SOUTH AFRICAN LAW COMMISSION

PROJECT 6

REVIEW OF THE LAW OF EVIDENCE

REPORT

October 1986

To Mr H J Coetsee, MP, Minister of Justice

I am pleased to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973, (Act 19 of 1973), the Commission's report on the review of the law of evidence for your consideration.

G VILJOEN
CHAIRMAN
31 March 1987

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 Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
Prof J T Delport
Mr J E Knoll
Mr P A J Kotzé
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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. 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 investigation was not commenced immediately because the Criminal Procedure Bill,[1] which contained a number of provisions relating to the law of evidence, was then under consideration.

1.2 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,[2] 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.[3] There were also certain aspects of the law of evidence which were considered to be in need of reform.

1.3 Professor C W H Schmidt of the University of South Africa was appointed an additional member of the Commission for purposes of the investigation. The Commission would like to express its appreciation to Prof Schmidt who has for several years done valuable work on the investigation. His knowledge and insight proved to be indispensable to the Commission.

1.4 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

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1 Now the Criminal Procedure Act 51 of 1977 (hereinafter the "Criminal Procedure Act").

2 As is evident from inter alia the Civil Proceedings Evidence Act 25 of 1965 (hereinafter the "Civil Proceedings Evidence Act") and the Criminal Procedure Act.

3 See for example s 42 of the Civil Proceedings Evidence Act and s 206 of the Criminal Procedure Act. See also Hoffmann & Zeffertt 12; Schmidt 16.

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.

1.5 The Commission considered the question whether there was really an urgent need for codification. The law of evidence is reasonably accessible. There are standard textbooks and specialised works from which the practitioner and the judiciary can readily ascertain the current rules of evidence. The most important rules which are contained in different Acts might, if need be, be consolidated in one Act. The law of evidence is a branch of the law with which legal practitioners and the judiciary are mainly concerned. It is the instrument with which the law is applied. However, the law of evidence affects the general public to a lesser degree in that knowledge of the rules of evidence is of no great importance to the public. The fact that English law is still a source of the South African law of evidence should be seen in its historical perspective. Even if codified, the rules incorporated in a Code could not be wrenched from their historical origin. An important consideration is that codification might present fresh problems of interpretation resulting in legal uncertainty.

1.6 In the light of all the considerations mentioned above, the Commission decided to abandon the codification of the law of evidence. It was decided to ascertain through research which aspects of the law of evidence are unsatisfactory or do not meet current needs and to formulate suggestions for their reform. For this purpose the Commission appointed a committee consisting of Prof C W H Schmidt (additional member), Mr G G Smit (full-time member) and Mr G J van Zyl, a researcher of the secretariat of the Commission. This committee examined the whole area of the law of evidence and also consulted various experts. The committee's report to the Commission formed the basis of a Working Paper. The Working Paper was distributed for comment. A list of the persons and bodies to whom the Working Paper was forwarded of the Commission's own accord is contained in Annexure A. A further 63 persons and bodies asked for the Working Paper.

1.7 A list of persons and bodies who commented on the Working Paper (hereinafter referred to as commentators) is contained in Annexure B. The Commission would like to express a special word of thanks to the commentators for their contributions. The comments received were considered by a committee consisting of Prof Schmidt, Mr Smit and Mr M Schutte, a researcher of the secretariat of the Commission. This committee in turn reported to the Commission.

1.8 In the Working Paper the Commission tentatively came to the conclusion that reform was desirable in respect of the following matters only:

- Judicial notice of customary law and of foreign law.
- The compellability of spouses to give evidence.
- Copies of documents.
- The marital privilege.
- Hearsay evidence.

In general commentators supported this conclusion. The few cases where certain commentators advocated reforms falling outside the subjects given above are dealt with at appropriate places in the report. With the exception of the Commission's tentative recommendations on the compellability of spouses to give evidence, commentators generally in principle supported the Commission's tentative proposals for reform (as contained in the Working Paper). The few cases where this was not the case are also dealt with at appropriate places in the report, as also suggestions made by commentators for the improvement of the draft legislation which was contained in the Working Paper.

1.9 Only one commentator differed from the Commission on the view that the codification of the law of evidence should not be proceeded with. The Commission is satisfied that its decision not to codify the law of evidence is the right one.

1.10 Certain proposals made by commentators, or problems brought to the Commission's attention, do not fit in readily with the present investigation. One such case is the practical problems experienced when an affidavit is required from abroad as evidence. The problems are due to the scarcity of persons abroad who are authorised commissioners of oaths for South African purposes. The commentator concerned agrees with the view expressed by Dean[4] that foreign notaries public should in general be appointed commissioners of oaths for South African purposes. This is a practical matter which can conveniently be dealt with by the department concerned. The Commission has therefore referred the matter to the Department of Justice.

1.11 Another commentator submitted certain proposals to the Commission concerning the administration of the courts and procedural matters. These comments were also referred to the Department of Justice since the suggestions are of such a nature that the Department of Justice is the obvious body to deal with them.

2. CONCEPTS

2.1 Although it is true that expressions such as "bewysleer", as employed in section 42 of the Civil Proceedings Evidence Act; "proof"; "sufficient proof"; "conclusive proof"; "evidence"; "prima facie evidence"; "conclusive evidence"; "competent" and "competence" (as synonyms for "admissible" and "admissibility"); and others are frequently used in a sense which does not convey the precise meaning of these expressions, the Commission feels that the definition of such expressions would really only have any point in a codification of the law of evidence and is not appropriate in its limited investigation into lacunae in the law of evidence.

3. SOURCES

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4 326.

3.1 This aspect of the law of evidence deals with the various statutory provisions in terms of which the law of evidence as at 30 May 1961 in the Republic remains in force in respect of the law of evidence not specifically regulated by law.[5] According to Hoffmann & Zeffertt[6] the effect of the 30 May 1961 formula is as follows:

(a) A pre 1952 decision of the Privy Council is to be regarded as if it were a decision of the Appellate Division itself: the Appellate Division may depart from it if it is clearly wrong;

(b) A pre '30th May 1961' decision of the Supreme Court of Judicature (or the House of Lords which, although not part of the Supreme Court of Judicature, binds it) is binding on the Appellate Divison to the extent that it is considered to be a correct reflection of the English law and to the extent to which it is not inconsistent with an established rule of South African practice that has achieved the quality of a binding rule. The law that applies, in other words, is the English law as it was applied in England *at that time* and as it is understood here. Statements, like that of Marais J in *Papenfus v Transvaal Board, Peri-Urban Areas*, that 'South African courts may henceforth, if so persuaded, follow a line independent of the English precept' are too widely stated: *Van der Linde v Calitz* is not authority for that proposition. Indeed Steyn C J expressly stated in that case that the law that 'until [the 30th May 1961] was applied in the Supreme Court of Judicature remains applicable'.

(c) Post '30th May 1961' decisions of the English courts have no binding force in our courts: they may, however, have persuasive value as has a post 1952 decision of the Privy Council.

3.2 These authors[7] state that the South African law of evidence remains to a certain extent frozen at 30 May 1961, but then show that developments are still possible in certain cases. Although there are ways available to the courts of freeing themselves of these shackles, it is true that certain parts of the law of evidence (for instance hearsay evidence) will not easily develop further without the intervention of the legislature.

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5 See Hoffmann & Zeffertt 5 et seq; Schmidt 13 et seq; Van der Merwe et al 19 et seq.

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The Commission is, however, of the opinion that the present position should be maintained in most cases. The reasons for this are the following:

- The relevant provisions are an embodiment of the historical development of our law of evidence which cannot be dismissed.

- The provisions do not in themselves preclude further development by the legislature. If there is good reason for reform, such reform can be accomplished by legislation.

- The provisions as such do not give rise to any insurmountable problems of interpretation or problems of enforcement.

- In so far as the rules of evidence have not been enacted by statute, rules of this nature are necessary, unless the remaining rules of evidence are codified, a step which is not contemplated at this stage.

4. THE BURDEN OF PROOF

* Nature and operation

4.1 In Tregea v Godart[8] the view was held that the burden of proof forms part of the substantive law and not of the law of evidence. This view is not subscribed to by all the experts on the law of evidence.[9] The matter is, however, dealt with in virtually all the textbooks on the law of evidence.

4.2 According to Schmidt[10] the burden of proof determines which party will come off second best if insufficient evidence is presented to the

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8 1939 AD 16.

9 See Schmidt 11. Hoffmann & Zeffertt 385 apparently accept this view.

10 25

court for a specific ruling on an issue of fact. In the past the burden of proof was quite often confused with the evidentiary burden. The evidentiary burden is the "...duty to adduce evidence to combat a prima facie case made by his opponent".[11] In the course of the trial this duty may shift from one party to the other whereas the burden of proof does not shift from the party upon whom it originally rested. The Commission does not consider legislation on these matters necessary or desirable.

