



**Australian Government**  
**Australian Law Reform Commission**



**NSW**  
**Law Reform**  
**Commission**



**Victorian**  
**Law Reform**  
**Commission**

# Uniform Evidence Law

R E P O R T

ALRC REPORT 102  
NSWLRC REPORT 112  
VLRC FINAL REPORT  
December 2005

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Victorian Law Reform Commission

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**Australian Government**

**Australian Law Reform Commission**

The Hon Philip Ruddock MP  
Attorney-General of Australia  
Suite MF 21  
Parliament House  
Canberra ACT 2600

5 December 2005

Dear Attorney-General,

***Review of the Evidence Act 1995***

---

On 12 July 2004, the Commission formally received a reference from you, pursuant to section 20 (1) of the *Australian Law Reform Commission Act 1996*, to undertake a review of the operation of the *Evidence Act 1995*.

This inquiry was conducted in association with the New South Wales Law Reform Commission and the Victorian Law Reform Commission. A consultative relationship was also established with the Tasmania Law Reform Institute, the Northern Territory Law Reform Committee, the Law Reform Commission of Western Australia and the Queensland Law Reform Commission.

On behalf of the Members of the Commission who have been involved in this reference, including Justice Susan Kenny, Justice Susan Kiefel and Justice Mark Weinberg, and in accordance with section 21 of the *Australian Law Reform Commission Act 1996*, we are pleased to present to you the final report in this reference: *Uniform Evidence Law* (ALRC 102, 2005).

Yours sincerely

A handwritten signature in dark ink, appearing to read 'David Weisbrot'.

Professor David Weisbrot  
President

A handwritten signature in dark ink, appearing to read 'Les McCrimmon'.

Associate Professor Les McCrimmon  
Commissioner in charge

A handwritten signature in dark ink, appearing to read 'Brian Opeskin'.

Brian Opeskin  
Commissioner



# **NEW SOUTH WALES LAW REFORM COMMISSION**

## **Letter to the Attorney General**

To the Honourable Bob Debus MP  
Attorney General for New South Wales

Dear Attorney

### **Review of the Uniform Evidence Acts**

We make this Report pursuant to the reference to this Commission received  
2 July 2004.

A handwritten signature in black ink, appearing to read 'M Adams', is positioned above the printed name of the Chairperson.

The Hon Justice Michael Adams  
**Chairperson**

### **Commissioners**

The Hon Justice Michael Adams  
Judge Christopher Armitage  
Mr Jim Bennett SC  
Acting Judge Angela Karpin  
Professor Michael Tilbury  
Hon Greg James QC

**November 2005**



## Victorian Law Reform Commission



5 December 2005

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Dear Attorney-General

### **Uniform Evidence Law: Report**

On 22 November 2004 the Commission received a reference from you under the *Victorian Law Reform Commission Act 2000* on evidence law. The reference required the Commission to consider whether the existing provisions of the Uniform Evidence Acts required modification before its introduction in Victoria. This review is unique in that it was to be undertaken in collaboration with the review already being undertaken by the New South Wales Law Reform Commission and the Australian Law Reform Commission.

On behalf of the Commission we are pleased to provide for your consideration the final report in this reference: *Uniform Evidence Law: Report*.

The terms of reference also require the Commission to consider the action required to facilitate the introduction of the Uniform Evidence Act into Victoria. We will provide you with a separate Implementation Report in early 2006.

In a letter dated 10 August 2005 you requested that the Commission consider the recommendations of the Office of Police Integrity in its report entitled *Review of the Victoria Police Witness Protection Program*. This will be addressed in the Implementation Report.

Yours sincerely

Professor Marcia Neave  
Chairperson





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# Terms of Reference

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## AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE EVIDENCE ACT 1995

I, PHILIP RUDDOCK, Attorney-General of Australia, HAVING REGARD TO:

- the importance of maintaining an efficient and effective justice system in which clear and comprehensive laws of evidence play a fundamental role,
- the experience gained from almost a decade of operation of the uniform Evidence Act scheme, and
- the desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia,

REFER to the Australian Law Reform Commission for inquiry and report under the *Australian Law Reform Commission Act 1996*, the operation of the *Evidence Act 1995*.

1. In carrying out its review of the Act, the Commission will have particular regard to:
  - (a) the following topics, which have been identified as areas of particular concern:
    - (i) the examination and re-examination of witnesses, before and during proceedings;
    - (ii) the hearsay rule and its exceptions;
    - (iii) the opinion rule and its exceptions;
    - (iv) the coincidence rule;
    - (v) the credibility rule and its exceptions; and
    - (vi) privileges, including client legal privilege;
  - (b) the relationship between the *Evidence Act 1995* and other legislation regulating the laws of evidence, including the provisions of the *Judiciary Act 1903*, in particular in relation to the laws, practices and procedures applying in proceedings in federal jurisdiction; and whether the fact that significant areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity;

- (c) recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the *Evidence Act 1995*;
  - (d) the application of the rules of evidence contained in the Act to pre-trial procedures; and
  - (e) any other related matters.
2. In carrying out its review of the Act, the Commission, in keeping with the spirit of the uniform Evidence Act scheme, will:
- (a) work in association with the New South Wales Law Reform Commission with a view to producing agreed recommendations;
  - (b) consult with the other members of the uniform Evidence Act scheme – the Australian Capital Territory and Tasmania;
  - (c) consult with other States and Territories as appropriate; and
  - (d) consult with other relevant stakeholders, in particular the courts, their client groups and the legal profession.

in the interests of identifying and addressing any defects in the current law, and with a view to maintaining and furthering the harmonisation of the laws of evidence throughout Australia.

3. The Commission is to report no later than 5 December 2005.

Dated: 12<sup>th</sup> July 2004

Philip Ruddock  
Attorney-General



# Terms of Reference

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## NEW SOUTH WALES LAW REFORM COMMISSION REVIEW OF THE EVIDENCE ACT 1995

I, BOB DEBUS, Attorney General of New South Wales, HAVING REGARD TO:

- the importance of maintaining an efficient and effective justice system in which clear and comprehensive laws of evidence play a fundamental role,
- the experience gained from nearly a decade of operation of the uniform Evidence Act scheme, and
- the desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia,

REFER to the New South Wales Law Reform Commission, for inquiry and report pursuant to section 10 of the *Law Reform Commission Act 1967*, the operation of the *Evidence Act 1995* (NSW).

1. In carrying out its review of the *Evidence Act 1995* (NSW), the Commission, will have particular regard to:
  - (a) the following topics, which have been identified as areas of particular concern:
    - (i) the examination and re-examination of witnesses; before and during proceedings;
    - (ii) the hearsay rule and its exceptions;
    - (iii) the opinion rule and its exceptions;
    - (iv) the coincidence rule;
    - (v) the credibility rule and its exceptions; and
    - (vi) privileges, including client legal privilege.
  - (b) the relationship between the *Evidence Act 1995* (NSW) and other legislation regulating the laws of evidence and whether the fact that significant areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity;

- (c) recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the *Evidence Act 1995* (NSW);
  - (d) the application of the rules of evidence contained in the *Evidence Act 1995* (NSW) to pre trial procedures;
  - (e) any related matter.
- 2. In carrying out its review of the *Evidence Act 1995* (NSW), the Commission, in keeping with the spirit of the uniform Evidence Act scheme, will:
  - (a) work in association with the Australian Law Reform Commission, with a view to producing agreed recommendations;
  - (b) consult with the other members of the uniform Evidence Act scheme – the Australian Capital Territory and Tasmania;
  - (c) consult with other States and Territories as appropriate; and
  - (d) consult with other relevant stakeholders, in particular the courts, their client groups and the legal profession;

in the interests of identifying and addressing any defects in the current law, and with a view to maintaining and furthering harmonisation of the laws of evidence throughout Australia.
- 3. The Commission is to report no later than 5 December 2005.

# Terms of Reference

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## VICTORIAN LAW REFORM COMMISSION REVIEW OF THE EVIDENCE ACT 1958

1. To review the *Evidence Act 1958* and other laws of evidence which apply in Victoria and to advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into Victoria, including any necessary modification of the existing provisions of the Uniform Evidence Act.
2. To consider whether modifications of the existing provisions of the Uniform Evidence Act are required:
  - to take account of case law on the operation of the Uniform Evidence Act in jurisdictions where the Act is currently in force;
  - in relation to the following topics which have been identified as areas of particular concern and are currently being considered by the Australian Law Reform Commission and the New South Wales Law Reform Commission:
    - the examination and re-examination of witnesses, before and during proceedings;
    - the hearsay rule and its exceptions;
    - the opinion rule and its exceptions;
    - the coincidence rule;
    - the credibility rule and its exceptions; and
    - privileges, including client legal privilege.
3. In conducting the review the Victorian Law Reform Commission should have regard to:
  - the experience gained in other jurisdictions in which the Uniform Evidence Act has been in force for some time;
  - the desirability of promoting harmonisation of the laws of evidence throughout Australia, in particular by consulting with the other members of the Uniform Evidence Act scheme;
  - recommendations for changes to the law of evidence which have already been made in the Victorian Law Reform Commission's Reports on Sexual Offences and Defences to Homicide;

- the right of defendants in criminal trials to receive a fair trial; and
- arrangements for vulnerable witnesses to provide evidence to promote their access to justice.

Consistent with the goal of promoting harmonisation of the laws of evidence, the Commission should collaborate with the New South Wales Law Reform Commission, and the Australian Law Reform Commission, in their respective reviews of the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth).

# Participants

---

## Australian Law Reform Commission

### Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprises the following:

Professor David Weisbrot  
Professor Anne Finlay (until November 2004)  
Associate Professor Les McCrimmon (from January 2005)  
Brian Opeskin  
Justice Susan Kenny (part-time Commissioner)  
Justice Susan Kiefel (part-time Commissioner)  
Justice Mark Weinberg (part-time Commissioner)

### Senior Legal Officers

Bruce Alston (until July 2005)  
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### Legal Officers

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**Consultant**

Stephen Mason, Blake Dawson Waldron

**New South Wales Law Reform Commission****Division**

The Division of the NSWLRC constituted under s 12A of the *Law Reform Commission Act 1967* (NSW) for the purposes of this Inquiry comprises the following:

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Professor Michael Tilbury

**Executive Director**

Peter Hennessy

**Legal Officers**

Catherine Gray  
Robyn Johansson

**Victorian Law Reform Commission**

**Division**

The Division of the VLRC constituted under s 13 of the *Victorian Law Reform Commission Act 2000* (Vic) for the purposes of this Inquiry comprises the following:

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Professor Marcia Neave AO (Chairperson)  
Iain Ross (Vice-President AIRC)  
Justice Tim Smith

**Chief Executive Officer**

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Daniel Evans

**Administrative Officers**

Kathy Karlevski  
Lorraine Pitman





# Executive Summary

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## Uniform Evidence Law

*Uniform Evidence Law*, being ALRC 102 (2005), NSWLRC 112 and VLRC FR, represents the culmination of an eighteen-month inquiry into the operation of the uniform Evidence Acts. The inquiry commenced on the eve of the tenth anniversary of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). These Acts were the product of an extensive research effort by the ALRC in the 1980s, which resulted in two reports: *ALRC Interim Report, Evidence* (ALRC 26) (1985); and a final report, *Evidence* (ALRC 38) (1987).

The primary objectives of this Inquiry are twofold: to identify and address any defects in the uniform Evidence Acts; and to maintain and further the harmonisation of the laws of evidence throughout Australia. In respect of the latter, in addition to the Commonwealth and New South Wales, Tasmania and Norfolk Island have also enacted legislation based on the uniform Evidence Act.<sup>1</sup> During the course of this Inquiry, the governments of Victoria, Western Australia and the Northern Territory signalled their intention to enter into the uniform Evidence Act regime. Hence, the Inquiry has provided a strong impetus for the realisation of a truly uniform evidence regime in Australia.

This Report is a joint effort of the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) (the Commissions). The Commissions, in consultation with the Tasmania Law Reform Institute, the Law Reform Commission of Western Australia and the Northern Territory Law Reform Committee,<sup>2</sup> have collaborated in this review, and in the formulation of 63 recommendations for reform.<sup>3</sup>

Based on the submissions received, and the consultations held, it is clear that, generally, the uniform Evidence Acts are working well, and that there are no major structural problems with the legislation, or with the underlying policy of the Acts. While areas of concern were identified, and have been addressed in this Report, the

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1 *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

2 The Queensland Law Reform Commission (QLRC) participated in a workshop where proposals for the Discussion Paper (DP 69) were formulated. The QLRC was invited to send a representative to the workshop where the recommendations for this Report were formulated, but was not able to take up the invitation.

3 All but two of the recommendations—Rec 5–2 and Rec 18–3—are unanimously supported by the Commissions.

clear message conveyed to the Commissions is that a major overhaul of the uniform Evidence Acts is neither warranted nor desirable.

During the course of the Inquiry, two community consultation documents were released—an Issues Paper (IP 28) in December 2004 and a Discussion Paper (DP 69)<sup>4</sup> in July 2005. Numerous consultations were held in every state and territory, and 130 written submissions from a wide range of individuals and organisations were received.

The recommendations for legislative amendment contained in this Report have direct application to the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). In the interests of uniformity, it is expected that the recommendations will be adopted by the other participants in the uniform Evidence Act regime (Tasmania and Norfolk Island), and by those jurisdictions which subsequently enact legislation based on the uniform Evidence Acts.

In pursuit of the latter, the ALRC met on two occasions with the Attorney-General of Queensland, and representatives of the Northern Territory Department of Justice, the Western Australian Department of Justice and the South Australian Attorney-General's Department.

At the time of publication of this Report, the governments of Victoria, Western Australia and the Northern Territory have indicated their intention to enact the uniform Evidence Act. When this occurs, the harmonisation of the laws of evidence throughout Australia will be well advanced. This, in turn, will result in a more uniform, coherent and accessible national approach to evidence law; reduced complexity and the attendant reduction in the costs associated with two evidence regimes in non-uniform Evidence Act jurisdictions; and the reform of unsatisfactory and archaic aspects of the common law.

## **Organisation of the Report**

The Report largely follows the organisation and structure of the uniform Evidence Act. In addition to provisions currently in the uniform Evidence Act, the Report discusses specific aspects of the policy framework of the uniform Evidence Act regime, issues relating to the receipt in court of evidence of Aboriginal and Torres Strait Islander traditional laws and customs, and the relationship between the uniform Evidence Act and other legislation.

### **Chapters 1–3: Introduction and background**

Chapter 1 contains introductory and background material to the Inquiry and the uniform Evidence Acts. Chapter 2 describes the Acts and their relationship with the

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4 The Discussion Paper is ALRC Discussion Paper 69 and NSWLRC Discussion Paper 47. The VLRC does not ascribe a number to its Discussion Papers. For ease of reference in this Report, the Discussion Paper shall be referred to as 'DP 69', or the 'Discussion Paper'.

common law and other legislation. The need to maintain uniformity, particularly as more jurisdictions take up the uniform Evidence Act, is discussed and a number of recommendations to achieve this objective are made. The Commissions' policy approach to evidentiary provisions outside of the uniform Evidence Acts is explained and discussed.

In Chapter 2, the policy framework underlying the uniform legislation is also addressed. One of the central approaches to evidence recommended in the ALRC's previous Evidence inquiry,<sup>5</sup> and adopted in the uniform Evidence Acts, was not to distinguish between jury and non-jury trials. Whether the Acts should be amended to allow greater differentiation between the rules of evidence applying in jury and non-jury trials is discussed, and no change to the existing regime is recommended. The chapter concludes with a discussion of the scope of the uniform Evidence Acts, and in particular the general obligation of the court to ensure a fair trial.

Chapter 3 discusses certain concepts in the uniform Evidence Acts which appear to have caused confusion. In particular, the approach adopted in the Acts to evidence of tendency, coincidence, credibility and character, and the concepts of probative value, unfair prejudice and unfairness are analysed in detail. The chapter concludes with a recommendation for the implementation of educational programs to facilitate a better understanding among judicial officers and legal practitioners of:

- the policy underlying the Acts;
- specific provisions, in particular s 41 relating to improper questions in cross-examination and those relating to the admissibility of expert opinion evidence; and
- issues relating to specific types of witnesses, such as children, and specific types of offences, such as sexual assault.

### **Chapters 4–6: Adducing evidence**

Chapters 4–6 are concerned with the competence and compellability of witnesses (Chapter 4), the adducing of evidence from witnesses (Chapter 5) and the use of documents in court proceedings (Chapter 6). Chapter 4 addresses the concept of competence, particularly in relation to the giving of unsworn evidence by a witness, and recommends a change to the test of competence in s 13 of the Acts to make it easier for children and people with a cognitive impairment to give evidence. The Commissions also recommend that the term 'de facto spouse' used in the *Evidence Act*

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5 Australian Law Reform Commission, Evidence, ALRC 38 (1987).

1995 (Cth) be replaced with the gender neutral term ‘de facto partner’. The definitional change has a significant impact on the compellability of a de facto partner to testify against a defendant in criminal proceedings.

Chapter 5 considers a number of issues relating to the examination and re-examination of witnesses, the primary focus being the rules governing cross-examination of witnesses. While there has not been a suggestion to the Inquiry that these sections of the Acts are fundamentally flawed or require significant amendment, the giving of evidence in narrative form, what constitutes an improper question in cross-examination and the controls on the cross-examination of vulnerable witnesses, are identified as matters requiring reform.

The uniform Evidence Acts introduced significant changes with respect to the proof of documents. Chapter 6 examines how the provisions of the uniform Evidence Acts dealing with documentary evidence have operated in practice. It then examines two specific issues raised in IP 28 and discussed in detail in DP 69: proof of electronic evidence and evidence of official records. A recommendation is made to remove the requirement in s 50 that proof of voluminous or complex documents through the use of a summary only can be made by application to the court before the hearing concerned. The Commissions also recommend modernising the terminology in the Acts to take into account advances in electronic communication.

### **Chapters 7–15: Admissibility of evidence**

Chapters 7–15 examine the rules pertaining to the admissibility of evidence. The discussion follows the ‘grid’ or ‘flowchart’ of admissibility set out in the diagram at the beginning of Chapter 3 of the uniform Evidence Acts. This diagram illustrates how the admissibility provisions in Chapter 3 of the Acts apply to particular evidence.

Chapter 7 discusses the hearsay rule, as codified in s 59 of the uniform Evidence Acts, and s 60, which governs the use for a hearsay purpose of evidence admitted for a non-hearsay purpose. Two amendments are recommended. The first will clarify the test of intended assertions in s 59. The second is designed to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the representation is first-hand or more remote hearsay.

In Chapter 8, two categories of hearsay evidence are discussed. The first applies to first-hand hearsay (where the maker has personal knowledge of the asserted fact).<sup>6</sup> The second category applies to more remote (or ‘second-hand’) hearsay.<sup>7</sup> Of particular note is the recommendation to remove the requirement in civil proceedings where the maker of a representation is available, that the occurrence of an asserted fact be fresh in the memory of that person at the time the representation is made. A recommendation

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6 Uniform Evidence Acts ss 63–66.

7 Ibid ss 69–75.

also is made to expand the matters the court must take into account in criminal proceedings when determining if the occurrence of an asserted fact is ‘fresh in the memory’ of the person who made the representation and that person has been or is to be called to give evidence.

Chapter 9 discusses the exceptions to the opinion rule. These include exceptions in relation to lay opinion<sup>8</sup> and opinion based on specialised knowledge<sup>9</sup> (expert opinion evidence). Submissions and consultations have identified the admissibility of expert opinion evidence as a significant issue for this Inquiry. The Commissions recommend that s 79 of the uniform Evidence Acts be amended to clarify that the section applies to expert opinion evidence on the development and behaviour of children.

Chapter 10 focuses on admissions in a criminal context, with emphasis being placed on ss 82, 85 and 90 of the uniform Evidence Acts. Two recommendations are made. The first is an amendment to s 82 to ensure that evidence of admissions in criminal proceedings that are not first-hand are excluded from the ambit of s 60. The second recommendation clarifies the meaning of the term ‘in the course of official questioning’ as used in s 85.

Chapter 11 considers evidence pertaining to tendency and coincidence. A number of issues have been raised concerning the operation of ss 97, 98 and 101. The Commissions recommend ss 97 and 98 be re-worded to make the sections easier to understand. In DP 69, particular attention was paid to whether, for criminal trials, s 101 should be replaced by a provision which relies upon ‘the interests of justice’ as the test for admissibility. A test of this kind currently applies in Victoria. The Commissions conclude that this is not an option that should be adopted, and no change is recommended to s 101.

Chapter 12 looks at the credibility rule and exceptions to the credibility rule. During the course of the Inquiry, attention was drawn to a number of drafting deficiencies in the credibility provisions. Consequently, recommendations have been made to amend ss 102, 103, 104, 106, 108A, and 112. Of particular note, the Commissions recommend that the uniform Evidence Acts be amended to ensure that the credibility rule applies to evidence relevant to the credibility of a witness and relevant to the facts in issue, but not admissible for that purpose, which is also relevant to the credibility of a witness. This recommendation is intended to address a deficiency in s 102 identified by the High Court in *Adam v The Queen*.<sup>10</sup> Further, the previous removal of provisions under Australian law for an accused in a criminal trial to make an unsworn statement has

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<sup>8</sup> Ibid s 78.

<sup>9</sup> Ibid s 79.

<sup>10</sup> *Adam v The Queen* (2001) 207 CLR 96.

necessitated a recommendation to repeal ss 105, 108(2) and 110(4) of the *Evidence Act 1995* (Cth).

Chapter 13 focuses on selected aspects of the identification evidence provisions of the uniform Evidence Acts, including: the definition of identification evidence and whether it covers DNA evidence and exculpatory evidence; identification using pictures kept for the use of police officers ('picture identification evidence'); and directions to the jury. The Commissions make no recommendations for amendment of these provisions.

Privilege is dealt with in Chapters 14 and 15. Chapter 14 deals specifically with client legal privilege, and the extension of privilege to any compulsory process for disclosure and in non-curial contexts. The protection of privileged communications is one of the major issues in the Inquiry. While it is clear from the submissions and consultations that the privilege provisions are working well overall, some amendments relating to client legal privilege and privilege against self-incrimination are warranted. The primary aim of the recommendations relating to client legal privilege is to clarify terms or, in some cases, align the Acts with developments at common law which are supported by the Commissions.

A major change recommended by the Commissions is the extension to *any* compulsory process for disclosure the following categories of privilege: client legal privilege, professional confidential relationship privilege, sexual assault communications privilege and matters of state. In addition to court proceedings, this includes pre-trial discovery and the production of documents in response to subpoena, and in non-curial contexts including search warrants and notices to produce documents. If these recommendations are implemented, the uniform Evidence Act provisions, rather than the common law, will apply in all of these circumstances.

Chapter 15 addresses confidential communications to a person acting in a professional capacity, sexual assault communications and medical communications privileges available under the *Evidence Act 1995* (NSW), the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 2001* (Tas). The Commissions recommend that a modified version of the New South Wales provisions dealing with such communications should be adopted. Criticism of the certification process available under s 128 of the uniform Evidence Acts dealing with the privilege against self-incrimination is also analysed, and a modified procedure recommended. The enactment of a new provision is recommended to provide that a very limited privilege against self-incrimination can be claimed in respect of orders made in civil proceedings requiring a person to: a) disclose information about assets or other information; b) attend court to testify regarding assets or other information; or c) permit premises to be searched. This limited use immunity only would apply to documents or information created pursuant to a court order, and not to pre-existing documents or information.

Chapter 16 contains a recommendation for a new provision which will provide that, in civil and criminal proceedings, the court may, if it thinks fit, give an advance ruling or

make an advance finding in relation to any evidentiary issue. The uniform Evidence Acts contain a number of provisions that give courts the discretion to exclude evidence otherwise admissible in both civil and criminal proceedings. In the chapter, the provisions in Part 3.11 of the Acts are discussed, and a recommendation is made to change the heading to read ‘Discretionary and Mandatory Exclusions’. This reflects the fact that s 137 is a mandatory, rather than a discretionary, exclusion.

### **Chapter 17–20: Other topics**

Chapter 17 considers judicial notice—an area of the legislation that largely mirrors the common law—and discusses whether this concept has raised any concerns in practice. No amendment of the judicial notice provisions of the uniform Evidence Acts is recommended.

Chapter 18 considers comments, warnings and directions to the jury, with particular emphasis on warnings: about unreliable evidence; where there has been a delay in complaint; and in respect of children’s evidence. This is an area that generated a significant amount of attention, both in consultations and submissions. However, many of the concerns raised are outside the Commissions’ Terms of Reference. An inquiry into the operation of the jury system, initiated by the Standing Committee of Attorneys-General, is recommended. A recommendation is made to amend the uniform Evidence Acts to include provisions dealing with warnings in respect of children’s evidence similar to those contained in the *Evidence Act 1995* (NSW). A recommendation designed to address the problems identified with *Longman* warnings is also made.

Chapter 19 addresses two issues relating to the evidence of Aboriginal or Torres Strait Islander (ATSI) witnesses. The Commissions recommend that the uniform Evidence Acts be amended to include a provision dealing specifically with the admissibility of evidence of ATSI traditional laws and customs. Whether it is necessary to amend the Acts to provide a privilege with respect to evidence that, if disclosed, would render an ATSI witness liable to punishment under traditional laws and customs, is also discussed, but no recommendation is made. In the Commissions’ view, the courts are currently dealing with the issue in an appropriate manner. Further, as explained in the chapter, any such amendment has the potential to disadvantage those it is designed to protect.

Chapter 20 considers the relationship between the uniform Evidence Acts and other legislation, and in particular examines whether there are concerns that significant areas of evidence law are dealt with in other legislation. The chapter looks at topics including rape shield laws, child witnesses and family law proceedings.





## List of Recommendations

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### 2. The Uniform Evidence Acts

- 2-1 To promote and maintain uniformity, the Standing Committee of Attorneys-General (SCAG) should adopt an Intergovernmental Agreement which provides that, subject to limited exceptions, any proposed changes to the uniform Evidence Acts must be approved by SCAG. The agreement should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the agreement, and the proposed amendment must be considered and approved by SCAG before being implemented.
- 2-2 All Australian jurisdictions should work towards harmonisation of provisions relating to issues such as children's evidence and offence-specific evidentiary provisions.
- 2-3 In order to ensure the maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts, Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years from the tabling of this Report.
- 2-4 Section 4(1) of the Commonwealth and New South Wales Evidence Acts should be amended to delete the words 'in relation' from the phrase 'in relation to all proceedings'. The words 'in relation' should also be deleted from sections 4(5), (5A) and 5 of the Commonwealth Evidence Act.
- 2-5 The definition of 'NSW court' in the Dictionary to the *Evidence Act 1995* (NSW) should be amended to delete the parenthetical words 'including such a court exercising federal jurisdiction'.

### 3. Understanding the Uniform Evidence Acts

- 3-1 The National Judicial College, the Judicial College of Victoria, the Judicial Commission of New South Wales and the state and territory law societies and bar associations should consider conducting educational programs about the policy underlying the approach of the uniform Evidence Acts to admissibility of evidence. The Inquiry also identified the following areas as warranting consideration:

- improper questioning;
- the admissibility of evidence of expert opinion;
- the cognitive and behavioural development of children and the implications of this for the reliability of the evidence of child witnesses; and
- the nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault.

#### **4. Competence and Compellability**

4–1 Section 13(2), (3) and (4) of the uniform Evidence Acts should be amended or replaced to bring about the following:

- a person not competent to give sworn evidence is competent to give unsworn evidence but may not do so unless the court informs the person of the importance of telling the truth;
- all witnesses must also satisfy a test of general competence in s 13(4);
- the test of general competence to give both sworn and unsworn evidence in s 13(4) should provide that if for any reason, including physical disability, a person lacks the capacity to understand, or give an answer that can be understood to, a question about a fact and that incapacity cannot be overcome, the person is not competent to give evidence about that fact;
- the inclusion of a note to s 13(1) that ‘the person may be competent to give unsworn evidence’;
- the inclusion of a note to s 13(4) that ‘the person may be competent to give evidence about other facts’; and
- the inclusion of a note to s 13(4) cross-referencing to s 31.

4–2 Section 13(7) of the uniform Evidence Acts should be amended to make it clear that in informing itself as to the competence of a witness, the court is entitled to draw on expert opinion.

4–3 The wording of ss 14 and 61 of the uniform Evidence Acts should be amended to bring them in line with the proposed changes to s 13(4).

- 4-4 The provisions of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) should be amended to eliminate the term ‘de facto spouse’ (including the definition) and to replace it with the term ‘de facto partner’.
- 4-5 The *Evidence Act 1995* (Cth) should be amended to provide a definition of ‘de facto partner’ in the following terms:
- ‘de facto partner’ means a person in a relationship as a couple with another person to whom he or she is not married.
- 4-6 The *Evidence Act 1995* (Cth) should be amended to provide that for the purpose of determining whether a relationship between 2 persons is a relationship as a couple, the matters that the court may take into account include:
- (a) the duration of the relationship;
  - (b) the extent to which the persons have a mutual commitment to a shared life; and
  - (c) the reputation and public aspects of the relationship.

## 5. Examination and Cross-Examination of Witnesses

- 5-1 Section 29 of the uniform Evidence Acts should be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. It should provide that a court may, on its own motion or on application, direct that the witness give evidence wholly or partly in narrative form, and the way in which narrative evidence may be given.
- 5-2 The ALRC and NSWLRC recommend that section 41 of the uniform Evidence Acts should be amended to adopt the terms of s 275A of the *Criminal Procedure Act 1986* (NSW). This section should apply both to civil and criminal proceedings.

## 6. Documentary Evidence

- 6-1 Section 50(1)(a) of the uniform Evidence Acts should be amended by removing the words ‘before the hearing concerned’.
- 6-2 Section 71 of the uniform Evidence Acts should be amended to replace the words ‘a document recording a message that has been transmitted by

electronic mail or by a fax, telegram, lettergram or telex' with the words 'an electronic communication', and to insert as s 71(2) a definition for 'electronic communication' identical to that in s 5 of the *Electronic Transactions Act 1999* (Cth).

- 6-3 The uniform Evidence Acts should be amended by the insertion of a new provision in terms equivalent to s 161 facilitating proof of electronic communications. The provision will provide for presumptions in relation to electronic communications and should include presumptions as to the source and destination of the communication.

## **7. The Hearsay Rule and Section 60**

- 7-1 The uniform Evidence Acts should be amended to provide expressly that, for the purposes of s 59, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.
- 7-2 The uniform Evidence Acts should be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

## **8. The Hearsay Rule — First-hand and More Remote Hearsay Exceptions**

- 8-1 Section 64(3) of the uniform Evidence Acts should be amended to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.
- 8-2 The uniform Evidence Acts should be amended to provide that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give evidence about the fact and that inability cannot reasonably be overcome.
- 8-3 Section 65(2)(d) of the uniform Evidence Acts should be amended to require that the representation be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable.
- 8-4 The uniform Evidence Acts should be amended to make it clear that, for the purposes of s 66(2), whether a memory is 'fresh' is to be determined by

reference to factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. These factors may include the nature of the event concerned, and the age and health of the witness.

- 8–5 Section 72 of the uniform Evidence Acts dealing with contemporaneous statements about a person’s health, feelings, sensations, intention, knowledge or state of mind should be repealed and re-enacted in identical form in Division 2 of Part 3.2 of the Acts.

## **9. The Opinion Rule and its Exceptions**

- 9–1 Section 79 of the uniform Evidence Acts should be amended to provide that, to avoid doubt, the provision applies to evidence of a person who has specialised knowledge of child development and behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:
- (a) the development and behaviour of children generally;
  - (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

## **10. Admissions**

- 10–1 Section 85(1) of the uniform Evidence Acts should be amended to provide that the section applies only to evidence of an admission made by a defendant: (a) to or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. A consequential amendment should be made to s 89(1) to incorporate (a) above.
- 10–2 To ensure that evidence of admissions in criminal proceedings that are not first-hand are excluded from the ambit of s 60, s 82 of the uniform Evidence Acts should be amended to provide that s 60 does not apply in a criminal proceeding to evidence of an admission.

## **11. Tendency and Coincidence Evidence**

- 11–1 Section 98 (1) of the uniform Evidence Acts should be amended to provide that: evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events and any similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless the party adducing the evidence gives reasonable notice in writing to each other party of the party's intention to adduce the evidence; and the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, has significant probative value.
- 11–2 To clarify the effect of the provision, a note should be added to s 98 of the uniform Evidence Acts stating that the events that may be considered include an event which is the subject of the proceeding.
- 11–3 Section 97 of the uniform Evidence Acts should be amended to replace the word 'if' with 'unless', and to replace the word 'or' with 'and' and to make any necessary consequential amendments. If Recommendation 11–1 is not taken up, a corresponding amendment should be made to s 98.

## **12. The Credibility Rule and its Exceptions**

- 12–1 The uniform Evidence Acts should be amended to include a definition of the evidence to which the credibility rule applies and to make consequential amendments to ss 102, 104 and 108A to ensure that the provisions of Part 3.7 apply to evidence:
- relevant only to credibility; and
  - relevant to credibility and relevant for some other purpose, but not admissible or capable of being used for that other purpose because of a provision of Parts 3.2 to Parts 3.6 inclusive.
- 12–2 Section 103(1) of the uniform Evidence Acts should be amended to read as follows: 'The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness'.
- 12–3 Section 104(4)(a) of the uniform Evidence Acts should be deleted from s 104(4) to remove the overlap between s 104(4)(a) and Part 3.8.
- 12–4 For consistency in drafting, s 112 of the uniform Evidence Acts should be amended by substituting 'A defendant must not be cross-examined' for 'A defendant is not to be cross-examined'.

- 12-5 Section 106 of the uniform Evidence Acts should be amended to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination. Leave should not be required to adduce evidence of the kind presently identified in paragraphs (a) to (e) of s106.
- 12-6 Section 108A of the uniform Evidence Acts should be amended to provide that, where the defendant in a criminal trial has not or will not be called to give evidence and evidence of a previous representation of the defendant has been admitted, the same restrictions should apply to evidence relevant to the credibility of a defendant as apply under s 104 when a defendant gives evidence at trial.
- 12-7 The uniform Evidence Acts should be amended to include a new exception to the credibility rule which provides that, if a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge; and (b) could substantially affect the assessment of the credibility of a witness; and (c) is adduced with the court's leave. The Acts should also include a provision clarifying that the evidence to which the exception applies includes evidence about child development and behaviour (including the effect of sexual abuse).
- 12-8 Sections 25, 105, 108(2) and 110(4) of the *Evidence Act 1995* (Cth) should be repealed to reflect the fact that there is no longer provision under Australian law for unsworn statements to be made by a defendant in a criminal trial.

#### **14. Privileges: Extension to Pre-Trial Matters and Client Legal Privilege**

- 14-1 The client legal privilege provisions of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.
- 14-2 Section 117(1)(a) of the uniform Evidence Acts should be amended to allow that a 'client' of a lawyer be defined as a person who engages a lawyer to provide professional legal services, or who employs a lawyer for that purpose, including under a contract of service (for example, as in-house counsel).

- 14–3 The definition of a ‘lawyer’ in the Dictionary of the uniform Evidence Acts should be amended to provide that a lawyer is a person who is admitted to the legal profession in an Australian jurisdiction or in any other jurisdiction.
- 14–4 Section 118(c) of the uniform Evidence Acts should be amended to replace the words ‘the client or a lawyer’ with ‘the client, a lawyer or another person’.
- 14–5 Section 122(2) of the uniform Evidence Acts should be amended to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege. The existing provisions should remain in a form appropriate to give guidance as to what acts are or are not acts inconsistent with the maintenance of the privilege.
- 14–6 If Recommendation 14–1 is adopted, s 123 of the uniform Evidence Acts should remain applicable only to the adducing of evidence at trial by an accused in a criminal proceeding.

## **15. Privilege: Other Privileges**

- 15–1 The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division 1A of the *Evidence Act 1995* (NSW) should therefore be adopted under Part 3.10 of the *Evidence Act 1995* (Cth).
- 15–2 If Recommendation 15–1 is adopted, Part 3.10, Division 1A of the *Evidence Act 1995* (Cth) should include that in family law proceedings concerning children, the best interests of the child should be a paramount consideration and that, where a child is the protected confider, a representative of the child may make the claim for privilege on behalf of the child.
- 15–3 The professional confidential relationship privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.
- 15–4 Part 3.10 of the *Evidence Act 1995* (Cth) and Part 3.10, Division 1B of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault communications privilege based on the wording of Division 2 of Part 5, Chapter 6 of the *Criminal Procedure Act 1986* (NSW) applicable in both civil and criminal proceedings. The amendment should include a general



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- discretion privilege and an absolute privilege in preliminary criminal proceedings.
- 15-5 If Recommendation 15-4 is accepted, Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW) should be repealed.
- 15-6 The sexual assault communications privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.
- 15-7 Section 128 of the uniform Evidence Acts should apply where a witness objects to giving evidence either to a particular question, or a class of questions, on the grounds that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law or a law of a foreign country or is liable to a civil penalty under such law. The section should provide that:
- (a) the court is to determine whether or not that claim is based on reasonable grounds;
  - (b) if the court is so satisfied, the court must inform the witness that the witness may choose to give the evidence or the court will consider whether the interests of justice require that the evidence be given;
  - (c) the court may require that the witness give the evidence if the interests of justice so require, but must not do so if the evidence would tend to prove that the witness has committed an offence against or arising under a law of a foreign country or is liable to a civil penalty under a law of a foreign country; and
  - (d) if the evidence is given, either voluntarily or under compulsion, a certificate is to be granted preventing the use of that evidence against the person.
- 15-8 Section 128(7) of the uniform Evidence Acts should be amended to clarify that a ‘proceeding’ under that section does not include a retrial for the same offence or an offence arising out of the same circumstances.
- 15-9 Section 128(7) of the *Evidence Act 1995* (NSW) should be amended to provide that for the purposes of that provision a ‘NSW court’ means ‘any New South Wales court or any person or body authorised by a New South

Wales law, or by consent of the parties, to hear, receive and examine evidence’.

- 15–10 The uniform Evidence Acts should be amended to provide that the privilege against self-incrimination cannot be claimed in respect of orders made in a civil proceeding requiring a person to disclose information about assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. However, it should be provided that evidence obtained in compliance with such orders cannot be used against the person in a criminal or civil penalty proceeding against the person, where the court finds that the evidence might tend to incriminate the person, or make the person liable to a civil penalty. This use immunity should only apply to documents or information created pursuant to the court order, and not to a pre-existing document or thing.
- 15–11 Section 130 of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

## **16. Discretionary and Mandatory Exclusions**

- 16–1 In order to reflect the fact that s 137 is not a discretion to exclude evidence but a mandatory exclusion, the heading at Part 3.11 ‘Discretions to exclude evidence’ of the uniform Evidence Acts should be amended to read ‘Discretionary and mandatory exclusions’.
- 16–2 The uniform Evidence Acts should be amended to provide that, in civil and criminal proceedings, the court may, if it thinks fit, give an advance ruling or make an advance finding in relation to any evidentiary issue.

## **18. Comments, Warnings and Directions to the Jury**

- 18–1 The Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including such matters as eligibility, empanelment, warnings and directions to juries.
- 18–2 The uniform Evidence Acts should be amended to include provisions dealing with warnings in respect of children’s evidence similar to those contained in ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW). Section 165B should be amended to make it clear that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child.

- 18–3 The ALRC and the VLRC recommend that the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.

The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.

No particular form of words need be used in giving the warning. However, in warning the jury, the judge should not suggest that it is ‘dangerous to convict’ because of any demonstrated forensic disadvantage.

## **19. Aboriginal and Torres Strait Islander Traditional Laws and Customs**

- 19–1 The uniform Evidence Acts should be amended to provide an exception to the hearsay rule for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.
- 19–2 The uniform Evidence Acts should be amended to provide an exception to the opinion evidence rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.
- 19–3 The definition of ‘traditional laws and customs’ in the uniform Evidence Acts should include ‘the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander persons’.



# 1. Introduction to the Inquiry

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## Harmonisation of Australian Evidence Law

1.1 On 12 July 2004, the Australian Government Attorney-General asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into the operation of the *Evidence Act 1995* (Cth). The New South Wales Attorney General had similarly asked the New South Wales Law Reform Commission (NSWLRC) on 2 July 2004 to conduct a review of the operation of the *Evidence Act 1995* (NSW) in almost identical terms. The ALRC, in consultation with the NSWLRC, published an Issues Paper, *Review of the Evidence Act 1995* (IP 28), in December 2004. In IP 28, the main issues relevant to the Inquiry were identified, and background information and over 100 questions designed to encourage informed public participation were provided.

1.2 The Victorian Government announced in 2004 that ‘it is proposing to implement legislation consistent with the model Evidence Acts passed by the Commonwealth and New South Wales parliaments and adapted to the needs of the Victorian courts’.<sup>1</sup> In November 2004, the Attorney-General of Victoria asked the Victorian Law Reform Commission (VLRC) to review the laws of evidence applying in Victoria. The VLRC was directed to review the *Evidence Act 1958* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the Uniform Evidence Act into Victoria. The VLRC was required to collaborate with the ALRC and NSWLRC in its review.

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1 State Government of Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General’s Justice Statement* (2004), 26.

1.3 In July 2005, following consultations in every state, the Australian Capital Territory and the Northern Territory, and the receipt of over 50 submissions in response to IP 28, the ALRC, NSWLRC and VLRC jointly published a Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69).<sup>2</sup>

1.4 The Inquiry commenced on the eve of the tenth anniversary of the Commonwealth and New South Wales Evidence Acts. The uniform Evidence Acts were themselves the product of extensive research and consultation by the ALRC, following its receipt of Terms of Reference in 1979 for an inquiry into the law of evidence. The ALRC produced a series of research reports and discussion papers; an Interim Report, *Evidence* (ALRC 26) including draft legislation in 1985;<sup>3</sup> and a final report, *Evidence* (ALRC 38) in 1987, which also contained draft legislation.<sup>4</sup>

1.5 The NSWLRC also conducted an inquiry into the law of evidence that commenced in 1966. It published two reports,<sup>5</sup> a working paper,<sup>6</sup> and three discussion papers<sup>7</sup> during the course of that inquiry. However, when the ALRC received the Terms of Reference for its evidence inquiry in 1979, the NSWLRC suspended its work pending the outcome of the ALRC's inquiry.<sup>8</sup>

1.6 In its 1988 Report, *Evidence* (NSWLRC 56), the NSWLRC recommended that the bulk of the ALRC's proposals be adopted in New South Wales and that the draft legislation be enacted.<sup>9</sup>

1.7 In 1991, the Commonwealth and New South Wales governments each introduced legislation substantially based on—but differing in some respects from—the ALRC's draft legislation. In the same year, the Standing Committee of Attorneys-General gave in-principle support to a uniform legislative scheme throughout Australia.

1.8 The Commonwealth and New South Wales parliaments each passed an Evidence Bill in 1993 to come into effect from 1 January 1995. The Acts were in most respects identical and are often described as the 'uniform Evidence Acts'. In 1997, the New South Wales Parliament enacted the *Evidence Amendment (Confidential*

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2 The Discussion Paper is ALRC Discussion Paper 69 and NSWLRC Discussion Paper 47. The VLRC does not ascribe a number to its Discussion Papers. For ease of reference in this Report, the Discussion Paper shall be referred to as 'DP 69', or the 'Discussion Paper'.

3 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985).

4 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987). Both reports may be found on the ALRC's website at <www.alrc.gov.au>.

5 New South Wales Law Reform Commission, *Evidence (Business Records)*, LRC 17 (1973) and New South Wales Law Reform Commission, *The Rule Against Hearsay*, LRC 29 (1978).

6 New South Wales Law Reform Commission, *Illegally and Improperly Obtained Evidence*, WP 21 (1979).

7 New South Wales Law Reform Commission, *Competence and Compellability*, DP 7 (1980); New South Wales Law Reform Commission, *Oaths and Affirmations*, DP 8 (1980); and New South Wales Law Reform Commission, *Unsworn Statements of Accused Persons*, DP 9 (1980).

8 New South Wales Law Reform Commission, *Evidence*, LRC 56 (1988), [1.2].

9 Ibid, [1.7].

*Communications) Act 1997*, which incorporated into Part 3.10 of the *Evidence Act 1995* (NSW) privileges in relation to professional confidential relationships and sexual assault communications. These amendments are discussed in detail in Chapter 15. Further, in 2002, the *Evidence Act 1995* (NSW) was amended to adopt a broader definition of ‘de facto relationship’<sup>10</sup> and to insert a provision relating to warnings about children’s evidence.<sup>11</sup> Comparable provisions were not introduced into the *Evidence Act 1995* (Cth), thus diminishing the uniformity achieved earlier.<sup>12</sup>

1.9 The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in proceedings, federal or state, before New South Wales courts and some tribunals.

1.10 In 2001, Tasmania passed legislation that essentially mirrors the Commonwealth and New South Wales Acts, although there are some differences.<sup>13</sup> In 2004, Norfolk Island passed legislation that essentially mirrors the *Evidence Act 1995* (NSW).<sup>14</sup>

1.11 No other state or territory has yet adopted similar legislation, however there is a strong movement towards the harmonisation of evidence laws in Australia based on the uniform Evidence Act. In May 2005, the Northern Territory Attorney-General asked the Northern Territory Law Reform Committee (NTLRC), ‘[t]o review the *Evidence Act* (NT) and other laws of evidence which apply in the Northern Territory and to advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into the Northern Territory, including the modification of the existing provisions of the Uniform Evidence Act’. By their Terms of Reference, both the VLRC and the NTLRC are directed to collaborate with the ALRC and the NSWLRC in this Inquiry.

1.12 The ALRC has also been advised that the Attorney-General of Western Australia and the Attorney-General of South Australia have both formally placed the introduction of the uniform Evidence Act on the legislative agenda.

1.13 In March 2005, the Queensland Attorney-General asked the Queensland Law Reform Commission (QLRC) to undertake a review under terms of reference similar to the ALRC’s inquiry, with some minor modifications in relation to Queensland specific matters. The QLRC’s Terms of Reference do not require the QLRC to advise on the action required to facilitate the introduction of the uniform Evidence Act into

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10 *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) which extended the non-gender specific definition of ‘de facto relationship’ contained in the *Property Relationships Act 1984* (NSW) to a number of statutes including the *Evidence Act 1995* (NSW). This is discussed in detail in Ch 4.

11 *Evidence Legislation Amendment Act 2001* (NSW). This is discussed in detail in Ch 18.

12 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.20].

13 *Evidence Act 2001* (Tas). This legislation came into effect on 1 July 2002.

14 *Evidence Act 2004* (NI).

Queensland. Rather, the QLRC is directed to work in association with the ALRC and the NSWLRC with a view to producing agreed proposals for inclusion in DP 69. The QLRC report was tabled in the Queensland Parliament in November 2005.<sup>15</sup>

1.14 In those states and territories that have not adopted the uniform legislation, the law of evidence is a mixture of statute and common law, together with applicable rules of court.

1.15 Under s 79 of the *Judiciary Act 1903* (Cth), the laws of each state or territory—including the laws relating to procedure, evidence, and the competency of witnesses—are binding on all courts exercising federal jurisdiction in that state or territory.<sup>16</sup> The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the state or territory rather than the *Evidence Act 1995* (Cth), except for those provisions that have a wider reach.

1.16 The passage of the *Evidence Act 1995* (Cth) therefore has had the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction. As a practical example, a Brisbane barrister defending a client charged with a federal crime before the Queensland Supreme Court would use that state's evidence law; but would use the *Evidence Act 1995* (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the following day.

## **Inquiry with other law reform bodies**

1.17 This project was conceived from the outset as a 'joint venture' between the ALRC and the NSWLRC. The scope of the project has widened since the publication of IP 28 as a result of the terms of reference received by the VLRC. The three Commissions collaborated to produce an agreed set of proposals in DP 69, and have produced agreed recommendations in this Report. In addition, an ongoing consultative relationship has been established with the Tasmania Law Reform Institute (TLRI), the QLRC, the NTLRC and the Law Reform Commission of Western Australia (LRCWA). In October 2005, representatives of all of the law reform bodies, with the exception of the QLRC, met at the ALRC offices to discuss and formulate the recommendations contained in this Report.<sup>17</sup>

1.18 The recommendations for legislative amendment contained in this Report have direct application to the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) and to the provisions which will apply in Victoria as a result of the introduction of the uniform Evidence Act. In the interests of uniformity, it is hoped that the recommendations will be taken up, where applicable, by other participants in the uniform Evidence Acts regime (Tasmania and Norfolk Island), and by those

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15 Queensland Law Reform Commission, *A Review of the Uniform Evidence Acts*, Report No 60 (2005).

16 Except as otherwise provided by the Constitution or the laws of the Commonwealth.

17 A representative from the QLRC was invited to participate in the consultations, but was unavailable.



jurisdictions which subsequently enact a uniform Evidence Act. The involvement of the law reform bodies noted in the preceding paragraph should facilitate this outcome.

1.19 This Report is a joint effort of the ALRC, VLRC and NSWLRC (the Commissions), and the Commissions have commented on all chapters of this Report. The VLRC had primary responsibility for researching and writing the chapters dealing with competence and compellability, tendency and coincidence and credibility evidence. The NSWLRC had primary responsibility for researching and writing the judicial notice and documentary evidence chapters. The ALRC had primary responsibility for researching and writing the remaining chapters.

1.20 Where a recommendation relates only to one jurisdiction,<sup>18</sup> the Commissions, in jointly making the proposal, rely on the requirement in the Terms of Reference of all three Commissions to promote greater harmonisation of the laws of evidence in Australia. Hence, such proposals are made by all of the Commissions, not just the Commission in the relevant jurisdiction.

## **The scope of the Inquiry**

### **Terms of Reference**

1.21 The ALRC, NSWLRC and VLRC Terms of Reference are reproduced at the beginning of this Report. The Terms of Reference require the Commissions to focus on the following areas:

- the examination and re-examination of witnesses, before and during proceedings;
- the hearsay rule and its exceptions;
- the opinion rule and its exceptions;
- the coincidence rule;
- the credibility rule and its exceptions; and
- privileges, including client legal privilege.

1.22 The ALRC and the NSWLRC are also directed to consider the relationship between the uniform Evidence Acts and other legislation regulating the laws of evidence, and whether the fact that significant areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity.

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18 For example, Rec 2–1.

1.23 In undertaking the Inquiry, the Commissions are also directed to consider recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the uniform Evidence Acts, together with the application of the rules of evidence contained in the Acts to pre-trial procedures.

1.24 The Commissions, in keeping with the spirit of the uniform Evidence Acts scheme, are directed to work with other law reform bodies. The ALRC, being a federal body, is directed to consult with relevant stakeholders in all states and territories, including government departments, the courts, their client groups and the legal profession, in the interests of identifying and addressing any defects in the current law, and with a view to maintaining and furthering the harmonisation of the laws of evidence throughout Australia.

### **Definition of ‘law of evidence’**

1.25 For the purpose of this Inquiry, the Commissions have adopted the approach to the definition of evidence utilised by the ALRC when it considered these matters in the previous Evidence inquiry. Rather than attempting a precise definition, the ALRC dealt with the issue of definition through an analysis of the topics which should be included and those that should be excluded in any examination of the law of evidence.

*Topics Excluded.* The approach taken to the problem of definition has been to exclude:

- Those topics which should be classified as part of the substantive law or which are so linked to the substantive law that they can only properly be considered in that context. These include legal and evidential burden of proof, parole evidence rule, *res judicata*, issue estoppel, presumptions.
- Those topics of adjectival law which should be classified as procedural rather than evidentiary. The result of this distinction is the exclusion of rules such as those relating to the gathering of evidence (including evidence on commission) the perpetuation of testimony, who begins, notice of alibi evidence, no case submission and the standard of proof applicable.
- Topics such as the ordering of witnesses out-of-court, bans on the publication of evidence, duties of the prosecution in calling evidence, the powers of judges and parties to call witnesses and the suggestion that there should be changes in the organisation and operation of forensic scientific services.<sup>19</sup>

1.26 The ALRC identified the following as being included in the law of evidence.

- *Witnesses* – competence and compellability; sworn and unsworn evidence; manner of questioning witnesses.
- *Rules of admissibility and exclusion* – relevance, secondary evidence of documents, hearsay, opinion, admissions and confessions, convictions as evidence of the facts on which they are based, identification, character, prior

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19 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [46].

conduct, privileges, exclusion of evidence in the public interest, exclusionary discretions.

- *Aspects of proof* – judicial notice authentication, standard of proof, and corroboration.<sup>20</sup>

## Terminology

1.27 The Commissions' Terms of Reference require consideration of the decisions of the High Court, the Federal and Family Courts, the Federal Magistrates Court, the courts of New South Wales and the courts of the Australian Capital Territory relevant to the interpretation of the uniform Evidence Acts. Given that the Commonwealth and New South Wales Acts have counterparts in Tasmania and Norfolk Island, relevant decisions about the meaning of a particular provision may arise in a Tasmanian or Norfolk Island court in relation to evidence legislation in these jurisdictions.<sup>21</sup> The Commissions consider that such decisions form part of the review as they indicate how the present legislation is operating and may highlight deficiencies in it.

1.28 Accordingly, in this Report, reference to the 'uniform Evidence Acts' means the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (NI). Where it is necessary in the context of a discussion to differentiate between the statutes, this will be done expressly.

## Breadth of the Inquiry

1.29 The ALRC's previous Evidence inquiry was lengthy and comprehensive. Although the topics identified in the Commissions' Terms of Reference for this Inquiry are broad, this has not been interpreted to mean that all aspects of the uniform Evidence Acts must be reviewed again. Based on the submissions received, and the meetings and consultations held, it appears that there are no major structural problems with the legislation or with the policy underpinning it. As was noted by the Law Council of Australia, 'this review is not the place for a wide-ranging review of the policies underpinning the uniform Evidence Acts', and '[t]he Council accepts the policy framework of the legislation'.<sup>22</sup> The Commissions agree with this view.

1.30 Two community consultation papers were produced prior to this Report.<sup>23</sup> In IP 28, the main issues relevant to the Inquiry were identified, some background information was provided, and informed public participation was encouraged. While

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<sup>20</sup> Ibid, [46].

<sup>21</sup> *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

<sup>22</sup> Law Council of Australia, *Submission E 32*, 4 March 2005.

<sup>23</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005).

assumptions were made in IP 28 about the likely breadth of the Inquiry,<sup>24</sup> this was not meant to inhibit full and open discussion of the issue and policy choices. Issues not raised in IP 28 arose and were dealt with in DP 69. Such issues included the unsworn testimony of children, evidence of Aboriginal and Torres Strait Islander (ATSI) traditional laws and customs and the definition of 'de facto spouse'.<sup>25</sup> Electronic copies of IP 28 and DP 69 are available on the ALRC website at <www.alrc.gov.au>.

1.31 In IP 28, the ALRC and NSWLRC also noted the potential impact of a large-scale revision of the uniform Evidence Acts. First, the commencement of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) required judicial officers and legal practitioners to master the Acts' provisions and to adapt to the modification of many common law evidentiary principles. This educative process is well advanced, and judicial officers and legal practitioners are familiar with the operation of the legislation. The areas that still require attention are identified specifically in this Report.

1.32 Secondly, there are well-founded concerns that any major changes in the uniform Evidence Acts will lead to litigation, with attendant cost considerations, to test the meaning of any new or reworded sections. This could lead to significant uncertainty until the court settles the meaning.

1.33 It follows that a case for change should be made before the Commissions propose a legislative amendment. In this Report, and in DP 69, the Commissions have attempted to reflect accurately the views expressed in submissions and consultations, and to set out clearly the view of the Commissions. Where, in the Commissions' view, a case for change has been established, a recommendation is put forward. Where no change is proposed, this has been noted either in the discussion in DP 69 or in this Report. The recommendations for reform are summarised at the front of this Report, and the areas where no change is recommended are summarised at the front of DP 69.

1.34 There was not a strong call in submissions and consultations for a more wide-ranging reappraisal. In fact, as outlined in Chapter 2, while areas of concern were identified, a clear message was conveyed to the Commissions that a major overhaul of the legislation is neither warranted nor desirable. Therefore, the Commissions have not carried out a review as extensive as that of the previous Evidence inquiry.

1.35 This Report contains the Commissions' final recommendations, and commentary explaining the recommendations. Detailed discussion is also provided where the Commissions recommend no change on issues or proposals discussed in DP 69.

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24 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [1.45].

25 See Ch 4 in relation to unsworn testimony and the definition of de facto spouse, and Ch 19 in relation to evidence of ATSI traditional laws and customs.

1.36 The ALRC's previous Report on Evidence contained draft legislation which became the basis of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). Such draft legislation was typical of the law reform effort in those times. Since then the ALRC's practice has changed, and it does not produce draft bills unless specifically asked to do so in the Terms of Reference. This is partly because drafting is a specialised function better left to the legislative drafting experts and partly a recognition of the fact that the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation.

1.37 However, this reference involves consideration of changes to legislation. The Commissions have found it necessary, and beneficial, to engage in the drafting of amendments and new provisions as part of the process of developing the joint recommendations. A consultant has been retained to assist with this process. The draft provisions are also available to assist those with the responsibility of implementing the recommendations contained in the Report. These draft provisions are set out in Appendix 1.

## Process of reform

1.38 It is standard operating procedure for the ALRC to establish a broad based expert Advisory Committee to assist with the development of its inquiries. In this Inquiry, the Advisory Committee includes members of the judiciary, practitioners from government and the private profession, and academics.<sup>26</sup>

1.39 The Advisory Committee met on three occasions: on 16 September 2004 before the publication of IP 28, on 26 May 2005 before the publication of DP 69, and on 10 November 2005 before the publication of this Report. The Committee has particular value in helping to identify the key issues for inquiry, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee has assisted with the development of the recommendations contained in this Report.

1.40 However, ultimate responsibility for the recommendations in this Report remains with the Commissioners of the ALRC, the NSWLRC and the VLRC. The Commissions held a workshop in October 2005 to discuss and finalise the recommendations in this Report. Representatives of the TLRI, NTLRC and the LRCWA also participated in the workshop.

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26 The members of the Advisory Committee are listed in the front of this Report.

**Community consultation**

1.41 Under the terms of its constituting Act, the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>27</sup> One of the most important features of ALRC inquiries is the commitment to widespread community consultation.<sup>28</sup> This is similarly the case with the NSWLRC and the VLRC.

1.42 The nature and extent of this engagement is normally determined by the subject matter of the reference. Areas that are seen to be narrow and technical tend to be of interest mainly to experts. Some ALRC references—such as those relating to children and the law, ‘Aboriginal customary law’, multiculturalism and the law, and the protection of human genetic information—involve a significant level of interest and involvement from the general public and the media. This Inquiry falls somewhere in between. While most of the issues addressed are of interest primarily to legal practitioners, the judiciary and legal academics, some issues, such as the cross-examination of vulnerable witnesses, professional confidential relationship privilege, sexual assault communications privilege and jury warnings, elicited interest from a wider section of the community.

1.43 Consultations prior to the publication of IP 28 in December 2004 included public forums and ‘round table’ discussions with legal practitioners, judicial officers and legal academics. The ALRC provided details of, and invited participation in, the Inquiry to courts and legal professional bodies throughout Australia. Some 15 meetings were held prior to the publication of IP 28. These included consultations with members of the judiciary in a range of jurisdictions. In addition, the ALRC had the benefit of submissions from the New South Wales judiciary responding to an invitation from the NSWLRC.

1.44 From January to April 2005, consultations on the issues raised in IP 28 were conducted in every state, the Australian Capital Territory and the Northern Territory. Judicial officers from every jurisdiction, including some members of the High Court, participated. In New South Wales and Victoria, consultations, public forums, and round table discussions were held with judicial officers from the Local, District/County and Supreme Courts. Legal practitioners from both branches of the profession, and their representative organisations, were also consulted, as were academics with an expertise in evidence law. Consultations were also held with organisations involved with specific client groups, for example the Legal Aid Office (ACT) and the Northern Territory Aboriginal Interpreter Service. Further, over 50 submissions addressing issues raised in IP 28 were received.

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27 *Australian Law Reform Commission Act 1996* (Cth) s 38.

28 See B Opeskin, ‘Engaging the Public: Community Participation in the Genetic Information Inquiry’ (2002) 80 *Reform* 53.

1.45 From July to October 2005, consultations on the proposals and questions set out in DP 69 were held in five states,<sup>29</sup> the Australian Capital Territory and the Northern Territory. In addition to stakeholders such as the legal profession, legal academics and the judiciary, other individuals and organisations, such as Aboriginal Land Councils, victim support groups and sexual assault counsellors, were also consulted. The VLRC organised four roundtables to discuss the major issues raised in DP 69 and also held meetings with judicial officers and other evidence law experts.

1.46 To promote the harmonisation of the laws of evidence throughout Australia, as mandated in the ALRC's Terms of Reference, the ALRC met on two occasions with the Attorney-General of Queensland, and representatives of the Northern Territory Department of Justice, the Western Australian Department of Justice and the South Australian Attorney-General's Department.

1.47 A list of those consulted during the course of this Inquiry appears in Appendix 3.

## **Organisation of this Report**

1.48 IP 28 largely followed the organisation and structure of the uniform Evidence Acts, with the inclusion of some additional topics in Chapter 15. DP 69 was structured in a similar way. However, it became clear during the course of the consultations, both with stakeholders and with participating law reform bodies, that additional areas warranted attention. In particular, it was decided that separate chapters dealing with aspects of the policy framework of the Acts, competence and compellability of witnesses, and evidence of ATSI traditional laws and customs were required. This Report follows a similar structure to DP 69, however to promote clarity and readability, the topics of hearsay and privilege have each been divided into two chapters.

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29 It was determined that the consultations held in Tasmania in March 2005 were sufficient for the purposes of the Inquiry.





## 2. The Uniform Evidence Acts

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### The movement towards a uniform evidence law

2.1 The law of evidence in Australia is a mixture of statute and common law together with rules of court.<sup>1</sup> As discussed in Chapter 1, although there were hopes when the *Evidence Act 1995* (Cth) was passed that this would lead to uniform legislation throughout Australia, this has not yet occurred. Federal courts and courts in the Australian Capital Territory apply the law found in the *Evidence Act 1995* (Cth)<sup>2</sup> and some provisions have a wider reach.<sup>3</sup> In addition, New South Wales, Tasmania and

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1 Each court has its own rules covering matters of procedure, including some relating to evidence.

2 This does not apply to appeals to the High Court from courts in states and territories that have not passed uniform Evidence Act legislation.

3 Under s 5 there are specified provisions to cover proceedings in all Australian courts; s 185 covers documents properly authenticated; s 186 deals with affidavits in Australian courts exercising federal jurisdiction; and s 187 abolishes the privilege against self-incrimination for bodies corporate.

Norfolk Island have passed mirror legislation.<sup>4</sup> These statutes are substantially the same as the Commonwealth legislation but not identical.<sup>5</sup> In New South Wales and Tasmania, state courts exercising federal or state jurisdiction and some tribunals apply the law found in the mirror legislation.

2.2 While harmonisation of the laws of evidence in Australia has not yet occurred, there are promising signs that non-uniform Evidence Act jurisdictions are moving towards entry into the uniform Evidence Act regime. The recommendations of the reports of the previous ALRC evidence inquiry<sup>6</sup> and the provisions of the uniform Evidence Acts have been considered by various bodies, each of which have recommended enactment:

- Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia Legislative Assembly) *Evidence Law*, 18th Report in the 34th Parliament (1996);
- Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* in Western Australia Final Report, Project 92 (1999);
- the Victorian Parliament Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1958* (1996);
- the Victorian Bar Council and the Law Institute of Victoria jointly in November 2003;<sup>7</sup> and
- the Victorian Law Reform Commission (VLRC) reports on defences to homicide and sexual offences.<sup>8</sup>

2.3 In addition, as discussed in Chapter 1, it now appears likely that Victoria, Western Australia and the Northern Territory will enact legislation based on the uniform Evidence Acts. The enactment of mirror legislation in a variety of jurisdictions brings with it the attendant difficulty of ensuring, to the extent possible, that the Acts remain uniform. This is discussed in detail below, and a recommendation to monitor and promote uniformity is made.

4 *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

5 Some of the uniformity was lost with the passage of the *Evidence Amendment (Confidential Communiations) Act 1997* (NSW) and provisions dealing with jury warnings in New South Wales in 2002. The Tasmanian Act has a number of sections not found in the Commonwealth or New South Wales legislation, for example, dealing with procedures for proving certain matters, certain privileges, certain matters dealing with witnesses and rape shield provisions.

6 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

7 See Victorian Law Reform Commission, *Evidence Uniformity: Information Paper* (2005) Victorian Law Reform Commission, 3.

8 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004). These reports identified deficiencies in the laws of evidence and recommended adoption of some uniform Evidence Act provisions to address the deficiencies: see Victorian Law Reform Commission, *Evidence Uniformity: Information Paper* (2005) Victorian Law Reform Commission, 3.

## Relationship with common law, equity and other statutes

2.4 The extent to which the uniform Evidence Acts operate as a code is an issue which has attracted some discussion.<sup>9</sup> It is uncontested that the uniform Evidence Acts in their entirety are not a code of the law of evidence. This would have required an express intention by the ALRC to develop a code and by the relevant legislatures to enact one.<sup>10</sup> The New South Wales Attorney General, in his second reading speech, stated: ‘it should be noted that, while the bill codifies many aspects of the law of evidence, it is not intended to operate as an exhaustive code’.<sup>11</sup> For the uniform Evidence Acts to do so would have required a significantly different statutory scheme; one which explicitly excluded the operation of evidentiary rules and principles contained in other bodies of law.

2.5 The New South Wales, Tasmanian and Norfolk Island Evidence Acts provide that the legislation does not affect the operation of an evidentiary principle or rule of the common law or equity in proceedings to which the legislation applies, except in so far as the legislation provides otherwise expressly or by necessary intendment.<sup>12</sup> Without limiting these provisions, the New South Wales, Tasmanian and Norfolk Island Evidence Acts also provide that they do not affect the operation of a legal or evidential presumption that is consistent with the legislation.<sup>13</sup> While the Commonwealth Act contains a version of the latter provision,<sup>14</sup> it makes no provision for the operation of the rules and principles of evidence developed at common law or in equity. However, so far as the provisions of the Commonwealth Act are not applicable to particular proceedings, are not sufficient to carry them into effect, or are not appropriate to provide adequate remedies, s 80 of the *Judiciary Act 1903* (Cth) will result in the application of the common law as modified by the statute law of the state or territory in which the court is exercising jurisdiction.

9 See *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* (1995) 62 FCR 289, 301; *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 349; *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351, 392; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 651–654; *R v Ung* (2000) 173 ALR 287, 353; *Workcover Authority of New South Wales v Tsougranis* [2002] NSWIRComm 282, [33]–[40]; *El Dupont de Nemours & Co v Imperial Chemical Industries* (2002) 54 IPR 304, [46].

10 Although the original terms of reference in 1979 advert to ‘a comprehensive review of the law of evidence to be undertaken by the Law Reform Commission with a view to producing a code of evidence’, it was made clear in ALRC 38 that the uniform Evidence Acts are not, and were not intended to be, a comprehensive code: see Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [27]–[47] and [213]–[230].

11 New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 113 (J Shaw—Attorney General), 114.

12 *Evidence Act 1995* (NSW) s 9(1); *Evidence Act 2001* (Tas) s 9(1); *Evidence Act 2004* (NI) s 9(1).

13 *Evidence Act 1995* (NSW) s 9(2)(b); *Evidence Act 2001* (Tas) s 9(2)(b); *Evidence Act 2004* (NI) s 9(2)(b).

14 *Evidence Act 1995* (Cth) s 9(3)(a).

2.6 The uniform Evidence Acts do, however, exclude the operation of other laws regarding the admissibility of evidence and the competence and compellability of witnesses.<sup>15</sup> As a consequence, there has been some judicial discussion as to whether Chapter 3 of the uniform Evidence Acts functions as a code. Stephen Odgers SC has argued that Chapter 3 ‘constitutes a code for the rules relating to the admissibility of evidence, in the sense that common law rules relating to the admissibility of evidence are abrogated’.<sup>16</sup> Section 56 has been cited by a number of judges as the ‘pivotal provision’ regarding the operation of the uniform Evidence Acts to admit or exclude evidence.<sup>17</sup> On this basis, Branson J suggested in *Quick v Stoland Pty Ltd* that ‘Chapter 3 is designed to deal exhaustively with this topic and, in a practical sense, constitutes a code relating to the admissibility of evidence in proceedings to which the Act relates’.<sup>18</sup> The issue has not been judicially resolved, with the discussion being limited to comments in obiter dicta.

2.7 The significance of whether the uniform Evidence Acts are a code has emerged in the context of the broader discussion regarding the relationship between the uniform Evidence Acts and the common law. If the admissibility provisions do operate as a code, this will influence significantly the way in which common law principles can be used in the application of the uniform Evidence Acts.<sup>19</sup> In the light of this, a consensus has emerged that the important issue is not whether Chapter 3 is technically a code, but the extent to which all issues of admissibility are to be governed by the statutory scheme.<sup>20</sup> There is judicial concern that statements implying that the uniform Evidence Acts are not a code might ‘be used as a means to retain aspects of the common law of evidence which are inconsistent with the operation of the Act’.<sup>21</sup>

2.8 An approach that abandons any technical attempt to characterise the admissibility provisions of the uniform Evidence Acts with respect to codification is preferable. The jurisprudence regarding legal codes and codification reveals a complexity not easily amenable to such an attempt.<sup>22</sup> However, reflecting on the nature of codified legislation can be useful. This is because the uniform Evidence Acts do embody some of the aspects of truly codified legislation, as implemented in common

15 Uniform Evidence Acts ss 12, 56(1) (‘except as otherwise provided by this Act’).

16 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.40].

17 *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 349; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 652; *El Dupont de Nemours & Co v Imperial Chemical Industries* (2002) 54 IPR 304, [46].

18 *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373.

19 See J Heydon, *Cross on Evidence* (7th ed, 2004), [46,080]; *Gamer’s Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 72 ALR 321, 325; *Mellifont v Attorney-General (Qld)* (1991) 104 ALR 89, 101.

20 *El Dupont de Nemours & Co v Imperial Chemical Industries* (2002) 54 IPR 304, [46].

21 *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 652.

22 J Bergel, ‘Principal Features and Methods of Codification’ (1987–1988) 48 *Louisiana Law Review* 1073; GA Weiss, ‘The Enchantment of Codification in the Common-Law World’ (1999) 25 *Yale Journal of International Law* 435. Also see New Zealand Law Commission, *Evidence Law: Codification—A Discussion Paper*, PP14 (1991), 3–4.

law jurisdictions.<sup>23</sup> When considering the codification of New Zealand's evidence law, the New Zealand Law Commission identified the essential elements of a legal code:

A true code may be defined as a legislative enactment which is comprehensive, systematic in its structure, pre-emptive and which states the principles to be applied. It is pre-emptive in that it displaces all other law in its subject area, save only that which the code excepts. It is systematic in that all of its parts form a coherent and integrated body. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be applied in a relatively self-sufficient way. It is, however, the final element which particularly distinguishes a code from other legislative enactments: the purpose of a code, as opposed to more limited statutory enactments, is to establish a legal order based on principles.<sup>24</sup>

2.9 A primary purpose of the ALRC's original evidence inquiry was to review the common law and develop a principled approach to evidence law. In some areas this resulted in substantial changes to the common law; in other areas the common law remains an important reference assisting application of the uniform Evidence Acts. The approach taken by the High Court of Australia in *Papakosmas v The Queen*<sup>25</sup> and the New South Wales Supreme Court in *R v Ellis*<sup>26</sup> reflects an approach guided by the principles articulated in the uniform Evidence Acts. Stated simply, Chapter 3 of the uniform Evidence Acts governs admissibility issues. Reference to the common law can facilitate an understanding of underlying concepts and helps to identify the changes brought about by Chapter 3.

2.10 A number of other statutes in each jurisdiction include rules of evidence applicable to specific legislative schemes or particular offences. For example, s 8(3) of the *Evidence Act 1995* (Cth) provides that the Act is subject to the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Provisions in these statutes contain specific formulations of the privilege against self-incrimination as they relate to proceedings brought under these Acts.<sup>27</sup> In New South Wales, s 293 of the *Criminal Procedure Act 1986* (NSW) restricts the circumstances in which evidence in relation to a complainant's sexual history will be admissible.<sup>28</sup>

## The uniform Evidence Acts

2.11 The uniform Evidence Acts extend to all proceedings in a relevant court,<sup>29</sup> including proceedings that relate to bail; are interlocutory proceedings or proceedings of a similar kind; are heard 'in chambers'; or, subject to the direction of the court,

23 J Heydon, *Cross on Evidence* (7th ed, 2004), [46,085].

24 New Zealand Law Commission, *Evidence Law: Codification—A Discussion Paper*, PP14 (1991), 3.

25 *Papakosmas v The Queen* (1999) 196 CLR 297.

26 *R v Ellis* (2003) 58 NSWLR 700.

27 *Corporations Act 2001* (Cth) s 1316A; *Australian Securities and Investments Commission Act 2001* (Cth) s 68.

28 See Ch 18.

29 The term 'proceeding', as used in s 4, is discussed in detail below.

relate to sentencing.<sup>30</sup> In relation to privilege, other than religious confession privilege, the Acts do not extend to pre-trial matters. This is an important issue for this Inquiry, and is discussed in detail in Chapter 14.

2.12 In relation to sentencing, s 4(2) states that the uniform Evidence Acts extend to sentencing only:

- (a) ... if the court directs that the law of evidence applies in the proceeding; and
- (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.<sup>31</sup>

2.13 The ALRC is currently conducting a separate Inquiry into aspects of federal sentencing law. One of the issues for that Inquiry is the role of evidence laws in relation to sentencing. As this is substantively a sentencing issue, it will be dealt with in that Inquiry.<sup>32</sup>

2.14 There are a number of matters, which might be described as evidentiary, that are omitted from the uniform Acts. This is a consequence of the definition of evidence law adopted in the previous Evidence inquiry.<sup>33</sup> In its Interim Report (ALRC 26), the ALRC stated that

the laws of evidence should be classified as part of adjectival law—the body of principles and rules which deal with the means by which ‘people’s rights and duties may be declared, vindicated or enforced, or remedies for their infraction secured’.<sup>34</sup>

2.15 Accordingly, it was stated in ALRC 26 that the ALRC’s review would exclude:

- Those topics which should be classified as part of the substantive law or which are so linked to the substantive law that they can only properly be considered in that context. These include legal and evidential burden of proof, parol evidence rule, *res judicata*, issue estoppel, presumptions.
- Those topics of adjectival law which should be classified as procedural rather than evidentiary. The result of this distinction is the exclusion of rules such as those relating to the gathering of evidence (including evidence on commission) the perpetuation of testimony, who begins, notice of alibi evidence, no-case submissions and the standard of proof applicable.
- Topics such as ordering witnesses out-of-court, bans on the publication of evidence, duties of the prosecution in calling evidence, the powers of judges and parties to call witnesses and the suggestion that there should be changes in the organisation and operation of forensic scientific services.<sup>35</sup>

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30 Uniform Evidence Acts s 4(1). However, Pt 3.6 does not apply to proceedings in relation to bail or sentencing.

31 Ibid s 4(2).

32 For more information see the ALRC’s website, <[www.alrc.gov.au](http://www.alrc.gov.au)>.

33 See further Ch 1.

34 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [31].

35 Ibid, [46].

2.16 This approach was reflected in the drafting of the *Evidence Act 1995* (Cth). As a result, a number of topics commonly found in evidence texts, perhaps most notably who bears the legal burden of proof on the facts in issue,<sup>36</sup> issue estoppel, *res judicata*, the parole evidence rule and the court's obligation to ensure a fair trial,<sup>37</sup> are not found in the statute.

2.17 The Acts are divided into five chapters. The organisation and structure follow the order in which evidentiary matters will generally arise in a trial. This is consistent with the recommendations of the ALRC.<sup>38</sup> Accordingly, issues concerning the adducing of evidence in relation to both witnesses and documents are dealt with in Chapter 2; Chapter 3, which is the central part of the statute, deals with the admissibility of evidence; and issues of proof follow in Chapter 4. A flow chart on the admission of evidence precedes s 55 and gives guidance on whether evidence is admissible.

2.18 The Acts introduce significant reforms to the common law.<sup>39</sup> For example, the 'original document' rule is abolished in favour of a more flexible approach (Pt 2.2); cross-examination of a party's own witness is permissible, with leave of the court, if the witness gives 'unfavourable' evidence (s 38); the hearsay rule is substantially modified (Pt 3.2); tendency and coincidence evidence is not admissible unless notice has been given and it has 'significant probative value', and in criminal proceedings, the probative value of such evidence adduced by the prosecution must 'substantially outweigh' any prejudicial effect it may have on the defendant (Pt 3.6); the privilege against self-incrimination is modified (s 128); a court may exercise a general discretion to refuse to admit evidence where the probative value is substantially outweighed by the danger that it is unfairly prejudicial to the defendant (s 135), or may limit the use to be made of the evidence if there is a danger that the evidence might be unfairly prejudicial to a party or be misleading or confusing (s 136); the use of computer-generated evidence is facilitated (ss 146–147); and a 'request' system has been introduced as a procedural safeguard (Div 1 of Pt 4.6). Other notable reforms include abolition of the ultimate issue and common knowledge rules (s 80), an extension of privilege to religious confessions (s 127) and, in the case of the *Evidence Act 1995* (NSW), an extension of a qualified privilege to protect communications made in the context of a professional confidential relationship (Div 1A of Pt 3.10).

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36 Part 4.1 of the uniform Evidence Acts does contain provisions relating to the standard of proof required in civil and criminal proceedings.

37 The court's obligation to ensure a fair trial is discussed in detail below.

38 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

39 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.60].

## **Evidentiary provisions outside the uniform Evidence Acts**

2.19 The Terms of Reference given to the ALRC and the New South Wales Law Reform Commission (NSWLRC) direct the Commissions to examine the relationship between the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) and other legislation regulating the law of evidence. The VLRC Terms of Reference direct the VLRC to examine more broadly ‘any necessary modification of the existing provisions of the Uniform Evidence Act’. The Commissions are to have regard to the laws, practices and procedures applying in proceedings in their respective jurisdictions; and whether the fact that significant areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity.

2.20 As discussed in Chapter 20, the uniform Evidence Acts work in conjunction with evidentiary provisions contained in a range of other Commonwealth, state and territory legislation. A central concern of the Inquiry is to consider whether, in view of the desirability of clarity, effectiveness and uniformity in evidence law, some of these other evidentiary provisions should be incorporated into the uniform Evidence Acts and, if so, in what form.

2.21 Issues concerning whether certain existing or proposed evidentiary provisions should be enacted in the uniform Evidence Acts or in other legislation arise in a multitude of contexts throughout this Report. The discussion and conclusions reached are informed by the Commissions’ common policy position with regard to matters that should be incorporated in the uniform Evidence Acts and matters that should be enacted elsewhere.

2.22 This policy position is based on the following propositions: (i) uniformity in evidence laws should be pursued unless there is good reason to the contrary; (ii) the uniform Evidence Acts should be a comprehensive statement of the laws of evidence (the evidence law ‘pocket bible’); and (iii) the uniform Evidence Acts should be of general application to all criminal and civil proceedings. Each of these propositions is discussed briefly below.

### **Uniformity in evidence laws should be pursued**

2.23 Uniformity in evidence laws should be pursued unless there is good reason to the contrary. A primary objective of the Inquiry is to capitalise on a decade of operation of the uniform Evidence Acts regime. The Commissions hope that identifying the pressure points that have arisen and addressing those aspects of the uniform Evidence Acts which require fine-tuning will facilitate the introduction of the Act in all Australian states and territories.

2.24 The *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were in almost all respects identical when enacted. The overwhelming majority of provisions remain identical but some now differ from each other in significant ways. The Tasmanian and



Norfolk Island Acts also have differences, both from each other and from the Commonwealth and New South Wales legislation. These differences are discussed, where relevant, throughout this Report.

2.25 The uniform Evidence Acts are more correctly described as ‘mirror’ legislation rather than as uniform legislation. Mirror legislation refers to a situation in which a draft statute is enacted by separate legislation in each participating jurisdiction. This was what occurred when the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were enacted. While this mechanism produces virtual uniformity at the outset, this often erodes over time as legislators exercise their independent political judgement and make piecemeal changes.<sup>40</sup>

2.26 The Commissions have been mindful of the desirability of maintaining uniformity when considering whether certain categories of evidence law should be incorporated into the uniform Evidence Acts. Arguably, the more non-uniform provisions that are included, the less the incentive to maintain uniformity in the existing provisions.

2.27 Further, as more jurisdictions pass mirror uniform legislation, the potential for divergence increases. This issue is not unique to the uniform Evidence Act regime. Current initiatives to enact uniform defamation and uniform legal profession legislation raise similar concerns. One possible solution is for a periodic review of the legislation by Australian law reform bodies. This Inquiry has demonstrated that coordinated efforts of state, territory and federal governments, coupled with the ability and willingness of law reform bodies to work cooperatively to achieve an outcome, can produce broad consensus on legislative reform in an important area.

2.28 In order to ensure the maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts, the Commissions are of the view that Australian governments should consider initiating a joint review of the Acts within 10 years of the tabling of this Report. Such a review will prevent ossification, allow for monitoring of the implementation of the policy objectives and promote uniformity.

2.29 Uniformity will also be promoted if the Commonwealth, state and territory governments enter into an intergovernmental agreement. This agreement should provide that, subject to limited exceptions, any proposed change to the uniform Evidence Act in force in each jurisdiction be approved by the Standing Committee of Attorneys-General (SCAG). The party proposing the change should be required to give notice in writing to the other parties to the agreement, and the proposed amendment should be considered at the next SCAG meeting, or as otherwise agreed by the members of SCAG.

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40 See generally, B Opeskin, ‘The Architecture of Public Health Reform’ (2002) 22(2) *Melbourne University Law Review* 337, 349.

2.30 To ensure that all views are taken into account when issues relating to the uniform Evidence Acts arise, the Commissions are of the view that the amendment process should be informed by the advice of an expert advisory committee established to assist SCAG. The Advisory Committee established by the ALRC for the purposes of this Inquiry provides a workable model.

2.31 If such an intergovernmental agreement is entered into, SCAG will have to determine whether all provisions of the uniform Evidence Acts are subject to the amending provisions of the agreement. There may be legitimate variations in local practice which warrant a non-uniform approach in relation to some provisions. An example from the *Evidence Act 2001* (Tas) illustrates this point. Section 53(2) of the Tasmanian Act provides that, on application that a demonstration, experiment or inspection be held,

- (2) A judge is not to make an order unless satisfied that –
  - (a) the parties will be given a reasonable opportunity to be present; and
  - (b) if there is a jury, the jury will be present.

2.32 There is no requirement that the judge be present. The Evidence Act legislation in force in the Commonwealth, New South Wales and Norfolk Island provides that the judge and, if there is a jury, the jury, will be present.<sup>41</sup>

2.33 The reason for this variation can be traced back to Tasmanian criminal practice which pre-dates the introduction of the *Evidence Act 2001* (Tas). In Tasmania a court officer known as a ‘shower’, usually a clerk of the court, takes the jury on the view. The judge usually does not attend.<sup>42</sup>

2.34 Any agreement will also need to allow, without requiring SCAG approval, alteration or introduction of:

- non-uniform provisions such as those that have to refer to the jurisdiction in question or to other legislation in that jurisdiction;<sup>43</sup> and
- offence-specific provisions located outside of the uniform Evidence Acts which limit or qualify the effect of provisions in the particular Act.

In addition, it should not be necessary to have the approval of SCAG before introducing the uniform Evidence Act into a new jurisdiction.

2.35 While such limited exceptions will need to be made, the Commissions are of the strong view that the provisions of the uniform Evidence Act, as in force in the Commonwealth and New South Wales, and as amended by the recommendations

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41 *Evidence Act 1995* (Cth), s 53(2)(b); *Evidence Act 1995* (NSW), s 53(2)(b); *Evidence Act 2004* (NI), s 53(2)(b).

42 Office of the Director of Public Prosecutions (Tas), *Consultation*, Hobart, 15 March 2005.

43 For example, see *Evidence Act 1995* (NSW) s 4(1), reference to ‘all proceedings in a NSW court’.

contained in this Report, should be the models upon which the future mirror statutes are based. These statutes, when amended in accordance with the recommendations in this Report, will contain what the Commissions regard as provisions of general application. Any amendment to these general provisions should trigger the amendment mechanism outlined in the intergovernmental agreement.

2.36 There are three issues on which the Commissions are not unanimous:

- the proposed amendment to s 41 relating to improper questions in cross-examination.<sup>44</sup> The ALRC and NSWLRC recommend that the section be replaced with a provision which reflects s 275A of the *Criminal Procedure Act 1986* (NSW). The VLRC is of the view that the amended provision should provide specific protection for vulnerable witnesses;
- the NSWLRC considers that s 60 should be amended to exclude a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence. The ALRC and the VLRC do not share this view;
- the NSWLRC does not agree that it is necessary to address in the uniform Evidence Act the circumstances in which a warning may be given by a judge where there is forensic disadvantage caused by delay in the prosecution of an offence.<sup>45</sup> The ALRC and VLRC do not share this view.

2.37 If Recommendation 2–1 is implemented, the matters will be resolved pursuant to the terms of the Intergovernmental Agreement. To assist SCAG, the Commissions have set out in the relevant chapters detailed reasons for adopting differing views.

### **The uniform Evidence Acts should be comprehensive**

2.38 The uniform Evidence Acts should be a comprehensive statement of the laws of evidence. One of the great advantages of the uniform Evidence Acts to judicial officers, legal practitioners and academics has been referred to as their ‘pocket bible’ status. That is, ideally, with respect to rules of evidence applicable in all civil and criminal proceedings, it should not be necessary to refer to other statutes.

2.39 This goal is in tension with the proposition that the uniformity of the Evidence Acts should be maintained. The uniform Evidence Acts could be made more comprehensive by including all manner of evidentiary provisions, even where these are not uniform across jurisdictions. Suggestions have been made that each uniform

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44 Recommendation 5–2.

45 Recommendation 18–3.

Evidence Act could include a separate part containing evidentiary provisions unique to the particular jurisdiction. Alternatively, the jurisdiction-specific provisions could be incorporated into the relevant part of the Act, maintaining its overall structure.

2.40 These suggestions found little support in submissions and consultations. In the Commissions' view the 'pocket bible' approach should not be pursued at the cost of reduced uniformity.

2.41 The two most common examples of non-uniform provisions are those dealing with the adducing of children's evidence, and offence-specific provisions relating to sexual assault proceedings. Both of these areas have received extensive consideration by a number of law reform bodies, government task forces, non-governmental organisations and royal commissions both in Australia and overseas.<sup>46</sup>

2.42 Hopefully, as more jurisdictions enact a uniform Evidence Act, there will be greater scope for uniformity in areas where significant difference now exists. Further, the requirement of the consent of SCAG to the amendment of provisions of general application, coupled with the Commissions' recommendation, noted below, that all Australian jurisdictions should work towards harmonisation of provisions relating to issues such as children's evidence and offence-specific evidentiary provisions, will facilitate the movement towards the Act as a true 'pocket-bible'. Pending these developments, the Commissions are of the view that the uniform Evidence Acts should be of general application.

### **The uniform Evidence Acts should be of general application**

2.43 The uniform Acts should be of general application to all criminal and civil proceedings. The corollary is that the uniform Evidence Acts should generally *not* include provisions of application only to specific offences or categories of witness.<sup>47</sup> In areas such as family law proceedings and proceedings involving child witnesses,

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<sup>46</sup> For example see: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997); Family Law Council, *The 'Child Paramountcy Principle' in the Family Law Act* (2004); New South Wales Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (1996); New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002); New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses—A Discussion Paper*, PP 26 (1996); NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004); NSW Bureau of Crime Statistics and Research, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction* (2005); NSW Bureau of Crime Statistics and Research, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Summary of Recommendations*, Report No 55: Part 2A (2000); Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997); Taskforce on Sexual Assault and Rape in Tasmania, *Report* (1998); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

<sup>47</sup> While the uniform Evidence Acts already contain some provisions of application only to specific categories of witness, these are limited; eg, in relation to the compellability of spouses and the questioning of mute or deaf witnesses: Uniform Evidence Acts ss 18–19, 31.

evidentiary provisions are closely linked with particular types of proceedings or associated procedural provisions, and it is most convenient for these to be co-located.

2.44 The balance of convenience and policy principle will differ from case to case. For example, while the Commissions have rejected the idea of introducing a hearsay exception directed to children's evidence into the uniform Evidence Acts, the introduction of a provision dealing with expert evidence on the credibility or reliability of children's evidence is recommended. This is, in part, because the latter reform does not constitute a major departure from the existing law, but rather highlights the admissibility of a particular type of expert opinion evidence to facilitate a change in practice.<sup>48</sup> In summary, the Commissions acknowledge that total consistency is desirable but currently unattainable.

**Recommendation 2–1** To promote and maintain uniformity, the Standing Committee of Attorneys-General (SCAG) should adopt an Intergovernmental Agreement which provides that, subject to limited exceptions, any proposed changes to the uniform Evidence Acts must be approved by SCAG. The agreement should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the agreement, and the proposed amendment must be considered and approved by SCAG before being implemented.

**Recommendation 2–2** All Australian jurisdictions should work towards harmonisation of provisions relating to issues such as children's evidence and offence-specific evidentiary provisions.

**Recommendation 2–3** In order to ensure the maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts, Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years from the tabling of this Report.

## Policy framework

### General

2.45 In carrying out its original inquiry, the ALRC sought to locate within the new legislation many of the existing common law rules. However, it also recommended modifications to those rules to remove unnecessary restrictions on evidence being

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<sup>48</sup> For a more detailed discussion of this issue see Ch 9.

placed before courts and to reform the law to meet the demands of contemporary society.<sup>49</sup>

2.46 In the final Report (ALRC 38), the ALRC stated that its inquiry was predicated on the continuation of the trial system.<sup>50</sup> In particular, it emphasised two features of that system:

- *The adversary nature of the civil and criminal trial.* In ALRC 38, the ALRC argued that: the nature of the adversary system meant that rules are important to guide and control the proceedings; rules allow predictability about what evidence is necessary and admissible so as to enable parties to prepare their cases for trial with reasonable confidence, and to be able to assess their prospects for success; and without a body of rules, control of trials through an appeal system and appellate review would be unpredictable. However, the ALRC noted the difficulty of establishing an appropriate level of predictability.

The more detailed and precise the rule, the more difficult it may be to understand it fully and the more rigid it is likely to be in its application. The more general the language used the more flexible the rule will be but the less predictable will be its application. This issue is central to the approach to be taken in reform proposals. The approach taken in the interim proposals was to attempt to draft rules as the first option. Where this was not possible, discretions were formulated.<sup>51</sup>

- *Jury trial.* In ALRC 38, the ALRC raised the question of separate rules for jury and non-jury trials. However, it concluded that the preferable approach was to distinguish between civil and criminal trials.<sup>52</sup> This is discussed in detail later in this chapter.

2.47 ALRC 38 was also predicated on the continuation of the laws of evidence in courts.<sup>53</sup> This is by way of contrast with many administrative and quasi-judicial tribunals that are not bound by the rules of evidence. In particular, the ALRC emphasised that even if it had been open to the Commission under its Terms of Reference, ‘it would not be appropriate simply to abolish the rules of evidence’.<sup>54</sup> In the case of criminal trials, the ALRC stated that ‘the trial is accusatorial and the underlying concern to minimise wrongful convictions warrants a strict approach to the admissibility of evidence’.<sup>55</sup> This Inquiry has not departed from this underlying assumption, nor does it consider that its Terms of Reference permit it to do so.

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49 Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Evidence Bill 1993*, Interim Report (1994), 3.

50 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [28].

51 *Ibid.*, [28].

52 *Ibid.*, [28].

53 *Ibid.*, [29].

54 *Ibid.*, [29].

55 *Ibid.*, [29], fn 10.

2.48 In relation to civil trials, the ALRC stated that while a civil trial is a method for the resolution of a dispute between plaintiff and defendant, ‘the object of a trial must be something more than merely to resolve a dispute’ and noted that the object should be to resolve a dispute in a way that is ‘just’.<sup>56</sup> It concluded that there were four essential elements to a civil trial achieving its purpose:

- fact-finding;
- procedural fairness;
- expedition and cost; and
- quality of rules.<sup>57</sup>

2.49 In ALRC 26, the ALRC argued that, while the elements of a civil trial are also important to a criminal trial,

the nature and purpose of the criminal trial differ significantly from those of the civil trial. Its larger and more general object is to serve the purposes of the criminal law, which are to control, deter and punish the commission of a crime for the general good.<sup>58</sup>

2.50 In ALRC 38, the ALRC confirmed the five key features of a criminal trial that had been discussed in ALRC 26:

- *Accusatorial system.* An accused is presumed innocent until proved guilty and has no obligation to assist the Crown.
- *Minimising the risk of wrongful convictions.* Traditionally this reflects the view that it is in the interest of the community to minimise the risk of conviction of the innocent even if it may result, from time to time, in the acquittal of the guilty.
- *Definition of central question.* The central question is whether the Crown has proved the guilt of the accused beyond reasonable doubt. The purpose of the criminal trial is to be able to say with confidence if there is a guilty verdict that the accused committed the offence charged with the requisite *mens rea*.

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<sup>56</sup> Ibid, [33].

<sup>57</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [34].

<sup>58</sup> Ibid, [35].

- *Recognition of rights of individual.* Convictions are not to be obtained at any cost and accused persons have rights consistent with recognition of their personal dignity and integrity and with the overall fairness of society.
- *Assisting adversarial contest.* An accused person is entitled to be armed with some protections consistent with ‘the idea of the adversary system as a genuine contest’.<sup>59</sup>

2.51 The ALRC noted that this view of the nature and purpose of the criminal trial is of long standing. It identified the three main issues for inquiry in relation to criminal trials:

- whether and, if so, to what extent the criminal trial involves a search for the truth;
- the traditional concern to minimise the risk of wrongful conviction; and
- the balance to be struck between the prosecution and the defendant.<sup>60</sup>

2.52 In ALRC 38, the ALRC discussed the arguments surrounding the issue of a ‘search for the truth’, noting their impact on the privilege against self-incrimination, the use of the unsworn statement and cross-examination of the accused.<sup>61</sup> It rejected the view that all else should be subordinated to a search for the truth, emphasising the policy considerations of ‘the serious consequences of conviction, fear of error, a concern for individual rights and fear of abuse of governmental power’.<sup>62</sup>

2.53 The ALRC also discussed whether a case had been made out to disturb the traditional balance that favours the wrongful acquittal of accused persons to wrongful conviction. It concluded that no such case had been made out. While the ALRC agreed with criticism of technical acquittals, it felt that its recommendations would go a long way to avoid such results.<sup>63</sup>

2.54 In ALRC 38, the ALRC also addressed the balance between the prosecution and the defence. The ALRC observed that the proposals in ALRC 26 had been criticised by some as favouring the accused, and by others as favouring the prosecution.<sup>64</sup> The ALRC noted in ALRC 38 that it had not started out with any preconceived notion of altering the balance, but acknowledged that some of the proposals advanced in ALRC 26 would have that impact. In response to submissions, amendments were made

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59 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [35].

60 Ibid, [36].

61 Ibid, [37].

62 Ibid, [38].

63 Ibid, [40].

64 Ibid, [41].



to some of the ALRC's original proposals: some that might favour the prosecution,<sup>65</sup> and some that might favour the accused.<sup>66</sup>

2.55 Perhaps not surprisingly, this debate continues. In some consultations and submissions, concerns were expressed that the uniform Evidence Acts may have shifted the balance in favour of the prosecution in criminal cases.<sup>67</sup> The basis of this criticism revolves largely around the operation of ss 38<sup>68</sup> and 60.<sup>69</sup> Others suggest that, while the uniform Evidence Acts have had a significant impact on the way criminal trials are conducted—and in particular on the prosecution's duty to call relevant witnesses—this change has not shifted the balance in favour of the prosecution.<sup>70</sup>

2.56 Ultimately, the recommendations in ALRC 38 were structured around the policy framework described in ALRC 26. The key elements of the framework were:

- *Fact-finding.* This is the pre-eminent task of the courts and recommendations were directed 'primarily to enabling the parties to produce the probative evidence that is available to them'.<sup>71</sup>
- *Civil and criminal trials.* These differ in nature and purpose and this should be taken into account. In regard to the admission of evidence against an accused, a more stringent approach should be taken. The differences were also reflected in areas such as: compellability of an accused, cross-examination of an accused, and in the exercise of a court's power in matters such as the granting of leave.
- *Predictability.* The use of judicial discretions should be minimised, particularly in relation to the admission of evidence, and rules should generally be preferred over discretions.
- *Cost, time and other concerns.* Clarity and simplicity are the objectives.<sup>72</sup>

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65 In relation to the tape recording of interviews, illegally obtained evidence, co-accused as witness for the prosecution and some issues around cross-examination of the accused: Ibid, [44].

66 Reinstatement of the discretion to exclude unfairly obtained evidence and inclusion of a rule regarding the exclusion of a confession in the absence of a caution: Ibid, [44].

67 For example see, eg, S Cox, *Consultation*, Darwin, 31 March 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

68 Discussed in Ch 5.

69 Discussed in Ch 7.

70 T Game, *Consultation*, Sydney, 25 February 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

71 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [46].

72 Ibid, [46].

## Evidence, jury and non-jury trials

2.57 One of the central approaches to evidence recommended in ALRC 38, and adopted in the uniform Evidence Acts, was not to distinguish between jury and non-jury trials per se, but to draw a distinction between criminal and civil proceedings. This has been discussed above. While juries are used primarily in criminal proceedings for serious indictable offences,<sup>73</sup> they are not the exclusive province of criminal trials. For example, juries are used in defamation cases in New South Wales, and in some civil trials in Victoria.

