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## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Madam Justice Y Mokgoro (Chairperson)

The Honourable Mr Justice W Seriti (Vice-Chairperson)

The Honourable Mr Justice D Davis (Member)

Adv D Ntsebeza, SC (Member)

Professor C Albertyn (Member)

Professor PJ Schwikkard (Member)

Advocate M Sello (Member)

Advocate T Ncgukaitobi (Member)

Ms T Madonsela (Full-time-member)

The Acting Secretary is Mr MF Palumbo. The Commission's offices are on the 12th floor, Sanlam Centre C/o Andries and Pretorius Street, Pretoria. Correspondence should be addressed to:

The Secretary  
South African Law Reform Commission  
Private Bag X 668  
PRETORIA  
0001

Telephone : (012) 392-9540

Telefax : (012) 320-0936

E-mail : [advanvuuren@justice.gov.za](mailto:advanvuuren@justice.gov.za)

Internet site : <http://www.doj.gov.za/salrc/index.htm>

A project committee on the review of the law of evidence was responsible for this project. The project leader of for this project is Professor PJ Schwikkard. The members of the committee are -

The Honourable Mr Justice W Seriti (Vice Chairperson of the Commission)

The Honourable Madam Justice N Mhlantla

The Honourable Madam Justice T Ndita

Prof L Fernandez

Adv T Masuku

## **PREFACE**

This issue paper (which reflects information gathered up to the end of August 2007) was prepared by Professor PJ Schwikkard on behalf of the project committee to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 June 2008** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is Professor PJ Schwikkard.

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- Australian Law Reform Commission Report 38 on *The review of the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories* 1987
- K Culp Davis 'An approach to Rules of Evidence for Non-jury Cases' (1964) 50 *American Bar Association Journal* 723
- Du Toit E et al *Commentary on the Criminal Procedure Act, Juta* 1987
- Hoffmann & Zeffertt *The South African Law of Evidence* 4 ed (1988)
- J Jackson & S Doran *Judge Without Jury* (1995)
- JJ Joubert ed *Criminal Procedure Handbook* 2001 (5 ed)
- AS Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society*
- L Meintjes-Van der Walt *Expert Evidence in the Criminal Justice Process* (2001)
- New Zealand Law Commission Preliminary Paper No 13: Evidence Law: Principles for Reform; and Preliminary Paper No 14, Evidence Law: Codification
- P Roberts *Rethinking the Law of Evidence: A twenty-first Century Agenda for Teaching and Research* (2002) unpublished paper
- A Rust & C Tredoux > 'Identification parades: an empirical survey of legal recommendation and police practice in South Africa' (1998) 11 *SACJ* 196
- P Schwikkard *Presumption of Innocence* (1999)
- Schwikkard, Skeen & Van der Merwe

*Principles of Evidence* (1997)

- J Seekings & C Murray *Lay Assessors in South Africa's Magistrates' Courts* (1998)
- South African Law Commission Project 6, Report on the *Review of the Law of Evidence* (October 1986)
- South African Law Commission Project 108, Discussion Paper 99, *Computer related crime: preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects* (2001)
- South African Law Commission Project 101, Discussion Paper 90: Simplification of criminal procedure (*A more inquisitorial approach to criminal procedure*) (1999)
- South African Law Commission Project 101, Report on the Application of the Bill of Right to Criminal Procedure, Criminal Law and the Law of Evidence and Sentencing (2001)
- South African Law Commission Project 106, Discussion Paper on Juvenile Justice, (1999)
- South African Law Commission Project 107, Discussion Paper on Sexual Offences.(2001)
- South African Law Commission Project 110, Discussion Paper 103 *The Review of the Child Care Act* (February 2002)
- South African Law Commission Project 106, Report on *Juvenile Justice* (2000)
- South African Law Commission Project 107, Report on *Sexual Offences*.(December 2002)

South African Law Commission	Project 110, Report on the Review of the Child Care Act, (December 2002)
Tapper	<i>Cross &amp; Tapper on Evidence</i> 8 ed (1995)
JB Thayer	<i>A Preliminary Treatise on the Law of Evidence</i> (1898)
N van Dokkum	Parents testifying against their children@ 1994 (7) SACJ 213
W Twining	<i>Theories of Evidence: Bentham &amp; Wigmore</i> (1985; W Twining <i>Rethinking Evidence</i> (1994)
Wigmore	<i>Textbook</i>

## **Legislation**

### **South Africa**

Births and Deaths Registration Act, Act 52 of 1992

Civil Proceedings Evidence Act, Act 25 of 1965

Companies Act, Act 61 of 1973

Computer Evidence Act, Act 57 of 1983

Criminal Procedure Act, Act 51 of 1977

Documentary Evidence from Countries in Africa Act, Act 62 of 1993

Electronic Communications and Transactions, Act 25 of 2002

Interception and Monitoring Prohibition Act, Act 127 1992

Law of Evidence Amendment Act, Act 45 of 1988

Magistrates Courts Act, Act 42 of 1944

Stamp Duties Act, Act 77 of 1968

Supreme Court Act, Act 59 of 1959

**List of cases**

*Arthur v Bezuidenhout and Miemy* 1962 (2) SA 566 (A)

*Attorney-General Transvaal v Kader* 1991 (4) SA 727 (A)

*Bernstein v Bester* 1996 (4) BCLR 449 (CC)

*Borchers v Estate Naidoo* 1955 (3) SA 78 (A)

*Ferreira v Levin Y Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC)

*Levack v The Regional Magistrate, Wynberg* 1999 (2) SACR 151 (C)

*HA Millard and Son (Pty) Ltd v Enzehofer* 1968 (1) SA 330 (T).

*Hollington v Hewthorn* 1943 2 All ER 35

*Holzhausen v Roodt* 1997 (4) SA 766 (W)

*Makanjuola, R v Easton* [1995] 3 All ER 730

*Mayer v Williams* 1981 (3) SA 348 (A)

*Nel v Le RouxNO* 1996 (1) SACR 572 (CC)

*Preen v Preen* 1935 NPD 138

*Pillay v Krishna* 1946 AD 946

*R v Fourie* 1937 AD 31

*R v Sebeso* 1943 AD 196

*R v Vilbro* 1957 (3) SA 223 (AD)

*S v Baleka(1)* 1986 (4) SA 192 (T)

*S v Baleka*(3) 1986 (4) SA 1005 (T)

*S v Dladla* 1980 (1) SA 526 (A)

*S v Francis* 1991 SACR 198 (A)

*S v Hlapezulu* 1965 (4) SA 439 (A)

*S v Hlongwa* 1991 (1) SACR 583 (A)

*S v Jackson* 1998 (1) SACR 470 (A).

*S v Johannes* 1980 (1) SA 531 (A)

*S v Lawrence* 1997 (2) SACR 540 (CC)

*S v Masuku* 1969 (2) SA 375 (N) 375

*S v Mhlakaza* 1996 (2) SACR 187 (C)

*S v Monyane* 2001 (1) SACR 115 (T)

*S v Ramgobin* 1986 (4) SA 117 (N)

*S v Safatsa* 1988 (1) SA 868 (A)

*S v Baleka*(3) 1986 (4) SA 1005 (T)

*S v Dladla* 1980 (1) SA 526 (A)

*S v Francis* 1991 SACR 198 (A)

*S v Hlapezulu* 1965 (4) SA 439 (A)

*S v Hlongwa* 1991 (1) SACR 583 (A)

*S v Jackson* 1998 (1) SACR 470 (A).

*S v Johannes* 1980 (1) SA 531 (A)

*S v Lawrence* 1997 (2) SACR 540 (CC)

*S v Masuku* 1969 (2) SA 375 (N) 375

*S v Mhlakaza* 1996 (2) SACR 187 (C)

*S v Monyane* 2001 (1) SACR 115 (T)

*S v Ramgobin* 1986 (4) SA 117 (N)

*S v Safatsa* 1988 (1) SA 868 (A)

## CHAPTER 1

### ORIGIN OF INVESTIGATION AND BACKGROUND

#### INTRODUCTION

1.1 The review of the law of evidence was included for research in the Commission's programme soon after its establishment in 1973. The Commission's original intention was to codify the South African law of evidence in its entirety and to consolidate it in one Act. The reasons for this were, mainly, that the rules of evidence are contained in various Acts and that a large part of the law of evidence is not codified, but is contained in case law built up over a long period. An important consideration which gave rise to the idea of codification was the fact that the English law is still referred to in some cases as a source of the law of evidence. There were also certain aspects of the law of evidence which were considered to be in need of reform.<sup>1</sup>

1.2 Research with a view to the eventual codification of the law of evidence was embarked on. During 1979 the stage was reached where the fundamental principles on which the contemplated Code would have to be based were formulated. The Commission gradually came to realise that the codification of the law of evidence as a whole was an enormous task which would take years to complete. The Commission noted that attempts elsewhere (for instance Canada) to codify the law of evidence had entailed much more manpower and money than was available to the Commission. It was therefore necessary to plan the investigation anew.<sup>2</sup>

1.3 In the light of all the considerations mentioned above, the Commission decided to abandon the codification of the law of evidence. It decided to ascertain through research which aspects of the law of evidence were unsatisfactory or do not meet current needs and to formulate suggestions for their reform. The Commission came to the conclusion that reform was desirable in respect of the following matters: judicial notice of customary law and of foreign law, the compellability of spouses to

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<sup>1</sup> The above comments are recorded in the South African Law Commissions Report, Project 6 *Review of the Law of Evidence* (October 1986) paras 1.1-1.2.

<sup>2</sup> Ibid para 1.4.

give evidence, copies of documents, the marital privilege and hearsay evidence.<sup>3</sup> The recommendations formulated in the Commissions Report formed the basis of the Law of Evidence Amendment Act 45 of 1988.

1.4 In 2001 the Commission's project committee dealing with the simplification of criminal procedure proposed that consideration should be given to the review of the rules of evidence with a view to simplify this area of the law and, also as a result of technological developments, to align it to new developments. The Commission approved the inclusion of the proposed investigation into the review of the rules of evidence in its programme to run concurrently with the other relevant investigations on its programme. Professor Schwikkard from the University of Cape Town was requested to conduct a preliminary investigation to determine the scope of the investigation to enable the Law Commission to proceed with the investigation and to make final recommendations concerning the review of the rules of evidence. The preliminary investigation was required to:

(A) identify and analyse the investigations currently on the Commission's programme and the extent to which they deal with a review of the rules of evidence;

(B) conduct research on the current legal position with the view to identify shortcomings in the existing rules of evidence relating to both civil and criminal law over and above those dealt with in investigations already on the Commission's programme; and

(C) make recommendations on the scope of the investigation and on how the overlap between the different investigations already in progress should be dealt with.

## **RATIONALE FOR THE INCLUSION OF THE INVESTIGATION**

1.5 Given that in 1986 the Commission concluded that the law of evidence required no major reforms it is necessary to ask what has changed since then. The new constitutional dispensation has impacted on the law of evidence in a number of

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<sup>3</sup> Ibid paras 1.6-1.8.

ways. For example, the right of access to information<sup>4</sup>, the entrenchment of fair trial rights<sup>5</sup> and the exclusion of unconstitutionally obtained evidence<sup>6</sup> have all had a direct impact on the law of evidence and have given rise large body of new case law. Additionally the right to equality has not only required a re-examination of evidence in so far as it departs from the requirements of formal equality<sup>7</sup> but has also required a reconsideration of the rules of evidence in so far as they relate to effective equal access to justice.<sup>8</sup> This has not only resulted in a substantial body of new case law and a number of new policy considerations but it also requires a departure from the Commission's previous view that 'the law of evidence is a branch of the law with which legal practitioners and the judiciary are mainly concerned" and not something of great importance to the public. It is in the public interest to know the extent of constitutionality enforceable rights and it is becoming increasingly apparent that knowledge of the law of evidence is essential for case preparation. This clearly impacts on the accused, prosecution and the police in criminal cases and may also impact on parties in civil cases. The law of evidence is also integral to the enforcement of substantive law and consequently has also attracted the interest of non-governmental organisations working in specific fields such as child justice and the abuse of women. Consequently, the Commission's previous conclusion that "knowledge of the rules of evidence is of no great importance to the public" must be questioned.