* Incidence

4.3 Although it may sometimes be difficult to ascertain upon whom the burden of proof in respect of a particular issue of fact rests, the Commission is of the opinion that no general rules need be enacted in this regard. The Commission has, nevertheless, considered whether there is justification for the alteration of the current law relating to the incidence of the burden of proof in the following situations:

. The incidence of the burden of proof in respect of exception clauses or indemnity clauses which often appear in standard contracts.[12] Since clauses of this nature will in any case be examined as part of the Commission's investigation entitled Unreasonable stipulations in contracts and the rectification of contracts (Project 47) the Commission does not consider it necessary to give attention to this matter at this stage.

. The incidence of the burden of proof where the defendant raises justification as a defence. Various writers have pointed out that in the case of libel the defendant only has an onus to rebut[13] whereas in other cases of delict he bears the full burden of

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11 According to Hoffmann & Zeffertt 387.

12 See Van Dorsten 36.

13 According to e g Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 3 SA 394 (A) and Borgin v De Villiers 1980 3 SA 556 (A).

proof.[14] In Joubert v Venter[15] the Appellate Division noted this anomaly and expressed the view that the position in libel cases should be re-examined. The Commission feels that further development should preferably be left to the courts and does not recommend any legislative amendment.

The incidence of the burden of proof in the case of insanity, with specific reference to the approach of our courts following the Woolmington v Director of Public Prosecutions case[16] (duty of the State to prove all the elements of the offence); the departure from this in R v Kaukakani;[17] and the burden of proof where Chapter 13 of the Criminal Procedure Act applies. The Commission is aware of the criticism.[18] Snyman, however, reasons as follows:[19]

> It has been alleged that the placing of the onus on a mentally ill person is unjustified, since he, being mentally ill, is the least capable of all people of discharging the onus. Theoretically this argument may be valid, but in practice the defence is chiefly raised in charges of crimes for which the death penalty may be imposed: in these cases the accused is almost invariably represented by counsel, who then investigates and argues the case on behalf of the accused. Furthermore, the accused's mental condition may be raised as an issue by both the prosecution and the court itself, and if the accused has been committed to a mental hospital for observation, the court will always have the report of the psychiatrists. If the burden of proof were on the prosecution, it would result in the untenable situation

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14 Mabaso v Felix 1981 3 SA 865 (A).

15 1985 1 SA 654 (A).

16 1935 AC 462, 1935 ALL ER 1. See R v Ndhlovu 1945 AD 369.

17 1947 SA 807 (A) - burden of proof rests on the accused who raises the defence of insanity.

18 See inter alia De Wet & Swanepoel 1975 at 112 who say that it is impossible to see why the burden of proof should rest on the accused in the case of the defence of insanity. De Wet & Swanepoel 1985 130 have, however, abandoned this view.

19 127 n 62.

> that the state would in each and every prosecution, however trivial the crime may be, have to prove beyond reasonable doubt that the accused was mentally normal. This would involve the prosecution in a great deal of trouble and be a waste of time and money.

The Commission considers that there is not sufficient justification for altering the present position by legislation.

. In R v Lembete[20] it was held that the onus was on the accused to prove the existence of extenuating circumstances (see section 277(2) of the Criminal Procedure Act) on a balance of probabilities. This matter is discussed by Du Toit[21] who, for the following reasons, is in favour of this decision:[22]

> Owing to the special nature of extenuating circumstances, as well as the fact that the accused bears an onus to persuade the court on a balance of probabilities that extenuating circumstances do exist, the State would very rarely in practice adduce evidence relating to extenuating circumstances. Extenuating circumstances are after all circumstances that subjectively so affected the accused's state of mind at the time of the commission of the crime that his act may be regarded as less reprehensible. The State will very seldom have evidence at its disposal showing in a direct sense the subjective influencing (or its absence). In most cases the State would already have submitted the evidence at its disposal on the merits of the case to the trial court, so that it would be unnecessary to repeat it. In most cases the State would address the court on the absence of extenuating circumstances.

The Commission is of the opinion that it is not necessary to change the present legal position by legislation.

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20 1947 2 SA 603 (A). This decision has just been confirmed in S v Theron 1984 2 SA 868 (A).

21 1983 216 et seq.

22 Du Toit 1983 216-217. (Our translation.)

. In S v Swanepoel[23] the court examined the question of the onus if the accused invoked section 49(2) of the Criminal Procedure Act. The court took note of the criticism against R v Britz[24] (the onus resting on accused to prove that this section applies to him) but nevertheless thought that this case had been correctly decided. The court again held that the onus of proof rested on the accused. In view of the clarity established by the Swanepoel decision the Commission considers that there is no need for legislative intervention.

4.4 There are numerous examples of the legislature's placing the burden of proof pertaining to particular facts on the accused. Unfortunately this has often not been done in very clear language with the result that it is at times uncertain whether the legislature really intended to shift the onus. This is, however, a problem that must be resolved by interpretation of the relevant provision and on which no recommendations can be made by the Commission.

5. STANDARDS OF PROOF AND COGENCY

* Standards of proof

5.1 Although interpretation problems regarding certain statutory provisions sometimes arise because the legislature does not always, where it intends to regulate the evidential value of certain classes of evidence, clearly indicate whether it has prima facie evidence, conclusive proof, or be what it may, in mind, this is not a matter that is susceptible of general legislation.

* Cogency

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23 1985 1 SA 576 (A).

24 1949 3 SA 293 (A). See Hoffmann & Zeffertt 401.

5.2 The factors which play a part in the assessment and the cogency of evidential material do not, as far as can be ascertained, give rise to any problems which call for statutory rectification.

6. CORROBORATION AND THE CAUTIONARY RULES

* Corroboration

6.1 Corroboration is concisely defined by Hoffmann & Zeffertt[25] as "... independent evidence which confirms the testimony of a witness". As far as can be ascertained there is only one statutory provision relating to corroboration, which relates to confessions.[26] Section 209 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed. The Commission considers this to be a necessary provision.[27]

6.2 One commentator was of the opinion that an amendment to section 209 of the Criminal Procedure Act should be considered. Schmidt[28] was referred to, who says that it is difficult to see why two separate requirements are set as alternatives in section 209 - evidence that the offence was committed would necessarily provide confirmation of the confession. Although section 209 might perhaps have been formulated more elegantly, the section does not present problems in practice. The Commission feels that it is undesirable to meddle with the section and by so doing possibly create problems of interpretation.

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25 459.

26 S 209 of the Criminal Procedure Act.

27 See par 19.2 infra.

28 128.

* The cautionary rules

6.3 The cautionary rules laid down over the years by the courts for the assessment of the evidence of, for instance, accomplices, traps, children, prostitutes, complainants in sexual cases, etc, are all rules of practice which draw attention to the dangers of passing judgment on the evidence of such persons. The Commission sees no reason to expand or to restrict these rules by legislation.

7. THE PRESUMPTION

7.1 Presumptions are traditionally classified as being threefold, namely the irrebuttable presumption of law, the rebuttable presumption of law, and the presumption of fact. Of the first-mentioned presumption Hoffmann & Zeffertt[29] rightly say that this presumption "... is simply an ordinary rule of substantive law formulated to look like a rule of evidence". Where such "presumptions", require law reform they fall outside the ambit of this investigation.[30] The second class of presumption, namely the rebuttable presumption of law, is certainly the most well known in our law. That is why both common law and statute law abound with presumptions of this kind. The Commission is not, however, aware of any problems worth mentioning which present themselves for law reform in this connection. The presumption (rebuttable) of fact is not a rule of law. The courts are constantly drawing certain inferences which in time become presumptions of fact. However, in practice these presumptions do not present problems necessitating law reform.

8. JUDICIAL NOTICE

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29 414.

30 As in the case of the irrebuttable presumption of law that a boy under the age of 14 years is incapable of having sexual intercourse, which was dealt with as part of Women and sexual offences (Project 45) - see South African Law Commission 1985 par 2.52.

8.1 Judicial notice forms part of the evidential material which makes it unnecessary to adduce evidence of the fact of which judicial notice is taken. There are numerous facts or matters of which a court may take notice[31] or of which it shall take notice.[32] This area of the law of evidence does not give rise to any problems worth mentioning. A matter which has been broached before[33] is that of judicial notice of the indigenous law and custom of Blacks - hereinafter referred to as "customary law". The law as it now stands is fully discussed in various textbooks and need not be repeated here.[34] The position is, briefly, that only the Commissioners' Courts could in the adjudication of civil actions between Blacks in which customary law is applicable take notice of such law. With the abolition of the Commissioners' Courts by the Special Courts for Blacks Abolition Act 34 of 1986, this competency has been transferred to the Magistrates' Courts.[35]

8.2 The main arguments put forward in favour of taking judicial notice of customary law are the following:

- The Supreme Court is not disposed to take notice of customary law because it is supposed to be "foreign law". However, customary law is not foreign law in the same sense as, for example, French law is foreign law vis-à-vis South African law. To the Blacks it is incomprehensible and even humiliating that their law is regarded as foreign law in the Republic.