2.58 While the Acts contain some provisions dealing specifically with juries—including those dealing with the presence (or absence) of the jury where preliminary questions are heard and determined, and concerning judicial directions to juries—the Acts do not generally distinguish between trials by judge and jury (jury trials) and trials by judge alone (non-jury trials).

2.59 One of the purposes served by the laws of evidence is to keep from juries evidence that may be misused by them.<sup>74</sup> In ALRC 26, the ALRC discussed in some detail the view that the laws of evidence developed from a mistrust of a jury's ability properly to assess the evidence placed before it. The ALRC noted that if that was the only, or the main, purpose served by the laws of evidence, the direction of reform should be to abolish, or at least severely to limit, the operation of the rules of evidence in Commonwealth and territory courts, as juries are seldom used.<sup>75</sup>

2.60 While the ALRC rejected the thesis that the rules of evidence are purely the 'child of the jury', it acknowledged that the significance of jury trials for the rules of evidence had to be considered.<sup>76</sup> Specifically, the ALRC considered whether there should be separate rules designed for jury and non-jury trials.

2.61 The case for separate rules is, in essence, that a more flexible and less exclusionary system can be used for non-jury trials. It is argued that judges and magistrates, through training and experience, are less susceptible than jurors to misusing evidence such as hearsay or character evidence.<sup>77</sup>

2.62 The ALRC observed that, on the available evidence, it could not be assumed that the potential to misuse evidence is greater for jurors. It concluded that a case had not been made out for the development of separate rules of evidence for jury and non-jury trials. Rather, for the purposes of evidence law, the distinction between civil and criminal trials was seen as the more important division.<sup>78</sup>

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73 New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986), [2.10].

74 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [49].

75 *Ibid.*, [50].

76 See *Ibid.*, [49].

77 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [28].

78 *Ibid.*, [28]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [79]. See also Australian Law Reform Commission, *Reform of Evidence Law*, IP 3 (1980), 19–29; 45–49.

2.63 The ALRC noted that there may be other reasons why doubtful evidence should be excluded from criminal trials except in clearly defined circumstances. Further, considerations of time, cost and fairness—none of which has any connection with the quality of the tribunal—were said to warrant control over unreliable and dangerous evidence.<sup>79</sup>

2.64 A more recent inquiry has considered whether different rules of evidence should apply to non-jury trials. The Law Reform Commission of Western Australia (LRCWA) considered, as part of its review of the criminal and civil justice system, whether the general applicability of exclusionary rules of evidence should be varied.

2.65 The LRCWA proposed initially that a dual system of rules of evidence should be introduced, with one set of rules applying to jury trials and one to non-jury trials.<sup>80</sup> The LRCWA later withdrew this proposal, noting that such a dual system of rules and procedure ‘may create further complexity in the already highly complex laws of evidence and undermine public confidence in jury trials’.<sup>81</sup>

### Submissions and consultations

2.66 There is general support for the approach in the uniform Evidence Acts of placing primary importance on the nature of the proceeding, rather than on whether the case was being tried before a jury.<sup>82</sup> The Law Council of Australia (Law Council) notes:

In considering evidential rules a fundamental distinction needs to be drawn between civil and criminal proceedings. Whilst civil process is ultimately concerned to provide a forum for the settlement of disputation between citizens, criminal process involves accusation by the state against citizens for the purpose of punishment. It is a foundational principle of criminal process that it should be designed to avoid the wrongful conviction of the innocent and this requires evidential rules protecting an innocent accused from this risk.<sup>83</sup>

2.67 The Law Council further notes that ‘this foundational principle applies whether an accused is tried before a jury or before a judge sitting alone and the Council is of the view that generally the rules of evidence should be the same at both forms of trial’.<sup>84</sup>

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79 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [28].

80 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Collected Consultation Drafts* (1999), Ch 1.3; Proposal 7.

81 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report* (1999), [7.6].

82 Law Council of Australia, *Submission E 32*, 4 March 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Confidential, *Submission E 31*, 22 February 2005.

83 Law Council of Australia, *Submission E 32*, 4 March 2005.

84 *Ibid.*

2.68 One senior practitioner considers that specific provisions, for example s 60 relating to the admission of hearsay evidence, and the credibility provisions, could be limited to jury trials.<sup>85</sup> This view has not received general support. For example, one judicial officer notes:

I think it would be highly undesirable to distinguish between jury and non-jury trials for the purposes of the rules of evidence. One of the great benefits of the Act is that there are uniform rules which, in my submission, operate fairly and efficiently in both criminal and civil trials. It would be confusing, and possibly a source of unfairness, to make more distinctions than are absolutely necessary.<sup>86</sup>

2.69 It is suggested that, even in non-jury trials, the discipline imposed by provisions such as the discretionary exclusions in ss 135 and 136 has a beneficial effect on judicial decision making.<sup>87</sup> The Law Council notes that

although it may appear unnecessary for judges sitting alone to exercise discretions to exclude prejudicial evidence, the existence of such discretions serves to emphasize emphatically to the judge not to act upon such evidence ...<sup>88</sup>

### The Commissions' view

2.70 Submissions received and consultations conducted during the course of this Inquiry indicate clearly that there is little support for more differentiation in the uniform Evidence Acts between rules applying in jury and non-jury trials. It appears that the emphasis on the distinction between civil and criminal trials, rather than whether a jury is involved in the decision-making, is working well in practice. The Commissions do not recommend that the uniform Evidence Acts be amended to allow more differentiation between rules of evidence applying in jury and non-jury trials.

## Scope of the uniform Evidence Acts

2.71 Chapter 1 of the uniform Evidence Acts deals with a number of preliminary matters.<sup>89</sup> Part 1.1 deals with formal matters, including the short title (s 1), commencement (s 2), and definitions (s 3). In relation to the definition section, the *Evidence Act 2001* (Tas) defines the terms used in the Act in s 3, whereas the Commonwealth, New South Wales and Norfolk Island Acts define the terms in a Dictionary at the end of the Acts.

<sup>85</sup> T Game, *Consultation*, Sydney, 25 February 2005.

<sup>86</sup> Confidential, *Submission E 31*, 22 February 2005. See also New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

<sup>87</sup> J Garbett, *Consultation*, Sydney, 28 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005, [14].

<sup>88</sup> Law Council of Australia, *Submission E 32*, 4 March 2005. The Commissions note that in, *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627, the High Court recognised that inadmissible evidence in a criminal case could affect a magistrate's decision.

<sup>89</sup> Ch 1 Pt 1 and Ch 1 Pt 2 in the *Evidence Act 2001* (Tas).

2.72 Part 1.2 of the uniform Evidence Acts deals with the application of the Acts. Some problems with the wording used in the sections in Part 1.2 have been identified. Drafting problems of general application will be discussed in this section of the Report.

### Section 4—Courts and proceedings to which the Acts apply

2.73 A question arises as to the meaning of the phrase ‘applies in relation to all proceedings’ in s 4(1) of the uniform Evidence Acts.<sup>90</sup> Dealing first with the meaning of the word ‘proceeding’, in the context of the *Evidence Act 1995* (NSW), Giles CJ Comm D (as his Honour then was) noted in *Sved v Council of the Municipality of Woollahra*:<sup>91</sup>

Proceeding is not defined in the Evidence (Consequential and Other Provisions) Act, or in the [*Evidence Act 1995* (NSW)]. The word ‘proceeding’ may or may not, depending upon its context and purpose, refer to a step in the action ... and in other contexts has been held to refer to the action as whole ... and to a step in the action ... Neither the report of the [Australian] Law Reform Commission (Report No 38, 1987) nor the report of the New South Wales Law Reform Commission (LRC 56, 1988) sheds light on the matter.<sup>92</sup>

2.74 His Honour held that ‘proceedings’ may consist of a step in an action.<sup>93</sup> The Family Court of Australia applied a similar interpretation of s 4(1) of the *Evidence Act 1995* (Cth) in *Deputy Commissioner of Taxation v McCauley*.<sup>94</sup>

2.75 Having established that ‘proceeding’ for the purpose of s 4(1) of the uniform Evidence Acts may consist of a step in the action, the question arises whether any step will suffice, or whether there are limitations on the types of steps that will qualify. Such a limitation was suggested in *Griffin v Pantzer*.<sup>95</sup> When addressing the application of s 128 of the *Evidence Act 1995* (Cth) to an examination under s 81 of the *Bankruptcy Act 1996* (Cth), Allsop J, on behalf of a Full Court of the Federal Court, stated:

The word ‘proceedings’ is capable of wide and flexible application. In the Evidence Act, however, the proceedings contemplated are those conducted by a court, or by a person or by a body who or which is required to apply the laws of evidence. The

90 The *Evidence Act 2001* (Tas) s 4 adopts the wording ‘applies to all proceedings’. This is discussed in detail below.

91 *Sved v Council of the Municipality of Woollahra* (Unreported, New South Wales Supreme Court, Giles J, 15 April 1998); leave to appeal was refused in *Council of the Municipality of Woollahra v Sved* (Unreported, New South Wales Court of Appeal, Mason P and Sheller JA, 30 September 1998).

92 *Sved v Council of the Municipality of Woollahra* (Unreported, New South Wales Supreme Court, Giles J, 15 April 1998), 6 (citations omitted).

93 *Ibid.*, 8.

94 *Deputy Commissioner of Taxation v McCauley* (1996) 22 Fam LR 538, [34]–[37].

95 *Griffin v Pantzer* (2004) 137 FCR 209.

whole Evidence Act is concerned with the regulation of the rules of evidence in proceedings in which there are parties, and in which there are witnesses.<sup>96</sup>

2.76 His Honour went on to note:

It is not easy to see how an examination under s 81 is such a proceeding. It is not between parties. It is not the resolution or agitation of a *lis* at which evidence is adduced under the rules of evidence. It does not have parties or witnesses properly so-called. It is an interrogation—a fact-finding exercise of the kind discussed by Lord Hanworth MR in *Re Paget* [[1927] 2 Ch 85].<sup>97</sup>

2.77 Hence, the present state of the law seems to be that ‘proceedings’ in s 4(1) of the uniform Evidence Acts encompasses any step in a suit or action where there is an issue between parties in dispute and the suit or action involves evidence ‘adduced under the rules of evidence’.<sup>98</sup>

2.78 While the case law has provided guidance as to the meaning of the word ‘proceedings’ in s 4(1), a question arises as to whether the prepositional phrase ‘in relation to’ as used in s 4 of the Commonwealth, New South Wales and Norfolk Island Evidence Acts means something different to the word ‘to’ as used in s 4 of the *Evidence Act 2001* (Tas).<sup>99</sup> If the answer is ‘no’, then to clarify the meaning of the section and promote uniformity, the phrase ‘in relation’ in s 4 of the uniform Evidence Acts should be deleted.

2.79 In *Perlman v Perlman*, Gibbs CJ considered the meaning of the words ‘in relation to’ in the *Family Law Act 1975* (Cth). He stated:

The words ‘in relation to’ import the existence of a connexion or association between the two proceedings; or in other words that the proceedings in question must bear an appropriate relationship to completed proceedings of the requisite kind.<sup>100</sup>

### ***The Commissions’ view***

2.80 It was proposed in DP 69 that ‘[s]ection 4(1) of the Commonwealth and New South Wales Evidence Acts should be amended to delete the words ‘in relation’ from the phrase ‘in relation to all proceedings’.<sup>101</sup> The proposal was supported in those submissions which commented on the issue.<sup>102</sup> The evidentiary rules prescribed in the

96 Ibid, [198].

97 Ibid, [202].

98 Ibid.

99 This is important, as the High Court has noted ‘a court construing a statutory provision must strive to give meaning to every word of the provision’: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382.

100 *Perlman v Perlman* (1984) 155 CLR 474, 484 (citations omitted).

101 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 2–2.

102 Australian Federal Police, *Submission E 92*, 20 September 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

uniform Evidence Acts have been held incapable of application otherwise than in the course of a hearing of a proceeding in a court.<sup>103</sup> Hence, there is no ‘proceeding’ outside of the courts identified in s 4 to which the ‘proceedings’ can ‘relate’.

2.81 The better view appears to be that the use of the words ‘in relation’ in s 4(1) of the Evidence Acts of the Commonwealth, New South Wales and Norfolk Island is an example of ‘verbosity in prepositions’.<sup>104</sup> For a similar reason, the words ‘in relation’ should also be deleted from ss 4(5), (5A) and 5 of the *Evidence Act 1995* (Cth).

**Recommendation 2–4** Section 4(1) of the Commonwealth and New South Wales Evidence Acts should be amended to delete the words ‘in relation’ from the phrase ‘in relation to all proceedings’. The words ‘in relation’ should also be deleted from sections 4(5), (5A) and 5 of the Commonwealth Evidence Act.

## Section 11—General powers of a court

2.82 Section 11 of the uniform Evidence Acts provides:

- (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

2.83 Section 11(1) assumes that the general power of a court to control the conduct of proceedings before it is found elsewhere—either in legislation or at common law. This power is preserved unless the Act provides otherwise, expressly or by necessary intendment. Section 11(2) preserves the general power of a court to control an abuse of process in a proceeding.<sup>105</sup>

2.84 What is not clear is the relationship between subsections 11(1) and (2). Does s 11(2) provide an absolute rule, or should the test used in s 11(1) be read by implication into s 11(2)? The latter position was accepted by the New South Wales Court of Appeal in *Van Der Lee v New South Wales*.<sup>106</sup> In that case, certain defendants to cross-claims in the New South Wales Supreme Court moved for the stay or dismissal of those cross-claims on the ground that they were an abuse of the Court’s

103 *Mann v Carnell* (1999) 201 CLR 1, 9; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 54–55.

104 E Gowers, *The Complete Plain Words* (2nd ed, 1973), 57.

105 In *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486, 497, Meagher JA referred to s 11 as being ‘almost unintelligible’. The Commissions do not share this view.

106 *Van Der Lee v New South Wales* [2002] NSWCA 286, [62].

process. At issue was whether the primary judge was correct in holding that s 131 of the *Evidence Act 1995* (NSW) rendered inadmissible on the motion before the court evidence of settlement negotiations.

2.85 Hodgson JA, with whom Mason P and Santow JA agreed on the point, stated:

I think s 11(2) does have the effect that, when evidence is tendered that could be evidence of an abuse of process, albeit evidence of without prejudice settlement negotiations, the Court may receive that evidence on the voir dire; and then, if that evidence does either by itself or in combination with other evidence establish an abuse of process, the Court may rule the evidence admissible and make appropriate orders to deal with that abuse of process. In my opinion, the powers of a court with respect to abuse of process include its powers to receive evidence, and in my opinion the authorities relied on by the claimants show that, at common law, communications evidencing abuse of process will not be protected by without prejudice privilege. *I do not think that s 131 provides otherwise, either expressly or by necessary intendment*  
...<sup>107</sup>

2.86 The last sentence of the above quotation supports the view that the test used in s 11(1) is to be read by implication into s 11(2).

### ***General obligation to ensure a fair trial***

2.87 In IP 28, opinion was sought as to whether s 11(2) should be amended to include a general obligation to ensure a fair trial.<sup>108</sup> Some practitioners consider that such an amendment is unnecessary.<sup>109</sup> One senior judicial officer notes that the obligation to ensure a fair trial is an obligation which operates at a higher level than the rules of evidence. For example, there is no rule of evidence that says that judges should not be biased. The judge suggests that it is better to treat the Acts as providing only detailed regulation of particular areas of evidence.<sup>110</sup>

2.88 In contrast, one submission notes:

Recent legislation, both Commonwealth and State, especially relating to alleged acts of terrorism and national security, have significantly restricted or curtailed traditional rights under the common law. This makes it essential that the courts have a general duty to ensure a fair trial and ... s 11(2) should be amended accordingly.<sup>111</sup>

<sup>107</sup> Ibid, [62] (emphasis added). See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.1260].

<sup>108</sup> See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–5.

<sup>109</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

<sup>110</sup> Justice of the High Court of Australia, *Consultation*, Canberra, 9 March 2005.

<sup>111</sup> Confidential, *Submission E 31*, 22 February 2005. The New South Wales Public Defenders Office submits that ‘it would be useful to give a statutory embodiment to the undoubted common law obligation to ensure a fair trial’: New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.



***The Commissions' view***

2.89 No further submissions on this point in response to DP 69 were received. For the reasons stated in DP 69,<sup>112</sup> the Commissions remain of the view that the obligation to ensure a fair trial is adequately enshrined in the common law and that the inclusion of such an obligation in the uniform Evidence Acts would be redundant and potentially counterproductive. Hence, the Commissions do not consider that an amendment to s 11(2) to ensure a fair trial is necessary.

**The application of the uniform Evidence Acts in federal jurisdiction**

2.90 Except for the few provisions set out in s 5 that apply to proceedings in an Australian court,<sup>113</sup> the Commonwealth Act applies only to proceedings in an Australian Capital Territory court or a federal court,<sup>114</sup> except where the federal court is hearing an appeal from a state or Northern Territory court.<sup>115</sup> Therefore, the Act does not apply to state courts even when such courts are exercising federal jurisdiction.

2.91 However, where a state court is exercising federal jurisdiction in New South Wales or Tasmania, the provisions of the mirror legislation in those states will apply to those proceedings by reason of s 79 of the *Judiciary Act 1903* (Cth). Yet both the New South Wales and Tasmanian evidence Acts purport to apply of their own force to proceedings in, respectively, New South Wales and Tasmanian courts when those courts are exercising federal jurisdiction.<sup>116</sup> To this extent, the legislation is plainly invalid. It is not within the power of a state parliament to make laws governing the exercise of federal jurisdiction, including the exercise of that jurisdiction by the courts of that state.<sup>117</sup> Indeed, even if it were within power, such state law would be inoperative through constitutional inconsistency with s 79 of the *Judiciary Act 1903* (Cth).

2.92 In DP 69, the Commissions proposed that the definition of 'NSW court' in the Dictionary to the *Evidence Act 1995* (NSW) be amended to delete the parenthetical words 'including such court exercising federal jurisdiction'. Four submissions

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112 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [2.99].

113 *Evidence Act 1995* (Cth) s 5.

114 *Ibid* s 4(1).

115 *Ibid* s 4(5)(a) and (b), subject to s 4(5A) which deals with appeals to the Family Court of Australia from a state or territory court of summary jurisdiction.

116 *Evidence Act 1995* (NSW) s 4(1), read with the definition of 'NSW court' in the Dictionary; *Evidence Act 2001* (Tas) s 4(1), read with the definition of 'Tasmanian court' in s 3(1).

117 Consider *Commissioner of Stamp Duties v Owens (No 2)* (1953) 88 CLR 168, 169; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [59].

addressed this proposal, and all supported the Commissions' view.<sup>118</sup> Hence, the Commissions recommend that the New South Wales Act should be amended to reflect this position.

**Recommendation 2–5** The definition of 'NSW court' in the Dictionary to the *Evidence Act 1995* (NSW) should be amended to delete the parenthetical words 'including such a court exercising federal jurisdiction'.

### Application of the *Evidence Act 1995* (Cth)

2.93 The *Evidence Act 1995* (Cth) applies generally to all proceedings in a federal court or an Australian Capital Territory court. However, some provisions of the Act apply to proceedings in all Australian courts, including the courts of the states and territories, whether or not exercising federal jurisdiction.<sup>119</sup> As has already been noted, the application of certain provisions specified in s 5 of the Act, for example, relating to proof of official records and Commonwealth documents, is extended to cover proceedings in all Australian courts.<sup>120</sup> Provisions dealing with the full faith and credit to be given to documents properly authenticated;<sup>121</sup> the swearing of affidavits for use in Australian courts exercising federal jurisdiction or similar jurisdiction;<sup>122</sup> and the abolition of the privilege against self-incrimination for bodies corporate<sup>123</sup> also apply to proceedings in all Australian courts. Reliance is placed on Commonwealth powers under the *Australian Constitution* that clearly support a wider application, for example, s 51(xxv) (recognition of state laws and judicial proceedings) and s 118 (full faith and credit).

2.94 Section 8(1) of the *Evidence Act 1995* (Cth) provides that the Act 'does not affect the operation of the provisions of any other Act, other than sections 68, 79, 80 and 80A of the *Judiciary Act 1903*'. The relevant provisions of the *Judiciary Act 1903* (Cth) allow state or territory procedural and evidence law to operate in courts exercising federal jurisdiction, where there is no Commonwealth law applicable. These provisions are modified in their operation by the provisions of the *Evidence Act 1995* (Cth), noted above, which have extended application to proceedings in all Australian

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118 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Australian Federal Police, *Submission E 92*, 20 September 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

119 See *Evidence Act 1995* (Cth) Dictionary definition of 'Australian court'.

120 Ibid s 5. One senior practitioner in the Northern Territory identified the extended application of s 182 (relating to the proof of Commonwealth records, postal articles sent by Commonwealth agencies and certain Commonwealth documents), as provided for in s 5, as an area of concern: J Tippet, *Consultation*, Darwin, 16 August 2005.

121 *Evidence Act 1995* (Cth) s 185.

122 Ibid s 186.

123 Ibid s 187.

courts. Otherwise, the *Evidence Act 1995* (Cth) does not affect procedural or evidence law in state or territory courts.

2.95 It has been suggested that one way to achieve greater uniformity in Australian evidence laws is to extend the operation of the *Evidence Act 1995* (Cth) to all Australian courts exercising federal jurisdiction. In ALRC 38, the ALRC noted the possibility of extending the application of Commonwealth evidence legislation to state courts exercising federal jurisdiction, but considered that its Terms of Reference did not extend to this question.<sup>124</sup>

2.96 There are fundamental policy questions about whether or to what extent the Commonwealth should attempt to prescribe the manner in which state courts exercise federal jurisdiction. One view is that the Commonwealth should accept state courts as it finds them. This derives from the idea that state courts provide a service to the Australian government when they exercise federal jurisdiction, albeit one that has an express constitutional foundation. An alternative view is that it is legitimate and desirable for the Commonwealth to seek to ensure that federal jurisdiction is exercised uniformly in all Australian courts, whether they be federal or state, and not only that it is uniform, but that federal jurisdiction is exercised effectively and efficiently.<sup>125</sup>

2.97 In ALRC 38, the Commission noted that there would be difficulties, in the absence of similar state evidence laws, in the trial in state courts of persons charged with both federal and state offences.<sup>126</sup> Some of the difficulties that would arise if state courts were required to switch between state and federal procedures according to the nature of the jurisdiction they exercised were highlighted in the ALRC's 2001 Report, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92).<sup>127</sup>

2.98 These difficulties include that: many disputes raise a combination of state and federal issues, the relative importance of which may change significantly during the course of litigation; emphasising the nature of the jurisdiction exercised by a court may lend disproportionate weight to the procedural aspects of a case; the determination of whether a matter lies within state or federal jurisdiction may be highly technical and ultimately peripheral to settling the substantive dispute between the parties; there is a degree of unpredictability as to when a matter becomes federal in character; and there

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124 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [21].

125 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1902 and Related Legislation*, ALRC 92 (2001), [6.45]–[6.47].

126 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [21]. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), Ch 5.

127 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1902 and Related Legislation*, ALRC 92 (2001); Justice J McKechnie, *Consultation*, Perth, 9 May 2005.

may be legal difficulties in determining the scope of federal jurisdiction where, for example, a federal claim is allied to a common law claim and the accrued jurisdiction of a federal court is consequently invoked.<sup>128</sup>

2.99 Such difficulties were a major factor contributing to the view, expressed in ALRC 92, that there should be no general policy of extending federal law, including matters of practice and procedure, to all courts exercising federal jurisdiction.<sup>129</sup>

### Submissions and consultations

2.100 Opinion was sought as to whether the application of the *Evidence Act 1995* (Cth) should be extended to all proceedings in all Australian courts exercising federal jurisdiction.<sup>130</sup> While not unanimous,<sup>131</sup> the general consensus is that such an amendment is undesirable.<sup>132</sup> It is suggested that such an extension may give rise to jurisdictional arguments that complicate and protract litigation,<sup>133</sup> result in the possibility that two evidentiary regimes might apply in cases where state and federal matters are heard together,<sup>134</sup> and create uncertainty as to the scope of ‘federal jurisdiction’, the resolution of which may result in complex collateral issues being raised in the litigation.

2.101 For example, in relation to criminal prosecutions, the Commonwealth Director of Public Prosecutions raised the following concern:

An issue was raised [in the Discussion Paper] concerning the possible extension of the application of the Commonwealth Evidence Act to proceedings in all Australian courts exercising federal jurisdiction. This measure would ensure uniformity in prosecuting Commonwealth offences. However, without State and Territory laws being in a similar form as part of a unified scheme, practical difficulties would arise in prosecuting. For example, joint trials of offences against Commonwealth and State/Territory law would not be feasible as it would not be possible for two sets of evidence rules to apply in the one trial for both State and Commonwealth offences. It would be necessary to avoid joint trials with the added cost and inconvenience where the alleged offences stem from related conduct. Over the last 5 years, there have been over 400 defendants (approximately 2%) prosecuted by the CDPP on both Commonwealth and State/Territory charges.<sup>135</sup>

128 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1902 and Related Legislation*, ALRC 92 (2001), [2.89].

129 Ibid, [2.89].

130 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 2–2.

131 Australian Customs Service, *Submission E 24*, 21 February 2005; Confidential, *Submission E 31*, 22 February 2005.

132 See, eg, Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

133 Law Council of Australia, *Submission E 32*, 4 March 2005.

134 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.

135 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

### The Commissions' view

2.102 The best path to uniformity is through the participation of all states and territories in the uniform Evidence Acts scheme, rather than by mandating the application of the *Evidence Act 1995* (Cth) to all proceedings in all Australian courts exercising federal jurisdiction. The implementation of uniform evidence legislation throughout Australia has received widespread, although not unanimous,<sup>136</sup> support.<sup>137</sup>

2.103 In addition to the problems identified in the submissions and consultations, with which the Commissions agree, it is unlikely that such an extension would be workable. To apply properly the provisions of the uniform Evidence Acts, judicial officers and practitioners must be familiar with both the Acts' provisions and the policy underlying the Acts. Such an understanding is gained through instruction, informed analysis and exposure on a regular basis to the Acts' provisions. Given the movement towards uniformity outlined in Chapter 1, mandating the application of the *Evidence Act 1995* (Cth) to all proceedings in all Australian courts exercising federal jurisdiction is currently not warranted.

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136 P Holdenson, *Consultation*, Melbourne, 17 March 2005; Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; J Tippet, *Consultation*, Darwin, 16 August 2005; Confidential, *Consultation*, Brisbane, 9 August 2005.

137 Law Council of Australia, *Submission E 32*, 4 March 2005; Commercial Bar Association of the Victorian Bar, *Submission E 37*, 8 March 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005; M Johnson, *Consultation*, Darwin, 30 March 2005; Justice J McKechnie, *Consultation*, Perth, 9 May 2005; W Martin, *Consultation*, Perth, 9 May 2005; Law Reform Commission of Western Australia, *Consultation*, Perth, 9 May 2005; S Tilmouth, *Consultation*, Adelaide, 11 May 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Law Institute of Victoria, *Submission E 116*, 27 September 2005; Justice M Kirby, *Submission E 44*, 16 March 2005; Justice R Nicholson, *Consultation*, Perth, 6 October 2005; Western Australian Bar Association, *Consultation*, Perth, 6 October 2005; Office of the Director of Public Prosecutions (NT) and Witness Counselling Service, *Consultation*, Darwin, 15 August 2005; Confidential, *Consultation*, Brisbane, 9 August 2005; Judge S Bradley, *Consultation*, Cairns, 12 August 2005; Confidential, *Consultation*, Brisbane, 9 August 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005.



## 3. Understanding the Uniform Evidence Acts

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### Introduction

3.1 The uniform Evidence Acts made significant modifications to existing common law evidentiary principles. While the specific provisions of the Acts are discussed in detail in subsequent chapters, certain aspects of the policy framework of the Acts warrant a thematic analysis.

3.2 Submissions received and consultations conducted following the release of IP 28<sup>1</sup> and DP 69<sup>2</sup> reveal a significant degree of confusion around certain concepts used in the uniform Evidence Acts. It is hoped that the following analysis will help to clarify the approach adopted in the Acts in relation to: evidence of tendency, coincidence, credibility and character; and the concepts of probative value, unfair prejudice and unfairness.

3.3 It also became clear during the course of the Inquiry that some aspects of the uniform Evidence Acts, and some specific areas of evidence law, require targeted educational programs. The areas of greatest need, as identified in this chapter and discussed in greater detail in the following chapters, include the policy underlying the uniform Evidence Acts’ approach to admissibility of evidence, controlling improper

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1 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004).

2 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005).

questions in cross-examination, the admissibility of expert opinion evidence, expert evidence of a child's cognitive and behavioural development and the nature and consequences of sexual assault.

## **Evidence of tendency, coincidence, credibility and character**

3.4 Parts 3.6 to 3.8 of the uniform Evidence Acts contain provisions to control the admissibility of evidence of past conduct and character which is relevant to the facts in issue or to the credibility of witnesses.

3.5 Part 3.6 (ss 94–101) deals with evidence of:

- character, reputation, conduct or tendency which is relevant to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind (s 97); and
- two or more related events which are relevant because the improbability of the events occurring coincidentally is relevant to prove that a person did a particular act or had a particular state of mind (s 98).

3.6 The act or state of mind must be a fact in issue at the trial. At common law, such evidence is referred to as 'propensity' and/or 'similar fact' evidence and includes evidence of conduct from which the nature of a relationship may be demonstrated.

3.7 Part 3.7 (ss 102–108) deals with evidence which is relevant only to the credibility of a witness. Part 3.8 (ss 109–112) relates to evidence about the character of accused persons which may be relevant both to the facts in issue and to the credibility of the accused.

3.8 Parts 3.6 and 3.7 apply in both civil and criminal proceedings, yet most of the issues raised to date concern the operation of those provisions in criminal proceedings. However, the fact that the provisions operate in both civil and criminal proceedings must be borne in mind when considering the issues and possible solutions discussed in Chapters 11 and 12. In particular, where a problem is unique to criminal proceedings, it may require a solution confined to such proceedings.

## **Lessons from psychological research**

3.9 The law has always been concerned with the potential to overestimate the value of, and to be improperly influenced by, evidence of tendency, coincidence, credibility and character. The approach of the law is supported to a considerable extent by a substantial body of psychological research, described in some detail in the Interim Report of the previous Evidence inquiry, ALRC 26.<sup>3</sup>

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3 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [793]–[800]. This is subject to one significant qualification, discussed below.



3.10 The common law generally assumes that the character of a person is indivisible—in other words, a person with bad character traits is likely to be a bad person generally and a person with good character traits is likely to be a good person generally. Underlying this assumption is the belief that people act consistently according to the character traits they exhibit, whatever the circumstances. Psychological research confirms that such assumptions are commonly made, although incorrectly, as in reality a person's behaviour will vary depending on the context. This is of particular relevance to the assumptions underpinning the common law approach to credibility evidence.

3.11 Originally, psychological theory assumed that the mental organisation of each individual embodied a predisposition towards either truthful or untruthful behaviour. It is now accepted that moral disposition is not so highly integrated as to cause consistency of behaviour in different situations. The fact that someone has a violent personality does not mean that they also have a dishonest personality. Evidence of previous convictions will generally have little probative value and may mislead on the issue of credibility unless it involves some element of dishonesty. Even then, a person may be dishonest in some circumstances and not others—for example, a person may lie only to protect his or her friends; the Machiavellian individual will lie and cheat only where it is feasible and to that person's advantage.

3.12 Psychological research has demonstrated that this process of attributing actions in others to stable personality dispositions is common and carries with it the danger of overestimating the probative value of such evidence.<sup>4</sup> This is exacerbated by what is known as the 'halo effect': the phenomenon that one outstanding good or bad quality will tend to colour all judgments about that person. This, of course, may result in bias against an accused person.<sup>5</sup> These processes are particularly troubling because the psychological research has demonstrated that evidence of character or evidence relevant to character generally has a low probative value. The law, however, must deal with such evidence.

3.13 Psychological literature has also confirmed and explained the risk of unfair prejudice flowing from evidence indicating bad character. In addition to the 'halo effect', there operates a mechanism described as the 'regret matrix'. In most trials, absolute certainty is not possible. The responsible fact finder will be concerned about making a wrong decision. The 'regret matrix' operates in a trial context so that a fact finder will be less concerned about making a wrong decision where he or she believes that the defendant has been guilty of other misconduct justifying punishment for which the defendant has not been convicted. Similarly, concern about wrongly convicting an

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4 See discussion in *Pfennig v The Queen* (1995) 182 CLR 461, 512; *BRS v The Queen* (1997) 191 CLR 275, 322.

5 *Pfennig v The Queen* (1995) 182 CLR 461, 512–513.

accused will be less if it is known that the person has prior convictions. The cost of an additional conviction which may be incorrect will be seen as less than if the conviction were an accused's first.<sup>6</sup>

3.14 In sum, the psychological research<sup>7</sup> shows that:

- behaviour tends to be highly dependent on situational factors and not, as previously postulated, on personality traits. Thus, the ability to predict behaviour from past behaviour depends on the similarity of the situations ('low cross-situational consistency of behaviour');
- people tend to attribute the behaviour of others to enduring personality traits and underestimate the role of situational factors in determining behaviour in any given situation ('fundamental attribution error');
- people tend to infer, from limited knowledge of a person, general personality traits which thereafter colour their perception of that person's behaviour ('the halo and reverse halo effects');
- jurors will be less reluctant to convict an accused if they are informed of an accused's previous misconduct and/or convictions, because they feel either that the gravity of their decision is lessened or that there is some basis for punishment, even if they are not convinced the accused committed the crime charged ('the regret matrix').

3.15 In a discussion in *Pfennig v The Queen*,<sup>8</sup> McHugh J identified similar issues in support of the exclusion of evidence of this kind, commenting additionally that such evidence creates 'undue suspicion' and 'undermines the presumption of innocence'.<sup>9</sup> McHugh J also commented that:

Common assumptions about improbability of sequences are often wrong, and when the accused is associated with a sequence of deaths, injuries or losses, the jury may too readily infer that the association 'is unlikely to be innocent'.<sup>10</sup>

3.16 His Honour also drew attention to the potential practical disadvantages of receiving evidence of other misconduct, in particular to its implications for the length and cost of trials.<sup>11</sup>

<sup>6</sup> R Eggleston, *Evidence, Proof and Probability* (2nd ed, 1983), 97–98.

<sup>7</sup> See, eg, research cited in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [795]–[800].

<sup>8</sup> *Pfennig v The Queen* (1995) 182 CLR 461.

<sup>9</sup> Murphy J expressed similar reservations concerning the impact of such evidence on the presumption of innocence in the earlier case of *Perry v The Queen* (1982) 150 CLR 580, 594: 'The presumption of innocence and the strict standard of proof required in criminal cases tend to be indirectly and subtly undermined from the outset by reference to a sequence of events which according to common human experience would not occur unless the accused were guilty'.

<sup>10</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 512.

<sup>11</sup> *Ibid*, 513.

3.17 In a discussion of the potential prejudicial effects of similar fact (coincidence) evidence, Professor Williams refers to the problem of a jury giving undue weight to the evidence, and reasoning that the accused deserves to be punished. He also notes that there are other forms of prejudice or potential unfairness, such as misdirecting the focus of the jury to the question of whether the disputed similar facts have been proved. This carries the attendant risk that, if the jury is so satisfied, it may precipitately reach the conclusion that the offence is proven. He also refers to the danger that, where an accused is charged with a number of counts, the evidence of which is admissible in respect of the others, a jury may reason that the accused must be guilty of some of them.<sup>12</sup>

3.18 The prejudicial effect of evidence of previous misconduct has been confirmed in research conducted by the Law Commission of England and Wales involving magistrates and mock juries.<sup>13</sup> In relation to mock juries it was found, among other things, that information of a previous conviction for indecent assault on a child can be particularly prejudicial whatever the offence charged and will have a significant impact on the jurors' perception of the defendant's credibility as a witness.<sup>14</sup> In relation to magistrates, the study concluded that:

In general the results indicate that information about previous conviction is likely to affect magistrates' decisions despite their awareness of the dangers and their efforts to avoid bias. These findings did not offer confidence that the rules on admitting previous convictions can be safely relaxed for magistrates anymore than for juries.<sup>15</sup>

### Psychological research since the previous Evidence inquiry

3.19 A review of psychological research since the previous Evidence inquiry and current psychology teaching confirms and, in some instances, strengthens the basis for the analysis in the ALRC Reports. Psychology texts<sup>16</sup> continue to refer to the studies used in the ALRC Reports<sup>17</sup> which contradicted classical 'trait theory'. Findings indicate that the correlation between individual behaviour in different situations is in fact quite low.

12 C Williams, 'Approaches to Similar Fact Evidence: England and Australia' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 21, 22; C Williams, *Submission E 14*, 3 February 2005.

13 Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), Appendix A, [A 35]–[A 38].

14 See Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, CP 141 (1996) Appendix D, [D 63].

15 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), Appendix A, [38].

16 See Z Kunda, *Social Cognition* (1999), 417–421; J Hunt and T Budesheim, 'How Jurors Use and Misuse Character Evidence' (2004) 89 *Journal of Applied Psychology* 347, 348.

17 H Hartshorne and M May, *Studies in Deceit* (1928); W Mischel, *Personality and Assessment* (1968).

3.20 Trait theory has not been wholly discredited. Personality psychologists argue that by aggregating behaviours across situations over time, one can discern consistent personality traits which may be used to predict an aggregate of future behaviour.<sup>18</sup> However, this research does not challenge the basic proposition that the behaviour of an individual on one occasion has a very low correlation to his or her behaviour on another occasion in a different situation.

3.21 Further research has sought to quantify the difference between the actual cross-situational consistency of behaviour and the general belief as to such consistency in others. Kunda and Nisbett found that participants in their study dramatically overestimated the consistency of trait related behaviour, stating:

People are enormously more confident of the expected nature of a person's social behaviour, given knowledge of the nature of their behaviour on one occasion, than reality affords them any right to be.<sup>19</sup>

3.22 Wilson and Brekke have taken this research one step further, examining the processes by which attribution and the halo effect occur and the processes' implications for attempts to correct for these biases.<sup>20</sup> They argue that people will only be able to make a successful correction for bias where they are: aware of the bias, motivated to correct it, aware of the magnitude of the bias, and able to adjust their response. They argue that

it is difficult to satisfy these conditions, in part because of fundamental properties of human cognition: people are unaware of many of their cognitive processes, mental contamination often has no observable 'symptoms', and people have limited control over their cognitive processes. These facts alone are cause for considerable pessimism about people's ability to avoid unwanted judgments.<sup>21</sup>

3.23 'Law and psychology' has now become a field of research in its own right, with some authors directing their research specifically to jury scenarios and the prejudicial effect of character evidence.<sup>22</sup> Research into the effectiveness of judicial directions to juries, particularly with regards to evidence of prior criminal history, has shown that directions to disregard evidence or to use it for only a limited purpose may not always

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18 See S Epstein, 'The Stability of Behaviour: I. On Predicting Most of the People Much of the Time' (1979) 59 *Journal of Personality and Social Psychology* 202; S Epstein, 'The Stability of Confusion: A Reply to Mischel and Peake' (1983) 90 *Psychological Review* 179; S Epstein and L Terapulsky, 'Perception of Cross-Situational Consistency' (1986) 50 *Journal of Personality and Social Psychology* 1152; D Funder and C Randall Colvin, 'Explorations in Behavioral Consistency: Properties of Persons, Situations, and Behaviors' (1991) 60 *Journal of Personality and Social Psychology* 773.

19 Z Kunda and R Nisbett, 'The Psychometrics of Everyday Life' (1986) 18 *Cognitive Psychology* 199, 221.

20 T Wilson and N Brekke, 'Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations' (1994) 116 *Psychological Bulletin* 117.

21 Ibid, 122.

22 J Hunt and T Budesheim, 'How Jurors Use and Misuse Character Evidence' (2004) 89 *Journal of Applied Psychology* 347.

be complied with.<sup>23</sup> In some instances such directions have the opposite effect to that intended.<sup>24</sup> The directions are likely to be more effective if the jurors accept the legitimacy of the directions<sup>25</sup> or believe it is not fair to consider the evidence.<sup>26</sup> This research accords with the conclusions of Wilson and Brekke that there must be recognition of biases and motivation to avoid them.

3.24 In ALRC 26, the ALRC stated:

The research confirms the need to maintain strict controls on evidence of character or conduct and for such evidence to be admitted only in exceptional circumstances. It demonstrates, however, that the emphasis of the law should be changed. For the sake of accurate fact-finding, fairness and the saving of time and cost, the law should maximise the probative value of the evidence it receives by generally limiting it to evidence of conduct occurring in circumstances similar to those in question. Only for special policy reasons should other evidence of character or conduct be received.<sup>27</sup>

3.25 It should also be borne in mind that the prejudicial effects of such evidence operate at all stages in which the evidence is considered—from consideration of admissibility of the evidence by the judge through to the assessment of the evidence by the finder of fact. As regards the latter, it can operate to affect the assessment of the credibility of the particular witnesses, the reliability of their evidence, the weight to be given to the evidence and the judgment as to whether the evidence has established the facts in question.

## Probative value, unfair prejudice and unfairness

3.26 The uniform Evidence Acts require the judge to assess the degree of probative value of particular types of evidence in order to determine the question of admissibility. These include evidence going to tendency or coincidence and evidence adduced in cross-examination as to credibility.<sup>28</sup> In addition, the judge will sometimes be required to balance the probative value of a piece of evidence against the danger of unfair prejudice to the defendant.<sup>29</sup> Other provisions require the judge to determine

23 R Wissler and M Saks, 'On the Inefficiency of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt' (1985) 9 *Law and Human Behavior* 37; K Pickel, 'Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation that Does Not Help' (1995) 19 *Law and Human Behavior* 407; J Lieberman and J Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677.

24 M Costanzo, *Psychology Applied to Law* (2004), 144–146.

25 S Kassin and S Sommers, 'Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive versus Procedural Considerations' (1997) 23 *Personality and Social Psychology Bulletin* 1046.

26 N Finkel, *Not Fair! The Typology of Commonsense Unfairness* (2001).

27 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [800].

28 Uniform Evidence Acts ss 97, 98, 103; *Evidence Act 1995* (Cth) 105.

29 Uniform Evidence Acts ss 101(2), 135, 137.

whether taking a particular course of action is ‘unfair’ or ‘unfairly prejudicial’ to the parties involved.<sup>30</sup>

3.27 The same terms appear in various sections throughout the Acts. ‘Probative value’ appears in ss 97, 98, 101, 103, 105,<sup>31</sup> 108, 135, 136, 137, 138, and 190. ‘Unfair prejudice’ appears in ss 53, 135, 136 and 137. The term ‘prejudicial’ appears in s 101. The term ‘unfair’ appears in ss 90 and 192.

3.28 Concerns have been raised as to the precise meaning of these concepts and the degree to which there has been or should be consistency in the interpretation of these terms in the various sections in which they appear throughout the Acts.

### Consistency of terms throughout the Acts

3.29 Clearly the legislative intent was that there be some degree of consistency in the use of these terms. In *R v BD*, Hunt CJ at CL said:

The meaning given to each of those phrases must logically be the same in each section—whether or not a weighing exercise is contemplated.<sup>32</sup>

3.30 In *R v Ellis*, Spigelman CJ said:

It is noteworthy that the Act provides a definition of ‘probative value’ ... Although the definition could well have been the same as at common law, the fact that such a term was defined at all suggests an intention to ensure consistency for purposes of the Evidence Act for the words, which appear in a number of sections. This suggests that the Act, even if substantially based on the common law, was intended to operate in accordance with its own terms.<sup>33</sup>

3.31 It is also apparent that the factors to be taken into account in determining whether a piece of evidence has the requisite degree of probative value or results in a degree of unfair prejudice will vary depending on the type of evidence and the context in which it is sought to be adduced. Some academic commentators describe probative value as ‘a floating standard’.<sup>34</sup> This is particularly evident with regard to evidence of credibility, tendency and coincidence, as evidence of this kind tends to bolster the strength of other evidence rather than being associated directly with a fact in issue. These concepts will be dealt with in more detail in the relevant chapters of this Report.

### Measuring probative value: ‘significant’ and ‘substantial’

3.32 Different categories of evidence require different degrees of probative value in order to be admissible. For example, tendency and coincidence evidence is required to

<sup>30</sup> Ibid ss 90, 136, 189, 192; *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) s 114.

<sup>31</sup> *Evidence Act 1995* (Cth) only.

<sup>32</sup> *R v BD* (1997) 94 A Crim R 131, 139.

<sup>33</sup> *R v Ellis* (2003) 58 NSWLR 700, [78].

<sup>34</sup> J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 312.

have ‘significant probative value’,<sup>35</sup> whereas credibility evidence adduced in cross-examination must have ‘substantial probative value’.<sup>36</sup> The uniform Evidence Acts provide no guidance as to the difference between ‘significant’ and ‘substantial’.

3.33 There appears to be consensus that ‘substantial probative value’ imports a more exacting standard than ‘significant probative value’. Hunt CJ at CL said in *R v Lockyer* that “‘significant’ probative value must mean something more than mere relevance but something less than a “substantial” degree of relevance’.<sup>37</sup> His Honour felt that ‘significant’ in this context meant ‘important’ or ‘of consequence’. He also felt that an assessment of the significance of the probative value of a piece of evidence would depend on both the nature of the fact in issue to which it was relevant and its importance in establishing that fact.<sup>38</sup>

3.34 It was observed by Lehane J in *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* that ‘more is required than mere statutory relevance’ in order to satisfy the test of ‘significant probative value’.<sup>39</sup>

3.35 As noted above, probative value must be assessed in its factual and legal context. While it is clear from authorities that ‘substantial’ probative value is a more exacting standard, the factors that will go to determining whether a piece of evidence reaches the requisite standard vary between the different types of evidence, and hence it is of little use to attempt a detailed comparison of the two standards.

### Unfair prejudice

3.36 As with probative value, the concept of unfair prejudice is used consistently between the provisions in the uniform Evidence Acts,<sup>40</sup> but the factors to be taken into account in determining unfair prejudice will vary according to the factual and legal context in which the evidence is sought to be adduced. Chapter 16 discusses this concept in detail.

#### ‘Unfair’ and ‘unfair prejudice’

3.37 The word ‘unfair’, as distinct from ‘unfair prejudice’, appears in ss 90(b) and 192(2)(b) of the uniform Evidence Acts. Section 90(b) provides the court with the power to exclude evidence of an admission adduced by the prosecution in criminal trials where, having regard to the circumstances in which the admission was made, it

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35 Uniform Evidence Acts ss 97, 98.

36 Ibid s 103(1).

37 *R v Lockyer* (1996) 89 A Crim R 457, 459. This has been cited with approval in a number of cases: *R v Lock* (1997) 91 A Crim R 356; *R v AH* (1997) 42 NSWLR 702; *R v Fordham* (1997) 98 A Crim R 359; *R v Martin* [2000] NSWCCA 332.

38 *R v Lockyer* (1996) 89 A Crim R 457, 459.

39 *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171, 175–176.

40 *R v Ellis* (2003) 58 NSWLR 700, [78]; *R v BD* (1997) 94 A Crim R 131, 139.

would be unfair to the defendant. Section 192(2)(b) provides that when granting leave or making a direction, a court must take into account the extent to which doing so might be unfair to a party or witness.

3.38 The High Court in *R v Swaffield* said that the concept of unfairness ‘necessarily lacks precision’, but that:

Unfairness ... relates to the right of the accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted.<sup>41</sup>

3.39 While the High Court was dealing with the common law, the majority indicated that its articulation of the fairness discretion at common law reflected the approach adopted in the uniform Evidence Acts.<sup>42</sup> Indeed, New South Wales courts have been influenced by *R v Swaffield* in the application of the uniform Evidence Act provisions.<sup>43</sup>

3.40 The High Court’s comments in *R v Swaffield* indicate that the notion of ‘unfairness’, both at common law and under the uniform Evidence Acts, is broader than that of ‘unfair prejudice’. As discussed in Chapter 16, the statutory concept of unfair prejudice relates primarily to the misuse of evidence by the tribunal of fact (for example, attributing more weight than it should to evidence due to an emotional reaction to the evidence).

3.41 There has been some uncertainty as to whether unfair prejudice can arise from procedural considerations (such as the inability to cross-examine on hearsay evidence). The Commissions are of the view that unfair prejudice can arise from procedural considerations only where this affects the ability of the tribunal of fact to assess rationally the weight of the evidence. By contrast, ‘unfairness’ may arise solely from procedural considerations. However, not surprisingly, the authorities indicate that there is some overlap in the use of the terms.

3.42 In *R v Duncan and Perre*, Wood CJ at CL held that the issues arising in relation to ss 135 and 137 in the context of that particular case were essentially the same as those arising under s 192(2)(b).<sup>44</sup> The defendant argued on appeal that the overall weight and reliability of the statement of a particular witness was such that either leave should have been refused to the Crown to cross-examine its own witness (pursuant to s 38) or the witness’ statement should have been excluded pursuant to ss 135 or 137. His Honour held that there was no unfairness or unfair prejudice in this case as the jury

41 *R v Swaffield* (1998) 192 CLR 159, [54].

42 *Ibid.*, [68], [70].

43 See, eg, *R v Em* [2003] NSWCCA 374; *R v Fernando* [1999] NSWCCA 66.

44 *R v Duncan & Perre* [2004] NSWCCA 431.



had been given ample directions and the defence had been given the opportunity to cross-examine the witness on his prior statement.<sup>45</sup>

3.43 A similar situation arose in *R v Fowler*,<sup>46</sup> where the Crown sought to cross-examine a witness pursuant to s 38. One of the grounds of appeal was that the trial judge, who had refused to exclude the evidence under s 137, had failed to consider s 192(b) fairness when deciding whether to grant leave under s 38. On appeal, the New South Wales Court of Criminal Appeal held that, although the trial judge had not considered s 192, there was no miscarriage of justice. The court held that the trial judge could not have found the evidence unfair under s 192 where she had refused to exclude it under s 137.<sup>47</sup>

### Probative value and unfair prejudice

3.44 It is clear from the conflict in the authorities that there is uncertainty as to the meanings of the terms ‘probative value’ and ‘unfair prejudice’. It has been suggested that the difficulty lies in the fact that the concepts are insufficiently distinct.<sup>48</sup> This is because it is difficult to measure prejudice without reference to the degree of probative value. As McHugh J said in *Pfennig*, ‘in many cases the probative value either creates or reinforces the prejudicial effect of the evidence’.<sup>49</sup> Hence, it is apparent that the concepts are interdependent. Difficulties of interpretation arise when attempts are made to treat them as completely distinct.

3.45 Another factor accounting for inconsistency in the interpretation of the relevant terms is that some judges and practitioners are still in the process of adjusting to the uniform Evidence Acts. When an evidentiary issue arises, there is a tendency on the part of some to approach the rules of evidence as they would have under the common law.

3.46 In order to understand the terms as they are used in the Acts, it is essential to recognise the important policy changes engendered by the Acts. Analysis of the case law dealing with these concepts reveals that at least some of the confusion, particularly in regard to unfair prejudice, is due to the fact that courts and practitioners have not yet come to terms with the fact that some types of evidence which would previously have been inadmissible under the common law are now admissible under the Acts.

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45 Wood CJ at CL noted at [248] that a similar situation had arisen in *R v GAC* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, McInerney and Sully JJ, 1 April 1997).

46 *R v Fowler* (2003) 151 A Crim R 166.

47 *Ibid*, [160].

48 D Mathias, ‘Probative Value, Illegitimate Prejudice and the Accused’s Right to a Fair Trial’ (2005) 29 *Criminal Law Journal* 8, 11.

49 *Pfennig v The Queen* (1995) 182 CLR 461, [39].

3.47 This is particularly evident in relation to hearsay evidence and the inability to cross-examine. Judges and practitioners trained under the common law may view such evidence as unfairly prejudicial due to the fact that it was previously inadmissible, and hence try to interpret the Acts' provisions in accordance with common law notions. McHugh J said in *Papakosmas*:

Some recent decisions suggest that the term 'unfair prejudice' may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995 ... I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons.<sup>50</sup>

3.48 His Honour went on to note:

Sections 135, 136 and 137 contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case. It may be proper for appellate courts to develop guidelines for exercising the powers conferred by these sections so that certain classes of evidence are usually excluded or limited. But those sections confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility.<sup>51</sup>

3.49 These issues are considered further in Chapter 16. It is hoped that the commentary in this Report will help to achieve clarity and consistency in the use of the terms probative value, unfairness and unfair prejudice. Further, as is discussed in detail below, education programs for the judiciary and the profession focusing on the policy underpinning the Acts will facilitate a more consistent approach.

## **The need for targeted educational programs**

### **Facilitating an understanding of the uniform Evidence Acts**

3.50 Consultations and submissions to date have indicated that, while most judicial officers and practitioners in uniform Evidence Acts jurisdictions are familiar with the Acts' provisions, more needs to be done to familiarise those using the Acts with the underlying policy of the legislation. This is particularly important in relation to the approach to issues of admissibility under Chapter 3 of the Acts—specifically the use of ss 135–137 (discretionary and mandatory exclusions).

3.51 ALRC 38 outlined the approach to admissibility under the uniform Evidence Acts:

As under the existing law, the admissibility of a piece of evidence should be determined by first asking whether it is relevant. If the answer to that question is in the negative it should be excluded. If the answer is in the affirmative, the evidence

<sup>50</sup> *Papakosmas v The Queen* (1999) 196 CLR 297, [93]. Unfair prejudice is also discussed in Ch 16.

<sup>51</sup> *Ibid*, [97].

will be admissible unless an exclusionary rule operates to exclude it or an exclusionary discretion is exercised. It will be for the party against whom it is led to direct the court's attention to the rules set out in the legislation justifying exclusion of the evidence if it wishes to have the evidence excluded.<sup>52</sup>

3.52 This approach to admissibility is illustrated clearly by a 'grid' found in the Introductory Note to Chapter 3 of the Acts. The questions and sequence set out in the grid (which mirrors the placement of Parts in the Chapter), provides an analytical guide to the admissibility of a particular piece of evidence. In other words, the 'grid' explains the reasoning process that should be employed when a question of admissibility arises.

3.53 The uniform Evidence Acts' relaxation of common law rules of admissibility, to accord with the primary objective of enabling 'the parties to produce the probative evidence that is available to them',<sup>53</sup> places greater emphasis on the use of the discretionary and mandatory exclusions contained in ss 135–137. As discussed throughout this Report, submissions and consultations suggest that judicial officers are often reluctant to take a robust approach to the use of the discretionary and mandatory exclusions contained in ss 135–137.

3.54 Some judicial officers in trial courts expressed concern that reliance on ss 135–137 to exclude or limit the use of otherwise admissible evidence could result in the decision being overturned on appeal.<sup>54</sup> Further, it was said that, rather than identifying the precise grounds upon which evidence should be excluded, counsel often seek exclusion or limitation pursuant to ss 135, 136 or 137, adopting a 'package approach' which is of little assistance to the decision-maker.<sup>55</sup>

3.55 It was proposed in DP 69 that educational programs should be implemented which focus on the policy underlying the uniform Evidence Acts' approach to admissibility of evidence. For judicial officers, this could be coordinated by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales. The state and territory law societies and bar associations should offer continuing legal education to their members in this regard.

3.56 The Criminal Bar Association of Victoria suggests that the desirability of such programs is 'self-evident'.<sup>56</sup> The proposal is also supported by a number of other organisations including the Victoria Police,<sup>57</sup> the Law Society of New South Wales,<sup>58</sup>

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52 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [51].

53 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [82].

54 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

55 Ibid.

56 Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005.

57 Victoria Police, *Submission E 111*, 30 September 2005.

58 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

the Intellectual Disability Rights Service,<sup>59</sup> the Australian Securities and Investment Commission,<sup>60</sup> the Australian Federal Police,<sup>61</sup> the Commonwealth Director of Public Prosecutions<sup>62</sup> and the Office of the Director of Public Prosecutions (NSW).<sup>63</sup>

3.57 In addition to education programs focusing on the approach in the uniform Evidence Acts to the admissibility of evidence, the prevalence in our courts of cases involving crimes against the person, and in particular sexual assault, raises other areas where a need for education of the judiciary and the profession has been identified. The primary areas of concern brought to the attention of the Commissions during the course of this Inquiry include:

- the identification of vulnerable witnesses and the use of the uniform Evidence Acts to constrain the use of improper questions in cross-examination of such witnesses, and of witnesses generally. This is discussed in detail in Chapter 5;
- procedural and substantive issues concerning the admissibility of expert opinion evidence. This is discussed in detail in Chapter 9;
- education about issues relating to the cognitive and behavioural development of children. The focus of such programs should be on the implications of such development on the reliability of the evidence of child witnesses. This is discussed in detail in Chapters 9 and 18;
- the nature of sexual assault. In particular, it is clear that many members of the judiciary and the legal profession have an inadequate understanding of the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault. This is discussed in detail in Chapter 18.

**Recommendation 3–1** The National Judicial College, the Judicial College of Victoria, the Judicial Commission of New South Wales and the state and territory law societies and bar associations should consider conducting educational programs about the policy underlying the approach of the uniform Evidence Acts to admissibility of evidence. The Inquiry also identified the following areas as warranting consideration:

- improper questioning;
- the admissibility of evidence of expert opinion;

<sup>59</sup> Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

<sup>60</sup> Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

<sup>61</sup> Australian Federal Police, *Submission E 92*, 20 September 2005.

<sup>62</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

<sup>63</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

- the cognitive and behavioural development of children and the implications of this for the reliability of the evidence of child witnesses; and
- the nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault.



## 4. Competence and Compellability

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### Introduction

4.1 Section 12 of the uniform Evidence Acts provides that every person is presumed competent to give evidence unless a court finds they are incompetent to do so. It also provides that, subject to some limited exceptions, all witnesses who are competent are compellable to give evidence. The section takes the place of any rule of common law or equity in relation to the competence and compellability of witnesses.<sup>1</sup>

4.2 In this chapter, the Commissions examine the provisions governing competence and consider whether the uniform Evidence Acts require amendment. The examination of the provisions governing compellability is confined to the scope and appropriateness of the definition ‘de facto spouse’, which affects the rights of a person in a de facto relationship with an accused in a criminal matter to object to being required to give evidence.

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1 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.640].

## Competence

### Background

#### *Rationale*

4.3 The law of competence addresses both legal competence<sup>2</sup> and competence in the sense of the capacity of a person to be a witness. This chapter is concerned with the latter. The primary rationale for the existence of tests of competence is to guard against the admission of evidence of little or no probative value. This need has to be balanced against the unnecessary exclusion of relevant evidence. These competing priorities are particularly evident in the context of the criminal law where it is necessary, on the one hand, to ensure that relevant evidence is before the trier of fact and, on the other, to provide an initial filter to exclude evidence that is so unreliable its admission would be unfair to the accused.

4.4 The assessment of competence should not be:

concerned with the many factors that can affect the value of the witness' evidence such as the powers of observation, the time which has elapsed between the perception of an event and its ultimate report and so on. These factors will have bearing on the credibility of the witness and should therefore be taken into account at the stage when the *weight* of the testimony is to be assessed.<sup>3</sup>

4.5 Rather, the test of competence should be concerned with assessing the 'ability of the witness to function as a witness'.<sup>4</sup>

4.6 The issue of competence generally only arises when the witness is a child or has some form of disability. There is a wide range of characteristics which may lead to a party seeking to impugn a person's competence as a witness including, for instance, age, some forms of physical or sensory disability, acquired brain injury, mental illness and intellectual or cognitive disability.

4.7 Historically, the rationale for stringent rules regarding competence reflects stereotypical views about children and their unreliability as witnesses. The reasons for children's evidence being considered inherently 'suspect' have been put on the basis that children have less reliable powers of observation and memory, are prone to live in a make-believe world, are egocentric and forget details unrelated to themselves, are

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2 This covers such matters as the competence of judges and jurors to give evidence in a proceeding: Uniform Evidence Acts s 16; and the competence of the accused to give evidence as a witness for the prosecution: Uniform Evidence Acts s 17.

3 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [236].

4 *Ibid.*



suggestible and have little notion of the duty to speak the truth.<sup>5</sup> Even more extreme views have been expressed in the past.<sup>6</sup>

4.8 Recent research challenges many of these views.<sup>7</sup> Of particular relevance in the context of this discussion about competence is that:

there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults. Indeed, research suggests that children may be actually more truthful than adults. Certainly, the research on children's beliefs about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses. When children do lie to an adult, the adult is usually well able to discern this, particularly with younger children.<sup>8</sup>

4.9 Further, some research about children's conceptions and moral judgments of truth-telling and lying shows that, in reality,

[c]hildren's knowledge about truth- and lie-telling emerges early and develops rapidly. Children from preschool years onward often show sophisticated understanding of the concepts of lying and truth-telling, rate truthful statements about rule violations positively, and judge lying to conceal rule violations negatively.<sup>9</sup>

#### **Position at common law**

4.10 The position at common law is that a person is only competent to give evidence if he or she can give sworn evidence.<sup>10</sup> The traditional common law test of competence to give sworn evidence is whether the person understands the nature and consequences of the oath.<sup>11</sup> There is conflicting authority on whether this test requires the witness to

5 J Heydon, *Evidence: Cases and Materials* (2nd ed, 1984), 83–84.

6 Ibid, 84, 'children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations'. Note this view is not repeated in subsequent editions of this text.

7 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.19]–[14.24].

8 Ibid, [14.22], citing J Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (1990), 259.

9 N Bala and others, 'Children's Conceptual Knowledge of Lying and its Relation to their Actual Behaviours: Implications for Court Competence Examinations' (2002) 4 *Law and Human Behaviour* 395, 396.

10 Historically to give sworn evidence a witness had to be prepared to testify on oath on the Gospel. However, other forms of oath and affirmation were gradually permitted. See J Heydon, *Cross on Evidence* (7th ed, 2004), [13275]; *Attorney-General's Reference No 2 of 1993: Re R v Mansell* (1994) 4 Tas R 26.

11 *R v Brasier* (1799) 1 Leach 199, 168 ER 202.

have a belief in a divine being and divine sanction so that the oath would have a binding effect on the witness' conscience.<sup>12</sup>

4.11 Experience has shown that the application of this test is a potentially cumbersome and abstract process. Some judicial officers have typically considered it necessary to inquire into a person's understanding of moral issues, religious beliefs or belief in God and their appreciation of the concept of divine sanction. These are matters which may discriminate against people of certain faiths or backgrounds and are not necessarily helpful in ensuring that a witness can give reliable or accurate evidence.

4.12 The following is a typical example of a trial judge's questioning based on the common law test of competence. The complainant, who was a girl with an intellectual disability, was aged 11 at the time of the alleged offences and aged 13 at the time of the trial. Before she was sworn she was questioned by the trial judge:

Do you know what the Bible is?—Talk about God.—A book about God did you say? Do you know what's meant ... when you talk about taking an oath, it sounds a lot of words, do you know what that means?—No.—Do you know what is meant if you take the Bible in your hands ...?—Yes.—Do you know what the truth is—Yes.—What's the truth?—If you be good.—Do you know what a lie is?—If you're bad.—Do you know what might happen if you tell a lie?—You go to gaol.—You what?—You go to gaol.—Go to gaol, I see. So if you take the Bible in your hands and you swear to tell the truth, what do you think might happen if you didn't?—I don't know.<sup>13</sup>

4.13 The judge then stated that he was satisfied that there was sufficient evidence to show that the complainant understood the nature of the oath. She was then sworn. On appeal the court noted:

The evidence quoted above does, however, leave it very much open to doubt that the victim had demonstrated a sufficient understanding that by taking the oath she had exposed herself to divine sanctions for false swearing if God exists or for that matter that she even knew what an oath was.<sup>14</sup>

### ***Reform and liberalisation***

4.14 The ALRC's previous Evidence inquiry (ALRC 26 and ALRC 38) reviewed the common law test of competence and pointed out that this approach was 'far from satisfactory',<sup>15</sup> essentially being a test of 'moral and religious understanding'.<sup>16</sup> In ALRC 26 the ALRC noted:

12 *R v Hayes* [1977] 2 All ER 288, 291; *R v Brown* [1977] Qd R 220; *Domonic v The Queen* (1985) 14 A Crim R 418; *R v Schaefer* (1992) 57 SASR 423; *Attorney-General's Reference No 2 of 1993: Re R v Mansell* (1994) 4 Tas R 26.

13 *R v Fotou* (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Charles JA and Southwell AJA, 26 June 1996), 5–6.

14 *Ibid*, 6.

15 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [243].

16 *Ibid*, [243].

A person's understanding of moral matters as evidenced by his [or her] comprehension of the oath might bear very little relationship to his [or her] ability to comprehend questions and formulate rational responses.<sup>17</sup>

4.15 The ALRC pointed to the need for a secular and more direct test of competence.<sup>18</sup> The main elements of its proposed reform included:

- a presumption that every person is competent to give evidence;
- in circumstances where doubt is raised, a person who does not meet a certain 'minimum standard', namely who does not understand the obligation to give truthful evidence, is not competent to give evidence; and
- a person 'who is incapable of giving a rational reply to a question about a fact' is incompetent to give evidence about that fact.

4.16 It was also proposed that a person was to give evidence having either sworn an oath or made an affirmation.<sup>19</sup> There was no proposal by the ALRC for a test of competence to give unsworn evidence, although it was noted that some state legislation enables children not competent to take the oath to give unsworn evidence.<sup>20</sup>

4.17 The recommendations of the ALRC reflect the evolution in recent years of competency laws in Australia and elsewhere, which favours an approach that is less exclusionary and promotes greater admissibility of evidence,<sup>21</sup> although there is still considerable variation between jurisdictions as to what is required. Some jurisdictions have introduced presumptions of competence for all persons.<sup>22</sup> In most Australian jurisdictions, the common law position has been modified to change the test of competence to give sworn evidence from one based in religion and the oath to an understanding of the obligation to tell the truth.<sup>23</sup> There have also been moves to allow witnesses to give unsworn, as compared to sworn, evidence in certain circumstances.<sup>24</sup>

17 Ibid, [243].

18 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix C, 287.

19 Ibid, Appendix A, 153 cl 26(1).

20 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), Appendix C, 99; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix C, 279.

21 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [521].

22 Uniform Evidence Acts s 12(a); *Youth Justice and Criminal Evidence Act 1999* c 23 (UK) s 53(1).

23 Uniform Evidence Acts s 13(1); *Evidence Act 1977* (Qld) s 9B(2); *Evidence Act 1906* (WA) s 106B; *Evidence Act 1929* (SA) s 9.

24 *Evidence Act 1995* (Cth) s 13; *Evidence Act 1995* (NSW) s 13; *Evidence Act 1977* (Qld) s 9B; *Evidence Act 1958* (Vic) s 23; *Evidence Act 1929* (SA) s 9; *Evidence Act 1906* (WA) ss 100A, 106C; *Evidence Act 2001* (Tas) s 13; *Oaths Act 1939* (NT) s 25A.

**The current law—the uniform Evidence Acts**

4.18 The competence and compellability provisions of the uniform Evidence Acts are found in ss 12–20. This part of the chapter is particularly concerned with ss 12 and 13, which relate to the capacity of a witness to give evidence.

4.19 Section 12 sets out the basic rules for competence and compellability. Under s 12(a), all persons, regardless of age or other factors, are presumed to be competent to give evidence. This proposition applies subject to application of other provisions of the uniform Evidence Acts, in particular s 13. The presumption of competence may be rebutted if it is challenged and the person does not meet the relevant test of competence.

4.20 Section 12(b) provides that a person competent to give evidence about a fact is also compellable to give that evidence. This provision enables the court to determine competence and compellability in terms of a person's capacity to give evidence about particular matters and not others.

4.21 Section 13(1)–(4) provides a number of qualifications to the general proposition that all witnesses are competent to give evidence.

4.22 Central to this discussion is the distinction made in s 13 between sworn and unsworn evidence and the tests for competence to give each type of evidence. Section 13(1) sets out the test of competence to give sworn evidence. It provides that a person who is incapable of understanding that he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

4.23 The test for competence to give unsworn evidence contained in s 13(2) requires the fulfilment of a number of criteria:

- first, the threshold issue must be established—that is, by virtue of s 13(1), the person is not competent to give sworn evidence because he or she is incapable of understanding the obligation to give truthful evidence;
- secondly, the court must be satisfied that the person understands the difference between a truth and a lie (s 13(2)(a));
- thirdly, the court must tell the person the importance of telling the truth (s 13(2)(b)); and
- fourthly, the person must indicate appropriately that he or she will not tell lies in the proceeding (s 13(2)(c)).

4.24 There is a further competence requirement applicable to both sworn and unsworn evidence contained in subsections 13(3) and (4). Section 13(3) provides for the concept of 'partial' incompetence—that is, a person who is incapable of 'giving a

rational reply to a question about a fact is not competent to give evidence about the fact'. He or she may nevertheless be competent to give evidence about other facts. Section 13(4) relates to a person who for physical or other reasons is not capable of 'hearing or understanding' or 'communicating', and provides that such a person is not competent to give evidence 'about a fact' if that 'incapacity cannot be overcome'.

4.25 Section 13(5) reinforces the proposition that all persons are competent by specifically providing for a presumption of competence which is displaced only 'if the contrary is proved'. Accordingly, the burden of proof is on the party challenging the competence of a witness.

4.26 Section 13(6) deals with a situation where, before a witness finishes giving evidence, he or she dies or becomes incompetent to give evidence. It provides that evidence that has already been given by the witness does not become inadmissible merely because of the happening of such an event.

4.27 In determining a question concerning a witness' competence under s 13, the court is, by virtue of s 13(7), permitted to inform itself as it sees fit.

4.28 The competence provisions in ss 12 and 13 for the most part reflect the original ALRC proposals except in two significant and related respects. First, the provisions make a distinction between competence to give sworn and unsworn evidence. Section 13(1) adopts the test of competence recommended by the ALRC—that is, an understanding of the obligation to give truthful evidence—but confines it to a test for giving sworn evidence. Secondly, s 13(2) introduces a test for competence to give unsworn evidence, which is to be applied where a witness fails to meet the competence test for sworn evidence but can satisfy another set of criteria.

### Criticisms of the current law

4.29 Recent law reform work, particularly in Victoria,<sup>25</sup> and academic consideration of the competency provisions, question the formulation of the competence tests under the uniform Evidence Acts.

4.30 There are a number of overlapping criticisms:

- first, taken together, the tests of competence to give sworn and unsworn evidence are too restrictive, with the risk that evidence of probative value will be excluded;

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25 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 291, Recs 70–74; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 296, Recs 132–138.

- secondly, the appropriateness of the requirement in the competence test to give unsworn evidence that a person ‘understands the difference between the truth and a lie’ is questionable;
- thirdly, the tests of competence to give sworn and unsworn evidence are too similar;
- fourthly, the tests of competence to give sworn and unsworn evidence pose difficulties for practical application; and
- fifthly, there is uncertainty about the application of the requirement that the court tell the witness that it is important to tell the truth.

4.31 These criticisms are dealt with below.

***Too restrictive***

4.32 The content and complexity of the tests in s 13 may defeat the trend towards less stringent laws of competence and an objective of greater admissibility of evidence. In their current form, the uniform Evidence Acts require a person whose competence is in doubt to meet certain standards. The level of cognitive ability or intellectual capacity required to fulfil these standards may exclude some persons from giving evidence who may nonetheless be able to communicate valuable information satisfactorily.

***Appropriateness of ‘understands the difference between the truth and a lie’***

4.33 The ‘truth’ criterion is a critical element in both the tests of competence to give sworn and unsworn evidence. The appropriateness of this, particularly for unsworn evidence, is questionable. Truth is an abstract, morally based concept. As has been said, ‘truth is not an unitary concept even for adults’.<sup>26</sup> For truth to be a meaningful element in communication between two people, ideally they should share the same definition. This may not be the case, for instance, with very young children who may have quite a different understanding of truth from older children or adults.

4.34 For instance, a young child may perceive an accurate statement as a truth and an inaccurate statement as a lie, regardless of the intention of the speaker. An older child or adult may have a greater appreciation of the subjective intention of the speaker. An understanding of truth may be influenced not only by developmental factors, but also possibly by cultural background and moral and religious influences.

4.35 Further, while children may have an appreciation of truth and lies, there is concern about their ability to articulate, explain, define or distinguish their understanding of these concepts. It has been concluded that:

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26 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [521].

Psychological research reveals that many children under age seven (as well as some older children) often have a good understanding of the difference between truth and lies, and yet are unable to 'correctly' answer abstract questions concerning such concepts.<sup>27</sup>

Given that the current test of competence to give unsworn evidence is expressed in terms of understanding 'the difference between truth and lies', it has the potential to invite developmentally inappropriate questions about these concepts.

4.36 There is also a lack of support for the assumption underlying competence examinations to the effect that an understanding of truth- and lie-telling will make it less likely that a person, particularly a child, will give inaccurate or untruthful evidence. All people (adults, children, those with disabilities or without) may be mistaken. Similarly, as a matter of common sense, most people probably lie on occasion. Some are perhaps better able to deceive than others. However, there is nothing to suggest that children are more inclined to tell lies than adults.<sup>28</sup> Whether someone is mistaken, is lying or is intending to deceive is a matter for the trier of fact to assess.

#### ***Tests too similar***

4.37 Having the truth criterion in common, the test of competence to give either sworn (s 13(1)) or unsworn evidence (s 13(2)) is distinguishable, but not significantly different.

4.38 The main distinction is that the test of competence to give sworn evidence requires a witness to understand that he or she is under an 'obligation' to tell the truth when giving evidence, while the test of competence to give unsworn evidence imposes no such understanding. An understanding of this obligation is something more than a promise or statement of an intention to tell the truth. It is an appreciation of the nature of the duty to tell the truth. It is a prerequisite for taking an oath or affirmation, which exposes the person to punishment for being untruthful.

4.39 The competence test for unsworn evidence does not require a person to understand his or her obligation to be truthful, but nonetheless requires a witness to understand the 'difference between the truth and a lie' (s 13(2)(a)) and to indicate that he or she 'will not tell lies' (s 13(2)(c)). Like the test for competence to give sworn evidence, s 13(2) involves a grasp of the abstract concepts, in this instance lies, as well as truth.

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27 N Bala and others, 'A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' (2001) 38 *Osgoode Hall Law Journal* 409, 411.

28 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.22], citing J Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (1990), 259.

4.40 The fundamentally similar bases of the tests dilute the value and effectiveness of two separate tests. For instance, if a person cannot readily demonstrate an understanding of ‘truth’ for the purposes of s 13(1), it would then seem inappropriate and unnecessary to take the matter further and to ask questions about the difference between the truth and a lie (as is required by s 13(2)(a)). In reality, a person who in these circumstances does not meet the requirements of the competence test for sworn evidence is likely to also fail to meet the requirements of the competence test for unsworn evidence.

### ***Practical difficulties***

4.41 The application of the competence tests in s 13 requires skilled questioning. Ideally a judicial officer should ask questions which are developmentally sensitive and not too difficult or abstract, particularly when questioning children, so that a person has the potential to demonstrate understanding.<sup>29</sup> If a child is questioned in a way which fails to take account of his or her stage of development, he or she may find it impossible to demonstrate their understanding. An example is questioning which asks the child to define ‘the truth’ or ‘a lie’ or to discuss the moral implications of lying.<sup>30</sup>

4.42 The questioning should also amount to a staged inquiry to establish whether a person has the capacity to understand the obligation to tell the truth and, if not, whether the witness nonetheless understands the difference between the truth and a lie. However, in practice where the distinction between competence tests for sworn and unsworn evidence is unclear, a judicial officer may resort to asking the same or substantially the same questions or to blend or fuse the questioning for each test for each evidence type. Arguably this reflects the view that one inquiry will usually serve for a determination on both issues of sworn and unsworn evidence.<sup>31</sup>

### ***Requirement that the court tell the witness that it is important to tell the truth***

4.43 The case of *R v Brooks* highlights uncertainty about the exact nature of the requirement in s 13(2)(b) for the court to tell a person that it is important to tell the truth.<sup>32</sup> For instance, the provision may be interpreted as requiring some form of judicial ‘instruction’. Sperling J in the New South Wales Court of Criminal Appeal said the policy behind the provision is that ‘the authority of the court is to be brought to bear on the witness by means of an instruction’.<sup>33</sup> It is therefore not surprising that the delivery of the judicial officer’s statement may have the potential to sound like a

29 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [6.92].

30 N Bala and others, ‘Children’s Conceptual Knowledge of Lying and its Relation to their Actual Behaviours: Implications for Court Competence Examinations’ (2002) 4 *Law and Human Behaviour* 395, 396.

31 K Schultz, ‘The Need for Competence Tests: Queensland Judicial Perspectives on the Non-Accused Child Witnesses in Criminal Proceedings, Part 2’ (2004) 23 *University of Queensland Law Journal* 134, 138, referring to *Lau v The Queen* (1991) 6 WAR 30, 59.

32 *R v Brooks* (1998) 44 NSWLR 121.

33 *Ibid*, 127.



‘formal or intimidating’ warning<sup>34</sup> to a child or a person with an intellectual disability or cognitive impairment, particularly if it is delivered by an adult in a black robe with the power to punish.

4.44 Some researchers on children’s competence hold a contrary view about the usefulness of this provision. They suggest that there may be some benefit in asking a child to tell the truth.<sup>35</sup> Indeed, like provisions exist in other jurisdictions.<sup>36</sup>

4.45 It has been suggested that the following is a simple, convenient form of words: ‘Tell us all you can remember of what happened. Do not make anything up or leave anything out. This is very important’.<sup>37</sup> It is also suggested that this is best said by the judge or magistrate in the introductory exchange with the witness and prior to any evidence being given.

### **Applicability of the competence provisions to a range of witnesses**

4.46 In considering reform it should be borne in mind that challenges to competence will occur not just in relation to children, but also in relation to potential witnesses with a range of disabilities, particularly those with some form of intellectual disability or cognitive impairment. It is therefore important that any test of competence be appropriate for broad application and not be an unfair hindrance to any potential witness. Testing founded on complex and abstract concepts is more likely to pose such a barrier than, for instance, a test which assesses a person’s basic comprehension and communication skills.

### **Proposals in DP 69**

4.47 To address the above criticisms, in DP 69 the Commissions proposed reform of the competence provisions in the uniform Evidence Acts.

### ***Liberalisation***

4.48 As a general approach, DP 69 proposed that the presumption of competence be retained and that the existing competency regime be made less stringent to guard

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34 K Schultz, ‘The Content of Competence Tests: Queensland Judicial Perspectives on Non-Accused Child Witnesses in Criminal Proceedings, Part 2’ (2004) 23 *University of Queensland Law Journal* 134, 145, referring to J Cashmore and K Bussey, ‘Judicial Perceptions of Child Witness Competence’ (1996) 20 *Law and Human Behavior* 313, n 20–21, 320.

35 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.92], referring to New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses—A Discussion Paper*, PP 26 (1996), 6–9.

36 *Evidence Act 1977* (Qld) s 9B(2)(b). Such a requirement has also been recommended for Victoria: see Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 296, Rec 136.

37 Home Office (UK) and others, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children* (2002), Vol 2, [5.22].

against the possibility of evidence of probative value being excluded from court proceedings (both civil and criminal).<sup>38</sup>

### **General competence**

4.49 The central proposal was that there is a test of general competence founded on basic comprehension and communication skills. The test is to be applicable to the giving of both sworn and unsworn evidence. The recommended standard for general competence to give sworn or unsworn evidence is that the person can understand a question about a fact and can give an answer which can be understood to a question about that fact. A person who does not possess general competence in relation to some facts will be incapable of giving evidence about those facts, but not necessarily others.<sup>39</sup>

4.50 Further, it was proposed that it be made explicit that if for any reason, including physical disability, a person is incapable of meeting the test of general competence and that incapacity cannot be overcome, the person is not competent to give evidence (sworn or unsworn).<sup>40</sup>

4.51 A test of general competence is not novel. A similar test formulated in the 19th century by Sir James Fitzjames Stephen, and as applied in Christmas Island and the Cocos (Keeling) Islands, was considered favourably in ALRC 26.<sup>41</sup> Another example exists in Queensland under the *Evidence Act 1977* (Qld).<sup>42</sup>

4.52 Such a test also applies in England under the *Youth Justice and Criminal Evidence Act 1999* (UK). The relevant provisions of the English legislation came into force in July 2002. Section 53 provides that in a criminal proceeding ‘all persons are (whatever their age) competent to give evidence’ unless it appears to the court that the person is ‘not a person who is able to (a) understand questions put to him as a witness, and (b) to give answers to them which can be understood’.<sup>43</sup>

4.53 There is little in the way of reported case law which gives an insight into the operation of the English provision. However, it has been applied in two separate reported cases, both concerning the sexual assault of elderly women suffering from

38 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [4.44].

39 Ibid, [4.45].

40 Ibid, [4.50]. Otherwise, the current provisions in relation to partial competence and physical competence in s 13(3) and (4) should be deleted.

41 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [237], referring to J Stephen, *A Digest of the Law of Evidence* (1876), arts 106–107: All persons shall be considered competent unless they are ‘prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind’.

42 *Evidence Act 1977* (Qld) ss 9A(2), (3): A ‘person is competent to give evidence in the proceeding if, in the court’s opinion, the person is able to give an intelligible account of events which he or she has observed or experienced’.

43 *Youth Justice and Criminal Evidence Act 1999* c 23 (UK) s 53.

dementia or Alzheimer's disease. In those cases the test in s 53 was applied in the context of the trial judge's consideration of the competence of the complainant as a witness when dealing with the issue of the admissibility of video-taped evidence under ss 23 and 26 of the *Criminal Justice Act 1988* (UK) where the witness was otherwise unfit to attend trial to give evidence.

4.54 In the more recent of the two cases, *Sed v The Queen*, the Court of Appeal formed the view, as did the trial judge, that the complainant was a competent witness.<sup>44</sup> In particular, the video of her showed:

That she did have some appreciation of why she was being questioned ... Whilst she did not always answer the question put to her and sometimes rambled off into other occurrences and places involving other people, her reference to such sexual assault by a man was a strong theme in her discourse with the officers. Sometimes her answers were hard to understand or bore little relation to the question asked, but at the end of the interview, the abiding picture was of a woman whose account and responses to questions were somewhat patchy, but who was nevertheless complaining repeatedly of a particular recent sexual assault by a man ...<sup>45</sup>

4.55 The Court of Appeal went on to observe it is for the judge to determine the question of competence:

bearing always in mind that, if, on critical matters, the witness can be seen and heard to be intelligible, it is for the jury and no-one else to determine reliability and general cogency.<sup>46</sup>

4.56 The Court of Appeal also noted that, '[t]he new s 53 test of "competence" is ... concerned at its highest with the degree of mutual comprehension of those questioning and of the person being questioned'.<sup>47</sup>

4.57 The Commissions favour a test of general competence substantially based on the English provision, which focuses on the ability of the witness to comprehend and communicate. Such a test is flexible, clear and unambiguous. It increases the possibility that a witness' evidence is heard, requiring mainly that they understand and answer simple questions and communicate what happened.

#### ***Competence to give sworn and unsworn evidence***

4.58 In DP 69, the Commissions also proposed that s 13 be reformulated so that the standard for determining competence of a witness to give unsworn evidence is

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44 *Sed v The Queen* [2004] 1 WLR 3218. The other case is *R v D* (2003) 141 A Crim R 471.

45 *Sed v The Queen* [2004] 1 WLR 3218, [42].

46 *Ibid*, [46].

47 *Ibid*, [50].

substantially different from, and less rigorous than, that required for competence to give sworn evidence.<sup>48</sup>

4.59 It was proposed that the test of competence to give sworn evidence in s 13(1) should:

- continue to require that the person understands the obligation to give truthful evidence; and
- provide expressly that a person who satisfies the test of sworn evidence must also satisfy the test of general competence. The proposal was to place the test of general competence, which is founded on basic comprehension and communication skills, elsewhere in s 13.

4.60 In relation to unsworn evidence, it was proposed that a person may give unsworn evidence about a fact if they satisfy the test of general competence. A person who does not possess the requisite comprehension and communication skills in relation to some matters will be incapable of giving unsworn evidence about these matters or facts, but not necessarily others. Otherwise, it was proposed that, subject to retaining (in general terms) the requirement that the court informs the person of the importance of telling the truth, the current test of competence to give unsworn evidence in s 13(2) be deleted.<sup>49</sup> It would therefore no longer be necessary for a person to understand the ‘difference between the truth and a lie’ as part of the test for competence to give unsworn evidence. Rather, it will be up to the court to determine the weight that should be given to unsworn evidence.

### ***Expert opinion in assessment of competence evidence***

4.61 In DP 69 the Commissions considered favourably the recommendation in the Victorian Law Reform Commission (VLRC) sexual offences reports that, in cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert about a child’s competence to give sworn or unsworn evidence.<sup>50</sup> As the VLRC noted, courts generally

do not hear expert evidence on the capacity of a particular child to give evidence, even though a person with expertise in the development patterns of children may be able to provide important information about the child’s capacity to give evidence.<sup>51</sup>

4.62 The Commissions considered that a court might benefit from the availability of expert reports in relation to other witnesses whose competence may be in doubt. For

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48 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [4.44].

49 Ibid, [4.46].

50 Ibid, [4.52]–[4.54].

51 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.76].

instance, the insights of an appropriately qualified expert skilled in determining intellectual functioning may assist the court to assess issues of competence concerning witnesses with an intellectual disability or cognitive impairment. In the absence of such evidence, the assessment would be made through judicial questioning and impressions ascertained in the artificial environs of the courtroom.

4.63 It was therefore recommended that the current provision s 13(7), which provides that in determining questions under s 13 the court may ‘inform itself as it sees fit’, should be amended to make it clear that a court is entitled to draw on expert opinion to assist in determining such questions.<sup>52</sup>

#### ***Consequential amendment***

4.64 Finally, the wording of ss 14 and 61 should be amended to bring them in line with the proposed changes to s 13(4).

#### **Submissions and consultations**

4.65 Submissions and consultations in response to the proposals in DP 69 have addressed different aspects of the detail. The issues raised are as follows:

- liberalisation;
- deletion of the requirement that a ‘person indicates ... that he or she will not tell lies in the proceeding’;
- focus on competence about ‘a fact’;
- ‘physical disability’ affecting competence;
- equality before the law for people with disabilities;
- practicalities in overcoming obstacles to competence; and
- expert opinion in the assessment of competence.

#### ***Liberalisation***

4.66 Achieving acceptable competency laws requires ‘a delicate balancing of the interests and needs of individuals [including defendants, victims and witnesses],

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<sup>52</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 4–1.

society, investigating authorities and the courts'.<sup>53</sup> No matter what form the law takes, it is to be expected that there will be differences of opinion about whether it is too strict or too liberal.

4.67 Not surprisingly, views differ about the appropriateness of this approach. For instance, the New South Wales Public Defenders Office (NSW PDO) submits that the common law requirements for competence (which preceded the uniform Evidence Acts competence regime) are considerably stricter and that 'the bar has been already lowered as far as should be allowed'.<sup>54</sup> Conversely, other submissions are generally supportive of a less stringent approach.<sup>55</sup>

***Deletion of the requirement that a 'person indicates ... that he or she will not tell lies in the proceeding'***

4.68 The one submission directed to this proposal described it as 'a retrograde step'. The argument is put on the basis of academic research which shows 'that asking children to promise to tell the truth has real value in encouraging children to tell the truth'.<sup>56</sup>

4.69 The proposed changes to the competence provisions for unsworn evidence aim to move the focus away from understanding of the truth and a lie. Rather, the emphasis in the recommended test of general competence is on capacity to comprehend and communicate. It is the Commissions' view that it would be inconsistent with the approach taken to require a witness who has been unable to demonstrate a capacity to understand an obligation to give truthful evidence (s 13(1)) and is therefore ineligible to give sworn evidence, to nonetheless be required to indicate appropriately that he or she 'will not tell lies' or to promise to tell the truth.

***Focus on competence about 'a fact'***

4.70 The proposed test of general competence provides that if a witness lacks capacity to understand a question or to give an answer which can be understood to a question about 'a fact' (and therefore is not competent to give evidence about that fact), nonetheless, subject to comprehending and communicating appropriately to a question about another fact, he or she be competent to give evidence about that fact.<sup>57</sup>

53 New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 113 (J Shaw—Attorney General).

54 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

55 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; NSW Disability Discrimination Legal Centre, *Submission E 98*, 22 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005.

56 T Beregi, *Submission E 79*, 16 September 2005, referring to N Bala and others, 'Children's Conceptual Knowledge of Lying and its Relation to their Actual Behaviours: Implications for Court Competence Examinations' (2002) 4 *Law and Human Behaviour* 395, 409.

57 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [4.46].

4.71 Victoria Police submits that, as a matter of practical concern, this approach may require constant rulings by a judicial officer regarding each ‘fact’ that is raised with the witness.<sup>58</sup>

4.72 It is the Commissions’ view that these concerns are more theoretical than real. Section 13 of the uniform Evidence Acts currently recognises that a witness may be competent to give evidence about some facts but not others.<sup>59</sup> It has been noted that:

This is particularly important for children who may have differing language skills, abilities to make inferences, conclusions or estimates or capacities to understand concepts such as time and special perspective. This approach to competency allows a young child to respond under oath to simple questions but not to questions beyond the child’s capacity that cannot be reframed in simpler terms.<sup>60</sup>

4.73 There have been no submissions or consultations which indicate that this approach has posed practical difficulties to date. Further, the Commissions are of the view that it is important that the Acts retain a flexible approach, allowing a court to hear evidence from a witness on certain matters but excluding evidence about matters they are not competent to deal with.

***‘Physical disability’ affecting competence***

4.74 The Australian Government Attorney-General’s Department expresses some concern about the specific reference to ‘physical disability’ in the proposed amendment to s 13(4).<sup>61</sup> The criticism seems to be that the use of this term over-emphasises the likelihood that a person with a physical disability will not meet the required standard of comprehension and, in particular, the standard of communication, and is therefore potentially discriminatory.

4.75 As has been discussed, competence provisions are typically viewed as relevant when assessing the capacity of children to give evidence, and the capacity of persons with an intellectual disability or cognitive impairment to give evidence. The specific reference to ‘physical disability’ is made to ensure that the potential applicability of the competence requirements to witnesses with this kind of disability is not overlooked. In light of the concerns expressed, consideration has been given to expanding the list of categories of potential matters which may affect capacity. However, the danger of this approach is that as more categories are listed, attention will focus on the list and if a particular category is omitted that may seem to be significant and create more

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58 Victoria Police, *Submission E 111*, 30 September 2005.

59 Uniform Evidence Acts s 13(3).

60 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.62].

61 Attorney-General’s Department, *Submission E 117*, 5 October 2005.

uncertainty. Therefore to retain the potential for flexible interpretation and the inclusive nature of s 13, it has been decided not to list further categories of disabilities.

***Equality before the law for people with disabilities***

4.76 A number of submissions in response to DP 69 also indicate that there is a need for the provisions to be more explicit about facilitating the participation of witnesses with a disability. For example, the Australian Government Attorney-General's Department submits that a person 'should not be excluded from giving evidence because they need to use an alternative means of communication'.<sup>62</sup> The Department acknowledges that a person's incapacity is subject to the qualification in the section 'that incapacity cannot be overcome' 'which goes some way to alleviating this concern'.

4.77 The Department recommends aligning the proposed competence provisions with the objectives and language associated with the *Disability Discrimination Act 1992* (Cth) ('DDA'). Specifically, it suggests that the qualifier 'that incapacity cannot be overcome' be replaced or expanded to reflect an obligation to 'reasonably accommodate the requirements of a person with disability, unless it causes unjustifiable hardship to the service provider'.

4.78 The Commissions are of the view that such change to the language of the proposed provisions is not required. Consistently with the policy approach of the DDA, the proposed changes to the provisions aim to reduce obstacles to the giving of evidence in court by persons with a disability. Currently, there is no explicit use of the terms 'reasonable adjustments' or 'reasonable accommodations' in the DDA (although it is noted that in early 2005 the Australian Government accepted a recommendation in the Productivity Commission's *Review of the Discrimination Act* to expressly include in the DDA a duty to make reasonable adjustments).<sup>63</sup> The phrase 'that incapacity cannot be overcome' implies making adjustments or accommodations and, in fact, favours a person with a disability and is not subject to an explicit exclusion for adjustments or accommodations that would cause 'unjustifiable hardship'.

4.79 However, the Commissions do consider it appropriate to include a note to s 13(4) cross referencing to s 31, which makes specific provisions for 'deaf and mute witnesses'.

***Practicalities in overcoming obstacles to competence***

4.80 In a related way a number of submissions raised the practicalities of overcoming obstacles to competence. For example, the New South Wales Disability Discrimination Legal Service submits that 'before a finding of incompetence is made it should be

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<sup>62</sup> Ibid.

<sup>63</sup> Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, (2004); Government Response to The Productivity Commission's Review of the *Disability Discrimination Act 1992*, February 2005.



demonstrable that the court made every reasonable attempt to facilitate the potential witness' participation'. The Intellectual Disability Rights Service also emphasises that the right support or 'special measures' in court can have a significant impact on the effect of a witness's disability, and consequently the capacity of a witness to understand or communicate. The Australian Government Attorney-General's Department suggests that, where appropriate, courts should provide Auslan interpreters and other alternative methods of communication.<sup>64</sup>

4.81 The competence provisions aim expressly to allow measures necessary to overcome obstacles to a person's ability to comprehend or communicate to facilitate competence to give evidence. However, the Commissions believe that addressing the responsibility for the practicalities of these measures is beyond the scope of the uniform Evidence Acts. This is a systemic and resource related issue.

#### ***Expert opinion in assessment of competence***

4.82 Submissions and consultations have produced a range of responses to the proposal that s 13(7) be amended to make it clear that a court is entitled to draw on expert opinion to assist in determining questions of competence. Some express anxiety and concern about experts 'determining' competence while others raise practical concerns.<sup>65</sup> The majority are supportive.<sup>66</sup>

4.83 The Australian Government Attorney-General's Department notes that provided that expert evidence is given on the basis of personal knowledge of the particular child concerned, the proposal may go some way to taking the onus off the individual judge in deciding what a witness can and cannot understand.<sup>67</sup>

4.84 Submissions from the NSW Disability Discrimination Legal Service<sup>68</sup> and the Intellectual Disability Rights Service<sup>69</sup> also suggest that expert opinion should be available to identify any alternative communication methods or support needs which could help facilitate the giving of evidence by a person with a disability.

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<sup>64</sup> Attorney-General's Department, *Submission E 117*, 5 October 2005.

<sup>65</sup> The NSW Law Society suggests that if the determination of a witness' competence is left until trial and an expert assessment is required, an adjournment of the trial may be the result: NSW Law Society Litigation Law and Practice Committee, *Consultation*, Sydney, 26 August 2005.

<sup>66</sup> Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005; Eastern and Central Sexual Assault Service, *Submission E 61*, 24 August 2005. The Office of the Director of Public Prosecutions (NSW) (NSW DPP) notes that this would be a 'logical extension' of recommendations made by the NSW Criminal Justice Sexual Offences Taskforce: Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

<sup>67</sup> Attorney-General's Department, *Submission E 117*, 5 October 2005.

<sup>68</sup> NSW Disability Discrimination Legal Centre, *Submission E 98*, 22 September 2005.

<sup>69</sup> Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

4.85 This proposal is not intended to allow an expert in any way to supplant the role of the court in making a determination as to competence. Generally, submissions and consultations have expressed approval of the proposal.

## Conclusion

4.86 The Commissions continue to favour a more liberal approach to the laws of competence. This can be achieved through the reform of s 13, in particular, by introducing a test of general competence to give sworn and unsworn evidence and by distinguishing better the tests of competence to give sworn and unsworn evidence so that they are sufficiently different. Consultations and submissions generally support this approach. The Commissions recommend that the proposals in DP 69 be adopted, with the qualifications set out below.

4.87 The draft of s 13(2)(a) in DP 69 provides that a person who is not competent to give sworn evidence because of s 13(1) is competent to give unsworn evidence.<sup>70</sup> The Commissions consider that, having regard to the terms of s 12, a person not competent to give sworn evidence remains, subject to the test of general competence, competent to give evidence, which of necessity will be unsworn. The Commissions' proposal is to delete the reference to competence to give unsworn evidence in s 13(2). To ensure that the change does not cause any uncertainty, a note to s 13(1) should be included in the following terms: 'Note: The person may be competent to give unsworn evidence'.

4.88 Further, s 13(4) of the draft provisions in DP 69 provides expressly that if a person does not meet the test of general competence and cannot give evidence about a fact, the person may nonetheless be competent to give evidence about another fact. The Commissions consider that it is not necessary to specify in s 13(4) that a person may be competent to give evidence about other facts, and are of the view that it is preferable for this to be indicated in a note to s 13(4).

4.89 Finally, as is noted above, there should also be a note to s 13(4) cross-referencing to s 31. The draft provisions are contained in Appendix 1.

**Recommendation 4–1** Section 13(2), (3) and (4) of the uniform Evidence Acts should be amended or replaced to bring about the following:

- a person not competent to give sworn evidence is competent to give unsworn evidence but may not do so unless the court informs the person of the importance of telling the truth;
- all witnesses must also satisfy a test of general competence in s 13(4);

<sup>70</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Appendix 1, 538.

- the test of general competence to give both sworn and unsworn evidence in s 13(4) should provide that if for any reason, including physical disability, a person lacks the capacity to understand, or give an answer that can be understood to, a question about a fact and that incapacity cannot be overcome, the person is not competent to give evidence about that fact;
- the inclusion of a note to s 13(1) that ‘the person may be competent to give unsworn evidence’;
- the inclusion of a note to s 13(4) that ‘the person may be competent to give evidence about other facts’; and
- the inclusion of a note to s 13(4) cross-referencing to s 31.

**Recommendation 4–2** Section 13(7) of the uniform Evidence Acts should be amended to make it clear that in informing itself as to the competence of a witness, the court is entitled to draw on expert opinion.

