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FILE No. C.27

MEMORANDUM RE UNSWORN STATEMENT

TO: S. CHARLES
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FROM: M. WEINBERG

DATE: 6 AUGUST, 1986

THE Crimes Act 1900, Section 405 (1) permits every accused person to make an unsworn statement at the close of the case for the prosecution. This provision is based upon the old common law rule that accused persons could not testify on oath. Nor were they entitled to be represented by counsel on charges other than misdemeanours until 1695 in treason cases, and 1836 in felony cases.

The harshness of these rules was softened very slightly by permitting all unrepresented accused persons to answer the charge in their own words. A practice arose of permitting the accused to make a statement, not on oath, from the dock, rather than from the witness box. The rationale for this practice was the need to make some inroad into the rule that the accused could not testify. In England, the Criminal Evidence Act 1898 (U.K.) conferred on the accused for the first time the right to give sworn evidence. It might have been thought that the necessity of the unsworn statement would have eased from then on. However, the right to make an unsworn statement was expressly retained in the legislation. In New South Wales, the right to testify was granted to persons charged with indictable offences in 1891. The right to make an unsworn statement was retained.

Section 405 (1) provides that an unsworn statement is to be made at the close of the prosecution case, and before any defence witness is called. The statement must be oral, and there is conflicting authority on the question whether it may be read. It is open to an accused person in New South Wales both to make an unsworn statement, and give sworn evidence in the one proceeding.

It seems plain that in New South Wales the unsworn statement is deemed to have evidentiary value, at any rate on behalf of the accused who makes it. It is part of the material before the jury, and can be used to prove facts in issue.

While it is true that in practice considerable latitude is allowed to accused persons in making statements from the dock, this is no doubt due to practical considerations. The Judge is not aware of what is to be included within the statement. There is a practical difficulty about exercising control over the content of any statement. When an unsworn statement substantially breaches an important rule of evidence, the Judge may intervene. On occasion, an accused has been prevented from reading to the jury a document which contained hearsay. Matters totally irrelevant may also be excluded.

The fact that an accused can not be cross-examined regarding the contents of his statement means that it can not be used against a co-accused person. Nor can it be used as evidence in favour of another co-accused.

It seems that prior to the abolition of unsworn statements in England in 1983, the practice of making them had declined. In New South Wales their use is much more common. It may be that in those States where the making of unsworn statements has declined in Australia, this situation may be attributed to the strength of judicial disapproval of such statements in those States, and the forceful comments made by Judges to juries expressing such disapproval.

The main arguments in favour of retention of unsworn statements may be summarised as follows:

(a) There is no evidence that guilty persons are escaping by use of these statements.

(b) Many accused persons are so incapable of expressing themselves adequately that, whilst they can repeat a prepared statement from the dock, they can not withstand skilled cross-examination without creating the false impression that they are lying.

(c) Cross-examination of an accused, no matter how properly conducted, could without offending as an attack on character, raise as going to credit matters personal to the accused and to his detriment but having nothing to do with the charge.

The main arguments in favour of abolition of unsworn statements may be summarised as follows:

(a) The right is an historical anachronism.

(b) It is a significant departure, and the only one, from a system based on the principles of evidence, and examination and cross-examination.

(c) It allows the professional criminal to lie without the appropriate test applied to other witnesses, to introduce irrelevancies, and in other ways to obscure the court's search for the truth.

(d) The incompetent or incapable accused is unlikely to be prejudiced by giving sworn testimony. A jury will make an assessment of him, and will make due allowance for his incapacities.

For many years, judicial complaints have been expressed regarding the use, or abuse, of the dock statement. Certainly a substantial body of respectable legal opinion would hold that the right to make an unsworn statement has so often been abused in practice that it should be abolished. A recent example of strong judicial criticism being levelled at the unsworn statement is to be found in R. v. Lane [1983] 2 V.R.449, per Fullagar J. In Lane, there was gross abuse of an unsworn

statement in that it was cleverly contrived to skate over a great many matters which required precise elucidation.