- Customary law is in fact part of our law and it is to some extent recognised by statute.

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31 E g generally known facts.

32 E g an Act - see s 224 of the Criminal Procedure Act.

33 See inter alia Kerr 313; Olivier 313, 323; VerLoren van Themaat 112; Visser 15.

34 See Hoffmann & Zeffertt 328; Schmidt 206. Cf Geldenhuys 137.

35 S 54A (1) of the Magistrates' Courts Act 32 of 1944.

- The Provincial and Local Divisions of the Supreme Court have concurrent jurisdiction with the Magistrates' Courts, and actions in which customary law is involved may in theory be instituted in these divisions. Moreover, the Appellate Division of the Supreme Court is in some instances the final court of appeal in respect of decisions of courts applying customary law.

- Customary law is offered as a course in most of the curricula for legal qualifications for the judiciary. There are few members of the judiciary, therefore, who do not have at least a basic knowledge of customary law. Customary law is furthermore readily ascertainable from available textbooks.

8.3 In the Commission's opinion the arguments in paragraph 8.2 carry weight. The Commission therefore recommends that any court should be able to take notice of customary law.

8.4 As regards foreign law, such law must be proved by an expert witness if it is a real point in issue.[36] The Commission feels that this rigid rule ought really to be relaxed by allowing the courts to take notice of foreign law in so far as it can be readily ascertained with certainty, provided that the parties are not prohibited from adducing evidence on such law. This view corresponds with that of Edwards.[37]

8.5 One commentator was opposed to the principle of taking judicial notice of foreign law. The reasons advanced for this opposition are that the present position presents no practical problems, that an expert assists the court in placing a rule of a foreign legal system in perspective, and that the average South African lawyer is not in a position to assist the court in the application of such a rule. One can easily imagine a situation in which a court would readily be able to take notice of foreign law - a system like the English law, for example, is known and accessible to most

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36 See Hoffmann & Zeffertt 328; Schmidt 203 et seq.

37 168, 170.

South African lawyers. In such a case there is no reason to insist on expert evidence. Furthermore clause 1(2) of the Commission's proposed Bill (contained in Annexure C) specifically provides that expert evidence may still be adduced.

8.6 Three commentators expressed concern about the element of surprise which may steal in if a court may take notice of customary and foreign law. It was said that parties to an action should know beforehand whether it is necessary to adduce evidence on the legal rules concerned, and that foreign law and customary law are not often applied in practice with the result that a practitioner will look up a rule only when his attention has been drawn to it. The possibility was raised that facts might be mentioned in pleadings, making such a rule applicable, that then no evidence would be led on the rule and the fact that the court has to take notice of the rule would simply be relied on in argument. Possible solutions suggested were the following:

- Legislation should provide that the presiding officer must warn the parties of his intention to take notice of a legal rule.

- The rules of court should provide for a pre-trial conference between the parties and the bench.

- Legislation should provide that judicial notice may be taken of a legal rule only if the existence and source of such a rule have been mentioned in the pleadings or affidavits.

8.7 The Commission considers the risk of an element of surprise to be small. If a party relies on another legal system in his pleadings his conclusion (seen in the light of South African law) will not be borne out by the facts he pleaded. Already at this stage it will emerge that reliance is being placed on another legal system. It is also possible at present for parties to deliberate in advance at a pre-trial conference on judicial notice being taken of foreign law. The Commission is not favourably disposed towards involving the bench in such a conference. An attempt to regulate this matter in legislation would create more problems than it would solve - it will be possible in practice to deal with the matter satisfactorily on the

basis of the existing rules of court. In the rare cases where an element of surprise does enter, the matter could be dealt with by a remand or a fitting order as to costs. Should problems regarding the application of clause 1 arise in practice at a later stage, the rules of court could be adapted at that stage.

8.8 The clause in the Working Paper regarding this matter read as follows:

> 1. (1) Any court may take notice of foreign law or of the unwritten customs and habits of the indigenous nations or tribes of the Republic or of territories which formerly formed part of the Republic which are binding rules of law in so far as such law can be ascertained readily and with sufficient certainty.

The Commission once again considered the words "customs and habits of the indigenous nations or tribes" and decided that the words "indigenous law" should rather appear in the Bill.

9. THE FORMAL ADMISSION

9.1 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 criminal cases are concerned, there is also an intricate interaction between formal admissions in terms of section 220 of the Criminal Procedure Act and the new plea procedures - sections 112 to 115 of the Criminal Procedure Act. In these cases the law of criminal procedure and the law of evidence are so intertwined that the reformer of the law of evidence would soon find himself within the domain of the law of procedure. So far as the law of evidence is concerned, the Commission is not aware of any adjustments which are necessary regarding formal admissions.

9.2 One commentator was of the opinion that an amendment to section 220 of the Criminal Procedure Act should be considered for the sake of

legal certainty, to enable the State also to make formal admissions. In practice the section works satisfactorily in this regard, however, and there is no need for such an amendment. The approach remains that only problem areas should be reformed. The Commission recommends that section 220 should stay as it is.

9.3 This commentator also suggested that section 115(1) of the Criminal Procedure Act should be so amended that an accused is compelled to indicate the basis of his defence. The problem seems to be that more and more accused with legal representation prefer not to make a statement disclosing the basis of their defence. This is a procedural matter. The Commission considered referring the matter to the Department of Justice but decided against it. The reason for this decision is that the Commission is aware that the question whether an accused should be compelled to disclose the basis of his defence was thoroughly considered before section 115(1) was enacted in its present form.

10. COMPETENCY AND COMPELLABILITY TO GIVE EVIDENCE

* Compellability

10.1 Attention has been given only to the compellability of spouses. There is nothing in civil proceedings which precludes a husband from testifying against his wife or a 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.[38] A similar privilege applies in criminal proceedings.[39] This privilege will receive attention below.[40]

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38 See in general Schmidt 225; Van der Merwe et al par 21.1; Van Niekerk et al 180.

39 S 198 of the Criminal Procedure Act.

40 See par 20.8 infra.

10.2 The position as regards the compellability of spouses in criminal proceedings differs substantially from that in civil proceedings. The provisions applicable to criminal proceedings are sections 195 and 196 of the Criminal Procedure Act. These provisions read as follows:[41]

> 195. (1) The wife or husband of an accused shall not be competent to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with -
>
> (a) any offence committed against the person of either of them or of a child of either of them;
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> (b) any offence under Chapter III of the Children's Act, 1960 (Act 33 of 1960), committed in respect of any child of either of them;
>
> (c) any contravention of any provision of section 11(1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;
>
> (d) bigamy;
>
> (e) incest;
>
> (f) abduction;
>
> (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Immorality Act, 1957 (Act 23 of 1957), or, in the case of the territory, of any provision of section 3 or 4 of the Girls' and Mentally Defective Women's Protection Proclamation, 1921 (Proclamation 28 of 1921), or of section 3 of the Immorality Proclamation, 1934 (Proclamation 19 of 1934);
>
> (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;
>
> (i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h),

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41 For a concise history of these provisions see Van Niekerk et al 181 et seq.

and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any offence against the separate property of the wife or of the husband of the accused, or with any offence under, in the case of the territory, section 1 or 2 of the said Immorality Proclamation, 1934.

(2) Anything to the contrary in this Act or any other law notwithstanding, any person married in accordance with Black law or custom shall, notwithstanding the registration or other recognition under any law of such a union as a valid and binding marriage for the purposes of the law of evidence in criminal proceedings, be deemed to be an unmarried person.

196. (1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that -

(a) an accused shall not be called as a witness except upon his own application;

(b) the wife or husband of an accused shall not be called as a witness for the defence except upon the application of the accused.

(2) The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.

(3) An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.

10.3 For a starting-point for a discussion of this topic there is no need to look any further than the well-known case of S v Khanyapa in which the following observation was made by the court:[42]

The problem which has arisen in this case is that there cannot be, to my mind, as the law now stands, any reason for regarding a spouse in a criminal case as incompetent to testify against an accused.

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42 1979 1 SA 824 (A) 835E. (Our translation.)

10.4 This view coincides with criticism previously levelled at the present provisions.[43] The Commission wishes to refer only briefly to some of the most important points of criticism against the provisions concerned:

. When considering the provisions of section 195 the provisions of section 192 (every witness competent and compellable unless expressly excluded) must always be kept in mind. Barton[44] holds that section 192 is based "... on the principle that our courts have unfettered access to all evidence which might assist them in ascertaining the truth. Only a principle greater than this could justify either the disqualification of a witness or a right to refuse to testify".