**Recommendation 4–3** The wording of ss 14 and 61 of the uniform Evidence Acts should be amended to bring them in line with the proposed changes to s 13(4).

## Compellability

### Compellability of certain witnesses in criminal proceedings

4.90 A submission to the Inquiry from Rights Australia has prompted the examination of compellability provisions relating to certain witnesses under the uniform Evidence Acts.<sup>71</sup> Rights Australia suggests that the *Evidence Act 1995* (Cth) be amended to include same-sex de facto relationships within the definition of ‘de facto spouse’. Such an amendment will ensure equal protection in relation to compellability of same-sex and opposite-sex partners of an accused in a criminal matter.

4.91 Under s 12(b) of the uniform Evidence Acts, a person who is competent to give evidence about a fact is compellable to give that evidence. Section 18, which applies only to criminal proceedings, permits certain categories of witnesses to object to giving

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<sup>71</sup> Rights Australia Inc, *Submission E 45*, 24 March 2005.

evidence against the accused. The witnesses entitled to raise the objection are the accused's spouse, de facto spouse,<sup>72</sup> parent or child.<sup>73</sup> The uniform Evidence Acts provide that the court has the discretion to excuse the witness from testifying after balancing the risk of harm to the witness or to the witness' relationship with the accused against the importance of the evidence.<sup>74</sup>

4.92 The uniform Evidence Acts also set out a non-exhaustive list of factors that must be taken into account in the exercise of the discretion, including the nature and gravity of the offence, the substance and importance of the evidence, the availability of other evidence, the nature of the relationship between the accused and the witness, and any breach of confidence involved.<sup>75</sup> This general approach is subject to exceptions for proceedings for certain criminal offences (which differ for each of the uniform Evidence Act jurisdictions, but which generally relate to offences against children and domestic violence offences). The exceptions are set out in s 19 of the uniform Evidence Acts. In proceedings relating to the excepted offences, the witness is compellable.

4.93 The discretionary approach to compellability in the uniform Evidence Acts reflects the underlying rationale and competing policy considerations:

on the one hand, the desirability, in the public interest, of having all relevant evidence available to the courts and on the other the undesirability in the public interest that

- the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require, and
- the community should make unduly harsh demands on its members by compelling them, where the general interest does not require it, to give evidence that will bring punishment upon those they love, betray their confidences, or entail economic and social hardships.<sup>76</sup>

4.94 A discretionary compellability regime applies not only in uniform Evidence Act jurisdictions, but also in Victoria and South Australia.<sup>77</sup> While there is general consistency of approach in these jurisdictions, there is some divergence in the categories of witnesses entitled to object to being required to give evidence. Of particular relevance for this discussion is the position of a person in a de facto relationship with an accused, particularly where the relationship is same-sex.

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<sup>72</sup> Section 18 of the *Evidence Act 2001* (Tas) only uses the term 'spouse' which includes a person who is in a 'significant relationship' within the meaning of the *Relationships Act 2003* (Tas).

<sup>73</sup> Section 20(3) of the uniform Evidence Acts sets out when the judge or any party (other than the prosecutor) may comment on the failure of a defendant's spouse, de facto spouse, parent or child to give evidence.

<sup>74</sup> Uniform Evidence Acts s 18(6).

<sup>75</sup> *Ibid* s 18(7).

<sup>76</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [80].

<sup>77</sup> *Crimes Act 1958* (Vic) s 400; *Evidence Act 1929* (SA) s 21.

4.95 The definition of ‘de facto spouse’ contained in the *Evidence Act 1995* (Cth), which also applies in the Australian Capital Territory and Norfolk Island,<sup>78</sup> provides that a de facto spouse:

- (a) of a man, means a woman who is living with the man as his wife on a genuine domestic basis although not married to him; and
- (b) of a woman, means a man who is living with the woman as her husband on a genuine domestic basis although not married to her.<sup>79</sup>

4.96 Clearly, the definition of de facto spouse in the *Evidence Act 1995* (Cth) does not extend to persons in a same-sex relationship.<sup>80</sup> In this respect, it is inconsistent with the uniform Evidence Acts in force in New South Wales and Tasmania—which treat all de facto couples, regardless of sex, equally (provided they fall within the definitions which are provided for in other legislation).<sup>81</sup> Further, to qualify as a ‘de facto spouse’ for the purposes the *Evidence Act 1995* (Cth), co-habitation with a person of the opposite sex must be established.<sup>82</sup>

4.97 The issues raised in this Inquiry are:

- whether the definition of ‘de facto spouse’ in the *Evidence Act 1995* (Cth) should be extended to cover a person in a de facto relationship, regardless of sex, as is the case in New South Wales and Tasmania, thereby including such a person amongst the class of persons who potentially may not be required to give evidence; and
- whether the term ‘de facto spouse’ is an appropriate descriptor of a person in a de facto relationship.

4.98 In most Australian jurisdictions, there has been a trend in recent years to change the law to recognise that parties in a genuine de facto relationship should have similar

<sup>78</sup> *Evidence Act 2004* (NI) Dictionary, Pt 1.

<sup>79</sup> *Evidence Act 1995* (Cth) Dictionary, Pt 1.

<sup>80</sup> However, the Commissions note that there are examples of a person’s same-sex partner being recognised for the purposes of other Commonwealth legislation. See for example the definition of ‘close family member’ in s 102.1 (in Chapter 5, ‘The Security of the Commonwealth’) of the *Criminal Code Act 1995* (Cth), which includes a ‘person’s spouse, de facto spouse or same-sex partner’.

<sup>81</sup> It is noted that the *Evidence Act 2004* (NI) Dictionary, Pt 1 includes the same definition as the Commonwealth Act.

<sup>82</sup> Similar pre-requisites apply in definitions of ‘de facto spouse’ and ‘de facto relationship’ in other Commonwealth legislation. See, for example, *Corporations Act 2001* (Cth) s 9 (‘de facto spouse’) and *Family Law Act 1975* (Cth) (‘de facto relationship’).

rights and privileges to parties in a legal marriage.<sup>83</sup> There have also been moves to increase equality and remedy legislative discrimination against those who live in a variety of relationships regardless of sex.<sup>84</sup>

4.99 In 2002, amendments were made to the *Evidence Act 1995* (NSW) with the passing of the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW), by which the definition of ‘de facto relationship’ contained in the *Property (Relationships) Act 1984* (NSW) was extended to a range of statutes, including the *Evidence Act 1995* (NSW). The effect of the amendment was to broaden the definition of ‘de facto spouse’ in the *Evidence Act 1995* (NSW) by making it non-gender specific. Since the passing of the amending Act, a ‘de facto spouse’ for the purposes of the *Evidence Act 1995* (NSW) is now a person with whom the person has a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW), that is:

a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.<sup>85</sup>

4.100 In determining whether two persons are in a de facto relationship, the court is to take into account all the circumstances of the relationship, including:

- (a) the duration of the relationship,
- (b) the nature and extent of common residence,
- (c) whether or not a sexual relationship exists,
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
- (e) the ownership, use and acquisition of property,
- (f) the degree of mutual commitment to a shared life,
- (g) the care and support of children,
- (h) the performance of household duties,
- (i) the reputation and public aspects of the relationship.<sup>86</sup>

83 W Harris, ‘Spousal Competence and Compellability in Criminal Trials in the 21st Century’ (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 274, 297.

84 See, by way of recent examples, Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under Section 207 of the Equal Opportunity Act 1995* (2005); South Australian Government, *Removing Legislative Discrimination Against Same Sex Couples*, Discussion Paper (2003); ACT Department of Justice and Community Safety, *The Recognition of Same Sex Relationships in the ACT*, Discussion Paper (2005); Parliament of Tasmania, Joint Standing Committee on Community Development, *Report on the Legal Recognition of Significant Personal Relationships*, (2001).

85 *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Property (Relationships) Act 1984* (NSW) s 4(1).

86 *Property (Relationships) Act 1984* (NSW) s 4(2).

4.101 Section 4(3) provides that no finding in respect of any of the above matters, or any combination of them, is

to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

4.102 Although not explicitly stated, the effect of the amendment in New South Wales is to extend the potential exemption to compellability to a person in a de facto relationship with the accused, regardless of the person's sex.

4.103 In Tasmania, all persons in a de facto relationship regardless of sex are recognised in a similar way. However, the position is less prescriptive than in New South Wales. The term 'spouse' in s 18 of the *Evidence Act 2001* (Tas) includes a person who is in a 'significant relationship' within the meaning of the *Relationships Act 2003* (Tas).<sup>87</sup> For the purposes of the *Relationships Act 2003* (Tas), the definition of a 'significant relationship' differs from the definition of a 'de facto relationship' contained in the *Property (Relationships) Act 1984* (NSW) in one notable respect. A 'significant relationship' is defined in s 4(1) of the *Relationships Act 2003* (Tas) as:

a relationship between two adult persons:

- (a) who have a relationship as a couple; and
- (b) who are not married to one another or related by family.

4.104 Therefore, in Tasmania, it is not necessary for a couple to live together to establish the requisite relationship (as is the case in New South Wales). Otherwise, s 4(2) provides that in determining whether two persons are in a 'significant relationship', the court is to take into account a range of matters that point to the nature and quality of the relationship. These are the same matters that are also contained in the *Property (Relationships) Act 1984* (NSW). The list includes 'the nature and extent of common residence',<sup>88</sup> as one of the matters that may be taken into account.

4.105 It follows that a broader class of persons enjoy potential exemption from compellability under the *Evidence Act 2001* (Tas).

4.106 Given the differing definitions of 'spouse' and 'de facto spouse' in the uniform Evidence Acts of the Commonwealth, New South Wales and Tasmania, currently there is disconformity between these jurisdictions in the laws relating to compellability of a person in a de facto relationship with the accused.

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<sup>87</sup> *Evidence Act 2001* (Tas) s 3.

<sup>88</sup> *Ibid* s 4(3)(b).

## Submissions and consultations

4.107 The Commissions endorse the view expressed in ALRC 38 that the procedures for enforcing the criminal law should not be allowed to disrupt ‘family relationships to a greater extent than the interests of the community require’.<sup>89</sup> The gender-based definition of ‘de facto spouse’ in the *Evidence Act 1995* (Cth) discriminates against those in relationships with persons other than of the opposite sex, is potentially disruptive of such relationships and unnecessarily harsh upon the parties to them and constitutes an unnecessary divergence between the *Evidence Act 1995* (Cth) and other uniform Evidence Act jurisdictions.

4.108 Accordingly, the Commissions proposed in DP 69 that the current definition of ‘de facto spouse’ in *Evidence Act 1995* (Cth) be amended to give a person in a same-sex de facto relationship with an accused the right to object to giving evidence for the prosecution in criminal matters.<sup>90</sup> Consultations and submissions subsequent to DP 69 have not addressed the proposal in detail but have been generally supportive of this approach.<sup>91</sup>

## The Commissions’ view

4.109 The Commissions remain of the view that the concept of a ‘de facto spouse’ should be gender-neutral.

4.110 Subsequent to DP 69, further consideration has been given to the use of the term ‘spouse’ in the context of de facto relationships. The Commissions have formed the view that it is preferable to eliminate the use of this word, which does not sit easily with a gender neutral concept of a de facto relationship. Accordingly, the Commissions recommend that the expression ‘de facto spouse’, which appears in ss 18, 20 and the Acts’ Dictionary, be replaced with the term ‘de facto partner’ in both the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW).

4.111 These changes would ensure equality and avoid discrimination by according the same legal privileges in relation to compellability provisions to all those who are couples, irrespective of the sex of the parties involved. It would also reflect developments in social attitudes in Australia and result in greater uniformity between the uniform Evidence Act jurisdictions.

<sup>89</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [80].

<sup>90</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [4.70].

<sup>91</sup> Submissions received which generally support the proposal include: Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Victoria Police, *Submission E 111*, 30 September 2005. The proposal was also supported in consultation with Judge S Bradley, *Consultation*, Cairns, 12 August 2005. A submission was received in opposition to the proposal from C O’Donnell, *Submission E 60*, 20 August 2005.



4.112 The Commissions are also of the view that the approach reflected in the definition of a ‘significant relationship’ under the Tasmanian legislation is to be preferred, that is:

a relationship between two adult persons—

- (a) who have a relationship as a couple; and
- (b) who are not married to one another or related by family.

4.113 This approach is less prescriptive because it does not require that the parties to a relationship live together. It caters for a range of situations in which a couple may not cohabit but may nonetheless have a relationship with many of the other characteristics indicative of a de facto relationship. For example, circumstances can be envisaged where parties in a relationship choose to maintain separate residences, or live apart while one party is in long-term care outside the home. In such cases, the circumstances of any cohabitation (or lack of it) are just one factor to be taken into account in determining whether a de facto relationship exists.

4.114 The Commissions have also considered whether or not it is necessary to include indicia for the court to take into account when determining what constitutes the requisite relationship. Lists of such matters exist in the relevant legislation in New South Wales and Tasmania. However, a number of these factors (such as the degree of financial dependence and independence, and any arrangements for financial support, between the parties; the ownership and acquisition of property; and the performance of household duties) have limited relevance to the potential exemption from compellability. Nonetheless, on balance it is thought desirable to include a short non-exhaustive list of indicia which may assist the court to determine whether ‘a relationship as a couple’ exists. The recommended indicia, extracted from the lists in the New South Wales and Tasmanian legislation, are:

- the duration of the relationship;
- the degree of commitment to a shared life; and
- the reputation and public aspects of the relationship.

4.115 Further, the Commissions propose that it should not be a requirement that the relationship is between two ‘adult’ persons (as is currently the case in NSW and Tasmania). It is quite foreseeable that one or both of the persons in a de facto relationship may be less than 18 years old and should be entitled to object to giving evidence in the same way as an older member of a de facto relationship.

4.116 It is also recommended that the words ‘or related by family’ which currently appear in the definitions of ‘de facto relationship’ in New South Wales and ‘significant relationship’ in Tasmania are superfluous and should not be included in the revised definition of ‘de facto partner’. The inclusion of such words would exclude persons who have a relationship as a couple who may also be related by family (for instance, cousins or family members related by marriage).<sup>92</sup>

4.117 Whatever definition of a person in a de facto relationship applies, ultimately it is up to the court to assess whether or not the relationship exists and whether, taking into account various factors, the discretion should be exercised to excuse the witness from giving evidence.

**Recommendation 4-4** The provisions of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) should be amended to eliminate the term ‘de facto spouse’ (including the definition) and to replace it with the term ‘de facto partner’.

**Recommendation 4-5** The *Evidence Act 1995* (Cth) should be amended to provide a definition of ‘de facto partner’ in the following terms:

‘de facto partner’ means a person in a relationship as a couple with another person to whom he or she is not married.

**Recommendation 4-6** The *Evidence Act 1995* (Cth) should be amended to provide that for the purpose of determining whether a relationship between 2 persons is a relationship as a couple, the matters that the court may take into account include:

- (a) the duration of the relationship;
- (b) the extent to which the persons have a mutual commitment to a shared life; and
- (c) the reputation and public aspects of the relationship.

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<sup>92</sup> The issue is raised in the submissions of: the Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; and in consultation with the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005.

## 5. Examination and Cross-Examination of Witnesses

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### Introduction

5.1 Chapter 2, Divisions 3, 4 and 5 of the uniform Evidence Acts govern the manner in which witnesses may be questioned and give evidence. For example, under s 26, the court has a general power to make such orders as it considers just in relation to the questioning of witnesses and the production and use of documents. Division 3 also sets the order in which examination in chief, cross-examination and re-examination are to take place, and deals with attempts to revive memory and evidence given by police officers. Division 3 deals with the giving of evidence by witnesses during proceedings. Division 4 is concerned with the examination in chief and re-examination of witnesses.

5.2 The focus of this chapter is on the rules governing cross-examination of witnesses. The Inquiry has found that there is general satisfaction with these sections of the uniform Evidence Acts. However, concerns relating to the giving of evidence in narrative form, cross-examination of unfavourable witnesses and cross-examination of vulnerable witnesses were raised.

### Examination of witnesses

5.3 It is a general principle of the common law that a witness must testify in his or her own words. In order to protect the integrity of the evidence, a party who calls a

witness is prevented from asking leading questions—questions that suggest a desired answer or a set of assumptions.<sup>1</sup>

5.4 Under s 37 of the uniform Evidence Acts, a leading question<sup>2</sup> may not be put to a witness in examination in chief or re-examination except where:

- the court has given leave;
- the matter relates to an introductory part of the witness' evidence;<sup>3</sup>
- no objection is made to the question (where the other party is represented by a lawyer);
- the question relates to a matter not in dispute; or
- the witness is an expert and the question seeks the witness' opinion on a hypothetical statement of facts related to the evidence being adduced.

5.5 This provision reflects what the ALRC considered in its final Report of the previous Evidence inquiry to be existing practices in relation to leading questions.<sup>4</sup> The exceptions contained in the legislation are similar to those canvassed by the ALRC as instances where leading questions could be appropriate either to obtain the whole of a witness' evidence or to expedite the trial.<sup>5</sup>

### Giving evidence in narrative form

5.6 In a trial, witnesses generally give their evidence in response to specific questions from counsel. The uniform Evidence Acts maintain the question and answer format as the primary way in which witnesses are examined. However, s 29(2) of the Acts also allows a witness to give evidence wholly or partially in narrative form, where the party applies to the court for a direction allowing the witness to do so. 'Narrative form' refers to the witness giving evidence as a continuous story in his or her own words, uninterrupted by questions from counsel.

5.7 In the Interim Report of the previous Evidence inquiry, the ALRC noted that there was a general reluctance by lawyers to allow witnesses to tell their story freely, with oral evidence being limited to the answering of specific questions.<sup>6</sup> However,

<sup>1</sup> A Ligertwood, *Australian Evidence* (4th ed, 2004), 537.

<sup>2</sup> Defined in the uniform Evidence Acts as a question which directly or indirectly suggests a particular answer to a question or assumes the existence of a fact which is in dispute: *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3(1); *Evidence Act 2004* (NI) Dictionary, Pt 1.

<sup>3</sup> Such as standard questions regarding name, occupation and relationship to the parties to proceedings.

<sup>4</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [114].

<sup>5</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [620].

<sup>6</sup> *Ibid*, [281].

research cited by the ALRC shows that allowing a witness to give a free report of events as a narrative may yield a significantly more accurate version, as answering specific questions may limit and distort testimony.<sup>7</sup> Giving evidence in narrative form may also be more culturally appropriate for some witnesses and may assist child witnesses to give evidence.

5.8 ALRC 26 discussed criticisms of ‘free report’ or narrative evidence. It has been argued that the method leads to witnesses taking charge of proceedings, resulting in wasted court time. Witnesses may also give irrelevant or inadmissible evidence, including hearsay evidence. Nonetheless, although the ALRC acknowledged that the benefit may be marginal in a number of cases, it was suggested that narrative evidence should be encouraged, to avoid the ‘filtering and distorting’ process of giving evidence by question and answer.<sup>8</sup>

Psychological research lends support to the claim advanced at times by witnesses that being tied to answering designated questions tends to result in the distortion of their testimony. Similarly, the claim that a free report would give a more accurate version of the events in dispute is supported. On the other hand, psychological research also confirms the experience of many legal practitioners: a free report by a witness is usually found to be sketchy or incomplete. ... Obviously, both these techniques have positive and negative attributes and there would be considerable merit in the courts generally adopting a procedure which incorporated the use of each method to its greatest advantage.<sup>9</sup>

5.9 The ALRC suggested that while it would not always be desirable, the opportunity for evidence to be given in free narrative should be available under the Acts to encourage the court to adopt the practice where appropriate.<sup>10</sup>

5.10 As noted above, s 29(2) of the uniform Evidence Acts allows a witness to give evidence in narrative form if the party calling the witness applies to the court for a direction that the witness give evidence in that form. As with making any directions under the uniform Evidence Acts, the court must take into account the factors listed in s 192(2) when considering whether to make any directions regarding how the witness is to give their evidence.<sup>11</sup> Where the court gives no direction under s 29, the witness must give his or her evidence in question and answer form. If an answer is unresponsive to the question asked, it may be struck out.<sup>12</sup> Section 29 applies only

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7 Ibid, [280], [607]–[609].

8 Ibid, [608]–[609].

9 Ibid, [607]–[609].

10 Ibid, [607]–[609].

11 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180].

12 *R v Parkes* (2003) 147 A Crim R 450. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180].

where the evidence is given orally by the witness, and does not apply to affidavit evidence.<sup>13</sup>

5.11 The requirement that a party apply for a direction was not part of the ALRC's original recommendation.<sup>14</sup> It has been suggested that the requirement to apply for a direction has limited the use of s 29. Stephen Odgers SC points out that a lawyer would rarely seek to have their own witness give evidence in narrative form, as it potentially allows the witness to take charge of the proceedings.<sup>15</sup> Similarly, Andrew Ligertwood states that, as directions under s 29 can only be made on application of the party calling the witness, the section is unlikely to be used.<sup>16</sup> Odgers notes that the section is most likely to be used in relation to expert witnesses, because they are familiar with the rules of evidence and can observe warnings regarding what evidence is or is not admissible.<sup>17</sup>

5.12 Section 29(2) reflects the common law position. The general rule is that evidence is given by question and answer, but an exception may be made where it would aid in the giving of more effective evidence.<sup>18</sup> The evidence legislation in force in Victoria and Western Australia contains provisions relating to narrative evidence, although these are more specifically directed at complex or expert evidence. Under s 42B of the *Evidence Act 1958* (Vic) and s 27B of the *Evidence Act 1906* (WA), the court may direct that voluminous or complex evidence be given in narrative form. These sections do not require an application by counsel.

5.13 The court may benefit from receiving evidence in narrative form from witnesses other than expert witnesses.

#### ***Aboriginal and Torres Strait Islander witnesses***<sup>19</sup>

5.14 The question and answer method for eliciting evidence may be particularly inappropriate for Aboriginal and Torres Strait Islander (ATSI) witnesses who are not accustomed to this method of communication or to approaching a story in a direct way in response to specific questions.<sup>20</sup> It has been argued that a question and answer method of eliciting information can be socially distressing for ATSI witnesses, because

13 *Ramirez v Sandor's Trustee (No 1)* (Unreported, New South Wales Supreme Court, Young J, 22 April 1997). The issue of affidavit evidence is discussed further below.

14 There is no comment in the second reading speeches or the explanatory memorandum as to why an application is required before a direction can be given.

15 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180], fn 82.

16 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.119].

17 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180].

18 In *R v Butera* (1987) 164 CLR 180, referring to evidence given by charts or explanatory materials, the High Court stated that in waiving the general rules regarding the giving of evidence, the court must consider whether there is a risk that an altered form of giving evidence might give it undue weight.

19 Other issues concerning the evidence of Aboriginal and Torres Strait Islander witnesses are discussed in Ch 19.

20 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Ch 4.

it is antithetical to their culture and style of communication, which emphasises narrative and indirect means of eliciting information.<sup>21</sup> Studies have shown that indirectness is a definitive characteristic of ATSI communicative styles.<sup>22</sup>

5.15 The New South Wales Law Reform Commission (NSWLRC) has identified a number of areas where communication difficulties may occur between ATSI people and other people in a courtroom setting:

- ATSI society values the use of silence in conversation more than non-ATSI society, which can lead to misunderstanding in court and incorrectly be seen as guilt, ignorance or reflection of a communication breakdown;
- an ATSI witness may agree gratuitously with whatever the questioner has put to him or her. This often occurs where many ‘yes-no’ questions are asked by someone in a position of authority; and
- ATSI people frequently do not use numbers or other quantitative means of describing events, such as days of the week, dates or time. Consequently, if specific answers are sought to questions like ‘how’ or ‘when’, ATSI witnesses are frequently seen as vague.<sup>23</sup>

5.16 Australian courts have to a certain extent recognised that the question and answer method is not always the most effective way of eliciting information from ATSI witnesses. For example, Blackburn J stated that experience taught him not to rely too heavily on the cross-examination of ATSI witnesses.<sup>24</sup> O’Loughlin J in *De Rose v South Australia* considered that the interests of justice would be best served by a witness giving his or her evidence in the most convenient and comfortable way for that witness.<sup>25</sup>

5.17 The Queensland Criminal Justice Commission has recommended that the *Evidence Act 1977* (Qld) be amended to allow the court to direct a witness to give evidence wholly or partly in narrative form.<sup>26</sup> This recommendation has not been implemented. The NSWLRC also recommended that the court should be able to

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21 J Byrne, *Indigenous Witnesses and the Native Title Act 1993 (Cth)—Occasional Paper Series No 2/2003* (2003) National Native Title Tribunal.

22 Ibid, citing D Eades ‘Communicative Strategies in Aboriginal English’, S Romaine (ed) *Language in Australia* (1991), 84.

23 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [7.5].

24 *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 171.

25 *De Rose v South Australia* [2002] FCA 1342, [252].

26 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), Ch 4, Rec 4.1.

exercise a discretion, wherever possible, to allow ATSI offenders to give their evidence in narrative form.<sup>27</sup>

### *Child witnesses*

5.18 The question and answer method of giving evidence may be particularly difficult for witnesses who are children, due to such factors as the formality of the court, legal language and procedures, and the limitations of children's understanding, experience and language.<sup>28</sup>

5.19 In *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84), the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) looked extensively at research into children's memory and the sociology and psychology of disclosing remembered events.<sup>29</sup> ALRC 84 noted that the presumed gulf between the reliability of evidence from children and from adults appeared to be exaggerated. Studies demonstrated that the ability to remember and describe an event accurately, both at the time of questioning and at later dates, could be dependent on the interviewing method.<sup>30</sup> Using misleading or suggestive questioning techniques adversely affects children's ability to recall an event accurately, and repetition of questions can also lead children to change their answers, as they may interpret the repetition of the question as a sign that their first answer was wrong. When children were asked to recount, in a free recall narrative, everything they remember, they typically remember less detail than older children or adults, although the information they do recall is equally accurate.<sup>31</sup>

5.20 ALRC 84 considered that allowing children to give their evidence in narrative form would be helpful in overcoming the problems children face in giving evidence in court, although it would not address the problems associated with cross-examination.<sup>32</sup>

5.21 Recommendations regarding the giving of evidence by children tend to focus on ways to keep children out of the courtroom, rather than the manner in which they give evidence. Most jurisdictions now allow for alternative arrangements to be made, such as for children's evidence in certain proceedings to be given via video links, closed

27 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [7.41].

28 P Byrne, 'Children as Witnesses: Legal Aspects' in J Vernon (ed), *Children as Witnesses: Proceedings of a Conference* (1991). In relation to cross-examination, researcher Dr Mark Brennan has found that the complex language of questioning means that 'children six to fifteen years of age fail to hear as sensible language about half of what is addressed to them during cross-examination': M Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71.

29 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.19].

30 *Ibid.*, [14.20].

31 *Ibid.*, [14.21].

32 *Ibid.*, [14.114].



circuit television, or a recording of a previous statement.<sup>33</sup> These procedural rules are discussed further in Chapter 20.

### ***Witnesses with an intellectual disability***

5.22 The question and answer method of giving evidence may also be unsuitable for witnesses with an intellectual disability. For example, a person with an intellectual disability may use simple language and non-verbal communication methods.<sup>34</sup> In its submission to the Inquiry, the Intellectual Disability Rights Service notes that difficulties in using numbers or other quantitative means of describing events may be part of a person's intellectual disability. Therefore if a witness with such a disability is asked questions like 'how' or 'when', they might be seen as vague or evasive.<sup>35</sup>

### ***DP 69 proposal***

5.23 In response to IP 28, the Commissions received differing views on the desirability of encouraging the use of narrative evidence. A common view expressed was that narrative evidence will allow a witness to give inadmissible evidence.<sup>36</sup> However, support was received for the view that the ability to give evidence in narrative form was important for ATSI witnesses and for child witnesses.<sup>37</sup>

5.24 In DP 69, the Commissions noted that the criticisms of narrative evidence raised in submissions and consultations are essentially the same as those considered in ALRC 26. The Commissions endorsed the view expressed in ALRC 26, that there is a place for narrative evidence in courtrooms and that its use should be encouraged. The considerable body of research identified above supports this position. In DP 69, the Commissions argued that more effective use may be made of s 29(2) if the requirement for a party to apply for a direction is removed and a provision closer to the ALRC's original proposal enacted.<sup>38</sup>

33 *Evidence (Children) Act 1997* (NSW); *Evidence (Children and Special Witnesses) Act 2001* (Tas); *Evidence Reform (Children and Sexual Offences) Act 2004* (NT); *Evidence Act 1977* (Qld) ss 21AA–21AW; *Evidence Act 1929* (SA) ss 12, 13; *Evidence Act 1958* (Vic), ss 37B, 37C, 42F; *Evidence Act 1906* (WA) ss 106H–106P.

34 New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System*, Report 80, (1996), 259. See also Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

35 *Ibid.*

36 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.14]. For example, B Donovan, *Consultation*, Sydney, 21 February 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

37 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.14].

38 *Ibid.*, [5.36].

5.25 It was therefore proposed that s 29 of the uniform Evidence Acts be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. A court would be able give directions about what evidence is to be given in narrative form and the way in which that evidence may be given.<sup>39</sup>

### ***Submissions and consultations***

5.26 Many of the concerns expressed in response to IP 28 were echoed in submissions on DP 69. The New South Wales Public Defenders Office (NSW PDO) opposes the proposal on the basis that there is an increased risk that a witness gives irrelevant or prejudicial evidence if the evidence is not adduced in traditional question and answer form. The NSW PDO also believes that there is a contradiction within the Commission's proposal, asking: if leave of the court is not required, how would directions be given about what evidence is to be given in narrative form?<sup>40</sup>

5.27 The Criminal Law Committee of the Law Society of New South Wales agrees, and supports repeal of s 29(2). In the Committee's view, the consequences of permitting a witness to give evidence in narrative form include increased risks of a trial being aborted as a result of witnesses giving prejudicial evidence, and lengthening the time it takes a witness to give evidence. In the view of the Criminal Law Committee, the problems of eliciting evidence from vulnerable witnesses would be better addressed by training of advocates and judicial officers in specialised advocacy techniques.<sup>41</sup>

5.28 Victoria Legal Aid (VLA) does not believe that narrative evidence should be encouraged because a witness may include inadmissible evidence that may prejudice the jury and the jury may be left to disentangle facts from opinion in relevant evidence. In its view, vulnerable witnesses, such as child witnesses, are already sufficiently assisted in giving evidence by procedures such as pre-taping of evidence, use of closed circuit television and allowing support persons to be present.<sup>42</sup>

5.29 The Law Society of South Australia opposes the proposal on the basis that the parties should be given notice of evidence being given in this form so that they may consider whether, and to what extent, they should object.<sup>43</sup>

5.30 However, the Litigation Law and Practice Committee of the Law Society of New South Wales believes that the proposal is sound. It notes that the proposal does not make a significant change in current practice, and merely seeks to allow the court to make such a direction in respect of the giving of such evidence rather than leaving it

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39 Ibid, Proposal 5-1.

40 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

41 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

42 Victoria Legal Aid, *Submission E 113*, 30 September 2005. Some of these protections are discussed below.

43 The Law Society of South Australia, *Submission E 69*, 15 September 2005.

in the hands of the parties to make an application.<sup>44</sup> The Office of the Director of Public Prosecutions (NSW) (NSW DPP) also supports the proposal, as does the Intellectual Disability Rights Service.<sup>45</sup> The Sydney South West Area Health Service (Eastern and Central Sexual Assault Service) submits that allowing a court to give directions about what evidence is to be given in narrative form can greatly assist witnesses in sexual assault matters who have a mental illness or an intellectual disability, child witnesses and those for whom English is a second language.<sup>46</sup>

5.31 The Commonwealth Director of Public Prosecutions (CDPP) considers that the advantage of the proposed amendment is that it would be more flexible by removing the requirement for a formal application. A disadvantage would be that a prosecutor could lose control over presentation of the case if a judge directed that evidence be given in narrative form without reference to the prosecutor. However, it suggests that in practice the judge could be informed of reasons for not allowing a witness to give evidence in narrative form at the time the direction is proposed.<sup>47</sup>

#### ***The Commissions' view***

5.32 Despite concerns from some advocates, the Commissions remain of the view that narrative evidence is an important tool in ensuring that the best evidence is before the court. This has been the view of a number of inquiries, and is supported by a number of submissions received. It is unlikely that such a provision will be used often. It may be used where, for example, a witness is lapsing into narrative evidence and the judge believes this is appropriate, where the court anticipates that a witness will best be able to give evidence in this form, or where a party makes an application that the witness be allowed to give evidence in this way.<sup>48</sup> Relevant considerations include a witness' age, cultural background and ability to observe warnings about what evidence is admissible.

5.33 While such a change may not impact on the practice of advocates, it signals a clear legislative intention that the section should be used where it will lead to the best outcome for the court in receiving the witness' evidence. Should the process of giving evidence in narrative form result in undue delay or inadmissible evidence being given, a judge has sufficient powers under ss 135 and 136 to control the proceedings.

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44 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support for the proposal was also received from the NSW DPP, and the Intellectual Disability Rights Service: Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

45 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

46 Eastern and Central Sexual Assault Service, *Submission E 61*, 24 August 2005.

47 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

48 Ibid.

5.34 The uniform Evidence Acts should therefore provide that the evidence may be given in narrative form, without the need for an application from a party. The court should be able to give a general direction about which evidence is to be given in narrative form and the way in which that evidence may be given. The Commissions note the view of the CDPP regarding maintaining s 29(3) and have taken that concern into account in drafting a recommended provision. That provision is set out in Appendix 1.

5.35 As noted recently by the Victorian Law Reform Commission (VLRC), judicial officers play a key role in controlling the courtroom process and the manner and type of questions that are put to witnesses.<sup>49</sup> ALRC 84 noted that most lawyers, magistrates and judges are not trained in talking to children and lack the necessary language, sensitivity and skills to elicit a coherent account from a child in courtroom interrogations.<sup>50</sup> ALRC 84 recommended that guidelines and training programs be developed to assist judges and magistrates in dealing with child witnesses.<sup>51</sup>

5.36 Amending the legislation will not provide a complete answer for the issues raised. Without an understanding of the reasons why giving evidence in narrative form may be more appropriate for some witnesses, it is likely that judges will fall back on their own experience as advocates and view this practice with suspicion. Judicial colleges should be invited to consider including in their program training on the ways in which different types of witnesses may respond to traditional methods of examination in chief and cross-examination. A recommendation in this regard is made in Chapter 3. As noted in DP 69, significant work is already being undertaken in this area.<sup>52</sup>

**Recommendation 5–1** Section 29 of the uniform Evidence Acts should be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. It should provide that a court may, on its own motion or on application, direct that the witness give evidence wholly or partly in narrative form, and the way in which narrative evidence may be given.

49 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.154].

50 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.112].

51 Ibid, Rec 110.

52 For example, the Australian Institute of Judicial Administration has published an *Aboriginal Cultural Awareness Benchbook for Western Australian Courts*, which includes information on cross-cultural issues that may arise in the conduct of trials involving ATSI people: Australian Institute of Judicial Administration, *Aboriginal Cultural Awareness Benchbook for Western Australian Courts* (2004) Australian Institute of Judicial Administration <[www.aija.org.au/online/ICABenchbook.htm](http://www.aija.org.au/online/ICABenchbook.htm)> at 28 November 2005; see also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.155].

## Cross-examination of witnesses

5.37 The provisions of the uniform Evidence Acts that concern the rules for cross-examination<sup>53</sup> substantially mirror practices under the common law. For example, s 40 adopts the rule that where a witness has been called in error and is not questioned, that witness is not then available to the other party for cross-examination.<sup>54</sup>

5.38 Section 41 provides that the court may disallow questions on the basis that they are misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Section 42 establishes that leading questions may be asked in cross-examination. However, the court may disallow the question or direct the witness not to answer it, taking into account a number of factors. Section 42(2) states:

Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:

- (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
- (b) the witness has an interest consistent with an interest of the cross-examiner; and
- (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
- (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

5.39 Cross-examination on documents is regulated by ss 43 and 44. Cross-examination may be undertaken on a witness' prior inconsistent statement without the need to provide full particulars or show the document in question.<sup>55</sup> Under s 44(2) and (3), limited cross-examination may be undertaken on the previous representations of another person. These sections are discussed further below.

## Unfavourable witnesses

5.40 Section 38 of the uniform Evidence Acts made a significant change to the law of evidence. It states:

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
  - (a) evidence given by the witness that is unfavourable to the party; or

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53 Uniform Evidence Acts ss 40–46.

54 W Harris, 'Examination of Witnesses under the Commonwealth Evidence Act 1995' (1996) 26 *Queensland Law Society Journal* 269, 271.

55 Uniform Evidence Acts s 43(1).

- (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
- (c) whether the witness has, at any time, made a prior inconsistent statement.

5.41 Under the common law, a party cannot cross-examine its own witness unless the witness is declared hostile. To be declared hostile, the court must find that the witness is deliberately withholding or lying about material evidence.<sup>56</sup>

5.42 In the previous Evidence inquiry, the hostile witness rule was criticised as irrational and anachronistic.<sup>57</sup> The ALRC found that there was no satisfactory rationale for such a stringent test and proposed that a party be permitted to cross-examine its own witness where the evidence being given is unfavourable to that party.<sup>58</sup>

5.43 Justice Tim Smith and Paul Holdenson QC have discussed the limitations of the common law in dealing with unhelpful witnesses.

Trial counsel have all found themselves in the unenviable position of having called a witness only to find that the witness gives evidence which is either damaging to the client's case or assists in the case of the other party. Other situations arise. It may be that there are witnesses, for example, that the Crown would rather not call because they do not assist the Crown to advance its case against the accused. It may be that witnesses are called who gave detailed statements about the events in question but at the trial claim to have no recollection.<sup>59</sup>

5.44 As Smith and Holdenson point out, apart from a limited procedure of putting facts set out in the statement of the witness to the witness in the form of leading questions with the court's leave,<sup>60</sup> at common law there is no remedy for this problem other than calling further witnesses to contradict that witness or convincing the court that the witness is hostile.

5.45 The effect of having a witness declared unfavourable under s 38 is significant. With the leave of the court, an unfavourable witness may be questioned as if being cross-examined. That is, they can be asked leading questions, given proof of prior inconsistent statements, and asked questions as to credit.<sup>61</sup> However, s 38 is limited to cross-examination on the areas of testimony in which the witness is unfavourable, and does not create a general right to cross-examine.<sup>62</sup> Leave can be granted to cross-

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56 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [39]. See *McLennan v Bowyer* (1961) 106 CLR 95.

57 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [623].

58 *Ibid.*, [625].

59 T Smith and O Holdenson, 'Comparative Evidence: The Unhelpful Witness' (1998) 72 *Australian Law Journal* 720, 720.

60 *R v Thynne* [1977] VR 98.

61 W Harris, 'Examination of Witnesses under the Commonwealth Evidence Act 1995' (1996) 26 *Queensland Law Society Journal* 269, 270.

62 *R v Hogan* [2001] NSWCCA 292.

examine a witness on only part of his or her evidence, even though the rest of the witness' evidence is favourable to the party that called him or her.<sup>63</sup> Section 38 is a discretionary section and the factors listed in s 192 must be considered in granting leave.<sup>64</sup>

5.46 The term 'unfavourable' has been interpreted simply as meaning 'not favourable', rather than the more difficult test of hostile or adverse.<sup>65</sup> In *R v Lozano*, it was accepted that s 38(1)(a) allows a witness to be declared unfavourable and cross-examined even when he or she genuinely cannot remember the events in question.<sup>66</sup>

5.47 There are numerous examples of the use of s 38 to admit evidence which would not be admissible under the common law. In *Randall v The Queen*, the complainant alleged that she was sexually assaulted by the accused in a room with 10–12 men present.<sup>67</sup> The Crown's case was that the complainant had been given drugs by the accused and was, in effect, comatose at the time of the offence and incapable of consenting to sexual intercourse. A number of the men present gave evidence consistent with the view that the complainant appeared comatose. Two witnesses gave evidence that suggested the complainant was alert and consented. As witnesses to the alleged offence, the Crown was obliged to call them. Without the ability to have the witnesses declared unfavourable under s 38, the Crown could not have cross-examined them, nor would they have been cross-examined by the defence, as their evidence was favourable to the accused.<sup>68</sup>

5.48 In *Saunders v The Queen*, a friend of the accused gave evidence at the trial that was substantially different to the story he gave police when they arrived on the scene of the alleged assault.<sup>69</sup> The friend was called by the prosecution and, when he gave the inconsistent version, an application was made to have him declared an unfavourable witness under s 38. The application was successful and his earlier statement was brought into evidence. The view was put to the Inquiry that, as this statement to police was contemporaneous, it held strong probative value and should be heard by the jury.<sup>70</sup>

63 *R v Pantoja* (Unreported, NSW Court of Criminal Appeal, James J, 5 November 1997).

64 These being (non-exhaustively): the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; the extent to which to do so would be unfair to a party or to a witness; the importance of the evidence in relation to which the leave, permission or direction is sought; the nature of the proceeding; and the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

65 *R v Souleyman* (1996) 40 NSWLR 712.

66 *R v Lozano* (Unreported, New South Wales Court of Criminal Appeal, 10 June 1997).

67 *Randall v the Queen* (2004) 146 A Crim R 197.

68 *Ibid*, 205.

69 *Saunders v The Queen* [2004] TASSC 95.

70 Office of the Director of Public Prosecutions (Tas), *Consultation*, Hobart, 15 March 2005.

5.49 In *R v Milat*, Hunt CJ at CL considered that s 38 was important in covering the situation where the Crown is obliged to call a witness at the request of the accused, notwithstanding that the evidence given is likely to be unfavourable.<sup>71</sup> In such a case, it was found to be unjust for the Crown not to be given leave to cross-examine such a witness. Hunt CJ at CL stated in *Milat* that the effect of s 38 would probably prove to be one of the most worthwhile achievements of the uniform Evidence Acts.<sup>72</sup>

5.50 A prosecutor is under a duty to call any witnesses whose evidence may assist in determining the truth of the matter at issue. Dawson J said in *Whitehall v The Queen*:

All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye witness, whose evidence he considers to be unreliable, untrustworthy or otherwise incapable of belief.<sup>73</sup>

5.51 As noted above, s 38 is not limited to the situation where a witness unexpectedly gives hostile evidence, or unexpectedly appears not to be making a genuine attempt to give evidence. Therefore the section allows a party (in practice, most likely to be the prosecution) to call a witness they know to be unfavourable, for the sole purpose of having them available for cross-examination and getting an inconsistent out-of-court statement admitted into evidence under s 38(1)(c). The prior inconsistent statement is only admissible if it satisfies the requirements of Part 3 of the Acts.<sup>74</sup>

5.52 The use of s 38 in this way was considered by the High Court in *Adam v The Queen*.<sup>75</sup> In *Adam*, the trial judge permitted the Crown to cross-examine a witness as an unfavourable witness under s 38(1)(c), in relation to prior inconsistent statements made to police by the witness. The use of the statements had two purposes. First, it related to the credibility of the witness. Second, and importantly, once admitted for that purpose, the statements were admissible also for their hearsay purpose under s 60,<sup>76</sup> and, used in that way, they incriminated the accused. The majority considered that such a practice was proper under the *Evidence Act 1995* (NSW) and had not resulted in unfairness to the defence in that case as the defence was free to cross-examine the witness on the prior inconsistent statement.<sup>77</sup>

<sup>71</sup> *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996).

<sup>72</sup> *Ibid*, 7.

<sup>73</sup> *Whitehall v The Queen* (1983) 152 CLR 657, 674.

<sup>74</sup> P Zahra, *Advocacy: Cross-Examination: Understanding the Parameters Set by the Evidence Act 1995* (2003) College of Law, 102.

<sup>75</sup> *Adam v The Queen* (2001) 207 CLR 96. *Adam* is also discussed in Ch 12.

<sup>76</sup> Section 60 allows evidence of a previous representation that is relevant and admitted for a non-hearsay purpose, to be used also for a hearsay purpose, that is, to prove the truth of its contents. See Ch 7.

<sup>77</sup> *Adam v The Queen* (2001) 207 CLR 96, 107. However, the propriety of this practice was based on the prior statement being admissible as evidence of the truth of what was said. See discussion of this aspect of *Adam* in Ch 12.



5.53 The discretions under ss 135, 136 and 137 may be employed to prevent questioning under s 38. In *R v GAC*, it was argued that leave should not be given to cross-examine the witness on the ground that it was unfairly prejudicial to the accused to allow the witness' prior statement into evidence, because his professed lack of memory meant that the defence could not cross-examine him on his earlier version of events given to the police. However, after finding that the witness' memory loss was founded on a desire to help the accused, the New South Wales Court of Criminal Appeal stated:

[H]aving regard to the circumstances of the interview, including its proximity to the critical events, what C said to the police was likely to be a good deal more reliable than what he said in court. For my part, I would not regard the probative value of the interview as being outweighed by unfair prejudice to the appellant; nor do I consider that there was substantial unfairness of the kind relied upon by the appellant.<sup>78</sup>

### ***Submissions and consultations***

5.54 Two views of s 38 emerged in submissions and consultations. One is that the test to have a witness declared 'unfavourable' is too lenient and unfairly allows a party to call a witness solely to allow a prior inconsistent statement into evidence that would not be admitted any other way.<sup>79</sup> The other view is that expressed in *Adam*—the practice ensures all relevant evidence gets in, and the availability of that witness for questioning by the other party overcomes any unfairness.<sup>80</sup>

5.55 In DP 69, the Commissions concluded that the guiding principle under which s 38 was first recommended—improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness—has been upheld by the operation of the section over the last 10 years. While there has been some criticism of the section, there has also been strong judicial support, as in the *Adam* and *Milat* judgments noted above. On that basis, it was proposed that no change be made to s 38.<sup>81</sup>

5.56 The CDPP supports the current operation of s 38, believing it operates well in practice. However, the CDPP argues that circumstances in which the section is

78 *R v GAC* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, McInerney and Sully JJ, 1 April 1997), 18.

79 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; Law Council of Australia, *Submission E 32*, 4 March 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005.

80 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Office of the Director of Public Prosecutions (Tas), *Consultation*, Hobart, 15 March 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; Commercial Bar Association of the Victorian Bar, *Submission E 37*, 8 March 2005.

81 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.72].

available should be expanded. In its view, there should be greater certainty as to when leave should be granted to cross-examine the witness. The CDPP favours a structured discretion where the starting point is that leave shall be granted unless there are overriding considerations to the contrary. The CDPP also suggests that a witness should be able to be cross-examined by the party calling the witness where: unfavourable evidence is given; there is not a genuine attempt to give evidence; or, the witness has made a prior inconsistent statement. The restriction that the cross-examination be confined to the area specified in paragraphs 38(1)(a), (b) or (c) should be removed so the witness can be cross-examined generally about all aspects of their evidence.<sup>82</sup>

5.57 In contrast, the NSW PDO maintains the view that the worst aspect of the uniform Evidence Acts is the approach to the evidence of an unwilling witness.<sup>83</sup>

By a number of different routes, the Crown is able to tender the statement of the witness as evidence of the fact, even if the witness is not prepared to adopt the statement as the truth. This leaves the accused's lawyer with the impossible task of cross-examining a witness whose starting position is that the earlier statement was not the truth.<sup>84</sup>

5.58 One of these routes is where the witness is unwilling to testify, and is discussed in Chapter 7. The second method nominated by the NSW PDO as problematic is the situation in *Adam*, where the Crown can make an application to cross-examine a witness on their prior inconsistent statement under s 38. If this application is successful, the operation of s 60 will admit the witness' prior statement as evidence of the asserted fact.<sup>85</sup> The NSW PDO believes that on this basis, s 38(1)(a) of the uniform Evidence Acts should be repealed. This would limit applications to cross-examine a witness to those witnesses who do not appear to be making a genuine attempt to give evidence, or who have made a prior inconsistent statement.<sup>86</sup>

5.59 The Criminal Bar Association of Victoria is also concerned about the connection between ss 38 and 60.

Under s 60 hearsay statements may be admitted for another purpose but, once admitted into evidence may be used as to the truth of their contents. The danger is particularly highlighted by the VLRC proposal that s 60 should be amended to make it clear that the provision applies to both firsthand and remote hearsay.<sup>87</sup>

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<sup>82</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

<sup>83</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.58]–[5.59].

<sup>84</sup> New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005. See Ch 7, Rec 7–2.

5.60 The Criminal Bar Association also argues that when cross-examination is allowed on a prior inconsistent statement, leave must be limited to cross-examination on the facts recorded in the earlier statement.<sup>88</sup>

5.61 VLA maintains that the effect of s 38 has been that witnesses whose evidence may only be considered ‘neutral’ have been declared unfavourable and been allowed to be cross-examined on the basis that some of their testimony contradicts an earlier statement.<sup>89</sup> VLA maintains that

[t]he prosecution will routinely lead the records of interview of persons involved in, or suspected of being involved in, the offending. It is often the case that a person who is unwilling to give evidence helpful to the prosecution, is called as a witness solely for the purpose of proving the contents of the interview. The NSW courts have held this to be quite proper.<sup>90</sup>

5.62 VLA submits that this practice leaves in the mind of the jury the implication that the witness has been interfered with by the accused, when it may simply be a matter of innocent memory loss or a changed story. On that basis it proposes that leave for the prosecution to cross-examine its own witness be given only where the court is satisfied that there can be no prejudicial implication drawn by the jury that the accused has interfered with a witness (where there is no evidence to make out the allegation).<sup>91</sup>

5.63 The Litigation Law and Practice Committee of the Law Society of New South Wales agrees with the Commissions’ conclusion in DP 69 that s 38 should remain unchanged.<sup>92</sup>

### ***The Commissions’ view***

5.64 In ALRC 26, it was considered whether the operation of s 38 should be limited by a requirement that the unfavourable evidence be unexpected. The ALRC rejected this approach on the basis that it would enable criminals to defeat prosecutions by suborning key witnesses. The ALRC also noted the argument that the prosecution receives a tactical advantage because, where a prior statement is used, it will go into evidence. ALRC 26 considered that the prosecution in that case has already suffered the tactical disadvantage of having to call a witness to prove its case and that witness has supported the defence.<sup>93</sup> Furthermore, if the operation of s 38 means that evidence could be admitted which is unfairly prejudicial within the meaning of ss 135, 136 and

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88 Ibid.

89 Victoria Legal Aid, *Submission E 113*, 30 September 2005.

90 Ibid.

91 Ibid.

92 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

93 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [626].

137, that evidence can be excluded or its use limited by the exercise of those discretions.

5.65 Smith and Holdenson have noted:

Much depends on the view that is taken about the importance for the credibility of trials, be they civil or criminal, that there be a genuine attempt to establish the facts on which the final decision will be based. The ALRC view was that that attempt was of fundamental importance.<sup>94</sup>

5.66 The Commissions note the suggestion of the CDPP that s 38 be amended to include a structured discretion which provides that leave shall be granted unless there are overriding considerations to the contrary. However, no other bodies have indicated to the Commissions that there have been cases where the discretion to cross-examine has not been exercised properly. A suggestion that leave should always be granted, unless there are overriding considerations to the contrary, would appear to favour the prosecution unnecessarily in these matters. The three bases on which cross-examination may be permitted in paragraphs 38(1)(a), (b) and (c) are clear, and the Commissions are not convinced greater certainty is required. In ALRC 26, it was foreshadowed that there would be cases where the unfavourable evidence is not of major importance and the attack on credibility of little weight. In that case, the judge should retain the ability to not allow the cross-examination.<sup>95</sup>

5.67 In relation to the suggestion that cross-examination should be permitted across all of the witness' testimony, and not only those matters on which the witness is unfavourable, the Commissions are unconvinced that any benefits to the trial process would be achieved by such an amendment. The ALRC limited the original proposal to the unfavourable evidence on the basis that the advantages of allowing a party to cross-examine their own witness more generally (which is likely to be only more general attacks as to credit) was of debatable advantage and risked wasting time and cost.<sup>96</sup> It is noted that in *R v White*, Smart AJ suggested that there may be cases where, in practical terms, because of the width of the material on which the witness may be questioned, a more general form of leave to examine could be granted without departing from the intention of s 38.<sup>97</sup>

5.68 Whilst the concerns of the VLA are noted, the Commissions remain supportive of the reasoning behind the enactment of s 38 and its practical application. Should a judge feel that the jury might draw an incorrect inference from the cross-examination, a judicial comment should be sufficient to overcome this problem. The Commissions do not agree with the views of the NSW PDO and others regarding the unfairness caused

94 T Smith and O Holdenson, 'Comparative Evidence: The Unhelpful Witness' (1998) 72 *Australian Law Journal* 720, 727.

95 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [625].

96 *Ibid*, [625].

97 *R v White* [2003] NSWCCA 64, [66]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.3300].

by the interaction between ss 38 and 60. These criticisms do not address the underlying policy on which the section is based. The Commissions are of the view that prior inconsistent statements should be allowed into evidence through s 38, as they tend to have strong probative value. Section 38 has made a significant change in allowing highly relevant and probative evidence to be placed before the court. The granting of leave to cross-examine under s 38 is subject to the matters prescribed by s 192(2), which includes the extent to which to do so would be unfair to a party or to a witness, and also to the discretions to exclude or limit evidence under ss 135 and 137.<sup>98</sup>

5.69 The guiding principle under which s 38 was first recommended—improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness—has been upheld by the operation of the section over the last 10 years. While there has been some criticism of the section, there has also been strong judicial support, as in the *Adam* and *Milat* judgments noted above. On this basis, the Commissions recommend no change to the section.

### Constraints in the cross-examination of vulnerable witnesses

5.70 Cross-examination is a feature of the adversarial process and designed to let a party confront and undermine the other party's case by exposing deficiencies in a witness' testimony. Under both the common law and statute, limitations have been placed on inappropriate and offensive questioning under cross-examination. However, it has been argued that the effect of these provisions in practice has not provided a sufficient degree of protection for vulnerable witnesses.<sup>99</sup>

5.71 Section 41 of the uniform Evidence Acts grants the court the power to disallow improper questions asked in cross-examination. It provides:

- (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
  - (a) misleading; or
  - (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
  - (a) any relevant condition or characteristic of the witness, including age, personality and education; and

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98 *R v Souleyman* (1996) 40 NSWLR 712. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.3300].

99 See, for example, T Drabsch, *Cross-Examination and Sexual Offence Complainants* (2003) NSW Parliament, 8.

- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

5.72 The ALRC intended this section to bring together and clarify common law and legislative provisions which set limits on cross-examination.

The proposals provide for the judge to disallow the question, or to inform the witness that he [or she] need not answer but may if he [or she] wants to do so. In this way the judge can prevent a slanging match developing, or let the witness answer the question nonetheless.<sup>100</sup>

5.73 As will be outlined below, the issue of improper questions and inappropriate cross-examination has been considered by a number of law reform bodies, with various attempts made in the state jurisdictions to protect vulnerable witnesses. In particular, a significant change has recently been made in New South Wales, with a duty imposed on a judge to disallow improper questions to any witness in a criminal matter.

### ***Child witnesses***

5.74 Child witnesses are particularly vulnerable in the adversarial trial system.<sup>101</sup> In their inquiry into children and the legal process, the ALRC and HREOC heard significant and distressing evidence that child witnesses, particularly in child sexual assault cases, are often berated and harassed to the point of breakdown during cross-examination.<sup>102</sup> Concerns were raised about the role of lawyers, and also about the role of judges and magistrates as the ‘referees’ of the trial. In ALRC 84, the ALRC and HREOC made recommendations for the development of guidelines and training programs to assist judges, magistrates and lawyers in dealing with child witnesses.<sup>103</sup>

5.75 These findings are consistent with a recent evaluation of the specialist jurisdiction for child sexual assault matters that was established as a pilot at the Sydney West District Court Registry in 2003. The aim of establishing a specialist jurisdiction was to address the difficulties in prosecuting child sexual assault cases by having, amongst other special measures to make child witnesses more comfortable in a court environment, specialist training in child development and child sexual assault issues for judicial officers and prosecutors.<sup>104</sup> The report’s findings indicated that, even in a

<sup>100</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [631].

<sup>101</sup> Issues involving child witnesses and children’s evidence are also discussed in Chs 7, 18 and 20.

<sup>102</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.111]. The Wood Royal Commission heard a number of similar complaints in relation to treatment of child witnesses: Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.92]. Similar comments were also made to the VLRC in its inquiry into reform of sexual offences law and procedure: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

<sup>103</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Recs 110–112. See also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Ch 3.

<sup>104</sup> NSW Bureau of Crime Statistics and Research, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005), 2.

specialist jurisdiction, there are still problems with judicial control of cross-examination.

Court observation and the interviews with children, parents and court professionals indicated that children are still subjected to overly long, complex questioning which is unlikely to produce the most reliable evidence. Judicial intervention to clarify the questions or control accusatory questioning, varied across trials but appears to be unrelated to either the age or linguistic style of child complainants.<sup>105</sup>

5.76 Part IAD of the *Crimes Act 1914* (Cth) includes a number of provisions that provide for the protection of child witnesses and child complainants in certain sexual offence cases (including in relation to child sex tourism and sexual servitude offences).<sup>106</sup> In particular, there is a specific provision for the court to disallow a question put to the child witness in cross-examination if the question is inappropriate or unnecessarily aggressive, having regard to the witness' personal characteristics, including age, culture, mental capacity and gender.<sup>107</sup>

5.77 In its report on sexual offences, the VLRC concluded that general provisions regulating cross-examination, such as s 41 of the uniform Evidence Acts, are insufficient to ensure that child witnesses are protected against inappropriate questions.<sup>108</sup> The VLRC supported a recommendation of the Queensland Law Reform Commission that included, as well as the considerations in s 41, consideration of the content, manner and language of questioning, and the culture and level of understanding of the child.<sup>109</sup> The VLRC recommended that there be a duty on the court to ensure that, in the case of questions asked of children under 18 years of age:

- Neither the content of a question, nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
- The questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
- In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding and any mental, intellectual or physical disability of the witness.<sup>110</sup>

105 Ibid, x.

106 Part IAD was inserted by the *Measures to Combat Serious and Organised Crime Act 2001* (Cth).

107 *Crimes Act 1914* (Cth) s 15YE. Part IAD of the *Crimes Act 1914* (Cth) also includes specific provisions applying to unrepresented defendants in sexual offence cases and limitations on how and when child witnesses and child complainants can be cross-examined. A similar protection is also available under s 28 of the *Evidence (Children) Act 1997* (NSW).

108 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.146].

109 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Summary of Recommendations*, Report No 55: Part 2A (2000), Rec 13.1.

110 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 143, 144.

### ***Complainants in sexual assault matters***

5.78 Complainants in sexual assault matters are in a particularly vulnerable and distressing position in a courtroom. The New South Wales Law Reform Commission (NSWLRC) recognised that there are at least three factors that make sexual offence trials particularly distressing for complainants: the nature of the crime; the role of consent with its focus on the credibility of the complainant; and the likelihood that the complainant and the accused knew each other before the alleged assault.<sup>111</sup> The NSWLRC found that the treatment of such matters in cross-examination is a particular concern, with complainants likely to be cross-examined for a longer period of time than victims of other types of assaults. Complainants have appealed for greater control of cross-examination to make the process less stressful.<sup>112</sup>

5.79 In all Australian states and territories, recognition of the nature of sexual offences has led to the enactment of specific evidentiary limitations, such as making evidence of a complainant's sexual experience inadmissible.<sup>113</sup> These specific provisions are discussed further in Chapter 20. Use of s 41 is another way in which improper cross-examination may be limited in sexual assault proceedings. In *R v TA Spigelman* CJ found that, in sexual assault matters, it is appropriate for the court to consider the effect of cross-examination and the trial experience upon a complainant when deciding whether s 41 should be invoked.

The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.<sup>114</sup>

5.80 Justice Wood, in a paper entitled, *Sexual Assault and the Admission of Evidence*, expressed the view that:

Perhaps regrettably, this is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a 'fair run'. In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.<sup>115</sup>

5.81 In November 2004, the New South Wales Adult Sexual Assault Interagency Committee released its advice to the New South Wales Government on evidentiary and

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111 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), [2.2].

112 Ibid, [2.7].

113 See, eg, *Criminal Procedure Act 1986* (NSW) s 293.

114 *R v TA* (2003) 57 NSWLR 444, 446.

115 J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), 30–31. See also Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.



procedural issues regarding criminal law sexual offences.<sup>116</sup> That report also found that provisions in place to address improper questioning are under utilised.<sup>117</sup> The Committee's report recommended three reforms to s 41:

- introduction of practice directions to assist judges in utilising section 41 of the *Evidence Act 1995 (NSW)* to regulate the conduct of cross-examination of the complainant;
- amendment of section 41 of the *Evidence Act 1995 (NSW)* to place greater restrictions on tone and manner of questions that may be put to the complainant in cross-examination (in addition to the content of questions);
- amendment of section 41 to model section 21 of the *Evidence Act 1977 (Qld)* to further allow the Court to consider whether a question is improper having regard to the level of understanding of the witness, cultural background or relationship to any party to the proceeding.<sup>118</sup>

### **Other vulnerable witnesses**

5.82 As well as child witnesses and sexual assault complainants, there may be other witnesses who are vulnerable in cross-examination, for example, because of their relationship to the other party,<sup>119</sup> disability, or lack of education. In most Australian states and territories, legislation allows for alternative arrangements for hearing the testimony of vulnerable witnesses. These arrangements include permitting a witness to testify with a support person present, through closed circuit television or in a closed court.<sup>120</sup>

5.83 The Intellectual Disability Rights Service submits that cross-examination using misleading or suggestive questioning techniques can adversely affect the ability of a person with an intellectual disability to recall an event accurately, and repetition of questions can cause a person with an intellectual disability to change his or her answers. This may result in the witness giving the questioner a response which the

116 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004). This report was also given to this Inquiry as a submission: Women's Legal Services (NSW), *Submission E 40*, 24 March 2005. See also NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

117 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 3.

118 Ibid, 4. *Evidence Act 1977* (Qld) s 21(2) states that in deciding whether a question is an improper question, the court must take into account: (a) any mental, intellectual or physical impairment the witness has or appears to have; and (b) any other matter about the witness the court considers relevant, including, for example, age, education, level of understanding, cultural background or relationship to any party to the proceeding.

119 For example, a spouse, parent or child of the accused. The compellability of certain witnesses is considered in detail in Ch 4.

120 *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1939* (NT) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1958* (Vic) s 37C. See J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005), [23.80].

questioning process has led the witness to perceive to be the ‘correct’ answer, even though the witness may effectively be agreeing to something which is not true. In the Service’s experience, some judges have demonstrated an unwillingness to limit inappropriate or offensive cross-examination of witnesses with an intellectual disability.<sup>121</sup> This view is consistent with a study undertaken in 2003 which found that judges are no more likely to intervene for witnesses with a learning disability than for witnesses in the general population.<sup>122</sup>

5.84 Kirby J has suggested that any witness may become vulnerable in the face of strident cross-examination on credibility. In *Whisprun Pty Ltd v Dixon*, his Honour argued that the law has advanced from the view of a trial as a tournament between parties, where a witness’ credibility is challenged, even on peripheral or irrelevant matters.<sup>123</sup>

Most judges today understand that the evaluation of evidence involves a more complex function, requiring a more sophisticated analysis ... Litigants are sometimes people of limited knowledge and perception. Occasionally, they mistakenly attach excessive importance to considerations of no real importance. In consequence, they may sometimes tell lies, or withhold the entire truth, out of a feeling that they need to do so or that the matter is unimportant or of no interest to the court. This is not to condone such conduct. It is simply to insist that, where it is found to have occurred, it should not deflect the decision maker from the substance of a function assigned to a court by law.<sup>124</sup>

### ***Amendments to the Criminal Procedure Act (NSW)***

5.85 In response to community concerns regarding cross-examination of witnesses, the *Criminal Procedure Act 1986* (NSW) has been amended to impose a duty on a court hearing any criminal proceeding to disallow improper questions that are put to witnesses in cross-examination.<sup>125</sup> Whilst the amendments impose the duty for any witness, they form part of the New South Wales Government’s ongoing program of legislative reform in sexual assault prosecutions.<sup>126</sup> New legislation will also shortly be introduced in Victoria to deal with this issue.<sup>127</sup>

5.86 As a result of the amendments, s 41 of the *Evidence Act 1995* (NSW) no longer applies to the cross-examination of witnesses in criminal proceedings, but continues to

121 Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

122 C O’Kelly, M Kebbell, C Hatton and S Johnson ‘Judicial Intervention in Court Cases Involving Witnesses with and without Intellectual Disabilities’ (2003) *Legal and Criminological Psychology* Vol 8, 229 cited in NSW Bureau of Crime Statistics and Research, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005), 51.

123 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, 477.

124 *Ibid*, 477–478.

125 Criminal Procedure Further Amendment (Evidence) Bill 2005 (NSW), Sch 1 was assented to on 31 May 2005.

126 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005, 14899 (R Debus—Attorney General).

127 The Hon Rob Hulls MP, ‘Court Proceedings to be Changed for Sexual Assault Cases’ (Press Release, 14 November 2005).

apply in civil proceedings. The new s 275A(7) of the *Criminal Procedure Act 1986* (NSW) states that s 41 of the *Evidence Act 1995* (NSW) does not apply to the criminal proceedings to which this section applies.<sup>128</sup>

5.87 Under s 275A, a court *must* disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question:

- (a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.

5.88 The factors which may be taken into account in determining whether a question should be disallowed are extended to include the ethnic and cultural background of the witness, the language background and skills of the witness, and the level of maturity and understanding of the witness.

5.89 However, a question is not disallowable under the section merely because:

- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or
- (b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.<sup>129</sup>

5.90 The duty to disallow the question falls on the court whether or not an objection is raised by the other party. A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.<sup>130</sup> The New South Wales legislation differs from s 41 as it imposes a duty on the court to disallow an improper question rather than a discretion.

### ***Submissions and consultations***

5.91 In DP 69, the Commissions concluded that the use of s 41 to control improper questions during cross-examination is patchy and inconsistent. A significant number of

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128 Criminal Procedure Further Amendment (Evidence) Bill 2005 (NSW). For the purposes of the section, 'criminal proceedings' means proceedings against a person for an offence (summary or indictable), including committal proceedings, bail proceedings, sentencing and appeals: s 275A(9).

129 *Criminal Procedure Act 1986* (NSW) s 275A(3).

130 *Ibid* s 275A(5), (6).

consultations and submissions indicated that the section is seldom invoked by judges, and its use often depends on the particular judicial officer and prosecutor.<sup>131</sup> The Commissions supported the view of the VLRC and others that the approach in s 41 is too limited to provide sufficient protection to vulnerable witnesses in some types of matters.<sup>132</sup> To respond to these concerns, the Commissions proposed expanding the types of questions that may be disallowed under s 41 to include those categories set out under the amendments to the *Criminal Procedure Act* in New South Wales.

5.92 In DP 69, the Commissions did not propose a general duty to disallow improper questions, but argued that a judge should have such a duty in the case of vulnerable witnesses, defined as child witnesses or witnesses with a physical or intellectual disability.<sup>133</sup> The Commissions also proposed that education programs be implemented by the judicial colleges, the law societies and the bar associations which draw attention to s 41 and the limits on improper questioning.<sup>134</sup>

5.93 A majority of submissions and consultations were supportive of the proposal to expand the categories of improper questions under s 41 to include reference to tone, manner and stereotyping.<sup>135</sup>

5.94 However, the proposal to impose a duty to disallow such questions in the case of vulnerable witnesses has raised concerns. These concerns relate to how the imposition of a duty could operate in practice, and how a vulnerable witness should be defined for the purpose of the section.

5.95 VLA argues that the proposal is not appropriate because the prosecution can (and should) object to improper questioning of its witnesses when necessary and the jury may be prejudiced if they perceive that the judge is ‘protecting’ the complainant or witness from cross-examination.<sup>136</sup> The Law Society of New South Wales states that, in its view, it is not appropriate to place a positive duty on judicial officers to disallow certain questions during a trial.<sup>137</sup>

5.96 The Australian Government Attorney-General’s Department also submits that the imposition of a duty might not, in some cases, serve the need to admit all relevant

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131 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.96]–[5.106].

132 Ibid, [5.108].

133 Ibid, Proposal 5–3.

134 Ibid, Proposal 5–4.

135 Justice R French, *Consultation*, Perth, 5 October 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Victoria Police, *Submission E 111*, 30 September 2005; Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005; The Law Society of South Australia, *Submission E 69*, 15 September 2005.

136 Victoria Legal Aid, *Submission E 113*, 30 September 2005.

137 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

evidence. In its view, whether a question is annoying or harassing or offensive is one involving a question of judgment, and it could be argued that retaining a discretion allows the question to be put, for example, when it is directed towards a pivotal issue in an important proceeding.<sup>138</sup>

5.97 One Federal Court judge feels that the duty to be imposed under the proposal is too vague. Having the definition of a ‘vulnerable person’ open to the judge’s discretion means that there will be little distinction in practice between the duty and leaving the issue to a discretion.<sup>139</sup> This view is consistent with that of other judges, with some commenting that it would be difficult for a judge to make a determination of vulnerability. This could lead to undue delay as a witness’ vulnerability is debated, or to appeals on whether a judge made the correct determination.<sup>140</sup>

5.98 In contrast, Women’s Legal Services Victoria considers that ‘given the persistent reluctance on the part of courts to take a proactive approach to address these issues’ the imposition of a duty on judges is an important reform.<sup>141</sup> The Intellectual Disability Rights Service submits that imposing a duty on judges to disallow improper questions put to a witness with an intellectual disability in cross-examination gives the witness the same opportunity to give evidence in court as a witness without an intellectual disability.<sup>142</sup>

5.99 The Criminal Law Review Division of the New South Wales Attorney General’s Department sees problems with the proposal on the basis that it is too limiting in its definition of vulnerability and

may create real problems in the court environment with lengthy contests as to whether a witness suffers from an intellectual or mental disability such as to invoke the ‘duty’ to disallow the question. This should not be the focus of the provision. Rather, a judicial officer should be guided by whether a question is misleading or confusing for the witness and should intervene accordingly, regardless of whether the person has a particular vulnerability.<sup>143</sup>

5.100 The Division’s view is that a judicial officer should have a duty to ensure that questions are not intimidating, offensive, humiliating or have no basis other than a sexual, racial or cultural stereotype and this duty should apply equally to all witnesses.

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138 Attorney-General’s Department, *Submission E 117*, 5 October 2005.

139 Justice R French, *Submission E 119*, 6 October 2005. This view was echoed by a Federal Magistrate: Federal Magistrate S Lindsay, *Consultation*, Adelaide, 5 October 2005.

140 Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

141 Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005. See also J Gans, *Consultation*, Melbourne, 17 August 2005.

142 Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

143 NSW Attorney General’s Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

It argues that the uniform Evidence Acts should be amended to adopt the provisions of s 275A of the *Criminal Procedure Act* (NSW).<sup>144</sup>

It is submitted that s 275A does not compromise judicial impartiality, but instead demonstrates a move away from the tacit acceptance of improper behaviours that cut across fundamental fair-trial principles. A judge should not allow tactics which deliberately seek to intimidate, offend, humiliate and break witnesses from being able to give evidence at all.<sup>145</sup>

5.101 The NSW DPP agrees that the uniform Evidence Acts should follow the path of a mandatory duty for all witnesses. It argues that the proposal for a duty only in relation to some types of witnesses does not take into account the fact that improper questioning can occur in relation to any witness and that counsel cannot be relied upon to object to it, often for tactical reasons.<sup>146</sup>

5.102 The NSW Disability Discrimination Legal Centre agrees with this view, arguing that determining which clients should be considered ‘vulnerable’ is extremely problematic. A person with a mental illness may not present as vulnerable, but could have his or her symptoms triggered by aggressive cross-examination. In its view, considering the lack of clear evidence that improper questioning generates evidence of better quality—the risk of traumatising a witness, and thereby potentially distorting or manipulating the evidence—does not justify the use of such questioning. The Centre argues that by creating a higher duty for all witnesses, judges would be forced to pay attention to the nature of the questioning and the effect of the examination on a witness.<sup>147</sup>

5.103 Some submissions and consultations argue that the definition of a vulnerable witness should include all victims of sexual assault.<sup>148</sup> Rosemount Youth and Family Services and Dymyna House argue that such a rule would encourage more victims of sexual assault to pursue claims through the courts.<sup>149</sup>

5.104 The NSW DPP also submits that the proposal’s definition of vulnerability is too narrow. In its view, under Proposal 5–3:

Vulnerability due [to] any other factor, such as ill health, education, learning or concentration difficulties, ethnic and cultural background, language background and skills, level of maturity and understanding or the stress of being required to publicly recount traumatic personal events involving intimate details in the presence of a group of strangers and the accused, would not be taken into account in the court’s assessment.<sup>150</sup>

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144 Ibid.

145 Ibid.

146 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

147 NSW Disability Discrimination Legal Centre, *Submission E 98*, 22 September 2005.

148 Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005; Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Eastern and Central Sexual Assault Service, *Submission E 61*, 24 August 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005.

149 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

150 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

5.105 A number of submissions and consultations argue that judicial education is a better way to achieve changes in judicial culture and ensure that vulnerable witnesses are protected under the powers already available under s 41 and similar legislation.<sup>151</sup> The proposal to increase judicial and practitioner education to draw attention to the importance of s 41 is supported.<sup>152</sup>

### ***The Commissions' view***

5.106 The Commissions continue to support the more comprehensive and detailed list of inappropriate questions introduced by the *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW). Whilst it is true that these types of questions could (and should) already be disallowable under s 41, explicit reference to these types of questions may serve to bring them to judicial attention and provide greater guidance as to when the power to limit cross-examination should be exercised.

5.107 The Commissions believe that the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters. As noted in DP 69, a witness in a negligence or a civil assault matter may be as vulnerable to attack in cross-examination as a victim of a crime. Any amendment to s 41 should apply to both civil and criminal matters.

5.108 However, the Commissions do not agree on how this protection should be provided. For the reasons discussed below, the ALRC and the NSWLRC are now of the view that s 41 of the uniform Evidence Acts should be amended to adopt the terms of s 275A of the *Criminal Procedure Act 1986* (NSW). They are also of the view that this section should apply both to civil and criminal proceedings. However, the VLRC continues to support the proposals put forward in DP 69,<sup>153</sup> with some modifications.

### ***The views of the ALRC and NSWLRC***

5.109 The ALRC and the NSWLRC note the concerns raised in submissions that the proposed definition of a vulnerable witness in DP 69 was too narrow. The ALRC and the NSWLRC agree with the view of the NSW DPP that vulnerability may arise in a number of circumstances beyond age and a mental or physical disability. It is also noted that simply expanding the categories of 'vulnerability' to include other groups,

151 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; Justice R French, *Consultation*, Perth, 5 October 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Victoria Legal Aid, *Submission E 113*, 30 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005.

152 NSW Disability Discrimination Legal Centre, *Submission E 98*, 22 September 2005; Judge S Bradley, *Consultation*, Cairns, 12 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

153 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposals 5–2 and 5–3.

such as sexual assault complainants, may be insufficient. A witness may be vulnerable not because of any inherent attribute of himself or herself, but because of the circumstances of the particular offence or a relationship to other parties to the proceedings. Conversely, a witness may not be vulnerable simply because he or she is the victim of a certain type of offence. It would be of little benefit to the trial process to have drawn out argument as to whether a witness suffers from a sufficient level of intellectual disability to be considered vulnerable.

5.110 The ALRC and the NSWLRC have closely considered the submission of the Criminal Law Review Division of the New South Wales Attorney General's Department which argues that the duty should have general application. The ALRC and NSWLRC agree that there is an inherent difficulty in the original proposal whereby certain types of questions are defined as improper, but may, nevertheless, be asked of some witnesses in some circumstances. The ALRC and the NSWLRC hold the view that there are no circumstances in which misleading, harassing, offensive or confusing questions are appropriate for any witness.

5.111 The ALRC and the NSWLRC have also been persuaded by recent findings, noted above, that even in a specialist child sexual assault jurisdiction, there remain problems with judicial control of cross-examination. There clearly remains a wariness amongst judges of intervening in cross-examination. Judge Roy Ellis of the District Court of New South Wales has commented:

Traditionally trial judges have been very careful about interrupting or restricting cross-examination. It is likely that this reluctance stems from concern about jeopardising a fair trial for the accused and/or concern regarding the approach to be taken by the Court of Criminal Appeal ... Anecdotally this seems to me to have caused trial judges to err on the side of caution, which means to err in favour of the accused and permit questionable cross-examination from time to time.<sup>154</sup>

5.112 The Criminal Law Review Division submits that the imposition of a duty to disallow questions under s 275A does not compromise judicial impartiality, but instead demonstrates a move away from 'the tacit acceptance of improper behaviours that cut across fundamental fair trial principles'.<sup>155</sup> Chief Justice Spigelman has acknowledged the dynamic nature of the principle of a fair trial:

In particular, it enables the court to acknowledge fundamental changes in community expectations as to the requirements of a fair trial. What is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances.<sup>156</sup>

154 R Ellis, *Judicial Activism in Child Sexual Assault Cases* (2005), National Judicial College of Australia Children and the Courts Conference, Sydney, November 2005.

155 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

156 J Spigelman, 'The Truth Can Cost too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 43.



5.113 In the second reading speech for the Bill enacting s 275A, the New South Wales Attorney General stated that s 275A

sets a new standard for the cross-examination of witnesses in criminal proceedings, including by referring, for the first time, to the manner and tone in which the question is asked ... This amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear.<sup>157</sup>

5.114 The ALRC and the NSWLRC are persuaded that s 275A of the *Criminal Procedure Act* provides a comprehensive model for the protection of all witness from improper cross-examination. As well as imposing a duty to disallow improper questions for all witnesses, it sets out a more comprehensive and detailed list of questions that are inappropriate. Whilst it is true that these types of questions could (and should) already be disallowed under s 41, submissions and consultations indicate clearly that the section is currently under utilised. Explicit reference to these types of questions may serve to bring them to judicial attention and provide greater guidance as to how the discretion to limit cross-examination should be exercised.

5.115 Under the proposed section, a question is not disallowable merely because it challenges the truth of the witness' statement or raises a distasteful or private topic. Therefore these provisions will allow a witness' evidence to be tested. Under s 275A(6) of the *Criminal Procedure Act 1986* (NSW), a failure of the court to exercise the duty will not affect the admissibility of any answer given in response. The ALRC and the NSWLRC note the view of the Criminal Law Review Division which submits that legislation does not open a new avenue of appeal points for accused persons.<sup>158</sup>

5.116 These provisions are designed to prevent cross-examination that is improper and will not unduly hamper the trial techniques of advocates. The Commissions endorse the view of the NSW Adult Sexual Assault Interagency Committee that 'curbing the use of improper questions does not impede the cross-examination process, it simply respects the rights of the complainant witnesses and ensures the best evidence is received by the courts'.<sup>159</sup>

5.117 It is therefore recommended that the provisions under s 275A of the *Criminal Procedure Act 1986* (NSW) be adopted under s 41 of the uniform Evidence Acts.

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157 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005, 14899 (R Debus—Attorney General), 14899.

158 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

159 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 4.

5.118 The Commissions believe that the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters. As noted in DP 69, witnesses in a negligence or a civil assault matter may be equally vulnerable to attack in cross-examination as a victim of a crime. Any amendment to s 41 to adopt the terms of s 275A of the *Criminal Procedure Act* should apply equally to civil and criminal matters.

**Recommendation 5–2** The ALRC and NSWLRC recommend that section 41 of the uniform Evidence Acts should be amended to adopt the terms of s 275A of the *Criminal Procedure Act 1986* (NSW). This section should apply both to civil and criminal proceedings.

### *The view of the VLRC*

5.119 The VLRC differs from the other Commissions for several reasons. First, the VLRC believes that it is important to retain the discretion of the trial judge to disallow inappropriate questions, while at the same time introducing a mandatory requirement to protect witnesses who are particularly vulnerable. By imposing a duty in relation to the questioning of all witnesses, the approach proposed by the ALRC and the NSWLRC may have the unintended effect of watering down protection for vulnerable witnesses.

5.120 The imposition of a duty in relation to all witnesses may also compel a judge to interfere inappropriately in questioning when this is contrary to the legitimate interests of the party questioning the witness or the party whose witness is being questioned. While improper questioning can compromise the fact-finding process, so too can inappropriate interference by the trial judge.

5.121 The VLRC takes the view that the general provision should be designed to prevent cross-examination that is improper because it is unfair to the witness while not unduly hampering the trial techniques of advocates. To make this policy clearer, the VLRC proposes that s 41 define an improper question as one that is unfair to the witness because it is a question or questioning that falls within one of the categories set out above. This would allow the court the discretion to determine if the questions or line of questioning are warranted, and to maintain a balance between the protection of the witness and eliciting the truth in cross-examination.<sup>160</sup> Unfairness is a term that is used elsewhere in the uniform Evidence Acts, and its meaning is considered in Chapter 3.

5.122 A further point of difference from the current NSW provision is that the VLRC model makes provision for both improper questions *and* improper questioning. This would allow the court to intervene in the situation where individual questions are not misleading or confusing, but the order in which they are put is misleading or confusing.

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<sup>160</sup> K McIntosh, *Submission E 74*, 15 September 2005.

5.123 Finally, while the VLRC is not persuaded that the duty should be of general application, it maintains that additional protection must be given by the courts to vulnerable witnesses. The VLRC is convinced that a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention. It is the expectation of the VLRC that judicial concerns about the effect on a fair trial of provisions requiring intervention where questioning is inappropriate are less likely to arise if the witness is a vulnerable witness.

5.124 In other words, the VLRC believes that a separate provision to deal with questioning of vulnerable witnesses is likely to be a more effective means of protecting people who fall into this category. The VLRC has considered the views expressed by some that the imposition of a duty on judges to limit improper questioning by reference to the vulnerability of witnesses is inappropriate or unworkable. It takes the view however, that, subject to a modification mentioned below, such an approach is workable.

5.125 The model put forward by the VLRC defines vulnerable witness to make it clear that persons under the age of 18 and persons with a cognitive impairment are to be regarded as vulnerable. This will prevent argument about whether or not the judicial duty applies when the witness is a child or a person with a cognitive impairment. However, the proposed provision will also impose a duty on the judicial officer in relation to other witnesses who may be found to be vulnerable because of other factors. Those factors should include:

- the age and cultural background of the witness;
- the mental, physical or intellectual capacity of the witness;
- the relationship between the witness and any party to the proceedings; and
- the nature of the offence.

5.126 This model removes the need for argument as to whether a witness is vulnerable in the most obvious of cases, while leaving scope for a witness to be treated as a vulnerable witness in other circumstances. A witness may be vulnerable not because of any inherent attribute he or she may have, but because of the circumstances of the particular offence or a relationship to other parties to the proceedings. Conversely, a witness may not be vulnerable simply because he or she is the victim of a certain type of offence. Judges, therefore, must be given some capacity to find a witness vulnerable for the purposes of limiting cross-examination based on the particular circumstances of the case. The above list of factors is consistent with provisions in non-uniform

Evidence Act jurisdictions in relation to improper questions.<sup>161</sup> These terms are also consistent with the criteria on which a witness is deemed to be a 'special witness' under state legislation for the purpose of allowing other measures such as the use of closed circuit television or allowing evidence to be given in a closed court.<sup>162</sup>

5.127 The VLRC considers that the best way to address any issue of unfairness to a party is to provide a mechanism for determining the appropriate limits on cross-examination which focuses on the central issues. It proposes that the section allow the court not to enforce the section provided it is satisfied in the circumstances that it is necessary that the question be put. The onus will be placed upon the party questioning to justify the questioning by demonstrating that it is necessary. This means that the imposition of a duty will not totally remove the judge's discretion to decide but will require the judge to intervene unless it can be shown by the questioner that the manner of questioning is necessary. The VLRC also believes that this will reduce the scope and opportunity for successful challenges to the judge's application of the duty.

5.128 The VLRC advances the following proposal:

Section 41 of the uniform Evidence Acts should be amended to permit a court to disallow an improper question or questioning put to a witness in cross-examination, or inform the witness that it need not be answered. An improper question or questioning should be defined as a question or questioning that is unfair to the witness because it is:

- (a) misleading, confusing or
- (b) unnecessarily repetitive;
- (c) annoying, harassing, intimidating, offensive, humiliating or oppressive; or
- (d) put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting), or has no basis other than a sexual, racial, cultural or ethnic stereotype.

The uniform Evidence Acts should be amended to provide, in relation to a vulnerable witness, that a court must disallow any question of the type referred to above unless satisfied that it is necessary in the circumstances that the question be put.

A 'vulnerable witness' is to be defined as a person under the age of 18, or a person with a cognitive impairment/intellectual disability, and also includes any other person rendered vulnerable by reason of:

- (a) the age or cultural background of the witness;
- (b) the mental, physical or intellectual capacity of the witness;
- (c) the relationship between the witness and any party to the proceedings;  
and
- (d) the nature of the offence.

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161 *Evidence Act 1977* (Qld) s 21.

162 See for example *Evidence Act 1906* (WA) s 106R; *Evidence Act 1929* (SA) s 13.

**Conclusion**

5.129 It is clear that to date the discretionary approach has not provided witnesses with adequate protection. At the heart of the difference between the Commissions is a debate about the most effective way of addressing the competing policy concerns and how best to change the adversarial culture to one in which protection is appropriately and readily provided to witnesses. The VLRC takes the view that, having regard to the fact that the New South Wales provision has only been in force since August 2005,<sup>163</sup> it is too early to judge its operation. Whatever opinions may have been expressed to date by those who have applied or experienced the application of a provision, a reliable assessment of its operation is not possible. In this situation, its concerns cannot be met by consideration of the experience of the New South Wales provision.

5.130 It is desirable for the uniform Evidence Acts to contain effective and uniform provisions to deal with this issue. But it is also important that the best solution for the problem be developed and adopted in any uniform proposal. Should the VLRC proposal be adopted in Victoria, it will be possible to assess its operation. At the same time a better assessment will be able to be made of operation of the New South Wales provision. Out of that experience, the uniform Evidence Act jurisdictions will be able to make an informed choice as to the best approach. That may be one of the above approaches, or some combination or variation of them.

5.131 Reference has been made to the issue of culture and the need for change. The VLRC noted in its sexual offences report that:

In order to maximise the effectiveness of tighter legislative controls on the types of questions asked of child witnesses, prosecutors, defence counsel and judicial officers need to be aware of the rationale for those changes. Previous experience has shown that legislative change in isolation from attitudinal change is not effective.<sup>164</sup>

5.132 The Commissions endorse the VLRC's recommendations regarding judicial and practitioner education on the needs of vulnerable witnesses in the context of this Inquiry. This recommendation is made in the context of other recommendations for targeted judicial and practitioner education programs in Recommendation 3–1.

**Use of documents in cross-examination**

5.133 Section 44 of the uniform Evidence Acts concerns circumstances where a cross-examiner may question a witness about a previous representation alleged to have been made by a person other than the witness. Section 44(2) allows the witness to be questioned on the representation if evidence of the representation has or will be

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<sup>163</sup> Section 275A of the *Criminal Procedure Act 1986* (NSW) commenced on 12 August 2005.

<sup>164</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.152].

admitted into evidence. Section 44(3) allows limited questioning on a document that would not be admissible if the document is produced or shown to the witness. In that case, neither the witness nor the cross-examiner is to identify the document or disclose its contents. The witness may only be asked whether, having seen the document, he or she stands by the evidence that he or she has given.

5.134 Section 44 reflects the common law as stated in *The Queen's Case*, a case that concerned the trial of Queen Caroline for adultery. During the trial, counsel sought to cross-examine a witness about a letter. The ruling reads:

If on cross-examination, a witness admits a letter to be of his hand-writing he cannot be questioned by counsel whether the statements, such as counsel may suggest, are contained in it, but the whole letter must be read in evidence ... In the ordinary course of proceedings, such letter must be read as part of the cross-examining counsel's case. The court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.<sup>165</sup>

5.135 In ALRC 26, the ALRC concluded that there was no policy reason to preclude cross-examination on statements that have or will be received into evidence. In the case of a document that cannot or will not be adduced, the ALRC approved of the common law approach in *The Queen's Case* under which the witness could be handed the document, asked to read it and then state whether he or she still adheres to his or her testimony.<sup>166</sup>

5.136 The ALRC acknowledged that there were criticisms of this approach on the basis that it may be oppressive to hand a witness a document and then cross-examine him or her so that an inference may be drawn on its contents.<sup>167</sup> For example, in 1978, the NSWLRC noted:

It seems undesirable to have a system where documents are handed around the courtroom without the jury hearing of their contents directly because of a rule of admissibility, but with the possibility open of their drawing inferences as to their contents, particularly where counsel has hinted at or summarised their contents.<sup>168</sup>

5.137 However, the ALRC considered that the power of the judge to control cross-examination and the rules contained in s 44(3) were sufficient protection. A judge may also order that the document be produced for examination by the court under s 45, if the judge thinks that a false impression of the contents of the document has been given.<sup>169</sup>

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<sup>165</sup> *The Queen's Case* (1820) 2 Brod & B 284; 129 ER 976.

<sup>166</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].

<sup>167</sup> *Ibid*, [636].

<sup>168</sup> New South Wales Law Reform Commission, *The Course of the Trial: Working Paper* (1978), [9.14].

<sup>169</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].

5.138 In relation to s 44(3), Odgers notes that it was suggested in *R v Hawes*<sup>170</sup> (under the common law) that it would be virtually impossible for the judge or jury not to gain the impression during cross-examination that the document asserted something contrary to the witness' testimony.<sup>171</sup> In *Hawes*, Hunt CJ at CL stated that he had never been satisfied as to the validity of this rule and concluded that the decisions that support it are of doubtful authority. However, his Honour concluded that, in the circumstances of the case, the refusal to allow counsel to put the records to the witness did not unjustly deny an opportunity to the defence.<sup>172</sup>

5.139 In DP 69, the Commissions did not identify any significant concerns with s 44(2) where the evidence has or will be admitted into evidence and proposed no change in that regard. However, the Commissions noted both the issue raised by Odgers and concerns raised in the previous Evidence inquiry regarding the practice under s 44(3) where the document is not admissible or counsel cross-examining does not intend to tender the document. Whilst the Acts are a reflection of the common law in this regard,<sup>173</sup> the Commissions agreed that the judge or jury might be susceptible to the impression (that cannot be refuted elsewhere) that the document asserted something contrary to the witness' testimony.<sup>174</sup>

5.140 However, the Commissions concluded that repeal of s 44(3) and (4) of the uniform Evidence Acts would mean that the common law would apply in this area and the result would effectively be no change to the practice.<sup>175</sup> It was also argued that judges could exercise greater control over this type of questioning under the existing provisions.

5.141 Where a judge is concerned that counsel is confusing or misleading the court or jury by questioning a witness on a previous representation of another person that is inadmissible (or counsel does not intend to tender), he or she may call for the document to be produced under s 45(1)(b) and give directions as to its use.<sup>176</sup> A judge could also presumably refuse to allow the document to be put to the witness under the general power in s 26 to control the questioning of witnesses.<sup>177</sup> It is noted that a

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170 *R v Hawes* (1994) 35 NSWLR 294.

171 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4220].

172 *R v Hawes* (1994) 35 NSWLR 294, [303].

173 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [307].

174 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.133].

175 *Ibid*, [5.133].

176 Note that under s 45(5), the mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

177 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [5.133].

survey of case law undertaken by the Commissions reveals that the sections have provoked little comment, other than in the cases mentioned above.

5.142 Further, concerns with s 44 have not been raised with the Commissions following DP 69. On this basis, the Commissions remain of the view that no amendment of s 44 of the uniform Evidence Acts is necessary.

### The rule in *Browne v Dunn*

5.143 The common law rule in *Browne v Dunn*<sup>178</sup> states that where a party intends to lead evidence that will contradict or challenge the evidence of an opponent's witness, it must put that evidence to the witness in cross-examination.<sup>179</sup> It is essentially a rule of fairness—that a witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness' evidence will be contested and further corroboration may be required.<sup>180</sup>

5.144 There are a number of consequences arising from a breach of the rule. The court may order that the witness be recalled to address the matters on which he or she should have been cross-examined. The court may also:

- prevent the party who breached the rule from calling evidence which contradicts or challenges that witness' evidence in chief;<sup>181</sup>
- allow a party to re-open its case to lead evidence to rebut the contradictory evidence or corroborate the evidence in chief of the witness;<sup>182</sup>
- comment to the jury that the cross-examiner did not challenge the witness' evidence in cross-examination, when that could have occurred,<sup>183</sup> or
- comment to the jury that the evidence of a witness should be treated as a 'recent invention' because it 'raises matters that counsel for the party calling that

<sup>178</sup> *Browne v Dunn* (1893) 6 R 67.

<sup>179</sup> The rule has also been held to apply to a party's failure to cross-examine its own witness pursuant to s 38: *R v McCormack (No 3)* [2003] NSWSC 645. The rule also may operate where the evidence is in the form of a written statement, rather than testimony: *Nye v New South Wales* (2003) 58 NSWLR 152. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4440].

<sup>180</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 64.

<sup>181</sup> *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551; see also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.10].

<sup>182</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 64.

<sup>183</sup> J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.10].



witness could have, but did not, put in cross-examination to the opponent's witness'.<sup>184</sup>

5.145 Courts have been clear, however, that while there are established remedies for a breach of the rule courts will have sufficient flexibility to respond to the particular problem before it.<sup>185</sup> The consequences of a breach of the rule in *Browne v Dunn* may also differ based on whether it is a criminal or civil matter. In *R v Birks*, Gleeson CJ noted that the failure to cross-examine may be based on counsel's inexperience or a misunderstanding as to instructions. Given the serious consequences, any judicial comment on a failure to cross-examine must take into account these factors, rather than allowing the jury to assume that the contradictory evidence must be a recent invention.<sup>186</sup>

5.146 The rule does not apply in every circumstance where a question is not put to a witness. In civil matters, where the issues in dispute are well known to the parties from the discovery process, the fact that the witness has had notice of the issues will make the rule redundant. In *Porter v Oamps*,<sup>187</sup> Raphael FM concluded that *Browne v Dunn* did not apply because the parties were aware of the issues by the time of the trial and knew the responses that each witness was likely to give to the propositions put to them.

5.147 Section 46 of the uniform Evidence Acts mirrors part of the rule in *Browne v Dunn*, but does not replace it. Under the section:

(1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:

- (a) it contradicts evidence about the matter given by the witness in examination in chief; or
- (b) the witness could have given evidence about the matter in examination in chief.

184 Ibid, [46.10].

185 See *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551, 556; J Heydon, *Cross on Evidence* (7th ed, 2004), [17460].

186 *R v Birks* (1990) 19 NSWLR 677, 685. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.15]. In *R v Liristis* (2004) A Crim R 547, whilst not deciding the point, the New South Wales Court of Criminal Appeal said there was 'much to commend' the view that the High Court has implied in decisions such as *Azzopardi v The Queen* (2001) 205 CLR 50 and *Dyers v The Queen* (2002) 210 CLR 285 that the rule does not apply to an accused in a criminal trial. However, both these cases concerned the right of the accused not to give evidence, rather than the rule in *Browne v Dunn* in a strict sense.

187 *Porter v Oamps* (2004) 207 ALR 635.

5.148 It was not the ALRC's intention that s 46 displace the common law in relation to possible remedies for a breach of the rule in *Browne v Dunn*. In ALRC 26, the ALRC stated that it was not possible or appropriate for evidence legislation to address issues such as comments that may be made based on inferences drawn from a failure to comply with the rule. The legislation, it was argued, should only allow judicial discretion to permit parties to recall witnesses who should have been cross-examined.<sup>188</sup> Case law has confirmed that the common law continues to operate in this area.<sup>189</sup>

5.149 It was asked in IP 28 whether s 46 of the uniform Evidence Acts deals adequately with the rule in *Browne v Dunn* and whether the consequences of a breach of the rule available at common law should be included in the Acts.<sup>190</sup>

5.150 Following IP 28, the Inquiry did not receive many submissions addressing this issue. One senior practitioner argues that s 46 is unnecessary and should be repealed, leaving the common law to apply. His view is that the remedy available under s 46 is too simple and could operate unfairly.<sup>191</sup>

5.151 The NSW DPP submits that s 46 does not require amendment and that the consequences of a breach of the rule in *Browne v Dunn* at common law are not needed under the Acts.<sup>192</sup> The NSW PDO does not support a statutory formulation of the consequences of a breach. It notes that recent doubt as to whether the rule applied in criminal proceedings means that it would be unfortunate for the Acts to include the entirety of the rule.<sup>193</sup>

5.152 As noted above, it was never intended that s 46 operate as a code to the exclusion of the common law remedies for a breach of the rule in *Browne v Dunn*. As the ALRC concluded in ALRC 26, a statutory enactment of the rule would be too rigid to take into account the need for a variety of options to be available to the court to remedy a breach. The Commissions received no further submissions on this issue, and therefore recommend no change to s 46.

## Other issues

5.153 In DP 69, an issue was raised regarding the form of evidence presented in affidavits in proceedings in New South Wales. In civil proceedings other than a trial, such as interlocutory applications, evidence is usually given by affidavit, unless the

188 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [635].

189 *Heaton v Luczka* (Unreported, New South Wales Court of Appeal, 3 March 1998).

190 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3–6.