A more recent example of judicial criticism of the abuses emanating from unsworn statements is to be found in the decision of the Victorian Court of Criminal Appeal in R. v. Sorby (unreported, 1986). In that case the accused had spoken for almost four days during the course of a meandering unsworn statement which contained much that was irrelevant and inadmissible.

Whatever the merits or demerits of unsworn statements, the question whether it is appropriate for a Justice of the High Court of Australia to make use of such a facility during the course of a criminal trial is one which must be considered as a separate matter. What inferences would the ordinary member of the community draw from this judge's refusal to give sworn evidence at his second trial? What lesson would be learned from the fact that his giving sworn evidence at the first trial lead to a conviction, while the unsworn statement lead to an acquittal?

The right to make an unsworn statement does not exist in Western Australia. It was abolished in New Zealand. It has been abolished in England. It has been recommended that it be abolished in South Australia. It has been significantly modified in Victoria. It never existed in the United States, nor in Canada. It does not exist in Scotland. There are numerous examples of strong judicial criticism of the existence of the right.

There are some judges who support its rention, but they would be few indeed. In these circumstances, can it be said that the judge is guilty of misbehaviour (in the relevant constitutional sense) because he availed himself of this right?

The fundamental question is whether the community expects, and is entitled to expect, higher standards of behaviour from

its judicial officers than from all other persons. Is conduct which would not be regarded as improper if carried out by ordinary members of the community to be regarded as improper if performed by a Judge? And if the answer to that question is yes, at what point does such conduct move from the area of imprudence or impropriety into the realm of constitutional misbehaviour justifying removal from office.

Some Judges hold that their conduct must always be like that of Caesar's wife, above any reproach. They will not, for example, be seen drinking in pubs. They will be scrupulous about paying their debts long before they fall due in order to ensure that no breath of scandal touches them. Some years ago a number of Victorian Supreme Court Judges expressed strong views to the effect that one of their brethren who had married the divorced wife of another sitting Judge should resign. It may be apocryphal, but it is said that English Judges formerly declined to travel on buses!

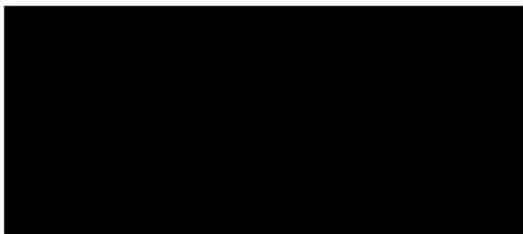
Times change, and so do perceptions and appropriate standards of behaviour. Today homosexual conduct (if consensual, and conducted in private) is not seen by many to be a factor which would necessitate a Judge's resignation from a Court. Nor is adultery, or fornication. These are regarded as being within the realm of private morality, rather than in the public domain.

By making an unsworn statement at his second trial, the Judge brought into question his motivation in electing to take that course. Was he apprehensive that his story could not withstand cross-examination? Was he concerned about the consequences of putting his character in issue, and being cross-examined as to matters of character? Should a High Court Justice be so concerned?

While it is impermissible in law to draw adverse inferences against a person for making an unsworn statement, the Judge must

have been aware that as a matter of ordinary common sense such inferences are regularly drawn. His action in making an unsworn statement in response to a prima facie case of guilt brought him into disrepute in the eyes of many of his professional brethren. The Judge might reply that he acted on legal advice. The decision was his own. From the perspective of what was in his own best interest as regards the outcome of the trial, the Judge plainly made the correct decision. From the perspective of the interests of the High Court, his decision was one which lessened the respect in which one of its Justices was held in the community, and therefore diminished the court itself.

On the other hand, what the Judge did was neither more nor less than what the law entitled him to do. Section 405 draws no distinction between Judges of the High Court and other members of the community. It requires one to move a long way in the direction of an extraordinarily wide definition of misbehaviour to describe the Judge's conduct as falling within this description.