. In seeking justification for a provision such as section 195, it might perhaps be said that this provision is aimed at the protection of the inviolability of the marital relationship. Barton gives short shrift to this argument by saying that:[45]

> Whatever the policy considerations behind the rule, they are invariably based on the sanctity of the ideal marriage, a concept which conjured up in the minds of men notions of spiritual unity and marital harmony which should, in the interests of society, remain inviolate. The marriage ideal, detached from reality, is placed on a pedestal to the exclusion of the spouse's evidence, irrespective of the present state of the marital relationship in question, the gravity of the charge against the accused, the availability of other evidence and the willingness of the witness to testify.

. Other members of the family (brothers, sisters, children, etc) and persons "married" in accordance with Black law or custom (see section 195(2)) have for years been compelled to testify under section 192. What about the violation of, and strain on,

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43 See inter alia Barton 1976 228; Du Toit 1978 431.

44 1976 229.

45 1976 238-9.

family relationships in these cases? Why are these persons not protected as well?

Du Toit sums up his views in this regard as follows:[46]

> The rule that the spouse of an accused is normally not competent nor compellable to testify for the State against her husband, especially where she has the only or the most important evidence against the accused, is indefensible. The modern system of criminal law should not put a higher premium on the bond of loyalty between spouses than on the administration of law and justice. If the accused endangers this bond and the sanctity of his marriage by unlawful conduct in the presence of his spouse, the ensuing violation of that bond and of the sanctity of his marriage forms part of the punishment for his conduct. If the spouse is also ready and willing to testify for the State against the accused, the accused should not be allowed to hide behind the artificial statutory shield of section 195(1) and thus escape his lawful punishment.

- The decisions in R v Jamba[47] and S v Khanyapa are proof of the untenability of the law as it now stands. The overruling by the Appellate Division in Attorney-General, Northern Cape v Brühns[48] of certain dicta in Khanyapa strengthens the objections to section 195.

- To continue to adjust section 195 by creating further exceptions on an ad hoc basis would not be proper reform, as is evidenced by the unsuccessful attempts of the legislature to adapt this provision from time to time by ad hoc remedial measures.

10.5 Both Barton and Du Toit[49] propose that section 195 be amended so as to make the spouse of the accused in all criminal proceedings a

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46 1978 439. (Our translation.)

47 1947 4 SA 228(C).

48 1985 3 SA 688(A).

49 1976 241 and 1978 439 respectively.

competent (but not a compellable) witness for the State against the accused. The Commission's tentative view contained in the Working Paper was that these proposals could not be supported. The reasoning was as follows: There is no denying that there are cases where the spouse should, for various reasons, be compelled to testify for the State against the other spouse. If not, the State will in many cases not be in a position to adduce evidence against the accused. If the spouse were given the option of deciding whether or not to testify, such spouse would in many cases be faced with an impossible choice. The spouse would then not only be exposed to the pressure of the other spouse not to testify, but would also be torn between the desire to testify and the possibility of distasteful recriminations for doing so.

10.6 A possible alternative would be to allow a spouse to testify in all cases, but then to give the court the discretion to absolve him or her from testifying. The snag is that it might sometimes be difficult for the parties to find out in advance what the court's decision will be - in other words the preparation and presentation of the case would be unnecessarily speculative and complicated. The court would also become unnecessarily involved in the process of presenting evidence. The court would naturally have to be fairly well informed of the broad background of the case and the evidence to be presented (availability, nature and scope, etc.) before being able to exercise its discretion. The court would inevitably have to give a decision one way or the other. Thus yet another possible ground of appeal would be created.

10.7 The Commission tentatively considered it desirable to make the spouse competent and compellable to testify for the State against the other spouse (the accused) in all cases. It appears from the comments received that there is a serious difference of opinion on the Commission's tentative recommendation. It was argued that the tentative recommendation might contribute to further strain in a marriage while marriages are already under pressure nowadays. The examples were given of a man killing somebody in a motor accident, committing a traffic offence or losing his temper at a party and uttering libellous words or assaulting someone. It was argued that this type of situation was more likely to occur than the type of situation in the Khanyapa case. The strain that the compellability to testify

of a wife who has witnessed her husband's actions would place on the marriage is obvious.

10.8 After reconsidering the Commission decided to drop its tentative recommendation that a spouse should be a compellable witness for the State. The question is whether the present position should be left as it is or whether the spouse should be made a competent but not a compellable witness. The Commission is of the opinion that the obvious solution is still to make the spouse a competent but not a compellable witness.

10.9 Section 195 of the Criminal Procedure Act at present makes a spouse a competent and compellable witness for the State where the other spouse is charged with certain offences mentioned in section 195. The reason why those offences have been specifically singled out is probably that they are offences which one member of a family can commit against another member of that family. Because of the special nature of the family intimidation by a spouse who has committed an offence against a member of the family to try to persuade the other spouse not to testify is a real possibility. It is therefore necessary that the spouse who is the potential witness should have no choice regarding the giving of evidence so that the protective function of the law towards the members of a family can prevail. The Commission therefore believes that a spouse should remain a compellable witness for the offences mentioned in section 195. The Commission is not aware of any practical problems resulting from the inclusion or exclusion of certain offences from section 195 and recommends that the existing list of offences be left unchanged

10.10 This proposal also affects the provisions of section 196(1)(b) of the Criminal Procedure Act. An accused in a joint trial cannot call as a witness the spouse of his co-accused - no matter how important and essential the evidence of such spouse may be to him. Such an accused would therefore be in the same dilemma as the State. The Commission would like to see the same principle applied here as in the case where the spouse is a potential witness for the State - the spouse should be a competent, but not a compellable, witness in cases where a co-accused of the other spouse calls the first-mentioned spouse as a witness.

10.11 The effect of section 195(2) of the Criminal Procedure Act is that Blacks who have contracted a customary union are regarded as unmarried for purposes of sections 195 and 196 of the Criminal Procedure Act. This is not a matter which should be rectified in an investigation into the law of evidence. However, the Commission did take section 195(2) into account in its investigation into the marriages and customary unions of Black persons (Project 51). The result of the recommendations in that investigation will be that the spouses of a customary union will be treated in the same way as the spouses of a civil marriage.[50]

11. THE PRESENTATION OF EVIDENCE BY WITNESSES

* The presentation of evidence

11.1 There are several exceptions to the rule that evidence be given viva voce, such as, for example, evidence on commission and interrogatories. The following statutory provisions are relevant in this regard:

- sections 52 and 53 of the Magistrates' Courts Act 32 of 1944;
- sections 32 and 33 of the Supreme Court Act 59 of 1959;
- section 24 of the Civil Proceedings Evidence Act;
- sections 171 to 173 of the Criminal Procedure Act;
- rule 26(1) of the Magistrate's Court Rules;
- rule 38(1) and (3) to (8) of the Uniform Supreme Court Rules.

11.2 Although one would like to see all the various provisions dealing with the same subject consolidated in one statutory enactment, this matter

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50 See South African Law Commission 1986 par 11.2.1.3.

does not form part of this investigation. So far as the Commission knows, the provisions concerned do not give rise to any practical problems that should be rectified by legislation.

* The oath

11.3 Here, too, there is no uniformity whatsoever in civil and criminal proceedings. The relevant provisions are the following:

. section 112 of the Magistrates' Courts Act 32 of 1944;

. sections 39 to 41 of the Civil Proceedings Evidence Act;

. sections 162 to 165 of the Criminal Procedure Act;

. section 28 of the Small Claims Courts Act 61 of 1984.

11.4 The Commission's standpoint in this regard is the same as in paragraph 11.2 above.

12. REAL EVIDENCE

12.1 The Commission has no proposals.

13. DOCUMENTARY EVIDENCE

* Secondary evidence of documents.

13.1 Representations have been made to the Commission to make provision for the admissibility of copies of documents. On closer examination it appeared that the real problem lay in the fact that there were various statutory provisions under which certain categories of

documents have to be preserved for specified periods.[51] Documents produced in bulk require substantial shelving space and this makes their preservation for long periods fairly expensive. The modern technique of microfilming documents can lead to a considerable saving. However, the relevant provisions require the preservation of the original documents. This problem does not relate to the law of evidence. The solution lies in the amendment of the relevant provisions so as to authorise the preservation of filmed documents.[52]

13.2 As regards the law of evidence, the common law makes clear and elastic provision for the admissibility of copies. As appears from the decision in Barclays Western Bank Ltd v Creser[53] our courts are not reluctant to admit filmed documents. The admissibility of copies of lost documents might however be a problem.[54] In order to put the matter beyond all doubt and to make specific provision for the admissibility of copies, the Commission has included a provision (clause 2) in the Bill (contained in Annexure A to the Working Paper) regarding the admissibility of documents.

13.3 One commentator posed the question whether the admission of copies should not be restricted to documents of which the original had been destroyed because it had been microfilmed. It is the Commission's precise intention that the clause should go beyond merely providing for microfilming. The Commission recommends that legislation should spell it out that a copy of a document should be admissible as evidence where the document itself is admissible as evidence unless the court rules otherwise.

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51 See inter alia s 36 of the Banks Act 23 of 1965 and s 23(6) of the Stamp Duties Act 77 of 1968.