191 P Greenwood, *Submission E 47*, 11 March 2005.

192 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

193 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005, citing the decision in *R v Liristis* (2004) 146 A Crim R 547, fn 175.

court agrees to accept oral evidence.<sup>194</sup> In some jurisdictions, certain evidence in a trial may be given solely by affidavit on the direction of the court.<sup>195</sup>

5.154 The adducing of evidence by affidavit was not dealt with specifically in the previous Evidence inquiry. It was submitted to this Inquiry, following IP 28, that the uniform Evidence Acts should contain provisions governing the form and content of affidavits on the basis that the Acts are concerned with the presentation of evidence generally.<sup>196</sup> One concern in particular was the requirement in New South Wales under the previous rules of the Supreme Court of New South Wales that affidavits be made in the first person and in direct speech.<sup>197</sup> Since the publication of DP 69, a new *Civil Procedure Act 2005* and Uniform Civil Procedure Rules have been introduced in New South Wales with the aim of rationalising and simplifying the state's civil court rules.<sup>198</sup> The new rules largely follow the previous rules, but do not have an express requirement of direct speech.<sup>199</sup>

5.155 Many of the conventions regarding affidavit evidence differ between courts and may or may not be struck out by the court at its discretion. Practice also differs between states. On that basis, it was asked in DP 69 if the uniform Evidence Acts should contain provisions dealing with the form of affidavit evidence. If so, what considerations should be included in such a section?<sup>200</sup>

5.156 The Commissions did not receive many submissions addressing this issue. Of those that did, the majority is of the view that questions of the form of affidavit evidence are best dealt with by the rules of the relevant court and not in the uniform Evidence Acts.<sup>201</sup> The Australian Securities and Investments Commission supports the inclusion of rules regarding affidavits in the Acts, on the basis that national consistency would reduce confusion and inconvenience for litigators who conduct litigation in a number of different jurisdictions.<sup>202</sup>

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194 B Cairns, *Australian Civil Procedure* (5th ed, 2002), 447.

195 Ibid, 447.

196 S Finch, *Consultation*, Sydney, 3 March 2005.

197 *Supreme Court Rules 1970* (NSW), Pt 38, r 2 (repealed).

198 *Civil Procedure Act 2005* (NSW).

199 *Uniform Civil Procedure Rules 2005* (NSW), Pt 35.

200 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 5–1.

201 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

202 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

5.157 There are a number of matters, which, although in one sense ‘evidentiary’, are omitted from the uniform Evidence Acts because they are largely procedural in nature. The Commissions consider that these matters are best dealt with by the rules of the relevant courts, and on this basis, no change is recommended.

## 6. Documentary Evidence

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### Background

6.1 The uniform Evidence Acts introduced sweeping reforms to the rules governing the admissibility of documentary evidence. The most significant of these is the abolition of the original document rule.<sup>1</sup> Under the common law, the contents of a document can only be proved by tendering the original document. There are several exceptions to this rule where the original is unavailable. Generally, however, secondary evidence of the contents of the document is not admissible. Section 51 of the uniform Evidence Acts provides that '[t]he principles and rules of the common law that relate to the means of proving the contents of a document are abolished'.

6.2 The uniform Evidence Acts also greatly widen the definition of 'document'. At common law, 'a document is essentially an object upon which is visibly inscribed intelligible writing or figures'.<sup>2</sup> The uniform Evidence Acts define 'document' as any record of information, including:

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1 Uniform Evidence Acts s 51.

2 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 72.

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.<sup>3</sup>

6.3 The wide definition of the term ‘document’ and the allowable means of proof are said to ‘greatly increase the flexibility of the law to admit the contents of documents into evidence’.<sup>4</sup>

6.4 Other reforms introduced by the uniform Evidence Acts relate to cross-examination on documents,<sup>5</sup> refreshing memory from documents<sup>6</sup> and proving attested documents.<sup>7</sup>

## The documentary evidence provisions

6.5 Part 2.2 of the uniform Evidence Acts contains the principal provisions dealing with documentary evidence. These are ss 47–51.

6.6 Section 48 sets out the ways in which the contents of a document can be proved. In addition to tendering the document itself, these include:<sup>8</sup>

- by an admission of a party to the proceedings as to its contents;<sup>9</sup>
- by tendering a copy of the document;<sup>10</sup>

3 Uniform Evidence Acts Dictionary, Pt 1. ‘This definition needs to be coupled with that contained in s 47(1) ... which sets the scope for the rules contained in Part 2.2’: J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 73.

4 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 105.

5 Uniform Evidence Acts s 45.

6 See V Bell, ‘Documentary Evidence under the Evidence Act 1995 (NSW)’ (2001) 5 *The Judicial Review* 1.

7 Uniform Evidence Acts s 149. Where the validity of a document depends on it having been properly attested, at common law it is necessary to prove this fact by calling one of the attesting witnesses to testify, unless the witnesses are unavailable or a presumption of validity applies. Section 149 does away with this requirement.

8 Odgers raises the question whether the ‘or’ is disjunctive in the sentence, ‘A party may adduce evidence of the contents of a document in question by tendering the document *or* by any one or more of the following methods: ...’. That is, if a party tenders the document itself, does this preclude also tendering additional evidence by one of the other methods: S Odgers, *Uniform Evidence Law* (Bulletin 10, Law Book Co, Sydney, 2005), 3. This argument was raised in *R v Georgiou* [2005] NSWCCA 237, but not resolved. Odgers suggests that the better view is that the provision should be read as if it contained the words, ‘or, or as well as’.

9 Uniform Evidence Acts s 48(1)(a). The admission can only be used against the party who made the admission, or who adduced evidence of it: s 48(3).

10 Ibid s 48(1)(b). It need not be an exact copy as long as it is ‘identical in all relevant respects’: s 48(2).

- if the document is an article or thing that records sounds, or in which words are recorded as code (such as shorthand writing), by tendering a transcript of the recording or decoded words;<sup>11</sup>
- by tendering a document produced by use of a device to retrieve stored information;<sup>12</sup>
- by tendering a copy or summary of, or extract from, a business record;<sup>13</sup>
- by tendering a copy of a public document;<sup>14</sup> and
- if the document is ‘unavailable’,<sup>15</sup> or if the existence and contents of the document are not in issue, by tendering a copy, summary or extract of the document, or by adducing oral evidence of its contents.<sup>16</sup>

6.7 Other provisions of the uniform Evidence Acts dealing with documentary evidence address matters including:

- inferences as to the authenticity of a document;<sup>17</sup>
- the hearsay rule and its exceptions;<sup>18</sup>

11 Ibid s 48(1)(c). See *R v Butera* (1987) 164 CLR 180 and *R v Cassar* [1999] NSWSC 436 on the admissibility of tape recordings. The latter case considers the combined effect of the common law and s 48(1) of the *Evidence Act 1995* (Cth).

12 Uniform Evidence Acts s 48(1)(d).

13 Ibid s 48(1)(e).

14 Ibid s 48(1)(f). Providing that it is, or purports to have been, printed: by the Government Printer or the state equivalent; by authority of the government or administration of the Commonwealth, a state or territory or a foreign country; or by authority of parliament: Uniform Evidence Acts s 48(1)(f). A ‘public document’ is defined to mean a document that forms part of the records of, or is being kept by or on behalf of: the Crown; a foreign government; or a person or body holding office or exercising a function under the Constitution, an Australian law or a foreign law: Uniform Evidence Acts Dictionary, Pt 1.

15 A document is defined ‘not to be available’ if and only if: it cannot be found after reasonable inquiry and search; it was destroyed (by or on behalf of the party otherwise than in bad faith); it would be impractical to produce it; its production could render a person liable to conviction; it is not in the party’s possession or control and (i) it cannot be obtained by any judicial procedure of the court; or (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding: Uniform Evidence Acts Dictionary, Pt 2, cl 5.

16 Ibid s 48(4).

17 Ibid s 58. Section 58(1) provides: ‘If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.’

- documents produced by processes, machines and other devices;<sup>19</sup>
- evidence of official records, Commonwealth documents and public documents;<sup>20</sup>
- presumptions about the sending and receipt of documents;<sup>21</sup>
- requests to produce documents or call witnesses;<sup>22</sup> and
- proof of certain matters by affidavits or written statements.<sup>23</sup>

6.8 In DP 69, the Commissions noted that the documentary evidence provisions of the uniform Evidence Acts have been largely successful in balancing the interests of the parties with facilitating the admission of documentary evidence.<sup>24</sup> The Commissions considered the following issues:

- the absence of legislative definition of the expression ‘summary document’ in s 156;
- the reliability and accuracy of computer-produced evidence and the operation of ss 146 and 147 of the uniform Evidence Acts;
- the application of s 71 of the uniform Evidence Acts to communications more broadly defined than ‘electronic mail’; and
- evidence of official records.<sup>25</sup>

6.9 This chapter discusses these issues and the proposals for reform outlined in DP 69 and considers responses to the proposals in submissions and consultations. It also considers three further ideas for reform which were not expressly canvassed in DP 69 but were subsequently raised in a number of submissions:

- the timing of an application under s 50 of the uniform Evidence Acts;

18 *Evidence Act 1995* (Cth) Ch 3 Pt 3.2; *Evidence Act 1995* (NSW) Ch 3 Pt 3.2; *Evidence Act 2001* (Tas) Ch 3 Pt 2; *Evidence Act 2004* (NI) Ch 3 Pt 3.2.

19 Uniform Evidence Acts ss 146–147.

20 Ibid ss 155–159; except s 155A of the *Evidence Act 1995* (Cth) which has no equivalent in the New South Wales and Tasmanian legislation.

21 Uniform Evidence Acts ss 161–162; see also s 163 of the *Evidence Act 1995* (Cth). Section 5 of the Commonwealth Act extends the operation of s 163 to all Australian courts.

22 Uniform Evidence Acts ss 166–169.

23 Ibid ss 170–173 (except that the definition of ‘authorised person’ differs between the Acts).

24 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Ch 6, [6.11].

25 Ibid, Ch 6.



- presumptions facilitating proof of the sending and receipt of electronic communications; and
- the admissibility of banking records.

### Summary of voluminous or complex documents

6.10 The Commissions did not consider that the absence of a legislative definition of ‘summary’ would give rise to any concerns in the application of s 156, or any other provisions in the uniform Evidence Acts containing the word ‘summary’, and did not propose any amendment to that section.<sup>26</sup> No submissions to DP 69 question this conclusion. However, a passing reference to s 50 (which allows proof of the contents of voluminous or complex documents by tendering a summary) in the discussion of s 156 in DP 69 gave rise to a submission as to how s 50 can be improved.

6.11 The Commonwealth Director of Public Prosecutions (CDPP) submits that the usefulness of s 50 is limited because an application to adduce evidence of two or more documents in the form of a summary must be made before the hearing.<sup>27</sup> It submits that this requirement is too restrictive and that the section should be amended to allow applications to be made during a hearing.<sup>28</sup>

6.12 In addition, preparation of a summary may be overlooked before a hearing commences, or not completed in time. For want of having applied to the court before the hearing, the usefulness of a summary is lost. In some cases, it may only become apparent once evidence begins to be adduced that a summary could streamline proceedings and assist the court.

6.13 The usefulness of s 50 is already widely acknowledged.<sup>29</sup> The Commissions are of the view that its usefulness will be enhanced if it is amended to allow an application to rely on a summary of documents to be made at any time in proceedings. The Commissions do not see that there will be any resulting prejudice to the party not tendering the evidence arising out of this amendment that could not be overcome by the exercise of judicial discretion, or that outweighs the benefits of the amendment. An

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26 See Ibid [6.15]–[6.16].

27 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005. See Uniform Evidence Acts s 50(1)(a).

28 The Commissions are aware that there is already an occasionally-employed informal practice that, in the course of a hearing, one party will volunteer to make a summary of a bundle of documents, giving the other party, say, one night to look at it. It will then be admitted by mutual consent.

29 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.16].

application can always be rejected if it is opposed and evidence of prejudice or disadvantage demonstrated.

6.14 The Commissions commented in DP 69 that the provision to the other party of summaries of documents has been a useful tool in settling the issues early on and reducing hearing time.<sup>30</sup> This advantage is lost if an application is made late in proceedings. Hence, it is likely that most applications will continue to be made prior to the hearing, along with other preparatory steps such as discovery, interrogatories, serving of documents and so forth. A party that delays in making an application runs the risk that an objecting party can demonstrate prejudice and the application will be refused. However, although a late application may hold up proceedings while the other party is given the opportunity to examine or copy documents, proceedings may ultimately be expedited by not having to go through voluminous or complex documents laboriously. A summary can also assist counsel and a trial judge summarising the case to a jury.

**Recommendation 6–1**      Section 50(1)(a) of the uniform Evidence Acts should be amended by removing the words ‘before the hearing concerned’.

## Reliability and accuracy of computer-produced evidence

### The issue

6.15 The uniform Evidence Acts contain a number of provisions facilitating proof of electronic evidence.<sup>31</sup> Sections 146–147 facilitate proof of ‘evidence produced by processes, machines and other devices’<sup>32</sup> and are intended, among other things, to facilitate the admission of computer-produced evidence.

6.16 Section 146 of the uniform Evidence Acts creates a rebuttable presumption that, where a party tenders a document or thing that has been produced by a process or device, if the device or process is one that, if properly used, ordinarily produces a particular outcome, then in producing the document or thing on this occasion, the device or process has produced that outcome. For example, it would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy the relevant document. Section 147 provides a similar rebuttable presumption in relation to documents produced by processes, machines and other devices in the course of business.

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<sup>30</sup> Ibid, [6.16].

<sup>31</sup> For example, s 48 permits the tendering of a copy of a document produced ‘by a device that reproduces the contents of documents’: Uniform Evidence Acts s 48(1)(b)(ii). This provision allows photocopies and computer-produced copies of documents to be admitted as evidence: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4920].

<sup>32</sup> Uniform Evidence Acts ss 146–147.

6.17 In DP 69, the Commissions asked whether the uniform Evidence Acts should be amended to impose a more rigorous requirement for the presumption of reliability and accuracy of computer-produced evidence.<sup>33</sup>

6.18 This question arose out of submissions to IP 28 by the Criminal Law Committee of the Law Society of South Australia and the Legal Services Commission of South Australia comparing the provisions of South Australia's evidence legislation dealing with evidence produced by processes, machines and other devices with s 146 of the uniform Evidence Acts.<sup>34</sup> Both commented that s 45C of the *Evidence Act 1929* (SA) seems to be more comprehensive than s 146 of the uniform Evidence Acts 'in ensuring that a device producing a document is in itself not prone to error'.<sup>35</sup>

6.19 These submissions also pointed out that the uniform Evidence Acts have no direct equivalent of s 59B of the *Evidence Act 1929* (SA), which requires a court to be satisfied that there have been no alterations made to the machine, such as tampering with the hard drive of the computer.<sup>36</sup>

### The discussion in DP 69

6.20 In DP 69, the Commissions examined the South Australian approach to presumptions as to the accuracy of reproductions.<sup>37</sup> Briefly, s 45C of the *Evidence Act 1929* (SA) allows the court to: rely on its own knowledge of the nature and reliability of the processes by which the reproduction was made; rely on the certification of someone with knowledge and experience of these processes or who has compared the contents of both documents and found them to be identical; or act on any other basis it considers appropriate in the circumstances.<sup>38</sup>

6.21 In addition, s 59B of the *Evidence Act 1929* (SA) makes 'computer output'<sup>39</sup> admissible subject to the court being satisfied as to a number of matters relating, broadly, to the proper programming, use and functioning of the computer; correct data entry; and the admissibility of the material from which the data was produced. The Commissions

33 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 6–1.

34 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005.

35 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005.

36 Ibid; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

37 These are reproductions made by 'an instantaneous process' or produced from a record made by a process in which the contents of a document are recorded by photographic, electronic or other means: *Evidence Act 1929* (SA) s 45C(3). Section 45C(4) creates a rebuttable presumption that a reproduction made by 'an approved process' (as defined by regulations) accurately reproduces the contents of the document purportedly reproduced.

38 *Evidence Act 1929* (SA) s 45C(2).

39 Ibid s 59A includes definitions for 'computer', 'computer output' and 'data'.

noted that the merit in this approach is that it ‘recognises in a direct way the need to address the issue of whether a computer has operated correctly in producing material that is to be admitted’.<sup>40</sup>

6.22 The Commissions observed that ss 45C and 59B provide alternative approaches to the admissibility of computer-produced evidence that have the outward appeal of being broad and investing the court with wide judicial discretion to admit into evidence photographic, electronic and other reproductions.

6.23 However, the Commissions commented that s 45C is flawed in that it relies entirely on the reliability of the ‘approved process’ without further, or actual, investigation into that process. The Commissions further observed that s 59B is based on the *Civil Evidence Act 1968* (UK), which was criticised by the Law Commission of England and Wales in a 1993 review of that Act. The Law Commission observed:

[T]here is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. It is at least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned.<sup>41</sup>

6.24 In DP 69, the Commissions also examined research into the reliability of computers carried out by Dr Cameron Spenceley.<sup>42</sup> Dr Spenceley developed an approach to the treatment of computer-produced evidence termed a ‘redundancy test’ approach. This relies on implementing a ‘redundant mechanism’<sup>43</sup> in the environment in which the computer is used to address the problem of reliability of computer output.<sup>44</sup> A ‘redundant mechanism’ does not increase the functional capacity of the computer system itself, but operates to prevent or mitigate unreliability in that system.<sup>45</sup> That is, it operates to provide some level of verification that a failure in the computer has not occurred.

6.25 The test of admissibility for computer-produced output that Spenceley proposes is that the party adducing the evidence should be able to demonstrate that:

- (a) some mechanism(s) of redundancy (however formulated and implemented) was or were utilised in connection with the production of particular material in the setting in which it was produced; and that

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40 C Spenceley, ‘Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation’, *Thesis*, University of Sydney, 2003, 233.

41 Law Commission, *The Hearsay Rule in Civil Proceedings*, Report 216 (1993), [3.15].

42 C Spenceley, ‘Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation’, *Thesis*, University of Sydney, 2003.

43 ‘Redundant mechanisms’ can involve hardware solutions, software solutions, human solutions, or any combination of the three. Examples of ‘redundant mechanisms’ are: manual verification of output by a person with knowledge of, or at least familiarity with, the expected output; or comparison of the output of interest with the output from a parallel computer system: *Ibid*, 255.

44 *Ibid*, 254–263.

45 *Ibid*, 255. ‘System A’ is the system that arrives at the result for which the computer is being used. ‘System B’ is a parallel system that verifies the result, but is redundant in so far as it is not actually needed to arrive at the result.

- (b) it is reasonably likely that any error(s) in the operation of that computer that affected the accuracy of information contained in that material would have been detected by such mechanism(s).<sup>46</sup>

6.26 The Commissions considered that a ‘redundancy test’ offers a more rigorous requirement for admissibility of computer-produced material that arguably balances the need to ensure reliability of evidence with the need for an efficient practice for use in litigation.<sup>47</sup> It was noted in DP 69 that relatively simple and cheap verifying measures could be built into the computer environment that could at least mitigate the risks of computer unreliability.<sup>48</sup> Then all that would be required in the courtroom would be to describe the measures that had been put in place in a particular setting.<sup>49</sup>

6.27 The Commissions also canvassed an alternative viewpoint to that which advocates a more rigorous test for admitting computer-produced evidence.<sup>50</sup> Adherents to this view argue that there are significant benefits to be derived from the presumption of reliability and accuracy of computer output, because this facilitates the admissibility of the numerous documents and business records generated from computer stored information.<sup>51</sup> The argument is that s 59B has not made it easy to have computer-produced documents admitted into evidence.<sup>52</sup>

6.28 In DP 69, the Commissions note that in the few cases in which the section has been considered, the South Australian courts have held that the conditions of s 59B were not complied with in at least three cases.<sup>53</sup> Reference was made to Emmanuel Laryea’s argument that ss 146 and 147 eliminate the problem arising under s 59B of computer evidence being rejected where there is no apparent system malfunction.<sup>54</sup> Even so, Laryea concludes:

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- 46 Spenceley argues that computer input should be treated exactly the same way as it would be treated if offered directly as evidence: *Ibid*, 263–265.
- 47 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.37].
- 48 *Ibid*, [6.37].
- 49 C Spenceley, ‘Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation’, *Thesis*, University of Sydney, 2003, 263.
- 50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.25]–[6.28].
- 51 L Crowley-Smith, ‘The Evidence Act 1995 (Cth): Should Computer Data be Presumed Accurate?’ (1996) 22(1) *Monash University Law Review* 166, 173.
- 52 E Laryea, ‘The Evidential Status of Electronic Data’ (1999) 3 *National Law Review* 1, [27].
- 53 *Ibid*, [27]. The evidence was admitted on other grounds in *Mehesz v Redman* (1979) 21 SASR 569 and *R v Weatherall* (1981) 27 SASR 238. The evidence was found inadmissible under s 59B and at common law in *Steiner v Modbury Towing Pty Ltd* (Unreported, Supreme Court of South Australia, Matheson J, 5 August 1998).
- 54 E Laryea, ‘The Evidential Status of Electronic Data’ (1999) 3 *National Law Review* 1, [37].

It must be ensured ... that adequate safeguards for testing computer evidence are put in place. Courts should be given, and use, wide powers to ensure that computer systems and electronic data are sufficiently tested for integrity and reliability when necessary.<sup>55</sup>

6.29 In DP 69, the Commissions observed that the case law dealing with ss 146 and 147 of the uniform Evidence Acts has not indicated that there are any problems with the operation of these provisions.

### Submissions to DP 69

6.30 Of the seven submissions addressing this question, three supported a more rigorous test<sup>56</sup> and four opposed it.<sup>57</sup>

#### *Submissions opposed to a more rigorous test*

6.31 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) does not support a higher threshold for admissibility of computer-produced documents for a number of reasons.<sup>58</sup> These can be summarised as follows:

- A more rigorous test is not justified; there is no solid evidence that such a provision is needed and no cases of wrongful conviction from computer-generated error.
- Litigation in Australia depends on an adversarial system and the burden of proof that rests on the prosecuting party, or plaintiff, ensures proper testing of evidence of this sort.
- It would impose a higher threshold than for other 'machine produced evidence'.
- Data manipulation can occur with any machine-generated information, such as photos, tapes and videos.
- The party challenging the accuracy of the evidence would have to be given the opportunity to inspect the relevant computer and perform their own tests—a costly, and time-consuming exercise.

6.32 The NSW DPP is particularly opposed to the 'redundancy test' approach for reasons that include the following:

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<sup>55</sup> Ibid, [92].

<sup>56</sup> The Law Society of South Australia, *Submission E 69*, 15 September 2005; Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>57</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Attorney-General's Department, *Submission E 117*, 5 October 2005; New South Wales Public Defenders, *Submission E 89*, 19 September 2005.

<sup>58</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

- The meaning of the term ‘redundancy mechanism’ is not readily understood.
- The ‘redundancy test’ is set at the civil standard of proof (it gives a basis for inferring that computer-produced material will be more likely than not to aid the identification of truth); as such, it is not relevant to criminal trials, or at best, favours the prosecution.
- Similar problems arise if the verifying mechanism built into the computer system is itself either another computer or part of a computer; should the verifying mechanism also require a ‘redundancy mechanism’?
- The example given in DP 69<sup>59</sup> of a customer checking a bank statement with the bank gives rise to several problems: the evidence would be hearsay and would be required to fall within one of the exceptions to the rule; the inquiry to the bank would result in the unsatisfactory solution of the bank checking its own computerised record; and, unless the ‘verifying measure’ is a guarantee of accuracy (which it is not), it may merely repeat or corroborate whatever in-built problem exists in the data generation process.
- There would be significant compliance costs in the extra statements and witnesses required simply to overcome an unidentified, unquantified, assumed risk.
- The cost of acquiring a ‘redundancy mechanism’ may put this beyond the reach of smaller litigants and may unfairly disadvantage them in litigation.
- The impact of such a test is potentially far-reaching as there are so many documents and other material, such as records, tests and photos, produced on computer or using computer technology. Any requirement that computers be subject to a ‘redundancy mechanism’ could result in these items of evidence being routinely challenged as to an assumed inaccuracy.

6.33 The Australian Government Attorney-General’s Department pointed out that, in a criminal case, the prosecution may have little choice about the type of documentary material available to it. It submits that it is unlikely to be in the interests of justice to require a court to reject evidence that appears cogent and reliable (and which may be

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<sup>59</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.31] fn 58.

corroborated by other material) simply because it does not satisfy formal preconditions for admissibility.<sup>60</sup>

6.34 The CDPP submits that there are significant benefits to be derived from the presumption of accuracy of computer output.<sup>61</sup> The presumption facilitates the admissibility of the numerous documents and business records generated from computer-stored information. When such evidence is becoming more pervasive, it is questionable whether more rigorous tests for its admission should be put in place. Section 59B of the *Evidence Act 1929* (SA), for example, has made it harder to get computer produced documents into evidence. Furthermore, it points out, as did the NSW DPP, that other forms of evidence are also prone to manipulation and falsification and yet are routinely accepted.

6.35 The CDPP emphasises that the presumptions in ss 146 and 147 are rebuttable. It submits that existing mechanisms to enable the testing of computer evidence are sufficient.

6.36 The CDPP strongly believes, both from its own experience of evidentiary law and the fact that a review of the case law does not reveal any problems with the operation of ss 146 and 147, that the creation of additional requirements for admission of computer records is not warranted.

***Submissions in favour of a more rigorous test***

6.37 The Office of the Victorian Privacy Commissioner observes that, in numerous instances in Victoria, technology-generated evidence (particularly speed camera evidence) has been shown to be less than reliable.<sup>62</sup> It submits that it is critical to maintain public confidence in the judicial process and that this can be eroded by even isolated instances of the admission of inaccurate computer evidence. It submits that the public's confidence in the accuracy and reliability of some technologies has already been shaken. It is therefore important to subject these technologies to scrutiny and maintain the highest standards of testing computer evidence, particularly as computer systems become more sophisticated and complex.

6.38 The other two submissions supporting a more rigorous test for the admissibility do not extensively detail the reasons for their support. The Law Society of South Australia favours the adoption of the approach taken in s 59B of the *Evidence Act 1929* (SA).<sup>63</sup>

6.39 The Law Society of New South Wales states that 'in an age of computer hacking and viruses the rebuttable presumption in s 146 of the uniform Evidence Acts is of

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60 Attorney-General's Department, *Submission E 117*, 5 October 2005.

61 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

62 Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

63 The Law Society of South Australia, *Submission E 69*, 15 September 2005.



concern'.<sup>64</sup> It points out that s 146 envisages application to machine-produced evidence such as photocopies (this is the example given in the legislation), but simple data copying is considerably different from computer-produced data, which can be stored and manipulated. It submits that the existence of quality control or internal control systems should be sufficient for computer-produced evidence to be considered *prima facie* accurate and reliable. However, it questions what the standard of quality control should be and suggests that there may have to be different standards for different litigants. (Compare, for example, the computer records and systems of a sole trader with those of a multinational corporation.) It also submits that the concerns raised about the accuracy and reliability of computer-produced evidence apply to other electronic communications such as SMSs.

### The Commissions' view

6.40 The Commissions have made it clear in this Inquiry that a major overhaul of the legislation is neither warranted nor desirable. It follows that a persuasive case for change should exist before the Commissions recommend a legislative amendment. As was stated in DP 69, the Commissions are interested in identifying those parts of the uniform Evidence Acts that may benefit from some fine-tuning in the light of experience.<sup>65</sup>

6.41 The submissions opposing a change in the threshold of proof for computer-produced evidence highlight the lack of evidence, both from their own experiences and from knowledge of the case law, of problems arising from the operation of ss 146 and 147. These submissions have argued strongly that a more rigorous test is not justified.

6.42 Given the division of opinion on this issue, the strongly-held views of those opposed to amendment and the lack of empirical evidence justifying a more rigorous test, the Commissions are persuaded that a case for change has not been made out.

### Electronic communications

6.43 Section 71 of the uniform Evidence Acts provides that:

The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:

- (a) the identity of the person from whom or on whose behalf the message was sent;
- or

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<sup>64</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>65</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [1.31].

- (b) the date on which or the time on which the message was sent; or
- (c) the message's destination or the identity of the person to whom the message was addressed.<sup>66</sup>

6.44 In DP 69, the Commissions explored whether s 71 of the uniform Evidence Acts should be amended to use a term broader than 'electronic mail'. In IP 28 it was suggested 'electronic commerce', 'electronic data transfer' or 'electronic messaging' are possible alternatives.<sup>67</sup>

### The technology

6.45 Email is not the only way to transmit messages between computers. Although largely superseded by the Internet, both traditional electronic data interchange (EDI)<sup>68</sup> and application-centric EDI<sup>69</sup> are other forms of data transmission via computer. In addition, communication between computers can be by way of Internet Relay Chats (IRCs) ('chat room' correspondence) and instant messaging.<sup>70</sup> While IRCs and instant messaging communications are generally not logged or stored, it is conceivable that a screen shot of conversations could be taken and kept. As well, applications are now being developed that can record and log instant messaging.<sup>71</sup>

6.46 Nor is messaging between computers the only method of electronic communication. Increasingly common is electronic communication by means of mobile phones, especially text messaging or SMS. A PDA device<sup>72</sup> can copy an SMS into an email or word processing program document. It is also possible, though not quite so easily done, to use a mobile phone to forward an SMS to a computer, where it can be printed out. At any rate, all devices that can receive an SMS can forward the

<sup>66</sup> *Evidence Act 1995* (Cth) s 182 gives s 71 a wider application in relation to Commonwealth records.

<sup>67</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4–3.

<sup>68</sup> EDI emerged in the early 1980s and gained some popularity in the late 1980s as a medium for electronic commerce. EDI is the exchange of standardised document forms between computer systems for business use. Companies who have set up similar applications can exchange information, such as trade orders, between their computers. EDI, as well as a Customs Interactive facility, available directly through the Internet can be used to access the Australian Customs Service's Integrated Cargo System, a new integrated IT system that will replace existing reporting and processing procedures: Australian Customs Service, *Submission E 24*, 21 February 2005.

<sup>69</sup> Application-centric EDI is an update to traditional EDI that uses secure transmission methods to facilitate the exchange of information between secure applications, typically located at different premises (for example, vendor and customer). Deployment of such secured applications over their intranets and the Internet is faster, less costly, and more effective than traditional EDI.

<sup>70</sup> Instant messaging, using software programs such as ICQ, is gaining popularity. It is a technology that combines features of email with chat.

<sup>71</sup> C Heunemann, *Consultation*, 1 April 2005; C Heunemann, *Consultation*, 1 April 2005.

<sup>72</sup> First introduced by Apple Computer in 1993 as the Newton MessagePad, 'PDA' is short for personal digital assistant. It is a handheld device that combines computing, mobile phone, fax, Internet, networking and personal organiser features. Unlike portable computers, most PDAs began using a stylus rather than a keyboard for input. This means that they also incorporate handwriting recognition features. Some PDAs can also react to voice input by using voice recognition technologies. PDAs are also called palmtops, hand-held computers and pocket computers.

message to another device. Electronic communication can also be by way of photos taken with a mobile phone camera, a device becoming increasingly popular.<sup>73</sup>

6.47 Whether computer or phone communications are made via wire, cable or wireless connection, they can all be classified as electronic communications. It is important to be satisfied of this as any reform of s 71 that centres on a definition of 'electronic communication' must include all these technologies. In particular, modern society's demand for mobility is fuelling a rapid growth in the use of wireless networking devices, including mobile phones, wireless modems and wireless local area networks (LANs). An understanding of messaging technologies is required before a view can be formed about the suitability of the technical language used. The following paragraphs give a brief outline of the technical aspects of ethernet and telecommunications technology.

6.48 When data are sent across a network, it is converted into electrical signals. These signals are generated as electromagnetic waves (analogue signaling) or as a sequence of voltage pulses (digital signaling). To be sent from one location to another, a signal must travel along a physical path. The physical path that is used to carry a signal between a signal transmitter and a signal receiver is called the transmission medium. There are two types of transmission media: guided and unguided.

6.49 The three most commonly used types of guided media are: twisted-pair wiring, similar to common telephone wiring; coaxial cable, similar to that used for cable television; and optical fibre cable.<sup>74</sup>

6.50 Unguided media are natural parts of the Earth's environment that can be used as physical paths to carry electrical signals. The atmosphere and outer space are examples of unguided media that are commonly used to carry signals. These media can carry such electromagnetic signals as microwave, infrared light waves, and radio waves.<sup>75</sup>

6.51 Network signals are transmitted through all transmission media as a type of waveform. When transmitted through wire and cable, the signal is an electrical waveform. When transmitted through fibre-optic cable, the signal is a light wave: either visible or infrared light. When transmitted through Earth's atmosphere or outer space, the signal can take the form of waves in the radio spectrum, including VHF and

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73 C Heunemann, *Consultation*, 1 April 2005; C Heunemann, *Consultation*, 1 April 2005.

74 The Explanatory Memorandum clarifies that 'communications by means of guided electromagnetic energy is intended to include the use of cables and wires, for example optic fibre cables and telephone lines': Explanatory Memorandum, Electronic Transactions Bill 1999 (Cth).

75 The Explanatory Memorandum also clarifies that 'communications by means of unguided electromagnetic energy is intended to include the use of radio waves, visible light, microwaves, infrared signals and other energy in the electromagnetic spectrum': Explanatory Memorandum, Electronic Transactions Bill 1999 (Cth).

microwaves, or it can be light waves, including infrared or visible light (for example, lasers).

6.52 Once a transmission medium has been selected, devices are needed that can propagate signals across the medium and receive the signals when they reach the other end of the medium. Such devices are designed to propagate a particular type of signal across a particular type of transmission medium. Transmitting and receiving devices used in computer networks include network adapters, repeaters, wiring concentrators, hubs, switches, and infrared, microwave, and other radio-band transmitters and receivers.

6.53 Microwave transmitters and receivers, especially satellite systems, are commonly used to transmit network signals over great distances. A microwave transmitter uses the atmosphere or outer space as the transmission medium to send the signal to a microwave receiver. The microwave receiver then either relays the signal to another microwave transmitter or translates the signal to some other form, such as digital impulses, and relays it by another suitable medium to its destination.

6.54 Infrared and laser transmitters are similar to microwave systems: they use the atmosphere and outer space as transmission media. However, because they transmit light waves rather than radio waves, they require a line-of-sight transmission path.

6.55 It is clear, then, that whatever the transmission medium, the receiver of the electromagnetic signals converts the signals to some form of electric signal that the device can understand. That being so, the technologies described above can all be defined as ‘electronic communication’.

6.56 By way of an insight into the possibility of unforeseen advancements in electronic communication and a reminder of the need for legislative definitions to accommodate such future developments, the Commissions note that, currently, technology is being developed to use the human body as a ‘wet-wire’ transmitter. The personal area network (PAN)<sup>76</sup> takes advantage of the conductive powers of living tissue to transmit signals. The PAN device, which can be worn on a belt, as a watch, or carried in a pocket, transmits extremely low-power signals (less than 1 MHz) through the body. With a handshake, users could, for example, exchange business cards.

### **The Commissions’ proposal**

6.57 In the light of its exploration of the technology to transmit messages between computers and other devices, the Commissions proposed in DP 69 that s 71 of the uniform Evidence Acts should be amended to replace the words ‘a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram

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76 The term PAN is also used to describe ad hoc, peer-to-peer networks.

or telex' with the words 'an electronic communication', as defined in s 5 of the *Electronic Transactions Act 1999* (Cth).

6.58 In DP 69, the Commissions argued that a device-specific or method-specific response to modern and developing technology may turn out to be too restrictive in itself and a short-lived solution. As highlighted by the discussion of the technology, ways of communicating electronically are expanding and changing rapidly. The Commissions stated that a broad and flexible approach to this technology is needed.

6.59 In DP 69, the Commissions concluded that the term 'electronic communication' would embrace all modern electronic technologies, including telecommunications, as well as the more outmoded fax, telegram, lettergram and telex methods of communication.<sup>77</sup> None of the terms 'electronic commerce', 'electronic data transfer' or 'electronic messaging' would cover sufficiently the possible means of communicating electronically.<sup>78</sup> The Commissions also rejected the term 'data message', as defined in the UNCITRAL Model Law on Electronic Commerce, as being insufficiently broad and unable to encompass future technologies.<sup>79</sup>

6.60 The Commissions also noted in DP 69 that the view was expressed in submissions and consultations that the reference in s 71 to 'electronic mail' is too restrictive.<sup>80</sup>

### Submissions to DP 69 and the Commissions' conclusion

6.61 The Commissions' proposal was unanimously supported by submissions to DP 69.<sup>81</sup> Accordingly, the Commissions recommend that s 71 be amended as set out in Recommendation 6–2 to expand the type of evidence to which the section applies. A draft provision is included in Appendix 1.

77 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.63].

78 Ibid, [6.64].

79 Ibid, [6.65].

80 A Davidson, *Submission E 7*, 20 December 2004; Clayton Utz, *Submission E 20*, 17 February 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Australian Customs Service, *Submission E 24*, 21 February 2005; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005; Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005; NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Victorian Supreme Court Litigation Committee, *Consultation*, 18 March 2005.

81 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; New South Wales Public Defenders, *Submission E 89*, 19 September 2005; Australian Federal Police, *Submission E 92*, 20 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

6.62 The Commissions also consider that it would be useful to produce an Explanatory Memorandum similar to that which accompanied the Electronic Transactions Bill 1999 (Cth),<sup>82</sup> noting that ‘electronic communication’, ‘communication’ and ‘information’ should all be interpreted broadly and explaining:

The use of the term ‘unguided’ is not intended to refer to the broadcasting of information, but instead means that the electronic magnetic energy is not restricted to a physical conduit, such as a cable or wire. ... Information that is recorded, stored or retained in an electronic form but is not transmitted immediately after being created is intended to fall within the scope of an ‘electronic communication’.

This definition should be read in conjunction with the definition of ‘information’, which is defined to mean data, text, images or speech. However, as a limitation is applied on the use of speech the definition of electronic communication is in two parts. Paragraph (a) states that, in relation to information in the form of data, text or images, the information can be communicated by means of guided and/or unguided electromagnetic energy. Paragraph (b) provides that information in the form of speech must be communicated by means of guided and/or unguided electromagnetic energy and must be processed at its destination by an automated voice recognition system. This is intended to allow information in the form of speech to be included in the scope of the Bill only where the information is provided by a person in a form that is analogous to writing. ‘Automated voice recognition system’ is intended to include information systems that capture information provided by voice in a way that enables it to be recorded or reproduced in written form, whether by demonstrating that the operation of the computer program occurred as a result of a person’s voice activation of that program or in any other way. This provision is intended to maintain the existing distinction commonly made between oral communications and written communications. The intention is to prevent an electronic communication in the form of speech from satisfying a legal requirement for writing or production of information. For example, it is not intended to have the effect that a writing requirement can be satisfied by a mere telephone call, message left on an answering machine or message left on voicemail.

‘Information’ is defined to mean information that is in the form of data, text, images or speech. ... These terms are not intended to be mutually exclusive and it is possible that information may be in more than one form. For example, information may be in the form of text in a paper document but is then transferred in to the form of data in an electronic document.<sup>83</sup>

**Recommendation 6–2** Section 71 of the uniform Evidence Acts should be amended to replace the words ‘a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex’ with the words ‘an electronic communication’, and to insert as s 71(2) a definition for ‘electronic communication’ identical to that in s 5 of the *Electronic Transactions Act 1999* (Cth).

<sup>82</sup> Explanatory Memorandum, Electronic Transactions Bill 1999 (Cth).

<sup>83</sup> Ibid.

### Presumptions facilitating proof of electronic communications

6.63 Sections 160–163 of the uniform Evidence Acts facilitate proof of postal articles, telexes, lettergrams, telegrams and letters sent by Commonwealth agencies. The sections apply presumptions relating to the sending (or transmission) and receiving of these communications.

6.64 The CDPP raises an issue in its submission not canvassed in DP 69.<sup>84</sup> It points out that there is no provision in the uniform Evidence Acts equivalent to ss 160–163 facilitating proof of electronic communications. Currently, the transmission and receipt of these must be strictly proved. The CDPP observes that investigative agencies devote considerable resources to proving strictly that a person sent or received an email. It submits that, ‘with the pervasiveness of this form of communication, a requirement that each be proved in a laborious way cannot continue to be warranted’.<sup>85</sup>

6.65 The Commissions see no reason why the presumptions relating to transmission and receipt of other forms of communication should not apply to electronic communications. The Commissions are confident that, had present-day electronic communications been as commonly in use at the time the *Evidence Act 1995* (Cth) was drafted, a provision equivalent to s 161 (presumptions relating to telexes) applying to electronic communications would have been included. Accordingly, the Commissions recommend that the uniform Evidence Acts be amended to remedy this omission. The new section should be drafted to include presumptions as to the source and destination of the communication. A draft provision is included in Appendix 1.

**Recommendation 6–3** The uniform Evidence Acts should be amended by the insertion of a new provision in terms equivalent to s 161 facilitating proof of electronic communications. The provision will provide for presumptions in relation to electronic communications and should include presumptions as to the source and destination of the communication.

### Evidence of official records

6.66 Section 155 of the *Evidence Act 1995* (Cth) facilitates proof of official records. It provides that evidence of Commonwealth records, or public records of a state or territory, may be adduced by producing a document purporting to be such a record, or a

<sup>84</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

<sup>85</sup> *Ibid.*

certified copy or extract from the record, and signed by the relevant minister, or the person who has custody of the record.<sup>86</sup>

6.67 In DP 69, the Commissions examined whether the application of s 155 of the uniform Evidence Acts to official reasons for decision raises any problems, and, if so, whether these should be addressed through amendment of the uniform Evidence Acts.<sup>87</sup> This discussion arose from a submission made by Justice French, who recommended that s 155 should be clarified, in particular to ensure that official reasons for decisions cannot be admitted on a non-consensual basis at the instigation of the decision maker without the decision maker being put to proof that these were the true reasons that he or she had for making the relevant decision.<sup>88</sup>

6.68 In DP 69, the Commissions analysed a decision of French J in *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*,<sup>89</sup> in which the Minister sought to rely on the reasons for a decision he had made under the *Migration Act 1958* (Cth) some months earlier.<sup>90</sup>

6.69 Counsel for the Minister argued that, as the statement of reasons had been provided pursuant to a statutory duty, it was admissible as a record of the material before the Minister, his findings of fact and his reasons for making the particular decision. The argument continued that the Minister's statement of reasons constituted a Commonwealth record for the purposes of s 155 and could therefore be admitted under that section, and not excluded as hearsay by virtue of s 59.<sup>91</sup>

6.70 Similar arguments were relied on in an earlier Federal Court case, *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs*.<sup>92</sup> In that case,

86 The New South Wales and Tasmanian legislation refer to a 'public document' of a state or territory: *Evidence Act 1995* (Cth) s 155; *Evidence Act 2001* (Tas) s 155. The explanation for the differing terminology 'public record' and 'public document' in s 155 of the *Evidence Act 1995* (Cth) and the Evidence Acts of the States relates to constitutional considerations. Section 51(xxv) of the *Australian Constitution* gives the Commonwealth Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states. 'Public record' in s 155 of the Commonwealth Act needs to have the same meaning as in s 51(xxv) of the *Australian Constitution*. There are no such restrictions on the drafting of s 155 of the New South Wales and Tasmanian Acts. The provision could include the broadly defined 'document'.

87 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.70-6.77]; see Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4-4.

88 Justice R French, *Submission E 3*, 8 October 2004. See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [4.12].

89 *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33.

90 The reasons for the decision were prepared pursuant to a statutory obligation under s 501G of that Act, but after the date of the decision itself, consequently not falling within the hearsay exception in Uniform Evidence Acts s 65(2)(b).

91 *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33, [48].

92 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069.



Hely J held that the effect of s 155 of the *Evidence Act 1995* (Cth) is to facilitate proof of records that are otherwise admissible and that s 155 is not a general exception to Chapter 3 in relation to admissibility of evidence.<sup>93</sup> French J, following the decision in *Tuncok*, held that while s 155 authorises the production of evidence of a Commonwealth record, it does not render evidence of such a record proof of the truth of its contents.<sup>94</sup> The statement of reasons signed by the Minister would be admissible only to show that the Minister states that these are his or her reasons, but not to establish the correctness or reliability of that statement.<sup>95</sup> Given that it was for the latter purpose that the statement of reasons was tendered, it was held not to be admissible by virtue of s 155 having regard to the operation of the hearsay rule.<sup>96</sup>

### The Commissions' view

6.71 French J held that s 155 did no more than facilitate proof of the record of reasons the Minister sought to tender but did not address the question of admissibility of the record as the Minister's reasons. The evidence before French J was an affidavit sworn by the solicitor exhibiting the alleged reasons. As there was an issue as to whether these were the true reasons for the original decision, French J, correctly in the Commissions' view, approached the tender of the record as a question of admissibility and ruled that the hearsay rule applied to render the evidence inadmissible. The solution was for the Minister to swear the requisite affidavit. The Commissions concluded in DP 69 that, in that event, there did not appear to be any need for amendment of the uniform Evidence Acts.<sup>97</sup>

6.72 The Commissions also concluded that the structure of the Acts and the purposes of the provisions in Chapters 3 and 4 are clear. If there is any uncertainty, the decision in *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* has clarified the matter and there is no need for further statutory clarification.<sup>98</sup>

6.73 No submissions or consultations in response to DP 69 addressed this issue. Accordingly, the Commissions remain of the view that no amendment is required.

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93 Ibid, [64]. His Honour stated that 'not every Commonwealth record is admissible in all proceedings': [64]. An appeal by Mr Tuncok to the Full Court of the Federal Court on grounds not related to the evidence point was dismissed: *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172.

94 *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33, [53].

95 Ibid, [54].

96 Ibid, [54].

97 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [6.76].

98 Ibid, [6.77].

## Admissibility of banking records

6.74 The CDPP raises another issue not investigated in DP 69 relating to the admissibility of business records of financial institutions, such as banking records.<sup>99</sup> It points to the requirement in s 170(2) of the uniform Evidence Acts that an affidavit be provided by an officer of the financial institution who at the time the record was prepared, or afterwards, had a position of responsibility in relation to making or keeping the record.

6.75 The CDPP states that ‘meeting this requirement imposes a not inconsiderable burden on law enforcement agencies as well as financial institutions, despite, in practice, few challenges being made to the veracity of such records’.<sup>100</sup> It submits that consideration should be given to facilitating the admissibility of these records. It suggests as a template s 79C(2a) and 79C(2b) of the *Evidence Act 1906* (WA), which provide a more streamlined approach to the admissibility of such evidence.

6.76 The CDPP also refers to the requirement in s 170(2) of the uniform Evidence Acts for evidence to be given in the form of an affidavit, or by a written statement if the evidence relates to a public document. It points out that s 74 of the *Criminal Procedure Act 1986* (NSW) provides that prosecution evidence in committal proceedings must be given by way of a statement which complies with the requirements of that Act, with the result that evidence must be produced in statement form at the committal and in affidavit form at the trial. The CDPP submits that, in order to avoid this dichotomy, s 170(2) should be amended by deleting the words ‘or if the evidence relates to a public document’ appearing in s 170(2). This would mean that a written statement or an affidavit would be admissible to prove the relevant matters at both the committal and the trial depending on the relevant procedural requirements of the relevant jurisdiction.

6.77 The CDPP has made constructive suggestions for improving the operation of s 170. However, the Commissions are not satisfied that there is sufficient evidence that the present operation of this section is of such concern as to merit statutory amendment. No other submissions were received on the point and, as it was raised late in the Inquiry, the Commissions were unable to consult widely on it.

6.78 Furthermore, the view that existing formalities for tendering banking records are overly strict rests on the assumption that these documents are reliable. However, this assumption is not necessarily correct, at least to the extent that banking records are so highly reliable that simpler formalities are justified. The above discussion in relation to ss 146 and 147 of the uniform Evidence Acts makes clear that the accuracy and reliability of electronic records (which most banking records are) cannot be assumed. Accordingly, the Commissions do not recommend amendment of the section.

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<sup>99</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

<sup>100</sup> *Ibid.*

## 7. The Hearsay Rule and Section 60

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### Introduction

7.1 This chapter discusses the hearsay rule, as codified in s 59 of the uniform Evidence Acts. Also discussed is the most controversial exception to the hearsay rule—the exception for evidence admitted for a non-hearsay purpose which is relevant for a hearsay purpose.<sup>1</sup> There are two other categories of exception. One category applies to first-hand hearsay—that is, where the maker has personal knowledge of the asserted fact.<sup>2</sup> The other category applies to second-hand and more remote hearsay.<sup>3</sup>

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1 *Evidence Act 1995* (Cth) s 60; *Evidence Act 1995* (NSW) s 60; *Evidence Act 2004* (NI) s 60; *Evidence Act 2001* (Tas) s 60. In terms of the order in which the provisions of the Acts are applied, however, s 60 only applies once the evidence is admitted for another purpose. It is not the ‘first’ hearsay exception in that sense.

2 *Evidence Act 1995* (Cth) ss 63–66; *Evidence Act 1995* (NSW) ss 63–66; *Evidence Act 2004* (NI) ss 63–66; *Evidence Act 2001* (Tas) ss 63–66.

3 *Evidence Act 1995* (Cth) ss 69–75; *Evidence Act 1995* (NSW) ss 69–75; *Evidence Act 2004* (NI) ss 69–75; *Evidence Act 2001* (Tas) ss 69–75.

These categories of exception are considered in Chapter 8. Aspects of the hearsay rule arising in special contexts are discussed elsewhere, including in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs (Chapter 19), as well as evidence in sexual offence cases, from child witnesses and in family law proceedings (Chapter 20).

7.2 Two recommendations are made for legislative amendment of ss 59 and 60. As the discussion of case law below will show, these recommendations are made because the operation of ss 59 and 60 is unclear in certain respects and would benefit from clarification in the light of experience and judicial interpretation since enactment of the uniform Evidence Acts. There is a risk that confusion will prevent the intention of the legislation being fully implemented. There is also a need to limit the operation of s 60 as it relates to hearsay evidence in criminal trials.

7.3 The first part of the chapter will describe the hearsay rule established by s 59 and an interpretive difficulty posed by s 59. Discussion will then turn to s 60, which provides an exception to the hearsay rule for evidence admitted for a non-hearsay purpose but which is relevant for a hearsay purpose.

## **The hearsay rule**

### **The uniform Evidence Acts and the common law**

7.4 Section 59 of the uniform Evidence Acts provides a general exclusionary hearsay rule:

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an *asserted fact*.

7.5 The Acts then provide exceptions to this rule in the three categories described above. Reasonable notice in writing is required in some circumstances where a party intends to adduce hearsay evidence.<sup>4</sup> The requirement of notice is discussed in Chapter 8.

7.6 The hearsay rule applies to evidence of representations made out of court—whether oral, written, or in the form of conduct—that are led as evidence of the truth of the fact the maker of the representation intended to assert by the representation. ‘Representation’ is a term defined by the uniform Evidence Acts.<sup>5</sup> The operation of the hearsay rule under the Acts resembles the operation of the hearsay rule at common law in that a general hearsay rule is adopted to which exceptions apply. Yet the scope of

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4 *Evidence Act 1995* (Cth) s 67; *Evidence Act 1995* (NSW) s 67; *Evidence Act 2004* (NI) s 67; *Evidence Act 2001* (Tas) s 67.

5 *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2004* (NI) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3.

the s 59 hearsay rule and the common law hearsay rules differs. The exceptions to the hearsay rule under the Acts also differ in nature and scope from the exceptions—both common law and statutory—which qualified the common law hearsay rule.

7.7 Exceptions to the common law hearsay rule include: contemporaneous narrative statements; statements of deceased persons; dying declarations; declarations in the course of duty; declarations as to public or general rights; declarations of pedigree; statements in public documents; and out of court admissions and confessions. Statutory exceptions apply, for example, to business records and computer evidence.<sup>6</sup>

7.8 The common law hearsay rule and its judge-made exceptions were characterised by the ALRC in its previous Evidence inquiry as capable of excluding probative evidence and as overly complex, technical, artificial and replete with anomalies.<sup>7</sup> In addition, statutory provisions modifying the common law rules at the time were stated to be overly complex, overlapping and unrealistic in practice.<sup>8</sup>

### The policy of the Acts

7.9 The ALRC stated that the retention of an exclusionary rule for hearsay evidence was justified on the following grounds:

- out of court statements are usually not on oath;
- there is usually an absence of testing by cross-examination;
- the evidence might not be the best evidence;
- there are dangers of inaccuracy in repetition;
- there is a risk of fabrication;
- to admit hearsay evidence can add to the time and cost of litigation; and
- to admit hearsay evidence can unfairly catch the opposing party by surprise.<sup>9</sup>

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6 For example, *Evidence (Business Records) Interim Arrangements Act 1984* (NT) (business records); *Evidence Act 1906* (WA) ss 79B–79F (business records); *Evidence Act 1929* (SA) s 45A (computer evidence); *Evidence Act 1958* (Vic) s 55B (computer evidence).

7 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [329]–[340].

8 Ibid, [341]–[345].

9 See Ibid, [661]–[675]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [126].

7.10 The policy framework for the ALRC's hearsay evidence proposals was set out in ALRC 26 and ALRC 38.<sup>10</sup> The starting point was the proposition that the 'best evidence available' to a party should be received. The view was taken that this would assist parties to present all relevant evidence and give the courts competing versions of the facts. In so doing, the appearance and reality of the fact-finding exercise would, on balance, be enhanced and so, in that respect, would the fairness of the trial process.

7.11 The concept of 'best available evidence' was said to involve two elements—the quality of the evidence and its availability.<sup>11</sup>

7.12 A distinction was drawn between first-hand and more remote hearsay for reasons to do with the quality of evidence. The view was taken that more remote hearsay is generally so unreliable that it should be inadmissible except where there are some guarantees of reliability. It was considered that remote hearsay would usually be of no value to the party seeking to call it and would only add to the time and cost of proceedings and difficulties in assessing its weight. Reasons to do with the quality of evidence also led to a distinction being drawn between statements made while relevant events were 'fresh in the memory' and statements which were not.<sup>12</sup>

7.13 Quality aside, the availability of evidence raises at least two issues—the physical availability of a witness or evidence; and the difficulty of producing a witness or evidence to the court, if available. It was observed that what is the best available evidence may depend upon balancing the importance and quality of evidence against the difficulty of producing it—in other words, balancing factors to do with the quality and availability of evidence.<sup>13</sup>

7.14 This general policy approach was subject to a major qualification for criminal trials. The concern to minimise wrongful convictions requires a more cautious approach to the admission of hearsay evidence against an accused. It was considered important that the accused be able to confront those who accuse him or her. Where the maker of the representation is unavailable, it was thought that some guarantees of trustworthiness should be required. At the same time, the concern to protect people from wrongful conviction was thought to justify fewer limits on the admissibility of evidence led by an accused person.<sup>14</sup>

7.15 The ALRC considered that, where relaxation of the hearsay rule leads to an increase in the hearsay evidence admissible, safeguards should be employed to minimise surprise and the possibility of fabrication, and to enable the party against

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10 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [48]–[49], [676]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [27]–[47], [139].

11 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678].

12 *Ibid.*, [678].

13 *Ibid.*, [678].

14 *Ibid.*, [679].

whom the evidence is led to investigate, meet and test the evidence, whether by cross-examination or other means.<sup>15</sup>

7.16 A final policy concern identified was the impact on costs. It was noted that, while relaxation of the hearsay rule can save costs, it can also result in more evidence being led and collateral issues being raised. A concern also raised in this context was the need for clarity and simplicity.<sup>16</sup> For this reason, and the other concerns mentioned above, the view was taken that a cautious approach to any relaxation of the hearsay rule was warranted.<sup>17</sup>

7.17 It should also be noted that considerations of quality were identified as important to the general framework of the uniform Evidence Acts. The ALRC commented:

To the extent that the [civil trial] system operates under rules, the more anomalous, technical, rigid and obscure the rules seem, the more the system's acceptability is lessened. The parties in a case can meet the situation by agreeing to ignore or waive the more unsatisfactory rules, as widely happens in the conduct of trials at present, particularly civil trials. This, however, only results in the rules lying in wait for the unwary and the party who does not have legal representation. Any rules or proposals that are complicated, difficult to understand or apply, produce anomalies, lack flexibility where this is needed or are very technical, require justification.<sup>18</sup>

7.18 Against this background, the first topic to consider is the interpretive difficulty posed by s 59. In particular, what is the meaning of 'intention' in that section?

## Unintended assertions

### The significance of 'intention'

7.19 Focusing on the terms of s 59, the uniform Evidence Acts exclude, as hearsay, evidence of a representation that is sought to be adduced to prove a fact that a person *intended* to assert by the representation. The term 'representation' is defined to include 'an express or implied representation', as well as unintended and uncommunicated representations, and representations to be inferred from conduct.<sup>19</sup>

7.20 The reliance by s 59 on the distinction between intended and unintended assertions must be understood against the common law background. Before the enactment of the uniform Evidence Acts there were (and, in Australian jurisdictions not operating under the Acts, there still are) irreconcilable authorities and commentary

<sup>15</sup> Ibid, [680].

<sup>16</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [46].

<sup>17</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [681].

<sup>18</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [34]–[35]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [36], [62].

<sup>19</sup> *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2004* (NI) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3.

as to whether implied representations of different kinds fell within the hearsay rule.<sup>20</sup> The ALRC stated that its proposed formulation of the hearsay rule was meant to resolve the issue of whether the hearsay rule should apply to implied (as well as express) representations by recommending that a different distinction be drawn: that is, between intended and unintended assertions, with the latter outside any hearsay rule.<sup>21</sup>

7.21 By placing unintended assertions outside the proposed hearsay rule, the ALRC envisaged that evidence of unintended assertions could be admissible as evidence of the truth of those assertions.<sup>22</sup> For example, on the facts of *Walton v The Queen*,<sup>23</sup> evidence that the child answered the telephone ‘Hello Daddy’ would generally not be hearsay as defined in s 59 when used to prove the identity of the caller, because it is unlikely the child would intend to assert the identity of the caller.<sup>24</sup> By contrast, at common law, the statement was held by the High Court in *Walton v The Queen* to be hearsay and therefore inadmissible as evidence of the identity of the caller.<sup>25</sup>

7.22 Given the terms of the hearsay rule in s 59 and its exceptions, as well as the policy underpinnings of the ALRC’s approach as adopted by the parliaments of the uniform Evidence Act jurisdictions, much turns on the meaning of ‘intention’, particularly as that term operates in s 59.

## The meaning of ‘intention’

### The United States approach

#### Rule 801

7.23 The distinction between intended and unintended assertions also arises in the United States. The framing of s 59 was influenced by the approach taken in the United States *Federal Rules of Evidence*.<sup>26</sup> Rule 801 of the *Federal Rules of Evidence* defines hearsay as:

a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

7.24 A ‘statement’ is defined as ‘(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion’.<sup>27</sup> The definition of ‘statement’ is said to exclude from the operation of the hearsay rule all evidence of

20 See J Heydon, *Cross on Evidence* (7th ed, 2004), [31035]–[31070] and the citations in [31035] fn 50.

21 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

22 Ibid, [684].

23 *Walton v The Queen* (1989) 166 CLR 283.

24 M Aronson, ‘Goodbye Hearsay: Hello Relevance—Subjective Statements under Section 48 of the New South Wales Evidence Bill 1991’ (1991) 65 *Australian Law Journal* 596, 601–602, 605.

25 However, the statement was able to be used as circumstantial evidence from which an inference could be drawn that the caller was the accused. Possible difficulties with this approach are discussed in: C Tapper, ‘Hillmon Rediscovered and Lord St Leonards Resurrected’ (1990) 106 *Law Quarterly Review* 441.

26 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.800], fn 77.

27 *Federal Rules of Evidence* (US), r 801.



conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.<sup>28</sup>

### **Reasoning behind Rule 801**

7.25 The commentary by the Advisory Committee on Rules<sup>29</sup> states, with respect to nonverbal conduct ‘offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred’, that

while evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.<sup>30</sup>

7.26 Similar considerations are said to govern non-assertive verbal conduct,<sup>31</sup> and verbal conduct which is assertive, but offered as a basis for inferring something other than the matter asserted.<sup>32</sup> Such evidence is also excluded from the definition of hearsay.<sup>33</sup> It may be noted in passing that parallel reasoning was found by the ALRC to support a hearsay rule that only applied to intended assertions:

Evidence of conduct, including statements from which an implied assertion of a fact can be drawn, suffers from weaknesses similar to those which affect evidence of express assertions of fact—the dependence on the perception, memory and clarity and behaviour of the ‘asserter’ and the inability to test them by cross-examination of the ‘asserter’. It will not, however, suffer from dependence on the veracity of the asserter unless the asserter intended that the assertion be implied from his [or her] conduct. If

28 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <[www.law.cornell.edu/rules/fre/ACRule801.htm](http://www.law.cornell.edu/rules/fre/ACRule801.htm)> at 22 November 2005.

29 The Advisory Committee on Rules is a committee of the United States Judicial Conference’s Committee on Rules of Practice and Procedure. The Judicial Conference approves rules of practice, procedure, and evidence for the federal courts, which are then prescribed by the Supreme Court and subject to Congressional review: L Meham, *The Rulemaking Process: A Summary for the Bench and Bar* (2004) UC Courts <<http://www.uscourts.gov/rules/proceduresum.htm>> at 22 November 2005.

30 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <[www.law.cornell.edu/rules/fre/ACRule801.htm](http://www.law.cornell.edu/rules/fre/ACRule801.htm)> at 22 November 2005.

31 See, eg, the use of nicknames in *United States v Weeks* 919 F2d 248 (5th Circuit, 1990), discussed below.

32 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <[www.law.cornell.edu/rules/fre/ACRule801.htm](http://www.law.cornell.edu/rules/fre/ACRule801.htm)> at 22 November 2005.

33 Rule 801 is said to place the burden upon the party claiming that the intention existed, with ambiguous and doubtful cases to be resolved in favour of admissibility: *Ibid*. Another view is that the Advisory Committee’s assertion is not supported by the wording of Rule 801 and that the party arguing for admission should have to show that the statement is not hearsay as the witness did not intend the statement to substitute for an assertion. This latter position appears to be the case under the *California Evidence Code*: see M Mendez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and its Exceptions* (2002) California Law Revision Commission <[www.clrc.ca.gov/pub/2002/MM02-41.pdf](http://www.clrc.ca.gov/pub/2002/MM02-41.pdf)> at 22 November 2005.

the implied assertion is unintended, then it is unlikely that there was any deliberate attempt to mislead.<sup>34</sup>

### ***Attitudes to Rule 801***

7.27 The distinction made by the *Federal Rules of Evidence* between intended and unintended assertions has been criticised on the ground that the distinction results in the admission of unreliable communications. Requiring intent to be shown has been said to complicate the hearsay rule unnecessarily. It is said the distinction between intended and unintended communications has led to inconsistencies in its application to unintended implications of speech.<sup>35</sup>

7.28 On the other hand, those who favour an intent-based approach to implied assertions consider that hearsay risks are reduced greatly where statements intentionally asserting one thing are used to prove something else that the person was not trying to say. That is, the person is unlikely to have intended to mislead on matters that the person had no intention to communicate. An intent-based test also allows the hearsay rule to exclude exaggerated, metaphorical or sarcastic statements where these are offered to prove the truth of the implied and intended meaning.<sup>36</sup>

7.29 Most United States commentators are said to favour an ‘intent-based’ approach toward implied assertions.<sup>37</sup> The authors of the *Federal Rules of Evidence Manual* observe that an intent-based approach to implied assertions is not free from difficulty:

There is some indeterminacy in the application of any intent-based test ... But any problem, we think, can be adequately handled by an objective, rather than subjective, test of intent. The question should be whether a reasonable person making a statement such as the declarant made would have intended to communicate the implied assertion that the proponent is offering for its truth. As with conduct, the burden should be placed on the nonoffering party to show that the declarant had the intent to communicate the implied assertion.<sup>38</sup>

### ***Case law on Rule 801***

7.30 There is much United States case law involving the distinction between intended and unintended assertions, including in situations comparable to that considered in *R v Hannes*,<sup>39</sup> discussed below. For example, one may contrast the outcomes in *United States v Weeks*<sup>40</sup> and *United States v Berrios*.<sup>41</sup>

<sup>34</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

<sup>35</sup> See, eg, P Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence* American University (2005) American University <[www.wcl.american.edu/pub/journals/evidence](http://www.wcl.american.edu/pub/journals/evidence)> at 22 November 2005.

<sup>36</sup> S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

<sup>37</sup> Ibid, [801.02], fn 20. See also G Weissenberger, ‘Unintended Implications of Speech and the Definition of Hearsay’ (1992) 65 *Temple Law Review* 857.

<sup>38</sup> S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

<sup>39</sup> *R v Hannes* (2000) 158 FLR 359.

<sup>40</sup> *United States v Weeks* 919 F2d 248 (5th Circuit, 1990).

<sup>41</sup> *United States v Berrios* 132 F3d 834 (1st Circuit, 1998).

7.31 In *United States v Weeks*, Weeks was charged with kidnapping and carrying a firearm during a crime of violence. The victims testified that their abductors used the names 'Jimmy' and 'Gato' in addressing each other. To establish that Weeks was 'Gato', the prosecution called a prison officer who testified that he had heard other prison officers and inmates refer to Weeks in the third person as 'Gato'. The United States Court of Appeals for the Fifth Circuit held that evidence of these out of court statements was properly admitted. It was not shown that these persons were intending to communicate an implied assertion that Weeks was nicknamed 'Gato'.<sup>42</sup>

7.32 In contrast, in *United States v Berrios*, the prosecution had proof that a man named 'Pablo' was a drug dealer, and sought to prove that the defendant went by that nickname. The defendant called a witness who would have testified that she was present at a drug deal with her husband, and that her husband introduced her to the seller, saying 'This is Pablo'. The witness would have testified that the person introduced as 'Pablo' was not the defendant. The United States Court of Appeals for the First Circuit held that the out of court statement of the witness' husband, 'This is Pablo', was properly excluded as hearsay.<sup>43</sup> This result can be justified on the basis that the intention of the husband was to assert to his wife that the person went by the name 'Pablo', and the evidence was adduced for the purpose of proving that fact.<sup>44</sup>

### **Conclusion on Rule 801**

7.33 In the United States, the distinction between intended and unintended assertions has been codified in the *Federal Evidence Code* since 1975, and built on similar provisions in the *California Evidence Code* enacted in 1965. While the matter has not been free of controversy, a survey of the American case law and commentary leads the Commissions to the view that the United States provisions have operated satisfactorily and are conceptually sound.

### **The uniform Evidence Act approach**

7.34 The quality of 'intention' necessary for an assertion to be 'intended' under s 59 was considered by the New South Wales Court of Criminal Appeal in *R v Hannes*.<sup>45</sup>

7.35 The court considered the application of s 59 to a written impression on the appellant's notebook, which read: 'Am confident I have full story after my conversations with Mark in London; But must take Mark with me to Australian Securities Commission otherwise will not be believed'. The appellant (accused) submitted, among other things, that the note should be admitted as an implied assertion

42 *United States v Weeks* 919 F2d 248 (5th Circuit, 1990), 252.

43 *United States v Berrios* 132 F3d 834 (1st Circuit, 1998), 838.

44 S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

45 *R v Hannes* (2000) 158 FLR 359.

that a person called Mark Booth existed and that the appellant had met him in connection with the relevant events. The prosecution's case was that Hannes had done acts for which he was criminally liable while using the name Mark Booth, and that Mark Booth was a fiction.

### ***Judgment of Spigelman CJ***

7.36 Spigelman CJ observed that, if the word 'intended' in s 59 requires 'some form of specific conscious advertence' on the part of the person making the representation, 'then very few of the implied assertions considered in the case law and legal literature' prior to ALRC 26 would be included.<sup>46</sup> That is because matters left to implication are generally inconsistent with 'intent' in the sense of 'specific conscious advertence'.<sup>47</sup> He added that nothing in ALRC 26 or the text of the *Evidence Act 1995* (NSW) suggests that parliament or the ALRC only intended s 59 to exclude evidence of previous representations to which the representor had specifically and consciously adverted.<sup>48</sup>

7.37 Hence, Spigelman CJ thought evidence of previous representations to which the representor specifically and consciously adverted would be excluded by s 59, but that s 59 also excluded evidence of other assertions. He said it is arguable that the scope of the word 'intended' in s 59(1) 'goes beyond the specific fact subjectively adverted to by the author as being asserted by the words used' and that '[i]t may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to'.<sup>49</sup>

7.38 Support for this view was drawn from *Pollitt v The Queen*,<sup>50</sup> where McHugh J said:

The objection to hearsay evidence is that it is unreliable—the declarant is not subject to cross-examination and his or her truthfulness and powers of memory, recall, perception and narration cannot be tested. Because the reliability of an implied assertion is dependent upon the material expressly stated, the grounds for excluding express assertions are equally applicable to implied assertions. Consequently, for the purpose of the hearsay rule, implied as well as express assertions are regarded as 'contained' in an out-of-court statement.<sup>51</sup>

7.39 On this basis, Spigelman CJ reasoned that

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<sup>46</sup> The reason ALRC 26 was taken as a reference point is presumably that the ALRC's report reviewed the existing case law on implied assertions and provisionally recommended enactment of statutory provisions in the form that fell to be construed in *Hannes*.

<sup>47</sup> *R v Hannes* (2000) 158 FLR 359, [359].

<sup>48</sup> *Ibid*, [360].

<sup>49</sup> *Ibid*, [361].

<sup>50</sup> *Pollitt v The Queen* (1992) 174 CLR 558.

<sup>51</sup> *Ibid*, 620, citing *Wright v Doe d Tatham* (1837) 7 Ad & E 313; 32 ER 488; *R v Blastland* [1986] AC 41; *Walton v The Queen* (1989) 166 CLR 283, 292; *R v Benz* (1989) 168 CLR 110, 143; *R v Kearley* [1992] 2 AC 228.

an implied assertion of a fact necessarily assumed in an intended express assertion, may be said to be ‘contained’ within that intention. For much the same reasons, it is often said that a person intends the natural consequences of his or her acts.<sup>52</sup>

### ***Judgment of Studdert J***

7.40 Studdert J seemed to maintain that ‘specific conscious advertence’ would be presumed:

Prima facie, the [defendant] intended to write what appears in [the document] at the time he wrote it. Absent evidence to the contrary, it could not be inferred that the [defendant] did not intend to assert by what he wrote the very matters which the [defendant] contends emerged from a reading of the document.<sup>53</sup>

7.41 Studdert J’s approach would often produce similar outcomes to Spigelman CJ’s approach, but has a different focus. Like Spigelman CJ’s approach it envisages that a person will be taken to intend to assert a fact even though he or she never specifically or consciously adverted to the fact provided an intention to assert a fact ‘emerges from a reading of the document’. Dowd J preferred Spigelman CJ’s approach.<sup>54</sup>

### ***Effect of Hannes***

7.42 Applying either approach, it appears that the imprint in *Hannes* would be read as intending to assert the existence of a person called Mark, and would therefore be excluded as hearsay under s 59(1). Spigelman CJ said this ‘may well’ be the case;<sup>55</sup> Studdert J said it was the case.<sup>56</sup> It was not necessary to decide the question because it was held that the evidence failed the relevance test in s 55.<sup>57</sup>

7.43 On one view, Spigelman CJ’s approach has no limitations. For if ‘intention’ for the purposes of s 59 means ‘any fact which is a necessary assumption underlying the fact that the assessor ... subjectively advert[s] to’,<sup>58</sup> a person making a simple representation in the form of an oral communication would be taken to intend to assert a very large number of facts. This is because the necessary assumptions of a simple oral representation include:

- that the assumption is capable of being understood;

52 *R v Hannes* (2000) 158 FLR 359, [357]. Dowd J agreed with the reasoning of Spigelman CJ and the reasoning of Studdert J except in so far as Studdert J disagreed with the Chief Justice about the document in question.

53 *Ibid.*, [477].

54 *Ibid.*, [485].

55 *Ibid.*, [355].

56 *Ibid.*, [478].

57 *Ibid.*, [337], [474].

58 *Ibid.*, [361].

- that other persons exist who have knowledge of the linguistic, social and other ‘public conventions’<sup>59</sup> relied on by the representor in making the oral assertion; and
- that consequences will follow from breach of those norms, whatever those consequences may be.<sup>60</sup>

7.44 Although these assumptions fall within Spigelman CJ’s test, it is undesirable to apply s 59 to them. As the Commissions noted in DP 69, adoption of the view could cause considerable practical difficulties.<sup>61</sup>

7.45 Practical outcomes aside, Spigelman CJ’s reasoning is problematic. As noted above, his Honour said ‘an implied assertion of a fact necessarily assumed in an intended express assertion, may be said to be “contained” within that intention’.<sup>62</sup> By this, his Honour appears to have meant that, where an implied assertion is necessarily assumed in an express assertion, *intention to make* the implied assertion is ‘contained’ within the *intention to make* the express assertion. Accordingly, s 59 would necessarily apply to express and to intended and unintended implied assertions.

7.46 This interpretation gives rise to difficulties.

- The passage of McHugh J’s judgment in *Pollitt v The Queen* cited by the Chief Justice represents a wide but not uniformly accepted view of the admissibility of evidence of implied assertions under the common law hearsay rule. There were also narrower approaches.<sup>63</sup>
- The ALRC chose not to follow any of the approaches to implied assertions available at common law—some of which excluded implied assertions as hearsay, and some of which did not.<sup>64</sup> It is questionable whether reliance on any of the common law approaches is possible under s 59, which distinguishes between intended and unintended assertions, not express and implied

59 See S Guest, ‘The Scope of the Hearsay Rule’ (1985) 101 *Law Quarterly Review* 385, 389–390.

60 See also Ibid, 389–390 as to what is a ‘statement’ for the purposes of the common law hearsay rule.

61 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.47]. Further, if this range of matters is taken to be asserted, s 60 has extremely wide potential application. This would also be the case under Studdert J’s approach to s 59. Contrast the narrow approach to s 60 taken by the High Court in *Lee v The Queen* (1998) 195 CLR 594.

62 *R v Hannes* (2000) 158 FLR 359, [357].

63 R Cross, ‘The Scope of the Rule Against Hearsay’ (1956) 72 *Law Quarterly Review* 91; M Weinberg, ‘Implied Assertions and the Scope of the Hearsay Rule’ (1973) 9 *Melbourne University Law Review* 268; S Guest, ‘The Scope of the Hearsay Rule’ (1985) 101 *Law Quarterly Review* 385; S Guest, ‘Hearsay Revisited’ (1988) 41 *Current Legal Problems* 33; A Rein, ‘The Scope of Hearsay’ (1994) 110 *Law Quarterly Review* 431; J Heydon, *Cross on Evidence* (7th ed, 2004), [31035]–[31070].

64 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [78].

assertions.<sup>65</sup> The distinction adopted between intended and unintended assertions has been described above.<sup>66</sup>

7.47 Spigelman CJ said his approach to the meaning of ‘intention’ in s 59 was based on ‘much the same reasons’ as the proposition ‘that a person intends the natural consequences of his or her acts’. A maxim or presumption to this effect is sometimes used to impose criminal liability in the United Kingdom.<sup>67</sup> However, in *Parker v The Queen*, the High Court of Australia said the introduction of a maxim or statement of this kind is ‘seldom helpful and always dangerous’.<sup>68</sup>

7.48 The Commissions observe that, on the United States’ position stated above, the notes in *Hannes* could be viewed as *not* containing an intended implied assertion that ‘Mark’ existed and was involved in the events of interest in the case. If so, the representations in the notes would not be hearsay if offered as proof of these facts. However, the prosecution could then raise the possibility of fabrication to support a contrary inference. Whether the assertion was intended would depend on the particular facts, including the surrounding circumstances.

### ***Critical response to Hannes***

7.49 Stephen Odgers SC considers that the approach suggested by Spigelman CJ should not be adopted. He states that the concern expressed by Spigelman CJ (about an overly restrictive interpretation of an ‘intended’ assertion) is ‘somewhat misplaced’ given that, in these circumstances, the party arguing for admission of the evidence as evidence not excluded by s 59 would have to satisfy the court that the representation was *not* intended to assert the existence of a fact. This view finds support in Studdert J’s reasoning. Odgers also contends that there is no reason to believe the ALRC envisaged ‘intention’ meaning anything other than ‘specific conscious advertence’ for the purposes of s 59.<sup>69</sup>

65 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [682] says: ‘The approach taken in the proposals is to develop a new and *comprehensive* set of exceptions’ (emphasis added). Contrast *R v Ung* (2000) 173 ALR 287, [46]–[53].

66 See also Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.46]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

67 *Director of Public Prosecutions v Smith* [1961] AC 290, 327–8.

68 *Parker v The Queen* (1963) 111 CLR 610, 632, citing *Stapleton v The Queen* (1952) 86 CLR 358, 365. For that reason, the court refused to follow a House of Lords authority for the first time since the creation of the High Court in 1903: see W Gummow, ‘The High Court of Australia and the House of Lords 1903–2003’ in G Doeker-Mach and K Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (2004) 43, 44–5; T Blackshield, ‘Parker v The Queen’ in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 523.

69 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.800].

7.50 On the other hand, Gans and Palmer state that the wider meaning of the word ‘intended’ adopted by Spigelman CJ is ‘a desirable way of achieving s 59(1)’s continuing rationale of ensuring that the fact-finder is not exposed to the risk of deliberate deception without the assistance of the trial’s processes for assessing witnesses’.<sup>70</sup> This relies on a view that s 59 is designed not only to ensure that fact-finders are assisted in detecting intentional deception, but also to ensuring the availability of trial processes such as cross-examination to resolve the possibility of ambiguity or mistake.

### **Amendment of s 59?**

7.51 The question was asked in IP 28 whether concerns are raised by the application of s 59 of the uniform Evidence Acts to previous representations containing implied assertions and whether any such concerns should be addressed through amendment of the uniform Evidence Acts—for example, to clarify the meaning of ‘intended’ in relation to implied assertions.<sup>71</sup>

7.52 In DP 69, the Commissions proposed that s 59 should be amended to provide that

in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.<sup>72</sup>

The Commissions also discussed whether ‘intention’ in s 59 should mean the subjective intention of the person who made the representation out of court.

### **Submissions and consultations on DP 69**

7.53 Two submissions propose that no amendment of s 59 be made. The New South Wales Public Defenders Office opposes the amendment of s 59 on the basis that the proposed amendment replaces a simple test with a similar but much more complicated test.<sup>73</sup> Similarly, the Law Society of New South Wales considers that a case has not been made for amendment of s 59 to provide expressly for a test of intention as proposed.<sup>74</sup>

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70 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 177.

71 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–1.

72 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–1.

73 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005. See also Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

74 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.



7.54 Other submissions favour amending s 59 to broaden the hearsay rule to apply to both express and implied assertions, thereby abandoning the distinction drawn in s 59 between intended and unintended assertions.<sup>75</sup> Support also exists for an amendment expressly to provide that s 59 covers the extended meaning given to the word ‘intention’ by Spigelman CJ in *Hannes*.<sup>76</sup>

7.55 However, Proposal 7–1 did receive substantial support.<sup>77</sup> One senior practitioner suggests that there is no way intention can be determined other than by the test proposed in DP 69.<sup>78</sup> Although submissions and consultations did not always articulate their support for Proposal 7–1 in such clear terms, the sentiment in this senior practitioner’s response was widely reflected.

### The Commissions’ view

7.56 A detailed study of the various approaches to hearsay taken at common law was undertaken by the ALRC in its previous Evidence inquiry. An approach raised as a possibility for adoption in the uniform Evidence Acts was that the hearsay rule should be defined to exclude evidence of all express and implied assertions made out of court. The proposal was ultimately rejected. The ALRC said:

To make unintended implied assertions subject to a hearsay rule and its exceptions could give rise to considerable practical difficulties. Every piece of human conduct is an assertion of something, even if it is only an assertion by the actor that he [or she] intends to perform the action that he [or she] engaged in. In many cases, evidence of intention or state of mind is not direct. The intent or state of mind is inferred or implied from the conduct engaged in by a person. From that conduct the inference is drawn that the person intended to do the act complained of. The result of including unintended implied assertions in the definition may, therefore, be that the hearsay proposal would embrace evidence of relevant acts, however detailed and complicated they may be, because it is sought to tender such evidence to prove, *inter alia*, the intent or state of mind of a relevant person. Depending on the proposed exceptions and procedures, trials could be seriously disrupted and much evidence excluded.<sup>79</sup>

75 Law Council of Australia, *Submission E 32*, 4 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005; K Arenson, *Submission E 67*, 13 September 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

76 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005; J Gans, *Consultation*, Melbourne, 17 August 2005.

77 Australian Federal Police, *Submission E 92*, 20 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Victoria Police, *Submission E 111*, 30 September 2005; Confidential, *Consultation*, Sydney, 27 July 2005; Confidential, *Consultation*, Brisbane, 9 August 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005; A Cossins, *Consultation*, Sydney, 3 August 2005.

78 Confidential, *Consultation*, Brisbane, 9 August 2005.

79 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

7.57 While the Commissions are of the view that the ALRC's reasoning remains valid, the concerns that have been raised, particularly in *R v Hannes*, indicate a need for the uniform Evidence Acts to give more guidance on the definition of hearsay evidence.

7.58 Amendment of s 59 to exclude all express and implied assertions, thereby discarding the distinction drawn in s 59 between intended and unintended assertions, is not the answer. The defined rule in s 59 is a significant improvement on the uncertainty surrounding the common law rule, the scope of which is disputed.

7.59 Until recent and significant statutory changes were made to the hearsay rule in the United Kingdom,<sup>80</sup> debate continued about whether implied assertions are excluded as hearsay at common law. The outcome of that debate was the conclusion that 'the presence of an intention to assert provides the most defensible watershed between hearsay and non-hearsay both as a matter of logical coherence and of practical commonsense'<sup>81</sup>—the basis upon which s 59 rests. A return to the distinction between express and implied assertions would result in adoption of what was recognised in the United Kingdom as an indefensible distinction.

***The meaning of 'intention' should be clarified***

7.60 It is important that there be a definition of hearsay evidence and that it be the most appropriate that can be devised. An issue of concern is that the practical outcomes of defining 'intention' along the lines discussed in *Hannes* could cause disruption if adopted. Those outcomes should be avoided by giving further definition to 'intention' in s 59.

7.61 The test proposed by the Commissions in DP 69<sup>82</sup> is external to the maker of the representation. It proceeds on the basis that 'intention may properly be inferred from the external and objective manifestations normally taken to signify intention'.<sup>83</sup> Intent or state of mind is inferred from the conduct engaged in by a person.<sup>84</sup> Investigation into the subjective mindset of the representor is not required. A subjective approach requires the party opposing a finding that a fact was subjectively intended to be asserted to do battle with the intangible shadows of subjective intentions, to use Deane

80 *Civil Evidence Act 1995* (UK) s 1; *Criminal Justice Act 2003* (UK) s 118(2). See C Tapper, *Cross and Tapper on Evidence* (10th ed, 2004), 615–618, 633–699.

81 C Tapper, *Cross and Tapper on Evidence* (8th ed, 1995), 573; S Guest, 'Hearsay Revisited' (1988) 41 *Current Legal Problems* 33, 38–39; C Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *Law Quarterly Review* 441, 452–453 (cited approvingly *Kamleh v The Queen* (2005) 79 ALJR 541, [38]). More qualified acceptance of the view is extended by A Rein, 'The Scope of Hearsay' (1994) 110 *Law Quarterly Review* 431, 438. See M Aronson, 'Goodbye Hearsay: Hello Relevance—Subjective Statements under Section 48 of the New South Wales Evidence Bill 1991' (1991) 65 *Australian Law Journal* 596, 598.

82 Proposal 7–1.

83 C Tapper, *Cross and Tapper on Evidence* (8th ed, 1995), 573.

84 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684]. See also fn 30 and accompanying text.

J's metaphor.<sup>85</sup> Proof of a subjective state of mind is very difficult,<sup>86</sup> particularly if the maker of the representation is not called to give evidence.

7.62 The prospect of courts adopting a different approach to 'intention', such as the approaches explored in *Hannes*, should be foreclosed. Given the difficulties that would follow from adoption of a different approach and the substantial support for an amendment in the form of Proposal 7-1, the Commissions recommend that the uniform Evidence Acts be amended. The recommended provision is set out in Appendix 1.

**Recommendation 7-1** The uniform Evidence Acts should be amended to provide expressly that, for the purposes of s 59, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.

### Evidence relevant for a non-hearsay purpose

7.63 At common law, where hearsay evidence is admitted for a non-hearsay purpose, the court is not usually permitted to use it for its hearsay purpose even where it is relevant for that purpose.<sup>87</sup> This applies, for example, to evidence of a prior statement of a witness inconsistent with the testimony of the witness.

7.64 By contrast, s 60 of the uniform Evidence Acts provides that:

The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

7.65 The section applies where evidence is admitted for a non-hearsay purpose and is relevant for a hearsay purpose. The intention of s 60 was to enable evidence admitted for a non-hearsay purpose to be used as evidence of the truth of the facts asserted in the representation, and to do so whether or not the evidence is first-hand or more remote

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<sup>85</sup> *Walton v The Queen* (1989) 166 CLR 283, 307.

<sup>86</sup> E Seligman, 'An Exception to the Hearsay Rule' (1912) 26 *Harvard Law Review* 146, 148-149; A Choo, *Hearsay and Confrontation in Criminal Trials* (1996), 99.

<sup>87</sup> Common law exceptions to this rule are discussed by J Heydon, *Cross on Evidence* (7th ed, 2004), Ch 17.

hearsay, subject to the controls provided by ss 135–137.<sup>88</sup> Other purposes of s 60 will be considered below.

7.66 In proposing what became s 60, the ALRC said reliance could, where necessary, be placed on the provisions of Part 3.11 to control the admissibility and use of evidence admitted under s 60. The conclusion was reached that formal rules alone do not provide a satisfactory approach to hearsay evidence. The ALRC said that the package of proposals later enacted by the uniform Evidence Acts provides balanced rules of admissibility with the discretions now found in ss 135 and 136.<sup>89</sup> The change made to the law was significant and remains so.

7.67 Several issues arise:

- (1) The s 60 approach was and remains controversial. Attention will be given to the reasons for enacting s 60.
- (2) The High Court, in *Lee v The Queen*,<sup>90</sup> has arguably construed s 60 in such a way as to limit its operation in ways not envisaged by the ALRC in its previous inquiry. The implications of *Lee v The Queen* require examination.
- (3) Aside from *Lee* and its effects, criticisms made of s 60 require evaluation.

### Reasons for enacting s 60

7.68 In the previous Evidence inquiry, the ALRC identified two major areas where difficulties arose from the common law principle that evidence admitted for a non-hearsay purpose could not be used for a hearsay purpose, even though the evidence was also relevant for the hearsay purpose. They are:

- prior consistent and inconsistent statements; and
- the factual basis of an expert's opinion.<sup>91</sup>

#### *Prior statements*

7.69 At common law, a prior statement of a witness can be used in prescribed circumstances for the purpose of deciding whether to believe the witness, but cannot be used for the purpose of deciding the truth of the facts asserted in the statement.

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88 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [142]–[146].

89 Ibid, [142]. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685].

90 *Lee v The Queen* (1998) 195 CLR 594.

91 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144].

Extensive criticism of this situation was identified in ALRC 26.<sup>92</sup> Criticism focused on the following:

- the exclusion of probative evidence;<sup>93</sup>
- the extreme difficulty, if not impossibility, of making the required distinction between use of the evidence for the hearsay purpose and for the non-hearsay purpose;
- the undesirability of proceeding on the assumption that such a distinction can be made easily or at all; and
- the questionable reasoning involved in the distinction.

7.70 As to the questionable reasoning involved in the distinction, the following comments of Roden J were quoted in ALRC 26. In relation to prior inconsistent statements, he gave the following illustration:

Illustration:

Evidence in Court: 'I was there; I saw it happen'

Cross-examination: 'Did you not say on a prior occasion, "I was not there; I didn't see it happen"?''

Force of Rule: If the prior statement is admitted, or is denied but independently proved, then, subject to considering any explanation given by the witness:

- (a) that statement may be taken as making it less likely that the witness was there and saw it happen (ie may be used to lessen the weight to be given to his testimony), but
- (b) it may not be used as rendering it more likely that he was not there and did not see it happen (ie may not be used as evidence of the truth of the prior statement).<sup>94</sup>

7.71 In relation to prior consistent statements, Roden J commented:

The prior consistent statement is only admissible in special circumstances, and then again not as evidence of the truth of its contents. When it is introduced, eg in answer to a suggestion of recent invention, it can so back-date any 'invention' to make invention at any time unlikely. The effect must be, it seems to me, to make it more likely that the evidence was truthful, and if the evidence and prior statement was to the same effect (as the term 'consistent' seems to

92 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [334].

93 On the basis that, if the evidence is rejected because it is believed that the prior statement is true, probative evidence is excluded if the court is not permitted to act upon the statement.

94 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [334].

require), then the statement is being used as evidence of the truth of its content.<sup>95</sup>

7.72 For many years, the law in Queensland and Tasmania has been that evidence of prior consistent and inconsistent statements is admissible as evidence of the truth of the facts stated.<sup>96</sup> Section 60 now performs an equivalent role in uniform Evidence Act jurisdictions.

7.73 Another major area of evidence which commonly falls within s 60 concerns the factual basis of expert opinion evidence.

***Factual basis of expert opinion evidence***

7.74 An expert's opinion involves the application of the expert's special knowledge to relevant facts to produce an opinion. At common law, if those facts are observed by the expert, he or she can give evidence to prove those facts. Typically, however, the expert relies partly upon statements made to him or her by others about their observations of events which are facts in issue, together with a wide range of factual information from more remote sources. These statements and other sources of information can range widely and include:

- statements to a medical expert by a person injured about the circumstances in which the injury was suffered and the subsequent progress of those injuries and past and present symptoms;
- information gathered by an expert valuer from a variety of people about the nature and quality of properties and the prices at which they were sold;
- information gathered by accountants and auditors (including financial records and other sources, including people) for the purpose of expressing opinions about the financial position or the management of companies;
- knowledge acquired by experts from reading the work of other experts and from discussion with them;
- the reported data of fellow experts relied upon by such persons as scientists and technical experts in giving expert opinion evidence;
- factual material commonly relied upon in a particular industry or trade or calling;
- information about the expert's qualifications; and

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95 See Ibid, [334].

96 *Evidence Act 1910* (Tas) s 81L; *Evidence Act 1977* (Qld) s 101.

- information received in the course of gaining experience upon which an expertise is said to be based.<sup>97</sup>

7.75 The common law and the uniform Evidence Acts require that the facts and factual assumptions made and relied upon by a witness giving expert opinion evidence be sufficiently identified; evidence of matters such as those listed above is relevant for that purpose.<sup>98</sup> Unqualified, the common law hearsay rule could, however, be used to prevent the expert's evidence on these matters being used to prove the truth of the facts relied upon in forming the expert opinion.

7.76 Through necessity, the common law hearsay rule has been qualified both by judicial decision and legislation. Judge-made exceptions now except the following kinds of information from the common law hearsay rule:

- the accumulated knowledge acquired by the expert;
- the reported data of other experts; and
- information commonly relied on in a particular industry, trade or calling.<sup>99</sup>

#### ***The common law exceptions for experts and s 60 compared***

7.77 The ALRC explored the scope of these common law exceptions in relation to expert opinion in the previous Evidence inquiry.<sup>100</sup> The proposal that became s 60 was formulated with these exceptions in mind, with the intention that s 60 would perform the role the miscellaneous common law exceptions had performed<sup>101</sup> and the complication of specific exceptions for these kinds of evidence avoided.

7.78 Section 60 also applies to representations of fact unique to the particular case upon which the expert bases his or her opinion. Such evidence is hearsay at common law, but s 60 lifts the statutory hearsay rule in that situation. An example is evidence from a doctor of a medical history given to the doctor. At common law, the High Court made clear in *Ramsay v Watson* that the doctor's evidence could be admitted to show

<sup>97</sup> For example, an experienced drug user identifying a drug: *Price v The Queen* [1981] Tas R 306.

<sup>98</sup> See Ch 8.

<sup>99</sup> See citations in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [131]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [91]; *Borowski v Quayle* [1966] VR 382; *PQ v Australian Red Cross Society* [1992] 1 VR 19; *R v Vivona* (Unreported, Victorian Court of Criminal Appeal, Crockett, Tadgell and Teague JJ, 12 September 1994); *R v Fazio* (1997) 93 A Crim R 522.

<sup>100</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [131], [685]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [107]–[108].

<sup>101</sup> See discussion below.

the basis of the expert opinion, but not as evidence of the truth of the statements made to the doctor.<sup>102</sup>

7.79 Whether such opinion evidence is admissible under the uniform Evidence Acts will depend on the significance of the hearsay evidence and whether other evidence of the truth of the medical history is led. For example, the opinion itself could be excluded as irrelevant because there is insufficient evidence of the factual basis of the opinion.<sup>103</sup> Assuming the relevance requirements are satisfied, and provided the doctor has the relevant expertise and otherwise satisfies the requirements of s 79, s 60 will allow such evidence to be used as evidence of the asserted fact subject to the provisions of Part 3.11. This is the outcome the ALRC intended.<sup>104</sup>

7.80 The operation of s 60 must be seen in the context of the conduct of trials. First, it only operates where evidence is already before the court—typically, either from the person alleged to have made a prior consistent or inconsistent statement or from the expert who has given evidence of the factual basis of his or her expert testimony. Other points should be noted.

- *Prior statements.* On occasion there will be disputes as to whether the statements were made and whether they were accurate. However, often the statements will be more reliable than the evidence given by the witness. In any event, the person who made the statement will often be a witness and can be cross-examined. Under s 60, it is then for the tribunal of fact to determine what weight it will give that evidence in the context of all the evidence. This is a more realistic approach than expecting the tribunal of fact to draw the artificial and difficult distinction, required by the common law, of using the evidence for one purpose but not for another.
- *Evidence of the factual basis of expert opinion.* In the majority of cases, the person supplying the factual material will be called to testify—for example, the injured plaintiff in a tort action. Through the use of s 60, the tribunal of fact can adopt a more realistic approach. It can assess the weight that the evidence should be given. Under the common law, the tribunal of fact is required to use the evidence for the non-hearsay purpose but not for the hearsay purpose. Further, while the statements made to the expert by a party might be self-serving, often the factual basis is reliable and not disputed. In those cases where it is disputed, the dispute will usually be confined to few facts.

7.81 For those reasons, it may be said that s 60 enhances the appearance and reality of the fact-finding exercise. It also enhances the fairness of the trial process by allowing

<sup>102</sup> *Ramsay v Watson* (1961) 108 CLR 642, 649.

<sup>103</sup> Under Uniform Evidence Acts ss 55–56. This issue is discussed further in Ch 9.

<sup>104</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685]; *Lee v The Queen* (1998) 195 CLR 594, [39]. See J Heydon, ‘Book Review’ (2003) 25 *Sydney Law Review* 409, 410–411.



evidence admitted for one purpose to be used for other relevant purposes. The focus will be on the weight to be accorded to the evidence, not on admissibility.

7.82 At the same time, it is recognised that there will be situations where s 60 could allow evidence of doubtful probative value to be received, and also evidence that cannot be adequately tested because the person who made the statement to the expert is not called to testify. In these situations, the fact-finding process and the fairness of the proceeding are challenged. To address these possibilities, the uniform Evidence Acts contain Part 3.11, which can be invoked either to exclude the evidence or to limit its permitted use. Part 3.11 also recognises the special policy concerns related to the criminal trial. Other safeguards, such as the request provisions in Part 4.6, also apply.

7.83 It is important to keep in mind that s 60 only operates in respect of evidence already admitted. If time and cost are concerns in a particular case, Part 3.11 is available to control the situation. In the case of the expert's evidence of the factual basis of his or her opinion, there is greater potential for the wastage of time and cost under the common law approach. The party against whom the evidence is led can take technical objections to any of the evidence so led, whether the evidence is in dispute or not. Under the uniform Evidence Acts, that party must justify rejection of the admission or the use of the evidence under Part 3.11.<sup>105</sup>

7.84 Clear, simple and easily applied rules of evidence are a desirable policy goal. The alternatives to s 60 require separate provisions dealing with the admissibility and use of prior consistent and inconsistent statements and the ill-defined common law exceptions, referred to above, which relate to the factual basis of expert testimony.

7.85 It is understandable that a person considering s 60 for the first time would see it as an extremely bold departure from the common law. However, the change must be considered in the context described above: that of the realities of the trial, and the statutory context in which s 60 operates. Viewed in that light, it is clear that s 60 is the result of a cautious approach to a number of major issues, and that it results in a simple and sound solution to those issues.

7.86 The considerations just discussed will be referred to when discussing criticisms of s 60 later in this chapter. The discussion also provides a background for evaluating the operation of s 60 in the courts, and in particular the High Court.

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105 See further the discussion of the issues in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685].

### ***Lee v The Queen: defining the operation of s 60***

7.87 In *Lee v The Queen*,<sup>106</sup> the High Court confirmed that s 60 is intended to change the common law considerably by allowing what would otherwise be inadmissible hearsay evidence of a representation made out of court to be admitted (subject to Part 3.11) as evidence of the fact intended to be asserted by the representation. However, the High Court identified an important limitation on the operation of s 60.

#### ***Facts***

7.88 The defendant (Lee) was tried for assault with intent to rob. At trial, evidence was led of a statement made about the defendant to the police by a witness, Calin. The statement to police reported that Calin had seen Lee walking up the street near the scene of the robbery and was told by Lee: ‘... leave me alone, cause I’m running because I fired two shots ... I did a job and the other guy was with me bailed out’.<sup>107</sup> In oral evidence, Calin admitted signing the statement to police but denied that the statements in the signed document were his.<sup>108</sup> The prosecution then called the police officer who prepared the statement, and evidence of the representation was admitted through that officer. Another police officer testified that Calin made a similar oral statement to that officer. Both the signed statement and evidence of the oral statement made by Calin to the police were admitted into evidence.

7.89 The High Court said in a joint judgment<sup>109</sup> that evidence of what Calin reported Lee had said ‘went only’ to Calin’s credibility as evidence of a prior inconsistent statement.<sup>110</sup> The court took the view that Calin intended to assert that he had heard Lee say the words attributed to him but did not intend to assert the truth of what Lee had said.

