SHOULD EVIDENCE LAW BE CODIFIED?

The Hon Justice Sir Daryl Dawson, a Justice of the Australian High Court, suggests, in this edited version of a paper presented to the Law Council of Australia Criminal Law Seminar, that the laws of evidence as derived from court cases may be preferable to the codifications proposed by the New South Wales and federal Governments in recent Bills.

The New South Wales Evidence Bill 1991 is an attempt to produce a wholly comprehensive law of evidence. At least that is what I understand it to be since it is based upon the recommendations of the Australian Law Reform Commission and the task given to that body was to review the laws of evidence with a view to producing such a law. The word 'code' is not used, but that is what a code is — a comprehensive law upon a subject in statutory form.

Codifying the law

No one would deny that, to the extent codification of the law can achieve its aims, it is a good thing. I take those aims to be to state the law pre-emptively upon a subject in a clear, concise, modern and accessible form which is both systematic and comprehensive. If those aims could be achieved then the law would be very much more certain and easier to find and apply. In Australia, To the extent that a code could be generally applied, it would lead to uniformity.

Evidence laws difficult to codify

The law of evidence has certain features which make it particularly difficult to codify successfully. For codification has certain disadvantages. The law in statutory form is more rigid and lacks the dynamics of the common law. Amendment may be difficult. If it is true to its purpose a code must sweep away the case law which lies behind it, but if it does so in a way which merely calls for more case law to clarify the uncertainties which it creates, then it hardly represents progress.

Principles cannot be reduced to rules

The law of evidence is different in a number of respects from other kinds of law; for example, the law relating to the sale of goods or bills of exchange. It does not lay down rules of conduct to guide ordinary citizens in the conduct of their day to day affairs. It is primarily directed at the courts and the way in which they go about their business. It is bound up with procedure and while it contains some quite precise rules of a more or less mechanical kind, at the same time it expresses principles rather than rules — principles which cannot successfully be reduced to rules, at all events rules of law. I will illustrate what I mean.

Relevance cannot be expressed in rules

The law of evidence exists principally to determine what evidence is admissible and what is not. Basically, what lies behind the determination of admissibility is relevance. Evidence which is relevant is admissible unless for some reason of policy or practicality it is excluded. But relevance is something which cannot be expressed in any rule of law which

is sufficiently particular to afford any real assistance. Putting to one side those matters which are mere machinery, matters such as the facilitation of proof, the attempt to put the law of evidence into statutory form may not only defeat its own purpose, but worse, by introducing a further complication in the form of the statutory provision, may actually impede the coherent development of the law by the courts.

Codifying evidence laws may hinder courts

I have already referred to the dilemma which the draftsman of an Evidence Bill faces. He or she has to decide whether to lay down only general principles or to attempt to formulate detailed rules which either express or alter the law. Obviously, in defining relevance the draftsman of the New South Wales Bill chose merely to state principle but, as I have observed, the very generality of the definition robs it of any real usefulness. In other areas the Bill has attempted to lay down rules which, I presume, are intended to introduce clarity, system and the like — all of those things which a code aims for — into the existing law. Has the legislative draftsman succeeded? Or do the rules laid down fail to clarify, merely being likely to hinder the courts in their efforts to provide solutions to the problems of proof which they daily face?

Applying the Bill to a High Court murder case

I think that the answers to these questions are best found in a practical way by attempting to apply the provisions of the Evidence Bill to some recent cases decided by the High Court and to see whether the common law provided any surer guide than that provided by the Bill.

The recent decision in *Walton v The Queen* (1989) 166 CLR 243 is a good starting point. That was a murder case in which the deceased had made statements to various witnesses, following a telephone conversation, that she intended to travel by bus to the town centre in order to meet the accused. It was held that evidence of these statements from the various witnesses was admissible as constituting conduct on the part of the deceased from which her state of mind at the relevant time could be inferred. There was, of course, an element of hearsay in those statements. They did contain an assertion by the deceased concerning her intention. It was held that the element of hearsay could, in the circumstances, be disregarded upon the basis that conduct very often contains an implied assertion which is disregarded in admitting evidence of the conduct.

How does the Evidence Bill tackle a problem such as that? Clause 47 provides:

> (1) Evidence of a previous representation (that is, 'hearsay evidence') is not admissible to prove the existence of a fact intended by the person who made the representation to be asserted by the representation.
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> (2) Such a fact is in this Part referred to as an asserted fact.
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> (3) Despite subsection (1), if evidence of a previous representation is admitted because it is relevant for some purpose other than proof of the fact asserted by the representation, the evidence may be used to prove the existence of the asserted fact.