1.6 The last decade has also seen a rapid development in technology and with it unforeseen forms of evidence and attendant difficulties in determining admissibility. This has also placed additional demands on the legislature.<sup>9</sup>

1.7 The developments outlined above also call the Commission's 1986

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<sup>4</sup> Section 32 of the Constitution.

<sup>5</sup> Section 35(3) of the Constitution.

<sup>6</sup> Section 35(5) of the Constitution.

<sup>7</sup> See South African Law Commission, Report on the Application of the Bill of Right to Criminal Procedure, Criminal Law and the Law of Evidence and Sentencing (2001)

<sup>8</sup> See for example, the South African Law Commissions= reports on Juvenile Justice, Review of the Child Care Act, and its discussion paper on Sexual Offences.

<sup>9</sup> See for example the Electronic Communications and Transactions Act 25 of 2002 and the Interception and Monitoring Prohibition Act, 127 of 1992.

conclusion that the law of evidence is reasonably accessible into question. The Commission was no doubt correct in concluding that codification would be a lengthy and costly exercise. Nevertheless the merits of codification need to be considered as well as alternative and/or interim measures.

1.8 Finally the increases in crime and increasing pressure on the criminal justice system has made it imperative that measures be adopted to simplify criminal procedure and evidence in order to improve efficiency.

#### **THE COMMISSION'S APPROACH IN THE INVESTIGATION**

1.9 An overall review of the law of evidence is a long term goal. It is extremely difficult to determine whether reform is necessary without some criteria against which to measure both the status quo and the proposed reform. For this reason the Commission resolved to publish an Issue Paper as the first step in the investigation. The purpose of this Issue Paper is to facilitate a focused debate by identifying some of the issues that need to be considered and secondly, to allow all role players and practitioners the opportunity to identify issues in theory and in practice for investigation and review. Some of the issues that need to be considered in this regard are raised in this issue paper to facilitate a focussed debate.

1.10 In the chapters hereafter a preliminary survey of the current legal position is undertaken. These chapters form the basis of the Commission's further investigation and discussion. Because of the wide scope of the project it was not possible to deal with all relevant topics in detail. In most instances rules of considerable importance are dealt with in a rather cursory fashion (eg the rules regulating documentary evidence). This is because it was felt that they could only be properly addressed in a dedicated discussion paper after eliciting submissions from practitioners. This Issue Paper will therefore be followed by the publication of a discussion paper where the issues identified for review and reform are discussed in detail and preliminary recommendations for reform considered.

## CHAPTER 2

### POLICY CONSIDERATIONS AND ACCESSIBILITY OF THE RULES OF EVIDENCE

#### INTRODUCTION

2.1 In this chapter the Commission raises the issue of policies underlying the law of evidence and the question whether or not the law of evidence is readily accessible and the need for codification of the law of evidence. These matters are crucial when considering reform of the law of evidence and respondents are specifically requested to comment on the questions raised in this regard.

#### POLICIES UNDERLYING THE LAW OF EVIDENCE

##### POLICY FRAMEWORK

2.2 Mainstream Anglo-American evidence scholarship has been shaped largely by the rationalist tradition.<sup>10</sup> This is the tradition that has been adopted by the South African courts. In terms of the rationalist model of adjudication: “The direct end of adjective law is rectitude of decision through correct application of valid substantive laws deemed to be consonant with utility and through accurate determination of the true past facts material to precisely specified allegations expressed in categories defined in advance by law ... proved to specified standards of probability or likelihood on the basis of the careful and rational weighing of evidence which is both relevant and reliably presented ... to a supposedly competent and impartial decision maker with adequate safeguards against corruption and mistake and adequate provision for review and appeal.”

2.3 Whilst there is a level of scepticism as to some of the assumptions underlying rationalist theory (for example, that accurate knowledge about particular past events is possible) there is little doubt that the rationalist tradition underlies South African evidence discourse and there would appear to be no obvious reason to depart from it. However, its Anglo-American roots also bring certain contextual assumptions that

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<sup>10</sup> See generally W Twining *Theories of Evidence: Bentham & Wigmore* (1985); W Twining *Rethinking Evidence* (1994).

are not as easily transplanted. A number of policies have major implications the law of evidence. A few aspects are raised for comment.

## 1. THE PARTICIPATION OF LAY ASSESSORS

2.4 Thayer claimed that the rules of evidence were the “child of the jury”.<sup>11</sup> Wigmore had this to say:

“The jury trial rules of evidence originated in jury trial, being peculiar to the historical control of the judge over the jury ... Hence they do not, in principle or in policy, apply as a matter of law to bind the judge or presiding officer in any other form of tribunal. But in the course of events, they have come to have an important influence in the procedure of other tribunals. The chief reason was that the study and use of the jury-trial rules led them to be looked upon and venerated by the Bar as the systematic instrument for judicial ascertainment of truth, and that in almost all other tribunals the judges and the counsel were men in whose minds the rules had been indelibly grained.”<sup>12</sup>

2.5 The Australian Law Reform Commission<sup>13</sup> rejected the thesis that the rules of evidence are the “child of the jury”, but it nevertheless recognised that the presence of a jury impacted on the rules of evidence. It considered the question whether different rules of evidence should apply to jury and non-jury trials. It summarised the argument for separate rules as follows;

“... a more flexible and less exclusionary system can be used for non-jury trials. Judges and magistrates, it is said through training and experience, are less susceptible than jurors to mis-estimating and misusing evidence such as hearsay or character evidence.”

2.6 The Australian Law Reform Commission concluded that it was not necessarily correct to assume that judges are better fact-finders and that consequently different rules were required for jury and non-jury trials.<sup>14</sup> It identified the distinction between civil and criminal trials as having a greater impact in evaluating the objectives of the rules of evidence.

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<sup>11</sup> JB Thayer *A Preliminary Treatise on the Law of Evidence* (1898) 47,266, 509.

<sup>12</sup> Wigmore *Textbook* 13.

<sup>13</sup> Australia Law Reform Commission Report 38 on *The review of the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories* para 28.

<sup>14</sup> See also J Jackson & S Doran *Judge Without Jury* (1995) 72.

2.7 In contrast Culp Davis<sup>15</sup> argued (in the 1960's) that as jury trials were used in only 3% of all tribunals it was an anomaly that the Anglo-American rules of evidence which were designed for jury trials were unquestionable applied and the rules of evidence were long overdue for reform. He argued that evidence reform should be: "(a) focussed primarily on non-jury trials, and (b) toward an enlarged discretion guided by broad standards and away from precise and rigid refinements...".<sup>16</sup>

2.8 However, Jackson & Doran<sup>17</sup> note that "many rules of evidence serve the purpose of not only preventing prejudice on the part of the trier of fact but also, ... of preventing parties from taking unfair advantage over one another either before or during the trial. The rules governing confessions, for example, restrain police abuse of suspects prior to trial and thereby help ensure that only reliable confessions are obtained." The question then arises is whether it is possible to distinguish between rules of evidence directed at controlling juries and those that are not.

2.9 Lay participation in the formal judicial system in South Africa dates back at least to the nineteenth century where justices of the peace and occasionally elected veldcornetten "administered law in many frontier areas".<sup>18</sup> Modelled on English law structures the jury system was adopted in South Africa in 1827.<sup>19</sup> Although prior to 1954 there was not an absolute colour bar in the vast majority of cases the jury was compromised of nine white men.<sup>20</sup> Trial by jury in civil cases was abolished in 1926 and there was a steady decline of the use of juries in criminal trials and by the 1960's

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<sup>15</sup> K Culp Davis 'An approach to Rules of Evidence for Non-jury Cases' (1964) 50 *American Bar Association Journal* 723.

<sup>16</sup> At 723.

<sup>17</sup> Op cit 72.

<sup>18</sup> J Seekings & C Murray *Lay Assessors in South Africa's Magistrates' Courts* (1998) 16. Seeking and Murray note at 16 "The involvement of chiefs, headmen and elders in sanctioned chiefs= courts might be considered a form of lay participation, but their significance was greatly reduced by both their subordination to district and commissioner's courts and their restriction to parts of the reserves of Bantustans."

<sup>19</sup> JJ Joubert ed *Criminal Procedure Handbook* 2001 (5 ed) 191.

<sup>20</sup> See Joubert op cit, Seekings & Murray op cit 17. Prior to 1931 women could not serve as jurors. As a result of women been enfranchised in 1930, in 1931 it became theoretically possible for all women juries to be appointed - however no such jury was ever appointed.

less than one percent of criminal trials was by jury.<sup>21</sup> Jury trials were abolished by the Abolition of Juries Act 34 of 1969. In the 1970's and 80's there was minimal lay participation in the formal judicial system. The 1990's saw the re-emergence of the use of lay assessors in both the magistrates and superior courts. Section 34 of the Magistrates' Court Act 32 of 1944 permits the court in civil actions, "upon the application of either party, to summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity".<sup>22</sup> Section 93*ter* makes provision for the use of lay assessors in criminal trials. A magistrate presiding over a criminal trial may if he/she deems it expedient for the administration of justice, before any evidence has been led or in considering a community-based punishment in respect of any person who has been convicted of any offence, summon one or two assessors to assist him or her at the proceedings. However, the provisions are more peremptory in respect of murder trials in the regional court where the presiding officer must summon two assessors to assist him or her, unless the accused requests that the trial be proceeded with without assessors, in such a case the use of assessors is within the discretion of the presiding officer. In the High court it is generally within the presiding officer's discretion whether to sit with an assessor in criminal matters.<sup>23</sup> Lay assessors are used in a number of civil tribunals.

2.10 Professor SE van der Merwe succinctly summarises the distinction between jurors and assessors as follows:

"Assessors in lower courts and in the Supreme Court can to some extent be compared with jurors as they are all finders of fact and do not decide legal issues. But our system of adjudication differs materially from trial by jury. The role of jurors can briefly be summarized as follows: jurors are lay people and sole finders of fact. They listen to the evidence and hear arguments, and they receive a summing-up and instructions from the presiding judicial officer: They are then called upon in their capacity as sole finders of fact to consider and reach their verdict in the absence of the presiding judicial officer. And they are not required to advance reasons in support of their verdict. But in our system the judge or magistrate is at all times either a sole finder of fact or, where assessors are involved, a co-finder of fact.<sup>24</sup> A judge must give

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<sup>21</sup> Seekings & Murray op cit 17.

<sup>22</sup> Section 34 has been substituted by s. 1 of the Magistrates' Courts Amendment Act 67 of 1998, a provision which will be put into operation by proclamation.

<sup>23</sup> See s 145 of the Criminal Procedure Act 1977.