#### ***The limitation on s 60***

7.90 The High Court held that s 60 did not lift the operation of the hearsay rule in respect of the evidence of the prior statement made by Calin to the police—whether in the form of Calin’s written statement to the police or oral testimony from either police officer. The reasoning supporting that conclusion is subtle, and doubts have been raised as to the precise principle applied.<sup>111</sup>

7.91 To explore the effect of the decision it is necessary to accept a formulation of the principle applied. Therefore, the following analysis proceeds on the basis that the essence of the reasoning is that ‘s 60 does not convert evidence of what was said, out

<sup>106</sup> *Lee v The Queen* (1998) 195 CLR 594, [40].

<sup>107</sup> *Ibid*, [6].

<sup>108</sup> *Ibid*, [11].

<sup>109</sup> Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ.

<sup>110</sup> *Lee v The Queen* (1998) 195 CLR 594, [41].

<sup>111</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.76]–[7.78].

of court, into evidence of some fact that the person speaking out of court did not intend to assert'.<sup>112</sup>

7.92 This proposition encapsulates the following steps:

- (a) s 60 operates only on representations that are excluded by s 59;
- (b) s 59 operates only on evidence of a previous representation made by a person to prove the existence of a fact that the person *intended to assert* by the representation;
- (c) therefore, s 60 does not apply to make admissible evidence of a representation the truth of which the witness did not intend to assert.

7.93 Applying these steps to the facts of *Lee*, evidence of Calin's statement to the police could not be used as truth of the admission made to Calin because Calin could not be taken to have intended to assert the truth of the admission.

7.94 Uncertainty arises from the above formulation. For example, if Calin's statement was not intended to assert the truth of the admission, on what basis did s 59 apply? By definition, s 59 only applies 'to prove the existence of a fact that the *person intended to assert*'.<sup>113</sup> Further, the High Court reinforced its reasoning and conclusion by referring to a statement by the ALRC that second-hand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility.<sup>114</sup> This has encouraged the view that s 60 does not apply to hearsay evidence more remote than first-hand hearsay. It raises serious doubt as to the application of s 60 to experts' evidence of the factual basis of their expert opinion, including those facts covered by the common law hearsay exceptions.

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112 *Lee v The Queen* (1998) 195 CLR 594, [29].

113 The High Court found that Calin did not expressly or impliedly intend to assert that Lee had run away from 'a job' in which he 'fired two shots'. It will be noted that the High Court did not consider the argument that, since s 59 is not designed to exclude unintended implied assertions, the evidence might have been admissible as evidence of its truth because it fell outside s 59. See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684] (cited *Lee v The Queen* (1998) 195 CLR 594, [21]); E Seligman, 'An Exception to the Hearsay Rule' (1912) 26 *Harvard Law Review* 146, 148; M Graham, *Handbook of Federal Evidence* (4th ed, 1996), [801.3]; C Ying, *Submission E* 88, 16 September 2005.

114 *Lee v The Queen* (1998) 195 CLR 594, [35].

***The policy underlying s 60 as articulated by the ALRC***

7.95 In referring to the ALRC policy,<sup>115</sup> the High Court said the exceptions to s 59 of the Act

are to be understood in light of the view expressed by the Law Reform Commission that ‘second hand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility’. As the Commission went on to point out, where A gives evidence of what B said that C had said, the honesty and accuracy of recollection of B is a necessary link in the chain upon which the probative value of C’s statement depends. Estimating the weight to be attached to what C said depends on assessing B’s evidence about it.<sup>116</sup>

7.96 The passage quoted from ALRC 26 was not related specifically to the proposal that became s 60. The passage which does relate specifically to that proposal reveals a different intention. The ALRC said:

Under existing law hearsay evidence that is admissible for a non-hearsay purpose is not excluded, but may not be used by the court as evidence of the facts stated. This involves the drawing of unrealistic distinctions. The issue is resolved by defining the hearsay rule as preventing the admissibility of hearsay evidence where it is relevant by reason only that it would affect the court’s assessment of the facts intended to be asserted. This would have the effect that evidence relevant for a non-hearsay purpose—eg to prove a prior consistent or inconsistent statement, or to prove the basis of the expert’s opinion—will be admissible also [as] evidence of the facts stated[.]<sup>117</sup>

7.97 The ALRC did not intend to limit s 60 to first-hand hearsay, either in relation to prior statements or in relation to the factual basis of expert opinion evidence.<sup>118</sup> Indeed, given the emphasis in ALRC 38 on the application of s 60 to evidence admitted as to the factual basis of expert opinion, it is difficult to argue that s 60 was not intended by the ALRC to apply to second-hand hearsay.<sup>119</sup> Uncertainty arises because a belief now exists that *Lee v The Queen* decides that second-hand and more remote hearsay does not fall within s 60.

***Lee v The Queen: defining s 60******Prior statements***

7.98 The significance of the uncertainties created by *Lee v The Queen* for the admission of evidence of prior statements is difficult to determine. However, the effect

115 The High Court referred to Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678].

116 *Lee v The Queen* (1998) 195 CLR 594, [35].

117 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685].

118 Although the proposal discussed in this passage of ALRC 26 was redrafted before the uniform Evidence Acts were enacted, the substance of the draft and the enacted provisions is the same: see cl 55(1), (3) of the Draft Bill.

119 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144]–[145]. Contrast *Lee v The Queen* (1998) 195 CLR 594, discussed below.

of *Lee* is that evidence of unintended implied assertions or second-hand hearsay may be treated as subject to the hearsay rule, contrary to the ALRC's intentions.

### ***Expert opinion evidence***

7.99 The uncertainty about the true policy basis of s 60 has much clearer effects on expert opinion evidence. If *Lee* is read as deciding that s 60 has no application to second-hand and more remote hearsay, it follows that evidence of accumulated knowledge, recorded data, and other factual material commonly relied upon by experts will be inadmissible as evidence of the truth of the facts asserted in the material.<sup>120</sup> Yet a central reason for enacting s 60 was to continue to allow such evidence to be admissible as evidence of the truth of the facts asserted, even though the evidence is hearsay.

### ***Conclusion on the effects of Lee v The Queen***

7.100 The confusion following *Lee v The Queen* potentially has wide effects and serious implications for the conduct of litigation. The High Court's interpretation of the effect of s 60 is contrary to the ALRC's intention, and runs counter to the policy underlying the admissibility of evidence in the uniform Evidence Acts.

## **Reform of s 60**

### **DP 69 Proposal 7–2: addressing *Lee v The Queen***

7.101 In DP 69 the Commissions proposed that the uniform Evidence Acts be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.<sup>121</sup> The Commissions also asked whether certain exceptions to s 60, discussed below, should be recommended.

### ***Submissions and consultations relating to Proposal 7–2***

7.102 Proposal 7–2 has received both unqualified<sup>122</sup> and qualified<sup>123</sup> support on the basis that the amendment supports the intention of the legislation. The Director of

<sup>120</sup> *Neowarra v State of Western Australia* (2003) 134 FCR 208, [39].

<sup>121</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–2.

<sup>122</sup> Women's Legal Services Victoria, *Submission E 110*, 30 September 2005; A Cossins, *Consultation*, Sydney, 3 August 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

<sup>123</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005; C Ying, *Submission E 88*, 16 September

Public Prosecutions for the Australian Capital Territory says that s 60 is generally operating satisfactorily, but notes that that might be because defence counsel has not seen the opportunity to contest admissibility. It is suggested that the basis for limiting the purposes for which evidence may be used under s 136 is not ‘crystal clear’.<sup>124</sup>

7.103 Some submissions opposing the proposal argue that s 60 should not apply to second-hand and more remote hearsay.<sup>125</sup> Others argue that s 60 should be repealed because it works injustice, is arbitrary, and otherwise lacks justification.<sup>126</sup> The foundation of this argument, and the proposed exceptions to s 60 identified in DP 69, are explored in greater detail below. However, before considering the proposed exceptions, the view of the Commissions on Proposal 7–2 is articulated.

### ***Commissions’ view on Proposal 7–2***

7.104 The Commissions affirm their view of the effects of *Lee v The Queen* expressed in DP 69. It was there explained that *Lee v The Queen* may be regarded as supporting a view of s 60 inconsistent with the intention or the scheme of the uniform Evidence Acts<sup>127</sup> and is contrary to the original intention of the proposals in ALRC 38.<sup>128</sup> In addition, the decision has created confusion and uncertainty about the operation of s 60. Uncertainty about the scope of s 60 creates major problems for the future application of the uniform Evidence Acts unless the consequences of uncertainty are addressed by amendment or in other suitable ways. The formulation of remedial measures is complicated by the difficulty of determining the precise ratio of *Lee*.

7.105 The Commissions’ view is that the uniform Evidence Acts should be amended to confirm that s 60 applies to relevant first-hand and more remote hearsay, subject only to the mandatory and discretionary exclusions in Part 3.11. In substance, the proposal is intended to put the law on the footing originally intended by the ALRC. To the extent *Lee* is inconsistent with this aim, the intention is to overrule the reasoning in *Lee*.

7.106 The proposed wording for the amendment implementing Recommendation 7–2 is found in Appendix 1.

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2005; A Cossins, *Consultation*, Sydney, 3 August 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

124 Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005.

125 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005; J Gans, *Submission E 59*, 18 August 2005.

126 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; K Arenson, *Submission E 67*, 13 September 2005; H Sperling, *Submission E 54*, 11 July 2005.

127 See also G Bellamy, *Consultation*, Canberra, 8 March 2005.

128 One submission states that the interpretation given to s 60 in *Lee* ‘goes against the clear and sound policy presented by the ALRC [in ALRC 38], which the legislature must have been intending’: Confidential, *Submission E 31*, 22 February 2005; also G Bellamy, *Consultation*, Canberra, 8 March 2005.

**Recommendation 7–2** The uniform Evidence Acts should be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

### Other reforms to s 60: Question 7–1

#### *Submissions and consultations relating to Question 7–1*

7.107 In DP 69, opinion was sought as to whether s 60 should be amended to provide that a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence, or evidence of admissions that are not first-hand, or both, should be excluded from the ambit of s 60.<sup>129</sup>

7.108 The Hon H D Sperling QC, in a detailed submission, proposed the following amendment to s 60 to give effect to the aspect of the question relating to expert evidence:

- (2) Notwithstanding subsection (1), this section does not apply to evidence of a previous representation that is admitted because it is relevant to establish what facts have been assumed by the expert as a basis for the expert's opinion.
- (3) Notwithstanding subsection (1), this section does not apply to evidence of a previous representation which is admitted because it is relevant that the representation occurred or was published.<sup>130</sup>

7.109 In his submission, Mr Sperling argues the following:

- section 60 permits the stated assumptions upon which an expert bases his or her opinion to be admitted as evidence of the truth of those assumptions—which is unsatisfactory;
- justifications for enacting and retaining s 60 are insufficient or unsound. In particular, there is no good reason for a medical history narrated to an expert, upon which the expert bases his or her opinion, to be admissible as evidence of the truth of the facts asserted simply because the history is admitted for the purpose of showing the basis of the expert opinion;

<sup>129</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 7–1.

<sup>130</sup> H Sperling, *Submission E 54*, 11 July 2005. The existing s 60 would be s 60(1) on this proposal.

- sections 135–137 in Part 3.11 provide inadequate safeguards against the risks of admitting these kinds of evidence.<sup>131</sup>

While not expressing support for the retention of s 60 or Proposal 7–2,<sup>132</sup> the submission was based on the assumption that s 60 would be retained.<sup>133</sup>

7.110 The Law Society of New South Wales submits that, if Proposal 7–2 is implemented, Question 7–1 should be answered in the affirmative to exclude from the ambit of s 60 both kinds of evidence raised in Question 7–1.<sup>134</sup>

7.111 The Commonwealth Director of Public Prosecutions (CDPP) takes a slightly different position. The CDPP supports Proposal 7–2 ‘on balance’, but subject to a reservation similar to Mr Sperling’s: that it is undesirable and inappropriate that ‘a psychiatrist’s report containing hearsay accounts related to the psychiatrist by a patient would become evidence of the truth of the contents [under s 60], thus elevating a mere medical history to fact’.<sup>135</sup>

7.112 The CDPP submits that an exception to s 60 is a better approach than reliance on s 136. Further, the CDPP maintains that parties often fail to call independent evidence to prove the contested facts relied upon by the expert.<sup>136</sup> The NSW DPP supports amendment along the lines suggested by the CDPP.<sup>137</sup>

### ***The view of the NSWLRC on Question 7–1***

7.113 The NSWLRC agrees with Mr Sperling that s 60 should be amended to exclude its operation in respect of previous representations admissible because they are relevant to establish facts assumed by an expert as a basis for the expert’s opinion. The following paragraph of text has been prepared by the NSWLRC to reflect this view.

7.114 As this chapter indicates, there is some support for Mr Sperling’s proposed exception. Sound policy reasons also support it.<sup>138</sup> First, communications made to an expert for the purpose of providing the factual basis for the expert’s opinion have no inherent reliability as a general rule, the more so where the report is prepared for the purposes of litigation, where the communication will usually be made by a person who

131 Ibid.

132 Ibid.

133 Justices Handley and Lindgren agree with this submission: Justice K Handley, *Submission E 62*, 26 August 2005; Justice K Lindgren, *Submission E 102*, 23 September 2005.

134 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

135 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

136 See also Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005. By contrast, the experience of one New South Wales District Court judge is that independent evidence supporting medical histories is ‘always’ called: Confidential, *Consultation*, Sydney, 27 July 2005. *R v Paliwala* [2005] NSWCCA 221 is cited as a case where no independent evidence was called.

137 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

138 See H Sperling, *Submission E 54*, 11 July 2005.



has a substantial interest in the facts being as specified and in the expert's opinion being based on the facts as specified. Secondly, applications under s 136, which are costly in time and money and give rise to the potential for inconsistent decisions in similar facts, are not, in this context, a sufficient response to a problem that should not arise in the first place. That problem is particularly acute in large civil and commercial cases (for example, intellectual property and corporate takeover litigation) where expert reports, often running to many volumes, are carefully constructed for the purposes of litigation. In such cases, the court has no knowledge of how the report has been assembled and it is inherently unfair to the other party to the litigation that representations in such reports that are admissible because they are relevant to the basis of the expert's opinion, should also be admissible as evidence of their truth.

### ***View of the ALRC and VLRC on Question 7-1***

7.115 The ALRC and VLRC do not agree with Mr Sperling's interpretation of s 60, or with the NSWLRC's view. Further, the ALRC and VLRC do not support the exclusion from s 60 of a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence. The following represents the view of the ALRC and VLRC on this issue.

### ***Does s 60 apply to assumptions or only to representations?***

7.116 The issue raised by Mr Sperling of whether s 60 applies to assumptions has arisen in case law. For example, in *Quick v Stoland*,<sup>139</sup> Branson J noted that parts of an expert's report were admissible to establish the facts upon which the expert gave his opinion. After quoting s 60, Branson J said in obiter dicta:

It is not necessary in the context of this case to give detailed consideration to the circumstances in which, and the extent to which, evidence of the factual basis of an expert opinion will amount to evidence of the truth of that factual basis ... It may be that a different result will follow depending upon the form in which the expert gives evidence of the factual basis of his or her opinion; that is, whether such evidence is given in the form of a representation or, alternatively, in the form of an identification of a hypothetical assumption.<sup>140</sup>

7.117 Branson J stated that if s 60 operates to 'give mere form significance in this way, the result cannot be regarded as entirely satisfactory'.<sup>141</sup> Similar concerns are seen in *R v Lawson*<sup>142</sup> and *Harrington-Smith v State of Western Australia (No 2)*.<sup>143</sup>

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139 *Quick v Stoland Pty Ltd* (1998) 87 FCR 371.

140 *Ibid.*, 377–378.

141 *Ibid.*, 378. See also *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [38].

142 *R v Lawson* [2000] NSWCCA 214, [103]–[107].

143 *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [38].

7.118 Is the distinction between a representation and an assumption a matter of ‘mere form’? The answer is ‘no’. The distinction between representations and assumptions is real and is reinforced practically by the fact that it would be perjury for an expert to state as a representation (from a person with knowledge of the facts) what was only an assumption put to the expert, in an attempt to gain an advantage from s 60.<sup>144</sup>

7.119 The better view is that s 60 does not apply to assumptions. That accords with the language and intent of the section.

- First, before s 60 applies, evidence must be admitted for a non-hearsay purpose and must be relevant for a hearsay purpose. Evidence expressed in terms of an assumption of fact on which the expert has expressed an opinion is plainly relevant to establish the basis of the expert opinion. But because it is expressed as an *assumption* of fact and not as an *assertion* of fact, it does not purport to assert the existence of a fact, or to repeat another person’s assertion that a fact exists. Therefore, the evidence has no capacity to prove that fact is true. Accepting that analysis, the evidence would not be hearsay and s 60 could not apply.
- Secondly, s 60 only applies to evidence of *representations*. A representation is a statement or conduct ‘which affirms, denies or describes a matter of fact’.<sup>145</sup> The Dictionary definition of ‘representation’, includes express, implied and inferred representations, as well as unintended and uncommunicated representations.<sup>146</sup> However, ‘[a]n assumption does not affirm, deny or describe a matter of fact—it merely postulates it’.<sup>147</sup> By merely stating the assumptions upon which their opinion is based, an expert witness does not make a representation. Therefore, s 60 could not apply.

7.120 Support for this analysis is found in Finkelstein J’s judgment in *Quick v Stoland*. His Honour considered the possibility that a history narrated to an expert could, because of s 60, be admitted as evidence of the facts asserted to the expert where evidence of those assertions is admitted to establish the basis of the expert opinion. Finkelstein J said that a way of overcoming this possibility was to require the expert to express an ‘opinion in answer to a hypothetical question’—that is, a question based on assumptions—‘leaving it to the party calling the expert to prove the facts upon which the opinion is based’.<sup>148</sup> In other words, Finkelstein J held that s 60 only applies to evidence in the form of representations, not assumptions.

144 J Heydon, ‘Commentary on Justice Einstein’s Paper’ (2001) 5 *The Judicial Review* 123, 137.

145 *Ibid*, 137.

146 *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2004* (NI) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3.

147 J Heydon, ‘Commentary on Justice Einstein’s Paper’ (2001) 5 *The Judicial Review* 123, 137.

148 *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 382. Techniques for using hypothetical questions to establish the basis for expert evidence are discussed in G Samuels, ‘Problems Relating to the Expert Witness in Personal Injury Cases’ in H Glass (ed), *Seminars on Evidence* (1970), 143–150.

7.121 Similarly, in *Roach v Page (No 11)*, Sperling J said of evidence of the factual basis of expert opinion:

Where such evidence is in the form of a bare statement of facts or where facts are stated as having been provided by some other person or persons, s 60 operates to make the account evidence of the truth of the facts so stated. *That is not so if the expert says that certain facts are assumed for the purpose of providing the opinion.*<sup>149</sup>

7.122 There will be situations in which an expert expressing an opinion may need to make a judgment about the veracity of the facts supplied and to express an opinion based on such judgment. In other cases this might not be necessary and a party might seek to obtain the use of s 60 by presenting factual assumptions as representations of fact. Such an attempt can be revealed through cross-examination of the expert.

7.123 However, if there is an issue as to the correctness of any fact relied upon, the simplest course is to invoke s 136 to limit the use of the statement to the purpose of identifying the facts upon which the opinion is based. This is the technique that seems to be employed commonly.<sup>150</sup>

### ***Justifications for s 60***

7.124 Next it is submitted by Mr Sperling that there is no good reason for making evidence of a narrated history evidence of the truth of the history and that the three main reasons the ALRC was said to have given for enacting s 60 are not full justifications for s 60. The three reasons are summarised as follows.

First, that it was too much to expect that the common law distinction [between using evidence of a representation as evidence that the representation was made and as evidence of the truth of the representation] was [being] or would be observed. Secondly, that there were common law exceptions to the hearsay rule ([for] accumulated knowledge [of experts], etc) which should be preserved and which would otherwise be lost. Thirdly, that the ameliorating provisions [in Part 3.11] would be adequate to deal with any untoward effect which [s 60] might otherwise have.<sup>151</sup>

7.125 The focus of concern appears to be the first and third justifications. Critics of s 60 acknowledge the need to accommodate the common law exceptions.<sup>152</sup> What is disputed is the justification concerning the difficulty of the distinction required by the common law between the uses to be made of the medical history, and the effectiveness of Part 3.11 to deal with any untoward effect of s 60.

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<sup>149</sup> *Roach v Page (No 11)* [2003] NSWSC 907, [74] (emphasis added).

<sup>150</sup> B Donovan, *Consultation*, Sydney, 21 February 2005.

<sup>151</sup> H Sperling, *Submission E 54*, 11 July 2005.

<sup>152</sup> *Ibid.*

7.126 The unreliability of medical histories is put forward as an example.<sup>153</sup> While it is true that in some cases medical histories provided to an expert can be unreliable, in the vast majority of cases the history is not challenged or, if it is, the challenge is limited to few matters.

7.127 In addition, in the vast majority of cases where expert opinion evidence is led based on history narrated by a plaintiff to his or her doctor, the plaintiff will give direct evidence of the history and can be cross-examined. Forensic reality, reinforced by the rule in *Jones v Dunkel*,<sup>154</sup> ensures that will occur. In the few cases where direct evidence is not given or the history is challenged but the evidence is otherwise admissible, the discretions and mandatory exclusions in Part 3.11 to exclude or limit the use of evidence are more than adequate to deal with any problems.

7.128 Turning to the common law distinction between permitted and forbidden uses of hearsay evidence, the distinction is very difficult, even for experienced lawyers. But the difficulty of the distinction is not the only concern that motivated the ALRC. There is also the concern that the distinction leads to the exclusion of probative evidence and the rationale for doing so is highly questionable.<sup>155</sup>

7.129 It is true that reliance on s 136 to limit the use that can be made of evidence will involve the drawing of a similar distinction. However, the total package of provisions ensures that the occasions when that needs to be done are limited in number and confined to those cases where it is an unavoidable necessity.

### ***Part 3.11—an adequate safeguard?***

7.130 Under ss 135 and 136, evidence may be excluded or its use limited by reference, in particular, to the concept of ‘unfair prejudice’ to a party.<sup>156</sup> ‘Unfair prejudice’ is a trigger for s 137 also, but s 137 requires, rather than merely permits, a court to exclude certain evidence where the section’s criteria are met.

7.131 In *Roach v Page (No 11)*,<sup>157</sup> Sperling J considered in detail the operation of ss 135 and 136. He found that an inability to test the truth of a previous representation is a legitimate consideration in the exercise of ss 135 and 136.<sup>158</sup> He said that where both ss 60 and 77 apply, this consideration can have added weight. In that case:<sup>159</sup>

Representations of fact become evidence of the truth of the representation, irrespective of whether they are first-hand or remote hearsay and irrespective of

153 Ibid.

154 *Jones v Dunkel* (1959) 101 CLR 298.

155 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [334].

156 The meaning of this expression may have different content in civil and criminal litigation. See also Chs 3 and 16.

157 *Roach v Page (No 11)* [2003] NSWSC 907.

158 Justice C Branson, *Consultation*, Sydney, 25 July 2005.

159 These comments also apply to s 77, in relation to opinion evidence.

whether the source of the information is disclosed. Representations of expert opinion in the document are probative of whatever is the subject of the opinion expressed, irrespective of whether the author of the document is qualified to express the opinion and irrespective of whether the assumptions made for the purpose of expressing the opinion are specified. Such consequences cannot have been intended where the opposite party is disadvantaged by such consequences. Section 136 serves to avoid such unfairness.<sup>160</sup>

7.132 His Honour made a number of rulings on the admissibility and use of evidence concerning the factual basis of opinion evidence led from several experts. While the initial ruling (number 11) was lengthy, it involved detailed consideration of the authorities on the operation of the above sections. This analysis did not have to be repeated, and the approach identified was then used to determine six other rulings. These were generally short, and the decisions turned on the ability of the party against whom the evidence was led to test it by cross-examination.<sup>161</sup> Evidence was made subject to a s 136 limit on the use in those cases where the opposing party was denied the opportunity to cross-examine.

7.133 *Quick v Stoland* also contains useful judicial observations on the relationship between s 60 and Part 3.11. Branson J said:

In cases in which there is a genuine dispute as to the relevant facts, it might be expected that a court would ordinarily limit the operation of s 60 ... by exercising the power vested in [the court] by s 136 of the [uniform Evidence Acts].<sup>162</sup>

7.134 In the same case, Finkelstein J said s 136 would be a suitable tool for limiting what he called the ‘extraordinary effect’ of s 60, ‘[f]or example, where the hearsay involves “facts” that are in conflict or “facts” that are unreliable’.<sup>163</sup> These statements must be read subject to the proposition that s 136 is not to be exercised routinely to reproduce the result that would have been achieved by the operation of the common law hearsay rules.<sup>164</sup>

7.135 While some suggest that ss 135–137 are insufficiently powerful to deal with perceived injustices arising from s 60 making admissible evidence for a hearsay purpose which is admitted for a non-hearsay purpose,<sup>165</sup> the ALRC and the VLRC take the view that ss 135–137 are more than adequate controls.

<sup>160</sup> *Roach v Page (No 11)* [2003] NSWSC 907, [74].

<sup>161</sup> *Ibid*, Rulings 15, 20, 29, 30, 31 and 35.

<sup>162</sup> *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 378.

<sup>163</sup> *Ibid*, 382.

<sup>164</sup> *Papakosmas v The Queen* (1999) 196 CLR 297.

<sup>165</sup> *R v Lawson* [2000] NSWCCA 214, [106]. See also *Roach v Page (No 11)* [2003] NSWSC 907, [74]; H Sperling, *Submission E 54*, 11 July 2005; Justice K Lindgren, *Submission E 102*, 23 September 2005.

7.136 Focusing particularly on s 136, although the discretion enacted is not unfettered and must be exercised on principled grounds, it nevertheless allows considerable flexibility in the tailoring of suitable orders to suit the individual case. The ability of a court to tailor orders under s 136 (read with s 192) is of great significance. Further, as the Commissions indicated in DP 69, there is no limitation on s 136 that appears to prevent a court making such orders, in the exercise of its statutory discretion, to overcome the difficulties identified in *Roach v Page (No 11)*, where s 136 was in fact applied that way. The issue is also discussed in Chapter 16.

7.137 The major difficulty posed by s 60 and the Part 3.11 provisions is that they provide a new approach and it appears that some have had difficulty making the necessary adjustment in thinking. Others have not and use the provisions with reasonable ease when the need arises.<sup>166</sup>

### ***Other considerations***

7.138 The criticisms just considered raise broader questions about expert opinion evidence. It is clear that there is a perceived problem with expert evidence—for example, in large civil and commercial cases. It is equally clear that reform of s 60 will not address these concerns. Unsatisfactory preparation of reports undoubtedly plays a part, and is best addressed through rules of court, the involvement of lawyers in the preparation of reports, and practitioner education. The point is that the perceived problems with expert evidence are not with s 60 alone.

7.139 The interaction of the various provisions of the uniform Evidence Acts constrains the uses to which doubtful evidence as to the factual basis of expert opinion can be put. As already discussed, the requirement that such evidence be relevant within the terms of s 55 as evidence of the proof of the asserted fact is an important threshold test. The operation of s 55 in these cases is discussed in Chapter 9.

### ***Conclusion***

7.140 The ALRC and the VLRC are of the view that s 60 does not require the suggested amendment. Many submissions and consultations raise important points about the operation of the uniform Evidence Acts, and subject s 60 to valuable scrutiny. However, there were positive reasons for introducing s 60 which were relied on by the ALRC in its previous Evidence inquiry, and which remain valid.

7.141 Critics tend to address one or some, but not all of the policy issues. There is also a tendency to assume that if the exception in s 60 applies, the evidence will be admitted. Experience of the uniform Evidence Acts has demonstrated that this is not so and that the provisions in Part 3.11, particularly s 136, are appropriate and used to avoid unfairness. Section 60 is not animated by any single factor, as the discussion

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166 Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

above is designed to show. Further, reading s 60 in isolation may lead to the placing of undue emphasis on the section at the expense of other provisions of the Acts.

7.142 To adopt some of the proposals for amending s 60 would entail rejection of the various policies that underlie s 60 as well as broader policies about the structure and operation of the Acts, including how different provisions of the Acts should interact. In addition they are likely to cause unnecessary complications and will apply in only limited circumstances. For example, consider an exception to prevent s 60 operating in relation to evidence given by an expert of a medical history on which the expert opinion evidence is based.

- It would provide the opportunity for technical objections to be taken to non-contentious evidence. That cannot be done under the uniform Evidence Acts as they currently stand: the objecting party has to show that the Part 3.11 provisions should or must be applied.
- In relation to contentious factual evidence, the debate would turn to the other hearsay exceptions—the various first-hand hearsay exceptions, the present s 72 (about statements of health etc) and business records.
- The scope and effect of a ‘history exception’ to s 60 would in fact be very limited and would not achieve the objectives of those seeking it. For example, in the case of a person suing for damages for personal injury, ss 63 and 64 will lift the hearsay rule in any event where the injured plaintiff:
  - (a) is not available to give evidence; or
  - (b) is called to give evidence; or
  - (c) the court can be persuaded that to call the plaintiff would cause undue expense or delay or would not be reasonably practicable.

7.143 Thus, the proposed exception to s 60 would only have effect where the plaintiff is not called and the absence of the plaintiff cannot be justified. That will not often arise. As noted above, there is considerable forensic pressure on a party leading expert testimony to call direct evidence about any disputed facts that are relied upon by the expert. The failure to call such evidence will, at least in civil proceedings, give rise to damning and powerful adverse comment. If the facts are challenged and direct evidence of them is not called, the party seeking to rely on the opinion runs the risk that the probative value of the evidence of the opinion will be held to be so slight that it

will be excluded as irrelevant.<sup>167</sup> In such a situation, admissibility can also be easily controlled by ss 135–137.

### **Second-hand hearsay evidence of admissions**

7.144 Chapter 10 discusses amendment of the uniform Evidence Acts to provide for the exclusion in criminal proceedings of second-hand and more remote hearsay evidence of an admission. The Commissions agree that the special nature of the evidence, the peculiar nature and risks of criminal proceedings and the need to safeguard the defendant's right to a fair trial make it important that remote hearsay not be admitted as evidence against the accused.

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<sup>167</sup> See the discussion of relevance in Chapter 9.



## 8. The Hearsay Rule — First-hand and More Remote Hearsay Exceptions

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## Introduction

8.1 The general hearsay rule established by s 59 of the uniform Evidence Acts is discussed in the previous chapter, along with a discussion of the exception in s 60 for hearsay that is admitted for a non-hearsay purpose and is relevant for a hearsay purpose.

8.2 This chapter discusses the remaining hearsay exceptions found in the uniform Evidence Acts. It was seen in Chapter 7 that s 60 is drafted to apply where there is ‘evidence of a previous representation’, irrespective of whether the evidence is first-hand or more remote hearsay. By contrast, whether the evidence of the previous representation is first-hand or more remote hearsay is crucial in deciding whether any of the hearsay exceptions discussed in this chapter apply.

8.3 Division 2 of Part 3.2 of the uniform Evidence Acts is restricted by s 62 to first-hand hearsay. Exceptions apply in civil<sup>1</sup> and in criminal proceedings.<sup>2</sup> The Division also contains a provision requiring notice to be given of intention to adduce first-hand hearsay evidence in certain civil and criminal proceedings<sup>3</sup> and a provision governing objections to the tender of hearsay evidence in civil proceedings where the maker of the out of court representation is available to testify but the required notice indicates an intention not to call the maker as a witness.<sup>4</sup>

8.4 Division 3 of Part 3.2 is headed ‘Other exceptions to the hearsay rule’. Exceptions are made for business records,<sup>5</sup> the contents of tags, labels and writing,<sup>6</sup> telecommunications,<sup>7</sup> contemporaneous statements about a person’s health etc,<sup>8</sup> reputation as to relationships and age,<sup>9</sup> reputation of public or general rights,<sup>10</sup> and interlocutory proceedings.<sup>11</sup>

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1 Uniform Evidence Acts ss 63–64.

2 Ibid ss 65–66.

3 Ibid s 67.

4 Ibid s 68.

5 Ibid s 69.

6 Ibid s 70.

7 Ibid s 71.

8 Ibid s 72.

9 Ibid s 73.

10 Ibid s 74.

11 Ibid s 75.

8.5 This chapter makes a limited number of proposals for reform of the first-hand and second-hand hearsay provisions. Particular issues which will be discussed include the exceptions applying:

- in civil proceedings if the maker of the representation is available;
- in civil and criminal proceedings if the maker of the representation is not available;
- in criminal proceedings to a representation made when relevant events were ‘fresh in the memory’ of the maker of the representation;
- to business records; and
- to contemporaneous statements.

### **Proceedings if maker available**

8.6 Section 64 of the uniform Evidence Acts provides exceptions to the hearsay rule where, in a civil proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Section 64(2) provides that:

- (2) The hearsay rule does not apply to:
- (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

8.7 Questions have been raised about the relationship of s 64(2) and s 64(3). Section 64(3) provides that:

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
- (a) that person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

### The ‘fresh in the memory’ requirement

8.8 The exception in s 64(3) applies to evidence of a previous representation about a fact by allowing evidence of the previous representation to be admitted as evidence of the asserted fact where the occurrence of the asserted fact was fresh in the memory of the person who made the representation at the time the representation was made.<sup>12</sup> The exception applies where the person who made the representation has been or is to be called to give evidence.

8.9 By contrast, a hearsay exception is created under subsection (2) without the ‘fresh in the memory’ limitation, and applies where it would cause undue expense or delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

8.10 The ALRC explained the reasons for applying a ‘fresh in the memory’ requirement in the first case but not the second as follows:

It has been questioned whether it is logical to require freshness of memory where the maker [of the previous representation] is available [to give evidence] and [is] called [to give evidence] and not [to] require it where the maker [of the previous representation] is not available [to give evidence]. Different considerations, however, apply. Where the witness is available, there is no need to admit the evidence of the prior statements except where the statement was ‘fresh’. It is then likely to be the least inaccurate account of the relevant events. The proposal overcomes some of the technicalities of the present laws of evidence and minimises the risk of adding to the time and cost of trials resulting from the admission of hearsay evidence. Where the witness is unavailable, however, different considerations apply. To exclude previous representations *whenever* made in those circumstances would deprive a party and the court of the ‘best available’ evidence.<sup>13</sup>

8.11 As the passage explains, where the maker of the representation is not available to testify, the evidence must be led from another witness. The best available evidence will be that which the witness can give, irrespective of whether the fact about which the representation is made is fresh in the memory of another person at the time the other person makes a representation about the fact.

8.12 On the other hand, where the maker of the representation has been or is to be called to testify, other policy concerns are relevant. This is so whether the person who gives evidence of the previous representation is the person who made it, or a person who saw, heard or otherwise perceived the representation being made (as contemplated by s 64(3)(b)).

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12 The nature of the ‘fresh in the memory’ test is discussed in detail later in this chapter.

13 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [688] (emphasis in original).

### **Submissions and consultations**

8.13 In DP 69 the Commissions proposed that s 64(3) be amended to remove the requirement that, when the previous representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.<sup>14</sup>

8.14 Few submissions or consultations addressed Proposal 7–3. A New South Wales District Court judge noted that reference is not often made to the ‘fresh in the memory’ requirement in s 64(3).<sup>15</sup> Opposition to the proposal was voiced by the Law Society of South Australia, which said that the requirement should not be removed because the ‘reason this exception [in s 64(3)] is allowed is that the asserted fact was cogent’ and fresh in the memory so that ‘there is no necessity to call the person who made the representation’.<sup>16</sup>

### **The Commissions’ view**

8.15 The Commissions’ view is that the fresh in the memory requirement should be removed from s 64(3). Although the ALRC’s original policy distinction remains valid, in practice the requirement of freshness in memory is not considered an important touchstone of evidentiary reliability. While the original policy distinction was designed to put the ‘best evidence’ before the court, practical experience suggests that any difference in the quality of hearsay evidence that satisfies the fresh in memory requirement and evidence that does not is slight. Further, the difference can be dealt with as a matter of the weight given to the evidence, or in exercise of the provisions in Part 3.11.

8.16 It is also more efficient to permit first-hand hearsay evidence to be admitted and to subject the witness to cross-examination than to delay proceedings with argument about whether a previous representation was made while fresh in the memory of the person who made it. Any increased risk that the evidence admitted is unreliable is minimal. Indeed, hearsay evidence is already admissible under s 64(2) without being subject to the requirement. The discretions in ss 135 and 136 to refuse to admit and to limit the use of evidence would apply.

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14 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–3.

15 Confidential, *Consultation*, Sydney, 27 July 2005.

16 The Law Society of South Australia, *Submission E 69*, 15 September 2005.

**Recommendation 8–1** Section 64(3) of the uniform Evidence Acts should be amended to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

### **Evidence influenced by violence and certain other conduct**

8.17 Section 66 of the uniform Evidence Acts provides exceptions to the hearsay rule that apply in criminal proceedings if the maker of a previous representation is available to give evidence, within the meaning of the Acts.

8.18 It was suggested to the Commissions at a late stage in the Inquiry that new subsections (5) and (6) should be added to s 66 to align the provision with the language of s 84, which excludes evidence of admissions influenced by violence and certain other conduct. The suggested subsections would read:

- (5) Prosecution evidence of a previous representation is not admissible unless the court is satisfied that the representation, and the making of the representation, were not influenced by:
  - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the representation or towards another person; or
  - (b) a threat of conduct of that kind.
- (6) Subsection (5) only applies if the party against whom evidence of the representation is adduced has raised in the proceeding an issue about whether the representation or its making were so influenced.

8.19 It is said that an argument can be made in favour of a corresponding amendment to s 85. It is further said that a preferred form of language would be to use the expression ‘torture or cruel, inhuman or degrading treatment or punishment’ to align the provisions with the phrase used in international law.

### **The Commissions’ view**

8.20 The suggested amendment of s 66 (and s 85) is interesting and worthy of consideration. The Commissions are of the view that this possibility should be kept under consideration, and that investigation into the utility and desirability of the suggestion should be undertaken when possible. However, given the late stage in the Inquiry at which the suggestion was made, it has not been possible to consult or solicit submissions regarding the matter. Further, at least some of the ground covered by the suggested amendments is currently covered by the s 138 discretion to exclude improperly or illegally obtained evidence.

## **Proceedings if maker not available**

### **‘Unavailability of persons’**

8.21 Sections 63 and 65 of the uniform Evidence Acts provide exceptions to the hearsay rule, in civil and criminal proceedings respectively, where a person who made a previous representation is not available to give evidence about an asserted fact.

8.22 The Acts provide that a person:

is taken not to be available to give evidence about a fact if:

- (a) the person is dead; or
- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or
- (c) it would be unlawful for the person to give evidence about the fact; or
- (d) a provision of this Act prohibits the evidence being given; or
- (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.<sup>17</sup>

## **Submissions and consultations**

### ***Submissions and consultations on IP 28***

8.23 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) noted that United Kingdom legislation relating to criminal proceedings contains a provision permitting the admission of hearsay evidence of a person who is ‘unfit to be a witness because of his bodily or mental condition’.<sup>18</sup>

8.24 Hearsay evidence may also be admitted in criminal proceedings where ‘through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence’.<sup>19</sup>

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17 *Evidence Act 1995* (Cth) Dictionary, Pt 2 cl 4; *Evidence Act 1995* (NSW), Dictionary, Pt 2 cl 4; *Evidence Act 2001* (Tas) s 3B; *Evidence Act 2004* (NI) Dictionary, Pt 2 cl 4.

18 *Criminal Justice Act 2003* (UK) s 116(2)(b). Similarly, in Queensland, s 93B of the *Evidence Act 1977* (Qld) provides a hearsay exception in prescribed criminal proceedings if the person who made the hearsay statement is unavailable because the person is ‘mentally or physically incapable of giving the evidence’.

19 *Criminal Justice Act 2003* (UK) s 116(2)(e).

8.25 By contrast, the uniform Evidence Act provisions do not ‘squarely provide for this category of witness’.<sup>20</sup> The NSW DPP submitted that the definition of ‘unavailability of persons’ should be amended to apply clearly to the situation where a person is “not available” by reason of his/her bodily or mental/psychological condition or for some other sound reason, he/she is unfit to attend as a witness’.<sup>21</sup>

8.26 The NSW DPP referred to then proposed NSW legislation to enable the transcript of evidence given by complainants in sexual offence trials to be admitted as evidence of the complainant in any retrial.<sup>22</sup> The *Criminal Procedure Amendment (Evidence) Act 2005* (NSW), which commenced in May 2005, amended the *Criminal Procedure Act 1986* (NSW) to permit the admission of a record of evidence given by a complainant in a sexual assault proceeding in any new trial that is ordered in an appeal.

8.27 The Commissions observe that, where a complainant in the sexual offence case is unavailable, the transcript of evidence may be able to be admitted under the existing provisions of the uniform Evidence Acts. Section 65(3) provides that:

- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:
  - (a) cross-examined the person who made the representation about it; or
  - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

### ***Submissions and consultations on DP 69***

8.28 In DP 69, the Commissions proposed that the uniform Evidence Acts be amended to provide that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give evidence about the fact.<sup>23</sup> Overall, Proposal 7–4 has been well received.<sup>24</sup>

8.29 Women’s Legal Service Victoria supports a provision which treats a witness as unavailable because of mental inability to give evidence due to fear, and cites the United Kingdom legislation approvingly.<sup>25</sup>

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20 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

21 Ibid.

22 Ibid.

23 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–4.

24 The Law Society of South Australia, *Submission E 69*, 15 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

25 Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005.



8.30 The Law Society of New South Wales objects to Proposal 7–4, which it finds ‘disturbing given the potential breadth of interpretation’ of the proposed definition ‘and the consequential loss of the ability of the defendant to cross-examine the witness’.<sup>26</sup> Similarly, one practitioner considers that the wording of the proposal would leave it open to manipulation by witnesses to allow untested statements to be admitted.<sup>27</sup>

8.31 Other submissions and consultations also point to perceived difficulties with the wording of Proposal 7–4, but say that the policy behind the proposal is sound. The Australian Government Attorney-General’s Department points out that the language of Proposal 7–4 might literally apply to a wheelchair-bound person, for example. It queried whether this was a result within the mischief sought to be overcome by the proposal.<sup>28</sup>

8.32 It is also queried whether the drafting of Proposal 7–4 would enable it to apply to persons to whom policy requires that it apply. One suggestion is that the words ‘mentally or emotionally incapable’ be used to ensure the provision covers complainants unwilling to face the trial because it would cause an emotional setback.<sup>29</sup> Similarly, the NSW DPP suggests inserting the words ‘or whose mental or physical wellbeing is likely to be adversely affected by giving’ after the words ‘unable to give’ in the proposal.<sup>30</sup>

### **The Commissions’ view**

8.33 The Commissions recommend broadening the definition of ‘unavailability of persons’ for reasons given above and in DP 69. A provision reflecting this recommendation is set out in Appendix 1. It will be noted that the wording of the provision differs from the wording of Proposal 7–4. Words that ensure that the provision is not abused but at the same time is applied to all persons who should on policy grounds be considered ‘unavailable’ are not easy to find. It is also difficult to find words that do not carry negative connotations.

8.34 With these points in mind, the Commissions have retained the formula ‘mentally or physically unable’. To prevent abuse of the amendment and to prevent the amendment being applied to discriminate against persons wrongly, the proposed amendment now contains a qualification that the ‘inability’ of the witness ‘cannot reasonably be overcome’. This is designed to exclude the possibility that (for example) a person unable to speak or hear but who can communicate in writing may be

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26 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

27 G Brady, *Consultation*, Sydney, 26 August 2005.

28 Attorney-General’s Department, *Consultation*, Canberra, 24 August 2005.

29 A Cossins, *Consultation*, Sydney, 3 August 2005.

30 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

considered ‘physically unable’ to testify: there will generally be reasonable measures for overcoming such difficulties.<sup>31</sup>

8.35 As to mental inability, it is intended that such an amendment may facilitate, in at least some cases, the admission of the transcript of a complainant’s evidence in a retrial. Requiring the complainant to testify again may, depending on the circumstances of the case, do such emotional or psychological harm to the complainant that the complainant should be considered unavailable to give the particular evidence.

8.36 In terms of the reliability of evidence, there appears to be no reason why the previous representations of persons who are mentally or physically unable to give evidence about particular facts should be any less reliable than evidence of the previous representations of persons satisfying the criteria of the existing definition of ‘unavailability of persons’. The provisions in Part 3.11 provide a further safeguard.

8.37 It is not intended that the amendment should lower the standard of unavailability generally. For instance, it is not intended that any person should be considered unavailable to give evidence simply by producing a medical certificate asserting that a person is mentally or physically unable to give evidence about a fact. A real mental or physical inability to testify must be shown. These are factual questions courts are well placed to consider on a case-by-case basis, looking to all the circumstances.

**Recommendation 8–2**      The uniform Evidence Acts should be amended to provide that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give evidence about the fact and that inability cannot reasonably be overcome.

### Representations of complicit persons

8.38 Questions have been raised about the operation of s 65 in relation to previous representations from persons who are complicit in the offence with which an accused is charged, but who refuse to give evidence at trial. The relevant parts of s 65 read:

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
  - ...
  - (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
  - (c) made in circumstances that make it highly probable that the representation is reliable, or

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<sup>31</sup> See Uniform Evidence Acts s 31, which deals with deaf and mute witnesses.

(d) against the interests of the person who made it at the time it was made.

...

8.39 In *R v Suteski*, the prosecution relied on s 65(2)(d) to tender an electronic recording of a police interview with an accomplice who had subsequently pleaded guilty. The person had refused to give evidence at the committal, and adopted the same position at trial.<sup>32</sup>

8.40 The NSW Court of Criminal Appeal held that the trial judge had not erred in admitting into evidence representations made in the police interview as evidence of the truth of the facts asserted in those representations. The Court noted that counsel for the appellant, at trial and on appeal, had acknowledged that the Crown had taken all reasonable steps to compel the witness to give evidence and that the trial judge had regarded that acknowledgement as a recognition that the sanction of contempt was unlikely to make the witness change his mind.<sup>33</sup>

8.41 The decision in *Suteski* has provoked concern about allowing the admission of previous representations from a person complicit in an offence to be used against a defendant who does not have the opportunity to cross-examine that person.

### Submissions and consultations

8.42 In DP 69, the Commissions proposed that s 65(2)(d) be amended to require that the representation be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable.<sup>34</sup> The proposal was made in light of concerns raised in response to IP 28 that s 65 permits previous representations made by persons who are taken to be unavailable to give evidence.<sup>35</sup>

8.43 The NSW DPP, the Commonwealth Director of Public Prosecutions (CDPP), and the Law Society of New South Wales support Proposal 7–5.<sup>36</sup> A practitioner supporting the policy behind the proposal expresses concern that the wording, ‘in circumstances that make it likely that the representation is reliable’, will not solve the problem. It is said that a police interview could easily be considered to be a

<sup>32</sup> *R v Suteski* (2002) 56 NSWLR 182.

<sup>33</sup> *Ibid*, [83].

<sup>34</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–5.

<sup>35</sup> See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–5.

<sup>36</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

circumstance making it likely that a representation is reliable, and that records of interview and admissions of co-accused persons should be completely excluded.<sup>37</sup> The mere fact that a representation is made in that context does not mean that the representation is reliable, although it often will be an indication of reliability.

### **The Commissions' view**

#### ***Application of the policy***

8.44 While the primary policy underlying the hearsay provisions is that the best evidence available to a party should be received, in its previous Evidence inquiry the ALRC considered that, in criminal trials where the maker of a statement is unavailable, some guarantees of trustworthiness should be required before hearsay evidence is admissible against an accused.<sup>38</sup>

8.45 The assumption behind s 65(2)(d) is that where a statement is against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may not be the case. An accomplice or co-accused may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other.

8.46 There is reason to suspect that an accomplice or co-accused would be more inclined to take such a course where (for example) they have immunity from prosecution. Where the accomplice gains immunity from prosecution the reliability safeguard of the representation being against self-interest no longer applies: the accomplice can fabricate evidence to implicate the accused and will only suffer the legal consequences of perjury if discovered.

#### ***Statutory amendment***

8.47 In the hearing of an application for special leave to appeal to the High Court, counsel for the appellant in *Suteski* argued that s 65(2)(d) should be read as requiring some assurance of reliability.<sup>39</sup> The application was unsuccessful, with Gleeson CJ stating, '[i]f the ultimate safety net is [Part 3.11], then you do not need to torture the language of section 65' to read in some assurance of reliability.<sup>40</sup>

8.48 While the admission and use of evidence from an accomplice or co-accused can be controlled by ss 135–137, amendment of s 65(2)(d) has the advantage of excluding evidence that carries such a risk of being unreliable. A rule making it inadmissible unless it meets some criteria of trustworthiness is warranted. Evidence of that quality should not be prima facie admissible.

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37 G Brady, *Consultation*, Sydney, 26 August 2005.

38 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [139].

39 *Suteski v The Queen* [2003] HCA Trans 493.

40 *Ibid*, 4.

8.49 A submission is made that, by introducing a second limb to s 65(2)(d), the proposed amendment introduces unwanted complexity. The same submission says that the proposal obscures the relationship between s 65(2)(d) and (c).<sup>41</sup> Paragraph (c) applies where the representation was ‘made in circumstances that make it highly probable that the representation is reliable’. No harm appears to result from any overlap between the various paragraphs. Further, there might not be overlap. Paragraph (c) requires it to be ‘highly probable’ that the representation is reliable, while the new component of paragraph (d) would only require it to be made in circumstances that make it *likely* the representation is reliable. As to introducing further complexity to s 65(2), the Commissions take the view that the amendment is relatively simple and clear. A safeguard of the proposed kind is necessary to avoid the outcomes described above.

8.50 While the recommendation is directed specifically to address problems concerning the evidence of an accomplice or co-accused, it involves an amendment to a provision of broader application: obviously, statements against interest can arise in other situations. However, amendment of s 65(2)(d) seems a simpler solution than drafting a new provision dealing specifically with the evidence of accomplices, which might unnecessarily introduce complexity into the Acts.

8.51 The Commissions recommend that s 65(2)(d) be amended to require the representation to be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable. The intention is to ensure that the hearsay rule is not lifted where a statement against interest is made in circumstances that would not suggest reliability.

**Recommendation 8–3** Section 65(2)(d) of the uniform Evidence Acts should be amended to require that the representation be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable.

### ‘Circumstances’ and the reliability of evidence

8.52 Sections 65(2)(b) and (c) refer respectively to ‘circumstances’ that make it unlikely that the representation is a fabrication and ‘circumstances’ that make it highly probable that the representation is reliable.<sup>42</sup>

<sup>41</sup> J Gans, *Submission E 59*, 18 August 2005.

<sup>42</sup> Section 65(2)(c) did not derive from recommendations of the ALRC but from the judgment of Mason CJ in *Walton v The Queen* (1989) 166 CLR 283, 293: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2080].

### ***The authorities***

8.53 There has been conflicting authority regarding what circumstances may be taken into account when assessing these matters.<sup>43</sup> In *Williams v The Queen*,<sup>44</sup> a Full Court of the Federal Court said that the statutory test is not whether, in all the circumstances, there is a probability or a high probability of reliability, but whether the circumstances in which the representation was made determine that there is such a probability.<sup>45</sup> The Full Court cited<sup>46</sup> with approval Sperling J's observation that the assessment of reliability under s 65(2)(b) is not 'at large', but is 'a narrower test' of 'the unlikelihood of concoction to which the paragraph is directed'.<sup>47</sup>

8.54 When assessing the reliability of evidence under s 65(2)(b) and (c), the court is permitted to consider any other events that are relevant to the circumstances in which the statement was made. However, in *Williams* the trial judge was held to have erred in addressing only the question of whether the evidence contained within the transcript of interview was reliable, rather than assessing all the circumstances in which the statement was made.<sup>48</sup>

8.55 In *R v Ambrosoli*, the NSW Court of Criminal Appeal held that relevant case law, including *Williams*, established that the focus when approaching s 65(2) should be on the circumstances of the making of the previous representation rather than on the accuracy of the representation.<sup>49</sup> That is, evidence tending only to the reliability of the asserted fact should not be taken into account.

### ***Submissions and consultations***

8.56 It was suggested in IP 28 that injustice might result when only the circumstances of the making of the representation can be taken into account under s 65(2), such as in a situation where the Crown seeks to lead representations made by way of records of interview of persons who have since died.<sup>50</sup> It was asked whether concerns are raised because the 'circumstances' that may be taken into account under ss 65(2)(b) and (c) in assessing the reliability of a previous representation are limited.<sup>51</sup>

8.57 The Commissions noted submissions in DP 69 that state that the 'circumstances' able to be taken into account under s 65(2)(b) and (c) should be broadened, for

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43 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2060]; *R v Gover* (2000) 118 A Crim R 8; *R v Mankotia* [1998] NSWSC 295.

44 *Williams v The Queen* (2000) 119 A Crim R 490.

45 *Ibid*, [54].

46 *Ibid*, [47].

47 *R v Mankotia* [1998] NSWSC 295, [10].

48 *Williams v The Queen* (2000) 119 A Crim R 490, [55]–[58].

49 *R v Ambrosoli* (2002) 55 NSWLR 603, 616.

50 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.46].

51 *Ibid*, Q 5–6.

example, to include the inherent truthfulness or otherwise of the representation.<sup>52</sup> Submissions were also noted that considered the provision should be left unchanged,<sup>53</sup> including for the reason that the question has been effectively settled by *R v Ambrosoli*.<sup>54</sup> The New South Wales Public Defenders Office (NSW PDO) submits that the view rejected in *Ambrosoli*—that the focus when approaching s 65(2) should be on the accuracy of the representation—could lead to a situation ‘where the judge had to in effect assess the strength of a party’s case, before being able to determine if this particular item was admissible’.<sup>55</sup>

### ***The Commissions’ view***

8.58 The Commissions’ view is that s 65(2) of the uniform Evidence Acts should be left unchanged regarding the ‘circumstances’ properly taken into account under s 65(2). Bearing in mind that the reliability of the representation will ultimately be a question for the tribunal of fact, it is reasonable for the legislation to delineate the s 65(2) hearsay exception by reference to the circumstances in which a representation was made and to the circumstances bearing on reliability, rather than also requiring the trial judge to form a view about the actual reliability of the representation. An inquiry as to whether the representation is reliable is likely to require the trial judge to consider the whole of a prosecution case and determine guilt before admitting the representation as reliable. This would sit uncomfortably with safeguards designed to afford the defendant a fair trial.

### **Evidence of a previous representation adduced by a defendant**

8.59 Section 65(8)(a) of the uniform Evidence Acts provides:

- (8) The hearsay rule does not apply to:
  - (a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; ...

8.60 Section 65(9) allows another party to adduce hearsay evidence that qualifies or explains a representation admitted under s 65(8)(a). The subsection reads:

- (9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:
  - (a) is adduced by another party; and
  - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

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52 Confidential, *Submission E 5*, 6 September 2004; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

53 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

54 *R v Ambrosoli* (2002) 55 NSWLR 603.

55 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

8.61 Section 65(9) turns attention to evidence ‘about a matter’ and ‘about the matter’ with which evidence adduced under s 65(8)(a) is concerned.

**‘About a matter’**

8.62 The suggestion was noted in IP 28 that the expressions ‘about a matter’ and ‘about the matter’ might be interpreted narrowly or broadly and so have uncertain meaning.<sup>56</sup>

8.63 In *R v Mankotia*, the accused proposed to adduce evidence of representations by a deceased person as to aspects of their ‘relationship’.<sup>57</sup> Sperling J observed that a ‘liberal construction’ of the term ‘the matter’ would allow evidence of any relevant representation by the deceased about the relationship. A narrower construction would confine ‘the matter’ to the factual aspect of the relationship that was the subject of a representation adduced by the accused, or perhaps to the issue in the proceedings to which such a representation related.<sup>58</sup>

8.64 It was asked in IP 28 whether there is significant uncertainty about the scope of the expression ‘about the matter’ in s 65(9).<sup>59</sup> Submissions were noted that suggest there is no need to clarify the meaning of this term in s 65(9).<sup>60</sup> For example, the NSW PDO said that it is difficult to see how it could be ‘amended or defined in a way which would take into account the wide range of situations to which it might apply’.<sup>61</sup>

**The Commissions’ view**

8.65 The Commissions re-affirm the view expressed in DP 69.<sup>62</sup> That is, the approach should be to identify the content of the representation to be adduced by the defendant and to consider whether the other representations can be said to be relevant to it. As a result, it should not be necessary to construe the term ‘about a matter’ and it may, in fact, be preferable to avoid defining it. If it is necessary to construe the term, a broad construction should be adopted and, where that may cause unfair prejudice, the mandatory and discretionary exclusions in Part 3.11 should be used. Narrowing the interpretation of any of the hearsay exceptions carries the danger of introducing technicalities, something the uniform Evidence Acts are intended to remove and avoid. The Commissions, therefore, do not propose any amendment to s 65(9) of the uniform Evidence Acts.

56 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.49]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2220].

57 *R v Mankotia* [1998] NSWSC 295.

58 Ibid.

59 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–7.

60 Law Council of Australia, *Submission E 32*, 4 March 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

61 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

62 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.188].



## Representations ‘fresh in the memory’

8.66 The uniform Evidence Acts provide exceptions to the hearsay rule where, in a criminal proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Section 66 provides:

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
  - (a) that person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made;
 if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.<sup>63</sup>

### *The decision in Graham*

8.67 In *Graham v The Queen*, the High Court held that a complaint made six years after an alleged sexual assault was not ‘fresh in the memory’ of the complainant for the purpose of s 66 at the time the representation—the complaint—was made.<sup>64</sup> Gaudron, Gummow and Hayne JJ said:

The word ‘fresh’, in its context in s 66, means ‘recent’ or ‘immediate’. It may also carry with it a connotation that describes the quality of the memory (as being ‘not deteriorated or changed by lapse of time’) but the core of the meaning intended, is to describe the temporal relationship between ‘the occurrence of the asserted fact’ and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.<sup>65</sup>

8.68 Callinan J (Gleeson CJ concurring) noted that while the quality or vividness of a recollection could be relevant in an assessment of its freshness, contemporaneity was considered the more important factor.<sup>66</sup> Cases in which evidence of an event relatively remote in time will be the most important consideration under s 66 were said to be ‘necessarily rare and requiring of some special circumstance or feature’.<sup>67</sup>

### *Subsequent cases*

8.69 *Graham* has been applied in a large number of cases. In many of these, evidence of the complaint has been inadmissible because the representations were not

<sup>63</sup> Uniform Evidence Acts s 64 contains a parallel provision applicable to civil proceedings. The concept of freshness in memory is also used in s 32(2), in relation to reviving memory in court by reference to a document.

<sup>64</sup> *Graham v The Queen* (1998) 195 CLR 606.

<sup>65</sup> *Ibid*, [4] (citation omitted).

<sup>66</sup> *Ibid*, [34].

<sup>67</sup> *Ibid*, [34].

considered to be ‘fresh’ because of the effluxion of time,<sup>68</sup> including where complaints were made within months of the event.<sup>69</sup> This has led to some concern about the operation of s 66 in such cases.

8.70 Some decisions have shown a degree of flexibility in interpreting the expression ‘fresh in the memory’. In *R v Vinh Le*, the NSW Court of Criminal Appeal considered the application of *Graham* to representations concerning a course of conduct that had originated about six months prior to the making of the representations.<sup>70</sup>

8.71 Sully J referred to the High Court’s statement in *Graham* that a particular application of s 66 might raise ‘questions of fact and degree’, and found that the ‘constant refreshing effect’ of repeated sexual abuse warranted a ‘departure from the narrowest and most literal construction’ of the expression ‘fresh in the memory’.<sup>71</sup> Hidden J stated that

s 66 of the *Evidence Act* does not always sit easily with evidence of complaint in sexual cases. Nevertheless, it would be absurd if the section could never apply to complaint of a pattern of behaviour when that pattern has continued up to, or near to, the time at which the complaint was made. Whether the evidence would be admissible under the section might depend upon the terms of the complaint and the length of time over which the abuse is said to have occurred. Obviously, each case must be judged according to its own facts.<sup>72</sup>

8.72 Similarly, in *R v Adam*<sup>73</sup> the NSW Court of Criminal Appeal commented on the analysis of s 66 made in *Graham* and then quoted with approval the observations of Wood CJ at CL, the trial judge in *R v Adam*.<sup>74</sup> The trial judge said:

In my view the judgment of Gaudron J, Gummow J and Hayne J was not intended to confine the expression ‘freshness’ strictly or exhaustively in terms of mere hours or days. As the Law Reform Commission Report underlined, a measure of flexibility is appropriate. The question is, as their Honours point out, one of fact and degree.

In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after events of the kind here involved. Having regard to normal expectation and experience of life, I would regard a statement made at that point in time as still being fresh in the memory of a relevant witness.<sup>75</sup>

68 For example, *R v Gillard* (1999) 105 A Crim R 479; *R v Lawson* [2000] NSWCCA 214. See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [64.45], fn 163.

69 See, eg, *R v Lawson* [2000] NSWCCA 214, [98].

70 *R v Vinh Le* [2000] NSWCCA 49.

71 *Ibid*, [52]. The decision in *R v Vinh Le* was not unanimous on this point, and the judgments differ in their interpretation of the decision in *Graham*.

72 *Ibid*, [126].

73 *R v Adam* (1999) 47 NSWLR 267. An appeal was dismissed: *Adam v The Queen* (2001) 207 CLR 96.

74 *R v Adam* (1999) 47 NSWLR 267, [127]–[130].

75 *Ibid*, [132].

8.73 The NSW Court of Criminal Appeal said it was unnecessary to decide whether the trial judge was correct, but that '[t]his view has much to commend it'.<sup>76</sup>

8.74 The reasoning of the NSW Court of Criminal Appeal in *R v Vinh Le* and *R v Adam* is consistent with this position. The High Court in *Graham* only had to decide whether a complaint made after six years was 'fresh in the memory' of the complainant. This was a question of fact. Accordingly, wider comments about the construction of s 66 are not binding on lower courts, which should decide whether a particular representation is 'fresh in the memory' of the relevant person on a case-by-case basis.

### Criticism of the 'fresh in the memory' test

8.75 Special difficulties with the 'fresh in the memory' criterion often arise in two cases: sexual offence cases and cases where identification and recognition evidence is in issue.

#### Sexual offences

8.76 Suggestions were noted in IP 28 that the psychological literature on child abuse justifies reform to ensure that hearsay evidence of a child's complaint may be admitted in sexual offence cases, irrespective of the time that has elapsed between the events in question and the hearsay statements of the child.<sup>77</sup> Prevalence studies are said to show that delay in disclosure is a typical response of sexually abused children as a result of confusion, denial, self-blame and overt or covert threats by offenders.<sup>78</sup>

8.77 The NSW Health Department Child Protection and Violence Prevention Unit noted that there are many compelling and valid reasons why victims of sexual assault do not immediately report sexual assault to the authorities, including the trauma, shame and embarrassment they suffer.

The nature and impact of child sexual assault, including grooming tactics by the perpetrators and their position of power and trust, act as significant barriers for child victims to disclose the assault. Perpetrators frequently use tactics to instil fear of disclosure in child victims, such as telling them they will not be believed. This power

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<sup>76</sup> Ibid, [133].

<sup>77</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.57] referring to A Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9(2) *Psychiatry, Psychology and Law* 163, 174.

<sup>78</sup> A Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9(2) *Psychiatry, Psychology and Law* 163. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 330–333, Rec 102.

dynamic can also be present in cases of domestic violence and in cases of ongoing sexual assault.<sup>79</sup>

8.78 Without empirical evidence, the view that certain memories (such as those of sexual assault) retain reliability and remain ‘fresh in the memory’ despite the passage of time might be thought to rest on circular thinking. The NSW PDO stated:

Psychological studies have increasingly emphasized the subjective nature of memory, and the suggestibility of people, especially psychologically damaged people, to the idea that they must have been sexually abused.<sup>80</sup>

8.79 On the other hand, it may be suggested that the ‘hours or days’ rubric, when applied to sexual offence cases, is analogous to the discredited common law requirement that complaints of sexual assault be spontaneous, and where failure to complain at the earliest possible opportunity could be used as evidence of consent.

### **Identification and recognition**

8.80 It was noted in IP 28 that particular issues arise with respect to the application of s 66 to previous representations concerning identification.<sup>81</sup> In this context, the NSW Court of Criminal Appeal, in *R v Barbaro*<sup>82</sup> and *R v Gee*,<sup>83</sup> has held that evidence of identification should be distinguished from evidence of recognition, where the person recognised is someone previously known.<sup>84</sup>

8.81 In the case of evidence of recognition—that is, where there is obvious contemporaneity between the act of recognition and the witnessing of this by an observer, and evidence is led from the observer about the act of recognition—what needs to be fresh in the memory is the recognising person’s continuing familiarity with the features of the person depicted.<sup>85</sup> In a case of identification, where the asserted fact is that the person identified was present at some relevant event, the ‘occurrence of the asserted fact’ which must be fresh in the memory is the event itself. That is, ‘the formation of the image, later drawn upon at the time of making the representation that the person depicted is identified’.<sup>86</sup>

8.82 The fact that s 66 applies to identification evidence provides additional reasons for favouring a more flexible interpretation of s 66. It can be argued that, for example, evidence of the identification of a war crimes suspect made five years after the events to which a prosecution relates is likely to be more reliable than evidence given by the same witness at a trial taking place another 15 years later.

79 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

80 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

81 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.60].

82 *R v Barbaro* (2000) 112 A Crim R 551.

83 *R v Gee* (2000) 113 A Crim R 376.

84 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2300].

85 *R v Gee* (2000) 113 A Crim R 376, 378; *R v Barbaro* (2000) 112 A Crim R 551, 558.

86 *R v Gee* (2000) 113 A Crim R 376, 378.

8.83 The Commissions observe that, if the uniform Evidence Acts were amended (as proposed below) to make it clear that the question whether a memory is ‘fresh’ is to be determined by reference to the quality of the memory, this would be consistent with the distinctions made between cases of recognition and of ordinary identification: that is, where the person recognised is someone previously known, it is likely that the quality of the memory will be stronger.

8.84 The application of the ‘fresh in the memory’ criterion in the two contexts just considered suggests that, in deciding if the criterion is made out, it may be desirable to consider factors other than the lapse in time between the occurrence of the relevant event and the making of the representation about the event. The feasibility of this approach depends in part on the nature of memory, including an understanding of what affects the formation and maintenance of, and ability to recall, memories.

8.85 In DP 69 it was noted that the ‘fresh in the memory’ concept used in s 66 may need to be revisited in light of recent psychological research, particularly to consider whether aspects of the quality of vividness of certain memories should be a factor in decisions about the admissibility of evidence tendered under s 66.<sup>87</sup> The results of the Commissions’ investigation are set out below.

### **Psychological research on memory**

8.86 Much research in this area has occurred since the previous Evidence inquiry, and the state of knowledge about the area has altered significantly.<sup>88</sup> Psychological research available at the time indicated that:

- negative emotion, stress and anxiety generally hinder memory function (known as ‘memory fallibility’);
- memory is likely to be lost rapidly after an event (a trend represented by the ‘Ebbinghaus forgetting curve’); and
- memory can be distorted easily, by unconscious reconstruction, the reception of information following the event, or by leading questions (known as ‘the misinformation effect’).<sup>89</sup>

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87 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.228]. See also Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.56].

88 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.215]–[7.221].

8.87 Each of these factors pointed towards the significance of the passage of time in the likely reliability of evidence. The state of knowledge in this area of psychological research has since developed significantly. A more detailed understanding has emerged of eyewitness memory. Certain flaws have been identified in the conclusions drawn from earlier research.

### *The effect of emotional arousal*

8.88 Elizabeth Loftus was a leading figure in eyewitness research at the time of the previous Evidence inquiry. The view expressed in her 1979 text, *Eyewitness Memory*, was that testimony about an emotionally significant incident should be treated with greater caution than testimony about a less emotional incident.<sup>90</sup> Implicit in Loftus' research is the idea that high levels of stress impair perception of complex events. The influence of this view was revealed in a 1989 study of experts on eyewitness testimony which found that the majority believed that the statement 'emotional stress impairs memory' was sufficiently reliable to be presented in court as fact.<sup>91</sup>

8.89 One of Loftus' studies<sup>92</sup> is frequently cited<sup>93</sup> in relation to the effect of emotion on memory. The study exposed groups of laboratory subjects to different video versions of a simulated bank robbery. In a violent version a bank robber shoots a boy in the head. A non-violent version of the film showed the bank manager asking everyone in the bank to stay calm. The subjects were asked a series of questions including what the number on the boy's shirt was, a detail apparent in the violent version shortly before the boy was shot. Those who viewed the violent version were less accurate in their recall of this detail. Loftus and Burns conclude from the results that 'witnesses to emotionally traumatic events, such as crimes, accidents, or fires, may be less able to recall key events that occurred prior to the eruption of the trauma'.<sup>94</sup> The study has been cited as concluding that emotion impairs memory.

8.90 Other studies have performed similar experiments with subjects tested for their recall of a number of details of images of scenes presented to them. The studies compare the recall of groups who viewed an arousing or violent version of a film with groups viewing a non-arousing or non-violent version. Results were obtained showing that the group exposed to the violent version had low scores for information recall.<sup>95</sup>

89 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [665]–[666], [678], [688].

90 E Loftus, *Eyewitness Memory* (1979), 32.

91 S Kassir, P Ellsworth and V Smith, 'The 'General Acceptance' of Psychological Research on Eyewitness Testimony: A Survey of the Experts' (1989) 44 *American Psychologist* 1089.

92 E Loftus and T Burns, 'Mental Shock Can Produce Retrograde Amnesia' (1982) 10 *Memory & Cognition* 318.

93 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 103.

94 Ibid, 322.

95 B Clifford and J Scott, 'Individual and Situational Factors in Eyewitness Testimony' (1978) 63 *Journal of Applied Psychology* 352; B Clifford and C Hollin, 'Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory' (1981) 66 *Journal of Applied Psychology* 364.

8.91 Two major difficulties exist with the relevance of these studies to the memory of eyewitnesses to crimes. First, the level of arousal generated by the presentation of a shocking image under laboratory conditions is unlikely to equate to that experienced by a witness to a real-life crime. Visual representations of violence are commonplace in the modern media and have been for some time. They lack the personal significance and impact of a real-life incident. The experiments are unlikely to replicate the psychological condition of a witness to a real-life violent act.

8.92 Some studies on the recall of witnesses to actual violent crimes have reported great detail and accuracy in eyewitness recall.<sup>96</sup> Three studies conducted by Yuille in conjunction with others were designed to test the accuracy of recall of witnesses to shooting incidents. The incidents were carefully selected to allow the studies to be conducted. They were chosen as incidents where the facts could be forensically obtained with a degree of certainty to allow accuracy to be tested. They were also incidents where no legal proceedings resulted (as the perpetrators were shot and killed) so that the study did not interfere with the judicial process. Extensive research interviews were conducted with witnesses to obtain as much detail as possible. Thus while the comparison material included the original statements of the witnesses, this approach enabled the researchers to ensure that the results reflected memory of the event itself and not merely the rehearsal of an earlier statement.<sup>97</sup> The first incident involved a shooting outside a gun store that had just been robbed. The perpetrator shot and wounded the gun storeowner who then shot and killed the perpetrator. The accuracy of recall was above 80% both at the time of the original police interview and in the more extensive research interview four to five months later.<sup>98</sup> Inaccuracies were detected regarding estimates of age, height and weight. The other incidents were the shooting of a bank robber by police, and the shooting by police of a man in a bread line who had attacked another man and a police officer with a knife. These two studies also revealed accuracy levels above 80%.<sup>99</sup>

8.93 The second major difficulty with the earlier research has been revealed by studies which have categorised the types of information in the scenes presented to

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96 J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291; J Yuille and J Cutshall, 'Analysis of the Statements of Victims, Witnesses and Suspects' in J Yuille (ed) *Credibility Assessment* (1989) 175; J Yuille and P Tollestrup, 'A Model of the Diverse Effects of Emotion on Eyewitness Memory' in S Christianson (ed) *The Handbook of Emotion and Memory* (1992) 201; S Christianson and B Hubinette, 'Hands Up! A Study of Witnesses' Emotional Reactions and Memories Associated with Bank Robberies' (1993) 7 *Applied Cognitive Psychology* 365.

97 J Cutshall and J Yuille, 'Field Studies of Eyewitness Memory of Actual Crimes' in D Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) 97, 107. What is not known is whether there was any discussion between witnesses before the initial interviews.

98 J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291.

99 J Cutshall and J Yuille, 'Field Studies of Eyewitness Memory of Actual Crimes' in D Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) 97.

laboratory subjects and examined the results for the recall of the different types of information between neutral and arousing sequences.<sup>100</sup> These studies have produced a much more complex picture of the interaction of emotional arousal and memory.

8.94 The leading study separated items into those relevant to the story presented (plot-relevant), and those that were not (plot-irrelevant). Plot-relevant details were then separated into items that defined the story (or gist items) and basic level visual information. Plot-irrelevant details were divided into those spatially associated with the action of the sequence and those in the background. The recall of the groups was assessed for three phases of the sequence presented with the middle phase being that in which groups were presented with either the emotional or neutral detail.

The general pattern of these results is that emotion aided memory for materials tied to the 'action' in the event. This included information about the plot itself ... but also included plot-irrelevant detail when that detail information was spatially and temporally linked to the arousal event ... When the temporal link to the action was broken ... memory was not improved by arousal ... Likewise, when the spatial link to the action was broken (as in background details), arousal produced a memory disadvantage.<sup>101</sup>

8.95 The effect has been described as one of memory narrowing with improved recall for central events, but reduced recall for peripheral details. While the results in relation to the narrowing effect have not always been able to be replicated, 'the memory-narrowing pattern associated with emotional events has been replicated often enough to be regarded as well-established.'<sup>102</sup> Previous studies, which found poor overall recall for emotional events, may be explained by the fact that they included more peripheral details in their testing procedure thus skewing the results.

8.96 A closer examination of the results of the Loftus and Burns study demonstrates that while the minor detail tested for was poorly recalled, 'subjects in the emotionally arousing condition were indeed *very* accurate in their recall of ... most of the information about the bank robbery'<sup>103</sup> and 'the critical emotion-eliciting event ... is remembered very well'.<sup>104</sup> A fact to an extent acknowledged by Loftus and Burns when they wrote, 'it is entirely possible that memory for some aspect of the violent event (for example, the shooting incident in the film) is better consolidated or reinforced'.<sup>105</sup>

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100 For a review see D Reisberg and F Heuer, 'Memory for Emotional Events' in D Reisberg and P Hertel (eds), *Memory and Emotion* (2004) 3.

101 A Burke, F Heuer and D Reisberg, 'Remembering Emotional Events' (1992) 20(3) *Memory & Cognition* 277, 287.

102 D Reisberg and F Heuer, 'Memory for Emotional Events' in D Reisberg and P Hertel (eds), *Memory and Emotion* (2004) 3, 10.

103 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 104.

104 S Christianson, 'Emotional Stress and Eyewitness Memory: A Critical Review' (1992) 112(2) *Psychological Bulletin* 284, 290.

105 E Loftus and T Burns, 'Mental Shock Can Produce Retrograde Amnesia' (1982) 10 *Memory & Cognition* 318, 322.



8.97 A number of factors have been postulated as contributing to improved recall for the central details of real-life crime apart from the emotional response of subjects including the closer scrutiny likely to be given to emotional events, the more frequent internal rehearsal of emotional events, the likely unusual nature of emotional events and their personal significance.<sup>106</sup> However, emotionality has been shown to have an effect in addition to that accounted for by an event being unusual.<sup>107</sup>

8.98 For the purposes of assessing the reliability of eyewitness recall, the important finding to extract from the research overall is that the significant central actions of an emotionally arousing event are likely to be better remembered than ordinary non-emotional events, even if peripheral details cannot be recalled.

### *Rates of forgetting*

8.99 The Ebbinghaus curve of forgetting, demonstrating rapid decline in retention of information over time,<sup>108</sup> was developed through an experiment involving memory for nonsense spoken syllables. It was deliberately designed to eliminate factors that might affect memory for particular words such as familiarity and significance. Studies of autobiographical memory,<sup>109</sup> memory for emotionally arousing events<sup>110</sup> and eyewitness memory for violent crimes,<sup>111</sup> have found that information can be accurately retained for much longer periods.

8.100 The three studies by Yuille of eyewitness memory for real-life crimes found highly accurate memory for the events (over 80%) at intervals of four to five months, 13 to 18 months and two years.<sup>112</sup> They conclude that this 'memory persistence results

106 D Reisberg and F Heuer, 'Memory for Emotional Events' in D Reisberg and P Hertel (eds), *Memory and Emotion* (2004) 3, 11.

107 S Christianson and E Loftus, 'Remembering Emotional Events: The Fate of Detailed Information' (1991) 5 *Cognition & Emotion* 81, 105; F Heuer and D Reisberg, 'Vivid Memories of Emotional Events: The Accuracy of Remembered Minutiae' (1990) 18 *Memory & Cognition* 496.

108 Seventy-five per cent of learned material was forgotten within 24 hours.

109 W Brewer, 'Memory for Randomly Sampled Autobiographical Memory' in U Neisser and E Winograd (eds), *Remembering Reconsidered: Ecological and Traditional Approaches to the Study of Memory* (1988) 21, 81–82; M Linton, 'Memory for Real World Events' in D Norman and D Rumelhart (eds), *Explorations in Cognition* (1975) 376.

110 F Heuer and D Reisberg, 'Vivid Memories of Emotional Events: The Accuracy of Remembered Minutiae' (1990) 18 *Memory & Cognition* 496; A Burke, F Heuer and D Reisberg, 'Remembering Emotional Events' (1992) 20(3) *Memory & Cognition* 277.

111 J Yuille and P Tollestrup, 'A Model of the Diverse Effects of Emotion on Eyewitness Memory' in S Christianson (ed) *The Handbook of Emotion and Memory* (1992) 201; J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291; J Cutshall and J Yuille, 'Field Studies of Eyewitness Memory of Actual Crimes' in D Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) 97; S Christianson and B Hubinette, 'Hands Up! A Study of Witnesses' Emotional Reactions and Memories Associated with Bank Robberies' (1993) 7 *Applied Cognitive Psychology* 365.

112 J Cutshall and J Yuille, 'Field Studies of Eyewitness Memory of Actual Crimes' in D Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) 97 (referring to all three studies).

from the nature of the event, and that an Ebbinghaus forgetting curve simply doesn't apply in this type of case'.<sup>113</sup> One study of autobiographical memory found that survivors accurately retained memories of the central experiences of life in a concentration camp after an interval of 40 years, although some former interns forgot certain information which might have been expected would be remembered.<sup>114</sup>

8.101 Studies of children's memory for stressful medical procedures have also found highly accurate recall of these procedures<sup>115</sup> and retention of that memory over time.<sup>116</sup>

8.102 These results have been confirmed by laboratory studies which have found that emotion slows the rate of forgetting.<sup>117</sup> It is generally accepted now that the shape of forgetting curves depends on the type of material to be remembered.<sup>118</sup>

8.103 This is an area of ongoing research and debate.<sup>119</sup> Field studies have a number of methodological limitations, while laboratory studies can be criticised for their lack of ecological validity.<sup>120</sup> The complicating factors of the known difficulties with identification evidence and estimations of time and distance persist through all studies. However, it is reasonable to proceed on the basis that how quickly something is forgotten depends upon its subjective significance, both at the time the event was witnessed, and in the days, weeks and months following the event.<sup>121</sup>

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- 113 J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291, 299.
- 114 W Wagenaar and J Groeneweg, 'The Memory of Concentration Camp Survivors' (1990) 4 *Applied Cognitive Psychology* 77, 80.
- 115 G Goodman and others, 'Children's Memory for Stressful Events' (1991) 37 *Merrill-Palmer Quarterly* 109; G Goodman, C Aman and J Hirschman, 'Child Sexual and Physical Abuse: Children's Testimony' in S Ceci, M Toglia and D Ross (eds), *Children's Eyewitness Memory* (1987) 1; J Schaaf and others, 'Children's Eyewitness Memory: True Disclosures and False Reports' in B Bottoms, M Kovera and B McAuliff (eds), *Children, Social Science and the Law* (2002) 342, 350–352.
- 116 C Peterson and M Bell, 'Children's Memory of Traumatic Injury' (1996) 67 *Child Development* 3045.
- 117 D Reisberg and F Heuer, 'Memory for Emotional Events' in D Reisberg and P Hertel (eds), *Memory and Emotion* (2004) 3, 178; A Burke, F Heuer and D Reisberg, 'Remembering Emotional Events' (1992) 20(3) *Memory & Cognition* 277, 286.
- 118 E Loftus, E Greene and J Doyle, 'The Psychology of Eyewitness Testimony' in D Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) 3, 27.
- 119 Other field studies of real-life crime have failed to replicate the results of the Yuille studies; see R Haber and L Haber, 'Experiencing, Remembering and Reporting Events' (2000) 6 *Psychology, Public Policy & Law* 1057. For a recent review see J Read and D Connolly, 'The Effects of Delay on Long-term Memory for Witnessed Events' in M Toglia and others (eds), *Handbook of Eyewitness Psychology: Volume 2 Memory for Events* (in press).
- 120 Another area of research concerns 'flashbulb memories'—ie memories for the circumstances of receiving news of a momentous and emotional event. Examples frequently given of this type of study are remembering where a person was when he or she found out about the assassination of John Fitzgerald Kennedy, or the death of Diana, Princess of Wales. Memory studies have been conducted on events such as the Challenger disaster and the terrorist attacks in the United States on 11 September 2001. These studies have been excluded from the current discussion because they relate to memory of personal circumstances on receiving emotional news and media reporting, rather than the eyewitness memory of an experienced emotional event.
- 121 D Thomson, *Submission E 130*, 8 September 2005.

8.104 The period for which a memory for a remarkable event is likely to be accurately retained will be longer than that for an unremarkable memory. A witness' memory of a dog biting a child is likely to be accurately retained for longer than a witness' memory of someone walking his or her dog. This supports the notion that the nature of the event observed must be considered as a factor in determining whether an event was 'fresh in the memory' at the time a representation was made.

Because there is less loss in retention of emotional events than of nonemotional events ... it would be more appropriate to conclude that the presence of emotional reactions will increase the witnesses' reliability rather than decrease it as is commonly claimed in the eyewitness literature.<sup>122</sup>

### ***Misinformation effect***

8.105 Research has consistently demonstrated that misinformation received by a witness following an event can lead the witness to respond in accordance with the misinformation rather than the remembered event.<sup>123</sup> For example, a witness asked whether he or she saw the broken headlight on the car may respond affirmatively even where there was no broken headlight. A number of factors contribute to the effect. The misinformation effect is greater where the misinformation comes from a source which the subject considers credible or knowledgeable<sup>124</sup> and lessened where the subject perceives the information as coming from a biased source such as a driver of a car involved in an accident.<sup>125</sup> The effect is greater where the subject's memory for an event, or aspects of an event, is uncertain and lessened where the subject's memory is strong.

We might say that the misinformation effect is largely a function of uncertainty, either because the subject failed to encode or incorrectly encoded the original memory, or because the subject was asked about peripheral details less likely to be clear in his/her memory. The magnitude of this uncertainty effect is greatly increased in a social context in which the misinformation is suggested by a highly credible source (like the experimenter or a police interrogator) who asked questions in a particular way (response bias) so as to permit the subject to shift his or her decision criteria, especially for uncertain experiences, in the direction of making memory commission errors.<sup>126</sup>

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- 122 S. Christianson, 'Emotional Stress and Eyewitness Memory: A Critical Review' (1992) 112(2) *Psychological Bulletin* 284, 291.
  - 123 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998).
  - 124 V Smith and P Ellsworth, 'The Social Psychology of Eyewitness Accuracy: Misleading Questions and Communicator Expertise' (1987) 71 *Journal of Applied Psychology* 294, 294–300. This is a factor of considerable significance with young children being interviewed by adults: D Thomson, *Submission E 130*, 8 September 2005.
  - 125 D Dodd and J Bradshaw, 'Leading Questions and Memory: Pragmatic Constraints' (1980) 19 *Journal of Verbal Learning and Learning Behavior* 695, 695–704.
  - 126 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 234.

8.106 While there is evidence that children (particularly young ones) are vulnerable to suggestion,<sup>127</sup> studies with children have found that direct participation generally heightened resistance to post-event suggestions.<sup>128</sup> One study involved children in activities which could lead to mistaken reports and found that, across all the studies conducted, ‘children never made up false stories of abuse even when asked questions that might foster such reports’.<sup>129</sup>

8.107 The form of questioning of witnesses and the repeated questioning of witnesses are also significant factors. A large body of research surrounds this topic.

8.108 Logically, the closer in time to the event a representation is made by the witness, the less likely he or she is to have encountered post-event information. This undoubtedly supports a temporal freshness in the memory test. However, the concern that memory may be contaminated by post-event information or suggestion is mitigated where the nature of the events witnessed contributes to a greater encoding of memory, thereby reducing the potential misinformation effect.

### ***Trauma and Memory***

8.109 Traumatic memory is one area that may be set aside from the more general research into memory. While there is no standard terminology, traumatic memory is used by some to refer to instances where post-traumatic stress symptoms occur.<sup>130</sup> The term is then defined by reference to the effect of the event on the individual rather than just the nature of the event itself. There is evidence to suggest that traumatic memory in this sense has its own features distinct from memory for emotional events.<sup>131</sup>

When people receive ordinary, nontraumatic sensory input, they synthesize this incoming information into symbolic form, without conscious awareness of the processes that translate sensory impressions into a personal story. Our research shows that, in contrast, traumatic experience[s] in people with PTSD are initially imprinted as sensations or feeling states that are not immediately transcribed into personal narratives.<sup>132</sup>

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- 127 D Thomson, *Submission E 130*, 8 September 2005; S Ceci and M Bruck, ‘The Suggestibility of the Child Witness: A Historical Review and Synthesis’ (1993) 113 *Psychological Bulletin* 403.
  - 128 L Rudy and G Goodman, ‘Effects of Participation on Children’s Reports: Implications for Children’s Testimony’ (1991) 27 *Developmental Psychology* 527, 534. For more recent reviews of research on children’s memory see M Eisen and G Goodman, ‘Trauma, Memory, and Suggestibility in Children’ (1998) 10 *Development and Psychopathology* 717; B Gordon, L Baker-Ward and P Ornstein, ‘Children’s Testimony: A Review of Research on Memory for Past Experiences’ (2001) 4(2) *Clinical Child and Family Psychology Review* 157.
  - 129 G Goodman, C Aman and J Hirschman, ‘Child Sexual and Physical Abuse: Children’s Testimony’ in S Ceci, M Toglia and D Ross (eds), *Children’s Eyewitness Memory* (1987) 1; D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 243.
  - 130 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 154.
  - 131 B van der Kolk, ‘Traumatic Memories’ in P Appelbaum, L Ueyhara and M Elin (eds), *Trauma and Memory: Legal and Clinical Controversies* (1997) 243, 255.
  - 132 B van der Kolk and R Fisler, ‘Dissociation and Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study’ (1995) 8(4) *Journal of Traumatic Stress* 505.

8.110 Post-traumatic stress disorder can lead to ‘extremes of retention and forgetting: terrifying experiences may be remembered with extreme vividness, or totally resist integration’,<sup>133</sup> with resulting amnesia (temporary or permanent).

The data on *completeness* of memory for trauma suggests a bimodal distribution, with a larger sample who always remember the trauma, often vividly and accompanied by intrusive reexperiencing symptoms, and a smaller sample who are amnesic for the trauma for some period of their lives and may or may not later recover the memory ... Traumatic amnesia is a common occurrence in a subsample of traumatized individuals for most types of trauma, including childhood sexual abuse.<sup>134</sup>

8.111 Individual differences become a factor in traumatic memory and therefore general statements that might guide assessments of whether memories are ‘fresh’ are not easily made. However, this is all the more reason to favour a flexible test for admission that can take account of such difference.

### ***Conclusion on psychological research***

8.112 Psychological research into memory and eyewitness memory in particular continues. It is a field in which experimental results vary and experts differ in their opinions.<sup>135</sup> The one matter on which there is general agreement is that memory processes are complex and subject to a number of different factors and processes. No single factor can ensure accuracy. However, understanding of memory processes has progressed significantly from that which formed the basis of the current law, and the law should reflect that knowledge.

### **Submissions and consultations**

8.113 In DP 69 the Commissions proposed that the uniform Evidence Acts be amended to make clear that, for the purposes of s 66(2), whether a memory is ‘fresh’ is to be determined by reference to factors in addition to the time lapse between the occurrence of the asserted fact and the making of the representation. It was said that these factors might include the nature of the event concerned, and the age and health of the witness.<sup>136</sup>

8.114 The NSW DPP supports the proposal subject to two comments. The first comment is that repetition of an event (such as assault) can refresh a person’s memory

133 Ibid.

134 D Brown, A Schefflin and D Croydon Hammond, *Memory Trauma Treatment and the Law* (1998), 198.

135 D Thomson, *Submission E 130*, 8 September 2005. See J Read and D Connolly, ‘The Effects of Delay on Long-term Memory for Witnessed Events’ in M Toglia and others (eds), *Handbook of Eyewitness Psychology: Volume 2 Memory for Events* (in press).

136 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–6.

each time the event occurs: to reflect this, s 66(2A)(a) should arguably read ‘the nature of the event or number or frequency of events concerned’. The second comment is that draft s 66(2A)(b) should be expanded to take account not only of age and health, but people with disabilities, historical offences, or other factors such as education, ethnic or cultural background, level of maturity and personality. This is said to be because all these and other factors can affect people’s memories.<sup>137</sup>

8.115 The Women’s Legal Service Victoria supports Proposal 7–6 to reflect ‘the fact that many women do not make a complaint about family violence and sexual assault for many years’ because of the controlling behaviour of the perpetrator of the violence, feelings of shame, beliefs that the violence is the victim’s fault, and lack of courage to report the violence.<sup>138</sup> Two child sexual assault counsellors take a similar view, and point to a body of psychological research supporting their view.<sup>139</sup>

8.116 The Director of the Criminal Law Division of the New South Wales Attorney General’s Department supports the proposal, and adds that other factors which might be relevant to assessing whether a memory is ‘fresh’ include the circumstances in which the event occurs; the length of time over which the event occurs;<sup>140</sup> and the circumstances in which the complaint was made.<sup>141</sup>

8.117 The Director of Public Prosecutions for the Australian Capital Territory observes that older people often have clearer memories of the distant past than of the recent past, and that a person may clearly recall where they were at a particular moment in the distant past—such as when US President John Fitzgerald Kennedy was assassinated.<sup>142</sup> Other support for the proposal was received, including from the Victoria Police.<sup>143</sup>

8.118 On the other hand, the Law Society of New South Wales rejects the proposed amendment because the High Court’s decision in *Graham v The Queen* ‘has not prevented judges from finding special elements in cases and developing a more flexible [approach]’ to s 66; and because the amendment would create an expectation that judges could engage in a complex analysis of ‘freshness’.<sup>144</sup> The NSW PDO likewise

137 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

138 Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005.

139 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

140 Supporting New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

141 NSW Attorney General’s Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

142 Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005. See also Supreme Court of Victoria judge, *Consultation*, Victoria, 17 August 2005; NSW Law Society Litigation Law and Practice Committee, *Consultation*, Sydney, 26 August 2005; Confidential, *Consultation*, Sydney, 27 July 2005; Justice C Branson, *Consultation*, Sydney, 25 July 2005; G Brady, *Consultation*, Sydney, 26 August 2005.

143 C Ying, *Submission E 88*, 16 September 2005; K Mack, *Submission E 82*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

144 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

opposes the amendment, which it is said would mean ‘the watering down of the test for admissibility of out of court representations of available witnesses’.<sup>145</sup> Another perspective is that by retaining the word ‘fresh’, Proposal 7–6—while desirable—might not achieve its objective.

### The Commissions’ view

8.119 The Commissions find that there is strong support for amendment of s 66 to clarify that ‘freshness’ may be determined by a wide range of factors. Support comes from a variety of sources. The decisions of lower courts since *Graham* have often sought to limit *Graham* to its facts in order to retain flexibility in the interpretation of s 66. The more flexible approach in *R v Vinh Le* and *R v Adam* has been noted above.

8.120 Psychological research carefully and specifically crafted to look at the factors affecting the memory of eyewitnesses to crimes also supports this amendment. The research shows that while focusing primarily on the lapse of time between an event and the making of a representation about it might be justifiable in relation to memory of unremarkable events, the distinct and complex nature of memory of violent crime indicates that the nature of the event concerned should be considered in deciding whether a memory is ‘fresh’ at the relevant time. The assessment of ‘freshness’ should not be confined to time.

8.121 While the decision in *Graham* may not prevent the courts from developing more flexible approaches to the admission of evidence under s 66—and the decisions in *R v Vinh Le* and *R v Adam* may be said to support this possibility—it often does create a major difficulty in situations where the assessment of freshness is confined to time lapse, and the relevant period is short. Understandably, lower courts often feel hesitation at distinguishing *Graham* given the firm statements of the majority in that case. The same issue and considerations apply to the other provisions of the uniform Evidence Acts that use the term ‘fresh in the memory’.<sup>146</sup>

8.122 Regarding the wording of the proposed amendments, the Commissions take the view that the nature of the event concerned and the age and health of the witness are only examples of a wide variety of considerations which may be relevant to the assessment of what is ‘fresh in the memory’. The examples given are not intended to constrain that assessment. On the other hand, it is thought that the proposed amendments make sufficiently clear the ALRC’s intention in the previous Evidence inquiry that the quality of ‘freshness’ will not be confined to the time which elapses between the occurrence of the relevant event and the making of a representation about the event.

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145 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

146 Uniform Evidence Acts ss 32(2), 64(3).

8.123 It has been suggested that the term ‘fresh’ should be replaced with a word not having time as its dominant connotation. While the Commissions agree that another term might be preferable, a better term is not easy to identify. The recommended amendment and the existing law make sufficiently clear that the meaning of ‘fresh’ in s 66(2) is not confined to the temporal criterion. Introduction of a new expression would be likely to introduce uncertainty and require litigation to resolve the uncertainty.

8.124 The recommended drafting of the amendment is set out in Appendix 1.

**Recommendation 8–4**      The uniform Evidence Acts should be amended to make it clear that, for the purposes of s 66(2), whether a memory is ‘fresh’ is to be determined by reference to factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. These factors may include the nature of the event concerned, and the age and health of the witness.

## Business records

8.125 Section 69 of the uniform Evidence Acts provides exceptions to the hearsay rule relating to the admissibility of business records.<sup>147</sup> The relevant parts of s 69 read:

- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
  - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
  - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation:
  - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
  - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- ...
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person’s knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

8.126 Concerns have arisen about how s 69 relates to opinion evidence contained in business records.

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<sup>147</sup> A ‘document’ falling within the terms of the uniform Evidence Acts 69(1).



## Opinion evidence in business records

### *The uniform Evidence Acts*

8.127 Section 69(2) provides that the hearsay rule does not apply to a representation in a business record if the representation is based on ‘personal knowledge of the asserted fact’. Examples include plans drawn up by an architect as part of a development application process or a business database compiled by a business broker.<sup>148</sup>

8.128 Section 69 is an exception to the hearsay rule and so it is only triggered if the hearsay rule (in s 59) itself applies. A question is raised whether s 59 and, consequently, s 69, apply to an opinion expressed in a business record.

8.129 On current authority, ss 59 and 69 apply to opinions expressed in business records in the following way. For the purposes of s 59:

- the expression of the opinion (in the business record) is taken to be a ‘representation’;<sup>149</sup> and
- that representation is an asserted fact.<sup>150</sup> In other words, the representation is sought to be admitted as evidence of a fact to which the opinion relates.

8.130 This makes evidence of the opinion from the business record *prima facie* hearsay. It is then necessary to consider whether s 69 applies. Provided that the test of ‘personal knowledge of the asserted fact’ is satisfied (and no other exclusions in s 69 are applicable), the opinion expressed in the business record may be admissible as evidence of a fact to which the opinion relates.

8.131 This issue arose in two cases in particular. The first is *Ringrow Pty Ltd v BP Australia Ltd*.<sup>151</sup> There it was held that because the experts stating their opinions in the relevant business records had formed and expressed the opinions themselves, the experts had ‘personal knowledge of the asserted fact’ for the purposes of s 69(2) and (5).<sup>152</sup> The opinions were therefore admissible as evidence of the facts about which the opinions were given, although Hely J excluded the evidence in exercise of s 135.

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148 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [69.25].

149 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2860]. Evidence of a previous representation in the form of an opinion as to the existence of a fact may be caught by both the hearsay and opinion rules: [1.3.780].

150 An ‘asserted fact’ is defined to mean a fact the existence of which the person intended to assert in the representation: Uniform Evidence Acts s 59(2).

151 *Ringrow Pty Ltd v BP Australia Limited* (2003) 130 FCR 569.

152 *Ibid.*, [19].

