FOREWORD

THE HON DUNCAN KERR MP, MINISTER FOR JUSTICE

Our courts are charged with resolving disputes, declaring rights and, whether in a civil or a criminal context, enforcing the law. Evidence plays a vital role in these processes. Therefore, we need the best evidence law possible; an evidence law that is efficient and fair; an evidence law that will best serve the interests of justice, and thereby best serve the community interest. The crucial role of evidence law in the effective operation of the justice system is not often adequately recognised. So it is very pleasing that the Journal is devoting its 1995 thematic issue to the issues of evidence law and court procedure.

Recent developments in evidence law reform and court procedure make the issue particularly timely. In May this year the Prime Minister released the Government's Justice Statement - a strategy for a fairer, cheaper and more accessible justice system.

One aspect of the Government's strategy is to simplify court rules and procedures in the Federal Court and the Family Court. The Federal Court will systematically review its practice and procedure to make certain the steps needed for a party to present its case fairly in court are kept to a minimum. The Government has introduced simplified procedures and information services in the Family Court, to maximise the number of cases resolved through early intervention. The changes will take effect when the amendments which are now before the Parliament take effect.

Simpler, purpose designed procedures will improve access to justice for middle Australia. But evidence law reform has provided the greatest opportunity to improve the operation of our courts.

The new Commonwealth and New South Wales Evidence Acts are a vitally important reform, in an area where law reform is not easy. The United States of America has taken 30 odd years to achieve substantially uniform evidence laws. Canada has not achieved comprehensive reform after over 40 years of trying. Reform in the United Kingdom has been piecemeal and slow. The Australian

experience has shown that commitment, co-operation and mutual goodwill can achieve results.

It may surprise some that the reforms in the Commonwealth *Evidence Act* 1995 have a Parliamentary origin. The impetus for comprehensive reform came from a report of the Senate Standing Committee on Constitutional and Legal Affairs in 1977 on the Evidence (Australian Capital Territory) Bill. The report recommended a review of the whole law of evidence by the Australian Law Reform Commission.

The reference for that review was given to the Commission in 1979. In the course of its work, the Commission released 16 research papers, held public hearings and received many submissions, and produced an Interim Report with draft legislation in 1985 before issuing a Final Report, also with draft legislation, 1987.

In November 1991 the Commonwealth and New South Wales Governments agreed to work together on identical text for new Evidence Bills for each jurisdiction. The Australian Capital Territory Government agreed to apply the proposed Commonwealth Act to proceedings in ACT courts. This commitment to reform, across both Commonwealth/State and Territory and party political boundaries, was the key to successful reform.

The co-operative efforts of the Commonwealth, New South Wales and the Australian Capital Territory resulted in the introduction of the Evidence Bill 1993 in the House of Representatives on 15 December 1993. The Bill's provisions were examined for 11 months by the Senate Standing Committee on Legal and Constitutional Affairs.

The Commonwealth and New South Wales, in consultation with the Australian Capital Territory, agreed on amendments to the Bill following consideration of the Senate Committee's Interim Report and submissions and testimony put to it.

The Bill was enacted in February this year, with the support of the Opposition and the Democrats. The New South Wales Evidence Bill 1995 was introduced and passed with bipartisan support following the NSW election earlier this year.

Diverse factors influence the content, form and structure of our evidence laws. Courts must determine facts, and evidence laws must assist, and not hinder, this process. Proceedings before courts must, of course, be fair and many of the evidentiary rules that apply in trials are intended to ensure procedural fairness. Proceedings before courts should also be efficient - not only for the sake of the parties concerned, but for the state which has a vital interest in the cost of the administration of justice.

Other factors that influence our evidence laws include: the presumption of innocence; that the prosecution must prove its case; and that public officials should respect personal dignity and integrity when investigating offences.

The new Acts relax or remove many restrictions on evidence that can be admitted in proceedings, so that a greater range of logically relevant evidence will be available to courts for fact finding purposes.

The hearsay rule, in section 59 of the Acts, is an example in point. Gone is the application of the hearsay rule to implied assertions, and to some computer and machine-produced evidence. The wider exceptions to the hearsay rule in the Acts

result in greater admissibility of hearsay evidence, subject to safeguards such as the disclosure of the proposed use of hearsay evidence and the calling, in appropriate cases, of the makers of hearsay statements to give evidence.

Documentary reforms in the Acts encourage efficiency in preparing and conducting litigation and in the conduct of commercial affairs in the community at large. The abolition of the original document rule and its replacement by simple means of proving the content of documents, including documents held in computer and other modern forms, is long overdue. The Acts provide for pre-trial procedures to examine and test documentary evidence, for calling as witnesses persons connected with record keeping systems, and for litigants to test the weight of documentary evidence tendered in proceedings.

Better understood evidence laws mean better evidence laws. Justice Smith, in his overview of the new Acts, argues that their structure, particularly the rules relating to admissibility, will lead to a better understanding of the rules of evidence. I agree. Understanding of evidence laws will also be enhanced by increased accessibility. Drawing together evidence laws in statute form, rather than finding them in a miscellany of common law decisions and statutory provisions, will make it easier for lawyers to research the law, thereby reducing costs and promoting efficiency.

The Acts' new rules for confessional evidence focus on the circumstances in which confessions are made. Section 84 provides a mandatory exclusionary rule for evidence of a confession influenced by actual or threatened violence. The Acts also embody, in section 89, the right to silence when being questioned by officials. They also extend, in section 139, statutory obligations to caution persons to other investigators, as well as to police.

As the consequences of a criminal conviction may be severe, the Acts also have more generous rules for evidence led by an accused than apply for evidence led by the prosecution. An example is subsection 65(8) of the Acts, which leaves all first hand hearsay evidence adduced by an accused admissible if the person who made the hearsay statement is not available to give evidence.

Eye-witness identification evidence is an area where both accurate fact finding and fairness considerations arise. For the first time in Australia, the Acts provide exclusionary rules for identification evidence in criminal trials: the rules address both accuracy and fairness. The rules in Part 3.10 of the Acts require a properly conducted identification parade before such evidence is admitted, unless there are good reasons for not holding a parade. The rules also protect persons identified through the use of police photographs. For example, police photographs must not suggest that they are of persons in custody.

There are great benefits to be obtained from uniform Australia-wide laws based on the Commonwealth and New South Wales Acts. I hope the States and the Northern Territory will enact parallel legislation in the near future.

The new Evidence Acts are not the end of evidence law reform. A committee, composed of judges, lawyers, and officers of the Attorney-General's Department, is being established to monitor the operation of the Commonwealth Act. The committee will co-ordinate its work with similar monitoring bodies in the Australian Capital Territory and New South Wales. The Senate Standing

Committee on Legal and Constitutional Affairs, in its Interim Report on the Evidence Bill 1993 in June 1994, stated that it would invite members of the committee to appear before it to report on any problems with the legislation.

It is critically important that we do not allow evidence law to stagnate again. While the Evidence Acts achieve far-reaching reforms, their operation may reveal areas where further refinement and improvement is possible and desirable. We must ensure that evidence law continues to serve the justice system and the interests of the community, while reflecting the values of our society.

When an area of law undergoes major developments, scrutiny is welcome and necessary. The Journal's decision to devote an issue to canvassing a range of views on evidence issues is laudable. I am pleased that the developments in evidence law have been considered worthy of this attention.