<sup>24</sup> See generally s 145(4)(a) of the Criminal Procedure Act 51 of 1977 and s 93*ter*(3)(e)

reasons for his verdict.<sup>25</sup> Magistrates almost invariably do give reasons for their verdict and, failing which, they may in certain circumstances be legally required to do so. It is true that the function of assessors can be compared with the function of jurors, because the function of assessor - with one exception<sup>26</sup> - is also limited to fact finding. But assessors - unlike a jury - must give reasons for their verdict.<sup>27</sup> They either agree or disagree with the presiding judicial officer's reasons and finding, and in the event of a disagreement must furnish their own reasons in a separate judgment which is read out in court by the presiding judicial officer. And assessors - unlike jurors - are under constant and immediate judicial guidance in the sense that a judge (or magistrate) and the assessors involved in the trial have joint deliberations in reaching their respective verdicts. During these deliberations the presiding judicial officer can and must draw the attention of assessors - who of course may be lay people - to certain rules which govern the evaluation of evidence, for example, the cautionary rule, the rules governing inferences drawn from circumstantial evidence, and those rules which determine the effect of an accused's silence on the evaluation of the prosecution's prima facie case.<sup>28</sup>

2.11 The absence of a jury and the somewhat different role of lay assessors in our courts as joint fact finders who are subject to the continual guidance of the court and who are required to give reasons for their decisions calls into question whether our jury based rules of evidence remain appropriate.

## 1. POLICIES UNDERLYING THE LAW OF EVIDENCE - THE PARTICIPATION OF LAY ASSESSORS: QUESTIONS FOR COMMENT

- **Do lay assessors need to be protected from unduly prejudicial evidence to a greater extent than judges?**
- **Does that fact that presiding officers frequently have sight of the prohibited evidence prior to its exclusion substantially undermine the function of the exclusionary rules?**
- **Should the exclusionary rules be directed at controlling juries in**

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of the Magistrates Court Act 32 of 1944.

<sup>25</sup> See s 146(b) of the Criminal Procedure Act.

<sup>26</sup> See s 93ter(1)(b) of the Magistrates Courts Act 42 of 1944.

<sup>27</sup> See s 146(d) of the Criminal Procedure Act 1977 and s 93ter(3)(e) of the Magistrates Court Act 1944.

<sup>28</sup> SE van der Merwe in Schwikkard et al *Principles of Evidence* (1997) 13-14.

**the exercise of their fact finding function be re-placed by judicial discretion, and if this approach is taken does the breadth of the discretion need to be examined?**

- **Should a distinction be drawn between those exclusionary rules concerned with the reliability of fact finding such as similar fact evidence and those that have a broader policy component for example the rules governing confessions which exclude improperly obtained confessions no matter how reliable they may be?**

## **2. THE ADVERSARIAL NATURE OF CIVIL AND CRIMINAL TRIALS**

2.12 The Anglo-American rules of evidence are also firmly embedded in the party driven adversarial system in which it is the party's rights and responsibility to choose the manner in which they will conduct their case including what evidence they will present. It is also the parties' responsibility to object and test the evidence presented by the opposing party. The Australian Law Commission argued that rules of evidence were necessary "to guide and control the participants if an adversary trial is to be managed effectively".<sup>29</sup> The corollary is that inquisitorial procedural systems adopt a far more flexible approach to the admissibility of evidence.<sup>30</sup> A study of adversarial and inquisitorial systems of criminal procedure was conducted by the South African Law Commission in Project 73: Simplification of Criminal Procedure (a more inquisitorial approach to criminal procedure). The Commission noted that the South African criminal justice system contained a number of inquisitorial elements, many of which were necessary to protect the unrepresented accused and found no difficulty in adopting further inquisitorial elements where these promoted the effective and fair administration of justice.

## **2. POLICIES UNDERLYING THE LAW OF EVIDENCE - ADVERSARIAL NATURE OF CIVIL AND CRIMINAL TRIALS: QUESTIONS FOR COMMENT**

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<sup>29</sup> Op cit 28.

<sup>30</sup> South African Law Commission Discussion Paper: Simplification of criminal procedure (a more inquisitorial approach to criminal procedure) at 2.10.

- **A thorough review of the law of evidence would also require consideration of the adversarial/inquisitorial balance in the different tribunals that administer justice. Should different procedural approaches require different application of the rules of evidence?**

### **3. POLICY CONSIDERATIONS UNDERLYING CRIMINAL AND CIVIL TRIALS**

2.13 The function of the law evidence in civil and criminal trials may be distinguished on the basis that they attract different policy considerations. In this regard the nature and purpose of civil and criminal trials need to be considered.

2.14 The following description of a civil and a criminal trial is set out as the basis for further investigation and discussion if necessary.

#### **Civil trials:**

2.15 A civil trial may be viewed as a mechanism for resolving disputes between parties and ordering relationships. However, its efficacy in performing either function requires just decision making. The Australian Law Reform Commission found that the following factors had to be present if civil trials were to have the respect and confidence of the parties.<sup>31</sup>

“(A) Although a civil trial is not a ‘search for truth’, it is nonetheless of critical importance that the courts make a genuine attempt to find the facts. If this is not done, the system will be seen to be at best arbitrary and at worst biased and will lose the confidence and respect of the community. Any limitation on the attempt to find the facts requires justification.

(B)The parties must be given, and feel they have had, a fair hearing. This will depend in part on the extent to which they have been able to present their case ... It will also depend upon the extent to which they have been able to challenge and meet the case presented against them. Again limits require justification....The fairness of the proceedings will also depend on the conduct of the judicial officer - the more arbitrary or subjective it appears to be, the less acceptable to all concerned. It is also important that there be the appearance and, if possible, the reality of control by law rather than judicial whim. Detailed rules of evidence lend to trial the appearance of proceedings

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<sup>31</sup> Op cit 34.

controlled by the law, not by the individual trial judge's discretion, and reduce the scope for subjective decisions.

(C) The parties and the community will judge the civil trial system in part by considering its efficiency. Any rules or proposals must be evaluated in the light of their effect on the time and cost of the trial.

(D) To the extent that the system operates under rules, the more anomalous technical rigid and obscure the rules seem, the more the system's acceptability is lessened. The parties in a case can meet the situation by agreeing to ignore or waive the more unsatisfactory rules,... This, however only results in the rules lying in wait for the unwary and the party who does not have legal representation. Any rules or proposals that are complicated, difficult to understand or apply, produce anomalies, lack flexibility where this is needed or are very technical, require justification."

### **Criminal trials:**

2.16 Although the objectives of a criminal trial include those that pertain to civil trials, (and the pre-requisites for a fair criminal trial also include those listed above in respect of civil trials) there is fundamental distinction. Roberts in asserting that "criminal evidence and procedure is a (very) applied branch of moral and political philosophy"<sup>32</sup> notes "[c]riminal law is amongst the principal public institutions in which the rights and responsibilities of citizenship are articulated, contested, elaborated and enforced. Criminal procedure, as the adjectival counterpart of substantive criminal law, is directly concerned with basic rights and liberties in the performance of an essential public function - censure and sanction of criminal wrongs". The relative strength of the states resources and the drastic nature of the criminal sanction require a more cautious approach to fact finding. It is the very policy choice that underlies the presumption of innocence and requires proof beyond a reasonable doubt which demands greater certainty in fact finding. (Whilst accepting that the search for the 'truth' is a mirage and that the 'proof' of facts is a matter of degree.)

2.17 This is reflected in the constitutional specification of fair trial rights in respect of criminal trials, many of which cannot be applied in civil trials. Furthermore, the fair trial rights, listed in s 35(3) of the Constitution, attach to the accused and cannot be claimed by the prosecution. This is a direct result of the different relationship between parties in civil trials (where equality is questionably presumed) and criminal trials where the inequality of the parties is expressly recognised.

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P Roberts A Rethinking the Law of Evidence: A twenty-first Century Agenda for Teaching and Research@ (2002) unpublished paper.

2.18 The most important factors influencing the distinction between the policies underlying criminal and civil trials would appear to be the relative strength of the parties and the nature of the criminal sanction. These require a more cautious approach to be taken to the admissibility of evidence in criminal trials.

### **3. POLICY CONSIDERATIONS UNDERLYING CRIMINAL AND CIVIL TRIALS - QUESTIONS ON THE EFFICIACY OF THE RULES OF EVIDENCE IN CIVIL AND CRIMINAL TRIALS – QUESTIONS FOR COMMENT**

- \* **Do the rules facilitate the fact finding function of the court?**
- \* **does public policy require the exclusion of probative and relevant evidence in the particular circumstances?**
- \* **do the rules give rise to uncertainty?**
- \* **can the rules be easily understood?**
- \* **What are the particular time and cost implications of any particular rule?**

### **4. CODIFICATION OF THE RULES OF EVIDENCE**

2.19 Although the common law remains a major source of the law of evidence a significant proportion of the rules of evidence are codified in the Criminal Procedure Act and the Civil Proceedings Evidence Act. However, there are a number of provisions found in other legislative instruments for example the Companies Act 61 of 1973, The Births and Deaths Registration Act 52 of 1992, the Stamp Duties Act 77 of 1968, the Law of Evidence Amendment Act 45 of 1988, the Electronic Communications & Transactions Act 25 of 2002. (This list is by no means conclusive and merely serves to illustrate the number of sources). From the subject matter canvassed in chapter 3 of this preliminary report it is apparent that there is a strong likelihood of a plethora of additional evidentiary provisions arising in a range of statutory instruments.

2.20 Accessing the rules of evidence are further complicated by the fact that where the legislature is silent we are required to apply the English law of evidence which

was in force in South African on 30 May 1961. Finally all rules of evidence are required to comply with the Constitution.

2.21 The varied sources of the law of evidence mean that the rules of evidence are frequently not readily accessible. However, this problem should not be exaggerated and comments from those who are required to work with or consider the rules of evidence in their work would be useful in identifying problems related to accessibility. A further danger of multiple sources of rules is the potential conflict between rules and difficulties of interpretation.

2.22 Codification would be useful in rationalising existing laws. However, there are number of options. For example, one single code in which all rules of evidence are exclusively contained or, a code which contains the main body of rules but allows other statutory provisions to prevail in circumstances not provided for by the Code. In 5 below potential questions for the basis of a codification discussion paper are set out.

#### **4. QUESTIONS DIRECTED AT FORMING PRINCIPLES FOR CODIFICATION**

- X *Is a single comprehensive code desirable?*
- X *What policies or principles should an evidence code express?*
- X *How detailed should codified rules be?*
- X *Should a code include instructions as to interpretation that would differentiate it from other Acts?*
- X *How should potential gaps in the code be dealt with?*
- X *How should the code be structured?*

#### **5. PRINCIPLES FOR REFORM**

2.23 A holistic approach to a review of the law of evidence requires consensus as to the policies and principles underlying the law of evidence, and then, if codification is favoured a further investigation is necessary into the principles that should underlie the content and structure of a future code. Potential questions to facilitate such discussions are set out below.<sup>33</sup>

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These are similar to the questions formulated by the New Zealand Law Commission. See Preliminary Paper No 13: Evidence Law: Principles for Reform; Preliminary Paper

**5. FORMUALTING PRINCIPLES FOR REFORM: QUESTIONS FOR COMMENT**

- X *What is the scope of the law of evidence? Should the focus of evidence law be exclusively on the trial or should other stages of the process be considered as well?*
- X *Should the exclusionary rules directed at controlling juries in the exercise of their fact finding function be re-placed by judicial discretion?*
- X *To what extent should relevance and weight be regulated?*
- X *To what extent should public and social interests be reflected in evidence law?*
- X *Should there be different rules for different courts and tribunals?*
- X *What should be the primary purpose of the rules of evidence in the trial process? In particular to what extent should evidence law facilitate all or any of the following policies:*
  - *rationality and truth-finding?*
  - *party freedom?*
  - *procedural fairness?*
  - *public interest?*
  - *efficiency and finality?*
- X *What areas of law need to be reformed?*
- X *Is there a need for an evidence code?*

## CHAPTER 3

### GENERAL OVERVIEW OF THE RULES OF EVIDENCE AND POSSIBLE AREAS FOR REFORM

#### INTRODUCTION

3.1 The purpose of this chapter is to identify areas for reform and to raise questions with the view to focus the responses to the issue paper on possible areas for reform. The preliminary research therefore includes a review of the relevant statutory provisions in the Criminal Procedure Act 1977 as well as the Civil Proceedings Evidence Act 1965. In addition the project committee requires recommendations in regard to the reform and codification of the rules of evidence, in particular in respect of - the burden of proof; the standard of proof and cogency, corroboration and the cautionary rules; presumptions; judicial notice; formal admissions; competency and compellability to give evidence; the presentation of evidence by witnesses; real evidence; documentary evidence; computer generated evidence; admissibility of evidence and relevance; previous inconsistent statements; informal admissions and confessions; privilege; hearsay evidence. This list has been extended in attempt to join a commentary on the relevant statutory provisions in the Criminal Procedure Act and the Civil Proceedings Evidence Act into a single narrative.

