detect and alert the Parliament to possible breaches of individual rights and liberties, and to provide ministers with the opportunity to argue why they consider such breaches to be necessary. The second recommendation of the Committee is the amendment of the *Interpretation Act 1987* so as to allow judges to consider international human rights instruments in trying to understand legislation where the meaning is ambiguous. The majority of the Committee noted in relation to this recommendation that[13]:

> Judges currently have this option in any case under common law statutory rules of interpretation. This amendment provides parliamentary endorsement of the common law position.

Peter Breen MLC, while supporting the recommendation, made these comments[14]:

> I wonder about the value of such a provision in the absence of a Bill of Rights. What benchmark would the judges use to decide a question of human rights that was not part of domestic law for example? Many treaty laws are subscribed to by the executive government with little or no scrutiny by the legislature.

The Committee's report would appear to have moved the question of a Bill of Rights off the present NSW Parliament's agenda. Advocates for a Bill of Rights may now have to look to the federal sphere to achieve their aims.

1 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p 114.

2 Peter Breen's Dissenting Report is published as Appendix 9 to the Report.

3 Ibid p xiii.

4 Ibid, p xiv.

5 Ibid, p 43.

6 Ibid, Appendix 9, p 1.

7 Ibid, Appendix 9, p 3.

8 (1982) 153 CLR 168.

9 (1983) 158 CLR 1.

10 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, Appendix 9, pp 3-4.

11 Ibid, pp 5-9.

12 *Canadian Charter of Rights and Freedoms*, section 1.

13 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p xiv.

14 Ibid, Appendix 9, p 1.

Recent High Court criminal cases

by Christopher O'Donnell

Adam v The Queen – [2001] HCA 57 (11 October 2001)

The appellant was charged with the murder of an off-duty police constable, David Carty. During the trial the prosecution led evidence from Thaier Sako, who had been wounded during the events that culminated in Carty's death. Three days after the murder Sako declined to be interviewed by police. He was charged with Carty's murder the next day. Six weeks later he requested an interview with police, which took place shortly afterwards. The interview was recorded and about a fortnight later the appellant was charged with Carty's murder. Some time afterwards Sako participated in another recorded interview with police and two weeks later the murder charge against Sako was dropped.

During the eighth week of the appellant's trial the prosecution granted Sako a conditional immunity from prosecution for any common assault or 'any associated offence' *except* murder in relation to evidence he might give in the trial. By the time Sako was called as a witness in the trial itself it was apparent that his testimony would be that his evidence of the events was based on what he had been told by others after those events. During his first full interview with the police he had stated that he was recalling his own observations. The trial judge granted Sako a certificate under s128 of the *Evidence Act 1995* preventing any evidence he gave from being used against him in a prosecution for offences other than perjury. He also allowed the prosecution to cross-examine Sako as an unfavourable witness pursuant to s38 of the Evidence Act. The trial judge admitted as evidence of the truth of their contents Sako's prior inconsistent statements to police during his first full interview.

A majority of the High Court, comprising Gleeson CJ, McHugh, Kirby and Hayne JJ. held that the prior inconsistent statements in the interview were properly admitted. Although the prior inconsistent statements were relevant to Sako's credibility they could also rationally affect (in at least some respects directly, and in others indirectly) the assessment of the probability of the existence of several of the facts in issue in the trial. Consequently they were relevant to issues apart from Sako's credibility. As the statements were relevant not *only* to Sako's credibility the credibility rule in s102 of the Evidence Act did not exclude the statements. As the evidence was relevant to Sako's credibility and to some of the facts in issue, it was relevant for a non-hearsay purpose. It therefore fell within the exception to the hearsay rule provided by s60 of the Evidence Act and was admissible as evidence of the truth of the contents of the statements.

In her dissenting judgment Gaudron J held that because the trial judge did not consider that Sako's prior inconsistent statements were potentially unreliable, his Honour erred in the exercise of his power to grant leave to the prosecution under s38 of the Evidence Act to cross-examine Sako. Further, because the grant of leave necessarily resulted in the admission of potentially unreliable evidence that could not effectively be tested, leave should not have been granted.

Smith v The Queen – (2001) 181 ALR 354

The appellant was tried for bank robbery in New South Wales. Bank security photographs allegedly showing the appellant were tendered. The appellant denied being in the photographs. Two police officers each gave evidence about previous dealings with the appellant and recognising him in the photographs.

The majority, comprising Gleeson CJ, Gaudron, Gummow and Hayne JJ defined the fact in issue to be 'Is the person standing trial the person who is depicted at the right-hand side of some of the photographs tendered in evidence?'

The majority held that the police conclusion that the appellant was in the photographs was based on information similar to the material available to the jury – i.e. the photographs and the appearance of the appellant. Therefore, the police conclusion did not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact. The jury had probably spent more time in the appellant's presence by the end of the trial than the police had prior to it. For these reasons the police identification evidence could not rationally affect the assessment by the jury of the question in issue and did not satisfy the relevance test in s55 of the *Evidence Act 1995*.

In cases where the facts in issue extend beyond the narrow question of whether the accused is the person depicted in a photograph the majority said identification evidence might be relevant. One example is whether an accused owned a jacket of the kind that the offender depicted in security photographs of a robbery was shown to be wearing. Another is where it is suggested that the appearance of an accused, at trial, differs in some significant way from the accused's appearance at the time of the offence. In the latter case, evidence from someone who knew how the accused looked at the time of the offence, that the photograph depicted the accused as he or she appeared at *that* time, would be relevant. But in these cases the opinion rule in s76 of the Evidence Act and the general discretions under s135 and s137 might restrict admissibility.

Kirby J held that the police evidence was relevant but inadmissible as a lay opinion upon a subject about which the members of the jury were required to form their own opinion.

Brownlee v The Queen (2001) 180 ALR 301

The applicant was tried on indictment in the District Court of New South Wales for the Commonwealth offence of conspiracy to defraud the Commonwealth contrary to s86A of the *Crimes Act 1914* (Cth). In the trial s68 of the *Judiciary Act 1903* (Cth), subject to s80 of the Constitution, applied to pick up the relevant provisions of the *Jury Act 1977* (NSW).

Section 80 of the Constitution provides, *inter alia*, that 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury…'.

Although the applicant's trial was conducted before a judge and jury, in accordance with the Jury Act, the applicant argued that his trial was not 'by jury' within the meaning of s80 of the Constitution for two reasons. The first was that two of the original twelve jurors were discharged during the course of the trial in accordance with s22(a)(i) of the Jury Act and the (unanimous) verdict was of the remaining ten jurors only. The second was that in accordance with s54(b) of the Act the members of the jury were permitted to separate after they retired to consider their verdict.

The Court, comprising Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, applied contemporary standards for the conduct of trial by jury to the interpretation of s80 of the Constitution and held that neither of the challenged provisions of the Jury Act was contrary to s80. Each judgment distinguishes the challenged provisions from those in some States which allow for majority verdicts. The Court affirmed its earlier decision in *Cheatle v R* (1993) 177 CLR 541 that such provisions are contrary to s80 and any jury verdict for a Commonwealth offence in any State or Territory court must be unanimous.

In their joint decision, Gaudron, Gummow and Hayne JJ said that a real question remained as to whether it is consistent with s80 of the Constitution to continue a trial on indictment for an offence against a law of the Commonwealth where a jury of 12 has been reduced below 10, as provided in s22(a)(iii) of the Jury Act.
