



10 October 2011

C62, 72.21, 79.12  
RB;rp

The Honourable Stephen Wade MLC  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Mr Shadow Attorney-General

***Evidence (Hearsay Rule Exemption) Amendment Bill 2011***

I refer to an email from your adviser, Mr Biar, dated 20 September 2011 and thank you for referring the above Bill to the Society. The Bill has been considered by the Society's Criminal Law Committee and accordingly we provide the following comments.

***Section 34LA(5)(b)(ii)***

We do not support this provision. It mandates a comment from the trial judge to the jury in the event the alleged victim gives evidence inconsistent with the out of court statement. The comment the judge must make is that there may be good reason for the inconsistent recollection and that the mere fact of the inconsistency is not a reason to find that the out of court statement was not made.

In fact, there may be no good reason for the inconsistent recollection. Indeed, the only reason for it could be that the out of court statement was fabricated or that there is a genuine mistake about the identity of the assailant. Section 34LA(5)(b)(ii) goes too far to attempt to overcome a perceived problem in prosecuting such matters. It is liable to have the effect of the jury convicting on an untruthful or unreliable account by the alleged victim. There is therefore a substantial risk of a miscarriage of justice because of the provision.

Parliament ought not legislate to make it easier for the State to secure a conviction where there is an inherent risk that that conviction might be unsafe. We view s34LA(5)(b)(ii) in this light.

Where the alleged victim lies about the commission of the offence, or is mistaken about the identity of the assailant, and thereby gives an account in evidence which is inconsistent to the out of court statement, that evidence should be assessed by the jury in the usual way. The evidence should not attract a comment from the trial judge which could only tend to validate what is otherwise discreditable or unreliable evidence.

Section 34LA(5)(b)(ii) seeks to diminish the effect, in the eyes of the jury, of certain inconsistencies in the evidence of a vulnerable witness which may emanate from the vulnerability itself but which does not detract from the probity of the out of court statement (and therefore the prosecution case). The flaw in s34LA(5)(b)(ii), however, is that its scope will inevitably capture discreditable evidence which should justifiably lead to a real doubt about its probative value. In such a case it would be wrong for the judge to comment to the jury in a manner which tends to legitimise the discreditable evidence.

This provision tips the balance too far in favour of a conviction and should, we submit, be deleted.

We do not oppose s34LA(5)(b)(i). That provision will play its part in overcoming a perceived unfairness working against the prosecution. Where there is an inconsistency, that should be dealt with in the usual manner by the adversarial process. Counsel will make submissions, the trial judge will sum up and the jury will apply their time honoured common sense in assessing whether the inconsistency was of any moment. The evidence of a child, for example, which cannot be shaken on the assault and the identity of the assailant, but is inconsistent on so-called peripheral issues, may well be accepted and form the basis of a conviction.

Not only is s34LA(5)(b)(ii) a dangerous provision in that it will tend to cause miscarriages of justice, but it is unnecessary.

### **Section 34LA(6)**

We do not support this provision where the defendant has had an opportunity to cross-examine the alleged victim but has elected not to for forensic reasons. It follows, therefore, that we believe that:

- s34LA(6)(b) should be deleted; and
- s34LA(6)(a) should only apply where the defendant has not had an opportunity to cross-examine the alleged victim or effective cross-examination could not take place.

If any witness is presented for cross-examination but is not cross-examined by choice, then the evidence of the witness should not be the subject of a warning that it has not been tested. It would be far too easy for the defendant to elect, for tactical reasons in order to gain an advantage, not to cross-examine if a warning would follow the failure to cross-examine. The same should apply to an alleged victim to whom s34LA applies.

We accept that there will be occasions when the difficulties created by cross-examining a vulnerable witness are so great so as to, in effect, leave the defendant with little choice but to decline to cross-examine. In those cases s34LA(6) should allow for the trial judge, on application by the defendant, to give such a warning where the judge is satisfied that it is in the interests of justice to do so (because effective cross-examination could not take place).

In its current form, the scope of s34LA(6) extends well beyond what we believe was (or should be) the intended reach of the provision and, as a result, will lead to an unfair advantage to the defendant.

I trust these comments are of assistance. Please do not hesitate to contact me, should you have any questions in relation to this response.

Yours sincerely



Ralph Bönig  
**PRESIDENT**