criminal trial should be polled to ensure that the verdict is unanimous and the responsibility for the verdict a personal one for each juror. This would depart from the formalistic presentation of verdicts that is the practice in many States and could even be conducted by the trial judge, rather than his or her associate. The Commission suggests that where alternative factual bases for a conviction are left for the jury, the judge should direct the jury to consider on which ground its verdict is based when the verdict is rendered in such a way that the ground accepted is not clear, and the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. Only if the jury's view is unanimous should the judge ask which ground was accepted. The jury's answer should be binding on the judge when sentencing. It is also proposed by the Commission that where both first and second juries have been unable to arrive at a verdict, there should be a statutory provision preventing further trials. The NSWLRC invites submissions on issues raised in its Discussion Paper by the end of 1985 and appends to its Paper an extensive comment sheet.

unsworn statements

> One of the Seven was wont to say: 'That laws were like cobwebs; where the small flies were caught and the great break through'.
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> Francis Bacon, Apothegms, 181

three reports. The right of an accused person to make an unsworn statement in the course of his or her trial is the subject of three recent reports. These are the Interim Report on *Evidence* published by the Australian Law Reform Commission, the Law Reform Commission of Victoria Report, *Unsworn Statements in Criminal Trials* and the Report of the New South Wales Law Reform Commission, *Unsworn Statements of Accused Persons.* All three reports recommend that the right of an accused to make an unsworn statement be retained although the VLRC proposes certain procedural changes in the case of a defendant who is legally represented. At the same time, all three reports attempt to address specific criticisms that have been levelled at the right to make an unsworn statement. In particular, the ALRC and the NSWLRC recommend that the rules of evidence should apply to the unsworn statement; the VLRC recommends that they should apply when the accused is represented.

alrc interim report on evidence. As part of its Reference on Evidence, the ALRC examined the question of unsworn statements and, in its Interim Report on *Evidence,* proposed that they be retained together with certain reforms to the current law and practice. The draft Evidence Act s21 provides that, in a criminal proceeding, a defendant may give unsworn evidence. This evidence will be subject to the rules of evidence. It may be read from a written statement, spoken with the aid of notes, or, where a defendant is unable to read from a statement, with the leave of the court, read by his or her legal representative. After such unsworn evidence has been given,

the legal representative may, with leave, question the defendant as though in examination-in-chief and evidence so adduced shall be taken to be part of the unsworn evidence given by the defendant. A defendant shall not be cross-examined in relation to unsworn evidence that he or she has given. However, the defendant is liable to prosecution for perjury if false evidence is given.

nswlrc recommends retention of unsworn statements. The NSWLRC is unanimously of the view that, subject to its other proposals, an accused person on trial before a judge or jury should retain the right to make a statement which does not expose him or her to cross-examination, and that the right to make an unsworn statement should be extended to summary proceedings. The reasons advanced for the retention of the unsworn statement include:

- for some accused, giving sworn evidence would be an ordeal that could result in injustice;
- there may be some persons who, being innocent, would convict themselves by the way they would perform under cross-examination;
- the unsworn statement is one, and sometimes the only, means whereby the accused can actually participate in his or her own trial basically on his or her own terms.

A majority of the Commission recommends that there should continue to be no legal sanction for giving false evidence in the course of an unsworn statement.

vlrc distinguishes between represented and unrepresented defendants. The VLRC is unanimously of the view that the right of an unrepresented defendant to make an unsworn statement should be retained in its present form. With respect to represented defendants, however, the Commission recommends certain procedural changes. A majority of the members of the Commission proposes that the right of a represented defendant to give unsworn evidence not subject to cross-examination should be retained. Such unsworn evidence is to be elicited, however, not by means of the unsworn statement in its present form, but by the putting of questions to the defendant by defence counsel, and the defendant responding. Two members dissented from the majority view having come to the conclusion that a represented defendant should not have an immunity from cross-examination if he or she chooses to give evidence, and that the choices should be restricted to saying nothing or giving sworn evidence. The Deputy Chairperson wrote a Minority Report in which she proposed that the third option open to the defendant should be to give evidence on oath or affirmation, but not subject to cross-examination.

leave of the court is not necessary. All three reports recommend that unsworn evidence may be given as of right, and not by leave of the court. Both the VLRC and the NSWLRC specifically reject the idea that the 'right' to give unsworn evidence should be available to an accused only at the trial judge's discretion. The VLRC considers this to be unsatisfactory because:

- it would impose an 'onerous, and often invidious, burden' upon the trial judge;
- such applications may well be very time consuming;
- the exercise of the discretion would inevitably give rise to appeals about its exercise.

