

provide access to a child at specified times and places.

- Many orders made in family law presuppose continued contact in some form between spouses and require compliance on numerous occasions, particularly orders for payment of periodical maintenance and orders for access to a child.
- Resistance to orders made in a family dispute may be particularly strong. Many such disputes are bitterly fought and the orders made relate to matters about which the losing party has intense feelings, for example, the custody of his or her child.

The problem of enforcement is further complicated by the Family Court's emphasis on conciliation and its statutory duty, in exercising its powers, to have regard, amongst other things, to the welfare of the family and the rights and welfare of children. These factors may, in particular cases, militate against the use of sanctions. Consequently, the Report recommends that the new procedure of non-compliance proceedings should operate in relation to orders made under the Family Law Act but that appropriate adjustments to take account of family law considerations should be made. These include, with respect to access orders, specifying certain circumstances in which, despite finding a breach coupled with the necessary mental element, the court should be required not to impose a sanction for non-compliance with an access order. In addition, certain conditions should be specified as relevant to the exercise of the court's discretion in imposing sanctions. Where non-compliance proceedings have been instituted for the first time in respect of

an access order, the court should not, except in special circumstances, impose sanctions until the spouses have been directed to attend confidential counselling and sufficient time has elapsed to permit counselling to take effect.

other aspects of contempt. The Report also deals with other areas of contempt. These include:

- forms of interference with proceedings, which do not involve acts or omissions within the courtroom or any form of publication
- disclosure and publication of jury deliberations and
- contempt in relation to commissions and tribunals.

This Report is the only comprehensive treatment of the current law of contempt in Australia and will be required reading for lawyers and academics, especially those whose interests include media law and family law. It will also be of particular interest to working journalists. It is published as a single volume and includes a summary, proposed legislation, tables of cases and legislation and a bibliography. A summary of the Report and recommendations has been published separately. Both the Report and the summary are available from the Australian Government Publishing Service. The cost of the *Contempt* Report is \$39.95.

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evidence law reform

Of that there is no manner of doubt –
No probable, possible shadow of doubt
No possible doubt whatever

Sir WS Gilbert, *The Gondoliers*

major report. A major Report by the Australian Law Reform Commission proposing new and comprehensive uniform laws of evidence for federal and Territory courts was tabled in Parliament in June.

The Report is the product of extensive consultation and negotiation with judges, lawyers in private practice and government lawyers, the Director of Public Prosecutions, the police and the general public.

The Reference was led by Mr T Smith QC, of Melbourne. Mr Smith was also in charge of the publication of an Interim Report in 1985 which formed the basis for the present Report.

In a recent comment on the Report the President of the Law Reform Commission, the Hon Xavier Connor AO QC, said:

The rules of evidence are badly in need of reform. They have grown up in an unsystematic way, through piecemeal statutes and judge-made law. They differ from State to State. Furthermore they are so complex that many lawyers do not understand them fully. In many important areas, it is unclear exactly what the law is — no definitive view has been pronounced by the courts. The Commission's work has demonstrated that, in order to enable the courts to work effectively, opposing practitioners frequently agree to ignore the laws of evidence.

The Commission's review of the law and its consultations showed the need for a comprehensive and uniform Evidence Act for federal and Territory courts, especially as it would be accompanied by significant rationalisation and reforms of areas of evidence law presently in doubt.

The President of the Commission went on to point out that the laws of evidence were in many respects out of

step with the requirements of a modern and efficient court system.

The rules of evidence can be used to frustrate, paralyse and delay cases and can cause great injustice. For example:

- a prosecution can be dismissed simply because the prosecutor did not formally tender regulations under which the accused was charged;
- a party can be forced to produce original business documents at considerable effort, expense and inconvenience even though microfilm copies are readily available and there is no dispute about their accuracy;
- eyewitness identification evidence of suspects has long been recognised as one of the most unreliable and potentially dangerous categories of evidence. Yet there are no formal rules to control its submission in evidence.

An outline of the major recommended changes follows.

confessions. New criteria should be adopted to determine whether a suspect's confession is admitted. First, a confession influenced by violent, oppressive, inhuman or degrading conduct would not be admissible. Second, the prosecution would have to show that the confession was not made in circumstances which were likely to affect its truthfulness adversely. In addition, the Commission recommended that in general, confessions should be tape recorded or made in the presence of a third person. 'Readbacks', in which the suspect is taped while confirming a previously given confession, would also be permitted.

eyewitness identification of suspects. The Commission recommends a number of rules specifically designed to ensure that eyewitness identification

evidence is only admitted if there are some guarantees of its reliability.

illegally obtained evidence. The Commission recommends that, if evidence is illegally obtained, in a criminal prosecution, the prosecution should have the task of showing that the evidence should be admitted notwithstanding the illegality.

evidence of previous misconduct. The Commission recommends a number of rules providing more detailed guidance for courts on the admissibility of evidence in criminal and civil trials of prior misconduct by the accused and by others.

unsworn statements from the dock. The Commission recommends that an accused in a federal or Territory court should have a right to make an unsworn statement as an alternative to giving sworn evidence and being subject to cross-examination. However, the Commission recommends a number of strict rules to guard against the possibility of abuse.

use of interpreters. The Commission recommends more relaxed rules allowing access to interpreters.

rules of corroboration. The Commission recommends that the existing complex, technical, artificial, misleading and anomalous rules on corroboration should be abolished and replaced by a flexible and more simple approach.

protection of confidences. A number of significant recommendations are made for alterations to the laws of privilege, which currently prevent the disclosure of certain confidential communications in court. The areas of privilege cover include

- privilege against self incrimination;

- spousal privilege;
- legal professional privilege.

In addition, the Commission recommends that there should be a judicial discretion designed to protect certain confidential communications, for example, where appropriate, those given to clergymen, doctors, journalists, psychiatrists, psychologists, school counsellors, social workers.

new spousal compellability rules. The Commission recommends that spouses should be compellable witnesses against their spouses but that the court should be able to excuse a spouse in a criminal trial from giving evidence against an accused spouse. The Commission further recommends that this power to excuse be extended to de facto spouses, parents and children of the accused.

hearsay. The Commission recommends a significant relaxation and rationalisation of the laws preventing the admission of hearsay evidence. It also recommends additional safeguards to enable the reliability of hearsay evidence that was admitted to be adequately tested.

opinion evidence. The Commission recommends the rationalisation of the law relating to the evidence of experts.

business records. The Commission recommends that the rules which presently make it difficult to prove the contents of business records (including computer records, microfilm and photocopies) be significantly eased. Again, the Commission recommends a number of detailed safeguards.

The *Evidence Report* is available from the Australian Government Publishing Service. The cost of the *Evidence Report* is \$24.95.