Mark Weinberg
6.8.86

0178M

ALLEGATION NO 14

Copy of allegation delivered 17/7

Particulars of Allegation

During June and July of 1985, the Honourable Lionel Keith Murphy, a Justice of the High Court of Australia, was tried before Cantor J. and a jury in the Supreme Court of New South Wales on an indictment containing two counts. Both counts charged the Judge with breaches of Section 43 of the Crimes Act 1914 (Cth). The Judge's trial began on the fifth day of June, and ended on the fifth day of July. The Judge gave evidence on oath in his own defence. On the fifth day of July the jury returned verdicts of guilty on the first count and not guilty on the second count.

Thereafter, the Judge appealed to the New South Wales Court of Criminal Appeal, and certain questions of law were reserved for consideration by the New South Wales Court of Appeal arising out of his conviction. On the eighteenth day of November 1985, their Honours delivered judgment, and ordered that the Judge be retried on the count upon which he had been convicted previously.

On the fourteenth day of April 1986, the retrial of the Judge upon that count commenced before Hunt J. and a jury in the

Supreme Court of New South Wales. The Crown case concluded on the twenty-first day of April. A submission that there was no case to answer was made on behalf of the Judge, but that submission was rejected by the trial Judge. Counsel for the Judge then stated that he did not wish to open the defence case, but told the Court that the Judge would make a statement to the jury. The Judge did make such a statement pursuant to Section 405 of the Crimes Act 1900 (NSW).

In the course of that statement, the Judge said, "the next time I met him (i.e. Mr Briese) was on Saturday 23 April 1983. This was fifteen months after I am supposed to have said something wrong or criminal to him - fifteen months after. It was at the Academy of Forensic Science Seminar at the University of New South Wales."

The Judge then went on to mention lunch, and he continued:

"...after the lunch I was just starting to walk back with someone else and Mr Briese came over and greeted me and joined us and I introduced the other person and then we walked, strolled, all the way up to the Lecture Room, about one hundred yards. It was for about three or four minutes he chatted away to me. Now, I thought he was very friendly to me, I just

cannot understand - to my mind he could not have been nicer to me, and this was after I am supposed to have invited him to do something criminal, to undermine, to subvert the justice, and pervert the course of justice."

The Judge, by including these remarks in his statement suggested to the jury that the conduct of Briese in April 1983 was inconsistent with the alleged act of criminality on the part of the Judge having taken place, and that Briese's allegations against the Judge had been invented by Briese after that meeting in April 1983.

The Judge, through his Counsel, had previously disavowed any suggestion that there had been an allegation of recent fabrication made during the course of the cross-examination of Briese. This disavowal was made expressly, and in terms. By including in his statement the imputation that Briese had recently fabricated his allegations against the Judge, the Judge deliberately and wilfully violated the principles laid down in Browne v Dunn (1893) 6 R 67. The consequences of this were that -

a) Briese was unfairly deprived of the opportunity of supporting his credibility and

b) the Crown was unable to adduce evidence in support of its case which would have been relevant and admissible, had there been compliance with the rule.

It will be contended that the conduct of the Judge -

a) in making a statement pursuant to Section 405 of the Crimes Act 1900 (NSW);

b) in deliberately and wilfully including in his statement the imputation that Briese had recently fabricated his allegations against the Judge, in circumstances where the Judge's Counsel had expressly and in terms disavowed any such suggestion;

amounted to misbehaviour within the meaning of Section 72 of the Constitution in that it constituted conduct contrary to accepted standards of judicial behaviour.

It will also be contended that the conduct set out in a) above constituted misbehaviour in the following further respects -

a) putting his own interests above the standing and esteem of the Court of which he was a member;

b) bringing himself, a Justice of the High Court of Australia, and thereby that Court, into disrepute.

Extract from Weinberg/Phelan Memorandum
dated 3 July 1986 (full copy on File C51

ALLEGATION NO. 14 - THE UNSWORN STATEMENT

There is no investigation required of this allegation. It seems to us that it cannot properly be regarded as a basis for a finding of proved misbehaviour. Accordingly we would recommend that the attention of the Commissioners be drawn to the fact that some have argued that the fact that the Judge made an unsworn statement warrants his removal but that Counsel assisting do not regard this as being an appropriate matter for further consideration.