3.2 If a review of the law of evidence is adopted as a longer term project it will be necessary to canvass and consult broadly with those who work with evidence provisions in order to fully identify problem areas. To a certain extent this has been done in specific areas investigated by the commission. However, if such a reform project is to have any utility it is essential that views of practitioners<sup>34</sup> are widely canvassed.

3.3 The general overview that follows must be viewed in its proper context. It is part of preliminary research study and is intended to form the basis of future research and discussion.

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<sup>34</sup> Practitioners refers to all persons who are required to take cognisance of the rules of evidence in their professional capacity (eg social workers) and is not restricted to legal practitioners.

## 6. THE BURDEN OF PROOF AND THE DUTY TO ADDUCE EVIDENCE FIRST

3.4 *Criminal trials:* The recognition of the presumption of innocence as a fundamental constitutional principle has brought a desirable degree of clarity to the allocation of the burden of proof in criminal trials. In all matters directed at ascertaining the guilt or innocence of the accused the prosecution bears the burden proof. Any reversal of the burden of proof, albeit it statutory or otherwise, that permits the conviction of the accused despite the existence of reasonable doubt will infringe the constitutional right to be presumed innocence and will be struck down unless justifiable in terms of the limitations clause. An inevitable consequence of the presumption of innocence and the right to remain silent is that the prosecution is required to adduce evidence first, any infringement of the right to remain silent will likewise have to be justified in terms of the limitations clause

3.5 *Civil trials:* There is considerable less certainty with regard to the burden of proof in civil trials. In terms of the general principles set out in *Pillay v Krishna*<sup>35</sup> the burden rests on the person claiming something or making an assertion that changes the status quo. However, where the person against whom the claim is made sets up a special defence he or she will bear the burden in respect of the defence. The problem that arises here is that is that in certain instances there can be confusion as to who is 'asserting' or 'denying' and ultimately the court will rely "upon broad and undefined reasons of experience and fairness".<sup>36</sup> Whether this gives rise to significant difficulties in practice requires investigation.

3.6 Although the burden of proof and duty to adduce evidence first frequently coincide, this is not always necessarily so. The rules regulating the duty to begin are codified in the High Court and Magistrates' Court Rules<sup>37</sup>. The High Court Rules use the term *Aonus to adduce evidence@* to reflect the duty to begin. However, in the Magistrates' Court Rules the phrase 'burden of proof' is conflated with the 'duty to

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<sup>35</sup> 1946 AD 946 at 951-2.

<sup>36</sup> *Pillay v Krishna supra* 954.

<sup>37</sup> High Court Rule 39 and Magistrates= Court Rule 29.

adduce evidence'. In *HA Millard and Son (Pty) Ltd v Enzehofer*<sup>38</sup> the court found that although the Magistrates' Court Rules refer throughout to the burden of proof, that phrase, seen in its context, means no more than the duty to adduce evidence. Consequently, it seems that Magistrates' Court Rule 29 will operate no differently to High Court Rule 39, notwithstanding that the language is not quite the same. For the sake of accessibility and clarity consideration should be given to re-drafting the rules to avoid any possible confusion.<sup>39</sup>

## 6. THE BURDEN OF PROOF AND THE DUTY TO ADDUCE EVIDENCE FIRST: QUESTIONS FOR COMMENT

- \* *Do the High Court and Magistrates' court rules give rise to problems in practice in respect of the allocation of the burden of proof in civil trials?*

## 7. STANDARDS OF PROOF

3.11 The standard of proof in criminal and civil matters is well established, namely proof beyond reasonable doubt and proof on a balance of probabilities.<sup>40</sup> A seemingly intractable problem is how to quantify these generalised seemingly intuitive standards. This has been the focus of much evidence scholarship in the last 30 years and is not something that can be remedied through codification. Another question that arises from these well established standards of proof is when do they apply - do they only have application at the end of the trial when the presiding officer is making his or her final determination or are they also applicable to the admissibility of evidence? In one instance the standards are clearly applicable to the admission of evidence: the admissibility of a confession must be established beyond a reasonable doubt. But must the admission of similar fact evidence or hearsay evidence be proved beyond a reasonable doubt or on a balance of probabilities? In criminal trials what standard of proof, if any, must be applied to the admissibility of evidence adduced by the accused?

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<sup>38</sup> 1968 (1) SA 330 (T).

<sup>39</sup> It should be noted that in its 1986 review of the Law of Evidence the Commission considered uncertainties and inconsistencies in relation to the incidence of the burden of proof in civil cases but came to the conclusion that there was insufficient justification for altering the present position by legislation.

<sup>40</sup> In criminal trials where the burden is placed on the accused (and constitutes a justifiable limitation of the right to be presumed innocence) the accused will be required to discharge his or her burden on a balance of probabilities.

3.12 It is possible to delineate the application of the reasonable doubt rule with reference to the presumption of innocence. It has been argued<sup>41</sup> that:

“The scope of the presumption of innocence as a constitutionally entrenched right in s 35(3)(h) of the Constitution, requiring the prosecution to prove guilt beyond a reasonable doubt at trial, is restricted to proof of those elements of the state’s case that must be established in order to justify punishment. The relevance of evidence must also be proved beyond a reasonable doubt in order to ensure the consistent application of the reasonable doubt standard. The blameworthiness of the accused is the underlying justification for punishment. Consequently, facts necessary to establish legal guilt but not pertinent to blameworthiness need not be proved beyond reasonable doubt in terms of the presumption of innocence, which reflects society’s tolerance of erroneous acquittals in an attempt to ensure that only the blameworthy are convicted. However, there maybe circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence. The constitutional right to be presumed innocence is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial. However, when imprisonment as a form of punishment is a possible result of ‘other proceedings’ the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard.”<sup>42</sup>

3.13 Even if the above argument is endorsed we are left with the problem of civil trials to which the presumption of innocence does not apply. The constitutional question could be reframed as follows: does the s 34 right to a fair hearing require the admissibility of evidence in civil trials to be proven on a balance of probabilities?

3.14 Any time spent on dealing with this somewhat complex issue needs to be constrained by responses to the following question: does the scope of the application of the standards in civil and criminal trials give rise to problems in practice?

## 7. STANDARDS OF PROOF: QUESTIONS FOR COMMENT

- \* ***Should a standard of proof be applied to the admissibility of evidence?***
- \* ***Are there instances where the criminal standard should be applied in civil proceedings?***

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<sup>41</sup> See P Schwikkard *Presumption of Innocence* (1999) 40-84.

<sup>42</sup> *Ibid* 83-84.

## 8. THE CAUTIONARY RULES

3.15 The limitation of any corroboration requirements to conviction on the basis of the single evidence of a confession<sup>43</sup> and the rationale of the cautionary rules applicable to complainants in sexual offence cases, children and single witnesses were discussed in the Commission Report on Sexual Offences<sup>44</sup>. However, there are numerous other categories of witness to which a cautionary rule applies these include, accomplices,<sup>45</sup> accessories,<sup>46</sup> co-accused<sup>47</sup> when testifying against a co-accused, police traps,<sup>48</sup> the plaintiff in paternity and seduction cases;<sup>49</sup> private detectives,<sup>50</sup> persons who claim against the estates of deceased persons.<sup>51</sup> The list is not exhaustive - but each cautionary rule needs to be examined to establish whether untrustworthiness is supported by social science evidence. The response might well be that the basis of the caution is self-evident and common sense. Unfortunately, the cautionary rule applicable to women in sexual offence cases is a good example of the dangers of such arguments and an irrational cautionary rule may well serve to hamper rather than enhance rectitude of decision making. An alternate approach would be to abolish all cautionary rules and require, in all cases, an evidential basis for suggesting that the evidence of the witness may be unreliable.<sup>52</sup>

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<sup>43</sup> Section 209 of the Criminal Procedure Act 1977.

<sup>44</sup> South African Law Reform Commission Project 107 *Report on sexual Offences*, December 2002.

<sup>45</sup> See *S v Hlapezulu* 1965 (4) SA 439 (A); *S v Hlongwa* 1991 (1) SACR 583 (A); *S v Francis* 1991 SACR 198 (A) and *S v Masuku* 1969 (2) SA 375 (N) 375-7.

<sup>46</sup> *R v Nhleko* 1960 (4) SA 712 (A).

<sup>47</sup> *S v Dladla* 1980 (1) SA 526 (A); *S v Johannes* 1980 (1) SA 531 (A).

<sup>48</sup> *S v Mabaso* 1978 (3) SA 5 (O), *S v Ramproop* 1991 1 SACR 555 (N).

<sup>49</sup> *Mayer v Williams* 1981 (3) SA 348 (A).

<sup>50</sup> *Preen v Preen* 1935 NPD 138.

<sup>51</sup> *Borchers v Estate Naidoo* 1955 (3) SA 78 (A).

<sup>52</sup> See *Makanjuola, R v Easton* [1995] 3 All ER 730 (CA) quoted with approval in *S v Jackson* 1998 (1) SACR 470 (A).

## 8. CAUTIONARY RULES: QUESTIONS FOR COMMENT

\* *In the absence of a jury should the cautionary rules be retained?*

## 9. PRESUMPTIONS

3.16 There are a plethora of presumptions scattered throughout the common law and statute law. They are traditionally classified in terms of three categories: irrebuttable presumptions of law, rebuttable presumptions of law, and presumptions of fact. Irrebuttable presumptions of law are better viewed as rules of substantive law<sup>53</sup> and it is debatable whether they should be included in a review of the law of evidence. A presumption of fact has been described by Hoffmann & Zeffertt as “a mere inference of probability which the court may draw if on all the evidence it appears to be appropriate”.<sup>54</sup> Consequently, it would seem that they reflect no more than ordinary reasoning and common sense - which begs the question whether they should be considered presumptions at all and whether any purpose would be served by codifying them or regarding them as rules of evidence.<sup>55</sup>

3.17 Presumptions of law on the other hand have potential constitutional implications in the criminal context in that depending on their formulation they may infringe the presumption of innocence and/or the right to remain silent.<sup>56</sup> The Commission made recommendations in regard to presumptions found in the Criminal Procedure Act in its *Report on the application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing*.<sup>57</sup> There are no doubt a number of provisions contained in other statutes that apply in the criminal context

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<sup>53</sup> Schwikkard, Skeen & Van der Merwe *Principles of Evidence* (1997) 344.

<sup>54</sup> Hoffmann & Zeffertt *The South African Law of Evidence* 4 ed (1988).