8.132 As noted above, in order for s 69 to apply, the hearsay rule must have applied. *Ringrow* proceeded on that basis because the parties agreed that s 59 applied to ‘opinion’ as well as ‘fact’. Although it was unnecessary for Hely J to decide, his Honour seemed to agree with that concession, stating that ‘[t]he distinction between a fact and an opinion is not clear cut’.<sup>153</sup> Hely J also adopted the view that ‘there is no doubt that the word “fact” is wide enough to cover opinion’.<sup>154</sup> And his Honour also noted that there was nothing to show the ALRC intended s 69 not to apply to opinion as well as fact, with the result that s 69 should be ‘construed broadly’.<sup>155</sup>

8.133 Finally, Hely J noted that s 111 of the uniform Evidence Acts assumes that the hearsay rule is capable of applying to opinion evidence.<sup>156</sup> Hely J concluded:

Given that s 69 is to be construed broadly, and that at least in some contexts ‘fact’ may include an opinion (without statutory extension [of the definition of ‘fact’]), in my view s 69 of the Act is capable of operation even if the asserted fact is an opinion in relation to a matter of fact.<sup>157</sup>

8.134 Concerns about the scope of s 69 again arose in *Australian Securities and Investments Commission v Rich*.<sup>158</sup> In this case Austin J said that the effect of *Ringrow* was that, ‘[a] statement of opinion in a document may be an asserted fact for the purposes of ss 59 and 60’.<sup>159</sup> Austin J followed *Ringrow* and other authorities perceived to support Hely J’s interpretation of s 59.<sup>160</sup> However, Austin J went further to state that even if a statement of opinion in a document is not an asserted fact for the purposes of ss 59 and 60, the opinion would not be subject to the exclusionary opinion rule found in s 76. This was because

an interpretation of the opinion rules which confines them to the *evidence of witnesses in court* receives some support (though it is limited) from extrinsic materials concerning the enactment of the Evidence Act. In its *Final Report, Evidence* (Report No 38, 1987), the ... Law Reform Commission presented its recommendations<sup>161</sup> in terms of the taking of ‘expert testimony’, and said<sup>162</sup> that the Interim Bill would have enabled ‘an expert to give opinion evidence’. The relevant part of the *Interim Report*

153 Ibid, [16] citing *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 375.

154 *Ringrow Pty Ltd v BP Australia Limited* (2003) 130 FCR 569, [16].

155 Ibid, [17].

156 Ibid, [18]. Section 111 provides:

(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant’s character if:  
     (a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and  
     (b) the person whose opinion it is has specialised knowledge based on the person’s training, study or experience; and  
     (c) the opinion is wholly or substantially based on that knowledge.  
 (2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that the evidence should not be accepted.

157 Ibid, [18].

158 *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320.

159 Ibid, [206].

160 See the cases cited in Ibid, [209]–[210].

161 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [150].

162 See Ibid, [151].

on Evidence (Report No 26, 1985) is headed<sup>163</sup> ‘The Expert Witness Exception’, and para [362] is headed ‘Expert Testimony Based on Inadmissible Evidence’. Additionally, this construction appears to accord with the common law, under which the opinion rule was stated in terms of a ‘witness’ being precluded from giving an opinion,<sup>164</sup> while an out-of-court opinion was excluded by the hearsay rule.<sup>165</sup>

8.135 An application for leave to appeal from Austin J’s decision was refused ‘essentially for procedural reasons’.<sup>166</sup> However, Handley JA also said (Giles and Basten JJA agreeing):

One of the potentially important questions raised by [the applicant] concerns the relationship of s 69, the business records section, to Part 3.3 of the Evidence Act dealing with the opinion rule, particularly s 79 dealing with opinions based on specialised knowledge. The primary judge may have thought that the principles stated by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 apply with full force to statements by experts in business records made when litigation was not in contemplation. It is far from clear that these principles apply with their full force, or at all, to out of court statements by experts in business records even if such statements do have to meet the standard in s 79.<sup>167</sup>

8.136 While not overstating the significance of the statements in obiter dicta of Handley JA in refusing to grant leave in this case, two further problems may be caused by Austin J’s approach in *Rich*. First, s 76 is expressed to apply to ‘evidence of an opinion’. Words of that generality do not reveal a distinction between expert opinion testimony and evidence of expert opinion expressed outside the witness box. There is no reason in terms of policy why the same restrictions should not apply to all expert opinion evidence.

8.137 The second problem introduced by *Rich* is the assumption that under legislation upon which s 69 was based, opinion evidence in business records was admissible as evidence of the facts about which the opinion was expressed without the need to comply with lay or expert exceptions. This assumption is incorrect.

8.138 It is true that the NSW and Commonwealth statutory precursors to s 69 permitted ‘statements’ or ‘representations’ contained in business documents to be used as evidence of the truth of a fact asserted by a statement or representation. These statutory reforms, introduced in the 1970s, have been described as ‘among the most successful statutory reforms of the law of evidence ever attempted in this country’.<sup>168</sup>

163 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [352].

164 See J Heydon, *Cross on Evidence* (7th ed, 2004), [29005].

165 *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320, [216] (emphasis added).

166 *Rich v Australian Securities and Investments Commission* (2005) 54 ACSR 365, [7].

167 *Ibid*, [13].

168 J Heydon, *Cross on Evidence* (7th ed, 2004), [35540].

Because ‘fact’ was defined to include ‘opinion’ under this legislation,<sup>169</sup> the precursors to s 69 also made a statement or representation of opinion made in a business document admissible for the purpose of establishing the truth or falsity of the facts to which the opinion related.<sup>170</sup>

8.139 However, that does not support the assumption made in *Rich*. The Commonwealth legislation in particular had a number of limiting features. For example, the statement had to be made by a qualified person or be reproduced or derived from information from a qualified person. ‘Qualified person’ was defined as the owner, servant or agent of the business, or someone associated with it. Significantly, if the statement was of expert opinion, the qualified person had to possess the appropriate expertise required by the common law.<sup>171</sup> If the statement was not a matter of expert opinion, the qualified person was required to be someone who had, or might reasonably be supposed to have had, personal knowledge of the facts about which the opinion was stated. Broadly, it required the statement of opinion in the business record to satisfy the common law requirements for the admission of lay opinion evidence. Thus, the assumption that there was no need to comply with the expert or lay opinion exceptions or statutory analogues to those exceptions is incorrect. Therefore, the situation under the uniform Evidence Acts is not materially different in this respect from that which applied under the legislation upon which s 69 was based.

### Submissions and consultations

8.140 In DP 69, the Commissions asked what concerns are raised by the operation of s 69(2) of the uniform Evidence Acts with respect to business records, and whether these concerns should be addressed through amendment of the Acts.<sup>172</sup> A number of submissions and consultations take the view that s 69(2) operates satisfactorily and requires no amendment.<sup>173</sup>

8.141 One submission welcomes the exclusion of opinion in business records as evidence of the facts about which the opinion was expressed.<sup>174</sup> Others do not address the issue, but assert that s 69(2) requires no amendment.<sup>175</sup> A consultation with a judge

169 *Evidence Amendment Act 1978* (Cth) s 7B(3).

170 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [702]–[709]; J Heydon, *Cross on Evidence* (7th ed, 2004), [35555].

171 *Evidence Amendment Act 1978* (Cth) s 7A(b)(i).

172 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 7–2.

173 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; J Tippet, *Consultation*, Darwin, 16 August 2005; Confidential, *Consultation*, Brisbane, 9 August 2005; Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

174 C Ying, *Submission E 88*, 16 September 2005.

175 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

of the Supreme Court of NSW raised this issue as a serious question about the operation of the Act.<sup>176</sup>

### **The Commissions' view**

8.142 Generally, submissions and consultations disclose a high level of satisfaction with the operation of the business records provisions of the uniform Evidence Acts and take the view that s 69 does not require amendment. The Commissions' view to this effect, as expressed in DP 69, did not elicit negative responses.

8.143 The reasoning in *Ringrow* and *Rich*, taken together, may indicate some *potential* problems in the interaction of s 69 and the opinion rule in Part 3.3. However, the solution adopted by Hely J in *Ringrow* has not provoked great concern and the Commissions believe that it seems to operate satisfactorily. In particular, Hely J's approach highlights that there are important safeguards to prevent evidence being wrongly admitted through the business records provision, namely the requirement of 'personal knowledge' and, even if this is satisfied, the provisions in Part 3.11 may still be exercised.

8.144 The Commissions remain of the view that a case for amending the uniform Evidence Acts to overcome the 'difficulties' in *Ringrow* and *Rich* has not been made. With the exception of some muted concern expressed in obiter dicta by the NSW Court of Appeal in *Rich*,<sup>177</sup> there has been relatively little judicial consideration of this issue at appellate level. This fortifies the Commissions' view that it is not appropriate at this time to recommend an amendment to s 69.

### **Police records**

8.145 In the final report of the previous Evidence inquiry (ALRC 38), it was proposed that the business records exception not be available 'if the representation was prepared or obtained for the purpose of conducting, or in contemplation of or in connection with, a legal or administrative proceeding'.<sup>178</sup> The rationale for this proposal included that, without this provision, 'any note of information and rumour in police or private records gathered during the investigation of a crime would be admissible'.<sup>179</sup> Section 69(3) enacts that proposal.

### **Submissions and consultations**

8.146 The Victorian Privacy Commissioner raises an issue about the application of s 69(3) to business records kept by police. The Commissioner supports the s 69(3)

176 Justice R Austin, *Consultation*, Sydney, 4 October 2005.

177 *Rich v Australian Securities and Investments Commission* (2005) 54 ACSR 365, [7], [13].

178 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App A, Evidence Bill 1987, cl 61(2).

179 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [707].

safeguard from a privacy protection perspective, submitting that making unsubstantiated police records admissible as evidence of the truth of what they assert may lead to injustices ‘to parties and to third parties incidentally involved in the data’.<sup>180</sup>

8.147 By contrast, the NSW DPP supports the enactment of a discretion to admit documents made in connection with an investigation relating or leading to a criminal proceeding. The discretion proposed would apply

where it is required in the interests of justice, having regard to the circumstances in which the document came into existence, and any other matter considered relevant.<sup>181</sup>

8.148 The CDPP goes further, submitting that ‘[a] compelling case can be made for the removal of [s 69(3)]’.<sup>182</sup> The CDPP argues that the concerns about fabrication of self-serving evidence are misplaced because if such evidence is tendered, it can be rejected as not relevant.<sup>183</sup> Further, the CDPP submits that the provision has ‘unintended consequences because legitimate relevant records are rendered inadmissible’, examples given being records of a telephone trace put on a telephone during the course of an investigation and official records of the movement of a drug seizure.

### *The Commissions’ view*

8.149 The Commissions are not satisfied that there is any compelling reason to depart from the existing formulation in s 69(3). Departure from the existing formulation would mean departure from the policy of the provision.

8.150 In *Vitali v Stachnik*, Barrett J stated that the purpose of s 69(3)(b) is to prevent the introduction of hearsay material

which is prepared in an atmosphere or context which may cause it to be self-serving in the sense of possibly being prepared to assist the proof of something known or at least apprehended to be relevant to the outcome of identifiable legal proceedings.<sup>184</sup>

8.151 For instance, without s 69(3), a note deliberately written in a police officer’s notebook with the intention of implicating a person in alleged criminal activities could be admissible as evidence of the fact asserted by the note. If such documents were deemed to be reliable by including them within the s 69(2) exception, fabricated evidence could be admissible as evidence of the truth of the representation made, even though the maker of the representation might not be available for cross-examination.

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180 Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005. See also C Ying, *Submission E 88*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

181 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

182 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

183 Uniform Evidence Acts ss 55, 56(2).

184 *Vitali v Stachnik* [2001] NSWSC 303, [12].

Unless there were clear indications that the representation was a fabrication or unreliable, the evidence could not be excluded as irrelevant under s 56(2) and might not justify orders under Part 3.11.

8.152 Where hearsay representations made in business records are not admissible under the hearsay exception in s 69(3), the exceptions in s 65 will generally not be available.<sup>185</sup> The relevant provision in s 65 is subsection (2).<sup>186</sup> A basic criterion for the exception in subsection (2) is that the evidence 'is given by a person who saw, heard or otherwise perceived the representation being made'. In the case of a note made by a police officer in his or her notebook, this criterion would only be satisfied if a witness were available who perceived the note being written. This could happen if, for instance, another officer who attended an incident about which the note was written saw it being written, but not otherwise. On the other hand, s 66(2), for example, could frequently apply to representations contained in police notes provided the relevant note was made when the occurrence of the fact asserted by the note was fresh in the memory of the note's author.

8.153 Where evidence is admissible under ss 65 or 66, s 69(3) does not operate to prevent that evidence from being admitted. Because the evidence is admitted under a hearsay exception, it may be used as evidence of the asserted fact. It should be noted that in such circumstances, the evidence would be admissible subject to Part 3.11.

## Criminal proceedings

### *Related issues*

8.154 A question raised in response to DP 69 is whether s 69 should have stricter application in criminal cases.<sup>187</sup> In the context of prosecutions for alleged fraud against Centrelink, it is said that s 69 coupled with ss 48(1)(e), 48(2), 146 and 147 operates unfairly against the defendant where the prosecutor,

in the absence of original documents, is relying on a previous representation (that of the data entry clerk) *of a previous representation* (continuation form from the welfare claimant) to prove the existence of a fact. This approach, apart from being unreliable, appears to beg the question, insofar as the premise that the reasoning is to be based on (x claimed w) is also the conclusion that is being attempted to be proven (that x claimed w).<sup>188</sup>

185 See Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

186 The remaining subsections are unlikely to be material to the situation under discussion. Those subsections concern, for example, whether the hearsay rule applies to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding: s 65(3)–(6).

187 J Phibbs, *Submission E 100*, 19 September 2005.

188 Ibid.

8.155 It is submitted that while the efficiency policy underlying s 69 justifies the admission of hearsay contained in business records in civil cases, in criminal cases the overriding justification for admitting such evidence should be reliability. The suggestion is made that the standard of proving the accuracy of computer-produced evidence in criminal prosecutions should be higher than in civil cases.

8.156 Conversely, the CDPP also proposes amendment to the provisions of the uniform Evidence Acts, particularly to make banking records more freely admissible. Section 69(2) is raised in this regard.<sup>189</sup>

8.157 Other submissions and consultations do not suggest that these questions reveal a particular problem with s 69. The Commissions do not believe that a case has been made out in favour of modifying the application of s 69 to criminal cases. The Commissions recommend no change to s 69 in this regard.

### **Contemporaneous statements about a person's health etc**

8.158 Section 72 of the uniform Evidence Acts provides an exception to the hearsay rule applying to certain contemporaneous statements. It states:

The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

8.159 In the previous Evidence inquiry, the ALRC did not recommend the inclusion of this provision in the uniform evidence legislation. The ALRC considered that such representations were covered adequately by confining the definition of 'hearsay' to evidence of facts the maker of a previous representation intended to assert by the representation and by the first-hand hearsay proposal.<sup>190</sup>

8.160 Section 72 of the uniform Evidence Acts assumes that the contemporaneous representations covered by it are hearsay, by allowing their admission as an exception to the hearsay rule. At common law, many such representations are admissible either as original evidence or as hearsay admissible under the *res gestae* exception.<sup>191</sup>

8.161 This provision has been criticised in several respects<sup>192</sup> which will be considered in turn.

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189 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

190 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3400].

191 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.00]; J Heydon, *Cross on Evidence* (7th ed, 2004), [37165].

192 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.70]–[5.72].



**‘Belief’ and ‘memory’**

8.162 It has been noted that if the words ‘intention, knowledge or state of mind’ include ‘belief’ or ‘memory’, the section may render the Act’s hearsay exclusionary rules generally inapplicable to contemporaneous statements.<sup>193</sup>

8.163 To date courts have not interpreted s 72 so broadly.<sup>194</sup> The potential absurdity of construing s 72 this way gives reason for not adopting a construction of that breadth.

8.164 The Acts appear to be operating satisfactorily in this regard. No submissions or consultations indicated support for amending s 72 in relation to this point.

**Use of statement about health etc**

8.165 It is unclear whether s 72 avoids the operation of the hearsay rule solely in respect of proving the ‘health, feelings, sensations, intention, knowledge or state of mind’ of the maker, or whether the evidence can be used for any other purpose.<sup>195</sup> For instance, where evidence is admitted to prove that a victim was afraid of the accused (being a representation about a state of mind) does s 72 also allow the representation to be used to prove the occurrence of an event that created that state of mind, such as the making of a threat?

8.166 Section 72 contemplates that the health, feelings, sensations, intention, knowledge or state of mind of a person who made a previous representation will be facts in issue. The section allows representations identified in the section to be used as evidence of the person’s health, feelings and so on. Where the evidence is sought to be used for another purpose, it must be relevant for that purpose. That is, to be admissible for that other purpose, it must be that the evidence admitted under s 72 could rationally affect the assessment of the probability of the existence of a fact in issue.<sup>196</sup> Provided the relevance requirement is made out, the evidence admitted under s 72 will be admissible as evidence of any fact in issue.

8.167 The Acts appear to be operating satisfactorily in this respect. No submissions or consultations indicated support for amending s 72 in relation to this point.

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193 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3400]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.00]; *R v Polkinghorne* (1999) 108 A Crim R 189, [25].

194 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; *R v Polkinghorne* (1999) 108 A Crim R 189.

195 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.72] referring to J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.40].

196 Uniform Evidence Acts s 55.

***Evidence of a ‘representation’***

8.168 The use of the term ‘representation’ in s 72 has been criticised. One commentator described the use of the expression ‘representation’ as a ‘serious drafting flaw in s 72’, pointing out that the purpose of s 72 is to exempt the *inference* about a person’s state of mind etc which arises from statements they make, rather than the representation which gives rise to the inference.<sup>197</sup>

8.169 Since permissible inferences can generally be drawn only from admitted evidence, including real evidence,<sup>198</sup> narrowing the language of s 72 in this way might not be practical. Further, s 72 is a statutory counterpart to the common law *res gestae* exception, under which evidence within the exception was admissible as evidence of its truth. The *res gestae* exception was not an exception applying only to inferences drawn from inadmissible hearsay. Section 72 shows no intention to take a different approach, and submissions and consultations do not indicate that s 72 currently works unsatisfactorily in this regard or has the potential to do so in future.

8.170 Again, the Acts appear to be operating satisfactorily in this respect. Accordingly, the Commissions recommend no change to s 72 in this regard.

***Second-hand hearsay***

8.171 The final criticism of s 72 is that it is not, by its terms, confined to first-hand hearsay as it refers only to ‘evidence’ rather than to representations made by a person who has personal knowledge of an asserted fact.<sup>199</sup>

8.172 The Commissions agree with this criticism of s 72. It is difficult to justify applying s 72 to second-hand and more remote forms of hearsay. The exception in s 72 is only justifiable if there is reason to think the evidence is reliable. A reliability constraint would be provided by restricting the scope of the s 72 exception to first-hand hearsay. Cross-examination of the person who had personal knowledge of the fact asserted in the hearsay representation would allow the tribunal of fact to assess whether the evidence is reliable by considering what forensic weight to give the evidence. Without those reliability safeguards, however, evidence which is potentially highly unreliable may be admitted and would not necessarily be tested forensically.

8.173 While evidence admissible under s 72 as currently drafted is subject to the provisions of Part 3.11, the Commissions take the view that second-hand evidence is so inherently unreliable that it should not be admissible subject to exclusion or limitation, but should be inadmissible as a rule.

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197 J Gans, *Submission E 59*, 18 August 2005.

198 For example, courtroom demeanour.

199 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.71] referring to S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3400].

8.174 Submissions and consultations in response to DP 69 support the proposal to limit s 72 to first-hand hearsay.<sup>200</sup> The Commissions recommend that s 72 be repealed and re-enacted in identical form in Division 2 of Part 3.2 of the uniform Evidence Acts (see Appendix 1). Section 62 (headed ‘Restriction to *first-hand* hearsay’) would apply to the re-enacted provision to achieve the desired limitation.

**Recommendation 8–5** Section 72 of the uniform Evidence Acts dealing with contemporaneous statements about a person’s health, feelings, sensations, intention, knowledge or state of mind should be repealed and re-enacted in identical form in Division 2 of Part 3.2 of the Acts.

### Hearsay in interlocutory proceedings

8.175 In interlocutory proceedings, parties often rely on affidavits, rather than on witness testimony. Where affidavits contain hearsay, the hearsay evidence will be admissible when tendered as evidence of the fact intended to be asserted by the person who made the representation out of court. Ordinarily, such evidence would be excluded by the general hearsay rule in s 59. However, s 75 of the uniform Evidence Acts provides that the hearsay rule does not apply in interlocutory proceedings ‘if the party who adduces it also adduces evidence of its source’. The rules of court in most federal, state and territory jurisdictions include a similar provision.<sup>201</sup>

### Additional formalities?

8.176 It has been suggested that, by the terms of s 75, the person swearing or affirming the affidavit or making a written statement should be required to swear or affirm to a belief in the information and the reasons for that belief. The same amendment is also suggested for s 172.<sup>202</sup>

### Comparison with s 172

8.177 Section 172 requires a similar procedure. In relation to evidence governed by Part 4.6 Div 2, in which s 172 is found, evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that the person has.

200 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 7–7. C Ying, *Submission E 88*, 16 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; J Gans, *Submission E 59*, 18 August 2005.

201 J Heydon, *Cross on Evidence* (7th ed, 2004), [33840].

202 A Hogan, *Submission E 1*, 16 August 2004.

If a person gives such evidence by affidavit (as permitted by s 170(2)), the deponent will thereby swear or affirm to a belief in the information. Thus, the person will not be required to swear or affirm to a belief in the information other than in the limited circumstance where s 172 applies, and where the evidence is given by affidavit.

8.178 In DP 69, the Commissions noted their intention not to propose any amendment to s 75 of the Acts.<sup>203</sup> It was noted that in the typical affidavit in interlocutory proceedings the deponent declares: 'I am informed by ... and verily believe ...'. These are matters going to information and belief. The uniform Evidence Acts do not impose this requirement but, at the same time, do not prevent rules of court imposing such requirements, and the existence of these requirements reflects the fact that the subject under discussion is dealt with outside the uniform Evidence Acts, and appropriately so. The Acts simply prescribe the circumstances in which the hearsay rule does not apply. They do not purport to spell out complete requirements as to the form and content of affidavits.

8.179 Bearing in mind the Commissions' policy that the uniform Evidence Acts should remain Acts of general application focusing primarily on evidentiary rules rather than matters of procedure, the Commissions are of the view that the appropriate vehicle for any alteration of the requirements of affidavits would be the relevant rules of court. The Commissions affirm that no amendment of s 75 or the related ancillary provisions of the Acts is necessary.

## Hearsay and children's evidence

8.180 The hearsay rule is particularly significant in cases involving child witnesses, as children are often incompetent to give sworn or unsworn evidence, or unwilling to give evidence due to the trauma involved.<sup>204</sup> Moreover, children may be unable to give satisfactory evidence due to the unfamiliarity of the courtroom setting and procedure, and limitations in memory, accurate recall of events, or mental and intellectual capacity.<sup>205</sup> The lack of evidence from child witnesses may mean that some cases are not prosecuted.<sup>206</sup>

8.181 Some previous statements, disclosures or descriptions made by children may fall into one of the existing exceptions to the hearsay rule, for example where the occurrence of the asserted fact is fresh in the memory of the child.<sup>207</sup> Others may be admissible as evidence of the truth of the asserted facts under s 60 if the evidence is

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203 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.255].

204 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.78].

205 *Ibid*, Ch 14.

206 *Ibid*, [14.78].

207 Uniform Evidence Acts ss 64, 66.

relevant for that purpose and for a purpose other than proof of the asserted fact (eg, for credibility purposes).<sup>208</sup>

8.182 In their joint inquiry into children in the legal process (ALRC 84), the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) considered that the hearsay exceptions in the uniform Evidence Acts are insufficient to admit all relevant previous statements made by children because patterns of disclosure among child victims often involve disclosure of small pieces of information over periods of time.<sup>209</sup> It was considered that the admission of a child's out-of-court statement could preserve the child's account at an early stage, making it a reliable form of evidence, and could reduce the stress and trauma on the child of testifying in court.<sup>210</sup>

8.183 For these reasons, it was recommended in ALRC 84 that the uniform Evidence Acts should be amended to allow children's hearsay statements to be admitted in certain cases:

Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable. A person may not be convicted solely on the evidence of one hearsay statement admitted under this exception to the rule against hearsay.<sup>211</sup>

8.184 The ALRC and HREOC recommendation is based on a hearsay exception created by the Supreme Court of Canada in *R v Khan*.<sup>212</sup> In Canada, courts may admit children's hearsay statements about a fact in issue if admission of the evidence is 'necessary' and the statement is reasonably reliable.<sup>213</sup> Admission of the evidence is considered 'necessary' where the child is: incompetent to give evidence; or is unable or unavailable to give evidence, such as where the child is extremely young or cannot give a coherent or comprehensive account of events; or the judge is satisfied that giving evidence might be traumatic for, or harm, the child.

208 See the discussion of *Lee v The Queen* (1998) 195 CLR 594 in Ch 7.

209 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.79].

210 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 1 (2000), Ch 8.

211 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 102.

212 *R v Khan* [1990] 2 SCR 531, 546; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.81]–[14.82].

213 *R v Khan* [1990] 2 SCR 531: in this case, a child's previous representation of sexual assault was admitted through an adult witness without calling the child.

8.185 In ALRC 84 it was noted that the ‘necessity’ limb of the test in *R v Khan* provides a much broader set of circumstances for the admissibility of a child’s statement than the hearsay exceptions found in ss 63 and 65 of the uniform Evidence Acts—tests which depend on the ‘unavailability’ of the child to testify. Further, the ‘reasonable reliability’ limb of the test in *R v Khan* is less stringent than the ‘high probability of reliability’ test in s 65(2)(c) of the uniform Evidence Acts.<sup>214</sup>

8.186 This issue has also been canvassed (in a non-uniform Evidence Act jurisdiction) by the VLRC in its report on sexual offences.<sup>215</sup> The VLRC recognised that direct evidence given by a child in court may not be better than hearsay evidence of a child’s earlier statements about sexual abuse and recommends a child-specific hearsay exception applicable to child sexual offence cases.<sup>216</sup>

8.187 In its interim report, the VLRC proposed that the courts should have a discretion to admit the hearsay evidence of children, regardless of whether the child is available to give evidence.<sup>217</sup> However, the final report expresses reservations about the fairness of such an approach where the child’s evidence cannot be tested in cross-examination because the child is not available to give evidence. The VLRC also notes that provisions allowing the court to admit hearsay evidence of sufficient probative value where the child is not available to give evidence may have limited effect because courts may routinely exercise their discretion to exclude evidence in this situation.<sup>218</sup>

8.188 In its final report, the VLRC recommended that a hearsay exception be enacted for evidence of statements to prove facts in issue:

- in any criminal case involving child sexual assault allegations where the child is under the age of 16 and is available to give evidence; and
- where the court, after considering the nature and content of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.<sup>219</sup>

### Existing laws

8.189 A number of jurisdictions have made provision for the admission of child witnesses’ hearsay statements as proof of the facts asserted. The *Family Law Act 1975* (Cth) provides that, in children’s matters under Part VII of that Act, evidence of a

214 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.82], fn 217.

215 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.97]–[5.130].

216 Ibid, [5.105]–[5.115].

217 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), Rec 75.

218 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.125]–[5.127].

219 Ibid, Rec 139.

representation made by a child about a matter that is relevant to the welfare of the child or another child is not inadmissible solely because of the law against hearsay.<sup>220</sup>

8.190 In NSW and Tasmania, in certain criminal proceedings the evidence of certain previous statements made by a child may be admitted.<sup>221</sup> Queensland legislation allows for the admission of documentary evidence of statements made by child witnesses tending to establish a fact as evidence of that fact.<sup>222</sup> In Western Australia, a statement made by a child before the proceedings were commenced that relates to any matter in issue in the proceedings may be admitted at the discretion of the judge.<sup>223</sup> Northern Territory legislation provides an exception to the hearsay rule in sexual offence proceedings for evidence of a child's statement to another person.<sup>224</sup>

### Submissions and consultations

8.191 In IP 28 it was asked whether there should be an additional exception to the hearsay rule regarding children's hearsay statements about a fact in issue, making such statements admissible to prove those facts and, if so, subject to what restrictions.<sup>225</sup> The Commissions expressed the view in DP 69 that the best way to address concerns about this issue, at least in the medium term, may be through hearsay exceptions specific to certain offences and located outside the uniform Evidence Acts. It was noted that the Commissions' common policy is that the uniform Evidence Acts should remain Acts of general application, and that hearsay exceptions for children's evidence have close links with complex procedural issues that at this point are more appropriately dealt with outside the uniform Evidence Acts.<sup>226</sup> This position received support.<sup>227</sup>

220 *Family Law Act 1975* (Cth) s 100D.

221 *Evidence (Children) Act 1997* (NSW) ss 8, 9: this applies only to children who are under the age of 16 at the time the evidence is given. *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5(1): this applies to children under the age of 17.

222 *Evidence Act 1977* (Qld) s 93A. Statements contained in a document that were made by another person in response to the child's statements are also admissible: s 93A(2). The maker of the statements must be available to give evidence in the proceeding. These sections apply to children under 16 years of age, or children aged 16 or 17 who are classed as special witnesses.

223 *Evidence Act 1906* (WA) s 106H. Details of the statement must be given to the defendant and the defendant must be given the opportunity to cross-examine the child: s 106H(1). The person to whom the child made the statement is to give evidence of the making of the statement and of its content: s 106H(2). These sections apply to proceedings relating to certain sexual and other violent offences under the *Criminal Code* (WA), and where the child was under 16 years of age when the complaint was made.

224 *Evidence Act 1939* (NT) s 26E.

225 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–15.

226 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.273]–[7.274].

227 G Brady, *Consultation*, Sydney, 26 August 2005.

8.192 In DP 69, the Commissions recorded the opposition to a new hearsay rule for child witnesses voiced by the NSW PDO and the Law Council.<sup>228</sup> The Law Council said:

The Council does not believe that such an exception can be based on necessity where the result of admitting hearsay evidence creates an unreasonable risk that an innocent person may be convicted. Where possible, children should testify orally and their testimony be subject to cross-examination.<sup>229</sup>

8.193 The Commissions also recorded the opposition of Victoria Legal Aid. That opposition was renewed in a further submission. It was said to be undesirable to introduce 'a general child hearsay exception and provisions that reduce the barriers to admissibility for child hearsay'. Factors were pointed to that may affect the reliability of the evidence, including that at the time of making the representation of which evidence is later tendered, the child may not be mature enough to understand the difference between the truth and a lie; may not understand the importance of telling the truth; may be mistaken about certain facts; and may misinterpret the nature or significance of events reported.<sup>230</sup> Objection is also made to other amendments to the hearsay rules that might have the effect of reducing barriers to admissibility for hearsay evidence from a child.<sup>231</sup>

### **The Commissions' view**

8.194 As pointed out in DP 69, there are significant barriers to the development of any recommendation for the introduction in the uniform Evidence Acts of a hearsay exception directed to children's evidence. There is no consensus on the precise limits of the perceived mischief, and therefore no consensus on the form any statutory hearsay exception might take. For example, some proposals apply only to evidence in sexual offence cases, others to family law proceedings, and others to all civil or criminal proceedings in which allegations of child abuse are made. A more precise formulation of the difficulties is necessary before such change could be made. Agreement as to how to make that change would also be vital.

8.195 For reasons already canvassed, the Commissions do not propose that evidentiary provisions relating specifically to hearsay evidence of child witnesses should be included in the uniform Evidence Acts. However, the Commissions reiterate that the recommendations in this Report for reform of some provisions of general application may, in some circumstances, reduce barriers to the admission of children's hearsay evidence.<sup>232</sup>

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228 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

229 Law Council of Australia, *Submission E 32*, 4 March 2005. The Law Council does, however, support modified procedures for the giving of evidence by children.

230 Victoria Legal Aid, *Submission E 113*, 30 September 2005.

231 Ibid.

232 See Rec 8–2 and Rec 8–4.



8.196 Finally, if reform of the hearsay rule relating to children's evidence is deemed necessary, the states and territories could work towards developing a uniform approach to the topic outside the uniform Evidence Acts. Once achieved, consideration could be given to including the laws in the uniform Evidence Acts. The mechanism proposed for monitoring uniformity, which is discussed in Chapter 2, may be useful in this regard.

### **Notice where hearsay evidence is to be adduced**

8.197 Section 67 of the uniform Evidence Acts makes the operation of certain of the first-hand hearsay exceptions conditional on notice being given to each other party by the party intending to adduce the evidence. Briefly, notice is required:

- in both civil and criminal trials where the maker of the representation is unavailable and reliance is placed on s 63(2) or ss 65(2), (3) or (8); and
- in civil trials under s 64(2) where the maker is available but the party adducing the evidence proposes not to call the maker because it would cause undue expense or delay or would not be reasonably practicable.

8.198 Notice is to be given in accordance with any regulations or rules of court made for the purposes of s 67.<sup>233</sup> Section 67(4) provides that failure to give notice may be excused by the court. The section does not set out criteria for the exercise of this discretion. However, the factors set out in s 192 of the Acts will apply, including the extent to which making a direction would be unfair to a party or witness, the importance of the evidence and whether it is possible to grant an adjournment.

8.199 In its previous Evidence inquiry, the ALRC spoke of the need for notice provisions in all trials where the maker of a representation out of court is not available, and a party to litigation intends to lead evidence of the out of court representation. The ALRC said the proposals later enacted as the general hearsay rule and its exceptions extend

the range of hearsay evidence that is admissible and creates the danger of a party being caught by surprise and being unable to check on the unavailability of the maker or the substance of the evidence. New safeguards are required. It is proposed that a party wishing to rely upon this relaxation of the hearsay rule in civil or criminal trials should be obliged to notify the other parties and give details of when, where and by whom the representation was made, why that person is not available, and the substance of the representation and other relevant representations by that person and the grounds [relied] upon. Concern has been expressed about whether this will open

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233 See, eg, *Evidence Regulations 1995* (Cth) r 5; *Federal Court Rules* (Cth) O 33 r 16.

up collateral material and add to the time and cost of litigation. The material, however, would have to relate to the issues [in the proceeding].<sup>234</sup>

8.200 It is helpful to keep these considerations in mind in evaluating the existing notice provisions in the uniform Evidence Acts, and in evaluating submissions and consultations addressing the notice provisions.

### Notice in civil proceedings

8.201 In IP 28, the view was noted that, while it is common for the Crown to give notice where hearsay evidence is to be adduced in criminal proceedings, the notice provisions are largely ignored in civil proceedings.<sup>235</sup> Comments were sought on how s 67 of the uniform Evidence Acts has operated in civil proceedings.<sup>236</sup>

8.202 Suggestions were noted in IP 28 and DP 69 that, in civil proceedings, the prescriptive form of notice required by the uniform Evidence Acts, regulations and rules of court should be replaced by a simple requirement to serve hearsay evidence on the other party.<sup>237</sup> This suggestion directs attention outside the uniform Evidence Acts. In terms of the Acts themselves, s 67 establishes a relatively simple requirement: the party intending to lead the hearsay evidence must give reasonable notice of its intention to do so to each other party. While s 67 does not detail a series of items for inclusion in any notice, meaningful notice of the matter required to be stated by s 67(3) could not be given without indicating what the evidence is, and the statutory provisions and grounds on which the party intends to rely. Any more detailed content requirements may be dealt with in rules of court.

8.203 Leaving aside the nature of the notice requirement, conflicting accounts were received of the extent to which the requirement is complied with and enforced in practice. Some practitioners state that it is important to comply with the notice requirements because NSW judges do not hesitate to exclude hearsay evidence where notice has not been given.<sup>238</sup> Others say that the notice provisions are rarely used,<sup>239</sup> but do not call for any change. One comment is that s 67 provides a simple procedure, the commonsense use of which should be encouraged.<sup>240</sup>

234 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [695].

235 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.90]. In relation to notice in criminal proceedings, the NSW PDO states that 'the traditional time for service of these notices appears to be the Friday afternoon before the trial is to commence. Judges appear not to be prepared to apply any sanctions for late notice of tendency and coincidence evidence': New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

236 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–16.

237 Ibid, [5.91]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [7.280].

238 For example, B Donovan, *Consultation*, Sydney, 21 February 2005.

239 For example, P Greenwood, *Submission E 47*, 11 March 2005; S Finch, *Consultation*, Sydney, 3 March 2005.

240 P Greenwood, *Submission E 47*, 11 March 2005.

***The Commissions' view***

8.204 The issue of notice of intention to adduce hearsay in civil proceedings did not receive a great deal of attention in submissions and consultations.<sup>241</sup>

8.205 Given the fact that few responses regarding s 67 were received by the Commissions, and that the material received gave conflicting accounts of how s 67 operates in practice, it is not possible to assess whether the provisions are operating satisfactorily or require amendment. For cases where the maker of the representation is not available to testify, an assessment of that kind would require evaluation of the operation of s 67 in practice against the general policy behind the notice provisions which has been referred to above, for cases where the maker of the representation is not available to testify. In relation to civil trials where the maker is available, the ALRC set out additional reasons of policy justifying the notice provisions:

Costs can be saved in civil trials in not having to call witnesses. The proposal extends existing law by enabling a party to avoid having to call witnesses who are available by serving notice on the other parties containing the above details and, should objection be received, obtaining the court's leave—before or at trial—[not to] call the witness.<sup>242</sup> If there is no objection the representation may be received in evidence without proof. In this context the notice provision not only protects the parties but also gives the court the means to regulate the admission of firsthand hearsay in civil trials. The judge will be able to resolve the issue of whether the witness should be called by directing that [the witness] be called and placing the burden of costs on the party objecting or, if in doubt, reserving the question of costs for further consideration after the witness' evidence is concluded. In this way unnecessary objections can be discouraged. The procedure introduces a discretionary element and therefore uncertainty in preparation for trial. It addresses that problem, however, by enabling the issues to be resolved before the trial commences should a party wish to do so.<sup>243</sup>

8.206 Section 67 represents the reconciliation of several competing considerations, and a balance struck between those ideas. Submissions and consultations directed to these considerations were not received. Further, if amendment is required, it is not currently possible to know what form any amendment should take. Accordingly, the Commissions do not recommend any change to the notice requirement for civil proceedings.

**Notice in criminal proceedings**

8.207 The Law Council raised an issue concerning the giving of notice in criminal proceedings. As discussed above, s 65(9) allows a party to adduce hearsay evidence

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241 One Federal Court judge recalled seeing notice given under 67 only twice: Justice C Branson, *Consultation*, Sydney, 25 July 2005.

242 The ALRC supported a provision that allowed a party to object to the tender of hearsay evidence in civil proceedings if the maker of the hearsay representation is available. Section 68 is such a provision.

243 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [695].

that qualifies or explains a representation about a matter in relation to which evidence has been led by the defendant and which has been admitted under s 65(8)(a). The Law Council submits:

The vagueness of the term ‘the matter’ [in s 65(9)], the possible ignorance of the accused about the evidence available to the prosecution, and the unavailability of an advance ruling by the trial judge make it difficult for the defence to decide whether to call hearsay evidence under s 65(8). Section 67(1) requires the defence to give notice of its intention to call hearsay evidence under s 65(8) but there is no subsequent corresponding obligation on the prosecution. The Council believes such notice should be given.<sup>244</sup>

8.208 In DP 69, the Commissions asked if s 67 should be amended to require the prosecution to give notice of an intention to adduce evidence under s 65(9). Some support was received for an amendment along these lines.<sup>245</sup>

8.209 However, the NSW DPP disagrees with the amendment.<sup>246</sup> It suggests that an amendment along the lines of DP 69, Question 7–4, has no rationale.

An obligation on the prosecution to give such notice could only apply where the defendant has in fact given notice to the prosecution and has adduced the evidence, as it is not until this stage is reached that the prosecution will be in a position to know what it is that it may adduce evidence about. Section 65(9) only allows the prosecution to adduce the evidence once the evidence of the defendant *has been admitted*.<sup>247</sup>

8.210 The NSW DPP questions the utility for the defendant in receiving such notice from the prosecution at that stage of the proceedings.

### ***The Commissions’ views***

#### ***‘The matter’ not vague***

8.211 Earlier in this chapter, attention was given to the meaning of the expressions ‘about a matter’ and ‘about the matter’ used in s 65(9). It was noted that the meaning of these expressions is constrained by the purpose for which the defendant tendered the evidence under s 65(8). The relevance requirement in s 55 requires the defendant’s evidence to be capable of rationally affecting the assessment of the probability of the existence of a fact in issue. The fact in issue ‘about’ which the defendant adduces evidence, which is admitted under s 65(8), is ‘the matter’ ‘about’ which another party to the proceedings may then tender evidence under s 65(9). It follows that the nature of the evidence admissible under s 65(9) is a factual question turning on the nature of the evidence admitted under s 65(8). These considerations address one of the reasons

<sup>244</sup> Law Council of Australia, *Submission E 32*, 4 March 2005.

<sup>245</sup> C Ying, *Submission E 88*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>246</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

<sup>247</sup> *Ibid* (emphasis original).

notice of intention to lead evidence under s 65(9) might be thought necessary—namely, perceived vagueness in the expressions ‘about a matter’ and ‘about the matter’.

### *Notice superfluous*

8.212 When formulating proposals for the hearsay provisions now found in Part 3.2 of the uniform Evidence Acts, the ALRC noted that a ‘major qualification’ was necessary to general hearsay provisions for criminal proceedings. The ALRC said:

The concern to minimise wrongful convictions requires a more cautious approach to the admission of hearsay evidence against the accused. The best available evidence for the prosecution should not necessarily be received.<sup>248</sup>

8.213 Adding a notice requirement to s 65(9) would further these policies. However, the amendment would likely serve no practical purpose and could create an unnecessary formal distraction from the smooth running of criminal trials. Given that the prosecution will not be in a position to know what evidence it may need to adduce in reply to the defendant, the stage at which notice would be received would be late. The formal attractions of the amendment would likely produce no substantive improvements in the administration of criminal jurisdiction. The Commissions do not recommend including such a notice requirement.

## **Hearsay in civil proceedings**

8.214 The hearsay rule and its exceptions are of much more practical importance in criminal than in civil proceedings. Consultations and submissions indicate that the hearsay rule is often ignored in civil proceedings.

8.215 In the United Kingdom, the hearsay rule was largely abolished in civil proceedings by the *Civil Evidence Act 1995* (UK).<sup>249</sup> Section 1 of the *Civil Evidence Act* states:

- (1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
- (2) In this Act—
  - (a) ‘hearsay’ means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
  - (b) references to hearsay include hearsay of whatever degree.

8.216 Under the United Kingdom legislation, the party proposing to adduce hearsay evidence must provide notice of that fact to the other party.<sup>250</sup> The Act also contains

<sup>248</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [679].

<sup>249</sup> See C Tapper, *Cross and Tapper on Evidence* (10th ed, 2004), 615–618.

detailed provisions setting out considerations relevant to the weighing of hearsay evidence by the court.<sup>251</sup>

8.217 The ALRC requested comments on whether the uniform Evidence Acts might be reformed to abolish the hearsay rule for civil proceedings or to allow parties to agree that the rule not apply to proceedings between the parties.<sup>252</sup> One starting point for such a reform might be s 190 of the uniform Evidence Acts. This provision states that the court may dispense with the application of certain rules of evidence,<sup>253</sup> but only if the parties consent.<sup>254</sup> In a civil proceeding, the court may order that certain provisions of the legislation do not apply to evidence if:

- (a) the matter to which the evidence relates is not genuinely in dispute; or
- (b) the application of those provisions would cause or involve unnecessary expense or delay.<sup>255</sup>

8.218 While abolition of the hearsay rules in civil proceedings has some support,<sup>256</sup> in consultations the abolition of hearsay rules in civil proceedings was generally opposed. It is considered that the breadth of the exceptions to the hearsay rule and the waiver provisions are sufficient to allow for appropriate use of hearsay evidence. One NSW District Court judge comments:

The hearsay provisions are, in my view, basic to the requirement of fairness in the courts, despite the criticisms that have been levelled at them. In some situations it is conceivable that all parties might consent to allow the admission of hearsay evidence, but in my view these would be relatively rare. In my submission it is better that the Act remain as it is.<sup>257</sup>

8.219 In addition, some judges oppose the abolition of the hearsay rule on case management grounds. That is, leaving aside concerns about the reliability of evidence, liberalising the admission of hearsay evidence could add to the volume of evidence before the court, potentially prolonging trials and increasing costs.

8.220 The Commissions propose no change to the uniform Evidence Acts to abolish the hearsay rule for civil proceedings, or to provide that the rule does not apply to proceedings between parties if the parties so agree. Parties not wishing to raise hearsay objections need not raise them. Beyond that, it is not apparent that it is desirable or necessary to abolish the hearsay rule as it applies in civil proceedings. A step of that kind would require a level of response to the question raised in IP 28 that was not received.

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250 *Civil Evidence Act 1995* (UK) s 2.

251 *Ibid* s 4.

252 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.96].

253 Uniform Evidence Acts s 190(1). The following provisions may be waived, in relation to particular evidence or generally: Divs 3, 4 or 5 of Pts 2.1, 2.2 or 2.3; or Pts 3.2 to 3.8. (Part numbers differ slightly in the Tasmanian legislation.)

254 Section 190(2) contains safeguards with regard to the consent of a defendant in criminal proceedings.

255 Uniform Evidence Acts s 190(3).

256 C Ying, *Submission E 88*, 16 September 2005.

257 Confidential, *Submission E 31*, 22 February 2005. See also P Greenwood, *Consultation*, Sydney, 11 March 2005.

## 9. The Opinion Rule and its Exceptions

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### Introduction

9.1 The common law rules of evidence generally render evidence of opinion inadmissible. Consistently with that position, s 76 of the uniform Evidence Acts provides a general exclusionary rule for opinion evidence:

- (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

9.2 While the Acts do not attempt to define the term ‘opinion’, it has been held that an opinion under the uniform Evidence Acts is, variously, ‘an inference drawn or to be drawn from observed and communicable data’,<sup>1</sup> an inference drawn from facts,<sup>2</sup> or ‘a conclusion, usually judgmental or debatable, reasoned from facts’.<sup>3</sup>

9.3 In theory there is no clear distinction between evidence of an opinion and evidence of fact because there is a ‘continuum between evidence in the form of fact and evidence in the form of opinion, the one at times passing imperceptibly into the other’.<sup>4</sup> However, in its earlier inquiry into the laws of evidence, the ALRC decided to retain the distinction (such as it is) and a rule for excluding opinion evidence. Because of the need to exercise some control generally upon material at the opinion end of the continuum, and specifically to control the admission of expert opinion evidence, this was found to be ‘unavoidable’.<sup>5</sup>

9.4 The uniform Evidence Acts provide a range of exceptions to the exclusionary opinion rule. These include exceptions in relation to lay opinion<sup>6</sup> and opinion based on specialised knowledge (‘expert opinion evidence’).<sup>7</sup>

9.5 Several concerns arise in relation to the operation of these exceptions. The chapter discusses but rejects reform of the lay opinion rule in s 78. Also discussed but rejected is reform of s 79 in response to *Makita (Australia) Pty Ltd v Sprowles*,<sup>8</sup> a case concerning proof of the factual basis of expert opinion. The chapter also discusses the admissibility under the uniform Evidence Acts of expert opinion evidence on the behaviour and development of children and other categories of witness, such as victims of family violence or people with an intellectual disability. Such evidence can be relevant to the facts in issue in a case and to the assessment of the credibility of witnesses. The latter aspect is discussed further in the discussion of the credibility rule and its exceptions in Chapter 12.

9.6 Aspects of the opinion rule in specific contexts, including in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs; evidence in family law proceedings; evidence in sexual offence cases; and evidence from child witnesses are discussed in Chapters 19 and 20.

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1 See *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73, 75.

2 *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [40].

3 *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129, 130, cited *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [40].

4 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [738].

5 *Ibid*, [738].

6 Uniform Evidence Acts s 78.

7 *Ibid* s 79. Other examples relate to: summaries of documents (s 50(3)); evidence relevant otherwise than as opinion evidence (s 77); admissions (s 81); evidence of judgments and convictions (s 92(3)); and evidence of the character of accused persons (ss 110–111).

8 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.



## Lay opinion

9.7 At common law, lay opinion evidence is inadmissible unless it fits within ‘an apparently anomalous miscellany’ of exceptions.<sup>9</sup> The main type of evidence admissible under the lay opinion exception to the opinion rule

consists of rolled-up statements by a witness which are in truth conclusions from mere primary facts too evanescent in character to be separately remembered or too numerous and complicated to be separately narrated. Examples include age, sobriety, speed, identity, weather and the condition of chattels or land.<sup>10</sup>

9.8 Section 78 of the uniform Evidence Acts was intended to reform the common law. It states:

The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person’s perception of the matter or event.

9.9 The ALRC gave consideration to including an express requirement that lay opinion be rationally based in order to fall under s 78, but considered that the words that now comprise s 78(b) provided sufficient protection.<sup>11</sup> Further, s 56(2) makes evidence inadmissible unless it could rationally affect the assessment of the probability of the existence of a fact in issue, as required by s 55. Hence, in *R v Panetta*, the New South Wales (NSW) Court of Criminal Appeal held that opinion evidence that lacked rational basis did not satisfy the test of relevance in s 55 of the uniform Evidence Acts and so was inadmissible.<sup>12</sup>

9.10 In IP 28 it was asked what concerns exist with regard to the admission of lay opinion evidence under s 78 of the uniform Evidence Acts, and whether any concerns should be addressed through amendment of the Acts.<sup>13</sup> It emerged, as stated in DP 69, that the main concern that exists regarding lay opinion evidence is identification

9 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [739].

10 J Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript, 3–4. Section 78 also makes admissible (subject to Part 3.11) lay opinion evidence as to the state of a road or the floor of a factory: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4180]; and as to the intelligence of a person with whom the witness has had dealings relative to the intelligence of inhabitants of a small town in which the person lives: *R v Fernando* [1999] NSWCCA 66, [154].

11 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [740].

12 *R v Panetta* (1997) 26 MVR 332, 336.

13 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–1.

evidence given by police officers. Discussion centres on the High Court decision in *Smith v The Queen*.<sup>14</sup>

### ***Smith v The Queen***

9.11 In *Smith*, two police officers gave similar evidence at trial that was admitted over the objection of the appellant. Both witnesses said that they had had previous dealings with the appellant and that they recognised the appellant as the person depicted in photographs of a bank robbery of which the appellant was accused. The forensic difficulty was that the photographs were of poor quality. They were individual frames extracted from a closed circuit television recording. The resolution of the images was poor, making ready identification of the person in the photographs impossible. The appellant was convicted; an appeal to the New South Wales Court of Criminal Appeal failed, but a further appeal met with success. The High Court ordered a new trial, holding that the police identification evidence was inadmissible.

9.12 The majority<sup>15</sup> held that the identification evidence was inadmissible because it was not relevant under s 55. The police witnesses were in no better position to make a comparison between the appellant and the person in the photographs—and hence to identify the person in the photographs—than the jurors.<sup>16</sup> Gleeson CJ, Gaudron, Gummow and Hayne JJ said that, because the witnesses' assertions of identity were founded on material no different from the material available to the jury from its own observation, the testimony was not evidence that could rationally affect the jury's determination of whether the accused was shown in the photographs. They said:

The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision maker permitting substitution of the view of another, for the decision-maker's own conclusion.<sup>17</sup>

9.13 Kirby J held that the evidence was relevant but that it was not covered by the lay opinion exception because neither police officer was present at the 'matter or event' for the purposes of s 78, which Kirby J considered to be the robbery. Kirby J stated that ALRC 26

<sup>14</sup> *Smith v The Queen* (2001) 206 CLR 650.

<sup>15</sup> Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>16</sup> *Smith v The Queen* (2001) 206 CLR 650, [9].

<sup>17</sup> *Ibid*, [11]. No attention had been given to the question of relevance in the arguments advanced at trial, or on appeal to the New South Wales Court of Criminal Appeal: *Smith v The Queen* (2001) 206 CLR 650, [6]. The decision of the Court of Criminal Appeal is reported as *R v Smith* (1999) 47 NSWLR 419.

makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses. It exists to allow such witnesses to recount, as closely as possible, 'their original perception [so as] to minimise inaccuracy and encourage honesty'.<sup>18</sup>

9.14 This interpretation has been criticised on the basis that the term 'matter or event' is not necessarily related to the offences or other events in question in the trial, but rather to what the person expressing the opinion 'saw, heard or otherwise perceived' regarding a fact. This can involve, for example, a photograph, the appearance of the accused and a comparison of the two.<sup>19</sup>

### Submissions and consultations

9.15 The question asked by the Commissions in DP 69—whether *Smith v The Queen* overly constrains the admission of police identification evidence and, if so, how the situation should be remedied—elicited detailed responses.

### Concerns about *Smith v The Queen*

9.16 The Commissions noted views in DP 69 that *Smith v The Queen* does overly constrain the admission of police identification evidence under s 78. Concerns of New South Wales Local Court magistrates were noted. Issues concerning the admission of identification evidence from police arise frequently and, as a result of the decision in *Smith*, magistrates said that they are not able to rely on police opinion evidence as to identification. It was said that magistrates are left to reach their own opinion on identification—in effect themselves identifying the person in police photographs and other evidence. This determination often occurs in a very short time frame, given the speed with which matters are dealt with in the Local Court.<sup>20</sup>

9.17 In submissions and consultations on DP 69, the view that *Smith v The Queen* provides too great a constraint on police identification evidence tendered under s 78 has been reiterated.<sup>21</sup> In particular, Victoria Police suggests that *Smith v The Queen* should not be permitted to constrain the admissibility of such evidence because 'police are trained and regularly exercise their skills in observation of people, their characteristics and actions'. Kirby J's view in *Smith v The Queen* is cited with approval.<sup>22</sup>

### Support for *Smith v The Queen*

9.18 Contrasting views have been expressed in other submissions and consultations. The Australian Federal Police says *Smith v The Queen* does not overly constrain the

18 *Smith v The Queen* (2001) 206 CLR 650, [60] citing Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [739]–[740].

19 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4180].

20 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

21 Supreme Court of Victoria judge, *Consultation*, Victoria, 17 August 2005; J Gans, *Submission E 59*, 18 August 2005.

22 Victoria Police, *Submission E 111*, 30 September 2005.

admission of police evidence, even though it can limit it. It notes that *Smith v The Queen* can be distinguished on other facts.

For instance where police tender opinion evidence on identification of a defendant from video footage where direct observation of the defendant (eg his or her physical appearance including body language, posture, movements, and facial expressions) has occurred [in] day to day dealings with the defendant over a period of time, the police have an advantage in identifying the defendant.<sup>23</sup>

9.19 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) puts a similar view. It says that *Smith v The Queen* poses no excessive constraint on police identification evidence being admitted under s 78 ‘because of the way in which the decision has been interpreted by the Courts’. The NSW DPP argues:

It appears that the *Smith* [majority] judgment is widely misunderstood as preventing the admission of ‘opinion’ evidence, even though the majority judgment makes it very clear that the finding that the evidence was irrelevant, very much turned on the facts of the case, in which the relevant images, the only evidence against the accused, were of poor quality.<sup>24</sup>

9.20 The Law Society of New South Wales and the New South Wales Public Defenders Office (NSW PDO) both say that *Smith v The Queen* does not constitute an excessive constraint. The NSW PDO reiterates its strong opposition to any ‘tampering’ with the decision.<sup>25</sup>

### ***Amendment of the Acts in light of Smith v The Queen?***

9.21 As noted above, the NSW DPP takes the view that *Smith v The Queen* poses no excessive constraint on the admissibility under s 78 of police identification evidence. However, it is suggested that erroneous interpretations of *Smith v The Queen* should be overcome by amendment of the uniform Evidence Acts to include a new Part 3.9 entitled ‘Crime Scene Identification Evidence’. This would apply to ‘evidence given about security photographs and video images of the type at issue in *Smith*’ and other cases ‘which depict persons at or near a crime scene or at a place connected with the crime’.<sup>26</sup>

### **The Commissions’ view**

#### ***Smith does not pose an excessive barrier***

9.22 The Commissions take the view that the majority’s approach in *Smith* creates a barrier to admissibility, but that the barrier is not excessive. The majority said that opinion evidence concerning identification can only be considered relevant where the witness is at some advantage in recognising the person in the photographs. What may constitute a sufficient advantage is not a matter elaborated on in the majority judgment,

23 Australian Federal Police, *Submission E 92*, 20 September 2005.

24 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

25 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

26 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

and is primarily a factual question to be determined in individual cases. On the majority view, a sufficient advantage was lacking in *Smith v The Queen*.

9.23 Another reason *Smith v The Queen* poses no excessive barrier is that the decision was made on peculiar facts, leaving room for the decision to be distinguished. As already seen, the reasoning of the majority in *Smith v The Queen* was that the opinions of the police officers were not based on anything in substance additional to that upon which the jury would base their view. It will often be the case (as noted by the Commissions in DP 69)<sup>27</sup> that a police officer will base his or her identification of a person in a photograph on material that is different in a substantial way from the material available to the tribunal of fact. In contexts outside police investigations, this may be even more likely. Family and social contexts are examples. There is no blanket prohibition on identification evidence being admissible under s 78, and such evidence is required to be relevant in order to be admissible.<sup>28</sup> Further, *Smith v The Queen* establishes no such prohibition. Whether lay opinion evidence of police officers or other persons is relevant must be determined on the particular facts of the case.

***Amendment of the Acts in response to Smith is problematic***

9.24 Accepting that *Smith v The Queen* poses no general difficulty in relation to s 78, no amendment is needed to overrule the decision or otherwise to qualify its effects. However, it may be added that overruling *Smith v The Queen* could be difficult given that it is a decision turning on its own facts, rather than on legal principles that require modification. Further, any amendment designed to overrule *Smith v The Queen* might mistakenly be interpreted as designed to change the underlying law. On the submissions received and consultations conducted, and the views expressed in the case law, the Commissions conclude that the lay opinion exception to the opinion rule is operating satisfactorily and requires no amendment.

## **Opinions based on specialised knowledge**

9.25 In contrast to most other kinds of witness, expert witnesses are permitted to offer opinions to the court as to the meaning and implications of facts and opinions. The basic distinction between lay and expert opinion evidence is that, of the two categories of opinion evidence, only expert opinion evidence is based on ‘specialised knowledge’ in a sense peculiar to this branch of the law.

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27 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [8.23].

28 Uniform Evidence Acts s 56(1).

9.26 So far as the common law of expert opinion evidence is concerned, views differ about the rules that control admissibility. Freckelton and Selby formulate the following list as rules of admissibility at common law.<sup>29</sup>

- *The field of expertise rule:* The claimed knowledge or expertise should be recognised as credible by others who are capable of evaluating its theoretical and experiential foundations;
- *The expertise rule:* The witness should have sufficient knowledge and experience to entitle him or her to be held out as an expert who can assist the court;
- *The common knowledge rule:* The information sought to be elicited from the expert should be something upon which the court needs the help of a third party, as opposed to relying upon its general knowledge and common sense;
- *The ultimate issue rule:* The expert's contribution should not have the effect of supplanting the function of the court in deciding the issue before it; and
- *The basis rule:* The admissibility of expert opinion evidence depends on proof of the factual basis of the opinion.

9.27 However, the authors recognise that these 'rules' have been applied with varying degrees of rigour. To some, analysis in search of rules of this kind is misleading and may oversimplify issues which are inherently complex.

9.28 The starting point for discussion is the expert opinion exception to the general exclusionary rule for opinion evidence. The exception is found in s 79 of the uniform Evidence Acts.

### Section 79 of the uniform Evidence Acts

9.29 Section 79 provides:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.<sup>30</sup>

9.30 The first part of this chapter focuses on aspects of s 79, including:

- the 'specialised knowledge' requirement and the related 'field of expertise' requirement;

<sup>29</sup> I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 2.

<sup>30</sup> Regarding the statutory context, it is useful to keep in mind that s 80 abolishes the 'ultimate issue rule' and the 'common knowledge rule'. Section 80 is discussed later in this chapter.

- the requirement that expert opinion evidence be based on the ‘training, study or experience’ of the expert witness; and
- the extent of the requirement under the uniform Evidence Acts to show that expert opinion evidence is ‘based on’ the application of specialised knowledge to relevant facts or factual assumptions.<sup>31</sup>

### ‘Specialised knowledge’ and ‘field of expertise’

9.31 At common law, there has been an ongoing debate as to whether and to what extent the law should require the demonstration of a field of expertise or acceptance of a particular discipline or some other requirement as a condition of admissibility of expert opinion on a matter. The uniform Evidence Acts do not contain any such express requirement but require the demonstration of specialised knowledge before expert opinion can be given in evidence. Should they contain some such additional requirement as a ‘field of expertise’?

9.32 Whether there is a field of expertise in relation to which an expert in the area may give opinion evidence is a question that has arisen in relation to fingerprinting evidence, the use of seat belts, the causes of traffic accidents, voice identification, stylometrics, the use of polygraphs, bushfire behaviour, DNA profiling and the ‘battered woman syndrome’.<sup>32</sup> What suffices as a field of expertise for the purposes of the common law of evidence is arguably not settled in Australia.<sup>33</sup> But it is said that the expert witness must be ‘qualified by training or practical experience in an area of knowledge beyond that possessed by the trier of fact, and of apparent assistance to it’.<sup>34</sup> The ‘specialised knowledge’ required of the expert by s 79 must be in this area of expert learning.

### *A variety of tests*

9.33 New and developing knowledge poses a difficulty. At what point in the development of the learning is there an area of expertise for the purposes of the law of expert evidence? Courts sometimes look to whether a body of expert knowledge has ‘general acceptance’ in the relevant—usually scientific—discipline. This approach is sometimes known as the ‘*Frye* test’, after a decision of that name delivered by the

31 A related issue concerns the extent to which facts stated by an expert as forming the basis for the expert’s opinion can be admitted as evidence of the facts stated. This issue is discussed in Ch 7, in relation to s 60 of the uniform Evidence Acts.

32 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 53–54.

33 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].

34 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.47].

Supreme Court of the United States.<sup>35</sup> South Australian case law asks whether the expert knowledge is ‘sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience’—which points to acceptance by the court rather than by a professional community.<sup>36</sup> In Victoria, it has been said:

Provided the judge is satisfied that there is a field of expert knowledge ... it is no objection to the reception of the evidence of an expert within that field that the views which he puts forward do not command general acceptance by other experts in the field.<sup>37</sup>

9.34 Debate in Australia about the appropriate test for an area of expert knowledge has more recently been influenced by the 1993 decision of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*.<sup>38</sup> *Daubert* decided that, when applying Rule 702 of the *Federal Rules of Evidence*,<sup>39</sup> a court must make an assessment of whether the reasoning or methodology underlying expert opinion evidence is scientifically valid.<sup>40</sup>

9.35 Discussion about the possible influence of the *Daubert* approach on Australian evidence law has centred on whether the adoption of similar criteria would usefully restrict the admission of evidence based on ‘junk’ science. While some have supported the application in Australia of the *Daubert* approach as setting more rigorous admissibility criteria,<sup>41</sup> others have concluded that it would be unlikely to lead to any significant improvement in the quality of scientific expert opinion evidence.<sup>42</sup>

35 *Frye v United States* 293 F 1012 (1923). See Australian cases cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].

36 *R v Bonython* (1984) 38 SASR 45, 47.

37 *R v Johnson* (1994) 75 A Crim R 522, 535.

38 *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (US Supreme Court, 1993). See, eg, S Odgers and J Richardson, ‘Keeping Bad Science Out of the Courtroom: Changes in American and Australian Expert Evidence Law’ (1995) 18(1) *University of New South Wales Law Journal* 108; G Edmond and D Mercer, ‘Keeping “Junk” History, Philosophy and Sociology of Science out of the Courtroom: Problems with the Reception of *Daubert v Merrell Dow Pharmaceuticals Inc*’ (1997) 20(1) *University of New South Wales Law Journal* 48.

39 Rule 702 is similar to s 79 of the uniform Evidence Acts in referring to the need for ‘scientific, technical, or other specialized knowledge’ in order for expert evidence to be admitted. In 2000, Rule 702 was amended in response to the decision in *Daubert*, providing some general standards that the trial court must use to assess the reliability of expert testimony.

40 By reference to factors including the ‘falsifiability’ of a theory, the ‘known or potential error rate’ associated with application of a theory and whether the findings have been subject to peer review or publication, as well as the ‘general acceptance’ of the scientific principles: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260]. See also *Kumho Tire Co Ltd v Carmichael* 119 S Ct 1167 (1999); I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 78–79.

41 S Odgers and J Richardson, ‘Keeping Bad Science Out of the Courtroom: Changes in American and Australian Expert Evidence Law’ (1995) 18(1) *University of New South Wales Law Journal* 108.

42 G Edmond and D Mercer, ‘Keeping “Junk” History, Philosophy and Sociology of Science out of the Courtroom: Problems with the Reception of *Daubert v Merrell Dow Pharmaceuticals Inc*’ (1997) 20(1) *University of New South Wales Law Journal* 48, 99.



9.36 Current High Court authority does not apply *Frye* or *Daubert* style tests to specialised knowledge in an identified area. Rather, in *HG v The Queen*,<sup>43</sup> Gaudron J (Gummow J agreeing) referred to the need, at common law, for the expert's knowledge or experience to be in an area 'sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience'.<sup>44</sup> Her Honour said there was no reason to think that the expression 'specialised knowledge' in s 79 of the uniform Evidence Acts 'gives rise to a test which is in any respect narrower or more restrictive than the position at common law'—that is, there is no reason to think that s 79 imposes additional thresholds on admissibility.<sup>45</sup>

9.37 Together with the comments of Gummow and Callinan JJ,<sup>46</sup> this leads a commentator to conclude that, while recognition may be one basis for a conclusion of reliability, under the uniform Evidence Acts 'it appears clear that the ultimate test is reliability' of the expert's knowledge or experience in an area.<sup>47</sup>

9.38 The ALRC expressed concerns in its original reports about how the area of specialised knowledge should be identified, and at the possibility that the identified area of specialised knowledge might be tested by general acceptance or similar theories.<sup>48</sup> It rejected identification of the area of specialised knowledge through application of a 'general acceptance' test or a 'reputable body of opinion' test of reliability because this was too strict, and would cause much useful and reliable evidence to be excluded. It would result in courts lagging behind advances in science and other learning.

### ***Submissions and consultations on IP 28***

9.39 In IP 28 comments were sought on whether significant problems are caused by the admission of expert evidence from novel scientific or technical fields and whether reform of the uniform Evidence Acts might address these problems.<sup>49</sup>

9.40 In DP 69 the Commissions set out the responses received. They noted that most stakeholders consulted were reasonably satisfied with the way s 79 has been interpreted

43 *HG v The Queen* (1999) 197 CLR 414, [58].

44 *Ibid*, referring to *R v Bonython* (1984) 38 SASR 45, 46–47; *Clark v Ryan* (1960) 103 CLR 486, 491; *Murphy v The Queen* (1989) 167 CLR 94, 111, 130; *Farrell v The Queen* (1998) 194 CLR 286, 292–294; *Osland v The Queen* (1998) 197 CLR 316, [53].

45 *HG v The Queen* (1999) 197 CLR 414, [58]. See also *Veleviski v The Queen* (2002) 187 ALR 233.

46 *Veleviski v The Queen* (2002) 187 ALR 233, [154] (Gummow and Callinan JJ).

47 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].

48 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [356], [743].

49 For example, it has been suggested that the area of expertise rule should be applied to render evidence of repressed memory syndrome inadmissible: I Freckelton, 'Repressed Memory Syndrome: Counterintuitive or Counterproductive?' (1996) 20 *Criminal Law Journal* 7.

and applied.<sup>50</sup> Having reviewed the responses, the Commissions stated the following views:

- that s 79 was not intended to enact, and does not enact, a ‘field of expertise’ test based on ‘general acceptance’ or similar requirements; and
- that the concerns as to probative value of evidence admitted under s 79, its potential to mislead, and the time and cost that have given rise to more stringent rules are best addressed by the discretion under s 135 for a court not to admit evidence in certain cases, and by the discretion under s 136 to limit the use which can be made of evidence by the tribunal of fact.<sup>51</sup>

9.41 It was suggested that evaluation of new and developing areas of knowledge will continue to pose a challenge for the courts due to the nature of the exercise, and that adding new criteria to the uniform Evidence Acts would not simplify the task and might introduce new uncertainties.<sup>52</sup>

#### ***Submissions and consultations on DP 69***

9.42 Submissions and consultations on DP 69 have not revealed particular difficulties with the application of the ‘specialised knowledge’ component of s 79. Notably, no comment was addressed to the *Frye*, *Daubert* and related tests of acceptance of the field of specialised knowledge.

#### ***The Commissions’ view***

9.43 The Commissions remain of the view that it is unnecessary to recommend an amendment to import any of the tests, such as the *Frye* test, that have been considered necessary at common law, or to clarify any aspects of the ‘specialised knowledge’ requirement of s 79.

#### **Training, study or experience**

9.44 It has been held that the term ‘specialised knowledge’ is not restrictive and expressly encompasses specialised knowledge based on experience.<sup>53</sup> Because of that, questions arise about so-called ‘ad hoc’ experts. An ad hoc expert is a person who, while not having formal training or qualifications in a particular area of expertise, has acquired expertise based on particular experience in that area, such as by listening to tape recordings which are substantially unintelligible to anybody who has not played them repeatedly, or by becoming familiar with the handwriting of another person.

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50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [8.47]–[8.50].

51 Ibid, [8.51]–[8.52].

52 Ibid, [8.53]–[8.55]. Further, s 137 requires evidence adduced by the prosecutor to be excluded by the court if the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.

53 See *ASIC v Vines* (2003) 48 ACSR 291, 294–295.

9.45 The concept of an ad hoc expert was recognised at common law by the High Court in *R v Butera*.<sup>54</sup> Cases since the enactment of the uniform Evidence Acts have recognised that s 79 is sufficiently broad to encompass ad hoc experts. In *R v Leung*, the prosecution sought to lead evidence from an interpreter, who had listened repeatedly to listening device tapes and tapes of police interviews with the accused, that the voice on the listening device tapes was that of the accused. It was held that, even if such evidence fell outside the scope of s 78, it was covered by s 79 because the interpreter's expertise and familiarity with the voices and languages on the tapes qualified him as an ad hoc expert.<sup>55</sup>

### ***The uniform Evidence Acts***

9.46 In IP 28 the view was noted that the current approach to ad hoc experts might create problems in that it gives a 'very broad, indeed almost unlimited' scope to s 79 and to the concepts of 'specialised knowledge' and 'training, study or experience'.<sup>56</sup> Another view is that the 'essentially pragmatic' scope of the opinion rule demands an equally pragmatic approach to its exceptions. Therefore, the lay opinion and expert opinion exceptions should be construed as broadly as possible, allowing borderline cases to be dealt with through the exercise of the discretion to exclude prejudicial evidence.<sup>57</sup>

9.47 It was asked in IP 28 whether concerns exist with regard to the admission of so-called 'ad hoc' expert opinion evidence and whether any concerns should be addressed through amendment of the uniform Evidence Acts.<sup>58</sup>

### ***Submissions and consultations***

9.48 The Commissions have not received many comments on this question, which raises similar concerns about the reliability and probative value of evidence as were discussed above in relation to the concept of specialised knowledge. Again, the Commissions' overall impression has been that this element of s 79 has not caused significant concern in practice.

9.49 However, the Law Society of South Australia submits that s 79 should be amended to replace the words 'the person's training, study or experience' with 'the person's training *and* experience' or, alternatively, 'the person's study *and* experience'.

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<sup>54</sup> *R v Butera* (1987) 164 CLR 180.

<sup>55</sup> *R v Leung* (1999) 47 NSWLR 405. See also *Li v The Queen* (2003) 139 A Crim R 281.

<sup>56</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.30] citing J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [78.15].

<sup>57</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 235.

<sup>58</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–4.

It is said that this would limit the number of those who could be classified as ad hoc experts.<sup>59</sup>

### ***The Commissions' view***

9.50 The Commissions agree that this would limit the numbers of persons who could be classified as ad hoc experts, but disagree with the suggestion. Changing the criteria 'training', 'study' and 'experience' from alternative criteria to cumulative criteria would rule out the admission of opinion evidence based on specialised knowledge obtained solely through training, solely through study, and solely through experience. To do so would render the expertise requirement of s 79 stricter than that at common law. Any problems arising in particular cases because of the broad scope of the words 'training, study or experience' can be addressed under ss 135 and 136. In criminal cases, s 137 will also apply.

9.51 The Commissions do not recommend any amendment in relation to the training, study or experience element of s 79.

### **The factual basis of expert opinion evidence**

9.52 At common law, the admissibility of expert opinion evidence is said to depend on proper disclosure and proof of the factual basis of the opinion. As noted above, this has been called the 'basis rule'. Under the 'rule', the expert must disclose the facts or assumptions upon which his or her opinion is based; those facts and assumptions must be capable of proof by admissible evidence; and evidence must be admitted to prove the facts and assumptions upon which the opinion is based.<sup>60</sup>

9.53 Submissions received and consultations held throughout the inquiry show that there is substantial uncertainty about the existence and effect of a 'basis rule' under the uniform Evidence Acts. There is also uncertainty about the effect of the decision of the NSW Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles*,<sup>61</sup> and in particular the status of the criteria advanced by Heydon JA as bearing on the admissibility of expert opinion evidence under the uniform Evidence Acts and, in particular, a basis rule. A range of comments on the topic was set out in DP 69.<sup>62</sup> In further submissions and consultations, those sentiments—ranging from disapproval to acceptance of a basis

59 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

60 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [64].

61 Ibid.

62 Confidential, *Submission E 31*, 22 February 2005; Confidential, *Submission E 49*, 27 April 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; P Greenwood, *Submission E 47*, 11 March 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; I Freckelton, *Consultation*, Melbourne, 17 March 2005; Victorian Bar, *Consultation*, Melbourne, 16 March 2005.

rule—were repeated.<sup>63</sup> Given the substantial practical importance of the question, further discussion is merited, building on what was said in DP 69.

### ***The critical issues***

9.54 The Commissions are of the view that no amendment of the uniform Evidence Acts is necessary in order to clarify this aspect of the expert opinion exception. In summary, this is because:

- no ‘basis rule’ exists at common law;
- no ‘basis rule’ exists under the uniform Evidence Acts, and *Makita* does not attempt to create one; and
- identification and proof of the factual basis of the opinion goes to the issues of: (i) whether evidence of the opinion is relevant; and (ii) if so, what weight it carries.

In the paragraphs that follow, these conclusions are explained.

### ***No ‘basis rule’ at common law***

9.55 In its previous Evidence inquiry, the ALRC said:

It has been implied in some cases and asserted in some academic writing that there is a rule of evidence that for expert opinion testimony to be admissible it must have as its basis admitted evidence. The better view is that there is no such rule.<sup>64</sup>

9.56 The Commissions affirm this view. On this view, recent authorities cannot be read as applying a common law ‘basis rule’ to cases decided under the uniform Evidence Acts simply as a matter of logic: for if no ‘basis rule’ exists, it cannot be applied. But the issues require more substantial analysis. If there is no common law ‘basis rule’, upon what principles and ideas do cases apparently establishing a common law basis rule rest?

### ***A shorthand explanation?***

9.57 It is arguable that the ‘basis rule’ is a shorthand explanation of the interaction of two processes that are involved in cases where the factual basis of expert opinion

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<sup>63</sup> Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 18 August 2005; The Law Society of South Australia, *Submission E 69*, 15 September 2005; Justice C Branson, *Consultation*, Sydney, 25 July 2005; Northern Land Council, *Consultation*, Darwin, 15 August 2005.

<sup>64</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [750]. See *Ramsay v Watson* (1961) 108 CLR 642, 649.

evidence is not proved (or is incompletely proved) by independent evidence. One is determining whether the evidence of expert opinion is relevant. The other is the forensic process of determining what weight the tribunal of fact can or should give the expert opinion. Confusion can arise because the processes overlap: where the factual basis of expert opinion is not proved, evidence of the opinion might lack any weight or carry very little weight and so have no probative value. Evidence carrying no weight will be inadmissible because it is irrelevant.

9.58 Recognising this overlap helps explain why courts in cases on the common law often do not say whether failure to disclose and prove the factual basis of expert opinion evidence goes only to weight, only to admissibility, or goes to both weight and admissibility.<sup>65</sup> They do not identify consequences in general terms because the consequences of failure to disclose and prove the factual basis of the opinion depend on the facts. In some cases, the only consequence will be that the weight of the opinion evidence is lessened; in some cases, the consequence will be that the evidence is inadmissible. Importantly, in some cases the evidence might be admitted by agreement, even though it is otherwise inadmissible. If so, the evidence will simply carry little or no weight.<sup>66</sup>

### ***The High Court decision in Ramsay v Watson***

9.59 *Ramsay v Watson*<sup>67</sup> emphasises the point. A question arose in this case whether expert opinion evidence of a doctor that was based on a history narrated to the doctor by a patient was admissible. If it was admissible, the further question arose: what use could be made of it? The High Court (Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ) held that evidence of the history was admissible to show the basis of the opinion, although not for the purpose of proving the truth of the patient's narrative.

9.60 For present purposes, two features of the High Court's reasoning in *Ramsay v Watson* are notable. First, the court said that if the history is not supported by admissible evidence, the expert opinion 'may have little or no value, for part of the basis of it is gone'—that is, failure to prove the factual basis of the opinion lessened the *weight* of the expert opinion evidence. It is also notable, however, that the High Court dismissed the appeal in *Ramsay v Watson*, endorsing the trial judge's orders *refusing to admit* expert opinion testimony because, although based on facts that were identified, the underlying facts were not proved. Thus, failure to prove the facts underlying the expert opinion went both to weight and to admissibility—as recognised

<sup>65</sup> See *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [22].

<sup>66</sup> Some cases refer to evidence which is 'strictly' inadmissible, but admitted by agreement or without objection. See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85]; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, [9], [87]; *Neowarra v State of Western Australia* (2003) 134 FCR 208, [81]; *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [13]–[15], [17]. Difficulties that arise where strictly inadmissible opinion evidence is admitted are discussed in *Re Doran Constructions Pty Ltd (in liq)* (2002) 194 ALR 94, [61]. As to the status of evidence admitted without objection see J Heydon, *Cross on Evidence* (7th ed, 2004), [1645]–[1680].

<sup>67</sup> *Ramsay v Watson* (1961) 108 CLR 642.

in ALRC 26.<sup>68</sup> Underpinning the High Court's reasoning on the common law is the proposition that the less weight an expert opinion has, the less relevance it has. Evidence that has no weight will not be relevant, and so will be formally inadmissible.

9.61 The common law was summarised by the High Court in *Paric v John Holland (Constructions) Pty Ltd*, where it was said:

It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence (*Ramsay v Watson* (1961) 108 CLR 642). But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from *Wigmore on Evidence* cited by Samuels JA in the Court of Appeal (*Wigmore on Evidence* 3<sup>rd</sup> ed, vol II, §680, p 800; 2 Wigmore, *Evidence* §680 (Chadbourn rev 1979), p 942) to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.

As Wigmore states (at pp 941–2, Chadbourn rev), 'the failure which justifies rejection must be a failure in some one or more important data, not merely in a trifling respect'.<sup>69</sup>

9.62 Similar terms were used by Heydon JA in *Makita* to describe the interaction at common law between weight (a forensic consideration) and relevance (an evidentiary concern). Heydon JA said:

The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material.<sup>70</sup> One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some *rational relationship* with the facts proved.<sup>71</sup>

### ***Conclusion on common law 'basis rule'***

9.63 There is no formal 'basis rule' at common law. Rather, the label 'basis rule' acts as a shorthand for two orthodox propositions: that (1) the lower the correlation between the facts proved and the facts assumed, the less weight can be given to the expert opinion evidence;<sup>72</sup> and (2) where the facts proved and the facts assumed are

68 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), Appendix C, [107]–[108].

69 *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85, 87–88.

70 See *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505, 509–510; *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85, 87.

71 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [64] (emphasis added).

72 *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 351.

substantially different, the point might be reached where the opinion evidence carries so little weight that it is not probative, and hence inadmissible.<sup>73</sup>

### ***Is there a ‘basis rule’ under the uniform Evidence Acts?***

#### ***The interplay of relevance and weight under the Acts***

9.64 The next questions to consider are whether the forensic and evidentiary issues just discussed arise under the uniform Evidence Acts and, if so, whether their interaction is the same as at common law. The uniform Evidence Acts establish a new standard of relevance. Nonetheless, the Acts require that weight and relevance interact as at common law.

9.65 The Acts do not create a formal and independent rule that requires proof of the factual basis of an expert opinion before the opinion will be admissible. The relevance provision is of primary importance. Section 55(1) defines relevant evidence as follows:

The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.<sup>74</sup>

9.66 In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,<sup>75</sup> Branson J described the significance of relevance to the admissibility of expert opinion evidence under the uniform Evidence Acts, stating:

To be admissible the evidence [of expert opinion] must ... be relevant. It is the requirement of relevance ... that, as it seems to me, most immediately makes proof of the facts on which the opinion is based necessary. If those facts are not ... proved, or substantially proved (see *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846), it is unlikely that the evidence, if accepted, could rationally affect the assessment of the probability of the existence of the fact in issue in the proceeding to which the evidence is directed.<sup>76</sup>

9.67 Thus, failure to acknowledge the practical effects of s 79 in requiring attention to be paid to matters of form—particularly the identification and proof of facts about which the opinion is given—may also affect whether or not the evidence satisfies the test of relevance under s 55 and, therefore, whether it is admissible. Elsewhere in her

<sup>73</sup> *Pownall v Conlan Management Pty Ltd* (1995) 2 WAR 370, 377, 388; *R v Anderson* (2001) 1 VR 1, [59]; *Velevski v The Queen* (2002) 187 ALR 233, [165]. See also *Arnotts Limited v Trade Practices Commission (No 1)* (1989) 21 FCR 297, 300 (Beaumont J), and on appeal: *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 352–353 (Full Court).

<sup>74</sup> Uniform Evidence Acts s 55(1).

<sup>75</sup> *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354.

<sup>76</sup> *Ibid*, [14]. Branson J accepted in *Red Bull* ([13]) that the elements of s 79 will often have the practical effect of emphasising the need for attention to requirements of form, including the need to set out the factual basis of the expert opinion ‘in order to differentiate between the assumed facts upon which the opinion is based, and the opinion in question’ (Branson J adopting the words of Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414, [39]). See *Ramsay v Watson* (1961) 108 CLR 642; *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 347–348; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, [149].



reasons for judgment, Branson J made it clear that failure to disclose and prove the factual basis of an expert opinion goes to the weight that can be given to the evidence when admitted.<sup>77</sup> Branson J's approach was followed by Sackville J in *Jango v Northern Territory (No 4)*.<sup>78</sup> More will be said below about how relevance may be established under the uniform Evidence Acts.

### ***The Makita criteria***

9.68 Notably, as mentioned above, Heydon JA in *Makita* did not say that the common law has a 'basis rule' that consists of any more than the interaction between considerations of weight and relevance, as emerges from *Ramsay v Watson*, and as supported by *Paric*, *HG v The Queen* and *Red Bull*. The following elements of the common law, however, were said by Heydon JA to be enacted by s 79:

- it must be agreed or demonstrated that there is a field of 'specialised knowledge';
- there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- the opinion proffered must be 'wholly or substantially based on the witness' expert knowledge';
- so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert;
- so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way;
- it must be established that the facts on which the opinion is based form a proper foundation for it; and
- the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the

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<sup>77</sup> *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, [8].

<sup>78</sup> *Jango v Northern Territory (No 4)* (2004) 214 ALR 608, [14]. See also *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [16].

opinion is ‘wholly or substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded.<sup>79</sup>

9.69 Read alone, these points might be understood as establishing independent rules governing admissibility. In particular, the fourth and fifth points include what some might understand to be a ‘basis rule’. It is suggested, however, that those points simply underscore the relationship between relevance and weight emphasised earlier. That is, the reason there is a need to identify and prove the factual basis of an expert opinion is that incomplete proof of material facts will reduce the weight that can or should be given to the expert opinion evidence. Where the facts proved and the facts assumed are substantially different, the point might be reached where the opinion evidence carries so little weight that it is not relevant, and therefore is inadmissible. In *Makita* itself, the listed criteria went only to weight because the expert’s report was admitted without objection.<sup>80</sup> However, Heydon JA said the factors above had more than forensic significance because ‘[e]vidence not complying with the principles described ... might be inadmissible as irrelevant (s 56(2)), as not complying with s 79, or on discretionary grounds (s 135)’.<sup>81</sup>

9.70 It should also be noted that s 79 itself does not, and cannot by its terms, require the factual basis of the expert opinion to be proved before the opinion can be admissible. Instead, s 79 has the *practical effect* of directing attention to the form in which the opinion is expressed so that it is possible to answer whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience. As Branson J accepted in *Red Bull*, in applying s 79 the factual basis of the expert opinion will also need to be identified ‘in order to differentiate between the assumed facts upon which the opinion is based, and the opinion in question’.<sup>82</sup> In taking this approach, Branson J adopted the words of Gleeson CJ in *HG v The Queen*.<sup>83</sup> In each case, s 79 requires the expert to ‘expose[] ... the facts upon which the opinion is based ... sufficient[ly]’ to enable the court to decide whether the opinion satisfies the requirements of the section.<sup>84</sup>

9.71 Since actual proof of the factual basis of the opinion is not necessary at the time of tender, the provisions of the Acts are not disruptive of the smooth running of trials. Following this approach arguably makes it simpler to rule whether the expert opinion

79 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85].

80 *Ibid*, [61], [86]; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, [8]. Contrast *Executive Director of Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510, [41], [45].

81 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [86]. See *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [25]; Australian Government Solicitor, *Consultation*, Canberra, 25 August 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 18 August 2005.

82 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, [13].

83 *HG v The Queen* (1999) 197 CLR 414, [39] citing *Ramsay v Watson* (1961) 108 CLR 642 and *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 347–348.

84 *Neowarra v State of Western Australia* (2003) 134 FCR 208, [24] (Sundberg J).

is admissible and thus provides parties to the litigation the certainty needed to be able to run their case.<sup>85</sup>

### ***Consideration of the factual basis of opinion under the Acts***

#### ***Establishing relevance***

9.72 The process of establishing the relevance of opinion evidence requires the tendering party to identify and to prove, or foreshadow the proof of, the facts relied on by the expert to an extent sufficient to persuade the court that the evidence of opinion, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.<sup>86</sup>

9.73 Precisely how it is decided whether expert opinion evidence is admissible in a particular case depends on the point in the trial at which the evidence is sought to be adduced. That in turn depends on factors including the subject matter of the proceeding, the adversarial strategies of the parties, the conditions of the locality in which the court sits, and expense.

9.74 Where it would be prohibitively expensive to the party seeking to adduce the evidence to pay for an expert to remain for the whole of a trial, or the expert is otherwise unable to remain for the whole of a trial, opinion testimony may be received from the expert early in each party's case. Where the subject matter of the dispute is complex—such as a dispute arising under Part IV of the *Trade Practices Act 1974* (Cth), or as to possible breaches of duty by company directors—expert evidence might only be adduced late in the relevant party's case. These differences of timing affect how the admissibility of the expert evidence is addressed.

9.75 Expert opinion evidence led *late* in a party's case will generally be led once the relevant party has led evidence of all matters which it bears the onus of proving. Facts upon which the expert is asked to opine fall under this category. The expert will state his or her opinion and the matters upon which the expert bases his or her opinion. In that situation, the court will be in a position to rule on the admissibility of the opinion evidence—in terms of relevance, the requirements of s 79, and any potential application under Part 3.11—immediately, before the close of the relevant party's case. Should the opinion evidence be ruled inadmissible, the party might lead other evidence of the fact with a view to tendering further expert opinion evidence. This also allows opposing litigants to determine what matters to cross-examine on, what witnesses to call and whether to submit that there is no case to answer.

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85 See also *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, [669]; Justice C Branson, *Consultation*, Sydney, 25 July 2005.

86 Uniform Evidence Acts s 55(1).

9.76 Expert evidence led *early* in the relevant party's case will often be led before the tendering party has led evidence of the matters on which the expert bases his or her opinion. At that point in the trial, so little of the factual basis of the opinion might be in evidence that the court might be unable to assess whether the opinion could rationally affect the assessment of the probability of the existence of a fact in issue in order to be relevant under s 55. Hence large parts of the expert opinion evidence, if not all of it, will be based on factual assumptions. However, the opinion may be admitted conditionally and subject to an undertaking from the tendering party under s 57. If the party later adduces full evidence of the factual basis of the opinion, the opinion may be admitted unconditionally: its weight will be judged at the end of the trial.<sup>87</sup> If less than full evidence of the factual basis of the opinion is adduced, the opinion might be admitted unconditionally but be given little weight forensically, or be subject to a limiting order under s 136. If the relevant party later adduces no or insufficient evidence of the factual basis of the opinion, the opinion may be ruled irrelevant and excluded under s 56(2). As discussed earlier, if the opinion is admitted without objection, failure to identify and prove the factual basis of the opinion will go only to weight.<sup>88</sup>

9.77 These are relatively clear examples, although a range of intermediate situations might arise, calling for more complex analysis. In each case, s 79 requires the expert to 'expose[] ... the facts upon which the opinion is based ... sufficient[ly]' to enable the court to decide whether the opinion satisfies the requirements of the section.<sup>89</sup> Since *proof* of the factual basis of the opinion is not necessary at the time of tender—and all that has to be shown is that the opinion is relevant and complies with s 79, or that it is reasonably open to the court to find the evidence relevant, or that it is relevant subject to further evidence being admitted which will make it reasonably open to find the evidence relevant—the provisions of the Act are not disruptive of the smooth running of trials.

### ***The discretions in ss 135 and 136***

9.78 It is also important to bear in mind that the identification and proof of the facts relied on in expressing an expert opinion are matters potentially relevant to the exercise of the discretions in ss 135 and 136. Section 135 provides that a court:

... may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

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87 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, [16], [87].

88 In consultations, Branson J noted that conditional rulings under s 57 can be unsatisfactory in removing the certainty parties need to run their case: Justice C Branson, *Consultation*, Sydney, 25 July 2005.

89 *Neowarra v State of Western Australia* (2003) 134 FCR 208, [24] (Sundberg J).

9.79 Section 136 provides:

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

9.80 Section 135 articulates the ‘discretion’ contained in the common law requirement of ‘sufficient’ relevance.<sup>90</sup> It can be brought into play at the outset of the admissibility enquiry to exclude evidence of an opinion that satisfies the s 55 relevance requirement. In addition, s 136 can be used in appropriate cases to limit the use of the expert opinion evidence so that it cannot be used as evidence of the truth of the facts to which it relates. This is a popular technique used by courts in uniform Evidence Act jurisdictions when evidence is tendered in circumstances where the court forms the view that the opinion evidence should be received but only for limited purposes. Experience suggests that s 136 is likely to provide the main control of the admissibility and use of expert opinion evidence and the facts to which the opinion relates.

***Factual basis: conclusion on the interaction of the common law and the uniform Evidence Acts***

9.81 Cases such as *Makita*, *Red Bull* and *HG v The Queen* do not transplant a common law ‘basis rule’ into a statutory context. Under the uniform Evidence Acts, as at common law, the lower the correlation between the facts proved and the facts assumed, the less weight can be given the expert opinion evidence; where the facts proved and the facts assumed are substantially different, the opinion might carry so little weight that it could not, if accepted, rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding.<sup>91</sup>

9.82 Experience has shown that, provided ss 55 and 79 (and, where appropriate, ss 135 and 136) are applied when objection is taken to the admissibility of expert opinion evidence, the issues of admissibility can be resolved sensibly. To seek to introduce a ‘basis rule’ or other inflexible criteria is unnecessary, and distracts attention from the pertinent statutory provisions. At the same time, as the Commissions noted in the DP 69,<sup>92</sup> a party preparing expert opinion evidence would be well advised to do so on the basis of the criteria listed in *Makita* because, if they are complied with not only will any admissibility problems be avoided, the expert testimony is likely also

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90 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), Appendix C, [57].

91 Uniform Evidence Acts, s 55.

92 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [8.96].

to be compelling. Indeed, compliance with the *Makita* criteria is frequently encouraged by rules of court.

9.83 In the Commissions' view the admissibility of expert opinion evidence should be approached simply by reference to the provisions of the uniform Evidence Acts. The proper approach is to follow the overall scheme of the uniform Evidence Acts, applying the relevance test, followed by the opinion rule and its exceptions and, finally, the discretionary provisions.<sup>93</sup> This structured approach is encouraged by the diagram in the Introductory Note to Chapter 3 of the Acts.

9.84 Accordingly, in the Commissions' view there is no need for any amendment to clarify the operation of s 79 in this regard.

### Expert opinion evidence in practice

9.85 It was noted in IP 28 that some judges are concerned that there is insufficient understanding among experts and some legal practitioners of the need to demonstrate that expert opinion evidence is the product of applying specialised knowledge to relevant facts or factual assumptions.<sup>94</sup> For example, a particular problem is said to be presented by expert reports in native title cases. *Jango v Northern Territory of Australia (No 2)* involved two expert reports in respect of which the government party made at least 1,100 objections. Sackville J said it was apparent the reports had been prepared with 'scant regard' for the requirements of the uniform Evidence Acts and that this was not a new phenomenon.<sup>95</sup>

9.86 Earlier in the Inquiry, it was asked whether there is insufficient understanding among legal practitioners of the need to demonstrate under s 79 of the uniform Evidence Acts that a particular opinion is 'based on' the application of specialised knowledge to relevant facts or factual assumptions.<sup>96</sup>

9.87 In response, the NSW Young Lawyers' Civil Litigation Committee submitted that

legal practitioners generally have sufficient understanding of the need to have an expert demonstrate that their opinion is based on the application of specialised knowledge to facts or factual assumptions. This is buttressed by a growing number of judgments and academic literature and also by court rules which make similar requirements for expert witnesses.<sup>97</sup>

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93 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

94 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.41].

95 *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [8]–[9]. The application of the opinion rule to evidence of Aboriginal and Torres Strait Islander traditional laws and customs is discussed in more detail in Ch 19.

96 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–6.

97 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

9.88 In this context, the decision in *Makita*<sup>98</sup> was seen as ‘reinforcing the view that trial judges should be careful only to pay regard to the evidence of sound experts who can state the reasons that support their views’.<sup>99</sup>

9.89 In submissions and consultations, the Commissions received many comments favouring stricter enforcement of rules of evidence in relation to expert opinion.<sup>100</sup> It is clear that serious concerns exist among judicial officers and legal practitioners about lenient approaches to the admission of expert evidence. These include, but are not limited to, concerns that the relevant specialised knowledge of experts might not be adequately demonstrated (for example, the formal or informal expert qualifications of the expert might be overlooked); and that the facts or assumptions relied on by the expert are not adequately identified.

9.90 In this context, the Commissions consider that, rather than new rules of admissibility, the best way forward is through rules of court and education and training of lawyers and expert witnesses. There is a risk that, in placing emphasis on formal admissibility rules, courts may ‘concentrate on technical formal compliance without proper regard to the purpose of the formal rules’.<sup>101</sup> That purpose is, in words used in *Makita*, to address, ‘whether the trier of fact (the court, where there is no jury) has been supplied with criteria enabling it to evaluate the validity of the expert’s opinions’.<sup>102</sup>

9.91 The Issues Paper noted that judicial officers have developed practices to help ensure that expert opinion evidence is presented in a way that assists them in assessing whether it complies with the requirements of s 79, including by requiring parties to prepare schedules describing explicitly how each component of expert opinion is connected to the specialised knowledge of the expert.<sup>103</sup> The increased use of such schedules<sup>104</sup> was favoured in several consultations.<sup>105</sup>

9.92 In addition, rules of court now require expert witnesses to prepare expert reports so as to promote transparency as to the basis of expert opinion. For example, the

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98 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

99 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, citing *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1084, [8].

100 P Greenwood, *Submission E 47*, 11 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005; Confidential, *Submission E 31*, 22 February 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Justice C Einstein, *Consultation*, Sydney, 6 August 2004; The Law Society of South Australia, *Submission E 69*, 15 September 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 18 August 2005; Confidential, *Consultation*, Brisbane, 9 August 2005.

101 *Australian Securities and Investments Commission v Rich* (2005) 53 ACSR 623, [259].

102 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [59].

103 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.41].

104 Such schedules are sometimes referred to as ‘Ellicott’ schedules.

105 Justice C Einstein, *Consultation*, Sydney, 6 August 2004; I Freckelton, *Consultation*, Melbourne, 17 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

Federal Court's Practice Direction *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* states, among other things, that:

- an expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report;
- all assumptions of fact made by the expert should be clearly and fully stated;
- the report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment;
- the expert should give reasons for each opinion;
- there should be included in or attached to the report: (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider; and
- the expert should make it clear when a particular question or issue falls outside the relevant field of expertise.<sup>106</sup>

9.93 Compliance with these requirements will in most cases go a long way towards supplying the trier of fact with criteria enabling it to evaluate the validity of the expert's opinion.

### ***The role of lawyers***

9.94 The Issues Paper noted some judicial comments suggesting that, in order to ensure that the legal tests of admissibility are addressed, lawyers should be more involved in the writing of reports by experts.<sup>107</sup> In *Harrington-Smith v Western Australia*, Lindgren J said:

Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the [*Native Title Act 1992*

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<sup>106</sup> *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia 2004* (Cth) r 2. See also *Supreme Court Rules 1970* (NSW), sch 11, r 5.

<sup>107</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.42] citing *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004, [8]–[9] (Sackville J); *Harrington-Smith v Western Australia* (No 2) (2003) 130 FCR 424, [19] (Lindgren J).



(Cth)], the requirements of s 79 (and of s [55] as to relevance) of the *Evidence Act* are determinative in relation to the admissibility of expert opinion evidence.<sup>108</sup>

9.95 The Commissions received a number of divergent views about the involvement of lawyers in the preparation of expert reports. The dominant view is that lawyers should be involved in order to ensure that expert reports are admissible.<sup>109</sup> Lawyers are involved in drafting affidavits for lay witnesses, so there is no logical reason why they should be excluded from assisting in the preparation of expert reports.<sup>110</sup>

9.96 While some express concerns that this may increase the risk that expert evidence will adopt an overly partisan position,<sup>111</sup> this problem can be seen as an ethical question that should be addressed through rules of court, legal practitioners' rules of professional conduct and expert witness codes of conduct, rather than by eliminating necessary contact between lawyers and experts. In a submission on DP 69, the Law Society of South Australia submits that a move to greater involvement for lawyers in the writing of expert reports 'will counteract the move of the last decade or so to increase the independence of experts', but, in line with what is said above, conclude that '[t]he court rules and ethical rules should ensure that "the line of independence" is not crossed'.<sup>112</sup>

#### ***Procedural and other concerns***

9.97 Many of the concerns expressed in relation to opinion evidence are primarily procedural in nature, including those relating to costs or delay attributable to the adducing of expert opinion evidence; or concerns not relating to admissibility, such as undue partisanship or bias on the part of expert witnesses. For example, concerns were expressed that measures to limit the number of expert witnesses or allowing the use of court-appointed experts<sup>113</sup> may operate to prevent the adducing of relevant evidence, for example, in personal injury cases.<sup>114</sup>

9.98 The Commissions consider that these issues do not directly concern the operation of the uniform Evidence Acts. Issues relating to the control of expert

108 *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, [19] (emphasis original). See *Yarmirr v Northern Territory* (2001) 208 CLR 1, [84].