52 See for instance s 101(1A) and (2A) of the Customs and Excise Act 91 of 1964.

53 1982 2 SA 104 (T).

54 See s 34(2)(b) of the Civil Proceedings Evidence Act; Bowskill v Dawson 1954 1 QB 288, 1953 2 All ER 1393; Hoffmann & Zeffertt 139; Schmidt 334.

13.4 The suggestion was made that clause 2 should refer to "reproduction" instead of "copy". The idea is to provide for modern methods of storing information. The Commission considers the term "reproduction" to be too narrow for present purposes. However, it was decided to use the word "reproduction" alongside of "copy" to make the intention clear.

13.5 Another commentator submitted that entries in the formal records of companies should be made admissible as prima facie evidence. Clause 3(2)(c) of the Bill recommended by the Commission (see Annexure C) will give the court a discretion to allow such evidence. However, the commentator is of the opinion that the admission of such evidence should not be left to the court's discretion. The Commission does not agree with this. It would simply be too dangerous to allow such evidence throughout as prima facie evidence. The records of companies are not all equally reliable.

* Computer print-outs

13.6 The Computer Evidence Act 57 of 1983, which came into operation on 1 October 1983, applies to civil proceedings only. One of the reasons put forward by the Commission at the time for applying the proposed provision to civil proceedings only was that "... it would be advisable to defer the extension of the proposed provisions to criminal proceedings until they have been properly evaluated and thrashed out in civil proceedings".[55] In the Working Paper the Commission mentioned that comment on the possible extension of the Act to criminal proceedings would be welcomed.

13.7 One commentator said that it would be useful to consult the English legislation on computer evidence so as to streamline Act 57 of 1983. Another commentator recommended that the Commission should go into the effectiveness of Act 57 of 1983. However, no urgent need was referred to in this regard. Such an investigation falls outside the ambit of the present

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55 South African Law Commission 1982 par 4.4.

investigation. None of the other commentators mentioned this matter in general. For the present the Commission is not convinced of an immediate need for a general investigation into the effectiveness of Act 57 of 1983.

13.8 One commentator said that the extension of the Computer Evidence Act 57 of 1983 to criminal proceedings was not justifiable at present. The reason submitted was that most accused do not have legal representation and out of ignorance would not know how to deal with computer evidence. It was pointed out that legislation on computer evidence did not apply to criminal cases in England either.

13.9 However, one commentator referred to a practical problem which may have some bearing on the operation of the Computer Evidence Act 57 of 1983. This problem is caused by automated teller machines. The commentator said that from the point of view of costs it was not worth instituting legal proceedings against people who defraud automated teller machines because of all the expert evidence that has to be adduced on the automated teller machine. This matter already forms part of the Commission's investigation into the payments system in South African law (Project 50) and the relevant comments will be considered as part of that investigation.

14. ADMISSIBILITY AND RELEVANCE

14.1 The Commission has given attention only to evidence obtained illegally or improperly. Such evidence is at present admissible in criminal proceedings because the courts take the view that unlawfulness or impropriety does not affect the admissibility of evidence.[56] The question whether the court nevertheless has a discretion to disallow such evidence was also investigated. In England the courts used to have a discretion to disallow evidence if the admissibility thereof would operate unfairly against the accused.[57] Possibly our courts could follow this course.[58] Hoffmann &

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56 See Hoffmann & Zeffertt 223 et seq; Schmidt 346 et seq.

57 See Kuruma v R 1955 AC 197, 1955 1 All ER 236. This view has now (Footnote continued)

Zeffertt[59] criticise fairness as a criterion saying that "(f)airness is a slippery, imprecise and vague concept". They go on to argue that the public interest would be a far better criterion because "(i)t appears to strike a satisfactory balance between the policy that all relevant evidence should be ventilated unless it be hit by an exclusionary rule and the policy that evidence should not be admitted if it is illegally obtained because the police should be deterred from illegal conduct and the liberties of the citizen should be zealously fostered".[60]

14.2 After a discussion of this matter (whether to admit inadmissible evidence on account of special circumstances) Schmidt[61] reaches the conclusion that there is no justification for such a discretion. His line of reasoning is briefly as follows:

- Except in extremely exceptional circumstances the court has no discretion to admit inadmissible evidence;

- evidence of little probative value is irrelevant and can be disallowed;

- the inadmissibility of evidence improperly or unfairly obtained from the accused himself is based upon the maxim nemo debet prodere se ipsum (i e self-incrimination) which forms the basis of the accused's right to remain silent;

- public interest as a criterion for a discretion does not mean much: all grounds of inadmissibility are after all aimed at the public interest.

(Footnote continued)
however been rejected - see R v Sang 1979 2 All ER 1222 (HL).

58 See S v Mushimba 1977 2 SA 829(A) 840E.

59 225.

60 Ibid.

61 347 et seq.

14.3 The matter under discussion has not as yet really received the attention of the Appellate Division. The Commission feels that this matter should be referred for consideration in its investigation into group and human rights (Project 58).

15. PREVIOUS CONSISTENT STATEMENTS

15.1 No suggestions for reform.

16. SIMILAR FACTS

16.1 No suggestions for reform.

17. CHARACTER

17.1 There is a strong connection between character evidence, the relevance of evidence, evidence of similar facts, the credibility of witnesses, previous convictions, the examination of witnesses, and so forth. This area (character evidence) of the law of evidence is a thorny one and it would be most difficult to make modifications here and there (for instance, by laying down what exactly is meant by character: does it refer to reputation or disposition?). The Commission is aware of the fact that the cross-examination of the complainant in sexual cases is often sharply criticised (perhaps from ignorance). This matter was, however, investigated in the course of Project 45 - Women and sexual offences in South Africa - and certain recommendations were put forward by the Commission.[62] For the rest the Commission does not see any need for statutory adjustments to this aspect of the law of evidence.

18. OPINION

* General

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62 See South African Law Commission 1985 par 3.24 to 3.50.

18.1 The Commission is aware of the problems and debate 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.[63] The Commission, however, feels that reform can be left to the courts: they deal with opinion evidence daily and they do not appear to encounter any insurmountable problems in laying down fair and equitable rules for the application of the rules.

* The rule in Hollington v Hewthorn[64]

18.2 This decision is surely the most discussed and criticised judgment in the sphere of the law of evidence.[65] As recently as in the case of S v Khanyapa[66] Rumpff CJ said (obiter) that the temptation was great to find the decision unacceptable. The decision means, briefly, that a conviction of negligent driving in a criminal case is not admissible evidence in a subsequent civil action for damages. Some of the reasons advanced by the court in the Hollington case to justify its decision are the following:

- The previous conviction is merely an opinion of the previous court and therefore irrelevant.
- The proceedings of the criminal court are for purposes of the civil case res inter alios acta.
- The previous conviction is hearsay evidence as far as the later case is concerned.
- Convictions are traditionally (the court went back to 1776) not admissible in civil cases.

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63 See Hoffmann & Zeffertt 77 et seq; Schmidt 427 et seq.

64 1943 KB 587 (CA), 1943 2 All ER 35.

65 See Hoffmann & Zeffertt 80 et seq; Schmidt 436 et seq.

66 1979 1 SA 824(A) 840C.

18.3 The criticisms against the decision are mainly the following:

. Evidence of a previous conviction is indeed relevant in subsequent civil proceedings.

. Although the finding of the criminal court is in fact an expression of opinion, it is an opinion of a particular nature which has authority and consequences.

. In a criminal court the guilt of the accused person must be proved beyond (any) reasonable doubt. Such proof has to be stronger than in civil proceedings where proof on a balance of probabilities is sufficient. The finding of a criminal court should therefore be admitted in civil proceedings.

. The inadmissibility of such evidence diminishes the respect of the man in the street for the administration of justice: it goes against common sense, especially if the finding of the civil court should differ from that of the criminal court.

. The court erred in its view that the authorities are against admissibility.

. On account of the inherent reliability of this kind of evidence some critics even argue that it is hearsay of a special nature and it ought therefore to be admissible.

18.4 As mentioned above, this rule has elicited wide reaction and it is not surprising that it has received the attention of law reform bodies in various countries. Suffice it to mention the following:

. The United Kingdom: The investigation of the Law Reform Committee resulted in the provisions of sections 11 and 13 of the Civil Evidence Act 1968. What the provisions amount to, briefly, is that evidence of a previous conviction is admissible in civil proceedings (with the exception of actions for defamation) if relevant. A presumption is created: the convicted person is

taken to have committed an offence unless the contrary is proved. It is provided further (section 13) that if a person "stands convicted of an offence" such finding is conclusive proof of his guilt for the purposes of "an action for libel and slander".

- South Australia: The Evidence Amendment Act 1945 provides for the admissibility of the evidence in question.

- Fiji: The Evidence (Amendment) Act 1975 is very similar to that of the United Kingdom.