<sup>55</sup> See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 574. Wigmore para 2491.

<sup>56</sup> The constitutional implications attaching to presumptions of law are dealt with in detail in the South African Law Commission Report *On the application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing* (2001) chapter 2.

<sup>57</sup> Op cit. Amendments to the following sections were recommended: ss 212(10)(a), 217, 219A, 237, 238, 240, 243, 245, 249, 269, 274, 332, 337, 319(3).

that similarly need to be considered.

3.18 The constitutional right to be presumed innocent is specified in relation to the accused's right to a fair trial and its application does not extend to civil trials.<sup>58</sup> Consequently, presumptions of law in civil trials are not susceptible to being struck down on the basis that they infringe the constitutional right to be presumed innocent or the right to remain silent. However, the constitutional demand that civil trials be fair<sup>59</sup> may well require that presumptions of law in civil cases have a requisite degree of internal rationality. This would be a departure from the common law in terms of which it is not necessary that the presumed fact constitutes a logical inference from the evidence which gives rise to the presumption.<sup>60</sup> As noted by Stratford ACJ in *R v Fourie*<sup>61</sup>: "the judge's mind does not - and ought not to - advert to the reason for the presumption, and the presumption must be accepted as proof of the fact presumed until rebutted." Consideration needs to be given to a review of rebuttable presumptions of law in civil cases.

## 9. PRESUMPTIONS: QUESTIONS FOR COMMENT

\* ***Should the rationality of rebuttable presumptions applicable in civil proceedings be reviewed?***

## 10. JUDICIAL NOTICE

3.19 In its 1986 report reviewing the law of evidence the Commission recommended that the law be amended so as to provide for the taking of judicial notice of foreign law and indigenous law.<sup>62</sup> In relation to all other aspects of judicial notice the Commission concluded that "[t]his area of the law of evidence does not give rise to any problems worth mentioning".<sup>63</sup> With the exception of the question of

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<sup>58</sup> See *Nel v Le Roux* NO 1996 (1) SACR 572 (CC); *Ferreira v Levin Y Vryenhoek v Powell* NO 1996 (1) BCLR 1 (CC); *Bernstein v Bester* 1996 (4) BCLR 449 (CC).

<sup>59</sup> Section 34.

<sup>60</sup> See Hoffmann & Zeffertt op cit 534.

<sup>61</sup> 1937 AD 31 at 44.

<sup>62</sup> See s 1 of the Law of Evidence Amendment Act 45 of 1988.

<sup>63</sup> Op cit para 8.1.

the rebuttability of judicially noticed facts there would appear to be no significant difficulties in this area. However, a notable development since 1986 has been the recognition of the distinction between adjudicative and legislative facts<sup>64</sup> and although the reported cases do not reflect any apparent difficulties in this regard - input from practitioners is necessary.

3.20 In terms of the English law, evidence is not admissible to rebut a judicially noticed fact and a judicially noticed fact may be removed from the jury.<sup>65</sup> Hoffmann & Zeffertt argue that the irrebuttable nature of a judicially noticed fact is consistent with its removal from the jury and further:

“If that were not so, it would be difficult convincingly to make a distinction between the process of judicial notice, and the ordinary evidentiary process, when judicial notice follows an inquiry. What is more, a judicially noticed fact would become little more than presumptive evidence, akin to a so-called presumption of fact...”

3.21 However, there is some authority to the contrary, for example in *S v Lund*<sup>66</sup> the court held that once a court has taken judicial notice of a fact “it is still a question of fact whether or not that fact establishes what the State had to prove in the case in question, and established it sufficiently clearly for it to be said to be established beyond reasonable doubt.”<sup>67</sup> Culp Davis<sup>68</sup> argues that the rationale for the rule prohibiting the rule is justified only by the practice of withdrawing the fact from the jury and makes no sense in the absence of a jury. If this is correct then there would be a sound basis for departing from English precedent. However, justification for irrebuttability may also be found in the rationale underlying judicial notice which has been expressed as follows:

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<sup>64</sup> Adjudicative facts are facts concerning the parties ie who did what, when, how and with what motive or intent - these are what the court considers in performing its fact finding function. Legislative facts are facts which the court considers in developing law and policy, they are of a general nature and are not of immediate concern to the parties. See *S v Lawrence* 1997 (2) SACR 540 (CC). See also Constitutional Court Rule 30, *Principles of Evidence* op cit 340-342.

<sup>65</sup> Tapper *Cross & Tapper on Evidence* 8 ed (1995) 75.

<sup>66</sup> 1987 (4) SA 548 (N).

<sup>67</sup> At 553A-B. See also Schmidt *Bewysreg* 3 ed (1989) 726.

<sup>68</sup> K Culp Davis ‘An approach to rules of evidence for non-jury cases’(1964) 50 *American Bar Association Journal* 723.

“In the first place, it expedites the hearing of many cases. Much time would be wasted if every fact which was not admitted had to be the subject of evidence which would, in many instances, be costly and difficult to obtain. Second, the doctrine tends to produce uniformity of decision on matters of facts where a diversity of finding might sometimes be distinctly embarrassing.”

3.22 On the other hand the *Lund* approach is in line with the function of the law of evidence in so far as it promotes rectitude in decision making. The extent to which finding clarity on this point is desirable will also be influenced by whether the debate has any significance in practice.

3.23 The growing use of social science evidence in constitutional limitation arguments, and the distinction drawn between adjudicate and legislative facts may also require greater clarification in regard to the application of judicial notice.

## 10. JUDICIAL NOTICE: QUESTIONS FOR COMMENT

\* ***Should the rules relating to judicial notice be reviewed and its application be clarified?***

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## 11. FORMAL ADMISSIONS

3.24 Formal admissions were considered by the Commission in its 1986 report which noted as follows:

“Formal or judicial admissions are regulated by section 15 of the Civil Proceedings Evidence Act in civil proceedings and by section 220 of the Criminal Procedure Act in criminal proceedings. These provisions are not identical, as one would have wished, and they are, moreover, to a greater or lesser extent, not a complete recording of the common law relating to the matter under discussion... So far as the law of evidence is concerned, the Commission is not aware of any adjustments which are necessary regarding formal admissions.”

3.25 Subject to submissions to the contrary there would appear to be no necessity to amend the existing position. However, in the event of a comprehensive codification project been undertaken - it would be apposite to consider the discrepancy between the wording in s 15 of the Civil Proceedings Evidence Act and s 220 of the Criminal Procedure Act and consider whether they should be expanded to embrace the full ambit of the common law in respect of formal admissions.<sup>69</sup>

<sup>69</sup>

It would also be necessary to consider those provisions applicable to formal admissions contained in the High Court Rules.

3.26 An issue raised but rejected by the 1986 Commission was the desirability of compelling the accused to disclose the basis of his or her defence. This was debated extensively in the Commission's project *Simplification of Criminal Procedure: (a more inquisitorial approach to criminal procedure)*<sup>70</sup> in which a qualified duty to disclose was endorsed.<sup>71</sup>

## 11. FORMAL ADMISSIONS: QUESTIONS FOR COMMENT

\* ***Do the rules governing formal admissions give rise to any difficulties in practice?***

## 12. COMPETENCE AND COMPELLABILITY

3.27 The Commission's 1986 report made welcome recommendations in regard to the competence and compellability of spouses. As a result of which previously incompetent spouses became competent but not compellable except in specified categories of offences.<sup>72</sup> Arguments were presented in favour of making spouses compellable witnesses but were rejected by the Commission on the basis that this would place undue strain on marital relationships.

3.28 The Commission also noted that "there is nothing in civil proceedings which precludes a husband from testifying against his wife or wife from testifying against her husband: spouses may be called and compelled by any party to give evidence. This does not, however, imply that the marital privilege in terms of section 10 of the Civil Proceedings Evidence Act no longer applies." The Commission did not recommend any change in the status quo in relation to civil proceedings. The question that arises, is do current circumstances justify making spouses compellable witnesses in criminal cases.

3.29 The constitutional right to equality<sup>73</sup> prohibits discrimination on the basis of

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<sup>70</sup> Op cit.

<sup>71</sup> See s 5 of the Draft Bill.

<sup>72</sup> See the Law of Evidence Amendment Act 45 of 1988 which amended s 195 & 196 of the Criminal Procedure Act.

<sup>73</sup> Section 9 of the Constitution.

marital status. Consequently, partners to long term relationships who choose not to enter a legally sanctioned marriage (or are unable to do so) may well claim that they are discriminated against when compelled to testify. (One may then ask whether a distinction should be made between short term and long term relationships and on what basis this should be done.) The rationale for upholding a claim to non-compellability in all these cases would appear to be that it would place undue stress on the 'relationship' it is submitted with respect that this is not a particular strong justification in any circumstances when weighed against the courts interest in hearing all relevant evidence. If we adopt the civil position a compellable spouse will still be able to claim privilege in relation to communications made between them during the subsistence of the marriage. This of course raises again the spectre of discrimination on the basis of marital status - this issue is dealt with under the discussion of private privilege below where it is submitted that the appropriate focus should rather be the constitutional right to privacy rather than marital status.

3.30 The Australian Law Commission in its review of the law of evidence<sup>74</sup> recommended that spouses should be compellable but should be able to seek exemption from the court. Additionally it was recommended that parents and children of the accused should be able to seek such exemption as well as the de facto spouse of the accused. (Such legislation has already been in force in Victoria and South Australia) This, the Commission felt, would serve the objective of protecting the family unit and avoiding undue hardship to witnesses.

3.31 The South African Law Commission in its 1986 report considered the option of judicial exemption (but not its extension to children, parents and de facto spouses) and concluded that this would result in too much uncertainty and provide yet another ground of appeal.

3.32 The New Zealand Law Commission<sup>75</sup> also recommended abolishing spousal non-compellability on the basis that it is an anomalous exception. It commented as follows:

"Any rule that offers greater protection to a particular group of people should also be extended to people in relationships of a similar kind. The Commission

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<sup>74</sup> ALRC 38 para 13.

<sup>75</sup> Op cit para 342 and 343.

therefore initially proposed extending the existing rule to other de facto or family relationships. The boundaries of such an extension were, however, difficult to logically establish, and in the words of one submission this '[left] the [undesirable] impression that the giving of evidence is discretionary'. The other logical alternative was the complete abolition of the spousal non-compellability rule. ... spousal non-compellability cannot be supported as a matter of logic or policy."<sup>76</sup>

3.33 The constitutional right of equality before the law requires a re-consideration of marital privilege.

## 12. COMPETENCE AND COMPELLABILITY: QUESTIONS FOR COMMENT

\* ***Should the non-compellability exception applicable to spouses be abolished?***

\* ***Should the non-compellability exception be extended to children who are required to testify against their parents?***

## 13. PRIVILEGE

3.34 A claim of privilege entitles a person to withhold relevant evidence from a court. The rationale of most claims of privilege is that the privilege is necessary to protect a particular class of relationship or a fundamental right or a public interest. Privileges impact negatively on the courts fact finding function and consequently only a narrow range of privileges is recognised. For the sake of convenience the discussion below is divided into two parts: In part one: private privileges will be discussed and in part two - state privilege.

### 13.1 PRIVATE PRIVILEGE

3.35 The privilege against self-incrimination prohibits a person being compelled to give evidence that incriminates him/herself. It is a common law right, which is reflected in a number of statutory provisions<sup>77</sup> and also enjoys constitutional protection.<sup>78</sup> It is a well established right and subject to submissions to the contrary does not require further clarification. However, in so far as the right to remain silent

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<sup>76</sup> See also Wigmore VIII para 2228 where he states: A[T]his marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice.@

<sup>77</sup> See s 14 of the Civil Proceedings Evidence Act, ss 203, 217 and 219A of the Criminal Procedure Act.