The NSWLRC rejected a discretionary scheme on the grounds that:

- it would be difficult to ensure that any such judicial discretion would be applied consistently;
- the decision whether or not to invoke the right is better left to the accused and his or her legal advisors;

- it may result in the development of different 'classes' of people in the criminal courts.

excluding irrelevant and inadmissible evidence. Among the arguments for the abolition of the right of an accused to make an unsworn statement is that it is very difficult to prevent the inclusion of irrelevant and inadmissible evidence. The majority of the VLRC accepted the view that it is unfair to the prosecution, to many victims and to the community that such matters be included in an unsworn statement. Its recommendations are intended to meet this criticism in cases where the defendant is legally represented. Unsworn evidence elicited by means of questions addressed to the represented defendant by counsel and answers to them will permit the operation of all the rules of evidence in relation to evidence-in-chief as the prosecutor will be able to object to questions seeking answers which contain irrelevant or inadmissible matters. The NSWLRC takes a different view. It considers that there exist adequate powers to control and minimise the effects of the intrusion of inadmissible material into an unsworn statement: judges may interrupt if an unsworn statement threatens to stray too wide of the mark, and, where inadmissible material emerges in the course of a statement, the judge may direct the jury to disregard it. Judges would, of course, expect defence counsel to ensure that their clients kept within permissible limits.

directions to the jury and judicial comment. In its Interim Report on *Evidence,* the ALRC drew attention to the difficult task faced by trial judges commenting on the unsworn statement in jurisdictions where the judge is not permitted to comment on the failure of the accused to give evidence on oath. The draft Evidence Act s22 provides that where a defendant has given unsworn evidence but has not also given sworn evidence, the judge may comment on the fact that the defendant failed to give sworn evidence. It further provides that the comment shall not suggest that this was because the defendant believed that he or she was guilty, or that unsworn evidence is necessarily less persuasive than sworn evidence. New South Wales is a jurisdiction where any comment by the judge on 'the failure of an accused person . . . to give evidence' is prohibited by statute: Crimes Act 1900 (NSW) s407(2). The prohibition has been held to extend to a judge's informing the jury of the three options open to an accused in response to a specific question from them, a position described by the NSWLRC as absurd and based on a presumption of ignorance on the part of the jury that is probably unfounded. In any case, it says, there is an even greater risk of serious injustice if jurors, being uninformed, come to an erroneous belief as to the true legal position. The NSWLRC recommends therefore that the judge should be entitled to inform the jury that an accused person may give sworn evidence, give evidence by way of unsworn statement, or give no evidence and to inform the jury of the legal characteristics of each option. As to whether there should be any statutory proscription of any particular type of comment, the NSWLRC is divided. A minority of members are of the opinion there should be no such proscription. The majority, however, recommends that:

- a judge shall not comment upon the failure of an accused person to give evidence should he or she elect to remain silent;
- the judge should not suggest that unsworn evidence is, by reason only that it is unsworn or that it was not subject to cross-examination, necessarily less persuasive than sworn evidence; and
- the judge should not comment on the reasons why any of the options available to an accused person was or was not taken unless the issue is raised by the accused person or by a co-accused in the presence of the jury.

On the other hand, the VLRC is of the view that the jury should appreciate that unsworn evidence not subject to cross-examination is different from evidence given under oath and

cross-examined under oath. Consequently, the majority of the VLRC believes that it should be mandatory for the judge to inform the jury, before the unsworn evidence is given, of the options available to the defendant and of the implications of each. Further, the majority of the VLRC considers that, where the accused has given unsworn evidence, the judge should reiterate the differences between the unsworn evidence and evidence on oath or affirmation and subject to cross-examination in the summing up, as well as making any presently permissible comments on the content of the unsworn statement.

liability to prosecution for perjury. The ALRC recommends that an accused who makes an unsworn statement should be liable to prosecution for giving false testimony. The majority view of both the NSWLRC and the VLRC is that there should continue to be no legal sanction for giving false unsworn evidence. The majority of the NSWLRC was persuaded by the following arguments:

- prosecutions for perjury are rarely brought in NSW;
- if making a false unsworn statement were made a criminal offence, defence counsel would feel obliged to draw attention to this fact thereby possibly allowing the jury to be misled given that the risk of prosecution is slight;
- in all probability, few accused persons who were determined to lie in criminal proceedings would be deterred by the presence of the sanction.

The minority sees no reason why an accused who seeks to make a positive contribution to the material available to be considered on the question of guilt ought not to be exposed to prosecution if he or she lies. Further, one member of the minority questions the appropriateness of the current policy not to prosecute persons who give false sworn evidence at their own trial.

conclusion. Clearly the members of the VLRC found the arguments against the retention of the unsworn statement more persuasive than did their NSW and Federal counterparts. In all three cases, the Commissions have produced a coherent set of proposals designed to meet specific criticisms of the current practice in their jurisdictions of allowing an accused to make an unsworn statement. While changing the procedure applicable to the giving of unsworn evidence by a represented defendant, the VLRC has nonetheless preserved the right of an accused to tell his or her side of the story to the court without taking the oath or making affirmation, and without undergoing the rigours of cross-examination.

australian capital territory law reform

Nothing endures but change.

Heraclitis

first report. The Australian Law Reform Commission has been conducting a community law reform program for the ACT since February 1984. Under this program members of the public are encouraged to suggest areas for law reform to the Commission. More than one hundred suggestions have been received. The Commission's first report on this program was tabled in Parliament on 29 November 1985. The report outlines the conduct of the community law reform program and recommends changes to the law in three areas relating to accident compensation.

contributory negligence. It recommends that the defence of contributory negligence be abolished in fatal accident cases and breach of statutory duty cases. These recommendations, if accepted, will bring ACT law into line with the law in NSW. The report also recommends that the legislation dealing with compensation for funeral costs following a negligently-caused fatal accident should be clarified so that more generous benefits are available than at present. The Commission argues that the defence of contributory negligence, whereby compensation