

# Premier State scores a first

by Evelyn McWilliams

*Changes to evidence law in NSW are in line with the ALRC's recommendations - putting Attorney-General John Dowd in the vanguard of evidence law reform.*

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New South Wales Attorney-General Mr John Dowd has led the field in implementing key law reform proposals for the law of evidence with the introduction of the Evidence Bill 1991 into State Parliament on 20 March 1991. The Attorney tabled the Bill for public exposure, inviting submissions on its provisions up until 30 June 1991. It is due to be debated during the Budget session later this year.

The Bill's provisions follow closely the ALRC's recommendations in its Evidence Report (ALRC 38) which was published in 1987. The NSWLRC later endorsed the major recommendations in its report Evidence, LRC 56, 1988.

The Bill breaks new ground in a number of ways. It is the first modern, comprehensive and wholly Australian statement of the law of evidence. In this respect it means that New South Wales will no longer lag behind jurisdictions such as Christmas Island which has had its own Evidence Code since 1860.

It covers the manner of taking evidence from witnesses, such as allowing a witness to give evi-

dence in narrative form or in the form of charts, summaries or other explanatory material and to use notes to revive memory about a fact or opinion. Rules for the admissibility of evidence include a new standard for the relevance test and allowing a court to admit evidence provisionally even if its relevance is not immediately apparent.

## **Significant reforms following on from the ALRC**

The Bill makes significant reforms in line with the ALRC's and NSWLRC's recommendations. It largely adopts the ALRC's recommendation to retain the right to make an unsworn statement; modifying it by applying the rules of evidence. It rationalises the law relating to hearsay. It proposes major reforms to the law governing admissibility of confessions and admissions. The Bill abolishes the 'voluntariness' test for admissions and confessions but requires a two-stage test for the admission of a confession in criminal cases. First, the confession must not have been obtained by violence and, secondly, it must not have

been obtained in circumstances likely to make it untrue. The court will have to consider circumstances such as the age and nationality of the suspect, and mode of questioning. The Bill adopts another ALRC recommendation, that a record of interview be inadmissible unless signed by the suspect.

There are also major changes to the law relating to admissibility of documents. The way courts treat documents, and the way they treat information created by machines is anachronistic and has created many problems for evidence law. The common law about tendering documents, particularly the best evidence rule, betrays an underlying attitude of mistrust. This is the rule that a party relying on the words used in a document must as a general rule give primary evidence of its content. Copies of a document are generally not acceptable. The same mistrust extends to authenticating documents. In its 1987 report, the ALRC presented a coherent, principled approach to solving these problems. It suggested a wider definition of 'document' to cover all forms of stor-

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age media, such as electronic documents, floppy discs and CD-Roms; it recommended relaxing the rules for proving documents to allow copies and other ways of presenting information; and it thoroughly overhauled the hearsay rule. The Evidence Bill draws substantially on all these recommendations.

### **Significant reforms departing from the ALRC**

The ALRC recommended a general privilege to protect confidential communications. It would have covered relationships such as those between journalist and confidential source; doctor and

patient; priest and confessee. The New South Wales Bill does not adopt all of these. Instead, following changes to NSW law made last year, it preserves only the privilege for priests in the confessional.

The second major departure from ALRC recommendations is the Bill's requirement that confessions are to be recorded. The Bill adopts the regime recommended by the Gibbs Committee in its report 'Detention before charge'. The federal Government has substantially adopted this regime for the Australian Federal Police and the Bill to enact it is before Federal Parliament. The issue has gained some currency with a

recent High Court decision requiring trial judges to warn juries of the danger of convicting people solely or mainly on the basis of their signed confessions to police. The decision effectively approves the use of audiovisual recordings of interviews as a means to overcome disputes about confessions.

This decision, as well as the requirement for a two-stage test for the admission of a confession in criminal cases, should go a long way towards ensuring that travesties of justice of the kind visited upon the so-called Guildford Four and the Birmingham Six (and numerous others before and since) should not happen in this country. □

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## **Driftnet fishing**

*by Kirsty Magarey*

*Driftnets, 'walls of death' up to 60 kms long, may have a disastrous effect on marine life and ecology in Papua New Guinea. They may even change the evolutionary paths of fish stocks.*

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The Papua New Guinean Law Reform Commission (PNGLRC) has recently issued its *Report on the Laws Relating to Gillnet and Driftnet Fishing in Papua New Guinea*. While this Report is not a final report it is evident that the Commission is likely to take a strong stand against the current practices of the driftnet fishing industry.

### **What is gillnet/driftnet fishing?**

The nets employed in gillnet fishing are made from a monofilament nylon which is virtually indestructible. The type of nylon used is invisible in water and cannot be seen by diving birds, nor can they be detected by the sonar systems of aquatic mammals such as dolphins. These

animals become caught in the net and are killed. The nets are suspended in the water with a system of weights and floats. A single driftnet can be up to 60 kms long.

### **International attitudes to gillnet fishing**

The PNG Report was commenced in the light of moves in the South