<sup>78</sup> Section 35(1)(a) & (c); s 35(3)(h) & (j).

may be regarded as a necessary pre-requisite for the effective exercise of the privilege against self-incrimination cognisance should be taken of the recommendations

contained in the Commission's Report *Simplification of Criminal Procedure ( a more inquisitorial approach to criminal procedure)* which permit adverse inferences from silence to be drawn in certain specified circumstances.<sup>79</sup>

3.36 Legal professional privilege is recognised as necessary for the proper functioning of the legal system.<sup>80</sup> The only question that arises is whether there are sufficient uncertainties regarding its application to warrant reform in this area?

3.37 In civil matters, "admissions included in a statement by a person involved in a dispute which are genuinely aimed at achieving a compromise are protected from disclosure... [and] may only be accepted into evidence with the consent of both parties"<sup>81</sup>. Subject to submissions to the contrary this common law rule would appear to give no difficulties in practice.

3.38 A more contentious area is that of marital privilege in terms of which spouses are entitled to refuse to disclose communications from the other spouse made during the marriage.<sup>82</sup> The difficulty encountered here is similar to that in relation to compellability: why should this category of witness enjoy a privilege not attaching to other witnesses. For example, it may be argued that if the rationale is to be found in the protection of the family unit why should a parent/caregiver - privilege not be recognised.<sup>83</sup> Furthermore, equally compelling arguments on grounds of policy can be made for the recognition of privilege in respect of communications made between persons whose successful relationship is dependent on the privacy of their communications. For example, doctor - patient, religious councillor - member, journalist - source, psychologist - client. This is by no means an inclusive list and the

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<sup>79</sup> See s 6 of the Draft Bill.

<sup>80</sup> *S v Safatsa* 1988 (1) SA 868 (A).

<sup>81</sup> *Principles of Evidence* op cit 194.

<sup>82</sup> See ss 198 & 199 of the Criminal Procedure Act and s 10 of the Civil Proceedings Evidence Act.

<sup>83</sup> See *N van Dokkum v Parents testifying against their children* 1994 (7) SACJ 213; *Principles of Evidence* op cit 128-129.

potential length of the list in itself militates against recognition of such privileges as they would constitute a significant constraint on the courts fact finding function by denying the court access to relevant information. On the other hand the constitutional right to privacy may well demand the recognition of such privileges in certain circumstances. The challenge then is to find a mechanism for facilitating a principled and consistent exercise of judicial discretion.

3.39 In the context of criminal trials such a mechanism may already exist if s 189 of the Criminal Procedure Act was interpreted so as to promote, the spirit, purport and objects of the Bill of Rights.<sup>84</sup> In terms of s 189 a person who refuses to testify or refuses to answer any question or produce any document is liable to a sentence of imprisonment unless they can show that they have a just excuse for not testifying. In *Attorney-General Transvaal v Kader*<sup>85</sup> the court held that just excuse was not confined to lawful excuse. And in *Nel v Le Roux*<sup>86</sup> the Constitutional Court held that if the answer to a question would infringe any of a witness' rights guaranteed in the Bill of Rights refusal to answer the question would constitute just excuse - unless the compulsion to answer such a question in the circumstances constituted a justifiable limitation. This may well prove the appropriate vehicle for mediating the public interest in ensuring that all relevant evidence is before the court and its competing interest in preserving and promoting certain relationships. Whilst it can be argued that the outcome in relation to legal professional privilege, without prejudice statements and the privilege against self-incrimination is so predictable that these privileges merit separate recognition, the same cannot be said for marital privilege. Consequently, consideration should be given to placing communications made between spouses on the same level as other relationships attracting the right to privacy.

3.40 In civil cases an argument can be made that a witness may claim a privilege on the basis of public policy - which will involve an inquiry similar to that in establishing just excuse under s 189 of the Criminal Procedure Act. Consideration should be given to formulating legislative provisions to regulate the position in civil trials. The alternative would be to give consideration to all those relationships not

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<sup>84</sup> Section 39(2) of the Constitution.

<sup>85</sup> 1991 (4) SA 727 (A).

<sup>86</sup> 1996 (1) SACR 572 (CC).

previously covered by any recognised privilege and consider whether the constitutional right to privacy (or any other constitutional right) requires specific recognition of privilege in respect of particular relationships.<sup>87</sup>

### 13.1 PRIVATE PRIVILEGE: QUESTIONS FOR COMMENT

- \* *Should martial privilege be abolished?*
- \* *Should a general rule be formulated on the basis of constitutional values to regulate the disclosure of private communications in court?*
- \* *Does the rule applicable to legal professional privilege give rise to any difficulties in practice?*

### 13.2 STATE PRIVILEGE

3.41 Van der Merwe<sup>88</sup> submits:

“That the repeal of s 66 of the Internal Security Act 74 of 1982, has the following result: on matters of state privilege the Anglo-South African common law as developed by our courts up to 1969 when legislative interference commenced, has been revived, except insofar as it must be concluded that these common rules and procedures are in conflict with constitutional provisions and cannot be saved as constitutionally permissible limitations in terms of s 36(1) of the Constitution. In this process of establishing constitutionally acceptable rules and procedure governing state privilege, it should be borne in mind that s 39(2) of the Constitution determines that ‘when developing the common law ... every court must promote the spirit, purport and objects of the Bill of Rights’...

In *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* Joffe J said:

‘It is submitted, in the light of the Constitution and after an analysis of how the issue of State privilege is dealt with in other jurisdictions, that claims of State privilege should be approached in South Africa in the following manner:

1. The Court is not bound by the ipse dixit of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to matters of State security, military operations, diplomatic relations, economic affairs, cabinet meetings or any other matter affecting the public interest.
2. The Court is entitled to scrutinise the evidence in order to determine the

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<sup>87</sup> See for example the discussion in Chapter 11 of the New Zealand Law Commissions Report on the Reform of the Law of Evidence, Report 55, Volume 1.

<sup>88</sup> Draft chapter for forthcoming 2 ed of *Principles of Evidence*.

strength of the public interest affected and the extent to which the interests of justice to a litigant might be harmed by its non-disclosure.

3. The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure.

4. In this regard the onus should be on the State to show why it is necessary for the information to remain hidden.

5. In a proper case the Court should call for oral evidence, in camera where necessary, and should permit cross-examination of any witnesses or probe the validity of the objection itself.

In view of the decision to which I have come it is not necessary to consider this argument further. For purposes thereof I accept the approach set out above.'

The principles and procedures as identified in paragraphs 1 to 5 of the above quotation were formulated by Paizes as principles and procedures 'characteristic of a society which has achieved an open and accountable democratic order based on fairness and equality'.<sup>89</sup> Paizes also formulated a sixth principle not referred to in the *Swissborough* - decision:

'[T]he onus borne by the state is widely regarded as being a heavy one which is not discharged by vague appeals to considerations of candour or emotive reliance on such things as 'national security' and 'diplomatic relations' (or both) but requires the state to show (i) the likelihood (as opposed to the possibility) of particular (as opposed to generic) injury; and (ii) that this injury is greater than that which would be caused to the interests of justice by non-disclosure.'

It is submitted that a further principle of procedure should be added to the ones identified above: a court which has inspected a document in private ... should, where appropriate, consider partial disclosure of the content thereof - especially where such partial disclosure creates no distortion and can still effectively protect that which in the opinion of the court cannot on account of public interest be disclosed.

Of ultimate and crucial importance, is the fact that courts of law should have the final say. In his critical analysis of the repealed legislation ... Mathews stated:<sup>90</sup>

'The vital interests that are at issue in state privilege cases make it important that the resolution of the conflict between the state, when it asserts privilege, and a litigant who seeks access to the officially withheld information, should be under the control of independent courts ... [T]hese interests transcend those of the nominal parties to the dispute and their importance demands a judicious weighing-up of the respective claims of each in the context of relevant facts. The courts are best equipped to balance the conflicting interests in a dispassionate and fair-minded way and to decide in particular which interests should prevail.'"

3.42 Section 7(1) the Promotion of Access to Information Act 2 of 2000 does not apply to a record of public or private body if:

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<sup>89</sup> Paizes in Du Toit et al *Commentary on the Criminal Procedure Act* 23-44A.

<sup>90</sup> AS Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* 176.

“(a) the record is requested for the purpose of criminal or civil proceedings;  
 (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and  
 (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.”

4.43 Consequently, it would appear that the boundaries of current state privilege are yet to be clearly drawn and the desirability of codification requires consideration.

### **13.2 STATE PRIVILEGE: QUESTIONS FOR COMMENT**

\* ***Should the rules relating to state privilege be reviewed and codified?***

## **14. THE PRESENTATION OF EVIDENCE BY WITNESSES**

3.44 In its 1986 Report the Commission noted that there were a number of statutory provisions dealing (a) with exceptions to the rule that evidence be given orally<sup>91</sup>; and (b) the oath<sup>92</sup>. The Commission noted that it would be desirable to have all the various provisions dealing with the same subject consolidated in one statutory enactment but indicated that such a recommendation was beyond the scope of its investigation. This recommendation merits re-consideration under the current project.

### **14. THE PRESENTATION OF EVIDENCE BY WITNESSES: QUESTIONS FOR COMMENT**

\* ***Should the rules relating to the giving of oral evidence and under oath be consolidated into one statutory enactment?***

## **15. REAL EVIDENCE<sup>93</sup>**

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<sup>91</sup> Namely ss 52 & 53 of the Magistrates= Court Act 32 of 1944; ss 32 & 33 of the Supreme Court Act 59 of 1959; s 24 of the Civil Proceedings Evidence Act; ss 171 7 173 of the Criminal Procedure Act; rule 26(10) of the magistrates=s Court Rules; rule 38(1) & (3)-(8) of the Uniform Supreme Court Rules.

<sup>92</sup> Namely, s 112 of the Magistrates= Courts Act 32 of 1944. Ss 3-41 of the Civil Proceedings Evidence Act; ss 162-165 of the Criminal Procedure Act; s 28 of the Small Claims Court Act 61 of 1984.

<sup>93</sup> The Commission in its 1986 report had no proposals to make in respect of real evidence.

3.45 There would appear to some uncertainty and conflict as regards the classification of tape and video recordings as real or documentary evidence. For example in *S v Ramgobin*<sup>94</sup> the court held that audio tapes and video recordings should be subject to the same requirements of admissibility and that in each case the state had to prove the following in order to establish admissibility: (i) originality; (ii) the absence of interference; (iii) that they related to the incident in question; (iv) that they were accurate; (v) the identity of the speakers; (vi) that the recordings were sufficiently intelligible. Conversely the court in *S v Baleka(1)*<sup>95</sup> and *S v Baleka(3)*<sup>96</sup> held that audio and video recordings were real evidence and should not be subject to the stringent requirements laid down in *Ramgobin*.<sup>97</sup>

3.46 The above is further complicated by the fact that a digitally recorded photograph, sound or video may constitute a 'data message' as defined in the Electronic Communications and Transaction Act. This area clearly needs further research and clarification.

## 15. REAL EVIDENCE: QUESTIONS FOR COMMENT

\* ***To what extent (if any) do the rules regulating the admission of electronic recordings need to be clarified?***

## 16. DOCUMENTARY EVIDENCE

3.47 The Law Commission, in its 1986 report, recommended that: "When a document is admissible as evidence, a copy or reproduction of such document may be admitted as evidence notwithstanding the availability of the original document unless the court directs otherwise."