Clause 48, so far as is relevant, provides:

> (1) Section 47 does not prevent the use of evidence of a previous representation to prove the existence of an asserted fact if:
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> (a) it is used to prove the existence of an asserted fact, being the physical, mental or emotional state of a person at the time the person made the previous representation; . . .
>
> (2) In this section, a reference to the physical, mental or emotional state of a person includes a reference to:
>
> (a) the person's sensations, intentions, plans, motives, designs, mental feelings and bodily health; . . .

Now at first sight these provisions would seem to cover the situation encountered in *Walton*, but closer examination reveals that they do not. Evidence of the statements made by the deceased in *Walton* was tendered not as hearsay, but as evidence of conduct on the part of the deceased from which it could be inferred that she had the intention which she asserted. That is to say, the evidence was tendered not to prove that what the deceased said was true because she said it was so. Rather the deceased's statements were admissible because they were what have been called 'verbal acts' from which an inference as to the deceased's state of mind could be drawn. The inference was justified because in ordinary circumstances a person's expression of their intention is in accordance with their actual intention. But, of course, circumstances may be other-

wise than to justify such an inference and if a statement of intention amounts to no more than a bare assertion (where, for example, all the circumstances point in one direction and the statement points in another), then it is hearsay and evidence of the statement ought not to be admitted. What is important is that *Walton* treated the deceased's statements not as hearsay, but as conduct from which an inference might be drawn.

Clauses 47 and 48 reverse the situation, although I suspect that they were intended to expound the law as it was laid down in *Walton*. Even if the deceased's statements in that case were conduct from which an inference might be drawn, they were nevertheless tendered to prove (albeit by inference) the existence of a fact intended by the deceased to be asserted by the representation. Even if it could be said that evidence of the statements was tendered as evidence of conduct, the purpose of the tender, notwithstanding that it was to found an inference, was to prove the fact asserted by the deceased, namely, her intention. It is doubtful then whether the evidence would fall within cl 47(3). The statements therefore fall within the exclusion of hearsay evidence contained in cl 47(1) and would be inadmissible, were it not for the exception contained in cl 48(1)(a). But the exception contained in cl 48(1)(a) is subject to no limits. Any statement containing an assertion of intention is admissible to prove actual intention — to prove the truth of the assertion — whether or not it also amounts to conduct from which an inference can be drawn. Clearly, this is to disregard the reasoning which lies behind the decision in *Walton* and to make admissible evidence which would not be admissible upon the principle accepted in that case. Why it should be possible to prove intention by calling evidence of statements made by the person said to possess that intention, regardless of the circumstances in which these statements were made, is not clear to me. In other words, it is not clear to me why, under the Bill, intention may be proved by pure hearsay evidence, without any of the protections built into the other exceptions to the hearsay rule; for example, statements made under a duty to do so, statements against interest or spontaneous statements: cl 53(2)(a), (b) and (d).

I sympathise with the draftsman in attempting to embrace that aspect of the law dealt with in *Walton*. Had he or she endeavoured to express the law in terms of principle it would have been difficult to avoid unhelpful generality. Even if the draftsman had succeeded he or she would have added nothing to the case law. But as it is, the attempt to lay down a specific rule has missed the true principle and allowed the admission of one category of hearsay evidence upon a basis which appears to be unfounded in principle.

(His Honour then applied the NSW Evidence Bill to the facts of two other recent High Court cases (*Ahern v The Queen* and *Harriman v The Queen*) and arrived at similar conclusions.)

A case by case exposition preferable

The examples which I have chosen above are, I think, sufficient to show a tension in the mind of the draftsman of the Bill between the desire to express the law of evidence in terms of general principle and the desire to lay down detailed rules. That is something to be expected. Perhaps a case by case exposition of the law of evidence is to be preferred to codification. After all, one of the aims of codification — accessibility of the law — is of less importance in the law of evidence than it is in other areas of the law. As I have said, the law of evidence is primarily directed to courts rather than to the ordinary citizens in the organisation of their day-to-day affairs. The courts and the lawyers who appear before them are adept in the application of principle to individual cases and do not have the same need for inflexible, and therefore more certain, rules to govern their conduct as does the layman.

Ordinary reasoning processes

Moreover, the guiding principle of the law of evidence — the admissibility of relevant evidence — involves no particular legal technique. It involves ordinary reasoning processes which are not easily expressed in legal form. Where exceptions to the guiding principle are necessary — and they form a large part of the law of evidence — it is easier to lay down particular rules, but even then it is desirable that they be not expressed in too detailed or technical a form, not only because it is likely to prove inadequate in many instances, but also because the purpose of those rules is above all to achieve a fair trial in the individual case, necessitating a degree of flexibility in the application of the law. The common law technique, which provides the opportunity for the expression of broad principle accompanied by the illustration of its application in the particular case is, it seems to me, singularly well-suited to the law of evidence. □