0047M

Brown v Dunn point

put to him, you may think it is of little if any assistance to you.

It was also put to Mr Briese that he had made no written note of any of these conversations with the accused until two years and four months after the event. That brought it up to the Senate inquiry into the Age tapes. It was put that, not having made any note of these conversations, Mr Briese should not be accepted as a reliable witness. Mr Briese agreed that he had made no note, although he did say that he had often spoken to other people about these matters. The absence of a note, of course, was relied upon by the accused himself as demonstrating that he had some difficulty in recalling the precise terms of these conversations, and you may think that it is a justifiable comment to be made about both of them that the absence of any note having been taken by them immediately after the conversation must affect the quality of their recollections.

The final matter relating to the credit of Mr Briese as a witness unfortunately was never put to him in cross-examination and consequently, I suggest to you, it should never have been put to you. In his statement the accused, having denied saying anything to Mr Briese about his little mate in that last conversation at the end of January, went on to describe to you a further occasion when he met Mr Briese. He made the point, as is conceded by Mr Briese himself, that there was no suggestion of any further mention of Morgan Ryan at that meeting, notwithstanding the fact that Morgan Ryan had not then been committed for trial.

That was a perfectly proper point to make and I make no criticism about it. It is a point that you have to take into account.

The accused also made the point, which was also a perfectly proper one, that he had no idea at the time that - years later, out of the blue - it would be suggested that he had done something wrong, and so for that reason had difficulty in meeting the allegation because he, like Mr Briese, had made no note of the conversations in question. Those, as I say, were perfectly proper points to make. What weight you give to them is a matter for you.

But, in the course of making those points, the accused said this to you:

"The next time I met him,"

that is, Mr Briese:

> "was on Saturday 23 April 1983. This was fifteen months after I am supposed to have said something wrong or criminal to him - fifteen months after. It was at the Academy of Forensic Science Seminar at the University of New South Wales."

The accused then went on to mention lunch, and he continued:

> "... after the lunch I was just starting to walk back with someone else and Mr Briese came over and greeted me and joined us. I introduced the other person and then we walked, strolled, all the way up to the lecture room, about a hundred yards. It was for about three or four minutes he chatted away to me. Now, I thought he was very friendly to me, I just cannot understand - to my mind he could not have been nicer to me, and this was after I am supposed to have invited him to do something criminal, to undermine, to subvert the justice, and pervert the course of justice."

That statement, you may think, goes a long way further than merely explaining the difficulties which the accused may be having in meeting the allegations when they come out of the blue some two

and a half years after the conversations in question. That statement, you may think, is suggesting pretty clearly that, because Mr Briese was still so friendly towards the accused fifteen months after the conversations in which he is alleged to have invited Mr Briese himself to commit a crime, these allegations which were not made until just a year after this event out at the University of New South Wales had been invented by Mr Briese.

It is a matter for you how you understood it. It is, of course, always a matter for you how you understand anything that is said of that nature in this Court, but you may think that that is what the suggestion was, that that is what the accused was saying to you - not directly, of course - but indirectly, making that suggestion to you. It would, however, produce a grave unfairness in this trial if you took any notice of such a suggestion - whether or not it was ever intended in that way by the accused.

A trial like this, indeed any trial, has certain rules by which it is conducted. Mostly, I think it is correct to say, those rules are based upon simple fairness to the people involved in that trial - not only the accused but also the witnesses called by the Crown.

One of those rules is that, where a suggestion such as that is intended to be put to the jury, the witness against whom the suggestion is made must first be given the opportunity to deal with that suggestion. That is, you may think, only basic to fair play. The witness must be given the opportunity to deny the suggestion on oath and to explain it in a way which takes the sting out of that suggestion. He must be given the opportunity to give other evidence, if necessary, which would explain or lessen

its effect. In the present case, all manner of denials or explanations may have been possible if counsel for the accused had put directly to Mr Briese the suggestion which you may think was conveyed by the accused in that statement which he made. But Mr Briese was never given the chance to make that denial or to give that explanation.