However, this provision did not find its way into the 1988 Law of Evidence Act, presumably because of the fairly extensive common law exceptions permitting the admission of secondary evidence.

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<sup>94</sup> 1986 (4) SA 117 (N).

<sup>95</sup> 1986 (4) SA 192 (T).

<sup>96</sup> 1986 (4) SA 1005 (T).

<sup>97</sup> See A Skeen *Principles of Evidence* op cit 256-7.

3.48 The 1986 report made no other recommendations in relation to documentary evidence. There are a plethora of statutory provisions dealing with documentary evidence<sup>98</sup> a thorough review of these needs to be undertaken to establish to what extent they can be rationalised and to ensure that the provisions are clear, easy to apply and do not exclude relevant evidence. Such a review should include an examination of those statutory provisions which provide for the admissibility of certain documents which contain hearsay.<sup>99</sup> Such a review should include an examination of the relationship of these statutory exceptions to the hearsay rule as formulated in s 3 of the Law of Evidence Amendment Act 1988. For example is it possible to seek to have documents admitted in terms of s 3 of the 1988 Act where the document falls short of some other statutory requirement?

## 16. DOCUMENTARY EVIDENCE: QUESTIONS FOR COMMENT

- \* ***Which rules (if any) regulating the admission of documentary evidence require reform?***

## 17. COMPUTER GENERATED EVIDENCE

3.49 In its 1986 report the Commission considered whether the application of the Computer Evidence Act 57 of 1983 should be extended to criminal matters but deferred any decision in this regard to further Commission investigations. The Commission published a discussion paper dealing with computer related crime in 2001.<sup>100</sup> This has been superseded by the Electronic Communications and Transactions Act 25 of 2000. Section 15 of the Act reads as follows:

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<sup>98</sup> See for example, ss 17 to 38 of the Civil Proceedings Evidence Act, ss 221, 222, 229 231, 233, 234, 235, 236, 236A, 246, 247 of the Criminal Procedure Act, s 12 of the Stamp Duties Act 77 of 1998, see also the Documentary Evidence from Countries in Africa Act 62 of 1993.

<sup>99</sup> See for example s 212, 212A, 213, 214, 215, 221, 235, 236, 236A, 237, 238 246, 247 of the Criminal Procedure Act, ss 22, 28, 33-38 of the Civil Proceedings Evidence Act; Section 94 of the Companies Act 1973, s 28(2) of the Births and Deaths Registration Act.

<sup>100</sup> Discussion Paper 99, Project 108 *Computer related crime: preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects* (2001).

“Admissibility and evidential weight of data messages

(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-

(a) on the mere grounds that it is constituted by a data message;

or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

## 17. COMPUTER EVIDENCE: QUESTIONS FOR COMMENT

\* ***Are the provisions in the Electronic Communications Act sufficient to regulate the admissibility of computer generated evidence?***

## 18. PREVIOUS STATEMENTS

3.50 In its 1986 Report the Commission made no suggestions for reform in relation to previous consistent statements. However, there are a number of rules relating to previous consistent statements that may require consideration.

## 18.1 REFRESHING MEMORY

3.51 The following comments by Van der Merwe would suggest that the rules governing refreshing of memory require consideration:

“The present South African rules governing refreshing of memory are the products of a trial system which seeks to maintain orality and which views ‘refreshing memory’ as a method of receiving oral evidence - even in those instances where the witness has no independent recollection and relies exclusively on his recorded recollection. This fiction should be rejected. It is true that the common-law procedure of ‘refreshing memory’ of a witness should be understood in the light of the principle of orality and the evaluation of the accusatorial trial system with its concomitant exclusionary rules of evidence, which largely come about as a result of trial by jury, the doctrine of precedent and the desire to protect the adversary. But it is also submitted that the distinction between present recollection revived and past recollection recorded can be easily reconciled with the fundamental rules and principles of the common-law trial and evidentiary system. It is not only a matter of employing accurate terminology. It is also a matter of establishing a sound analytical framework to solve practical problems.”<sup>101</sup>

3.52 The New Zealand Law Commission in its review of the law of evidence<sup>102</sup> took cognisance of the fact that “recent psychological research indicates that identification evidence is not reliable as is commonly believed”.<sup>103</sup> Section 37(1)(b) of the Criminal Procedure Act provides that any police official may make any person who has been arrested “available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine”. In order to deal with potential unreliability certain recognized procedures are followed. However these do not “strictly speaking, consist of rules of law, but are basically rules of police practice based upon considerations of fairness and guidelines gleaned from reported cases”.<sup>104</sup> Non-compliance does not necessarily make the identification

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<sup>101</sup> SE van der Merwe in *Principles of Evidence* op cit 305.

<sup>102</sup> Op cit 53.

<sup>103</sup> Ibid para 190.

<sup>104</sup> Du Toit et al *Commentary on the Criminal Procedure Act* 3-5.

inadmissible<sup>105</sup> and circumstances will determine the effect that non-compliance has on evidential weight.<sup>106</sup>

3.53 At present there are two major criticisms directed at these rules. Firstly, they are not readily accessible and secondly the content of the rules do not necessarily ensure optimal reliability. Rust & Tredoux<sup>107</sup> make the following comments as regards the procedures for identification parades in South Africa:

“First, the way parades are conducted in South Africa is inoptimal. Secondly, there are methods of conducting identification parades which show better identification results - that is, they afford more protection to suspects, while not affecting the number of identifications of guilty suspects. Thirdly, these alternative methods make it easier for the police to construct identification parades. Finally, these alternate parade procedures are less stressful for witnesses.”<sup>108</sup>

3.54 The procedures suggested by Rust & Tredoux include: the use of photographs or videotapes in place of corporeal parades and the use of ‘sequential parades’ in terms of which “parade members are presented to the witness individually, in a randomised sequence”.<sup>109</sup>

3.55 Consideration needs to be giving to codifying the rules regulating identification parades bearing in mind the criticisms directed at the content of the existing rules.

3.56 It would appear that voice identification is even more unreliable.<sup>110</sup> Section 37(1)(c) of the Criminal Procedure Act has been interpreted as empowering the police to extract voice samples.<sup>111</sup> Consideration needs to be given to the

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<sup>105</sup> *S v Monyane* 2001 (1) SACR 115 (T).

<sup>106</sup> *R v Sebeso* 1943 AD 196.

<sup>107</sup> A Rust & C Tredoux >Identification parades: an empirical survey of legal recommendations and police practice in South Africa (1998) 11 SACJ 196. See also *S v Mhlakaza* 1996 (2) SACR 187 (C).

<sup>108</sup> *Ibid* 210.

<sup>109</sup> *Ibid* 211.

<sup>110</sup> New Zealand Law Commission *op cit* para 215.

development of guidelines in order to optimise the reliability of voice identification.

3.57 The previous statements discussed above can all be categorised as previous consistent statements. The discussion below must be distinguished on the basis that it relates to previous inconsistent statements.

## **18.1 PREVIOUS STATEMENTS – REFRESHING MEMORY: QUESTIONS FOR COMMENT**

- \* ***Should the rules regulating identity parades be revised and codified?***
- \* ***Should rules be developed to regulate other forms of identification evidence?***

## **18.2 CROSS-EXAMINATION OF YOUR OWN WITNESS: THE HOSTILE WITNESS**

3.58 The rule prohibiting a party from cross-examining their own witness may also require re-examination in light to the accused's constitutional right to cross-examine. Whilst a party may prove a previous inconsistent statement against their own witness as a general rule cross-examination is prohibited unless the witness is declared hostile. Van der Merwe recommends that in determining whether cross-examination is permissible "[t]he constitutional right to a fair trial should be the ultimate test and not the question of whether the accused has proved the defence witness 'hostile' in the technical sense of the word."<sup>112</sup>

## **18.2 PREVIOUS STATEMENTS –HOSTILE WITNESS: QUESTIONS FOR COMMENT**

- \* ***Do the present rules prohibiting the cross-examination of a party's own witness frustrate the truth seeking function of the court?***
- \* ***Do the present rules governing hostile witness infringe the right to a fair trial?***

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<sup>111</sup> *Levack v The Regional Magistrate, Wynberg* 1999 (2) SACR 151 (C).

<sup>112</sup> In *Principles of Evidence* op cit 316.

## 19. SIMILAR FACT EVIDENCE

3.59 The Commission in its 1986 Report made no recommendations in relation to similar fact evidence and noted that character evidence was a *Atorney@* area of the law of evidence but declined to make any recommendations in respect of this area.<sup>113</sup>

3.60 The South African Law Reform Commission in its discussion paper on Sexual Offences (See Project 107, discussion paper 102): process and procedures made a number of recommendations in relation to character evidence and similar fact evidence.

3.61 Paizes argues that exclusion is an inappropriate way of dealing with the dangers inherent in the admission of similar fact evidence. It is absurd to require a judge to exclude evidence “Whenever he envisages that its reception might induce him wrongly to convict the accused: if he is able to perceive this risk, he will be able, too, to guard against it”. Paizes acknowledges that there is always a possibility that judges may make mistakes, but that such errors are best guarded against by invoking a cautionary rule.

“Such an approach would compel a judge to (i) recognize the dangers of receiving and relying on similar fact evidence, (ii) acknowledge that he has guarded against these dangers and (iii) specify precisely what part of the similar fact evidence has played in his line of reasoning and in what way it has contributed to his findings in both the intermediate and the ultimate issues.”

## 19. SIMILAR EVIDENCE: QUESTIONS FOR COMMENT

\* *Is the exclusionary rule applicable to similar fact evidence appropriate in the absence of a jury system?*

## 20. OPINION EVIDENCE

3.62 In its 1986 Report the Commission, whilst recognising that there were debates regarding the ultimate issue doctrine and the rule that opinion evidence is inadmissible if it relates to the applicability of a rule of law on the facts, held the view that reform could be left to the courts. It would appear that there remains a certain

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<sup>113</sup>

Op cit 17.1.

level of uncertainty regarding the application of the opinion evidence rule. For example, despite the Appellate Division's apparent rejection of the assertion that opinion evidence must be excluded because it usurps the function of the court<sup>114</sup> subsequent judgements have relied expressly on the rejected rationale.<sup>115</sup> Consideration should be given to clarifying the rules applicable to the admissibility of opinion evidence.

3.63 The 1986 Report also considered the *Hollington v Hewthorn*<sup>116</sup> rule in terms of which a conviction in a criminal case is not admissible evidence in a subsequent civil action for damages. The court took cognisance of the many arguments directed at this rule and the fact that it has resulted in law reform in a number of jurisdictions which now expressly permit evidence of such a conviction to be admitted in a civil trial.<sup>117</sup> But concluded that any disadvantages suffered by parties as a result of the rule could be ameliorated by adopting a more flexible approach to hearsay evidence<sup>118</sup> (which presumably would allow the record of the proceedings to be admitted). However, it felt that there were nevertheless good reason for excluding evidence of the conviction itself for the following reasons:

“... a conviction is essentially hearsay opinion; the issues and parties in the criminal proceedings and subsequent civil proceedings are not necessarily identical, in criminal proceedings there are a number of statutory provisions relating to presumptions and the burden of proof which do not apply in civil proceedings and which might make it unreasonable to admit evidence of convictions without exception in civil proceedings; a civil court might attach too much weight to a conviction; the decision of the criminal court as such has no evidential value in the next court; to attach evidential value to the decision of the first court would in effect mean declaring something that is irrelevant to be relevant.”