109 P Greenwood, *Consultation*, Sydney, 11 March 2005; Department of Justice (NT), *Consultation*, Darwin, 31 March 2005.

110 B Donovan, *Consultation*, Sydney, 21 February 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 18 August 2005.

111 ACT Bar Association, *Consultation*, Canberra, 9 March 2005; The Law Society of South Australia, *Submission E 69*, 15 September 2005.

112 The Law Society of South Australia, *Submission E 69*, 15 September 2005.

113 For example, see *Federal Court Rules* (Cth) O 24 r 2 and O 34B r 2 (appointment of an expert to assist the Court); O 34 r 6 (restrictions on further expert evidence).

114 ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

evidence in federal civil proceedings were considered in depth in the ALRC's 2000 Report, *Managing Justice: A Review of the Federal Civil Justice System*.<sup>115</sup>

9.99 More recently, the NSW Law Reform Commission (NSWLRC) has concluded an inquiry on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales. The inquiry examined issues including the extent of partisanship or bias on the part of expert witnesses and possible measures to reduce the problem, including through the formulation of standards and codes of conduct, accreditation schemes for experts, restricting the use of 'no-win no-fee' arrangements and sanctions for inappropriate or unethical conduct by expert witnesses.<sup>116</sup> Recommendations were made that the *Uniform Civil Procedure Rules 2005* (NSW) should provide that in civil proceedings parties may not adduce expert evidence without the court's permission, and should include provision for 'joint expert witnesses' in addition to the existing provisions for court-appointed experts. Recommendations were also made regarding examination of experts, remuneration of experts, and other matters going to bias and the ability of parties to test the opinion.<sup>117</sup> These are matters that can be advanced consistently with the approach of the uniform Evidence Acts.

9.100 A specific issue relating to the partisanship of expert evidence is raised by the New South Wales Young Lawyers Civil Litigation Committee. The Committee submits that the Commissions should consider recommending that the uniform Evidence Acts be amended 'to exclude parties from being able to give expert evidence, or that evidence be prima facie inadmissible'.<sup>118</sup> It is said that expert evidence adduced from a party to proceedings is likely to be biased and in breach of obligations to assist the court impartially.

9.101 The Committee refers to *Mulkearns v Chandos Developments Pty Ltd*,<sup>119</sup> in which a party, who was a licensed real estate agent, sought to give expert evidence under s 79 of the *Evidence Act 1995* (NSW) as to the market value of a property. In that case, Young CJ in Eq noted that while the position has been taken in England that where a person is a party, or a close friend of a party, the evidence should not be received, expert evidence is admissible in New South Wales from a party or close associate where the criteria of admissibility (particularly s 79) in the *Evidence Act 1995* (NSW) are made out.<sup>120</sup> Young CJ in Eq noted, however, that:

115 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), in which the ALRC made a number of recommendations dealing with the use of expert evidence in Federal Court, Family Court and Administrative Appeals Tribunal proceedings.

116 New South Wales Law Reform Commission, *Expert Witnesses*, IP 25 (2004).

117 New South Wales Law Reform Commission, *Expert Witnesses*, Report 109 (2005).

118 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

119 *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1084.

120 *Ibid*, [14]. The England and Wales approach denies testimonial competence to experts who are parties, or are connected with a party to the proceedings: J Heydon, 'Comments on May LJ's Paper at Supreme Court Conference, 22 August 2003' (Paper presented at Supreme Court Conference, Hunter Valley, 22 August 2003).

when one gets the situation where a party, without even paying lip service to [the expert witness code of conduct], gets into the box and tries to give expert evidence, when there is no reason why the availability of first class expert evidence has not been presented, then that party starts behind scratch.<sup>121</sup>

9.102 The Commissions are not convinced that it is necessary to amend the uniform Evidence Acts to deal with this issue. Such concerns can be addressed through regulating the appointment of expert witnesses in ways such as those discussed by the NSWLRC, and when evaluating the weight to be given to expert opinion evidence. The Commissions do not consider that amendment of s 79 in relation to these aspects of the expert opinion exception is necessary.

## Opinion on an ultimate issue

### The ultimate issue rule

9.103 The ultimate issue rule at common law was abolished by s 80 of the uniform Evidence Acts. Section 80(a) provides that '[e]vidence of an opinion is not inadmissible only because it is about ... a fact in issue or an ultimate issue'. At common law, an expert witness cannot be asked the central question or questions which the court has to decide—that is, the 'ultimate issue' in the case. The ALRC found that the traditional formulation of the ultimate issue rule could be criticised as uncertain, arbitrary in its implementation and conceptually problematic, and recommended that the rule be abolished.<sup>122</sup>

9.104 The ALRC's criticism reflects widely held views. A decision of a Full Court of the Federal Court, decided before the uniform Evidence Acts were enacted, adopted the following analysis:

It is often said that an expert cannot give an opinion as to the ultimate fact that the court has to decide. This is inaccurate, as experts, especially valuers, often give evidence as to the ultimate fact, and in many cases the question whether that fact exists can be answered only by experts ... What the rule really means is that an expert must not express an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.<sup>123</sup>

9.105 Further, *Cross on Evidence* suggests that there is no modern rule of evidence than an expert 'may not give an opinion upon an ultimate fact in issue'.<sup>124</sup> The

<sup>121</sup> *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1084, [15].

<sup>122</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743].

<sup>123</sup> *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 350 (Lockhart, Wilcox and Gummow JJ) quoting R Eggleston, *Evidence, Proof and Probability* (2nd ed, 1983), 147–148.

<sup>124</sup> J Heydon, *Cross on Evidence* (7th ed, 2004), [29125].

following statement by Giles J in *R W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd*<sup>125</sup> is said to be ‘substantially accurate’.<sup>126</sup>

It is almost impossible for a rule in those terms to be applied, there are many cases in which an expert has given such an opinion, and a rule in those terms has been doubted in the High Court: see *Murphy v The Queen* (1989) 167 CLR 94 at 110, 126–127. A lesser restriction has been recognised, that the expert may not give an opinion on an ultimate issue where that involves the application of a legal standard—for example, that the defendant was negligent, that a risk was reasonably foreseeable, that a testator possessed testamentary capacity, that a representation was likely to deceive or that a publication was obscene.<sup>127</sup>

9.106 The main justification for an ultimate issue rule is to prevent the expert becoming involved in the decision-making process. However, as pointed out in *Cross on Evidence*, ‘it is difficult to believe that a properly directed jury, or *a fortiori* a court comprising a judge sitting alone, would allow its functions to be usurped by an expert’s answer to the question it has to decide’.<sup>128</sup>

### Two issues

#### *Should the ultimate issue rule be revived?*

9.107 Calls were noted in IP 28 for the ultimate issue rule to be revived,<sup>129</sup> while still permitting experts to give evidence, for example, about whether the defendant in a professional negligence claim acted ‘in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice’.<sup>130</sup>

9.108 In *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)*, Lindgren J considered the operation of s 80 in relation to expert evidence on foreign law. He found that the provision left untouched the fundamental common law principles that exclude expert legal opinion evidence ‘as intruding upon the essential judicial function and duty’.<sup>131</sup> The intention of the section was said to be to address non-legal expert evidence, whether by a non-legal expert witness or a non-expert witness, which applies a legal standard to facts.<sup>132</sup> The section was said to be ‘[inapt] to refer to expert legal opinion which impinges upon the essential curial function of applying the law, whether domestic or foreign, to facts’.<sup>133</sup>

125 *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129.

126 J Heydon, *Cross on Evidence* (7th ed, 2004), [29125].

127 *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129, 130–131.

128 J Heydon, *Cross on Evidence* (7th ed, 2004), [29105].

129 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.46].

130 In terms of the *Civil Liability Act 2002* (NSW) s 50(1) introducing a modified *Bolam* rule: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

131 *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)* (1996) 64 FCR 79, 84. However, while the court is presumed to know the public laws of the State, foreign law is proved ‘as fact’: 83.

132 *Ibid*, 84.

133 *Ibid*, 83.

9.109 However, in *Idoport Pty Ltd v National Australia Bank*,<sup>134</sup> Einstein J distinguished the decision in *Allstate* and stated that, at least where the effect of foreign law is relevant to the administration of domestic law, the evidence of foreign law experts ‘is not capable of usurping the function of the court any more than is evidence of any other fact relevant to the determination of the rights and liabilities of the parties under domestic law’.<sup>135</sup>

9.110 The Commercial Bar Association of the Victorian Bar submits that there is some confusion as to the interpretation of s 80 of the Act as a result of the conflict between *Allstate* and decisions of the Supreme Court of the Australian Capital Territory.<sup>136</sup> It states that an ‘authoritative statement by a superior court will, no doubt, clarify the confusion’.<sup>137</sup>

### **Expert argument**

9.111 A related issue concerns the position of expert argument under the uniform Evidence Acts. Although this does not necessarily raise concerns about the operation of s 80(a), it does when expert argument occurs in relation to the ultimate issue. For that reason, it is convenient to deal with the matter at this point.

9.112 The *Federal Court Rules* authorise the Federal Court to receive expert opinion ‘by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence’.<sup>138</sup> This provision is said to permit ‘expert argument’.<sup>139</sup>

9.113 In some proceedings expert argument may play a valuable role, in the same way as legal argument, in assisting the court to reach its own characterisation of the evidence for the purposes of applying statutory criteria—for example, economic evidence about market definition in competition cases.<sup>140</sup>

9.114 Suggestions were noted in IP 28 that expert argument should be recognised and encouraged, for example through a saving provision to the effect that the rules

134 *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640.

135 *Ibid*, 656–657.

136 *John Edward Platts v The Nominal Defendant* [1996] ACTSC 87; *Walton v Corporate Venture Pty Ltd* [1996] ACTSC 55: suggesting that s 80 has entirely displaced the common law relating to evidence on an ultimate issue.

137 Commercial Bar Association of the Victorian Bar, *Submission E 37*, 8 March 2005.

138 *Federal Court Rules* (Cth) O 10 r 1(2)(j).

139 Justice R French, *Submission E 3*, 8 October 2004.

140 *Ibid*; J Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript, 70–72. See *Velevski v The Queen* (2002) 187 ALR 233, [181]–[182].

governing the admissibility of opinion evidence do not prevent the reception of expert opinion as a submission.<sup>141</sup>

### Submissions and consultations

9.115 In IP 28 it was asked what concerns exist with regard to the admission of expert opinion evidence about an ultimate issue or expert opinion by way of submission or argument and whether these should be addressed through amendment of the uniform Evidence Acts.<sup>142</sup>

9.116 There was some support for reintroduction of the ultimate issue rule. The concern focused the possible influence such evidence may have on juries.<sup>143</sup> Some judges of the New South Wales District Court submitted that the abolition of the ultimate issue (and common knowledge) rules has led to a significant increase in the tendering of opinion evidence which, while apparently relevant, is ‘redundant’ and that the rules should be re-established.<sup>144</sup>

9.117 Others considered that the experience under the uniform Evidence Acts does not suggest any problems that could be remedied by reintroducing an ultimate issue rule.<sup>145</sup> There were comments that the ultimate issue rule is too technical and hard to apply; is not needed in trials before a judge alone; and restricts the expression of expert opinion unnecessarily. The Law Society of South Australia agreed that ‘it would not be advisable’ to reintroduce the ultimate issue rule.<sup>146</sup>

9.118 While submissions and consultations emphasised the need to distinguish clearly between submissions based on expert opinion and expert opinion evidence itself, there were no calls for amendment to the uniform Evidence Acts in relation to expert submissions or argument.

### The Commissions’ view

9.119 The Commissions maintain the view expressed in DP 69: that the uniform Evidence Acts appear to be operating well without the ultimate issue rule, and accordingly do not require amendment in this regard.

141 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.51]; Justice R French, *Submission E 3*, 8 October 2004.

142 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–7.

143 P Greenwood, *Submission E 47*, 11 March 2005; Confidential, *Submission E 31*, 22 February 2005; Victorian Bar, *Consultation*, Melbourne, 16 March 2005.

144 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

145 B Donovan, *Consultation*, Sydney, 21 February 2005; S Finch, *Consultation*, Sydney, 3 March 2005; I Freckelton, *Consultation*, Melbourne, 17 March 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

146 The Law Society of South Australia, *Submission E 69*, 15 September 2005, agreeing with Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [8.131].

9.120 In the previous Evidence inquiry, the ALRC spoke of the rule's justification as follows:

The popular justification for the rule, that it [prevents] the expert or lay witness from usurping the function of the jury, is misconceived. There is no usurpation. The jury, in any event will be told that they must assess the evidence, lay and expert. It is upon the most important issues that expert assistance can be crucial and the courts need to be able to receive it. It is necessary to give both sides, be the proceedings criminal or civil, full opportunities to call witnesses to give relevant evidence.<sup>147</sup>

9.121 It was noted that such evidence would be controlled by the requirements for lay and expert opinion evidence and by the provisions now found in Part 3.11.

9.122 The Commissions continue to find the ALRC's reasoning compelling. Consideration of the materials and of submissions and consultations on the current inquiry has not altered the Commissions' intention not to recommend any change to s 80 of the uniform Evidence Acts as regards the ultimate issue rule.

### **Opinion on matters of common knowledge**

9.123 Section 80 of the uniform Evidence Acts also abolished the common knowledge rule—the rule that excluded expert opinion evidence in areas said to be areas of common knowledge. Section 80(b) provides:

Evidence of an opinion is not inadmissible only because it is about:

...

(b) a matter of common knowledge.

9.124 The ALRC was critical of the common knowledge rule.<sup>148</sup> It identified significant uncertainty in the common law, where one of two views is taken. One view is that the mere existence of an area of common knowledge precludes reception of expert evidence in the area. The second approach is to ask whether the tribunal of fact is 'competent' to reach an informed decision without the advantage of the opinion: where it is, the opinion evidence is inadmissible. The ALRC commented that a clear definition of what is 'common knowledge' is impossible. It also expressed the view that the exclusion lacked theoretical justification because there are many situations in which the trier of fact might have some acquaintance with a subject, along with the rest of the community, but might nevertheless find expert assistance on the subject valuable.

9.125 The ALRC referred to the fact that one of the consequences of the common knowledge rule has been to deny courts testimony on the working of memory, on the

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<sup>147</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743].

<sup>148</sup> *Ibid.*, [354].

process of identification, and generally on the mental function of persons not suffering recognised psychiatric disease. Much valuable research is done in areas that would be classified by the courts as falling within ‘common knowledge’, on this approach. To refuse to receive such evidence has the result that decisions can be based on knowledge that is incomplete and out-of-date. The ALRC recommended that, rather than ask whether the area in relation to which expert opinion evidence is tendered is one of common knowledge, the question for the court should be whether the trier of fact could usefully receive assistance from the expert opinion evidence.<sup>149</sup> The view was taken that s 135 of the uniform Evidence Acts provides the appropriate controls. To that may be added the relevance requirement under s 55.

9.126 Suggestions were noted in IP 28 that, as a result of the abolition of the common knowledge rule, dealing with evidence about such matters as motor vehicle accident reconstruction, which may have been excluded by the application of the common law rules, involves unnecessary time and expense.<sup>150</sup>

9.127 The Commissions note that, in particular, s 80 may have facilitated attempts to introduce expert opinion evidence in relation to identification.<sup>151</sup> Such evidence involves opinion based on knowledge of research by psychologists into factors affecting the accuracy of eyewitness identification. The Commissions also understand that expert evidence on ‘facial mapping’ using data from facial recognition information technology is increasingly being used in criminal proceedings.<sup>152</sup> Under the common law, such expert opinion evidence in relation to identification is generally inadmissible because it concerns a matter ‘within the range of human experience which must be determined by the jury’.<sup>153</sup>

9.128 In *R v Smith*,<sup>154</sup> it was accepted that because the uniform Evidence Acts expressly abolish the common knowledge rule, identification expert evidence may fall within s 79 of the Act. Smart AJ noted that ‘the routine admission of expert evidence in cases where identification was the main issue would lengthen the hearing of these cases and to some extent change the way in which they are conducted’.<sup>155</sup> The New South Wales Court of Criminal Appeal held that the particular expert identification evidence, if tendered as fresh evidence at trial, should be excluded under s 135(c) of the New South Wales Act as likely to cause or result in undue waste of time.<sup>156</sup>

9.129 Earlier in the Inquiry, it was asked whether concerns exist with regard to the admission of expert opinion evidence on matters of common knowledge; for example,

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149 Ibid, [354].

150 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.52].

151 This may address historic problems with the handling of eyewitness identification, by allowing juries and judicial officers to be informed by the psychological evidence about the unreliability of eyewitness accounts.

152 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

153 *Smith v The Queen* (1990) 64 ALJR 588, 588.

154 *R v Smith* (2000) 116 A Crim R 1.

155 Ibid, [59].

156 Ibid, [70].



in relation to expert identification evidence or motor vehicle accident reconstruction.<sup>157</sup> Subsequently, in DP 69, the Commissions said they considered that there is no reason to reintroduce the common knowledge rule.

### Submissions and consultations

9.130 In response to DP 69, the Law Institute of Victoria submits that the common knowledge rule should not be abolished if Victoria adopts the uniform Evidence Act because of what is said to be the ‘high risk that juries might rely on, or afford particular probative value to, expert evidence on matters of common knowledge’. Section 135 is said to ‘provide insufficient exclusionary power’ to protect against the perceived risk.<sup>158</sup>

9.131 Professor Kathy Mack submits that ‘common knowledge’ is problematic throughout evidence law and practice because experience ‘is not necessarily common, and knowledge thought to be general might be specific to particular individuals or groups’.

This is especially problematical when the experience which controls [the admissibility of evidence] is that of the judge, and it differs significantly from the experiences of other groups in society especially litigants or parties before the court.<sup>159</sup>

9.132 While acknowledging that ‘such beliefs are implicated in all inferential reasoning about facts’, Professor Mack submits that any reliance on common experience ‘should at the very least be articulated and expressed so that [the beliefs] can be tested’.<sup>160</sup>

9.133 In consultations held by the Victorian Law Reform Commission, a Supreme Court judge said that great difficulties arise where an expert strays outside his or her area of expertise because a jury might give undue weight to the opinion. The common knowledge rule is said to prevent these difficulties. Another participant supported that position.<sup>161</sup>

### The Commissions’ view

9.134 The effect of s 80(b) of the uniform Evidence Acts is that evidence previously of doubtful admissibility because of the common knowledge rule, for example evidence from psychologists or psychiatrists about human behaviour or on child development, is admissible, subject to ss 135–137. Section 80(b) also removes the difficulty that, where

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157 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–7.

158 Law Institute of Victoria, *Submission E 116*, 27 September 2005.

159 K Mack, *Submission E 82*, 16 September 2005.

160 Ibid.

161 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 18 August 2005.

an expert gives opinion evidence relying partly on specialised knowledge based on the expert's training, study or experience, and relying partly on matters of common knowledge, the opinion would strictly be inadmissible if common knowledge formed a substantial part of the basis of the opinion. In that respect, it complements and is complemented by s 79, which makes admissible expert opinion evidence complying with the elements of the section 'that is wholly *or substantially* based on' expert knowledge.

9.135 The following can be said regarding experts straying outside their fields of expertise. That the problem has arisen in jurisdictions such as Victoria where the common knowledge rule applies shows that the mere existence of the rule is not itself preventive of the problem. Under the uniform Evidence Acts, s 79 confines the scope of admissible expert opinion evidence to evidence that is 'wholly or substantially' based on the person's expert knowledge. Opinion not at least substantially based on expert knowledge is not within the s 79 exception. Even before reaching that stage, s 55 might render the opinion inadmissible if it is based too heavily on matters of common knowledge, because the opinion could be incapable of rationally affecting the assessment of the probability of the existence of a fact in issue.

9.136 The Commissions consider that s 135, as presently drafted, provides adequate grounds on which to exclude evidence on matters of common knowledge. Any adverse consequences of the enactment of s 80(b) can be addressed by a robust application of s 135(c). Limiting orders can also be made under s 136. In criminal cases, s 137 in some cases requires the court to exclude opinion evidence based on common knowledge, further filtering the evidence. Such an approach provides adequate latitude for courts to exclude evidence on matters of common knowledge.

9.137 The Commissions do not consider that there is any reason to propose the reintroduction of the common knowledge rule. However, this is another area that should be considered in any program of continuing education on the operation of the uniform Evidence Acts. The Commissions refer to the discussion in Chapter 3.

## **Expert opinion regarding children's development and behaviour**

9.138 In DP 69, the Commissions raised an issue as to the admission under the uniform Evidence Acts of expert opinion evidence on the behaviour and development of children. The issue raised has two aspects: first, whether such evidence is admissible under the Acts; second, whether more needs to be done to encourage the admission of such evidence in appropriate circumstances.

### **The need for expert opinion evidence**

9.139 Expert opinion evidence on the development and behaviour of children can be relevant to a range of matters in legal proceedings, including testimonial capacity, a fact in issue (for example, the inferences to be drawn from evidence of the behaviour

of a child towards a person alleged to have assaulted the child), the credibility of a child witness, the beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions. There is a concern that, for a number of reasons, such evidence is not being received as frequently as it should be.

9.140 The ALRC and the Human Rights and Equal Opportunity Commission (HREOC), in their 1997 Report, *Seen and Heard: Priority for Children in the Legal Process*, identified a traditional belief, based on preconceptions about the capacity of children to remember and recall events accurately, that children's evidence is unreliable.<sup>162</sup> The ALRC and HREOC concluded that these preconceptions are often inaccurate.<sup>163</sup> There is growing psychological research, for instance, demonstrating that even very young children are capable of giving reliable evidence.<sup>164</sup> It was also concluded that unsatisfactory legal outcomes follow from these preconceptions.<sup>165</sup>

9.141 In order to overcome the problem of potential misconceptions about children, the ALRC and HREOC recommended that expert opinion evidence on issues affecting the assessment of child witness reliability should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. Particular emphasis was given to evidence that might assist the decision maker in understanding 'the patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court'.<sup>166</sup> In order to achieve this, the ALRC and HREOC recommended that the opinion and credibility rules be modified.<sup>167</sup> The Royal Commission into the NSW Police Service (the Wood Royal Commission) supported this recommendation.<sup>168</sup>

9.142 The New South Wales Legislative Council Standing Committee on Law and Justice recommended, in its 2002 report on child sexual assault prosecutions, that the *Evidence Act 1995* (NSW) be amended to permit, in child sexual assault proceedings, the admission of expert evidence relating to child development (including memory development) and the behaviour of child victims of sexual assault, along the lines of s 79A of the *Evidence Act 2001* (Tas).<sup>169</sup>

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162 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Ch 14.

163 Ibid, [14.15]–[14.25].

164 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.30].

165 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.15]–[14.25].

166 Ibid, Rec 101.

167 Ibid, [14.77].

168 Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.131].

169 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), Rec 21. See the discussion of the Tasmanian provision below.

9.143 Like Tasmania, Queensland<sup>170</sup> and New Zealand<sup>171</sup> have enacted legislative provisions that at least partially address the issue of the admissibility of expert evidence regarding the assessment of the credibility or reliability of child witnesses.

## Barriers to admission of expert opinion

### *Relevance and the common knowledge rule*

9.144 At common law, Australian courts have at times demonstrated a reluctance to admit expert opinion evidence of typical patterns of behaviour and responses of child victims of abuse.<sup>172</sup> There is a tendency to exclude expert evidence about the behaviour of child victims because it is considered to be within the ordinary experience of the jury.<sup>173</sup> Australian courts operating under the common law opinion rule are likely to continue being cautious in admitting expert evidence regarding patterns of behaviour in child abuse victims,<sup>174</sup> although South Australian<sup>175</sup> and Canadian courts<sup>176</sup> have allowed the admission of expert evidence concerning child witnesses.

9.145 In some respects, the admission of expert opinion evidence in relation to the development and behaviour of children should be easier under the uniform Evidence Acts. The requirements in relation to expert opinion evidence are less stringent than at common law. Under the uniform Evidence Acts, expert opinion evidence on child development and behaviour and the effects abuse has on those processes must be shown to derive from specialised knowledge of the expert based on that person's training, study or experience. The expert opinion must be wholly or substantially based on that knowledge. Admission of such evidence is theoretically simplified by the abolition in s 80 of the common knowledge rule. Unfortunately, such evidence is still excluded in some cases as 'unnecessary'.

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- 170 *Evidence Act 1977* (Qld) s 9C(2). Expert evidence is admissible about the child's level of intelligence, including their powers of perception, memory and expression, or another matter relevant to their competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence. See, eg, *R v D* (2003) 141 A Crim R 471.
- 171 *Evidence Act 1908* (NZ) ss 23C, 23G. Expert evidence is admissible in child sexual abuse cases on issues including the child's mental capacity, intellectual impairment, and emotional maturity; the general development level of a child the same age; and the degree of consistency of evidence about the child's behaviour with the behaviour of sexually abused children of the same age: see, eg, *R v M* [1993] NZFLR 151.
- 172 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Ch 15.
- 173 See, eg, *Ingles v The Queen* (Unreported, Tasmanian Court of Criminal Appeal, Green CJ, Crawford and Zeeman JJ, 4 May 1993); *R v Venning* (1997) 17 SR(WA) 261; *F v The Queen* (1995) 83 A Crim R 502.
- 174 See I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 363–371.
- 175 In *C v The Queen* [1993] SASC 4095, King CJ at [17] stated that expert evidence regarding the behaviour of child sexual abuse victims may be admissible where that behaviour is 'so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries'.
- 176 Expert evidence of the typical patterns of behaviour of child sexual abuse victims may be admitted to assist the jury in their decision where they might otherwise, using their common knowledge and sense, draw an adverse inference against the child witness due to their behaviour: see, eg, *R v J (FE)* (1990) 74 CR (3d) 269; *R v RAC* (1990) 57 CCC 3d 522.

***The credibility rule***

9.146 As noted above, expert opinion evidence of the development and behaviour of children can be relevant to the credibility of a child witness. Such evidence can assist the tribunal of fact in assessing the reliability of the witness. It can also prevent the tribunal of fact drawing inappropriate inferences from the behaviour of the witness either in giving evidence or in the factual circumstances of the case.

9.147 Where expert opinion evidence is tendered for this purpose it must not only satisfy the requirements of Part 3.3, it must also satisfy the credibility provisions in Part 3.7. The provisions of Part 3.7 pose a significant obstacle to the admission of this type of evidence. As currently formulated, there are limited circumstances in which evidence relevant to the credibility of one witness can be led in chief from another witness. Evidence cannot be led by a party to ‘bolster’ the credit of the party’s own witness.<sup>177</sup> Evidence sought to be led to challenge the credibility of the witness must fall within one of the categories set out in s 106.<sup>178</sup> Further, such evidence must be put to the witness in cross-examination and denied. It is highly unlikely that counsel would ever be able to lead expert opinion evidence on the development and behaviour of children that goes to the level of development of a particular child, or to possible psychological explanations of the behaviour of the particular child. Evidence to reestablish the credit of a witness may only be led from the witness in re-examination, or, in certain circumstances, in the form of evidence of a prior consistent statement.<sup>179</sup>

***Potential solutions***

9.148 The *Evidence Act 2001* (Tas) departs from the other uniform Evidence Acts by including an additional provision in s 79A specifically relating to experts in child development and behaviour. Section 79A provides:

A person who has specialised knowledge of child behaviour based on the person’s training, study or experience (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters:

- (a) child development and behaviour generally;
- (b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

<sup>177</sup> As a result of Uniform Evidence Acts s 102.

<sup>178</sup> The failure of evidence to fall within one of these defined categories was the reason cited by Gaudron J in *HG v The Queen* (1999) 197 CLR 414 for holding that opinion evidence of a psychologist regarding a child complainant was in that case inadmissible.

<sup>179</sup> Uniform Evidence Acts s 108. See the discussion in Ch 12.

9.149 This provision clearly seeks to overcome, for certain criminal proceedings, the traditional reluctance to accept that child development and behaviour is a subject of specialised knowledge and that expert opinion evidence is admissible on the topic. However, the provision does not expressly address the credibility rule.

9.150 The question was asked in IP 28 whether the *Evidence Act 1995* (Cth) should be amended to allow clearly for the admission of expert evidence regarding the credibility or reliability of child witnesses and, if so, whether s 79A of the *Evidence Act 2001* (Tas) is the appropriate model.<sup>180</sup> The Commissions in DP 69 proposed that such an amendment should be made, using a modified form of the Tasmanian provision.<sup>181</sup> The proposal was advanced together with a proposal to create an exception to the credibility rule for expert opinion evidence.<sup>182</sup>

## Submissions and consultations

### *Support for the proposal*

9.151 The NSW DPP<sup>183</sup> supports the Discussion Paper proposal, Proposal 8–1, noting the recommendation of the New South Wales Legislative Council Standing Committee on Law and Justice referred to above. Victoria Police supports Proposal 8–1, saying that it is ‘imperative that juries and the court’ have this information, particularly when considering the evidence of children in matters involving sexual assault.<sup>184</sup> The need to overcome stereotypical perceptions of children is cited as a reason for adopting the proposal,<sup>185</sup> so is the need to ‘rectify gaps and misunderstanding in allegedly common or general knowledge’ about child development and behaviour.<sup>186</sup>

9.152 While supporting Proposal 8–1, two sexual assault counsellors nevertheless note their concern that increased reliance on expert opinion evidence relating to child development and behaviour could lead to ‘expert wars’.<sup>187</sup> Similarly, the Litigation Law and Practice Committee of the New South Wales Law Society supports Proposal 8–1, but says that experience shows that, in matters involving expert evidence on psychological issues, questions can arise whether the expert has training, study or experience on the relevant field of expertise, and whether that training, study or experience furnishes evidence of ‘substance that can be assessed by the [tribunal] of fact’.<sup>188</sup>

180 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–9.

181 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 8–1.

182 Ibid, Proposal 11–6.

183 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

184 Victoria Police, *Submission E 111*, 30 September 2005.

185 R Shackel, *Submission E 105*, 27 September 2005.

186 K Mack, *Submission E 82*, 16 September 2005.

187 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

188 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

***Opposition to the proposal***

9.153 On the other hand, the New South Wales Law Society's Criminal Law Committee opposes Proposal 8–1 on the basis that s 79 sufficiently caters for admission of expert opinion evidence on child development and behaviour.<sup>189</sup> The Criminal Law Review Division of the New South Wales Attorney General's Department holds the same view, and sees the real issue as being the need for an exception to the credibility rule. In that respect, the Division supports Proposal 11–6.<sup>190</sup>

9.154 The NSW PDO is 'strongly opposed' to the proposal. Support is expressed for leaving credibility to the tribunal of fact 'untainted by an expert's opinions'. Questions are posed. Will the accused be permitted to call expert evidence that children lie? Is it conceivable that expert evidence would be permitted to the effect that falsely accused people sometimes give false accounts to police in order to bolster a just cause? Reference is also made to experience under the uniform Evidence Acts.

Public Defenders have had experience of both successful and unsuccessful attempts by the Crown to call this sort of evidence under the [New South Wales] *Evidence Act* as it stands. There are many difficulties with this sort of evidence. Doctors and counsellors who have treated alleged victims of sexual assault naturally regard it as part of their role to support the alleged victim. Many of them have a deeply felt but mistaken conviction that alleged victims of sexual assault never lie. There is a tendency of such witnesses to treat every conceivable response of the complainant as being a 'normal' response of a victim of sexual assault. Thus immediate complaint is a 'normal' response, but so is not making a complaint for 20 years.<sup>191</sup>

**The Commissions' view*****Policy position***

9.155 In the Commissions' view expert opinion evidence on child development and behaviour (including the effects of sexual abuse on the development and behaviour of children) can in certain cases be important evidence in assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour.

9.156 There is scope within s 79 as it currently stands for the admission of expert opinion evidence on child development and behaviour. However, submissions received and consultations held by the Commissions demonstrate that Australian courts continue to demonstrate a reluctance to admit such evidence under s 79. Therefore, the Commissions conclude that s 79 should be amended to clarify the position. The Commissions do not see the recommended reform as constituting any major departure

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189 Ibid.

190 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

191 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

from the existing law, but as highlighting the admissibility of a particular type of expert opinion evidence.

9.157 There is some danger in admitting this category of evidence. In particular, the evidence might invite a jury to reason using the doubtful syllogism: abuse of children elicits certain behavioural responses; the complainant exhibited some or all those behaviours; therefore, the complainant is likely to be telling the truth about being sexually abused, or is likely to have been sexually abused, or was sexually abused.<sup>192</sup> The reasoning is doubtful for several reasons. However, the dangers of such expert opinion evidence being misused can be addressed adequately by judicial comments or directions and the application of Part 3.11.

### ***Drafting the proposed amendment***

9.158 In drafting an amendment to s 79, the terms of s 79A of the *Evidence Act 2001* (Tas) provide the Commissions with a starting point. As the credibility issue is dealt with elsewhere in the Report (see Chapter 12), the Commissions have opted for a simplified approach. The proposed provision is set out in Appendix 1.

**Recommendation 9–1** Section 79 of the uniform Evidence Acts should be amended to provide that, to avoid doubt, the provision applies to evidence of a person who has specialised knowledge of child development and behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:

- (a) the development and behaviour of children generally;
- (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

### **Expert opinion regarding other categories of witness**

9.159 In addition to children, in DP 69 the Commissions raised whether there is also a need to clarify the admissibility of expert opinion as ‘counter-intuitive’ evidence in other instances.<sup>193</sup> Similar themes are discussed above in relation to preconceptions about the behaviour and development of children.

<sup>192</sup> J Dowsett and F Feld, ‘Opinion Evidence’ (Paper presented at Evidence Acts Review Workshop for the Judiciary, Sydney, 30 April 2005).

<sup>193</sup> That is, evidence that is capable of dispelling myths or rectifying erroneous assumptions that may be held by the jury on a particular issue. See *Ibid*; I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 16.



9.160 The Commissions asked whether the uniform Evidence Acts should be amended to provide for the admissibility of expert opinion evidence in relation to witnesses such as victims of family violence or people with an intellectual disability that is directly relevant to the facts in issue or to the credibility of witnesses.<sup>194</sup>

### Submissions and consultations

9.161 The NSW DPP supports such an amendment.<sup>195</sup> The amendment is said to be a useful step in rectifying ‘gaps and misunderstandings in allegedly common or general knowledge’ about human behaviour.<sup>196</sup>

9.162 The Criminal Law Review Division of the New South Wales Attorney General’s Department supports Proposal 11–6, saying it is fundamental that the court be able to assess all the evidence accurately, which requires understanding of ‘the particular nature of the intellectual disability’ a witness has in assessing the credibility of the witness. Otherwise, certain mannerisms or difficulty in recalling details may lead to unfounded doubt about the credibility of the witness.<sup>197</sup>

9.163 Other support is qualified. Women’s Legal Service Victoria supports ‘in principle’ an affirmative answer to Question 8–2 as it relates to ‘the credibility and reliability of victims of family violence’, but adds:

However, we believe that very great care would need to be taken in the drafting of any such provision to ensure that it did not *increase* the risk of victims of violence being seen as unreliable witnesses. It should not be possible, for example, for the provision to be used by an alleged perpetrator of violence to *raise* questions of credibility and reliability of evidence of victims of violence, merely on the basis of their being a victim of violence. If the provision cannot be clearly directed and limited in this way, then it should not be introduced.<sup>198</sup>

9.164 Opposition was received from Victoria Police, stating that it is ‘a matter for the court to decide on credibility and reliability’ and that operation of the amendment would be unclear.<sup>199</sup>

9.165 The operation of such an amendment also concerns the Law Society of New South Wales, on the basis that it could extend to people who simply have limited education or difficulties of recall but not disability proper.<sup>200</sup>

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194 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 8–2.

195 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

196 K Mack, *Submission E 82*, 16 September 2005.

197 NSW Attorney General’s Department Criminal Law Review Division, *Submission E 95*, 21 September 2005. See Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

198 Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005.

199 Victoria Police, *Submission E 111*, 30 September 2005.

9.166 The NSW PDO ‘very much oppose[s]’ the amendment for similar reasons to those given for rejecting Proposal 8–1.<sup>201</sup>

### **The Commissions’ view**

9.167 The Commissions are of the view that no compelling case has been made out for any further statutory amendment of the opinion rules as they apply in this area other than as recommended above for children.

9.168 The Commissions note that the Victorian Law Reform Commission (VLRC) concluded in its *Defences to Homicide* report that expert opinion evidence on family violence, for example, ‘is already admissible under current rules of evidence’, both at common law and under the uniform Evidence Acts.<sup>202</sup> Submissions and consultations summarised by the VLRC generally took the same view.<sup>203</sup> In submissions and consultations on DP 69, no reluctance to admit such evidence was shown that would warrant amendment of the uniform Evidence Acts. Significantly, the wide support for an amendment in relation to child witnesses shown by the individuals, bodies and legislatures referred to above has no counterpart in relation to other categories of witness.

9.169 It is important to keep in mind, however, that the credibility rules provide an obstacle to the admission of evidence where it relates to the credibility of a witness. Recommendation 11–7 recommends amendment of the credibility rule to allow expert opinion evidence to be received about the credibility of witnesses upon satisfaction of certain conditions, but does not limit the class of witness about which such evidence would be admissible. The section would therefore allow expert evidence of the credibility of witnesses other than children to be admitted. These issues are addressed in Chapter 12.

9.170 The reason for recommending a clarification of the expert opinion exception to the opinion rule for children is that, despite the fact that expert opinion evidence about the development and behaviour of children falls within s 79, courts have shown a reluctance to apply the section to such evidence. That appears to be due to a pervasive view that ‘child development and behaviour’ is within the common knowledge of the tribunal of fact. By contrast, there is greater acceptance of the fact that behaviour of victims of crime and those with cognitive impairment is not within common knowledge.

9.171 The Commissions do not recommend any further amendment to s 79.

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200 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

201 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

202 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [4.127].

203 *Ibid.*, [4.118].

## 10. Admissions

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### Introduction

10.1 An ‘admission’ is a previous statement or representation by one of the parties to a proceeding that is adverse to their interests in the outcome of the proceeding.<sup>1</sup> An admission made outside the proceedings, and which is offered to prove the truth of the assertion in the previous representation, is hearsay.<sup>2</sup>

10.2 The definition of ‘admission’ in the uniform Evidence Acts covers admissions in both civil and criminal proceedings.<sup>3</sup> However, because of the serious consequences of admitting evidence of admissions and confessions<sup>4</sup> made by an accused in criminal

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1 *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3(1); *Evidence Act 2004* (NI) Dictionary, Pt 1.

2 Uniform Evidence Acts s 59.

3 It was the ALRC’s intention that the definition include admissions contained in civil pleadings: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [755]. See also J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 215.

4 ‘Confessions’ and ‘admissions’ are distinguished at common law. Confessions are ‘statements which amount to admissions of actual guilt of the crime in question’: *R v Lee* (1950) 82 CLR 133, 150. In the context of criminal proceedings, Coldrey J in *Hazim v The Queen* (1993) 69 A Crim R 371, 380 stated

proceedings—in particular, the weight that admissions can carry with a fact-finder in negating reasonable doubt—a number of specific rules of admissibility apply.

10.3 This chapter will focus on admissions in the criminal context with primary reference to ss 85 and 90 of the uniform Evidence Acts.

## Background to admissions under the uniform Evidence Acts

10.4 The rules governing admissions are located in Part 3.4 of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2004* (NI); and Chapter 3, Division 3, Part 4 of the *Evidence Act 2001* (Tas).

10.5 Admissions are a specific exception to the hearsay and opinion rules at common law and under the uniform Evidence Acts (for first-hand hearsay only).<sup>5</sup> There is an exception in respect of admission evidence as against third parties (a third party being a party other than the party who made the admission or adduced the evidence). That is, unless the third party consents, such evidence remains subject to the hearsay and opinion rules.<sup>6</sup> This is intended to ensure that one defendant's admission cannot be used against another defendant in the same proceedings without the latter's consent.

10.6 At common law there are several grounds upon which otherwise admissible evidence of out of court admissions made by the accused can be excluded.<sup>7</sup> These are lack of voluntariness,<sup>8</sup> unfairness to the accused<sup>9</sup> and where the admission was illegally or improperly obtained.<sup>10</sup> There is also a general discretion to exclude evidence that will be 'unduly prejudicial' to the accused.<sup>11</sup> Controls over admissibility of admissions at common law reflect a mixture of policy objectives such as a desire to maximise evidentiary reliability (that is, to safeguard the truth of admissions), to safeguard the interests of the individual in relation to state interference, and to deter official misconduct and ensure judicial legitimacy.<sup>12</sup>

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that 'the accepted distinction between confessions and admissions is that the former involve admissions of actual guilt of the crime, whereas the latter relate to key facts which tend to prove the guilt of the accused of such crime. The category of admissions includes relevant false denial'. References in this chapter to 'admissions' encompass full confessions and partial or implied admissions. For a discussion on the ambiguity of the definition of admission, and whether the definition of admission includes implied admissions, see J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 218.

5 Uniform Evidence Acts ss 81–82.

6 Ibid s 83.

7 See, generally, P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 1.

8 J Heydon, *Cross on Evidence* (7th ed, 2004), [33605]. Note also that '[t]he word "voluntary" ... does not mean "volunteered". It means "made in the exercise of a free choice to speak or be silent": *R v Lee* (1950) 82 CLR 133, 149.

9 J Heydon, *Cross on Evidence* (7th ed, 2004), [33610].

10 Ibid, [33760]; *Cleland v The Queen* (1982) 151 CLR 1.

11 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].

12 See Ibid, [761].

10.7 The requirement that an admission be voluntary has been a fundamental requirement at common law since the 18th century.<sup>13</sup> However, in the Interim Report from the previous Evidence inquiry (ALRC 26), the ALRC was critical of the voluntariness test on the basis that it provides little guidance for resolving individual cases and it is often difficult to determine ‘the extent to which an individual’s capacity for choice had been impaired’.<sup>14</sup>

10.8 Under the uniform Evidence Acts, ss 84 and 85 replace the common law test of voluntariness. Section 84 retains the traditional prohibition on the obtaining of admissions via violent, oppressive, inhuman or degrading conduct, or via threats of that nature. Section 85 (which applies to criminal proceedings only) excludes admissions obtained in the course of official questioning, or as a result of an act of a person capable of influencing the decision whether to prosecute, ‘unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected’. The common law voluntariness requirement focuses on whether the will of the accused was overborne in some way, or whether threats or promises were made by officials or others, leading to a ‘subtle reversal of onus’ onto the accused.<sup>15</sup> Section 85, on the other hand, operates differently: it shifts the focus of the fact finder to the likely reliability or truth of the admission, in light of all the circumstances in which it was made, and the onus of proof on that issue is on the party tendering the evidence of the admission.

10.9 The common law unfairness discretion has been retained, to some extent, in s 90 of the uniform Evidence Acts.<sup>16</sup> The section provides a discretion to exclude admissions in criminal proceedings where, having regard to the circumstances in which the admission was made, it would be unfair to the defendant to use the evidence.

10.10 The discretion to exclude confessional evidence based on unlawful or improper conduct is embodied in s 138 of the uniform Evidence Acts. This differs from the common law in that, where unlawful or improper conduct is established, the onus is

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13 Ibid, [761]. See also *R v Swaffield* (1998) 192 CLR 159, [10]–[13].

14 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [372]. Some of the submissions in response to Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) suggest that the voluntariness requirement should be reinstated in the uniform Evidence Acts: Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005. This suggestion was rejected in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [9.35]–[9.37]. The difficulties with the voluntariness rule at common law were canvassed in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [764]; and Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [156].

15 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [156]. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [437]; P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 6.

16 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160].

placed on the party tendering the evidence to persuade the court to exercise the discretion in its favour. The common law discretion to exclude prosecution evidence that is unfairly prejudicial to the accused has its statutory equivalent in s 137.<sup>17</sup> Unlike s 90, the application of ss 137 and 138 is not limited to evidence of an admission; these provisions also apply to other evidence falling under Part 3.4.<sup>18</sup>

### Meaning of ‘in the course of official questioning’

10.11 The purpose of s 85(2) is to ensure that only reliable admissions are allowed into evidence, by requiring the prosecution to demonstrate, on the balance of probabilities, that the particular admission was made in circumstances which make it unlikely that its truth was adversely affected.<sup>19</sup> In considering whether these circumstances exist, the court is to have regard to the factors in s 85(3).<sup>20</sup>

10.12 Section 85(1) limits the application of s 85(2) to evidence of admissions made in two particular circumstances: admissions made by a defendant in the course of official questioning,<sup>21</sup> and admissions made as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.<sup>22</sup> As Stephen Odgers SC points out, the initial ALRC proposal did not limit the application of the section in this way, and it may be that ss 85(1)(a) and (b) were ‘introduced to replicate the common law requirements relating to a “person in authority” under the voluntariness test.’<sup>23</sup>

10.13 The limitations on the application of s 85 also reflect a broader concern about admissions made to officials, police and persons in authority. The opportunity for police to fabricate or coerce admissions from accused persons and the impact of claims of fabrication on public confidence in, and the effective functioning of, the criminal justice system are long recognised problems, both in Australia and overseas.<sup>24</sup> As part

17 The discretion now requires that the probative value of the evidence be outweighed by the unfair prejudice to the accused: see Uniform Evidence Acts s 137.

18 See, also, the more detailed discussion of the discretionary and mandatory exclusions in Ch 16.

19 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [766].

20 Notably, ‘any relevant condition or characteristic of the person who made the admission’ and, if the admission was made in response to questioning, the nature and manner of any questions put, and the nature of any threat, promise or inducement made: Uniform Evidence Acts s 85(3).

21 Uniform Evidence Acts s 85(1)(a).

22 Ibid s 85(1)(b). Note that, with respect to s 85(1)(b), ‘it would appear that proof of a causal link between the admission and the “act”, and proof that the person who did the act was in fact capable of influencing the decision to prosecute (at the time of the “act”), are required’: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5200].

23 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5160]. The scope of the common law requirement that an inducement be made by a person in authority was ambiguous: see Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [141] citing *R v Lee* (1950) 82 CLR 133 and *McDermott v The King* (1948) 76 CLR 501. The concept included police officers and probably extended to ‘anyone who has authority or control over the accused or over the proceedings or the prosecution against him’: *Rex v Todd* (1901) 13 Man LR 364, 376, cited with approval in *Deokinanan v The Queen* [1969] 1 AC 20, 33.

24 See, generally, Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), Chapter 34 (Admissions). See also Australian Law Reform Commission, *Criminal Investigation*, ALRC 2

of attempts to address this concern, legislation has been enacted in all Australian jurisdictions providing that admissions made to police must be electronically recorded in order to be admissible, in the absence of special circumstances.<sup>25</sup> Section 85 of the uniform Evidence Acts, while dealing with the reliability of admissions in general, is drafted along similar lines to many of these provisions.

10.14 Section 85 applies to admissions made by a defendant ‘in the course of official questioning’. ‘Official questioning’ is defined in the uniform Evidence Acts as ‘questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence’. The recent High Court case, *Kelly v The Queen*,<sup>26</sup> considered the meaning of ‘in the course of official questioning’ in the context of s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas), the Tasmanian mandatory taping provision.<sup>27</sup>

10.15 The decision in *Kelly* limited the meaning of ‘in the course of official questioning’. An issue has arisen as to the effect of this decision on the uniform Evidence Acts in light of the similarity of the wording used in s 85(1)(a). The remainder of this part of the chapter will discuss *Kelly* and its impact on s 85 of the uniform Evidence Acts. It will also discuss some of the issues which may arise with respect to mandatory taping legislation.

### The decision in *Kelly*

10.16 The joint majority judgment in *Kelly* (Gleeson CJ, Hayne and Heydon JJ) took a narrow view of the term ‘in the course of official questioning’. They accepted that the object of the section is to overcome ‘the “perceived problems” with the so-called police “verbal”’, including the possibility of fabrication of evidence by police, especially alleged admissions that are uncorroborated and which the accused would have the practical burden of disproving.<sup>28</sup> However, the majority held that the ‘purpose or object’ of a section does not compel any particular construction. Rather, the correct construction depends on the ‘quite detailed language’ used in the Act.<sup>29</sup>

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(Interim) (1975), [154]–[162], [348]; N Boyden, ‘The Thin End of the Verballing Wedge’ (2004) 42(6) *Law Society Journal* 62; J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), Ch 19 (admissions to investigators).

25 *Crimes Act 1914* (Cth) s 23V; *Crimes Act 1914* (Cth) s 23V as applied to the Australian Capital Territory by *Crimes Act 1914* (Cth) s 23A(6) (for indictable offences); *Crimes Act 1900* (ACT) s 187(3) (for summary offences); *Criminal Procedure Act 1986* (NSW) s 281; *Police Powers and Responsibilities Act 2000* (Qld) ss 246, 263–266; *Crimes Act 1958* (Vic) s 464H; *Criminal Code* (WA) s 570D; *Evidence Act 2001* (Tas) s 85A; *Summary Offences Act 1953* (SA) s 74D; *Police Administration Act* (NT) ss 142–143.

26 *Kelly v The Queen* (2004) 218 CLR 216.

27 This section has now been repealed and relocated to s 85A of the *Evidence Act 2001* (Tas) in similar, but not identical, terms.

28 *Kelly v The Queen* (2004) 218 CLR 216, [42].

29 *Ibid.*, [43].

10.17 The majority considered that the phrase “‘in the course of official questioning’ ... marks out a period of time running from when questioning commenced to when it ceased’.<sup>30</sup> The majority rejected any interpretive approach which involved ‘inserting ideas which have no foothold in the language of s 8 of the Act’ and, more specifically, they held that statements made within a reasonable time after the conclusion of questioning, or statements made ‘as a result of questioning’, are not made ‘in the course of official questioning’.<sup>31</sup>

10.18 By contrast, the dissentients, McHugh and Kirby JJ, each construed ‘in the course of official questioning’ more expansively, finding that this approach was required to fulfil the policy behind the provision. McHugh J argued that the section should be interpreted broadly to cover the mischief at which it is aimed: that is, ‘the attack on the integrity of the administration of justice by false or unreliable confessions or admissions’ regarding serious criminal offences. He noted that construing ‘in the course of official questioning’ narrowly would ‘make the section’s operation hostage to the oral evidence of the police officers as to when the questioning commenced and ended’.<sup>32</sup> McHugh J concluded that, given the purpose of the section, the words ‘confession or an admission ... made in the course of official questioning’ refer to ‘a confession or admission *made in connection with* police questioning’.<sup>33</sup>

10.19 Similarly, Kirby J favoured a ‘purposive approach’. His Honour considered that the mischief which the section is intended to address consists of both the potential wrongful conviction of an accused, and ‘*the protection of the system* itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society’.<sup>34</sup> He held that the ‘course of official questioning’ begins, according to the terms of the legislation, ‘when reasonable suspicion arose, or ought reasonably to have arisen, in the minds of the police officer detaining that person’.<sup>35</sup> and does not conclude

at the termination of any formal interview, the termination by police of video recording or other decisions wholly within the power of the police officers. The termination only occurs when the investigation of the offence whilst the accused person is in police detention is terminated either by the release of that person or by the action of police in bringing the accused to a judicial officer upon a charge laid by the police officer concerning an offence.<sup>36</sup>

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30 Ibid, [52].

31 Ibid, [48].

32 Ibid, [104].

33 Ibid, [106] (emphasis added).

34 Ibid, [146] (emphasis in original), quoting Lamer J in *Rothman v The Queen* [1981] 1 SCR 640, 689.

35 Ibid, [170]. The fact that Kirby J required actual or reasonable suspicion of an offence as a ‘trigger’ for the operation of the provision arose due to the wording of s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas). The wording of s 85 of the Uniform Evidence Acts currently contains no such trigger of ‘reasonable suspicion’ to initiate the protections under the section.

36 *Kelly v The Queen* (2004) 218 CLR 216, [170].



10.20 The decision in *Kelly* was considered by the High Court in *Nicholls v The Queen*.<sup>37</sup> This case also concerned a failure by the police to record an alleged off-camera admission made by an accused, as required by s 570D of the *Criminal Code* (WA). This section is worded differently to the Tasmanian provisions considered in *Kelly* but is directed to the same mischief: ‘the problem of admissions to the police and the perceived problem of the police “verbal”’.<sup>38</sup>

10.21 Under s 570D of the *Criminal Code* (WA), evidence of an admission relating to a serious offence by a suspect to the police is not admissible unless it was recorded on videotape, or the prosecution proves that there was a reasonable excuse for there not being such a recording, or there are ‘exceptional circumstances which, in the interests of justice, justify the admission of the evidence’. Section 570D(4)(c) of the Code states that a reasonable excuse includes a situation where ‘the accused person did not consent to the interview being videotaped’. The term ‘interview’ is defined as, ‘an interview with a suspect by a member of the Police Force’ under s 570 of the *Criminal Code* (WA). The scope of the term ‘interview’ was an issue in the case.

10.22 A majority of the High Court in *Nicholls* (McHugh, Gummow, Kirby and Callinan JJ) favoured a ‘purposive’ approach to the construction of the provision in question, in line with that suggested by McHugh and Kirby JJ in *Kelly*. The ‘purpose’ of the section was, as stated earlier, recognised as overcoming the problem of police ‘verbals’.<sup>39</sup>

10.23 McHugh J was the only judge to consider the meaning of the term ‘interview’. He held that both the natural and ordinary meaning and a purposive analysis of ‘interview’ in s 570D of the *Criminal Code* (WA) support interpreting this term to mean ‘the entirety of a discussion between a police officer and a suspect carried out on a particular day for the purpose of eliciting statements from the suspect concerning the commission of a “serious offence”’.<sup>40</sup>

10.24 The remaining judgments turned on the question whether there was a ‘reasonable excuse’ on the facts of the case, rather than on the meaning to be given to the term ‘interview’.<sup>41</sup> However, the majority held that, unlike the off-camera

<sup>37</sup> *Nicholls v The Queen* (2005) 219 CLR 196.

<sup>38</sup> *Ibid*, [98] per McHugh J. See also [154] per Gummow and Callinan JJ.

<sup>39</sup> It has been held that *Nicholls* requires a purposive interpretation of the equivalent New South Wales provision (*Criminal Procedure Act 1986* (NSW) s 281): *R v Taouk* [2005] NSWCCA 155, [72].

<sup>40</sup> *Nicholls v The Queen* (2005) 219 CLR 196, [103]–[104]. Note that McHugh J’s interpretation was influenced to some extent by the specific structure of the Western Australian provision, which ostensibly applied to ‘any admission’ and mentions the term ‘interview’ only in the context of the provision of a reasonable excuse not to tape: *Criminal Code* (WA) s 570D(4)(c).

<sup>41</sup> *Nicholls v The Queen* (2005) 219 CLR 196, [152]–[154] per Gummow and Callinan JJ; [215]–[218] per Kirby J. In dissent on this point, see: [336] per Hayne and Heydon JJ (Gleeson CJ agreeing).

admissions which were the subject of *Kelly*, the unrecorded admissions in this case were inadmissible for failure to comply with s 570D.

10.25 In DP 69, the Commissions argued that the decision in *Nicholls* did not overrule the majority's interpretation of the scope of 'in the course of official questioning' in *Kelly*.<sup>42</sup> There were two reasons for this.

10.26 First, the terms of the statutory provisions under consideration in the two cases differ. While on one view the meaning of 'interview' may be synonymous with 'questioning',<sup>43</sup> there is also authority suggesting that 'interview' and 'in the course of official questioning' are not synonymous.<sup>44</sup> Indeed, the joint majority judgment in *Kelly* states that '[e]ither "official questioning" is identical with an "interview" with an accused person, or it is broader, because it cannot be narrower'.<sup>45</sup>

10.27 Secondly, even if the terms 'in the course of questioning' and 'interview' are considered to be synonymous, the decisions of three of the four majority judges in *Nicholls* (Gummow, Kirby and Callinan JJ) turn on the interpretation of the term 'reasonable excuse' rather than 'interview'.<sup>46</sup> Only McHugh J appears to rely on the unanimous view of the High Court in *Kelly* regarding the mischief at which such legislation is directed, in order to reach a broad interpretation of the term 'interview'.<sup>47</sup>

10.28 It is therefore likely that the majority's interpretation of 'in the course of official questioning' in *Kelly* remains good law. This approach arguably grants a wide discretion to police to nominate when 'official questioning' begins and ends.<sup>48</sup>

### Submissions and consultations

10.29 In IP 28, the Commissions asked what, if any, concerns are raised by the High Court's construction in *Kelly* of 'in the course of official questioning' and whether

42 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [9.22]–[9.23].

43 *R v Raso* (1993) 68 A Crim R 495, 525. In *Kelly*, Kirby J remarked that the Tasmanian Minister for Justice 'understood the expression "in the course of questioning" in [the *Criminal Law (Detention and Interrogation) Act 1995* (Tas)] to be generally equivalent to the expression "interview"': *Kelly v The Queen* (2004) 218 CLR 216, [153].

44 In *R v McKenzie* [1999] TASSC 36, [14], Wright J stated that "'interview" seems to be used in contradistinction to the words "official questioning" which appear as part of the definition of "confession or admission" used in s 8(1) [of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas)]. The words "official questioning" are not then used again in the section. The very requirement that the "interview" must be videotaped tends to confirm that it is a formal, unhurried interrogation procedure, conducted in circumstances in which electronic recording aids are likely to be available, which is the real target of s 8'.

45 *Kelly v The Queen* (2004) 218 CLR 216, [54].

46 *Nicholls v The Queen* (2005) 219 CLR 196, [152] per Gummow and Callinan JJ; [218] per Kirby J.

47 *Ibid*, [98]–[104].

48 N Boyden, 'The Thin End of the Verballing Wedge' (2004) 42(6) *Law Society Journal* 62, 63.

these concerns require amendment of s 85 of the uniform Evidence Acts or of the definition of ‘official questioning’.<sup>49</sup>

10.30 In DP 69, the Commissions proposed that s 85 be amended to overcome the potential effect on the operation of s 85 of the interpretation of the phrase ‘in the course of official questioning’ in *Kelly*. Specifically, it was proposed that the section be amended so as to apply to evidence of an admission made by a defendant (a) to an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. It was also proposed that a consequent amendment should be made to s 89(1) to incorporate (a) above.<sup>50</sup>

10.31 Initial responses to IP 28 varied. Some suggested that s 85 does not require amendment. The Director of Public Prosecutions (NSW) (NSW DPP) opposed broadening the operation of s 85, submitting that the scope of s 85 should not extend to statements made before the questioning commenced, statements made within a reasonable time after the conclusion of questioning, or statements made as a result of questioning but which do not otherwise fall within the period of official questioning as defined by the majority in *Kelly*.<sup>51</sup>

10.32 The Australian Securities and Investments Commission (ASIC) also opposes broadening s 85, arguing that since s 85(2) is mandatory in its application and places the burden of proof for admissibility upon the prosecution, any broadening of its scope carries with it the risk that highly probative evidence will not be considered by the trier of fact.<sup>52</sup>

10.33 Others favoured amending s 85 to cover all conversations between suspects and the police. The Law Council of Australia suggested that s 85 be amended to make clear that it applies to all conversations between a suspect and police, not merely conversations which can be categorised as official questioning.<sup>53</sup> The New South Wales Public Defenders Office (NSW PDO) submitted that the High Court majority’s interpretation of the phrase ‘in the course of official questioning’ effectively limits the period of official questioning ‘to the time between the turning on and the turning off of

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49 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 110, Q 7–1.

50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 9–1.

51 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

52 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.

53 Law Council of Australia, *Submission E 32*, 4 March 2005.

the recording equipment machine'.<sup>54</sup> The NSW PDO submitted that there are 'no good policy reasons for limiting the protections afforded by s 85 to this period' and so the entire phrase should be deleted.<sup>55</sup>

10.34 In consultations and submissions on DP 69, general support is expressed for the proposed amendment to s 85.<sup>56</sup>

10.35 However, some maintain that Proposal 9–1 is too broad. For instance, the NSW DPP noted that the proposed wider application of s 85 would mean that a tribunal of fact would be deprived of certain highly probative evidence in some prosecutions and, for this reason, it submits that the current narrow interpretation should be retained.<sup>57</sup> The Australian Federal Police agrees with this position.<sup>58</sup>

10.36 Other submissions propose limiting the scope of the wording in Proposal 9–1. ASIC reiterates its view, expressed in response to IP 28,<sup>59</sup> that while it understands the logic in expanding the scope of s 85, the test in s 85(2) should be made discretionary rather than mandatory.<sup>60</sup> The Victoria Police agree that any extension of s 85 should be qualified by making the section discretionary rather than mandatory. It notes that, while an extension of s 85 may offer additional protection to defendants, some situations can be envisaged where additional compliance with a broader section by the police may not be feasible.<sup>61</sup>

10.37 An alternative formulation has also been suggested, based on the requirement of actual or reasonable suspicion in many mandatory taping provisions.<sup>62</sup> For instance, in response to IP 28, the Law Society of South Australia stated that s 85(1) should be expanded to cover 'any conversation' or 'every conversation' between the suspect and the police, but only where the investigating official suspects, or has reasonable grounds to suspect, the person in question of having committed an offence.<sup>63</sup>

54 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

55 Ibid.

56 G Brady, *Consultation*, Sydney, 26 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; C Ying, *Submission E 88*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005; Victorian Supreme Court Litigation Committee, *Consultation*, 18 March 2005; Confidential, *Consultation*, Sydney, 27 July 2005; Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

57 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

58 Australian Federal Police, *Submission E 92*, 20 September 2005.

59 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [9.26].

60 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

61 Victoria Police, *Submission E 111*, 30 September 2005.

62 See *Crimes Act 1958* (Vic) s 464H; *Evidence Act 2001* (Tas) s 85A; *Crimes Act 1914* (Cth) s 23V; *Police Powers and Responsibilities Act 2000* (Qld) s 246; *Criminal Procedure Act 1986* (NSW) s 281; *Police Administration Act* (NT) s 142; *Summary Offences Act 1953* (SA) s 74D; *Criminal Code* (WA) s 570D.

63 Law Society of South Australia, *Consultation*, Adelaide, 11 May 2005.

10.38 Several responses to IP 28 and DP 69 focus on the impact of *Kelly* on mandatory taping requirements, rather than on s 85 of the uniform Evidence Acts. The Law Society of New South Wales notes that even if Proposal 9–1 were implemented, the practical problems caused by the definition of ‘in the course of official questioning’ would remain in relation to taping provisions in s 281 of the *Criminal Procedure Act 1986* (NSW) and similar provisions in other Australian jurisdictions.<sup>64</sup> The Law Society suggests that, given that the outcome of a case often depends almost entirely on the admissibility of alleged admissions by an accused, any alleged admissions in respect of serious offences should not be admissible unless electronically recorded. It submits that, ideally, virtually all conversations that police have with persons of interest, suspects and even witnesses should in future be electronically recorded.<sup>65</sup> The Law Council of Australia takes a similar approach, submitting that the best protection for an accused against fabrication of an admission is to require that all conversations between the police and a suspect be electronically recorded, with the court having a discretion to admit unrecorded admissions where the interests of justice so demand.<sup>66</sup>

10.39 Similarly, in consultations on IP 28, one judicial officer expressed concern that the effect of *Kelly* is to weaken significantly the policy that only in the most exceptional circumstances should an admission be admissible in the absence of either an electronic recording or a written record signed (or otherwise adopted) by the accused.<sup>67</sup> The Office of the Director of Public Prosecutions (ACT) also noted that police verbals are a canker in our justice system and, while police initially tried to avoid the introduction of mandatory videotaping of interviews, they have turned out to be highly beneficial.<sup>68</sup> That is, it has facilitated admissions being allowed into evidence, given that the reliability of an admission is easier to demonstrate if it was recorded.

### The Commissions’ view: taping provisions

10.40 The amendment to s 85 proposed in DP 69 will not affect the operation of mandatory taping provisions which are located in state– and territory–specific legislation or (in the case of Tasmania) in s 85A of the *Evidence Act 2001* (Tas).<sup>69</sup> For

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64 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support for this submission was expressed by Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005.

65 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support for this submission was expressed by Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005.

66 Law Council of Australia, *Submission E 32*, 4 March 2005.

67 Confidential, *Submission E 31*, 22 February 2005.

68 Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005.

69 The proposed amendment will not affect the operation of s 85A in the *Evidence Act 2001* (Tas) because the recommendation is not to alter the definition of ‘official questioning’ in the Dictionary of the Acts, but rather to revise the wording of s 85 alone.

jurisdictions which rely on wording such as ‘in the course of official questioning’, *Kelly* will therefore remain binding.<sup>70</sup>

10.41 This means that, in some jurisdictions, an admission made by an accused to the police during a period outside that which is designated ‘official questioning’ will not necessarily need to be electronically recorded to be admissible. This could undermine the significant benefits which the introduction of mandatory taping has brought to accused persons, police and the courts.<sup>71</sup> The Law Society of New South Wales notes:

Governments have long recognised the desirability of having admissions electronically recorded. Electronic recording protects both accused persons and investigating officials. Prior to the introduction of electronic records of interview with suspects in NSW, much court time was spent challenging signed or unsigned records of interview. While initially police resisted taping interviews with suspects, they soon realised the protection it afforded them in guarding against allegations of impropriety. Further, government resources are spared by savings in court time, not only on voir dire hearings but on appeals and subsequent inquiries under Part 13A *Crimes Act 1900* (NSW).<sup>72</sup>

10.42 It is beyond the scope of this Inquiry to consider amending the mandatory taping provisions contained in state- and territory-specific legislation. However, there is a question whether the mandatory taping provisions should be consolidated within the uniform Evidence Acts (and, in the process, amended so as to overcome the effect of *Kelly*). To achieve this, a uniform approach to mandatory taping across all jurisdictions would be required. As the High Court noted in *Kelly*, Australian legislatures have at present adopted a wide variety of provisions which, while working towards the same purpose, differ widely in scope and application.<sup>73</sup>

10.43 The most comprehensive approach would be ‘universal exclusion’. This requires that

no confession to a police officer be admitted unless video-recorded—whether or not the maker was in custody; whether or not the maker was suspected, or ought reasonably to have been suspected, of committing the crime confessed; and whether or not the maker had been asked any question by a police officer.<sup>74</sup>

70 *Criminal Procedure Act 1986* (NSW) s 281(1)(b); *Evidence Act 2001* (Tas) s 85A(1)(a); *Summary Offences Act 1953* (SA) s 74D (which uses the term ‘interview’). The following provisions rely on the concept of ‘questioning’ to some extent (eg. to determine the type of recording required): *Police Administration Act* (NT) s 142(1)(a) and (b); *Crimes Act 1958* (Vic) s464H(1)(c)–(f); *Crimes Act 1914* (Cth) s 23V; *Police Powers and Responsibilities Act 2000* (Qld) s 263.

71 In *Kelly v The Queen* (2004) 218 CLR 216, [29] the High Court stated: ‘It came to be viewed as commonplace, not only in circles favourable to defence interests but also in police circles, that, despite its financial costs, the electronic recording of police interviews, particularly video-recording, would generate real advantages’.

72 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support for this submission was expressed by the Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005.

73 *Kelly v The Queen* (2004) 218 CLR 216, [31]–[36].

74 *Ibid*, [31].

As the majority in *Kelly* noted, this approach has not been enacted in any Australian jurisdiction.<sup>75</sup>

10.44 A less comprehensive approach is adopted in s 464H of the *Crimes Act 1958* (Vic), requires exclusion of all admissions made to investigating officials and police officers by persons who ‘were or ought reasonably to have been suspected of having committed an offence’, unless the admission was tape- or video-recorded. There is an exception to this requirement if the party seeking to adduce the evidence shows that the circumstances which gave rise to the admission not being recorded were ‘exceptional’ and ‘justify the reception of the evidence’.<sup>76</sup>

10.45 An approach which is less comprehensive again is adopted in s 570D of the *Criminal Code* (WA). This requires the recording of all admissions made to police officers by persons who are suspected on reasonable grounds of having committed an offence.<sup>77</sup> On this approach, it does not matter if the police officer triggered the admission through questioning, as long as the police officer suspected the person on reasonable grounds of having committed an offence. Similarly, in s 142 of the *Police Administration Act 1978* (NT), recording requirements apply to evidence of admissions made to a police officer by a person suspected of having committed certain offences.

10.46 The approach in the legislation of the type considered in *Kelly* is less comprehensive still.<sup>78</sup> Recording requirements apply to admissions made in the course of official questioning or interviewing by a person who is, or ought reasonably to have been, suspected by a police officer of having committed an offence. This method is adopted in s 85A of the *Evidence Act 2001* (Tas), s 281 of the *Criminal Procedure Act 1986* (NSW) and s 74D of the *Summary Offences Act 1953* (SA).

10.47 From 1997–2000, Queensland required the recording of all admissions made to a police officer during ‘the questioning of a person in custody’.<sup>79</sup> Today, Queensland has adopted an approach similar to that of the Commonwealth and the ACT. The Commonwealth *Crimes Act* requires the recording of all admissions made to a police officer or investigating official by a person being questioned as a suspect (whether under arrest or not).<sup>80</sup> The current Queensland statute applies only when the person making the admission is being questioned as a suspect by a police officer.<sup>81</sup> The

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75 Ibid, [31].

76 *Crimes Act 1958* (Vic) s 464H(2).

77 This provision was judicially considered by the High Court in *Nicholls v The Queen* (2005) 219 CLR 196.

78 *Kelly v The Queen* (2004) 218 CLR 216, [34].

79 *Police Powers and Responsibilities Act 1997* (Qld) s 104.

80 *Crimes Act 1914* (Cth) s 23V.

81 *Police Powers and Responsibilities Act 2000* (Qld) s 246.

legislation in these jurisdictions does not address the issue of whether the maker of the admission ought reasonably to have been suspected of the relevant offence.<sup>82</sup>

10.48 As the outline above suggests, there are significant differences in the taping requirements of the various Australian jurisdictions. Arguably, given the widespread agreement among stakeholders in the criminal justice system, including police, as to the benefits of mandatory taping of admissions, this degree of difference and inconsistency between states and territories is undesirable and unnecessary.

10.49 In the previous Evidence inquiry, the ALRC proposed that mandatory recording requirements be included in the uniform Evidence Acts, as part of the general aim of increasing the reliability of admissions admitted into evidence.<sup>83</sup> However, ultimately, the taping provisions were not enacted within the uniform Evidence Acts. As noted, Tasmania is currently the only Australian jurisdiction to have located its taping provision in its Evidence Act.<sup>84</sup>

10.50 The Commissions' view is that, ideally, mandatory taping provisions should be consistent across jurisdictions. One way to facilitate this would be to place the provisions within the uniform Evidence Acts. The Commissions believe that uniformity in this area is achievable, particularly in light of widespread agreement as to the benefits of mandatory taping for police, suspects and the courts. Further, locating mandatory taping provisions in the uniform Evidence Acts is logical for two reasons. First, the provisions are not offence specific.<sup>85</sup> Secondly, acting in conjunction with s 85, the taping provisions impose conditions on the inclusion of admission evidence in the interest of maximising the reliability of evidence which is actually adduced.

10.51 If uniform mandatory taping provisions are adopted within the scheme of the uniform Evidence Acts, the Commissions' view is that a comprehensive approach would be preferable. The wording currently used in the Victorian legislation (requiring taping where an admission is made to an investigating official by a person who was or ought reasonably to have been suspected of committing a relevant offence<sup>86</sup>) could serve as a model. This provision contains exceptions where it would not have been reasonable to record the admission (for instance, due to a lack of facilities) or where there are exceptional circumstances that justify the reception of the evidence.<sup>87</sup> The Commissions consider these exceptions avoid imposing unreasonable requirements on police and they are flexible enough to be applied successfully in practice.

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82 *Kelly v The Queen* (2004) 218 CLR 216, [36].

83 See: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [768]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), 40 (cl 72(2)–(3) of the Draft Bill); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 169 (cl 74 of the draft Bill).

84 *Evidence Act 2001* (Tas), s 85A.

85 There would, however, need to be agreement as to which offences are considered serious enough to warrant the application of the taping requirements.

86 *Crimes Act 1958* (Vic) s 464H(1).

87 *Ibid* s 464H(1) and (2).



10.52 The Commissions suggest that the Standing Committee of Attorneys-General (SCAG) consider adopting uniform mandatory taping provisions either within the scheme of the uniform Evidence Acts, or in separate legislation. The Commissions phrase this as a suggestion, as distinct from a recommendation, because the Commissions believe that there is a strong argument that such a question would go beyond the scope of the review, as specified in the Terms of Reference. That is, with the exception of Tasmania, the taping provisions in the various Australian jurisdictions are not currently contained in each jurisdiction's evidence statute,<sup>88</sup> and it may be considered preferable to retain this structure.

### The Commissions' view: s 85

10.53 To date there have been no cases applying the decision in *Kelly* beyond taping provisions in general, or to s 85 in particular. It is thus uncertain how *Kelly* will affect the scope of s 85. Nevertheless, it seems likely that, given the similar wording of s 85, the courts would be obliged to limit the application of s 85(2) to admissions made to police in situations defined by the police to constitute 'official questioning'. As earlier noted, submissions and consultations indicate a general assumption that the decision in *Kelly* will impact on the operation of s 85.<sup>89</sup>

10.54 There is an argument that the law should permit police to determine with some degree of certainty what constitutes 'official questioning'.<sup>90</sup> This aim is facilitated if the narrower application of s 85 is maintained. Further, arguably, many admissions made outside the scope of 'official questioning' (as narrowly construed in *Kelly*) could still fall within s 85(1)(b) where the admission was the result of an inducement or threat or other improper police action (the police being persons 'capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued' within s 85(1)(b)).

10.55 It is true that s 85(1) is intended to limit the application of the section. However, the Commissions' view is that s 85(1) was not intended to create an overly high hurdle to the application of s 85(2). This is because the purpose of s 85 is to ensure that admissions are only allowed into evidence if it can be shown that they are generally reliable or truthful. As Kirby J noted in *R v Swaffield*, enhancing the reliability of evidence (including evidence of admissions) is of fundamental importance:

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88 *Crimes Act 1914* (Cth) s 23V (and as applied to the Australian Capital Territory by *Crimes Act 1914* (Cth) s 23A(6) for indictable offences); *Crimes Act 1900* (ACT) s 187(3) (for summary offences); *Criminal Procedure Act 1986* (NSW) s 281; *Police Powers and Responsibilities Act 2000* (Qld) ss 246, 263–266; *Crimes Act 1958* (Vic) s 464H; *Criminal Code* (WA) s 570D; *Evidence Act 2001* (Tas) s 85A; *Summary Offences Act 1953* (SA) s 74D; *Police Administration Act 1978* (NT) ss 142–143.

89 See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5180]: 'absent amendment, the narrow approach of the majority must be regarded as determinative.'

90 *R v Sharp* (2003) 143 A Crim R 344, [19].

Unreliable evidence not only taints individual trials. It also undermines community confidence in the administration of justice and in law enforcement. If evidence is properly classified by the judge as unreliable, it should not be admitted.<sup>91</sup>

10.56 Without a broader interpretation of ‘official questioning’ than that offered by the majority in *Kelly*, the requirement in s 85(2) to examine the relative reliability of an admission would not apply to many admissions made to police officers which may be unreliable for reasons other than as a result of an act by a person capable of influencing the prosecution. This would include, for instance, admissions made to police officers that are unreliable or untruthful primarily due to subjective characteristics of the accused.

10.57 Moreover, unlike the mandatory taping provisions, the requirements in s 85 place few administrative or resource demands on the police. Rather, s 85 places an onus on the prosecution to show reliability in cases where the truth of an admission may have been in doubt due to the surrounding ‘circumstances’ in which it was made. Thus, an admission is not necessarily inadmissible because it falls within s 85(1); rather, it means that the prosecution can only introduce the evidence if it first overcomes the burden in s 85(2) on the balance of probabilities. The prosecution must show that the circumstances surrounding the admission make it unlikely that the truth of the admission was adversely affected. This onus will be easily discharged if the admission is more likely than not reliable.

10.58 In light of the purpose of the section (to ensure that only reliable evidence is placed before the court), limiting the period of ‘official questioning’ to one determined by investigating officials is unsatisfactory. The Commissions are particularly concerned that the majority judgment in *Kelly* may allow the police to circumvent s 85 simply by nominating times for the beginning and end of questioning. Thus, the Commissions maintain that s 85(1)(a) should be amended in accordance with Recommendation 10–1 so as to overcome the majority interpretation of ‘in the course of official questioning’ in *Kelly*.

### ***Wording of the amendment***

10.59 A question arose as to whether the wording of Proposal 9–1 in DP 69 was too broad. Consultations and submissions suggest two ways in which the proposed amendment can be narrowed.

10.60 The first is to make the application of s 85 discretionary, rather than mandatory.<sup>92</sup> On one view, this would bring s 85 more into line with s 84, which provides that the party against whom the evidence is adduced must raise as an issue in the proceeding the impermissible conduct (within the terms of s 84(1)) before the provision applies.

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91 *R v Swaffield* (1998) 192 CLR 159, [125].

92 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

10.61 The Commissions do not agree with this proposed limitation. The requirement that evidence of admissions allowed into court must be reliable is fundamental to maintaining public confidence in the criminal justice system and to avoiding miscarriages of justice.<sup>93</sup> Evidence of an admission is likely to be given considerable weight by a jury. Where an admission is made to police or a person capable of influencing the decision whether to bring a prosecution, both the common law and the uniform Evidence Acts are particularly sensitive to the need for strict safeguards to ensure reliability. Therefore, consideration of the reliability (or ‘truth’) of an admission made in such circumstances should be mandatory.

10.62 A second option is to narrow the application of s 85 to admissions made to police only after the police suspect, or have reasonable grounds to suspect, that the person is involved in the commission of an offence.<sup>94</sup> This would render the operation of s 85 consistent with that of the mandatory taping provisions in some jurisdictions, which require a ‘reasonable suspicion’ on the part of the police before the obligations under the section arise.<sup>95</sup> Under this approach, any admission made to a police officer before the defendant was or ought to have been a suspect (for example, spontaneous admissions at the scene of the crime) would not fall outside the scope s 85.

10.63 The Commissions do not consider that the trigger of reasonable suspicion is necessary in the context of s 85 for two reasons. First, the purpose of s 85 is to ensure the reliability or truth of admissions placed before a court. If a person makes an admission to a police officer and that admission is at risk of being unreliable or untruthful (due, for example, to subjective characteristics of the accused), the fact that the police officer did not suspect that person at the time the admission was made has no bearing on the relative reliability of the relevant statement.<sup>96</sup>

10.64 Secondly, as noted earlier, unlike the taping provisions, s 85 does not place practical or administrative burdens on the police (apart from a general duty to ensure

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93 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), Chapter 19 (Admissions to Investigators) and especially [19.2.2]: ‘Most significant miscarriages of justice have resulted from evidence of answers to investigative questioning that proved to be unreliable, because those answers were false, the inferences drawn from those answers were flawed or the evidence itself was a fabrication. Even when it generates reliable confessional evidence, improper investigative conduct nonetheless frustrates the deeper values of the criminal justice system and contributes to a broader culture of investigative corruption’.

94 This would bring the uniform Evidence Acts more into line with the *Summary Offences Act 1953* (SA): Law Society of South Australia, *Consultation*, Adelaide, 11 May 2005.

95 *Summary Offences Act 1953* (SA) s 74D; *Crimes Act 1958* (Vic) s 464H; *Evidence Act 2001* (Tas) s 85A; *Criminal Procedure Act 1986* (NSW) s 281. In some jurisdictions, it is not required that the suspicion be ‘reasonable’: *Crimes Act 1914* (Cth) s 23V; *Police Powers and Responsibilities Act 2000* (Qld) s 246; *Police Administration Act* (NT) s 142.

96 This is different from the common law test of voluntariness, which tended—in practice—to depend on an examination of the nature and effect of the conduct of persons in authority, rather than on the reliability of the confession: *R v Swaffield* (1998) 192 CLR 159, [14].

that admissions are made in circumstances which are unlikely adversely to affect the truth of the admission). Rather, it imposes an evidentiary burden on the prosecution for a certain class of admissions. This burden can be discharged on the balance of probabilities. As such, there can be no argument that it would be unreasonable to oblige the police to comply with s 85 before they had, or ought reasonably to have, suspected a person of having committed an offence.

10.65 The Commissions acknowledge that the wording of the proposed amendment is broad. For instance, it does *not* provide that an investigating official to whom an admission is made must be performing functions in connection with the offence for which the defendant is subsequently charged; rather, he or she could be investigating *any* offence. However, the breadth of this operation is consistent with the traditional caution with which the law treats admissions made to police officers and to other persons in authority.<sup>97</sup>

10.66 The Commissions' view is that, given the fundamental purpose of s 85 in ensuring that only reliable admissions are allowed into evidence in criminal trials, the broad wording of Recommendation 10–1 is appropriate. The Commissions therefore recommend amending s 85 accordingly.

**Recommendation 10–1** Section 85(1) of the uniform Evidence Acts should be amended to provide that the section applies only to evidence of an admission made by a defendant: (a) to or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. A consequential amendment should be made to s 89(1) to incorporate (a) above.

## The circumstances of the admission

10.67 Section 85(2) of the uniform Evidence Acts provides:

Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

10.68 Section 85(3) provides a non-exhaustive list of matters that the court must take into account for the purposes of s 85(2):

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<sup>97</sup> At common law, it is simply required that the person to whom the admission is made be 'in authority'; not that the admission occur during interrogation, or custody or at a specific point in the procedure: *Ibid*, [12]. Problems with the 'person in authority' requirement at common law are discussed in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [141].

- (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
- (b) if the admission was made in response to questioning:
  - (i) the nature of the questions and the manner in which they were put; and
  - (ii) the nature of any threat, promise or other inducement made to the person questioned.

10.69 Questions have been raised in respect of the requirement in s 85(2) that the court consider the ‘circumstances’ in which an admission was made. The issue is whether these ‘circumstances’ are to be considered under a so-called ‘subjective’ or ‘objective’ analysis. This raises the question whether a court can consider evidence as to the truth of the admission made by the defendant (the subjective analysis); or if the inquiry is instead a hypothetical examination as to the likely truthfulness of any admission made in such circumstances (the objective analysis).

10.70 In ALRC 26, it was said that in order for an admission to be admissible, the trial judge should be satisfied on the balance of probabilities that it was made in circumstances not likely to affect adversely its truth.<sup>98</sup> As Odgers notes, the language used in ALRC 26 suggests that the court should use a ‘subjective’ analysis, focusing on the actual reliability or truth of the admission in the particular case.<sup>99</sup>

10.71 However, statements in ALRC 38 appear to prefer a more ‘objective’ analysis. The ALRC called for a provision stating that ‘questions as to the truth of the admission will not be allowed’.<sup>100</sup> This shift was deemed necessary to ensure, inter alia, that the trial judge does not, during the voir dire, encroach upon the jury’s task of determining the truth of the admission.<sup>101</sup> However, despite the intended change in approach, the wording of s 85 ultimately adopted in the uniform Evidence Acts does not expressly require the actual truth of the particular admission to be disregarded in applying the section and, indeed, it arguably implies that a more ‘subjective’ analysis is to be adopted.<sup>102</sup>

10.72 There is conflicting case law on this issue. Odgers suggests that the general trend in the case law since the enactment of the uniform Evidence Acts supports a

98 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765].

99 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220], citing Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160].

100 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160].

101 Ibid, [160].

102 Odgers compares the language of s 85 (requiring an analysis of ‘the truth of the admission’, and the taking into account of any relevant condition or characteristic of the person who made the admission) to the clearly objective test in s 76(2)(b) of the *Police and Criminal Evidence Act 1984* (UK): S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

subjective analysis of s 85(2), with a focus on the actual content of a particular admission to conclude whether the admission is reliable.<sup>103</sup> For instance, it has been held that the terms of the particular admission ‘are not to be ignored’ in determining the reliability of the admission.<sup>104</sup>

10.73 Conversely, there is some judicial support for the so-called objective test.<sup>105</sup> For example, in *R v Esposito*, Wood CJ at CL stated that in considering whether the circumstances were such that the truth of the admission might have been adversely affected, the question whether an admission was in fact made, or whether it was true or untrue, is for the jury rather than the judge.<sup>106</sup> This decision was referred to by Wood CJ at CL in *R v Moffatt*<sup>107</sup> and applied by Gray J in *R v Fischetti and Sharma*.<sup>108</sup>

10.74 Another question arises as to the extent to which the subjective characteristics of an accused should be taken into account in considering the ‘circumstances’ in which the admission was made for the purposes of s 85(2). This prompts the question whether admissions can be excluded under s 85 solely on the basis of an accused’s subjective characteristics, in the absence of any police misconduct or irregularity, and even if the police are unaware of these vulnerabilities.

10.75 In *R v Rooke*, Barr J reiterated that the untruthfulness or unreliability of admissions produced in circumstances other than through official questioning is not a question for the judge but rather for the jury.<sup>109</sup> Similarly, in *R v Nikau*, the limitation in s 85(1)(a) to admissions made ‘in the course of official questioning’ was held to mean that it must be the circumstances of official questioning which give rise to the possibility of untruthful or unreliable evidence.<sup>110</sup> While the scope of these decisions is ambiguous,<sup>111</sup> one implication is that any unreliability resulting from factors other than those arising directly as a result of ‘official questioning’ are irrelevant for the purposes of s 85.

10.76 This line of reasoning was followed in *R v Munce*.<sup>112</sup> In this case, the accused had psychiatric problems and there was doubt as to whether the statement he made to police was accurate or reliable. McClellan J held that because there was nothing arising

103 Ibid, [1.3.5220].

104 *R v Donnelly* (1997) 96 A Crim R 432, 438–439; *R v Waters* (2002) 129 A Crim R 115, [38]–[44].

105 *R v Esposito* (1998) 105 A Crim R 27, 44. See also *Inspector Wade v Mid North Coast Area Health Service* [2004] NSWIRComm 254, [100]. Odgers states it is arguable that an objective test should be applied to s 85(2). This would allow the focus to shift to whether it was likely that the interrogators’ conduct would affect reliability rather than whether it actually did: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220]; see also I Dennis, ‘The Admissibility of Confessions under Sections 84 and 85 of the Evidence Act 1995: An English Perspective’ (1996) 18 *Sydney Law Review* 34, 46–47.

106 *R v Esposito* (1998) 105 A Crim R 27, 44.

107 *R v Moffatt* (2000) 112 A Crim R 201, [46].

108 *R v Fischetti and Sharma* [2003] ACTSC 9, [9].

109 *R v Rooke* (Unreported, New South Wales Court of Criminal Appeal, 2 September 1997), 15–17.

110 *R v Nikau* (Unreported, New South Wales Supreme Court, Howie AJ, 14 October 1997).

111 For instance, Odgers argues that the decision in *Rooke* is ‘surprising’ irrespective of whether an ‘objective’ or a ‘subjective’ test is applied: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

112 *R v Munce* [2001] NSWSC 1072.

from the circumstances of the interview itself (in the way in which it was conducted by officials) which would impact upon the truth of the admission, he was bound to follow *Rooke* and allow the admission into evidence. He focused on the ‘objective circumstances’ in which the admission was made and put to one side the defendant’s ‘undoubted psychiatric problems’.<sup>113</sup> Whether the admission was considered credible was a question for the jury.<sup>114</sup>

10.77 Other decisions which examine s 85 in the context of admissions that are allegedly unreliable or untruthful, despite the absence of any police misconduct or unfairness, have tended to hold that the admissions should not be excluded under s 85. Generally, these findings involve cases where the accused is intoxicated or mentally ill, but there is no irregular conduct by the police.<sup>115</sup> While these decisions turn largely on their facts, they suggest reluctance on the part of the courts to exclude evidence of admissions under s 85 in the absence of police misconduct.<sup>116</sup>

10.78 This may be contrasted with *R v Taylor* where Higgins J of the Supreme Court of the ACT held that the ‘circumstances of the admission’ in s 85(2) were not limited to those circumstances that were known to the investigating officials or ‘to any objective tendency in the questions or the manner in which they had been put to produce an unreliable or untruthful answer’.<sup>117</sup> His Honour observed that s 85(3) makes it clear that ‘the range of such circumstances can and will include the physical and mental characteristics of the person being interviewed’.<sup>118</sup>

10.79 The lack of clarity in s 85(2), on both the relevance of the content of the admission at issue and the subjective characteristics of the accused, may be the result of the change in the ALRC’s view between ALRC 26 and ALRC 38. This change of policy is not reflected clearly in the legislation. It has been suggested that this section may therefore require legislative amendment to address any ambiguity.<sup>119</sup>

### Submissions and consultations

10.80 It was asked in IP 28 whether s 85(2) of the uniform Evidence Acts requires clarification to indicate whether it is a subjective or an objective test.<sup>120</sup> In DP 69 the Commissions concluded that no amendment to the section is necessary.

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113 Ibid, [28].

114 Ibid, [26]–[28].

115 See *R v Donnelly* (1997) 96 A Crim R 432; *R v Esposito* (1998) 105 A Crim R 27; *R v Helmhout* (2000) 112 A Crim R 10.

116 Compare *R v Waters* (2002) 129 A Crim R 115 where s 85 was successfully applied because there was police misconduct.

117 *R v Taylor* [1999] ACTSC 47, [29]–[30].

118 Ibid, [29]–[30].

119 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

120 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 111, Q 7–2.

10.81 In response to IP 28, both the NSW DPP<sup>121</sup> and ASIC<sup>122</sup> consider that s 85(2) should be amended to specify that an objective test is to be applied. The Legal Services Commission of South Australia<sup>123</sup> and the Criminal Law Committee of the Law Society of South Australia<sup>124</sup> agree that the objective test is preferable.

10.82 By contrast, the submission of the NSW PDO does not consider that amendment of s 85 is necessary. Despite the conflicting case law on the issue, s 85(3) already expressly states that the characteristics of the accused, including any mental, intellectual or physical disability, are to be taken into account.<sup>125</sup>

10.83 Others suggest that there is some confusion as to the purpose of s 85.<sup>126</sup> The Law Council of Australia suggests that s 85 should be amended to make it clear that the section concerns the reliability of the admission.<sup>127</sup>

10.84 In response to DP 69, there was some support for the Commissions' conclusion that no amendment to s 85(2) is necessary.<sup>128</sup> Odgers indicates that, although the case law considering s 85(2) has not yet given a clear indication of whether the 'circumstances' surrounding an admission should be analysed subjectively or objectively to determine whether it was 'unlikely that the truth of the admission was adversely affected', it might be too early for amendment of this section.<sup>129</sup>

10.85 By contrast, the Commonwealth Director of Public Prosecutions (CDPP) supports an approach which takes into account the truth of the particular admission. This ensures that relevant evidence is put before the trier of fact, and allows it to decide the weight to be given to such admissions.<sup>130</sup> The CDPP supports an amendment to clarify that the relevant 'circumstances' are the circumstances surrounding the interview and the making of the admission. The trier of fact could then consider any other issues in the circumstances surrounding the offence, or the physical and mental characteristics of the person being interviewed, which might also affect the reliability of the admission.<sup>131</sup>

### The Commissions' view

10.86 Despite some ambiguity being reflected in the case law, the Commissions maintain the view expressed in DP 69 that no amendment to s 85(2) is necessary.

121 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

122 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.

123 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005.

124 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

125 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

126 For instance, C O'Donnell, *Submission E 9*, 26 December 2004.

127 Law Council of Australia, *Submission E 32*, 4 March 2005.

128 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support for this submission was expressed by Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005.

129 S Odgers, *Consultation*, Sydney, 9 August 2004.

130 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

131 *Ibid.*



10.87 The purpose of s 85(2) is to enhance the truth of admissions.<sup>132</sup> Accordingly, as a general rule the question is not whether the circumstances did *in fact* adversely affect the truth of the admission (resulting in an admission that is in fact untrue), but whether they were *likely* to do so.<sup>133</sup> As such, the court should not consider evidence as to the actual truth of the admission when determining its admissibility under s 85(2). Rather, the focus should be on the likelihood that the reliability of an admission made in such circumstances would be adversely affected by those circumstances.<sup>134</sup>

10.88 The application of this general rule may be affected by s 189(3) of the uniform Evidence Acts which provides:

In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence ... in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

10.89 This suggests that if, during the course of a voir dire, a defendant does not raise the issue of whether the alleged admission is in fact true, this question is to be disregarded and no evidence adduced in respect of it.<sup>135</sup> Only if the *defence* raises the issue of the truth or untruth of the alleged admission will the prosecution be entitled to adduce evidence in support of the truth of the admission in arguing that the admissions falls within s 85(2).<sup>136</sup>

10.90 Simpson J stated in *R v Ye Zhang*:

It seem to me that subs (3) is designed to obviate a 'bootstraps' argument in the determination of the admission of the evidence. That is, evidence of an admission will not be admitted because the admission can be shown, by other evidence, to be truthful. The attention of the court is to be directed to the circumstances in which the admission was made, excluding evidence that would substantiate or contradict the admission. The legislation delineates the circumstances in which the admission was made from its independently verifiable (or otherwise) content.<sup>137</sup>

10.91 To summarise: when applying s 85(2), the court's capacity to hear evidence of the actual truth of the admission in issue depends on whether the defendant chooses to adduce evidence as to the truth or untruth of the alleged admission during the voir dire. Given that, if the actual admission is shown to be untrue, this would tend to support an

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132 This was the view expressed in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765].

133 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

134 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [85.40].

135 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

136 *Ibid*, [1.3.5220]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [85.40].

137 *R v Ye Zhang* [2000] NSWSC 1099, [52].

argument that the admission was made in circumstances which were likely to affect adversely the truth of any admission made, it is not uncommon for the defendant to raise the issue.<sup>138</sup>

10.92 On the second issue—the relevance of the defendant’s subjective characteristics—the Commissions note that although s 85(2) is ‘objective’ in that the actual truth or falsity of an admission is generally irrelevant to the application of s 85 (unless s 189(3) applies), s 85(3) still requires the court to consider the personal characteristics of the accused in analysing the ‘circumstances’ in which an admission is made.

10.93 When canvassing the various proposals to enhance the reliability of the admissions admitted into evidence in criminal proceedings, the ‘truth test’ (which was eventually adopted) was contrasted with the ‘ordinary man test’ (which was not adopted). The proposed ‘ordinary man test’ involves testing the effects of the circumstances of an admission on ‘the hypothetical person of average or ordinary firmness, a construct of common experience’.<sup>139</sup> The ALRC indicated that a subjective test, taking into account the particular characteristics of the accused at the time of the admission, is preferable, in part because it allows for a more comprehensive assessment of the reliability of the admission in light of all the circumstances in which it was made.<sup>140</sup>

10.94 On the question whether some police conduct or impropriety is necessary in order to trigger s 85, the ALRC previously noted in ALRC 26 that

there can be no doubt that the effect of various techniques of interrogation will vary depending on the personality and condition of the particular interviewee. Moreover, characteristics of an interviewee which render him or her particularly susceptible to psychological manipulation may not be readily apparent to the officer interrogating. A resulting admission may well be untrue regardless of whether the officer should or should not have been aware of those characteristics.<sup>141</sup>

10.95 The Commissions observe that the purpose of s 85 is not to punish improper conduct by the police. This is better dealt with using legal mechanisms which are directly targeted towards such conduct (such as police disciplinary hearings), rather than by rules governing admissibility of evidence.<sup>142</sup> Instead, the aim of s 85 is to ensure the general reliability of admissions put in evidence before the courts. The cause of that unreliability, while relevant, is not determinative to the applicability of s 85.

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138 For further discussion, see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

139 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765].

140 Ibid, [765].

141 Ibid, [765].

142 See Australian Law Reform Commission, *Admissions*, RP 15 (1983), 15ff. See also M Bagaric, *Submission E 55*, 19 July 2005, which argues that the disciplinary aim of evidence laws should be abandoned because the law of evidence is an ineffective vehicle for achieving such ends. For a contrary view, see Civil Liberties Australia (ACT), *Submission E 109*, 16 September 2005, arguing that there are no effective deterrents against police wrongdoing other than excluding evidence which is the fruit of that wrongdoing, and the admission of illegally obtained evidence does irreparable damage to the rule of law.

10.96 The Commissions believe that it is sufficiently clear that s 85(3) operates in two ways. First, where an admission is made in response to questioning, s 85(3) requires the nature and manner of any questions put, and the nature of any threat, promise or inducement made, to be considered by a court in determining whether the admission was made in circumstances unlikely to affect the truth of the admission.<sup>143</sup> Secondly, the Commissions consider it is evident from s 85(3) that, in the context of s 85(2), the ‘circumstances of the admission’ include, among other things, the characteristics and conditions of the accused independently of any actions taken by the police. In addition, s 85(3) does not confine those characteristics and conditions to those which are known to the investigating officials.<sup>144</sup>

10.97 Although case law in this area has rarely found that an admission is inadmissible and excludable under s 85 in the absence of police impropriety or misconduct, these cases appear to turn largely on their specific facts.<sup>145</sup> If s 85 is to serve as a mechanism for ensuring that only true and reliable admissions are allowed into evidence, it is essential to include consideration of an accused’s characteristics when applying s 85; and to allow that an admission may be unreliable even in the absence of police misconduct or irregularity. The Commissions do not therefore recommend amending s 85(2).

### The ‘unfairness’ discretion in s 90

10.98 Section 90 provides an overarching discretion to exclude admissions in a criminal proceeding where, having regard to the circumstances in which the admission was made, it would be unfair to the defendant to use the evidence. The concept of unfairness is not defined in the uniform Evidence Acts. This provision reflects the common law.<sup>146</sup>

10.99 Two issues have arisen with respect to the unfairness discretion in s 90. The first is whether it should be extended to apply to all evidence, not just admissions. The second is whether the section should enumerate some of the factors that the court should take into account when determining whether it would be unfair to the defendant to admit the evidence.