There was never any suggestion made to Mr Briese in cross-examination that he invented these allegations a long period after the events themselves. There was never any question put to him in cross-examination which would have opened up this question of why he waited nearly two and a half years to make the allegations. Counsel for the accused, you may think, was scrupulous not to do so. In any event, he never gave Mr Briese the opportunity to explain the reason for the delay or the reason why his conduct in April 1983 was inconsistent with the accused having made an improper suggestion to him fifteen months earlier. You do not know what that explanation is or might be, because Mr Briese was not given that opportunity to explain. He should have been given it if these suggestions were going to be made. You are not permitted to speculate as to what event it was in 1984 which caused Mr Briese perhaps to see a significance in these conversations which he may not have previously seen. Such speculation is just not permitted. That is why the opportunity should have been given to Mr Briese to explain these matters in evidence.

The rule is that, where that chance to explain has not been given to a witness, the suggestion which he may have been able to deal with had he been given that chance should not later be made to the jury, because it is simply unfair to the witness to permit

that suggestion to be made. I therefore direct you that it was not open to the accused to make that suggestion to you, that the conduct of Mr Briese in April 1983 was inconsistent with the "What about my little mate?" conversation having taken place, and that his allegations against the accused had been invented by Mr Briese subsequently to that meeting in April 1983. I direct you that you should not give any weight to that particular argument.

The problem unfortunately does not end there, for it was to some extent compounded, or made worse, by repetition by Mr Barker in his final address. At the very outset of that address, Mr Barker submitted to you that you were being asked to find criminal conduct on the part of the accused in having made this "What about my little mate?" remark, notwithstanding that Mr Briese had not said a word of protest or complaint. Shortly thereafter, he repeated his client's suggestion. What he said was that you are expected to accept that the accused had acted criminally towards Mr Briese when, a little over a year later in April 1983, Mr Briese had joined the accused, greeting him in an ordinary friendly manner. This, it was said to you, was the Mr Briese to whom the accused is supposed to have made a proposition to commit a serious crime. He then drew attention to the fact that the bombshell did not drop for more than another year. Mr Barker did go on, after a significant pause, to draw attention to the difficulties which the accused faced in recalling what was really said when the accusation suddenly came out of the blue, years after the event. However, the suggestion there, you may think, was again pretty clear, that the conduct of Mr Briese was inconsistent with the "What about my little mate?" conversation having taken place, and that his allegations against the accused had been invented by

Mr Briese at some time after this meeting in April 1983.

Once again, members of the jury, it would produce a grave unfairness in this trial if you took any notice of such a suggestion - whether or not it was intended by Mr Barker and whether or not it was intended by the accused. The suggestion, if you thought that is what was being made, must be ignored by you. I direct you that it was not open to either the accused or Mr Barker to make those suggestions to you, and you must not give any weight to that particular argument.

(Further hearing adjourned to 10.00 am Thursday, 24 April 1986)

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to have referred to Mr Ryan in those terms. Nevertheless, that was not the basis of Mr Barker's complaint. His complaint was simply that reliance upon a positive habit of speech was prohibited by the decision of the Court of Appeal. I do not see why evidence of the accused having called Mr Ryan his "little mate" on other occasions (whatever they may have been) would not have been admissible (if available) had the accused taken up such an issue. There is nothing in the judgment of the Court of Appeal to suggest to the contrary. There is a world of difference between proof of a positive habit of speech and proof of a negative habit of speech. It was a matter for the jury whether any weight should be given to whatever similarity there may be amongst the three expressions said by the Crown prosecutor to be "all of a piece". This objection must also be rejected.

That concludes my reasons for rejecting the application made on Wednesday to discharge the jury because of what the Crown prosecutor had said in his final address. I can dispose more speedily of the application made on Thursday to discharge the jury because of what I said in my summing up.