3.64 Subsequent to the report, the recognition of the presumption of innocence as a constitutional right has meant that the impact of presumptions in criminal trials has been greatly reduced. Consequently, it would be appropriate to once again consider

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<sup>114</sup> *R v Vilbro* 1957 (3) SA 223 (AD).

<sup>115</sup> See for example, *Holzhausen v Roodt* 1997 (4) SA 766 (W).

<sup>116</sup> 1943 2 All ER 35.

<sup>117</sup> Op cit 18.4.

<sup>118</sup> Op cit 18.5.

the application of the *Hollington v Hewthorn* rule in our courts.

3.65 The Law Reform Commission's discussion paper reviewing the Child Care Act (Project 110, *Review of the Child Care Act*, December 2002) contains recommendations that effectively abrogate the application of the *Hollington v Hewthorn* rule in matters heard by the Child and Family Court.

## 20. OPINION EVIDENCE: QUESTIONS FOR COMMENT

\* **Is there a need to clarify the rules relating to the admissibility of opinion evidence?**

\* **Should the *Hollington v Hewthorn* rule be abolished?**

## 21. EXPERT EVIDENCE

3.66 In a recently published doctoral thesis<sup>119</sup> Professor L Meintjes-Van der Walt makes a number of suggestions for increasing the efficacy and reliability of expert evidence. These include pre-trial disclosure by the defendant of the intention to call an expert witness in criminal trials and the utilisation of pre-trial expert meetings. These recommendations are substantially met by the Commission's recommendations in its Report dealing with a more inquisitorial approach to criminal procedure<sup>120</sup> which deals precisely with these issues.<sup>121</sup>

3.67 Meintjes-Van der Walt also recommends that statutory guidelines be introduced to strengthen the chain of laboratory processing. She also argues that the rules of admissibility applicable to the admission of expert evidence can be relaxed in the absence of a jury and that criteria should be developed to determine the admissibility of scientific evidence. Furthermore, she recommends the development of guidelines that can assist in the judicial evaluation of expert evidence. Clearly Professor Meintjes-Van der Walt's work merits further consideration.

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<sup>119</sup> *Expert Evidence in the Criminal Justice Process* (2001).

<sup>120</sup> Op cit.

<sup>121</sup> See ss 4 & 5 of the draft Bill.

## 21. EXPERT EVIDENCE: QUESTIONS FOR COMMENT

- \* *Are the current rules governing expert evidence sufficient?*
- \* *How can the rules regulating expert evidence be improved so as to improve efficacy and reliability?*

## 22. INFORMAL ADMISSIONS AND CONFESSIONS

3.68 The Commission in its Report Simplification of Criminal Procedure: A more inquisitorial Approach to Criminal Procedure, has recommended significant amendments in regard to the rules governing the admissibility of admissions and confessions. These relate to common admissibility requirements for confessions and admissions.<sup>122</sup>

### 22. INFORMAL ADMISSIONS AND CONFESSIONS: QUESTIONS FOR COMMENT

- \* *Are the current rules governing admissions and confessions sufficient?*
- \* *Should the distinction between admissions and confessions be retained.*
- \* *Should the requirement that a confession made to a non-commissioned officer be reduced to writing in the presence of a magistrate be retained.*

## 23. RELEVANCE AND HEARSAY EVIDENCE

3.69 In its 1986 Report the Commission made significant amendments in respect of hearsay evidence which were subsequently given legislative force in the Law of Evidence Amendment Act 45 of 1988. The new provisions were directed at ameliorating the rigidity of the common law. Unfortunately, there is the perception that despite the new reforms relevant evidence continues to be excluded due to the continued influence of the common law on judicial interpretation. Whether this perception is true, it is questionable whether the problem can be resolved through further legislation. However, if an evidence code were accompanied by a statement of its underlying purpose and principles this could supersede the common law as an interpretative guide encouraging presiding officers to depart from the comfort of the familiar.

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The Commission in its 1986 Report made no recommendations for reform.

3.70 A discussion paper dealing with relevance and hearsay has been released simultaneously with this issue paper consequently the issues of relevance and hearsay are not raised in this paper

## CHAPTER 4

### CONCLUSION AND SUMMARY OF QUESTIONS FOR COMMENT

4.1 In relation to longer term objectives this preliminary research paper also sets out to identify shortcomings in the existing rules of evidence and to define the possible scope of further investigation.

4.2 The review of existing provisions in chapter 3 makes it clear that there is much that can be done to clarify and simplify the rules of evidence. On the other hand this will not be a successful process if consensus is not reached on the policies and principles underlying the rules of evidence. Chapter 2 is an attempt to set a framework for further discussion directed at obtaining consensus on a policy framework for a review of the law of evidence.

4.3 The Commission is of the view that it would be extremely useful to obtain the input from practitioners (broadly defined) on the issues raised in this issue paper. In addition the Commission invites all interested parties and role players to identify any other issues not raised in this issue paper which should be considered for reform. This information would be extremely useful in its consideration of the reform of the rules of evidence and its planning of the project.

4.4 For ease of reference the Commission provides a summary of questions raised in this Issue paper for comment.

### SUMMARY OF QUESTIONS FOR COMMENT

#### 1. POLICIES UNDERLYING THE LAW OF EVIDENCE - THE IMPACT OF LAY ASSESSORS: QUESTIONS FOR COMMENT

- Do lay assessors need to be protected from unduly prejudicial evidence to a greater extent than judges?
  
- Does that fact that presiding officers frequently have sight of the prohibited evidence prior to its exclusion substantially undermine the function of the exclusionary rules?

- Should the exclusionary rules be directed at controlling juries in the exercise of their fact finding function be re-placed by judicial discretion, and if this approach is taken does the breadth of the discretion need to be examined?
- Should a distinction be drawn between those exclusionary rules concerned with the reliability of fact finding such as similar fact evidence and those that have a broader policy component for example the rules governing confessions which exclude improperly obtained confessions no matter how reliable they may be?

**2. POLICIES UNDERLYING THE LAW OF EVIDENCE - ADVERSARIAL NATURE OF CIVIL AND CRIMINAL TRIALS: QUESTIONS FOR COMMENT**

- A thorough review of the law of evidence would also require consideration of the adversarial/inquisitorial balance in the different tribunals that administer justice. Should different procedural approaches require different application of the rules of evidence?

**3. POLICY CONSIDERATIONS UNDERLYING CRIMINAL AND CIVIL TRIALS - QUESTIONS ON THE EFFICIACY OF THE RULES OF EVIDENCE IN CIVIL AND CRIMINAL TRIALS -**

- \* Do the rules facilitate the fact finding function of the court?
- \* does public policy require the exclusion of probative and relevant evidence in the particular circumstances?
- \* do the rules give rise to uncertainty?
- \* can the rules be easily understood?
- \* what are the particular time and cost implications of any particular rule?

**4. CODIFICATION OF THE RULES OF EVIDENCE: QUESTIONS DIRECTED AT FORMING PRINCIPLES FOR CODIFICATION**

- X *Is a single comprehensive code desirable?*
- X *What policies or principles should an evidence code express?*
- X *How detailed should codified rules be?*
- X *Should a code include instructions as to interpretation that would differentiate it from other Acts?*
- X *How should potential gaps in the code be dealt with?*
- X *How should the code be structured?*

**5. FORMULATING PRINCIPLES FOR REFORM: QUESTIONS FOR COMMENT**

- X *What is the scope of the law of evidence? Should the focus of evidence law be exclusively on the trial or should other stages of the process be considered as well?*
- X *Should the exclusionary rules directed at controlling juries in the exercise of their fact finding function be re-placed by judicial discretion?*
- X *To what extent should relevance and weight be regulated?*
- X *To what extent should public and social interests be reflected in evidence law?*
- X *Should there be different rules for different courts and tribunals?*
- X *What should be the primary purpose of the rules of evidence in the trial process? In particular to what extent should evidence law facilitate all or any of the following policies:*
  - *rationality and truth-finding?*
  - *party freedom?*
  - *procedural fairness?*
  - *public interest?*
  - *efficiency and finality?*
- X *What areas of law need to be reformed?*
- X *Is there a need for an evidence code?*

6. THE BURDEN OF PROOF AND THE DUTY TO ADDUCE EVIDENCE  
FIRST: QUESTIONS FOR COMMENT

- \* *Do the High Court and Magistrates' court rules give rise to problems in practice in respect of the allocation of the burden of proof in civil trials?*

7. STANDARDS OF PROOF: QUESTIONS FOR COMMENT

- \* *Should a standard of proof be applied to the admissibility of evidence?*
- \* *Are there instances where the criminal standard should be applied in civil proceedings?*

8. CAUTIONARY RULES: QUESTIONS FOR COMMENT

- \* *In the absence of a jury should the cautionary rules be retained?*

9. PRESUMPTIONS: QUESTIONS FOR COMMENT

- \* *Should the rationality of rebuttable presumptions applicable in civil proceedings be reviewed?*

10. JUDICIAL NOTICE: QUESTIONS FOR COMMENT

- \* *Should the rules relating to judicial notice be reviewed and its application be clarified?*

11. FORMAL ADMISSIONS: QUESTIONS FOR COMMENT

- \* *Do the rules governing formal admissions give rise to any difficulties in practice?*

12. COMPETENCE AND COMPELLABILITY: QUESTIONS FOR COMMENT

- \* *Should the non-compellability exception applicable to spouses be abolished?*
- \* *Should the non-compellability exception be extended to children who are required to testify against their parent?*

**13.1 PRIVATE PRIVILEGE: QUESTIONS FOR COMMENT**

- \* *Should marital privilege be abolished?*
- \* *Should a general rule be formulated on the basis of constitutional values to regulate the disclosure of private communications in court?*
- \* *Does the rule applicable to legal professional privilege give rise to any difficulties in practice?*

**13.2 STATE PRIVILEGE: QUESTIONS FOR COMMENT**

- \* *Should the rules relating to state privilege be reviewed and codified?*

**14. THE PRESENTATION OF EVIDENCE BY WITNESSES: QUESTIONS FOR COMMENT**

- \* *Should the rules relating to the giving of oral evidence and under oath be consolidated into one statutory enactment?*

**15. REAL EVIDENCE: QUESTIONS FOR COMMENT**

- \* *To what extent (if any) do the rules regulating the admission of electronic recordings need to be clarified?*

**16. DOCUMENTARY EVIDENCE: QUESTIONS FOR COMMENT**

- \* *Which rules (if any) regulating the admission of documentary evidence require reform?*

**17. COMPUTER EVIDENCE: QUESTIONS FOR COMMENT**

- \* *Are the provisions in the Electronic Communications Act sufficient to regulate the admissibility of computer generated evidence?*

**18.1 PREVIOUS STATEMENTS – REFRESHING MEMORY: QUESTIONS FOR COMMENT**

- \* *Should the rules regulating identity parades be revised and codified?*

- \* *Should rules be developed to regulate other forms of identification evidence?*

## 18.2 PREVIOUS STATEMENTS –HOSTILE WITNESS: QUESTIONS FOR COMMENT

- \* *Do the present rules prohibiting the cross-examination of a party's own witness frustrate the truth seeking function of the court?*
- \* *Do the present rules governing hostile witness infringe the right to a fair trial?*

## 19. SIMILAR EVIDENCE: QUESTIONS FOR COMMENT

- \* *Is the exclusionary rule applicable to similar fact evidence appropriate in the absence of a jury system?*

## 20. OPINION EVIDENCE: QUESTIONS FOR COMMENT

- \* *Is there a need to clarify the rules relating to the admissibility of opinion evidence?*
- \* *Should the Hollington v Hewthorn rule be abolished?*

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