- New South Wales: Section 74 of the Defamation Act 1974 corresponds with section 13 of the legislation of the United Kingdom.

- Western Australia: After investigation it was recommended that the rule be upheld.

- Alberta and British Columbia: It was recommended that the rule be abolished.

- Ontario: The Ontario Law Reform Commission was not prepared to recommend the unconditional admissibility of such evidence. In its report this Commission argues its view as follows:[67]

> However, it would not be wise ... to amend the law to permit a court to receive in evidence, in civil proceedings, proof of a prior conviction for an offence arising out of the same facts. This issue is particularly significant in negligent actions. The result of a conviction for a breach of a provincial statute or a municipal by-law may be very minor, while the consequences for a judgement in a civil action may be great. In our view the results of the proceedings in the criminal court are quite irrelevant to the issues between the parties in the civil suit. In most negligent cases the real defendant in the civil suit is the insurer. Since the insurer is not before the court in the criminal proceedings, it would be unjust if it were to be

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67 Ontario Law Reform Commission 97.

prejudiced by the result of those proceedings. If such an amendment were made, it would tend to encourage the use of the criminal courts to promote civil interests.

18.5 The Commission's views may be summarised as follows:

. The acute predicament of the plaintiff in the case concerned regarding the adducing of evidence may largely be ascribed to the rigidity of the hearsay rule. If the hearsay rule could be modified to make provision for matters such as these and others, a case such as the one under discussion would not arise again. The hearsay rule will be dealt with below.[68]

. As for the remaining consequences or effects of the rule complained of, the Commission is not in favour of eliminating them. The reasons are, briefly, that 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 to 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.

19. THE INFORMAL ADMISSION AND THE CONFESSION

* The informal admission.

19.1 No proposals for reform.

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68 See paragraph 22 infra.

* The confession

19.2 A confession is a special kind of admission because the declarant acknowledges full criminal responsibility. All the admissibility requirements relating to an admission also apply to a confession. The additional requirements laid down by section 217(1)(a) of the Criminal Procedure Act also apply. These additional requirements, which are a departure from our common law, were introduced in 1917 and have since been extended. It is these additional requirements that are the main target of criticism, and their application has (sometimes) caused the court problems.[69] Although some of the criticism against the above-mentioned section is not without substance, for instance that the proviso is foreign to our law; that the proviso results in relevant and reliable evidence being regarded as inadmissible: that various devices are employed to characterise a statement as an admission; that a confession made to a respected and trustworthy policeman (not a justice of the peace) is excluded virtually without exception (one commentator also objected to this); that an apparently voluntary confession confirmed in the presence of a magistrate or a justice of the peace might be misleading if it could have been preceded by improper conduct on the part of the police; that the presumption that the primary requirements for admissibility have been met places a real onus of proof on the accused, the Commission is nevertheless of the opinion that the existing law relating to confessions should be retained. The Commission is also of the opinion that there should not be a return to the position at common law, as is advocated. A reason for this is that the provisions concerned have been part and parcel of our law of criminal procedure and evidence for over 75 years. Furthermore, the legal rules relating to confessions were thoroughly reviewed as recently as 1977. Although certain modifications were made, the principle was retained.

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69 See the comprehensive article by Labuschagne 58, 170, 262. Cf Hoffmann & Zeffertt 178 et seq; Schmidt 519 et seq.

were thoroughly reviewed as recently as 1977. Although certain modifications were made, the principle was retained.

20. PRIVILEGE

* Legal professional privilege

20.1 Only legal professional privilege is at present recognised in our law.[70] In view of this it is only to be expected that members of other professions such as medical practitioners, journalists, clergymen, bankers, accountants, etc, who are also involved daily in confidential relationships with the man in the street, will lay claim to a similar privilege.

20.2 In the first place the Commission wishes to point out that the privilege of the legal profession is based on grounds to which other professions can lay little or no claim. Van Niekerk et al[71] have made a thorough study of the history of and grounds for this privilege. The Commission is in full agreement with their views. The following view put forward by Schmidt[72] concerning the grounds on which the privilege is based puts the whole question in a nutshell:

> The underlying reason for the privilege is the protection or stabilisation of the practitioner's role in the accusatorial system. The practitioner cannot perform his duty as an adviser and spokesman properly if communication with his client is not frank and confidential. The object is therefore to promote the administration of justice and not to preserve the secrecy of confidential communications in general.

20.3 It must also be borne in mind that the legal professional privilege applies only if certain strict requirements are met, one of these being that there must have been a confidential communication. Confidentiality as such

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70 See s 201 of the Criminal Procedure Act. In civil cases the common law applies without qualification.

71 28 et seq and see Van Niekerk's LLM thesis.

72 542. (Our translation.)

is not the only criterion. Furthermore the privilege belongs to the client and not to the legal practitioner.

20.4 Other professions cannot, therefore, claim the same privilege on the strength of the precedent of this privilege. They would have to justify their claims on other grounds. It is necessary to examine the basic principles or the rules of the law of evidence to be able to judge whether new privileges should be created. It will consequently be necessary to establish whether there are such principles to apply. Wigmore supplies the answer. According to him, the following four requirements must be satisfied before the law will recognise a communication as being a privileged one:[73]

(1) The communications must originate in a *confidence* that they will not be disclosed;

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

20.5 In conjuction with this it must be borne in mind that the court must, as far as possible, be unfettered in its search for the truth and that it is entitled to all evidence which will assist it to discover the truth, and also that every person who is in possession of evidence has a duty to assist the court. Wigmore warns that:[74]

> It follows, on the one hand, that *all privileges of exemption from this duty* (i e duty to give evidence) *are exceptional*, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their

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73 Wigmore Vol 8 par 2285. However, cf Van Niekerk et al 46 n 2.

74 Par 2192(3).

extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

20.6 The Commission endorses the above views and believes that new privileges should be created with great circumspection. The question poses itself whether only a few specific churches should be excluded and not other splinter groups or sects. Which medical practitioners must be included and which not? In the case of journalists, communications are often anything but confidential: the journalist is extremely keen to publish his scoop! His only concern is to protect his sources. To some extent medical practitioners,[75] insurers[76] and bankers[77] do enjoy some protection in certain circumstances.

20.7 It is recommended that the existing position be retained.

* Marital privilege

20.8 This privilege, which is governed by section 10 of the Civil Proceedings Evidence Act and section 198(1) of the Criminal Procedure Act, respectively, deserves to be retained in every respect. Only two matters received the attention of the Commission here, namely the character of the marriage concerned and the termination of the privilege.

20.9 This privilege is available only to persons who have entered into a valid monogamous marriage (a civil marriage), marriages according to

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75 Schmidt 348 & 513 n 17; S v Forbes 1970 2 SA 594 (C).

76 Schmidt 547.

77 Hoffmann & Zeffertt 212; s 236(4) of the Criminal Procedure Act; s 31 of the Civil Proceedings Evidence Act.

legal systems which countenance polygamy being excluded.[78] "Marriages" of persons in accordance with the indigenous law and custom of Black persons and of Muslims therefore fall outside the privilege concerned. As regards Hindus, it was held in S v Vengetsamy[79] that such unions do in fact qualify as a marriage for purposes of the provision concerned. This is a controversial decision and it is criticised.[80] The Commission does not think that the decision will be followed readily.

20.10 The Commission considers that problems concerning the character of the marriage can be dealt with more effectively in investigations relating to the possible recognition of customary marriages. The Commission has accordingly taken account of marital privilege in its investigation into the marriages and customary unions of Black persons (Project 51). The effect of the recommendation in that investigation will be to place spouses of a customary marriage in the same position as spouses of a civil marriage.[81] The Commission has also decided to undertake an investigation into Islamic marriages and related matters.

20.11 Provision is made for the termination of a marriage (and therefore by implication the marital privilege) in section 11 of the Civil Proceedings Evidence Act and section 198(2) of the Criminal Procedure Act. Section 11 refers to a marriage which has been dissolved or annulled whereas section 198(2) refers to a marriage which has been dissolved or annulled by a competent court. Since a marriage may be dissolved by death as well as by divorce, the question arises whether section 11 applies to widows and widowers as well while section 198(2) does not, especially since the word dissolved in the last-mentioned section is qualified by the expression a competent court. The Commission feels that the matter ought to be cleared up - it only leads to confusion and unnecessary problems of interpretation.

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78 See Labuschagne 71; Schmidt 550; Van Niekerk et al 189.

79 1972 4 SA 351(D) 353A-354A. See also Ismail v Ismail 1983 1 SA 1006 (A).

80 See inter alia Hiemstra 399; Kotzé 164 n 56; Van Niekerk et al 190.

81 South African Law Commission 1986 par 11.2.1.3.

20.12 If the history of these provisions is traced, section 3 of the English Evidence Amendment Act 1853 is found to be their source. This section reads as follows:

> No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage, and no Wife shall be compellable to disclose any Communication made by her Husband during the Marriage.