The objection was to the Browne v Dunn direction which I gave at the end of the previous day concerning the suggestion of recent invention. It was submitted that the Crown had not made any complaint concerning any suggestion of recent invention which may have been understood as having been made by the accused in his unsworn statement, and that the Crown had not asked me to give such a direction. It was also submitted that - if what the accused said had amounted to a

suggestion of recent invention (which was denied) - the Crown would have been entitled to a case in reply to call Mr Briese to deal with that suggestion, and its failure to exercise that right to have the situation cured at that stage denied the propriety of the direction which I gave. It was said that such was the prejudice it created that the jury had to be discharged.

The history of the matter may be stated shortly. At the conclusion of his cross-examination of Mr Briese, Mr Barker stated (in the absence of the jury) that the accused had raised no suggestion of recent invention, and that Mr Briese should not be permitted to give evidence of how he came to make the allegations against the accused for the first time almost two and a half years after the event. It was said that, unless Mr Briese were controlled, evidence which was unresponsive but nonetheless prejudicial may emerge. Accordingly, Mr Briese did not give evidence of why he made the allegations against the accused for the first time so long after the event.

In the course of his unsworn statement, the accused referred to his meeting with Mr Briese in April 1983 and drew attention to how Mr Briese, who was alleging that he had invited him to do something criminal fifteen months earlier, was so friendly towards him, and how these allegations had not been made by Mr Briese until just over a year after that meeting. That was, as I later said to Mr Barker, the clearest suggestion of recent invention. This suggestion was a matter which I raised with Mr Barker myself before the addresses.

I did not accept the explanation proffered by Mr Barker, that this was dealing with the difficulties which the accused had experienced in meeting the allegations when he had had no warning that they would be made so long after the event. I stated that it was only fair that I should deal with it in my summing up to make it clear that the jury should not use that part of the accused's unsworn statement as a basis for disbelieving Mr Briese. The Crown prosecutor then said (at p 277):

> "The point you specifically raised with my friend, I will, in addition, be submitting in relation to that - I want to make it clear at this stage - there is an Allied Pastoral point involved in this."

The reference there was to Allied Pastoral Holdings Pty Ltd v FCT [1893] 1 NSWLR 1, which discussed in some detail the case of Browne v Dunn (1894) 6 R 67.

It is thus clear that the Crown did make a complaint and did ask me to give a Browne v Dunn direction. As to the point that the Crown would have been entitled to a case in reply by reason of the late suggestion of recent invention, it does not take much imagination to see what the principal ground of appeal would have been had I permitted the Crown a case in reply in those circumstances, notwithstanding what clearly enough appears to have been a deliberate plan to avoid permitting Mr Briese to explain what it was that finally led him, two and a half years later, to perceive the real purpose of the "what about my little mate?" remark. Rebutting a suggestion of recent invention is not the same as rebutting evidence of an alibi, as Mr Barker suggested: cf Killick v The Queen (1981) 37 ALR 407. It is not evidence which the Crown could have led in its case from Mr Briese in chief, only in re-examination.

If it were to be given a case in reply, its effect would have been greatly inflated and - bearing in mind its highly prejudicial effect in any event - the accused would no doubt have been successful in opposing leave to call such a case in reply.

But the Crown was entitled to a <u>Browne v Dunn</u> direction whether or not it could have obtained leave to call a case in reply. The accused through its counsel had expressly disclaimed any suggestion of recent invention. This was done deliberately in the absence of the jury. Even if the suggestion of recent invention had been made inadvertently and unintentionally (which I doubt), the Crown is entitled to have the accused limited to the stand which he had taken and it should not be obliged to litigate an issue which the accused had in such a formal manner disclaimed.

It was for these reasons that Thursday's application to discharge the jury was rejected.

I certify that this and the 13 preceding pages are a true copy of the reasons for Judgement herein of The Honourable Mr. Justice Hunt.

[redacted] Associate

Dated 28-4-86.