20.13 In Shenton v Tyler[82] the court decided that this section "...relates only to husbands and wives, and no principle of construction known to me entitles me to read into the section a reference to widowers or widows..." The Commission endorses this interpretation and further holds the view that there is no need to extend this privilege to a widower or widow.

20.14 It will be noticed that the privilege may be claimed only by the witness (the one who has made the statement or the one who has heard it) and not the spouse of the witness.[83] The Commission's view is that the existing position should not be changed.

20.15 The Commission recommends that the Civil Proceedings Evidence Act be amended to make the marital privilege applicable to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court. For the sake of uniformity a similar provision should replace the existing provision in the Criminal Procedure Act.

21. SUBSTANTIVE LAW IN THE GUISE OF THE LAW OF EVIDENCE

* Estoppel

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82 1939 (Ch) 620, 1939 1 A11 ER 827. Cf Hoffmann & Zeffertt 200-201.

83 S 12 of the Civil Proceedings Evidence Act and s 199 of the Criminal Procedure Act read with the provisions under discussion. See in general Barton 1979 39 et seq; Hoffmann & Zeffertt 199 et seq.

21.1 The Commission has noted Zeffertt's[84] warning that the introduction of issue estoppel into criminal cases could be dangerous, but believes that our courts will guard against this. Since issue estoppel strictly speaking does not form part of the law of evidence it in any case falls outside the scope of this investigation.

* Parol evidence

21.2 Parol evidence does not form part of the law of evidence and it was therefore not investigated.[85]

22. HEARSAY EVIDENCE

22.1 The Commission is of the opinion that the hearsay rule, in its current form, inhibits rather than promotes the administration of justice. The attention which this rule has received, and is still receiving, in related legal systems also strengthens the impression that there is an urgent need of reform in this sphere.

22.2 The Commission was fortunate in that the essential research on this rule was done by Dr A P Paizes who made the results of his research available to the Commission.[86]

22.3 The Commission itself has on previous occasions given attention to the rule. The following provision was then formulated by the Commission:

> 1. Hearsay evidence shall be evidence of any oral, written or other statement made by any person other than a witness or a party (hereinafter referred to as the declarant), which is tendered for the purpose of proving the truth of what is contained in such statement.

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84 Zeffertt 312 et seq. Cf Hoffmann & Zeffertt 268-9; Schmidt 582-583.

85 See Hoffmann & Zeffertt 228; Schmidt 592.

86 Dr Paizes took the extra trouble of adding to his doctoral thesis, The concept of hearsay with particular emphasis on implied hearsay assertions (Ph D Wits 1983), a chapter for the Commission titled "Conclusion: Suggestions for law reform in South Africa". The (Footnote continued)

2. Hearsay evidence shall not be admissible unless -

(a) the declarant is not available to testify: Provided that, subject to the provisions of paragraph (b), evidence of the statement shall not be admissible if the party who intends to tender such evidence caused the non-availability to testify of the declarant with the intention of preventing the declarant from attending the proceedings or testifying at such proceedings; or

(b) the party against whom evidence of the statement is to be given agrees to the declarant not being called as a witness.

3. For the purposes of section 2(a) the declarant shall be deemed not to be available to testify if he is deceased or unfit or incompetent to testify, or if every reasonable attempt to trace him has been fruitless, or his appearance or obtaining of his evidence is not reasonably feasible.

22.4 The definition of hearsay evidence in clause 1 is the cardinal point on which this provision turns. This definition is based on the well-known definition of hearsay evidence laid down in Estate De Wet v De Wet.[87] In this case hearsay evidence was defined as "... evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement".

22.5 Paizes's thesis is undoubtedly the most thorough research that has been done up to now on this difficult aspect of our law of evidence. He adopts, so far as South African Law is concerned, a fresh and novel approach.[88] His research shows that all definitions of hearsay evidence can be either "declarant-orientated" or "assertion-orientated". The latter definitions "... focus on whether an out-of-court assertion will be used to prove the truth of what it asserts", whereas the former definitions "... focus on whether the use of the utterance will require reliance on the

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87 1924 CPD 341. This definition was recently confirmed in Gonsalves v Gonsalves 1985 3 SA 507 (T) where the court said that (512 G) "... if it (i e hearsay evidence) is tendered to prove the truth of what was said, it is not admissible".

88 See, in particular, Chapter IV of Paizes's thesis.

credibility of the out-of-court declarant".[89] Depending upon the "model" employed, different consequences may result.[90] On the strength of his research Paizes came to the definite conclusion that the "declarant-orientated" type of definition was the correct approach. The definition quoted above, which the Commission had in mind initially, is based on an "assertion-orientated" approach. After further consideration the Commission believes that the "declarant-orientated" approach is the sounder one.

22.6 Notwithstanding the fact that Paizes's suggestions for reform represent a marked departure from the approach which the Commission originally had in mind, and also that these suggestions are at present somewhat novel to South African law, Paizes's suggestions appeared to the Commission to be completely consistent with the ratio for the exclusion of hearsay evidence (namely the inherent unreliability of hearsay evidence) and hearsay by implication.[91] For that reason they were used as the basis for the definition of hearsay evidence and the requirements for the admissibility thereof in clause 3 of the Bill contained in Annexure A to the Working Paper. It is clear from the comments received that the founding of proposals for reform on the "declarant-orientated" approach is welcomed.

22.7 It was also evident from the comments that considerable pains had been taken in analysing the proposed clause 3 contained in the Working Paper. Comments on clause 3 will now be dealt with. The numbers of the subclauses as they appear in Annexure C to this report are referred to below.

22.8 The question was posed whether the phrase "Subject to the provisions of any other Act" in clause 3(2) did not introduce a conflict through the introduction of the English common law via the residuary provisions. The residuary provisions provide for those cases for which

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89 Paizes 1983 77.

90 For concise notes in this connection see Paizes 1983 71 and Paizes 1985 258, respectively.

91 See in this connection Hoffmann & Zeffertt 100, 111, 115; Schmidt 442, 453; Kroon v J L Clark Cotton 1983 2 SA 197 (ECD) 206.

there is no other provision. The proposed Bill introduces a specific provision - a residuary provision would therefore have to yield to specific provisions of the Bill. Moreover the phrase cannot be omitted. It provides for provisions such as that of section 6(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983. Section 6(3) provides that a court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence.

22.9 Two commentators were concerned about the effect of clause 3(2)(a) on the unrepresented accused. One felt that an accused should be able to give his consent only where he is represented. If he is unrepresented his agreement should be a factor contemplated in clause 3(2)(c)(vii) which the court must take into account in exercising its discretion in terms of clause 3(2)(c). The other commentator felt that in this regard legislation would not be able to provide for the protection of the unrepresented accused - this would be up to the persons applying clause 3(2)(a). The Commission agrees with the latter view. The courts are always most careful to inform the unrepresented accused of relevant matters.[92] The Commission envisages that, in applying clause 3(2)(a), presiding officers will tell an unrepresented accused that evidence which is to be adduced is hearsay evidence, but will be admissible if the accused agrees to the adducing of such evidence, and would have to inform the accused of the implications of his agreement. The question was posed whether clause 3(2)(a) should not provide that agreement shall be given expressly. The Commission is of the opinion that the present wording of clause 3(2)(a) does in fact require express agreement.

22.10 Clause 3(2)(a) contained in the Working Paper (as clause 3(1)(a)) read that "the accused or any party against whom such evidence is to be adduced" may agree. The problem arose that the wording did not provide for the State to agree to the admission of hearsay evidence in criminal proceedings. For that reason the Commission decided to refer to "party" only and to define "party" for purposes of clause 3.

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92 See eg Ferreira 46-47.

22.11 It was submitted in certain comments that clause 3(2)(b) is superfluous. If clause 3(2)(b) is left out (and clauses 3(2)(a) and 3(2)(c) are not applicable) a person will never be able to give evidence the probative value of which depends on the credibility of another person - it remains hearsay evidence after all. It might be asked whether there is any reason for prohibiting a person from giving hearsay evidence while the person on whom the probative value of the hearsay evidence depends is actually going to testify on such evidence or will be available for cross-examination. The Commission can see no such reason and recommends that clause 3(2)(b) be retained.

22.12 One commentator would have preferred the factors listed in clause 3(2)(c) to be defined to facilitate their application. Clause 3(2)(c) was drafted precisely so as to lay down the principle, leaving the courts the necessary latitude within which to apply the principle. It would be an impossible task to define the factors that the court has to take into consideration in such a way as to provide for every possible situation in practice. It will have to be accepted that clause 3(2)(c) must be extended by case law.

22.13 One commentator suggested that the various factors listed in clause 3(2)(c) should be linked with the word "and" every time. The "and" between subparagraphs (vi) and (vii) of clause 3(2)(c) already makes it clear, however, that the court must take <u>all</u> these factors into consideration.

22.14 It was also suggested that the phrase "unless ... the court admits the hearsay evidence in terms of paragraph (c) of subsection (2)" should be omitted from clause 3(4). It was argued that the phrase might be prejudicial to parties. A party might for instance request that hearsay evidence be provisionally allowed in terms of clause 3(2)(b), not call the person on whose credibility the probative value of the hearsay evidence depends, and then rely on clause 3(2)(c) for the admissibility of the hearsay evidence. This could lead to points at issue not being properly investigated because of the person giving the hearsay evidence not being properly cross-examined on such evidence. After all, the cross-examiner would be under the impression that he would later have the opportunity of

cross-examining the person on whose credibility the evidence depends. It was also submitted that a court would be more disposed to allow hearsay evidence on the basis of clause 3(2)(b) than on the basis of clause 3(2)(c). If it appears after hearsay evidence has provisionally been allowed on the basis of clause 3(2)(b) that the person on whose credibility the evidence depends is not to be called, the hearsay evidence would already have made a certain impression on the mind of the presiding officer. In these circumstances it would be only human for the presiding officer to allow the hearsay evidence more readily in terms of clause 3(2)(c) than would otherwise have been the case.

22.15 The Commission is of the opinion that the phrase concerned should be retained. Quite possibly a witness on whose credibility the hearsay evidence depends might not be called because the circumstances have changed in such a way that he can no longer be called. The hearsay evidence could have been admissible from the start in terms of clause 3(2)(c). In such a case it would be unacceptable if the evidence could not be admitted in terms of clause 3(2)(c). It must be borne in mind that the court cannot simply act arbitrarily, but has to take certain factors into account in applying clause 3(2)(c). The Commission believes that this will restrain the presiding officer from incorrectly admitting hearsay evidence on the strength of the impression that such evidence made on him when it was provisionally admitted.

22.16 It has been suggested that clause 3(4) should also provide for the case where the person on whose credibility the probative value of the hearsay evidence depends does not testify because the opposing party has in the mean time agreed to the admission of the hearsay evidence. The suggestion has been accepted.

22.17 The observation that the phrase "person giving such evidence" in clause 3(1) might not adequately provide for written evidence prompted the Commission to take another look at clause 3(1). The Commission feels that the clause is clear because it refers to oral or written evidence.

22.18 Sections 216 (hearsay evidence) and 223 (dying declarations) of the Criminal Procedure Act should also be repealed in the light of the proposed clause 3.

23. SUMMARY OF RECOMMENDATIONS

23.1 Only recommendations requiring legislation are mentioned here. Recommendations that the status quo should remain are not repeated.

* Judicial notice of customary law and of foreign law

  . Any court should be able to take notice of the indigenous law of Blacks provided that evidence can still be adduced on the issue.

  . Courts should be able to take notice of foreign law provided that evidence can still be adduced on the issue.

* The compellability of spouses to give evidence

  . A spouse should be a competent witness against the other spouse, but not a compellable witness.

* Copies of documents

  . When a document is admissible as evidence, a copy of such document should be admissible as evidence unless the court rules otherwise.

* Marital privilege

  . Marital privilege should consistently apply to a communication between spouses made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.

* Hearsay evidence

- Hearsay evidence should be defined as evidence the probative value of which depends upon the credibility of any person other than the person giving such evidence.

- Hearsay evidence should be admissible if the party against whom such evidence is to be adduced agrees to such admission or if the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings.

- The court should have a discretion to allow hearsay evidence in certain circumstances.

ANNEXURE A

PERSONS AND BODIES TO WHOM THE WORKING PAPER WAS FORWARDED ON THE COMMISSION'S OWN INITIATIVE

Afrikaanse Handelsinstituut

Association of Building Societies of South Africa

Association of Chambers of Commerce of South Africa

Association of General Banks and Finance Houses

Association of Legal Advisers of South Africa

Attorneys-General (8)

Bar Councils (7)

Chief Justice and Judges President (7)

Clearing Bankers Association of South Africa

Committee of University Principals

Government departments:

- Commission for Administration
- Finance
- Foreign Affairs
- Health and Welfare
- Home Affairs
- Justice
- Public Works and Land Affairs
- State President's Office

Human Sciences Research Council

Journals other than law journals (5)

Justice Training

Land and Agricultural Bank of South Africa

Law Journals (25)

Law Libraries (51)

Law Societies (7)

Magistrates (306)

Magistrates' Association of South Africa

Maritime Law Association

Merchant Bankers' Association of South Africa

Minister of Justice

National States (6)

Organisation of South African Law Libraries

Provincial Administrations (4)

Public Prosecutors (306)

Regional Court Presidents (6)

Regional Magistrate A J van Wyk

Registrars of the Supreme Court of South Africa (10)

Society of University Teachers of Law

South African Federated Chamber of Industries

South African Reserve Bank

State Attorneys (6)

Union Acceptances Ltd

Universities: Faculties of Law and Institutes (18)

ANNEXURE B

PERSONS AND BODIES WHO COMMENTED ON THE WORKING PAPER

Association of General Banks

Association of Law Societies of the Republic of South Africa

Cape Bar Council

Congress of the Society of University Teachers of Law - group interested in the law of evidence

Control Instruments (Pty) Ltd

Department of Criminal Law and the Law of Procedure, University of South Africa

Department of the Law of Procedure and Evidence, Potchefstroom University for Christian Higher Education

Prof C F Eckard, University of Pretoria

General Council of the Bar of South Africa

Magistrates, East London

Magistrates, Pretoria

A Patel

Regional Magistrate A J van Wyk

South African Institute of Patent agents

ANNEXURE C

DRAFT LEGISLATION

GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate deletions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the law of evidence so as to provide for the taking of judicial notice of foreign law and of indigenous law; to regulate further the proof of copies of documents; to lay down general requirements for the admissibility of hearsay evidence; to regulate at civil proceedings communications between spouses during the marriage; to make the husband or the wife of an accused a competent witness at criminal proceedings; to regulate further at criminal proceedings communications between spouses made during the marriage; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Judicial notice of foreign law and of indige= nous law.

1. (1) Any court may take notice of foreign law and of indigenous law of the Republic or of territories which formerly formed part of the Republic in so far as such law can be ascertained readily and with sufficient certainty.

(2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a rule of law contemplated in subsection (1) which is a point in issue at the proceedings concerned.

Proof of copies of documents.

2. 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.

Hearsay evidence.

3. (1) For the purposes of this section -

"hearsay evidence" shall mean evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" shall mean the accused or party against whom hearsay evidence is to be adduced, and also the prosecution.

(2) Subject to the provisions of any other Act, hearsay evidence shall not be admitted at criminal or civil proceedings, unless -

(a) the party agrees to the admission of such evidence at such proceedings; or

(b) the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings; or

(c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(3) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(4) Hearsay evidence may be provisionally admitted in terms of paragraph (b) of subsection (2) if the court is informed that the person upon whose credibility the probative value

of such evidence depends is to testify himself in such proceedings: Provided that the hearsay evidence shall be left out of account if such person does not testify later in such proceedings, unless the hearsay evidence is admissible in terms of paragraph (a) or the court admits the hearsay evidence in terms of paragraph (c) of subsection (2).

Amendment of section 10 of Act 25 of 1965.

4. Section 10 of the Civil Proceedings Evidence Act, 1965, is hereby amended by the insertion of the following subsection, the existing section becoming subsection (1)

"(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.".

Repeal of section 11 of Act 25 of 1965.

5. Section 11 of the Civil Proceedings Evidence Act, 1965, is hereby repealed.

Amendment of section 195 of Act 51 of 1977.

6. Section 195 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The wife or husband of an accused shall /~not~/ be competent, but not compellable, to

give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with -

(a) any offence committed against the person of either of them or of a child of either of them;

(b) any offence under Chapter III of the Children's Act, 1960 (Act 33 of 1960), committed in respect of any child of either of them;

(c) any contravention of any provision of section 11(1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;

(d) bigamy;

(e) incest;

(f) abduction;

(g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17

or 20 of the Immorality Act, 1957 (Act 23 of 1957), or, in the case of the territory, of any provision of section 3 or 4 of the Girls' and Mentally Defective Women's Protection Proclamation, 1921 (Proclamation 28 of 1921), or of section 3 of the Immorality Proclamation, 1934 (Proclamation 19 of 1934);

(h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;

(i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h),

/ **and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any**

offence against the separate property of the wife or of the husband of the accused, or with any offence under, in the case of the territory, section 1 or 2 of the said Immorality Proclamation, 1934_7.".

Amendment of section 196 of Act 51 of 1977.

7. Section 196 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence.".

Substitution of section 198 of Act 51 of 1977.

8. Section 198 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) The provisions of subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.".

Repeals.

9 Section 216 and section 223 of the Criminal Procedure Act, 1977, are hereby repealed.

Short title and commencement.

10. This Act shall be called the Law of Evidence Amendment Act, ..., and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.