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143 See Uniform Evidence Acts s 85(3)(b).

144 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220]: ‘[T]here need not be a causal link between the conduct of the police carrying out the questioning and the making of the admission. It would tend to follow that the admission may be inadmissible by reason only of something attributable to the accused’.

145 Persons who are intellectually handicapped or who suffer from a disease or disorder of the mind are clearly not necessarily incapable of telling the truth (a fact recognised in *R v Helmut* [2000] NSWSC 186). Of course, each case is partly governed by its own, particular facts. If there were a real danger of confabulation, lack of awareness, or lack of capacity to make a rational decision between speaking and remaining silent or to give rational answers, exclusion may be appropriate: *R v Medcalfe* [2002] ACTSC 83, [24].

146 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].

### Expanding unfairness to non-admission evidence

10.100 The unfairness discretion at common law, now embodied in s 90, is limited to admission evidence. That is, there is no *general* discretion (other than the discretionary and mandatory exclusions)<sup>147</sup> to exclude other types of evidence where it would be unfair to the defendant to adduce that evidence. The issue is whether the discretion to exclude admission evidence on unfairness grounds should be extended to apply to non-admission evidence.<sup>148</sup>

#### *History of discrete unfairness discretion for admissions*

10.101 The development of the unfairness discretion in the context of admission evidence appears to have been a response to the narrow view of the test of ‘voluntariness’ (the common law admissibility requirement for admissions) taken by the courts.<sup>149</sup> For instance, in *McDermott v The King*, Dixon J stated that the development of the discretion may have been in part

a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person’s free choice to speak.<sup>150</sup>

10.102 The unfairness discretion thus acted as a residual safeguard, allowing evidence of admissions to be excluded if, despite the fact that they appeared to be ‘voluntary’, it would be unfair to the defendant to admit them.<sup>151</sup>

10.103 By contrast, ‘real evidence’ could not be excluded solely on considerations of fairness to the accused; it was also necessary to refer ‘to large matters of public policy’.<sup>152</sup> This required the balancing of two competing considerations: the desirable goal of bringing wrongdoers to conviction and the undesirable effect of curial approval or even encouragement being given to unlawful conduct of law enforcement officers.<sup>153</sup> In the exercise of this discretion, the question of unfairness to the accused is just one factor to consider, and its relevance and importance will depend on the circumstances of the particular case.<sup>154</sup> This ‘public policy’ discretion is now embodied in s 138 of the uniform Evidence Acts.

10.104 The public policy discretion was held to apply to confessional evidence in *Cleland v The Queen*.<sup>155</sup> It was inevitable that there would be considerable overlap

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<sup>147</sup> See Ch 16.

<sup>148</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.78].

<sup>149</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].

<sup>150</sup> *McDermott v The King* (1948) 76 CLR 501, 512.

<sup>151</sup> *R v Swaffield* (1998) 192 CLR 159, [15].

<sup>152</sup> *Bunning v Cross* (1978) 141 CLR 54, 76–77. Earlier, at 74, the Court contrasted the Australian position with the UK’s approach where the leading authority (then, *Kuruma v The Queen* [1955] AC 197) held that the discretion to exclude real evidence unlawfully obtained was part of the general discretion which always exists to exclude admissible evidence when to admit it would be unfair to the accused.

<sup>153</sup> *Bunning v Cross* (1978) 141 CLR 54, 74.

<sup>154</sup> *Ibid*, 74; *R v Swaffield* (1998) 192 CLR 159, [22]–[25].

<sup>155</sup> *Cleland v The Queen* (1982) 151 CLR 1. See also *R v Swaffield* (1998) 192 CLR 159, [23].

between that discretion and the existing (admission-specific) unfairness discretion, at least in cases where a ‘voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers’.<sup>156</sup> Despite the overlap, the two discretions were held to be independent but related.<sup>157</sup> The focus of the two discretions is different: the unfairness discretion focuses on the effect of the unlawful conduct on the accused, whereas the public policy discretion focuses on ‘large matters of public policy’.<sup>158</sup>

10.105 Moreover, it has been suggested that in *R v Swaffield* the High Court took a narrow view of the fairness discretion, holding that it should consider only whether the reception of the evidence is likely to preclude a fair trial, in the sense that it involves a risk of the wrongful conviction of an accused.<sup>159</sup> By contrast, additional factors that do not affect the outcome of the trial, but violate more general notions of fairness, must be considered under the public policy discretion: that is, balanced against the public interest in the conviction of the guilty.<sup>160</sup> The approach to the application of the fairness discretion and its interaction with the public policy discretion adopted in *Swaffield* has influenced the application of the unfairness discretion under s 90.<sup>161</sup>

10.106 In ALRC 26, the common law unfairness discretion was criticised on the basis that ‘fairness’ is a vague concept that had not been properly defined by the courts, maximising uncertainty and unpredictability and making satisfactory appellate review difficult.<sup>162</sup> Other concerns were that that each possible rationale for the discretion could be satisfactorily met by one of the other proposed provisions, notably ss 85, 137 and 138. It was noted that retaining the discretion could create an additional, unnecessary and unsatisfactory complication of the law relating to evidence of admissions, and that ‘the psychological comfort which is induced by a discretion based on fairness may well be illusory and may be veiling a position which is causing injustice.’<sup>163</sup> It was also pointed out that there are very few reported cases where the

156 *Cleland v The Queen* (1982) 151 CLR 1, 23–24; cited in *R v Swaffield* (1998) 192 CLR 159, [23]. See also *Pollard v The Queen* (1992) 176 CLR 177, 201.

157 *Cleland v The Queen* (1982) 151 CLR 1, 23; cited in *R v Swaffield* (1998) 192 CLR 159, [23].

158 *Foster v The Queen* (1993) 67 ALJR 550, 554, citing *Bunning v Cross* (1978) 141 CLR 54, 77.

159 See J Clough, ‘The Exclusion of Voluntary Confessions: A Question of Fairness’ (1997) 20(1) *University of New South Wales Law Journal* 25, 26–27; B Presser, ‘Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence’ (2001) 25 *Melbourne University Law Review* 757, 760.

160 J Clough, ‘The Exclusion of Voluntary Confessions: A Question of Fairness’ (1997) 20(1) *University of New South Wales Law Journal* 25, 26–27, 35.

161 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].

162 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [150]–[153], [382]–[384].

163 *Ibid.*, [384].

discretion has been exercised in favour of the accused.<sup>164</sup> On this basis, it was initially proposed that the discretion not be enacted in the uniform Evidence Acts.

10.107 Following consultations on the issue, it was concluded in ALRC 38 that the continued application of the discretion was necessary to cover situations that can be regarded as ‘unfair’, but where the admission cannot be shown to have been obtained illegally or as a result of improper conduct.<sup>165</sup> This includes where the accused has chosen to speak to the police on the basis of assumptions that were incorrect, whether because of untrue representations or for other reasons.<sup>166</sup> Thus, the discretion was adopted in the uniform Evidence Acts.

10.108 By contrast, a number of common law authorities suggest that the fairness discretion (reflected in s 90) is not limited to evidence of admissions, but can extend to other evidence such as identification evidence and real evidence.<sup>167</sup> In *R v Schuurs*, Fryberg J noted that the common law fairness discretion was generally discussed in terms of confessional evidence. However:

the purpose of that discretion is the protection of the rights and privileges of the accused, including procedural rights. It would be odd if such a purpose were to be fulfilled only in relation to confessional statements.<sup>168</sup>

10.109 Similarly, in *R v Grant*, Smart AJ observed:

The question remains whether the court still retains the discretion to exclude otherwise admissible evidence where that is necessary to ensure a fair trial, if the discretions conferred by the Act do not cover the position which has arisen. As I am of the opinion that the use of the evidence in question (the prescribed statement) would not result in an unfair trial for the appellant the question need not be answered and it would be best left to a case where the court receives full argument on the *Evidence Act* ... I would be reluctant to see such a discretion disappear as it is an important aspect of a court’s ability to ensure a fair trial. Experience has shown that it is necessary. It enables the court to deal with new and unforeseen situations.<sup>169</sup>

### ***Submissions and consultations***

10.110 In consultations and submissions on DP 69, support is expressed for extending s 90 into a general discretion to exclude non-admission evidence on the grounds of unfairness.

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<sup>164</sup> Ibid, [378].

<sup>165</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160]. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].

<sup>166</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [162].

<sup>167</sup> *R v Edelsten* (1990) 51 A Crim R 397, 408; *Police (SA) v Jervis* (1998) 101 A Crim R 1, 14; *Pearsall v The Queen* (1990) 49 A Crim R 439, 442–443. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5860].

<sup>168</sup> *R v Schuurs* [1999] QSC 176, [27].

<sup>169</sup> *R v Grant* (2001) 127 A Crim R 124, [85]. Smart AJ also referred to: *McDermott v The King* (1948) 76 CLR 501, 506–507, 513–515; *R v Lee* (1950) 82 CLR 133, 150–151; *MacPherson v The Queen* (1981) 147 CLR 512, 519–520; *Cleland v The Queen* (1982) 151 CLR 1, 18, 31, 34; *Phillips v The Queen* (1985) 159 CLR 45, 51.

10.111 Jeremy Gans notes there is nothing particular about admission evidence and there is no reason why other evidence should not be excluded if it is ‘unfair’ to the defendant to admit it. He suggests that the sole reason that s 90 continues to apply only to admissions is the (‘tortured’) development of the case law. He also notes the general broadening of the application of the unfairness discretion to real evidence at common law, suggesting that there may be cases where it would be unfair to a defendant to admit certain evidence that is not covered by existing discretions (for example, where the prosecution has destroyed evidence, making it unable to be tested by the defence).<sup>170</sup>

10.112 The Law Council of Australia points out that there will inevitably be overlap between unfairness and other discretions, such as s 138. The Law Council does not see this overlap as a problem, arguing that the fairness discretion in s 90 should apply generally to all evidence tendered against an accused, not simply admissions.<sup>171</sup> The Law Council’s view is that this would emphasise that the uniform Evidence Acts are based on deep-rooted common law notions of fair trial.<sup>172</sup>

10.113 Others agree with the Commissions’ conclusion in DP 69 that s 90 should not be extended beyond admission evidence. The CDPP states that, despite the superficial attraction of creating a general unfairness discretion as part of the obligation to ensure a fair trial, it remains to be convinced that making fairness an overriding consideration is necessary in light of the current operation of Part 3.11 of the uniform Evidence Acts.<sup>173</sup> The Law Society of New South Wales, the Legal Aid Commission of New South Wales and the Office of the Victorian Privacy Commissioner also agree that no change to s 90 is warranted.<sup>174</sup>

### ***The Commissions’ view***

10.114 The Commissions maintain the view, expressed in DP 69, that s 90 should not be extended beyond evidence of admissions.

10.115 The fairness discretion embodied in s 90 is part of a broader concern to ensure that accused persons receive a fair trial. In *Dietrich v The Queen*, Mason CJ and McHugh J stated that ‘the right of an accused to receive a fair trial according to law is a

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170 J Gans, *Submission E 59*, 18 August 2005.

171 Law Council of Australia, *Submission E 32*, 4 March 2005.

172 Ibid.

173 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

174 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005, support for whom was expressed by Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005; Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

fundamental element of our criminal justice system'.<sup>175</sup> What constitutes a fair trial 'may vary with changing social standards and circumstances'.<sup>176</sup>

10.116 Although the concept of 'fairness' embodied in the 'right' to a fair trial has many aspects, an important part of the guarantee is procedural rather than substantive.<sup>177</sup> Thus, the 'right' to a fair trial is said to be 'manifested in rules of law and of practice designed to regulate the course of the trial'.<sup>178</sup> These 'rules of evidence and rules of procedure' gradually evolved as notions of fairness developed.<sup>179</sup> Arguably then, it is the rules of evidence themselves—or 'the withholding of evidence from the jury'—which constitute 'one of the most important manifestations of the principle of a fair trial'.<sup>180</sup>

10.117 Concern for the need to ensure a fair trial clearly underlies many aspects of the rules of evidence, both at common law and in the uniform Evidence Acts. The development of special rules of admissibility for certain categories of (usually prosecution) evidence reflects a broader concern that the trial be conducted as fairly as possible: for instance, evidence that is known to be especially unreliable (for example, identification evidence<sup>181</sup> and hearsay evidence<sup>182</sup>), or evidence that is susceptible to being given disproportionate weight by the fact finder (such as tendency and coincidence evidence<sup>183</sup>). Similarly, the various mandatory and discretionary judicial warnings found at common law and in the Acts seek to ensure fairness among the parties, often particularly for the defendant.<sup>184</sup>

10.118 Equally, concern for the fairness of the trial grounds the discretionary and mandatory exclusions, located in Part 3.11 of the uniform Evidence Acts.<sup>185</sup> Sections 135 and 137 provide for the exclusion of 'unfairly prejudicial' evidence. This is consistent with the position at common law where failure to exclude evidence that is unfairly prejudicial to the defence can violate a person's right to a fair trial.<sup>186</sup> Although s 138(1) does not expressly refer to 'unfairness' to the accused as a factor in

175 *Dietrich v The Queen* (1992) 177 CLR 292, 299. See also, generally, F Wheeler, 'Fair Trial and the Australian Constitution' (2005) 17(3) *Legal Date* 7.

176 *Dietrich v The Queen* (1992) 177 CLR 292, 328.

177 *Ibid*, 299–300 per Mason CJ and McHugh J; 353, per Toohey J.

178 *Ibid*, 299–300.

179 *Ibid*, 328.

180 J Spigelman, *The Internet and the Right to a Fair Trial: Address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, to the 6th World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005* (2005) <www.lawlink.nsw.gov.au> at 24 November 2005. See also *Connelly v DPP* [1964] AC 1254, 1347.

181 Uniform Evidence Acts, Part 3.9.

182 *Ibid*, Part 3.2.

183 *Ibid*, Pt 3.6.

184 *Ibid* Pt 4.5, s 116. See discussion in Ch 18.

185 See Ch 16.

186 *Dietrich v The Queen* (1992) 177 CLR 292, 323 fn 15. It has been noted that the common law discretion derives from a concern to protect the accused from unduly prejudicial evidence—prejudicial because it may be given too much weight or because it may lead to conviction on an improper basis. This concern in turn reflects both a desire to ensure accurate fact finding and a policy to prevent innocent persons being convicted: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].



determining whether it would be undesirable to admit improperly or illegally obtained evidence, it is clear that considerations of fairness to an accused may be taken into account in the exercise of that discretion.<sup>187</sup> Admittedly, in *R v Em*, Howie J (with whom Ipp JA and Hulme J agreed) stated:

[S]ection 138 is not, in its terms at least, concerned with the court ensuring a fair trial for the accused. Certainly that is not a paramount consideration when exercising the discretion. The discretion exercised under s 138(1) seeks to balance two competing public interests, neither of which directly involves securing a fair trial for the accused.<sup>188</sup>

10.119 Despite this, Odgers comments that ‘while it must be correct that fairness is not “paramount”, in the sense of determinative in the application of s 138, there is clearly a public interest in an accused receiving “a fair trial”, and admitting evidence that would result in an ‘unfair’ trial for the accused is clearly undesirable.<sup>189</sup>

10.120 The combination of the obstacles to admissibility of certain categories of evidence, the discretionary and mandatory exclusions in Part 3.11, and the underlying concern for the fairness of the trial in the rules of evidence as a whole, make it highly likely that a court would be able to exclude a piece of evidence that would jeopardise the right of an accused to a fair trial under an existing provision in the uniform Evidence Acts.<sup>190</sup> For this reason, the Commissions’ view is that there is no need to expand the unfairness discretion beyond the area of admission evidence.

10.121 The Commissions acknowledge that if a general unfairness discretion is viewed as unnecessary in the context of ‘real’ evidence, there is an argument that the discretion should be abandoned with respect to admission evidence. That argument is bolstered by the existence of additional barriers to the inclusion of admission evidence, apart from those in Part 3.11; most notably ss 84 and 85.

10.122 On the other hand, as this chapter has discussed, courts have always been particularly sensitive to allowing evidence of admissions (at least when the admission is made to an investigator). Admissions constitute an exception to the hearsay rule, but they remain susceptible to fabrication or to being tainted by improper or illegal official conduct. In addition, admissions tend to be regarded by tribunals of fact as highly probative evidence, regardless of their reliability, and there is a concern that, once

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187 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.15020].

188 *R v Em* [2003] NSWCCA 374, [74].

189 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.15020].

190 J Gans, *Submission E 59*, 18 August 2005.

admitted, juries tend to attach significant weight to them. A further consideration relates to the law's long-held aversion to compelled self-incrimination.<sup>191</sup>

10.123 While these issues may be dealt with under other provisions in the uniform Evidence Acts—such as ss 85, 137 and 138—the potential unfairness in using a person's own statement against him or her at trial, and the weight attached to admission evidence by tribunals of fact, arguably justify the continued existence of a residual discretion to exclude such evidence if it would be broadly unfair to use it. As noted in ALRC 38, the aim of the s 90 discretion is to allow the trial judge the discretion to exclude evidence of admissions where that evidence was 'obtained in such a way that it would be unfair to admit the evidence against the accused who made them', but was not otherwise covered by the discretion to exclude illegally or improperly obtained evidence.<sup>192</sup> That is, unlike s 138, s 90 is not confined to unlawfully obtained evidence and is thus more effective, for example, where the accused chose to speak to the police but on the basis of false assumptions.<sup>193</sup>

10.124 The Commissions believe that, on balance, the discretion in s 90 should be retained, but continue to be limited to admission evidence.

### Defining 'fairness'

10.125 The meaning and scope of the concept of 'fairness', both at common law and within s 90, are notoriously unclear.<sup>194</sup>

10.126 In *R v Swaffield*, a majority of the High Court acknowledged that fairness is an inherently vague concept, whose 'very nature ... inhibits great precision'.<sup>195</sup> The court accepted that the exercise of the unfairness discretion is uncertain because courts have not defined the policy behind the discretion or the relevant considerations to be taken into account in its application.<sup>196</sup>

10.127 Case law provides some guidance on the factors relevant in assessing unfairness. In *Foster v The Queen*, the High Court found that any significant infringement of the defendant's rights would constitute unfairness.<sup>197</sup> In *R v Swaffield*, the High Court suggested that the purpose of the discretion is to protect the right of an accused to a fair trial. Thus, the unfairness discretion should focus on 'whether the

191 *McDermott v The King* (1948) 76 CLR 501, 513. The privilege against self-incrimination is enshrined in Uniform Evidence Acts s 128. See also Australian Law Reform Commission, *Admissions*, RP 15 (1983), [81].

192 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160].

193 *Ibid.*, [160].

194 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].

195 *R v Swaffield* (1998) 192 CLR 159, [66].

196 *Ibid.*, [66].

197 *Foster v The Queen* (1993) 67 ALJR 550.

reception of the evidence is likely to preclude a fair trial', in the sense that it involves a risk of the wrongful conviction of an accused'.<sup>198</sup> The majority stated in *R v Swaffield*:

Unreliability is an important aspect of the unfairness discretion but it is not exclusive. ... [T]he purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.<sup>199</sup>

10.128 The discretion is not intended to act as a sanction against police officers for failing to obey police regulations.<sup>200</sup> Thus, 'unfairness' is assessed by reference to how the admission is used in evidence by the prosecution, rather than through an assessment of whether the accused was treated unfairly by the police.<sup>201</sup>

10.129 The general purpose of the discretion, to protect the right of the accused to a fair trial, also incorporates consideration of whether 'any forensic advantage has been obtained unfairly by the Crown from the way the accused was treated'.<sup>202</sup> However, the admission of an improperly obtained admission into evidence would not necessarily constitute a forensic disadvantage for the accused. Rather, the disadvantage must affect the conduct of the defence,<sup>203</sup> in the sense that 'the accused is forced to defend him or herself against unreliable evidence'.<sup>204</sup> Although the fairness discretion primarily involves questions of reliability,<sup>205</sup> reliability is not 'the sole touchstone' of unfairness.<sup>206</sup>

10.130 Despite the guidance on the application of s 90 and the common law fairness discretion given in case law, the scope of the discretion remains uncertain. The public policy discretion in s 138(3) lists a number of matters that the court may take into account when exercising its discretion. Given the subsisting uncertainty as to the meaning of the concept of 'unfairness', it has been argued that s 90 should similarly

198 See B Presser, 'Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 760; J Clough, 'The Exclusion of Voluntary Confessions: A Question of Fairness' (1997) 20(1) *University of New South Wales Law Journal* 25, 26–27.

199 *R v Swaffield* (1998) 192 CLR 159, [78].

200 *Ibid*, [15].

201 *R v Lee* (1950) 82 CLR 133, 154; *Van Der Meer v The Queen* (1988) 35 A Crim R 232, 248; *R v Em* [2003] NSWCCA 374, [104].

202 *R v Em* [2003] NSWCCA 374, [104] citing *R v Swaffield* (1998) 192 CLR 159, 189.

203 A Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325, 332.

204 B Presser, 'Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 760.

205 A Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325, 340.

206 *R v Swaffield* (1998) 192 CLR 159.

define the circumstances when it would be unfair to admit into evidence a defendant's admission.

### ***Submissions and consultations***

10.131 It was asked in IP 28 whether s 90 of the uniform Evidence Acts should define the circumstances in which it would be unfair to admit an admission against a defendant.<sup>207</sup> In DP 69, the Commissions concluded that no amendment to s 90 is necessary.<sup>208</sup>

10.132 In consultations and submissions on IP 28, some considered the fairness discretion too open-ended. There was support for the inclusion in s 90 of additional guidance as to the circumstances that may constitute unfairness,<sup>209</sup> possibly in the form of a list of factors to be weighed when deciding whether evidence is sufficiently probative to warrant inclusion.<sup>210</sup> The NSW DPP also supported the call for additional guidance, but suggest that that guidance should not be prescriptive or exhaustive of all the factors that would meet that description.<sup>211</sup> For example, s 90 could state that any significant infringement of the rights of the accused would constitute unfairness within the section. Alternatively, it was suggested that further guidance on the exercise of discretions can be established through guideline judgments.<sup>212</sup>

10.133 Rather than defining the circumstances in which it would be unfair to allow an admission into evidence, some New South Wales District Court judges suggested that fairness should be partially defined.<sup>213</sup> By contrast, the NSW PDO submitted that any attempt to define 'fairness' as used in s 90 would narrow the meaning of the concept, arguing that 'fairness' cannot, and should not, be defined.<sup>214</sup>

10.134 ASIC submits that no attempt should be made to prescribe the circumstances in which it would be unfair to allow a defendant's admission into evidence.<sup>215</sup> ASIC argues that any attempt to prescribe the circumstances of unfairness is likely to result in complex legislation which will provide fertile ground for argument as to whether a given fact situation fits within the prescribed circumstances. ASIC considers that a list of investigative techniques that is considered either legitimate or unfair will be of

207 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 113, Q 7–3.

208 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005).

209 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 17; J Gans, *Consultation*, Sydney, 6 September 2004; W Roser, *Consultation*, Sydney, 17 August 2004.

210 W Roser, *Consultation*, Sydney, 17 August 2004.

211 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; J Gans, *Consultation*, Sydney, 6 September 2004.

212 J Gans, *Consultation*, Sydney, 6 September 2004.

213 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

214 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

215 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.

limited value because a legitimate technique may be carried out in a manner or in circumstances resulting in unfairness.<sup>216</sup>

10.135 The Law Council of Australia submits that it would not be helpful to define the circumstances in which it would be unfair to allow into evidence an admission against a defendant.<sup>217</sup> The phrase ‘unfair to a defendant’ is capable of a broad interpretation, ensuring a fair trial by taking into account matters going to the justice of individual cases and to the moral integrity of the trial process. Concerns are also raised that the exercise of judicial discretion may become more complex if there is an increase in the factors which the court must consider.<sup>218</sup>

10.136 Following the Commissions’ proposal in DP 69 not to amend s 90, few comments or submissions on this issue were received. Some support is expressed for the decision not to amend the section.<sup>219</sup>

### ***The Commissions’ view***

10.137 The Commissions maintain the view expressed in DP 69 that any attempt to define ‘unfair’ in s 90 would limit the discretion and could have unforeseen consequences. There are two reasons for this: first, the concept of ‘fairness’ itself remains difficult to define to the extent that would be required for any amendment; and secondly, any attempt to define the application of s 90 would undermine the desirable flexibility and scope of the section.

10.138 As Odgers observes, given the elusiveness of the concept of ‘fairness’, it is difficult to provide comprehensive guidance on the relevant considerations to the exercise of this discretion.<sup>220</sup> A review of the case law shows that comprehensive guidance would not be practicable. In the exercise of the fairness discretion, examples of relevant considerations include the nature and extent of any infringement of the accused’s rights and privileges, and cases where ‘the circumstances in which the admission was made rendered it unreliable’.<sup>221</sup> However, the discretion is not limited to such cases.

10.139 Further, there are certain matters which may not necessarily be regarded as unfair to an accused—whether they would be so regarded would depend on the circumstances of the case—thus making it more difficult to provide comprehensive

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216 Ibid.

217 Law Council of Australia, *Submission E 32*, 4 March 2005.

218 P Zahra, *Consultation*, Sydney, 18 August 2004.

219 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005 with whom support is expressed by the Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005; Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

220 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5770].

221 Ibid, [1.3.5770].

guidance. Examples of matters which would not necessarily be regarded as unfair include:

- the use of an admission which has been compelled by law;<sup>222</sup>
- an interview conducted despite the suspect's objection;<sup>223</sup>
- continuation of an interview despite an indication from the suspect that he or she did not wish to participate further;<sup>224</sup>
- interviewing a suspect who is intellectually handicapped or who suffers from a disease or disorder of the mind;<sup>225</sup>
- interviewing an accused who is affected by alcohol or drugs;<sup>226</sup> and
- admissions made to police informers.<sup>227</sup>

10.140 It is inherently difficult to be prescriptive in the exercise of the fairness discretion because it involves an evaluation of circumstances.<sup>228</sup> Even an attempt to list a series of 'non-exhaustive' factors to be taken into account in the exercise of judicial discretion in the application of s 90 may be problematic. This is because, in practice, the enumeration of non-exhaustive factors could still result in narrowing the application of s 90 to circumstances of the types listed, undermining its flexibility.

10.141 Admittedly, the scope of s 90 remains broad. This may cause difficulties for courts applying the provision at first instance and on appeal.<sup>229</sup> Despite this, on balance the Commissions consider that the breadth and lack of specificity in s 90 are positive, rather than negative, aspects of the provision—aspects which are to some extent inherent in all broad judicial discretions. The Law Reform Commission of Canada, in a passage cited with approval by the High Court in *Swaffield*, noted that

there is an undeniable advantage in granting judges discretionary power, since it keeps the court continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities.<sup>230</sup>

222 *Director of Public Prosecutions (NSW) v Alderman* (1998) 104 A Crim R 116.

223 *R v Phan* (2001) 123 A Crim R 30, [54]–[55].

224 *R v Clarke* (1997) 97 A Crim R 414.

225 *R v Donnelly* (1997) 96 A Crim R 432.

226 *R v Helmhout* (2000) 112 A Crim R 10, [39].

227 *R v Swaffield* (1998) 192 CLR 159. See also *R v Pfennig (No 1)* (1992) 57 SASR 507; *R v Bailey and Smith* (1993) 97 Cr App R 365; *R v Lowe* [1997] 2 VR 465; *R v Juric* (2002) 129 A Crim R 408.

228 B Selway, 'Principle, Public Policy and Unfairness: Exclusion of Evidence on Discretionary Grounds' (2002) 23 *Adelaide Law Review* 1, 5.

229 See concerns raised in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [382]–[384].

230 *Ibid*, [964], citing Law Reform Commission of Canada, *Compellability of the Accused and the Admissibility of His Statements: A Study Paper* (1973).

10.142 As outlined above, s 90 is intended to deal with unfair situations that are not otherwise covered by admissibility rules for admission evidence. Any attempt to define the operation of s 90 would undermine the capacity of the section to act as a residual ground for exclusion of evidence of admissions in unforeseen circumstances. For this reason, and in order for the concept of ‘fairness’ to remain ‘broad enough to adapt to changing circumstances as well as evolving community values’,<sup>231</sup> it is not considered wise to fetter this discretion.

10.143 The Commissions’ view is that the principles expounded in *R v Swaffield* provide sufficient guidance for the exercise of the fairness discretion and that further rules or a list of factors may narrow the scope of the discretion unnecessarily. Section 90 should therefore not be amended.

### Admissions which are not first-hand

10.144 One relatively narrow issue has arisen with respect to the operation of s 60 of the uniform Evidence Acts in the context of admissions which are more remote than first-hand hearsay. The situation may arise as follows. X says to Y, “I assaulted V”. Y then repeats that statement to Z who is called to give evidence against X.<sup>232</sup> Notwithstanding that this is second-hand hearsay, if the contested statement is admissible by the operation of one of the statutory exceptions to the hearsay rule (for example, on credibility grounds under Part 3.7), then, subject to the operation of any other exclusions or limitations, it may be allowed into evidence by operation of s 60.<sup>233</sup> This principle also applies in relation to more remote forms of hearsay.<sup>234</sup>

10.145 While the contested statement may, *prima facie*, be allowed into evidence, there are several ways in which such a statement, or its use, could be partially or wholly excluded—that is, before or after the contested statement is actually allowed into evidence. Such a statement may be excluded under s 83 as an admission against a third party; it may be excluded under s 84 if it was improperly obtained; it may be excluded under s 85 if the relevant conditions are met; it may be excluded for unfairness within the ambit of s 90; or, the court may exclude or limit the use of the statement as evidence on one of the grounds in ss 135–139 of the Acts.

231 *R v Swaffield* (1998) 192 CLR 159, [53].

232 For ease of reference for the purposes of this part of the chapter, such a statement will be referred to as ‘the contested statement’.

233 This is essentially the position in *Adam v The Queen* (2001) 207 CLR 96. In S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4880], it is noted that a statement of this nature ‘would not be protected by s 81 from the application of the hearsay rule’ but that ‘the exceptions to the hearsay rule in Div 3 of Pt 3.2 may apply to render such second-hand or more remote hearsay evidence admissible’.

234 In the hypothetical example, there is a chain involving only three people: X tells something to Y who repeats it to Z. This makes Z’s evidence second-hand hearsay. However, it would make no difference to the application of s 60 if the hearsay were more remote than this; eg, if Z went on to tell A who gave evidence (third-hand hearsay), or if A went on to tell B who gave evidence (fourth-hand hearsay) etc.

10.146 Even if none of the exclusions in the previous paragraph apply, a court would first have to consider *Lee v The Queen*<sup>235</sup> when determining whether to allow the contested statement into evidence and, if so, subject to what conditions. Critical to the High Court's construction of s 60 was its observation that

[Section] 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not attend to assert.<sup>236</sup>

10.147 This statement has been interpreted to mean that s 60 does not allow second-hand or more remote hearsay to be used as evidence of an admission or, in other words, such a statement (if allowed into evidence) must not be used to prove the truth of the fact which appears to be asserted by the representation.<sup>237</sup> That is, in the hypothetical example above, Z's evidence of the statement by X ('I assaulted V') could not be used to prove that X did indeed assault V because Z never intended to assert that X assaulted V. This reasoning is consistent with *Lee* because, in that case, the High Court held that the witness (Calin) never intended to assert that the defendant had actually 'done a job', but merely that the defendant had *said* that he had 'done a job'.<sup>238</sup>

10.148 It should also be noted that the Commissions recommend that s 60 of the uniform Evidence Acts be amended so as to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.<sup>239</sup> Subject to the qualification explained in Chapter 7 that it is difficult to discern a single, unifying ratio in *Lee*, this recommendation is intended to overcome the High Court's decision in *Lee*.<sup>240</sup>

10.149 Although there are numerous ways in which an admission which is not first-hand may be excluded, or its unfair effects mitigated, there is no clear rule that such statements *must* be excluded. To some extent, therefore, whether or not such a statement is allowed into evidence will depend on the discretion of the particular presiding judge. Thus, while the uniform Evidence Acts contain various safeguards to prevent a miscarriage of justice arising from such a statement being erroneously or unfairly allowed into evidence, the Commissions believe that the remaining scope for this to occur (narrow though that scope is) should nevertheless be foreclosed.

### Risks of unfairness to the accused

10.150 There are three particular risks associated with evidence derived from statements constituting admissions which are not first-hand. First, as discussed earlier in this chapter, admissions, in the criminal law context, are subject to tight restrictions on admissibility. The reason for this strict approach to admissions is that evidence of

235 *Lee v The Queen* (1998) 195 CLR 594.

236 *Ibid*, [29].

237 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.940].

238 *Lee v The Queen* (1998) 195 CLR 594, [29].

239 See Rec 7–2.

240 See Ch 7.



an admission can be highly persuasive as to whether the evidence is reliable or not and can, therefore, be highly prejudicial to the accused. In some cases, the evidence of an admission can be critical to the Crown case. For these reasons, it is important to ensure that the evidence of the admission is sufficiently reliable *before* it is allowed into evidence. This is not to say that juries are unable to differentiate between reliable and unreliable evidence.<sup>241</sup> However, because evidence of an admission can be powerful, the court should, where possible, take a prophylactic approach by excluding an unreliable admission prior to allowing it into evidence because, once an admission is in court, it is difficult to cauterise or limit its impact.<sup>242</sup>

10.151 Secondly, if admissions constituting remote forms of hearsay are more frequently allowed into evidence, it could have serious deleterious effects on the rights of an accused. For instance, the right to silence is undermined where a defendant can be inculpated by a statement which was said to have been made by the defendant but over which the defendant has lost all control. There is a qualitative difference between allowing into evidence an admission that is first-hand hearsay and allowing an admission constituted by a more remote form of hearsay. For first-hand hearsay, a person, X, makes an admission to another person, Y, and Y then gives evidence about it. As it was X who made the statement to Y in the first place, X had control over its content. However, with more remote hearsay, the situation changes to one in which Y purports to repeat X's statement to Z and Z then gives evidence.<sup>243</sup> In this second situation, X will have lost control over what is, in substance, 'X's admission'. There is a greater risk of error or distortion in the re-telling and it is conceivable that even an apparently minor error can inculpate the defendant.<sup>244</sup>

10.152 Another possible incursion into the rights of an accused relates to the problem of police 'verbals'. The general nature of this problem is widely recognised.<sup>245</sup> Its application in the specific context of evidence of admissions constituted by more remote forms of hearsay is manifest: if the Crown is permitted to adduce such material, the defendant will face grave difficulties in trying to refute it. As was stated in the joint majority judgment (Mason CJ, Deane, Gaudron and McHugh JJ) in *McKinney v The Queen*:

241 For which see, for example, Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005.

242 J Spigelman, *The Internet and the Right to a Fair Trial: Address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, to the 6th World Wide Common Law Judiciary Conference, Washington DC, 1 June 2005* (2005) <www.lawlink.nsw.gov.au> at 24 November 2005.

243 As with the earlier hypothetical example, this is second-hand hearsay. The situation is the same if the hearsay becomes more remote – ie, if Z repeats the statement to A, and so on.

244 This problem was adverted to in Criminal Law Revision Committee England and Wales, *Evidence (General)*, Report 11 (1972), [225] and in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678]. See also *Lee v The Queen* (1998) 195 CLR 594, [35].

245 See, eg, *McKinney v The Queen* (1991) 171 CLR 468, 472; *Carr v The Queen* (1988) 165 CLR 314, 337–338. See also the discussion earlier in this chapter in relation to *Kelly v The Queen* (2004) 218 CLR 216.

[I]t is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated ...<sup>246</sup>

10.153 The third risk relates to the concern that hearsay evidence is inherently problematic.<sup>247</sup> This is why the uniform Evidence Acts establish the general rule that hearsay evidence should be excluded.<sup>248</sup> The fact that this general rule is subject to a limited number of exceptions does not detract from the principle just stated—namely, that caution should be exercised before admitting hearsay evidence because it is potentially unreliable. The risks are, however, compounded when one is dealing with hearsay which is more remote than first-hand hearsay.<sup>249</sup>

10.154 None of this is to say that hearsay evidence is always unreliable, nor that first-hand or more remote hearsay should be excluded in all circumstances. However, evidence derived from hearsay that is more remote than first-hand should be treated with caution, a fact that was at the heart of submissions urging that the uniform Evidence Acts be amended so that s 60 would no longer apply to second-hand and more remote hearsay.<sup>250</sup>

### The Commissions' view

10.155 The Commissions believe that the combination of the three main risk factors identified above militates in favour of an amendment to the uniform Evidence Acts. This amendment would make clear that evidence of an admission, constituted by a statement which is more remote than first-hand hearsay, should be excluded from the ambit of s 60.

10.156 In summary, this amendment is necessary because admissions can be highly persuasive, whether reliable or not, and highly prejudicial to the case of an accused. It is therefore important that the reliability of evidence of admissions is maximised. Having regard to the three risk factors, evidence which is more remote than first-hand hearsay should be excluded unless its reliability can be assured.

246 *McKinney v The Queen* (1991) 171 CLR 468, 476.

247 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [661]–[675]. See also Ch 7.

248 Section 59 articulates the hearsay rule. See Ch 7 for a more detailed analysis of hearsay.

249 This was recognised in the previous Evidence inquiry: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678]. It was also recognised by the High Court in *Lee v The Queen* (1998) 195 CLR 594, [35]. See also uniform Evidence Acts Part 3.2 Division 2. See the discussion in Ch 8.

250 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005; J Gans, *Submission E 59*, 18 August 2005.

10.157 Finally, the Commissions believe the proposed amendment to the operation of s 60 is a modest one, but one which is important to preclude potential injustice. The Commissions' view is that the change is consistent with the purpose behind s 60.<sup>251</sup>

10.158 One further question needs to be addressed: What is the status of unintended assertions? As explained in the earlier chapter on hearsay,<sup>252</sup> it may be misleading to reduce the reasoning in *Lee* to the proposition that s 60 *precludes* second-hand or more remote hearsay to be used as evidence of an admission. This is because the reasoning turns on the proposition that s 59 only applies to 'intended' assertions; if the assertion was not intended then it should not be classed as 'hearsay' within the meaning of the uniform Evidence Acts and so both ss 59 and 60 would be inapplicable. As explained earlier in the chapter dealing with hearsay, a deliberate policy decision was made in ALRC 26 to exclude unintended assertions from the meaning of 'hearsay' under the Acts, in part, because of the likely greater reliability of such assertions and for practical reasons.<sup>253</sup> The amendment now proposed would not alter the position in relation to unintended assertions which constitute second-hand or more remote hearsay evidence of an admission. The Commissions note that the provisions in Parts 3.4 and 3.11 of the Acts continue to apply to exclude or limit the use of evidence, where it would be unfair to the accused to allow such evidence to be adduced.

10.159 The Commissions therefore recommend amending s 82 of the uniform Evidence Acts in accordance with Recommendation 10–2 below.

**Recommendation 10–2** To ensure that evidence of admissions in criminal proceedings that are not first-hand are excluded from the ambit of s 60, s 82 of the uniform Evidence Acts should be amended to provide that s 60 does not apply in a criminal proceeding to evidence of an admission.

10.160 While the Commissions believe that Recommendation 10–2 will assist in ensuring the reliability of evidence of admissions, there remains some limited scope for permitting more remote evidence to be admitted to prove an admission. Given the critical importance of ensuring the reliability of the evidence, a further amendment to s 82 which would allow s 60 to operate in respect of second-hand or more remote hearsay of admissions which are nevertheless deemed to be 'reliable'. Such an amendment would need to be restricted to evidence that is *prima facie* reliable and its relative reliability must be capable of being readily assessed. For instance, if such an admission is video-recorded, in accordance with a regime like that in use for the

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251 See Ch 7.

252 Ibid.

253 Ibid; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

recording of interviews of accused persons, it is likely to be reliable and its reliability can be more accurately assessed. This issue has not been the subject of any consultation and no recommendation is made. It is a matter for future consideration and the Commissions suggest that the Standing Committee of Attorneys General (SCAG) consider this further question and do so whether or not Recommendation 10–2 is implemented.

# 11. Tendency and Coincidence Evidence

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## Introduction

11.1 Part 3.6 of the uniform Evidence Acts provides rules for the admissibility and use of evidence of character, reputation, prior conduct or events where the evidence is relevant because it tends to prove a person had a tendency to act or think in a particular way, did a particular act or had a particular state of mind. At common law, such evidence is commonly referred to as ‘propensity’ and ‘similar fact’ evidence.

11.2 An example of the use of such evidence is in the case of *R v Straffen*.<sup>1</sup> To identify Straffen as having killed a young girl, evidence was admitted that:

- Straffen was in the vicinity at the time of the murder;
- he had escaped for two hours from a nearby prison where he was being detained; and

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1 *R v Straffen* [1952] 2 QB 911.

- the detention was for killing two young girls in precisely the same circumstances as the killing in question.

11.3 The fact that Straffen had killed the other two young girls in the circumstances alleged was not disputed. The evidence was admitted because it showed that Straffen had a tendency to kill in a particular manner and his presence in the vicinity of the murder and the similarities with the killing in question identified him as the killer.

11.4 The relevance and admissibility of the evidence can also be justified using coincidence reasoning. The situation was one where the evidence showed that three young girls had been killed in similar circumstances and it was improbable that the killings would have been the acts of different people. It was established that Straffen had killed the two other young girls and therefore it was highly probable, he being in the vicinity of the murder, that he had killed the third.

11.5 Reference is made in Chapter 3 to the dangers of this sort of evidence, particularly when it concerns evidence of other discreditable conduct. It poses problems for the fact-finding process because the probative value of such evidence tends to be overestimated and the evidence can be highly prejudicial. It also poses risks of unfairness to parties against whom it is led because, without sufficient notice of the evidence, a party may be taken by surprise and be unprepared to meet the evidence. When led against an accused person, its prejudicial effect significantly increases the risk of wrongful conviction.<sup>2</sup> Admitting evidence of other conduct also raises collateral issues that can significantly increase the time and cost of both civil and criminal litigation.

11.6 At common law, when such evidence is adduced by the prosecution in criminal cases to prove tendency or coincidence, it must satisfy the extremely stringent ‘no rational explanation’ test.<sup>3</sup> Under the uniform Evidence Acts, evidence may not be admitted for tendency or coincidence purposes unless it has ‘significant probative value’ and reasonable notice of intention to adduce it has been given to the other parties to the proceedings.<sup>4</sup> Where such evidence is adduced by the prosecution against an accused to prove a tendency or coincidence, it must satisfy the further requirement that the probative value of the evidence must substantially outweigh any prejudicial effect it may have before it can be used to prove a tendency or coincidence.<sup>5</sup>

11.7 In DP 69, the Commissions considered a number of issues that had been raised concerning the operation of each of the relevant substantive sections (ss 97, 98 and

2 *Perry v The Queen* (1982) 150 CLR 580. One barrister argues that once such evidence is admitted the case is almost decided: G Brady, *Consultation*, Sydney, 26 August 2005.

3 *Hoch v The Queen* (1988) 165 CLR 292; *Pfennig v The Queen* (1995) 182 CLR 461. Note that the High Court granted special leave on 23 June 2005 in *Phillips v The Queen* [2005] HCA Trans 455, a case involving the application of *Pfennig v The Queen*.

4 Uniform Evidence Acts ss 97–99.

5 *Ibid* s 101.

101)<sup>6</sup> and the notice requirement (s 99). Consideration was also given to the question whether, for criminal trials, ss 97–101 should be replaced by a provision which relies upon ‘the interests of justice’ as the test for admissibility—for example, s 398A of the *Crimes Act 1958* (Vic). Some new issues were raised in the course of consultations on the Discussion Paper.<sup>7</sup> The major issue that emerged from consultations was whether s 101 should be amended to apply to all evidence of disreputable conduct tendered against an accused person.<sup>8</sup>

## Tendency evidence—s 97

11.8 Section 97(1) provides:

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind, if:
  - (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party’s intention to adduce the evidence; or
  - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.<sup>9</sup>

The section applies in both civil and criminal proceedings.

## Determining whether evidence is tendency evidence

11.9 The differing views taken in a decision of the New South Wales Court of Criminal Appeal, *R v Cakovski*,<sup>10</sup> as to whether certain evidence was tendency evidence, were referred to in IP 28.<sup>11</sup> The issue was considered further in DP 69.<sup>12</sup> The

6 Determining whether evidence is tendency evidence for the purposes of s 97; whether s 98 is too narrow in its operation and whether the events to be considered under s 98 include the event the subject of the proceeding; the operation of ss 97 and 98 in civil proceedings and the redrafting of those sections to simplify their language; and the application of *Hoch and Pfennig* to s 101.

7 Whether s 97 strikes the right balance in controlling the admissibility of tendency evidence and the use of ‘significant’ rather than ‘substantial’ in describing the level of probative value required.

8 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 10–1.

9 See the discussion of the concept ‘probative value’ in Ch 3.

10 *R v Cakovski* (2004) 149 A Crim R 21.

11 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [8.7]. The accused was charged with murder and relied on self-defence in circumstances where he maintained that the deceased had continued to threaten to attack him even though he held a knife. The evidence in question concerned past acts of violence and threats of violence by the deceased. One judicial analysis was that this evidence made the accused’s account more credible. The other was that it did so because of the tendency to violence it revealed. All judges agreed that the evidence had significant probative value.

Commissions there commented that the judgments demonstrate that views can differ as to the application of s 97 but that this does not point to any problem with the definition of tendency evidence in the uniform Evidence Acts. The Commissions concluded that legislative amendment cannot resolve the differences of opinion that may occur from case to case.

### ***Submissions and consultations***

11.10 The only relevant submission received was that responding to IP 28.<sup>13</sup> The NSW DPP expresses the view that the definition of tendency evidence is satisfactory. In submissions and consultations on DP 69, no views were directed to this issue.

### ***The Commissions' view***

11.11 The Commissions remain of the view that no change should be made to the definition of tendency evidence in s 97. As explained in DP 69, although *R v Cakovski* points to potential problems in the process of characterising the evidence as tendency evidence or otherwise, that case provides an example of the robustness of the package provided by the uniform Evidence Acts. Although, in that case, the approach taken by Hodgson JA and Hulme J had the result that ss 97 and 101 did not control the admissibility of the evidence because it was not tendency evidence, the uniform Evidence Acts provide the means to control admissibility through s 135.<sup>14</sup> Consequently, the Commissions do not recommend any amendment to the definition of tendency evidence in s 97.

### ***Scope of operation of s 97***

11.12 Submissions and consultations on DP 69 raise a new issue—whether s 97 goes too far in allowing evidence of character and reputation evidence to be admitted, or not far enough.

11.13 In arguing for a more limited provision, one submission states that there is no place for character evidence unless the accused has put his or her character in issue and there is no place at all for reputation evidence. The submission also states that s 97, together with s 101, would weaken the common law test. The submission argues that s 97, in its present form, should be confined in criminal trials to evidence adduced by the accused.<sup>15</sup>

12 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.8]–[10.15].

13 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

14 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.15].

15 Confidential, *Submission E 63*, 29 August 2005.



11.14 The contrary view is also put that the provision is too stringent and will exclude probative evidence which should be admissible against accused persons. It is submitted that, if relevant to a fact in issue, tendency evidence should be prima facie admissible.<sup>16</sup> This submission relies on recommendations made in 2002 and 2004<sup>17</sup> as a result, in part, of the case law in New South Wales (NSW)<sup>18</sup> that tendency evidence should be excluded under ss 97 and 101 unless it bears no reasonable explanation other than the inculcation of the accused for the crime charged. That interpretation was rejected in *R v Ellis*<sup>19</sup> and so no longer applies.

### ***The Commissions' view***

11.15 The submissions highlight the challenge posed by evidence of prior misconduct and other evidence of bad character. It can be highly prejudicial evidence carrying with it the very grave risk of wrongful conviction. At the same time, it can be very important and highly probative evidence. The submissions also highlight the different perceptions and strongly held views that exist about the likely operation of the relevant provisions. The uniform Evidence Acts, especially through ss 97–101, recognise the competing issues and provide the means by which the trial judge can resolve this fundamental conflict.

11.16 The submissions also highlight the problem referred to elsewhere in the Report about the tendency to look at the specific exclusionary rules and their exceptions and assume that if evidence is not excluded by those rules it will be admissible. This is not so. Section 97, for example, does not make evidence of character, reputation or conduct admissible to prove a relevant tendency. Assuming such evidence is relevant and that it attracts and satisfies s 97, it will not be admissible unless, in the case of criminal proceedings, it satisfies s 101 and, in civil and criminal proceedings, it does not fall foul of the discretionary and mandatory exclusions in Part 3.11. The reference to character and reputation in s 97 was necessary as a matter of drafting to cast the net of s 97 wide enough to ensure that the controls of ss 97 and 101 would be available to exclude, where appropriate, any evidence relevant because it tends to prove a tendency.

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16 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005

17 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), [4.25]–[4.30]; NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 8, 10.

18 *R v Lock* (1997) 91 A Crim R 356, 366; *R v AH* (1997) 42 NSWLR 702, 709; *R v Fordham* (1997) 98 A Crim R 359.

19 *R v Ellis* (2003) 58 NSWLR 700.

11.17 Experience of the legislation suggests that the concerns expressed are not warranted.<sup>20</sup> The Commissions remain of the view that ss 97–101 provide an appropriate combination of rules for controlling the admissibility of tendency evidence.

## Coincidence evidence

### The scope of s 98—is it too narrow?

11.18 The critical provisions of s 98 of the uniform Evidence Acts are as follows:

- (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
  - (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
  - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.<sup>21</sup>
- (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
  - (a) they are substantially and relevantly similar; and
  - (b) the circumstances in which they occurred are substantially similar.

...

11.19 Like s 97, this section applies in both civil and criminal proceedings. For the section to apply, the evidence must satisfy the definition of 'related events' in subsection (2). As pointed out in IP 28, that definition has the effect that the intended controls on admissibility only apply if the events and circumstances in which the events occurred are substantially similar.<sup>22</sup> Paradoxically, therefore, there is a test of admissibility for 'related events' (which, if they satisfy the subsection (2) definition, will satisfy the admissibility test) but not a test for unrelated events.<sup>23</sup> As a result, s 98 will not apply to exclude evidence where the events are not substantially and relevantly similar, or the circumstances in which they occurred are not substantially similar. In addition, the other intended control, s 101, will have no application.<sup>24</sup> However, such evidence should be excluded because it will probably be of little probative significance or value.

20 It is noted that the New South Wales Public Defenders Office expresses no concern about s 97: New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

21 See discussion of the concept 'probative value' in Ch 3.

22 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [8.20].

23 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 319–320.

24 See definitions of 'tendency evidence' and 'coincidence evidence' in the Dictionary to the uniform Evidence Acts.

***The proposals in DP 69***

11.20 Several options for amendment were canvassed in DP 69. A draft provision representing the preferred option was included and is as follows:

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless:
  - (a) the party adducing the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
  - (b) the court thinks that the evidence would, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.<sup>25</sup>

***Submissions and consultations***

11.21 There was support for addressing the problem in the manner suggested.<sup>26</sup> Submissions were also received arguing for a less stringent approach<sup>27</sup> and a more stringent approach.<sup>28</sup> The latter involved the addition of a new subsection (2) as follows:

- (2) For the purposes of sub-s. (1)(b), the evidence only has significant probative value if:
  - (a) the events are strikingly and relevantly similar; and
  - (b) the circumstances in which they occurred are strikingly and relevantly similar.<sup>29</sup>

11.22 While the draft provision in DP 69 requires consideration of similarities in events and circumstances, it does not require, in contradistinction to the suggested

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25 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Appendix 1, 547.

26 Confidential, *Submission E 63*, 29 August 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Victoria Police states that it has no comment other than a concern that the notice 'may present' difficulties for police prosecutors in summary matters: Victoria Police, *Submission E 111*, 30 September 2005; A Cossins, *Consultation*, Sydney, 3 August 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005; J Gans, *Consultation*, Melbourne, 17 August 2005 (but queries whether the use of 'similarities' might unduly confine the operation of the section); Western Australian Bar Association, *Consultation*, Perth, 6 October 2005.

27 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005 argues for evidence to be prima facie admissible if relevant.

28 Confidential, *Submission E 63*, 29 August 2005.

29 Ibid.

alternative, that there be similarities in both the events and circumstances and that the similarities be striking.

11.23 Another issue that arose is whether a party tendering evidence of prior conduct can avoid the operation of the provision put forward in DP 69 by taking the position that it is not intended to rely on similarities in the circumstances of the events and, therefore, the section does not apply.

***The Commissions' view***

11.24 The Commissions' view is that to require both a striking similarity of events and a striking similarity of circumstances would be to raise the threshold too high and would be likely to exclude highly probative evidence. For example, highly probative evidence of unusual, similar acts occurring in different circumstances would be excluded.<sup>30</sup> It should be borne in mind that this provision is intended as a preliminary screening provision for civil as well as criminal proceedings. Care must be taken not to set the proposed threshold too high. The Commissions consider that the amendment as drafted in DP 69 strikes the appropriate balance.

11.25 As to the other issue raised concerning avoidance of the provision, the argument assumes that the proposed amended section would only apply if the reasoning process employed for the tendering party depends on both similarities between the events and similarities between the circumstances surrounding them. The intention of the proposal is that s 98 will apply where the tendering party argues that the evidence is relevant to the issues in the case on the basis of improbability reasoning and that reasoning turns on similarities between the events, or in the circumstances surrounding those events, or both. The Commissions' view is that the terms of the recommendation and the suggested draft provision make either or both bases relevant to the test so that if the tendering party sought to limit the reasoning process to similarities of the events the section would still apply. However, the Commissions want to put this issue beyond argument. The recommendation has been amended to make the intention clearer by inserting the word 'any' before 'similarities'. A draft provision is set out in Appendix 1.

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30 For example, evidence in a matter in which a person suing on an insurance policy for accidental fire damage to his or her property who has had the misfortune of five fires causing damage to other insured property in the previous three years but where the circumstances of each fire were different.

**Recommendation 11–1** Section 98(1) of the uniform Evidence Acts should be amended to provide that: evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events and any similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless the party adducing the evidence gives reasonable notice in writing to each other party of the party's intention to adduce the evidence; and the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, has significant probative value.

### Section 98—‘2 or more’ events

11.26 Another issue considered in DP 69 was whether the events referred to by the expression ‘2 or more’ events include the event in question in the proceeding. Some commentators suggest that the section is ambiguous on this issue.<sup>31</sup>

11.27 In DP 69,<sup>32</sup> the Commissions commented that it was the intention of the original ALRC proposals<sup>33</sup> that the events which are the subject of the charge would be included in appropriate cases. That is, in fact, typical of cases where coincidence reasoning is employed.<sup>34</sup> For example, if the Crown has evidence that the accused committed another substantially similar crime, the evidence could go to the jury on the basis that, if satisfied beyond reasonable doubt that: (i) the accused committed the other substantially similar crime; and (ii) that the same person committed that crime and the crime charged, the jury should be satisfied that it was the accused who committed the crime with which he or she is charged.

11.28 The Commissions concluded that there is, in fact, no ambiguity.

### *Submissions and consultations*

11.29 The issue is raised, however, in discussion of DP 69.<sup>35</sup> Plainly, the construction that the Commissions regarded as reasonably clear is not clear to everyone who reads

31 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [98.20].

32 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.28].

33 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [809].

34 This was the approach taken in *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 5 September 1996).

35 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

the section, particularly those new to the uniform Evidence Acts. The suggestion was made that the desired interpretation should be made clear by amendment or by a note to the section.

### *The Commissions' view*

11.30 The issue of the ease of interpretation remains a real one, particularly for those not familiar with the legislation. In the interest of ease of application and clarity, the issue needs to be addressed. The Commissions' view is that it will be sufficient to do so by inserting a note to the uniform Evidence Acts stating the effect of the section.

**Recommendation 11–2** To clarify the effect of the provision, a note should be added to s 98 of the uniform Evidence Acts stating that the events that may be considered include an event which is the subject of the proceeding.

## **Issues common to ss 97 and 98**

### **Tendency and coincidence evidence in civil proceedings**

11.31 The operation of ss 97 and 98 in civil proceedings was also considered in DP 69. The Commissions referred to a submission from the Law Council of Australia that, in civil proceedings, the rules of evidence should be kept to a minimum, and the admission of tendency and coincidence evidence should be left to principles of 'sufficient relevance'.<sup>36</sup>

11.32 The Law Council of Australia's submission did not identify the way in which its proposal might be implemented. The concept of 'sufficient relevance' is the common law requirement of relevance. The 'sufficiency' aspect of the common law requirement is dealt with by s 135—the relevance discretion.<sup>37</sup> The view taken in DP 69 was that what was proposed by the Law Council of Australia was that the admissibility in civil proceedings of tendency and coincidence evidence should be controlled by s 135.

11.33 The Commissions expressed the view that there would not be any advantage gained in applying this approach in civil proceedings.<sup>38</sup> While it has the merit of simplifying the statement of the rules to be applied in civil proceedings, it will not remove the need to argue and consider the probative value of the evidence in question.

<sup>36</sup> Law Council of Australia, *Submission E 32*, 4 March 2005.

<sup>37</sup> The common law test requires consideration of the matters listed in s 135, including the consideration of unfair prejudice. See discussion in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [640]–[645]; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), Appendix C [57]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [122].

<sup>38</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.36].

It will in fact have the result that, in civil cases, whenever the issue of admissibility arises, it will be dealt with by a balancing process under s 135.

11.34 One of the benefits of applying ss 97 and 98 in civil proceedings is that they can be used to exclude evidence on objection on the single basis of insignificant probative value without a debate involving the balancing process of s 135. It also needs to be borne in mind that parties preparing for cases consider what evidence to call. In making this decision, they will commonly consider whether the evidence will satisfy the rules of admissibility. It is important for this exercise that there be a threshold test such as ‘significant probative value’ rather than a balancing discretion, the outcome of which is less predictable. The reality is that the application of ss 97 and 98 in civil proceedings is likely to have the result that there will be significantly fewer occasions when s 135 has to be considered.

### ***Submissions and consultations***

11.35 One concern raised in response to DP 69 is that s 97 will allow too readily the admission of tendency evidence in civil proceedings.<sup>39</sup> The view is expressed that the equivalent of the common law similar fact requirements should be imposed—such as requiring a striking similarity—s 135 not being an adequate final control. The contrary view was also expressed that a requirement of significant probative value is appropriate and adequate.<sup>40</sup>

### ***The Commissions’ view***

11.36 The policy concerns giving rise to the uniform Evidence Acts’ approach were that the typical evidence—prior conduct—may have minimal probative value, cause unfair prejudice, raise collateral issues, take parties by surprise and have a significant impact on the time and costs of litigation.<sup>41</sup> There was also concern about the range of approaches to the control of the admission of such evidence at common law.<sup>42</sup> These concerns remain and the Commissions consider that a threshold requirement of significant probative value must be satisfied before such evidence can be admitted. Further, experience of the ‘significant probative value’ test suggests that the concerns that have been raised are not, in fact, warranted. The Commissions remain of the view that no change should be made.

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39 Confidential, *Submission E 63*, 29 August 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

40 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

41 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [790].

42 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), Appendix C [172]–[175]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix C [24].

## Notice requirements

### *Submissions and consultations*

11.37 Concerns are expressed by the Office of the Director of Public Prosecutions New South Wales (NSW DPP) that the notice requirements in relation to tendency and coincidence evidence are too onerous.<sup>43</sup> Reference is made to cl 6(2) of the *Evidence Regulation 2000* (NSW) which states:

A notice given under section 97(1)(a) of the Act (relating to the tendency rule) must state:

- (a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce, and
- (b) if that evidence consists of, or includes, evidence of conduct of a person, particulars of:
  - (i) the date, time, place and circumstances at or in which the conduct occurred, and
  - (ii) the name of each person who saw, heard or otherwise perceived the conduct, and
  - (iii) in a civil proceeding—the address of each person so named, so far as they are known to the notifying party.<sup>44</sup>

11.38 The NSW DPP, quoting from the case *R v AB*,<sup>45</sup> notes that it is sufficient compliance with the regulation if the notice states ‘either in its own body or by reference to documents readily identifiable, the nature and substance of the evidence sought to be tendered’.<sup>46</sup> The NSW DPP submits that

the notice provisions are interpreted such that where the Crown wishes to rely on tendency evidence in an alleged sexual assault prosecution involving a number of complainants, the Crown must nominate in the notice each paragraph of each complainant’s statement which refers to the alleged offences against the other complainants. In our view notice by the Crown that it intends to rely upon the alleged offences committed against complainants A, B and C as set out in their statements dated x, y and, z respectively, should constitute adequate notice.<sup>47</sup>

11.39 The NSW DPP renews its submission, in response to DP 69, arguing that the defence would have the bulk of the Crown brief of evidence. Referring to the policy issue of time and cost, the NSW DPP submits that the issue be reconsidered because of its costs implications.<sup>48</sup>

<sup>43</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

<sup>44</sup> The same wording appears in *Evidence Regulations 1995* (Cth) cl 6(2) and *Evidence Regulations 2002* (Tas) cl 5(2).

<sup>45</sup> *R v AB* [2001] NSWCCA 496, [15].

<sup>46</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, citing *R v AB* [2001] NSWCCA 496, [15].

<sup>47</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

<sup>48</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.



***The Commissions' view***

11.40 In DP 69, the Commissions noted that the construction of the regulations and the practice developed in NSW,<sup>49</sup> if complied with, is onerous. However, the Commissions also noted that the detail required has the benefit of requiring careful thought on the part of the prosecution in identifying the evidence on which it seeks to rely. The Commissions commented that it is critical in determining the admissibility of this class of evidence to identify the evidence with precision. It is then possible accurately to identify the relevance of the evidence and the way the prosecution intends to rely upon it. Other benefits identified were enabling defence lawyers to prepare, with reasonable confidence, to test the evidence sought to be led and limiting the scope for misunderstanding between the prosecution and the defence thereby reducing time spent in court while clarification is given.<sup>50</sup>

11.41 Time and cost considerations are very important. However, they include not only the time and cost implications for the prosecution, but also the time and cost implications for the defence, for the trial and those associated with any retrials. Requiring the prosecution to give notice is important and helps significantly to reduce the time and cost involved in those other areas.

11.42 It is suggested, therefore, that the advantages to all parties and to the trial system of the present rules and practice outweigh the burden placed upon the prosecution. The Commissions consider no change is required to the notice provisions under s 99 of the uniform Evidence Acts or the regulations.

**A drafting issue**

11.43 Another concern addressed in DP 69 was the difficulty in understanding ss 97 and 98 which arises from the use of the word 'if' in the text immediately before paragraphs (a) and (b) (in both ss 97(1) and 98(1)) and the resulting need for double negatives in the section.<sup>51</sup>

11.44 In DP 69, the Commissions proposed a draft which substituted the word 'unless' for 'if' and the removal of the double negatives. This change is supported in

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49 This practice was explained in a consultation: Judicial Officers of the Supreme Court of New South Wales, *Consultation*, Sydney, 31 March 2005.

50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.18].

51 *Ibid.*, [10.26].

consultations and submissions.<sup>52</sup> The Commissions recommend that the changes be made.

**Recommendation 11–3** Section 97 of the uniform Evidence Acts should be amended to replace the word ‘if’ with ‘unless’, and to replace the word ‘or’ with ‘and’ and to make any necessary consequential amendments. If Recommendation 11–1 is not taken up, a corresponding amendment should be made to s 98.

### The use of ‘significant’ and ‘substantial’ to qualify probative value

11.45 Sections 97 and 98 provide a test of ‘significant probative value’ on tendency and coincidence evidence tendered as relevant to the factual issues in the case. This is to be contrasted with the ‘substantial probative value’ test in s 103 for cross-examination on matters of credit.

#### *Submissions and consultations*

11.46 In the course of consultations on DP 69, concerns were raised about the meaning of ‘significant probative value’ in ss 97 and 98 and ‘substantial probative value’ in s 103.<sup>53</sup> Experience of the application of the uniform Evidence Acts indicates that there was some debate initially about the different meanings of these terms, but the debate has been resolved.<sup>54</sup> It has been held that ‘significant’ means something more than mere relevance but less than a substantial degree of relevance.<sup>55</sup> To be significant it must be of consequence and this will depend on the nature of the fact in issue and the importance of the evidence in establishing the fact.<sup>56</sup> The issue was not raised in consultations on DP 69 in the present uniform Evidence Act jurisdictions.

11.47 Issues were also raised as to why ss 97 and 98 qualify the expression ‘probative value’ with the word ‘significant’ and s 103 imposes a more rigorous qualification of ‘substantial’.<sup>57</sup> It is argued, for example, that a requirement of substantial probative value should operate to control the admission of tendency and coincidence evidence, particularly against the accused person, and a requirement of significant probative

52 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; J Gans, *Consultation*, Melbourne, 17 August 2005.

53 Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

54 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.6680].

55 *R v Lockyer* (1996) 89 A Crim R 457.

56 *R v Lock* (1997) 91 A Crim R 356, 361.

57 Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

value would be more appropriate as a control of cross-examination as to credit under s 103, particularly when conducted on behalf of an accused person.<sup>58</sup>

11.48 The argument does not give due recognition to the fact that ss 97 and 98 provide a preliminary admissibility screen which operates in both civil and criminal proceedings and that, in criminal proceedings, there are other requirements that must be satisfied. In particular, tendency or coincidence evidence tendered against an accused that satisfies ss 97 or 98 must satisfy the requirement of s 101—that the probative value substantially outweighs the prejudicial effect. As to evidence relevant to credibility, the requirement of substantial probative value imposed by s 103 applies to all cross-examination but in relation to cross-examination of accused persons, the uniform Evidence Acts impose further constraints.<sup>59</sup>

11.49 The Commissions recognise that in criminal trials cross-examination on behalf of the accused directed to the credibility of witnesses called by the Crown is critical and it is important that rules controlling such cross-examination do not prevent effective cross-examination of that kind. However, there has been no suggestion in the course of consultations that the requirement of ‘substantial probative value’ has created any difficulties for cross-examination conducted on behalf of accused persons in uniform Evidence Act jurisdictions.

11.50 The explanation of the distinction lies in the fact that a more rigorous requirement is needed for evidence the admissibility of which can only be justified on the basis that it relates to issues of credibility. Such issues are collateral issues and carry with them the dangers, among other things, of adding unnecessarily to the time and cost of proceedings. On the other hand, the provisions relating to tendency and coincidence evidence concern evidence relevant to the facts in issue and a lower preliminary threshold is warranted.

### ***The Commissions’ view***

11.51 The Commissions consider that the meanings of ‘significant probative value’ and ‘substantial probative value’ have been construed appropriately and are reasonably clear. In addition, the use of the terms ‘significant’ and ‘substantial’ strikes the balance required for the appropriate operation of ss 97, 98 and 103.<sup>60</sup> No changes are proposed in the use of the expressions.

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58 For further discussion in the context of the credibility rules, see Ch 12.

59 *Evidence Act 1995* (Cth) s 104, Pt 3.8.

60 For further discussion of credibility rules, see Ch 12.

## The operation of s 101

11.52 Section 101 is in the following terms:

**101 Further restrictions on tendency evidence and coincidence evidence adduced by the prosecution**

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect<sup>61</sup> it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

11.53 Three issues were canvassed in DP 69,<sup>62</sup> whether:

- the common law requirements developed by the High Court in *Hoch v The Queen*<sup>63</sup> and *Pfennig v The Queen*<sup>64</sup> must be applied when determining, under s 101, and the probative value substantially outweighs any prejudicial effect;<sup>65</sup>
- that test should be replaced by an ‘interests of justice’ test;<sup>66</sup> and
- section 101 should be amended to apply in terms to any relevant evidence of prior misconduct of the accused.

### Application of *Hoch* and *Pfennig* to s 101

11.54 The common law test of admissibility for tendency and coincidence evidence, developed in *Hoch* and in *Pfennig*, is that the evidence, to be admissible, must in all cases possess sufficient ‘probative value or cogency such that, if accepted, it bears no

61 The expression ‘prejudicial effect’ is not qualified by the word ‘unfair’. One commentator, Peter Bayne, considers the significance of this omission but concludes, correctly it is suggested, that properly construed the prejudice in question is unfair prejudice: P Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003), [6.260], citing *W v The Queen* (2001) 115 FCR 41, [61], [89]; *R v AH* (1997) 42 NSWLR 702; *R v Colby* [1999] NSWCCA 261. See discussion of the concepts in Chapter 3.

62 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.38]–[10.39].

63 *Hoch v The Queen* (1988) 165 CLR 292.

64 *Pfennig v The Queen* (1995) 182 CLR 461.

65 See also Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 8–6(a).

66 See also *Ibid*, Q 8–6(b).

reasonable explanation other than the inculpation of the accused in the offence charged'.<sup>67</sup>

11.55 *Hoch* concerned coincidence evidence. The accused was charged with sexual offences against three boys. The charges were heard together. The accused disputed the offences of which the boys gave evidence. Their evidence of the indecent dealings and the circumstances in which they were said to have occurred was strikingly similar. In the majority judgment, it was stated that the probative value of the evidence lay in 'the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred'.<sup>68</sup>

11.56 However, there was evidence that two of the boys were brothers and the third was a friend of one of the brothers. They lived in a boys' home where the accused was employed as a recreation officer and there was evidence that the boys had an antipathy to the accused which may have been unrelated to the alleged sexual acts. The High Court held that the evidence admissible on each count was not admissible on the others, stating:

The evidence ... has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence.<sup>69</sup>

11.57 *Pfennig* concerned tendency evidence. The accused was charged with the murder of a 10-year-old boy at or near Murray Bridge in South Australia. The Crown relied upon circumstantial evidence including proof of the circumstances of an abduction and rape by the accused of another young boy, H, about a year later at Port Noarlunga. The accused had pleaded guilty to those offences. The issue on appeal was whether the latter evidence was admissible in respect of the charge of murder of the 10-year-old boy.

11.58 It was held that the evidence was admissible on the basis that the prosecution case pointed to an abduction of the boy for sexual purposes and that this required a person of the requisite disposition equipped with the means of carrying out an abduction. The evidence concerning the offence committed against H was adduced to prove the requisite disposition. There was also evidence that the accused was in the area at the relevant time and had a van with which to carry out the abduction. There was other admissible evidence of earlier contact between the accused and the boy and other evidence of relevance.

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<sup>67</sup> *Hoch v The Queen* (1988) 165 CLR 292, 294; *Pfennig v The Queen* (1995) 182 CLR 461, 481.

<sup>68</sup> *Hoch v The Queen* (1988) 165 CLR 292, 295.

<sup>69</sup> *Ibid*, 296.

11.59 Applying *Hoch*, the majority expressed the view that because propensity evidence

has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused.<sup>70</sup>

In *Hoch*, it was held that the evidence satisfied this test.

11.60 In DP 69, the Commissions referred to the fact that the Australian Capital Territory (ACT) and federal courts have held that the *Hoch/Pfennig* test does not operate under s 101, but that the NSW Court of Criminal Appeal has held that it does.<sup>71</sup> The NSW Court of Criminal Appeal in *R v Ellis* resolved this difference of view.<sup>72</sup> It rejected the previous line of authority in NSW by holding that the *Hoch/Pfennig* test is not applicable under s 101.<sup>73</sup> Subsequently, the High Court, having given leave to appeal, revoked that leave indicating that it agreed with the decision of Spigelman CJ in *R v Ellis* regarding the construction of the uniform Evidence Acts.<sup>74</sup>

11.61 The Commissions, in DP 69, went on to summarise the present state of the law following settlement of the above issue.<sup>75</sup> Reference was made to the comment of Spigelman CJ:

My conclusion in relation to the construction of s 101(2) should not be understood to suggest that the stringency of the approach, culminating in the *Pfennig* test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied.<sup>76</sup>

11.62 Prior to the release of DP 69, a number of submissions and consultations had supported the adoption of the *Hoch/Pfennig* test for the admission of tendency and coincidence evidence in a criminal case.<sup>77</sup> However, the opposing view received support from the majority of submissions and consultations addressing the issue.<sup>78</sup>

70 *Pfennig v The Queen* (1995) 182 CLR 461, 482–483.

71 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.41].

72 *R v Ellis* (2003) 58 NSWLR 700.

73 *Ibid* [70], [74], [83].

74 *Ellis v The Queen* [2004] HCA Trans 488.

75 *R v Gibbs* (2004) 146 A Crim R 503. It has also been applied subsequently in NSW in *R v Mason* (2003) 140 A Crim R 274; *R v Milton* [2004] NSWCCA 195; *R v Folbigg* (2005) 152 A Crim R 35.

76 *R v Ellis* (2003) 58 NSWLR 700, [96].

77 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Confidential, *Submission E 31*, 22 February 2005. See also E Kerkyasharian, *Submission E 15*, 4 February 2005 who draws attention to the absence in s 101 of the expression 'and other evidence to be adduced' which expression is found in ss 97 and 98. This issue of construction does not appear to have been raised in litigation. It is suggested that the absence of the expression in s 101 should not result in an approach where the weighing of the probative value and the prejudicial effect of the evidence is made by

11.63 The Commissions expressed the view that the *Hoch/Pfenning* test is too narrow and should not be the test for admission and that the reasoning of Spigelman CJ in *Ellis* is to be preferred both as a matter of construction and policy.<sup>79</sup>

### ***Submissions and consultations***

11.64 The issue attracted some attention in consultations on DP 69 with views for<sup>80</sup> and against<sup>81</sup> the construction adopted in *R v Ellis*.

### ***The Commissions' view***

11.65 The Commissions remain of the view that the construction of s 101 applied in *R v Ellis* is correct. As Spigelman CJ commented:

[T]here are a number of indications in the regime of tendency and coincidence evidence, found in Pt 3.6, that the parliaments intended to lay down a set of principles to cover the relevant fields to the exclusion of the common law principles previously applicable.<sup>82</sup>

11.66 Among the indications noted were:

- the use of terminology not used in the common law such as ‘tendency evidence’ and ‘coincidence evidence’;
- the definition of ‘related events’;
- the fact that the express provisions for tendency evidence clarified the common law at the time of their introduction;
- the introduction of a notice system; and

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focusing solely on the evidence in question. The balancing test involves the consideration of all the evidence. It seems likely that the words are included in ss 97 and 98 out of an abundance of caution.

78 NSW Crown Prosecutors, *Consultation*, Sydney, 11 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; G Bellamy, *Consultation*, Canberra, 8 March 2005; P Bayne, *Consultation*, Canberra, 9 March 2005; Chief Justice P Underwood, *Consultation*, Hobart, 15 March 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005.

79 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.48].

80 Confidential, *Submission E 63*, 29 August 2005; NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

81 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005.

82 *R v Ellis* (2003) 58 NSWLR 700, [74].

- the inconsistency between the balancing test stated in s 101(2) and the *Pfennig* test.<sup>83</sup>

11.67 In addition, as a matter of principle, the ‘no rational explanation’ test should not be accepted as a test of universal application. It requires the trial judge, and, where there is an appeal, the appeal court to perform the task of the jury and evaluate the strength of the evidence and apply the same test that the jury must apply in determining the question of guilt where the evidence is admitted.<sup>84</sup> Further, the trial judge must generally do so before the evidence has been adduced and tested, relying upon the committal depositions and other written material.<sup>85</sup>

11.68 Finally, from a policy perspective, the test is inconsistent with the policy framework which underlies the Acts. The ‘no rational explanation’ test will exclude probative evidence of minimal prejudicial effect. Even though the probative value may clearly outweigh any prejudicial effect, it can be excluded under the ‘no rational explanation’ test.<sup>86</sup> It may be said that the ‘no rational explanation’ test gives more ‘guidance’ than the balancing test,<sup>87</sup> but it does so at a price—the exclusion of probative evidence which should be left to the consideration of the jury. The Commissions continue to endorse the reasoning in *R v Ellis*.

### ‘Interests of justice’ alternative for s 101

11.69 Another issue raised in relation to s 101 is whether the uniform Evidence Acts should take a different approach by incorporating an ‘interests of justice’ test to control admissibility of tendency and coincidence evidence in criminal trials. In DP 69, the Commissions considered recently published proposals for an ‘interests of justice’ test for England and Wales,<sup>88</sup> and the test in s 398A *Crimes Act 1958* (Vic).<sup>89</sup> The Commissions compared the operation of the uniform Evidence Acts and the Victorian test.<sup>90</sup>

11.70 Section 398A of the *Crimes Act 1958* (Vic) states:

- (1) This section applies to proceedings for an indictable or summary offence.
- (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all circumstances it is just to admit it

83 Ibid, [75]–[95].

84 Ibid, [91], citing McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, 516.

85 *Hoch v The Queen* (1988) 165 CLR 292, 297; J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 383–385.

86 *Pfennig v The Queen* (1995) 182 CLR 461, 516 per McHugh J.

87 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

88 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001).

89 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.54]–[10.78] and Appendix 2.

90 See Ibid, [10.79]–[10.116].



despite any prejudicial effect it may have on the person charged with the offence.

- (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
- (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
- (5) This section has effect despite any rule of law to the contrary.

11.71 ‘Propensity evidence’ is not defined but has been held to include evidence which discloses the commission of offences other than those with which the accused is charged. However, it is not confined to such evidence and covers any evidence which, if accepted, discloses conduct which is discreditable or reflects badly on the accused’s character.<sup>91</sup> It covers what has been called in the past ‘similar fact evidence’ and can also include relationship evidence. It may go to the identity of the offender or reliance may be placed on the improbability of a number of similar incidents occurring coincidentally.<sup>92</sup>

11.72 In DP 69, the Commissions expressed the view that the uniform Evidence Acts’ approach is to be preferred to the proposal of the Law Commission of England and Wales for a hybrid approach.<sup>93</sup>

11.73 In considering and comparing the uniform Evidence Acts and s 398A of the *Evidence Act 1958* (Vic), the Commissions concluded that it could not be said that the two approaches have produced significantly different fact-finding outcomes. However, in the Commissions’ view, the uniform Evidence Acts better serve a number of other policy objectives: a fair trial, accessibility, predictability, cost and time, and uniformity.<sup>94</sup> As to minimising the risk of wrongful conviction, the Commissions expressed the view that, on balance, there is potentially a greater risk of wrongful conviction under s 398A of the *Crimes Act 1958* (Vic) than under the uniform Evidence Act provisions. The Commissions therefore expressed a preference for the approach of the uniform Evidence Acts.

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91 *R v Best* [1998] 4 VR 603, 608.

92 *Ibid*, 606.

93 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [10.87]–[10.98].

94 *Ibid*. The NSW DPP submits that the uniform Evidence Acts provisions should not be replaced by an ‘interests of justice’ test: Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

### ***Submissions and consultations***

11.74 In consultations on DP 69, the ‘interests of justice’ approach attracted little support.<sup>95</sup> The UK approach was criticised as too vague<sup>96</sup> and s 398A of the *Crimes Act 1958* (Vic) as too broad and difficult to understand.<sup>97</sup> Preference was expressed for a structured approach.<sup>98</sup> An issue was also raised as to whether it might be useful to provide a ‘shopping list’ of factors to be considered in applying s 101.<sup>99</sup> Such a list would need to be expressed in generalities and the Commissions are not persuaded that it would be beneficial.

### ***The Commissions’ view***

11.75 The Commissions reaffirm their original conclusion that the uniform Evidence Act approach is to be preferred.

### **Broadening the categories of evidence to which s 101 applies**

11.76 The final issue referred to in DP 69 is whether s 101 should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although tendered for a non-tendency or non-coincidence purpose.<sup>100</sup> This issue emerged in the course of consultations on IP 28. There was support for a wider approach because the prejudicial effect of evidence of the kind dealt with in the section will be present, whatever is the stated purpose of the tender of the evidence.

11.77 The typical case is where the Crown tenders evidence of prior misconduct relevant to establish the nature of the relationship between an accused and a victim in a sexual assault case. Such evidence will often also be relevant because it shows a tendency to behave in a particular way. The same issues can arise in relation to evidence relevant as setting the context in which the alleged events occurred or evidence relevant to the issue of lack of complaint by the victim.

11.78 Under the uniform Evidence Acts, such evidence will be subject to the control of s 101 if it is adduced for the purpose of showing a relevant tendency or a

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95 A submission supporting the retention of s 398A of the *Crimes Act 1958* (Vic) refers to the large number of valuable decisions of the Court of Appeal and argued that the section and its interpretation by the Court of Appeal had adequately addressed the issue raised by *Hoch*. It argues that the vast majority of Victorian practitioners and judges would be very concerned if the s 398A approach were abandoned: K Arenson, *Submission E 67*, 13 September 2005. The Victoria Police see no difference in the uniform Evidence Act and s 398A approaches: Victoria Police, *Submission E 111*, 30 September 2005.

96 Confidential, *Submission E 63*, 29 August 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

97 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

98 *Ibid.*

99 As was proposed by the Law Commission of England and Wales: Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001). See also J Gans, *Consultation*, Melbourne, 17 August 2005.

100 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 10–1.

coincidence.<sup>101</sup> However, if the purpose of the tender is expressly limited to a different purpose, such as the establishment of the relationship, s 101 will not apply. The use and admissibility of the evidence will be controlled by ss 135–137. Where such evidence is admitted, the trial judge must give warnings and directions about the appropriate use of the evidence and warn that it cannot be used as proof of any propensity of the accused, thereby addressing any prejudicial effects the evidence might have.<sup>102</sup>

11.79 To achieve this result, the language of s 101 forbids the use of the evidence against an accused person when relevant and tendered to prove a tendency or coincidence unless the stated test is satisfied. Section 101 does not limit the use or, as a consequence, render the evidence inadmissible, where it is relevant and it is tendered for other purposes. In this, the section is arguably intended to reflect the common law position as it had developed prior to *Pfennig v The Queen*.<sup>103</sup>

### **Submissions and consultations**

11.80 There is strong support for widening the operation of s 101 to apply to evidence which discloses a tendency or coincidence, regardless of the purpose of the tender.<sup>104</sup> Concern is expressed about the dangers of such evidence and what is seen as a too ready admission of such evidence.

11.81 The suggested widening of the operation of s 101 is also strongly opposed.<sup>105</sup> Those taking that position express concern about the possible exclusion of important probative evidence in child and adult sexual assault cases and a potential for different and inconsistent outcomes.

101 See definition of tendency and coincidence evidence in uniform Evidence Acts, Dictionary; it defines ‘tendency evidence’ and ‘coincidence evidence’ as evidence of a kind referred to in ss 97(1) and 98(1) the party seeks to have adduced for the purpose referred to in the respective subsections.

102 *R v ATM* [2000] NSWCCA 475, [76].

103 T Smith and O Holdenson, ‘Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part 1’ (1999) 73 *Australian Law Journal* 432, 436, 437.

104 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005; Western Australian Bar Association, *Consultation*, Perth, 6 October 2005; J Gans, *Consultation*, Melbourne, 17 August 2005 (argues that relationship evidence will still be admitted because of its high probative value).

105 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Women’s Legal Services Victoria, *Submission E 110*, 30 September 2005; Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Confidential, *Submission E 63*, 29 August 2005; A Cossins, *Consultation*, Sydney, 3 August 2005; Victim Support Australasia, *Consultation*, Sydney, 4 July 2005; Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 25 August 2005.

***The Commissions' view***

11.82 The views expressed in consultations and submissions again highlight the difficult task of formulating appropriate rules to deal with probative but prejudicial evidence in a way consistent with the policy framework. In this area there is a stark conflict between the policy objectives of receiving all probative evidence and minimising the risk of wrongful conviction.

11.83 Assessment of the issues has not been assisted by the arguments advanced. Views are expressed strongly, but not supported by evidence of actual experience with the operation of the section. Predictions made in submissions and consultations about the likely impact of the widening of the operation of the section do not explore in any detail the question of how the widened section would operate in practice.

11.84 Among those opposing the extension, the level of concern of some appears to have been affected by the experience of s 101 in the period when the *Hoch/Pfennig* principle was treated as applicable under s 101.<sup>106</sup> That principle was likely to lead to the exclusion of evidence that should have been admitted and left for the jury's consideration. In addition, it assisted applications for separate trials where numerous sexual assaults on different victims were alleged. While the better view appears to be that the *Hoch/Pfennig* principle did not apply to evidence of relationship or context,<sup>107</sup> the experience appears to have heightened concern about the potential to exclude evidence of clear probative value if the operation of s 101 were to be extended. In some submissions opposing the extension, there is also some misunderstanding as to how the amended section would operate in practice.<sup>108</sup>

11.85 The present limit to the operation of s 101 is difficult to justify when regard is had to the prejudicial impact of the evidence, because the prejudicial effect of the evidence will in reality be little different whatever is the purpose of the tender. It has been argued that

similar prejudicial consequences are likely to flow in any particular case whatever basis is advanced for the relevance of the evidence in that case. Whatever basis is advanced, the evidence will raise an inference of a particular propensity. It is the irrational impact of such evidence that carries the danger for the fair trial; it is that which may cause the miscarriage of justice.<sup>109</sup>

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106 The *Hoch/Pfennig* principle is discussed above.

107 T Smith and O Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part 1' (1999) 73 *Australian Law Journal* 432.

108 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005.

109 T Smith and O Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part 1' (1999) 73 *Australian Law Journal* 432, 437.

11.86 But will the suggested extension of s 101 lead to more frequent limitation on the use of such prejudicial evidence and so result in its inadmissibility?<sup>110</sup> Plainly those seeking extension of s 101 do so because they anticipate that this will be the result. However, such a result is unlikely.

11.87 In a trial, an accused might invoke an extended s 101 to seek the exclusion of evidence relevant to show the nature of a relationship because of the prejudicial effect of the propensities it reveals. To meet this argument, the Crown could disavow any attempt to use the evidence for any propensity purpose and concede the need for a warning that the evidence not be used for that purpose. If necessary, it could invite or consent to the court applying s 136 to limit the use to the nature of the relationship. While s 101 would still have to be satisfied, the Crown could argue that the prejudicial effect would thereby be overcome or significantly reduced and that the probative value of the evidence on the issue of the nature of the relationship substantially outweighs any remaining prejudicial effect.

11.88 If that is the approach taken under any extended version of s 101, it will be similar in practice to the operation of the common law<sup>111</sup> and s 398A of the *Crimes Act 1958* (Vic). As interpreted, s 398A requires a balancing test which considers what the evidence discloses. Under s 398A, such evidence is admitted to establish the relationship but generally is not permitted to be used for any propensity purpose. In the leading judgment in *R v Best*,<sup>112</sup> Callaway JA stated that the directions that had become customary, at common law, where the Crown relies on relationship evidence in sexual cases should continue to be given. His Honour stated:

In *R v Grech* [1997] 2 VR 609, I discussed the directions that had become customary where the Crown relies on relationship evidence in sexual cases. They are well established by the authorities. Three things have to be done. The first is to explain to the jury the limited purpose for which the relationship evidence is admitted. The second is to direct them not to substitute that evidence for evidence of the offences charged. The third is to warn them against reasoning that because the accused engaged in other misconduct, he is the kind of person who was likely to have committed those offences.<sup>113</sup>

11.89 A similar approach has been applied under the uniform Evidence Acts. For example, in *R v ATM* it was said that:

Where relationship evidence is admitted only to give context to, or by way of explanation of, the allegation contained in any charge in the indictment, the trial judge

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110 For example, if evidence is relevant to prove both a tendency and a relationship, and if its probative value for both purposes does not substantially outweigh its prejudicial effect, s 101 will prevent its use for both purposes and, as a result, render it inadmissible.

111 At least, prior to *Pfennig v The Queen* (1995) 182 CLR 461; see *R v Grech* [1997] 2 VR 609, 613.

112 *R v Best* [1998] 4 VR 603, 615, 616; *R v GAE* (2000) 1 VR 198, 206, 217.

113 *R v Best* [1998] 4 VR 603, 615.

should direct the jury against using the evidence as proof that the accused committed any offence on the indictment. This may require the<sup>114</sup> trial judge to direct the jury that they must not use the evidence as proof of any propensity on the part of the accused.<sup>115</sup>

11.90 This approach is deeply ingrained and generally practiced in both common law and uniform Evidence Act jurisdictions. It is highly likely, therefore, that it will continue under any extended version of s 101. It should be noted that this approach, which requires warnings about the use that is allowed and the use that is forbidden, imposes an extremely difficult task on the judge and the jury but, whether s 101 is extended or not, it cannot be avoided.

11.91 Accepting that extending s 101 will not result in more or less evidence being admitted, are there any other benefits in amending the legislation in the way suggested? There are other considerations, but they are, at best, inconclusive.

- *Accessibility.* In applying the present Acts it is necessary to refer to the Dictionary to understand the operation of s 101 because the restriction on its operation arises from the fact that ‘tendency evidence’ and ‘coincidence evidence’ are defined by reference to the purpose of the tender. One way to widen the operation of s 101 would be to remove that aspect of the definition. Therefore, there is a possible marginal benefit in making the extension because the scope of the section could probably be understood without having to refer to the Dictionary. On the other hand, as demonstrated in those jurisdictions where the section has been operating for some time, once the section is understood, reference to the Dictionary is not needed.
- *Simplifying the Acts’ application?* At one level, extending the provision would simplify the application of s 101 in that one approach would be taken to the admissibility of any evidence of prior misconduct when adduced by the prosecution. However, at another level it introduces an issue that was not previously present when considering the admission of evidence relevant for a non-tendency purpose, such as relationship evidence—whether, and if so how, s 101 should be applied.

11.92 These are relevant considerations but they do not point in any clear direction and are marginal. The critical question is the practical impact of any change. In the Commissions’ view, a case has not been made out for change. The suggested change to the legislation is unlikely to result in different outcomes where questions arise as to the admissibility of evidence relevant for tendency or coincidence purposes and for other purposes.

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114 Citing *R v AH* (1997) 42 NSWLR 702, 708–709; *BRS v The Queen* (1997) 191 CLR 275, 305; *R v RNS* [1999] NSWCCA 122.

115 *R v ATM* [2000] NSWCCA 475, [76].

11.93 In these circumstances, the appropriate course to follow is that suggested by the Director of the Criminal Law Review Division of the New South Wales Attorney General's Department, that the section be applied in its current form in the light of *R v Ellis*, and monitored.<sup>116</sup>

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116 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.





## 12. The Credibility Rule and its Exceptions

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## Introduction

12.1 Part 3.7 of the uniform Evidence Acts<sup>1</sup> contains the credibility rule and its primary exceptions. Section 102 of the uniform Evidence Acts provides that:

Evidence that is relevant only to a witness's credibility is not admissible.

12.2 The term 'credibility of a witness' is defined in the uniform Evidence Acts as:

the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.<sup>2</sup>

12.3 The exclusionary rule for credibility evidence therefore applies to evidence that bears on the reliability of a witness generally, and evidence that bears on the reliability of particular testimony of that witness.<sup>3</sup>

12.4 The credibility rule is subject to specific exceptions that apply when evidence:

- is adduced in cross-examination (s 103);
- is led to rebut denials made in cross-examination (s 106);
- is admitted to re-establish credibility (s 108); or
- relates to the credibility of accused persons (s 104).

## Evidence relevant only to a witness' credibility

12.5 IP 28 and DP 69 raised the issue of the literal interpretation of s 102 of the uniform Evidence Acts by the High Court in *Adam v The Queen*.<sup>4</sup> The decision has led to a situation where the credibility rule will not apply if evidence is relevant both to credibility and a fact in issue, even where the evidence is not admissible for the purpose of proving a fact in issue. Prior to the decision in *Adam*, the provisions in Part 3.7 had been used to control the admissibility of such evidence. As a result of *Adam*, that control no longer exists.

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1 The equivalent Tasmanian provisions are labelled *Evidence Act 2001* (Tas) Ch 3, Pt 7.

2 Uniform Evidence Acts Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3.

3 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7640]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [102.10].

4 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.9]–[9.14], referring to *Adam v The Queen* (2001) 207 CLR 96; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.8]–[11.20].

12.6 Stephen Odgers SC illustrates this point with the example of prior statements.<sup>5</sup> Evidence of a prior statement relevant to the facts in issue may not be admissible to prove the facts stated in it because it does not come within one of the hearsay exceptions. It is likely, however, also to be relevant to the witness' credibility. The literal interpretation of s 102 has the result that the credibility rule does not apply to the evidence. The statement will be admissible for a credibility use without having to satisfy the requirements of Part 3.7. Having been admitted for credibility purposes, s 60 will then apply to lift the hearsay rule so that the evidence is admissible as evidence of the facts stated, unless it is excluded under ss 135–137.

12.7 Substantially similar terminology ('relevant only because it is relevant to the defendant's credibility') is used to define the evidence which attracts the additional protections provided in s 104 to an accused person when cross-examined.<sup>6</sup> The interpretation in *Adam* would also exclude the operation of these provisions where credibility evidence is relevant but not admissible for another purpose, reducing the protection available to the accused.

12.8 The Commissions proposed in DP 69 that the uniform Evidence Acts be amended to ensure the credibility provisions apply both to evidence relevant only to credibility and to evidence which is also relevant for another purpose although not admissible for that purpose.<sup>7</sup> A draft amendment was included in DP 69 which included a new s 101A to define the evidence to which the Part relates and amendments to ss 102, 104 and 108A. The draft of s 101A put forward was in the following terms:

101A Credibility Evidence

- (1) A reference in this Part to evidence that is relevant to a witness's credibility, or to the credibility of a person referred to in s 108A, is a reference to evidence that:
  - (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
  - (b) is otherwise relevant but is not admissible.
- (2) For the purposes of paragraph (1)(b), ignore sections 60, 77, 135, 136 and 137.

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5 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7660]. See also Odgers' example of tendency evidence.

6 See Uniform Evidence Acts s 104(2), (4).

7 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 11–1.

## Submissions and consultations

12.9 In DP 69, the Commissions identified support in submissions and consultations for amending the uniform Evidence Acts to address the consequences of the decision in *Adam*.<sup>8</sup> The Law Council of Australia submit that s 102 should be amended to read:

Evidence is not admissible that is either (a) relevant only to credibility; or (b) relevant to credibility and, insofar as it is also otherwise relevant, inadmissible under this Act.<sup>9</sup>

12.10 In DP 69, the Commissions also referred to submissions from the Office of the Director of Public Prosecutions (NSW) (NSW DPP)<sup>10</sup> and the New South Wales Public Defenders Office (NSW PDO)<sup>11</sup> which express the view that there is no need to amend s 102 as a result of the decision in *Adam*.

12.11 In response to the DP 69, Dr Jeremy Gans proposes that the credibility rule in s 102 be re-drafted as follows:

- (1) Evidence is not admissible to prove that a witness has or lacks credibility.
- (2) Subsection (1) does not apply to evidence that is admitted for a purpose other than to prove that a witness has or lacks credibility.<sup>12</sup>

12.12 Others submissions support the amendment proposed in DP 69.<sup>13</sup>

12.13 The NSW DPP,<sup>14</sup> the Commonwealth Director of Public Prosecutions (CDPP)<sup>15</sup> and the NSW PDO<sup>16</sup> submit that the proposed amendment is unnecessary. While the NSW PDO maintains its earlier position, it indicates in its second submission that it does not oppose the amendment.<sup>17</sup>

## The Commissions' view

12.14 In the Commissions' view, it is necessary to amend s 102. The Commissions agree with Odgers that it is unsatisfactory to have a situation in which control of evidence relevant for more than one purpose including credibility depends entirely upon the exercise of the discretions and exclusionary rules contained in ss 135 to 137.

8 Law Council of Australia, *Submission E 32*, 4 March 2005; T Game, *Consultation*, Sydney, 25 February 2005; Confidential, *Submission E 31*, 22 February 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005; S Finch, *Consultation*, Sydney, 3 March 2005; Judicial Officers of the Supreme Court of the ACT, *Consultation*, Canberra, 8 March 2005.

9 Law Council of Australia, *Submission E 32*, 4 March 2005.

10 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

11 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

12 J Gans, *Submission E 59*, 18 August 2005.

13 C Ying, *Submission E 88*, 16 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

14 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

15 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

16 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

17 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

This has the potential to lead to greater uncertainty, inconsistent outcomes and increased appeals.<sup>18</sup> Evidence relevant both to credibility and a fact in issue, but not admissible for the latter purpose, should be subject to the same rules as other credibility evidence. Section 102 should be amended to enable it to operate as originally intended. The terms ‘relevant only because it is relevant to the defendant’s credibility’ in s 104 and ‘relevant only to the credibility of the person who made the representation’ in s 108A also need to be addressed through amendment.

12.15 The Commissions considered the draft put forward by Dr Gans as a possible means of achieving the desired outcome. It has the advantage of greater simplicity and is closer to the original draft proposed by the ALRC.<sup>19</sup> However, the draft presents a difficulty. It assumes that the admissibility of evidence for another purpose is determined before the credibility provisions are applied. The design of the Acts requires the admissibility of the evidence to be determined by the evidence passing through a ‘grid’ system, one component of which is Part 3.7.<sup>20</sup> Evidence cannot be admitted unless it passes through that grid and therefore the credibility rule must be drafted to define the evidence to which it applies without reference to ‘evidence which has been admitted’. The draft proposed does not do this.

12.16 It is clear, however, that the drafting proposed in DP 69 requires further revision to clarify its operation and make it easier to understand and apply. A revised provision has been included in Appendix 1 and is reproduced below.

A reference in this Part to evidence relevant to the credibility of a witness or other person is a reference to evidence that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant because it affects the assessment of the credibility of the witness or person and is relevant for some other purpose but is not admissible for, or cannot be used for the other purpose because of a provision of Parts 3.2 to 3.6 inclusive.

Note: Sections 60 and 77 will not be relevant to the application of sub-paragraph (b) because they cannot be applied to evidence that is yet to be admitted.

12.17 The amendment now put forward by the Commissions has two main components. It introduces the notion of purpose, and directs attention to the preceding provisions of the Acts rather than those that follow.

- By referring to evidence which is not admissible for another purpose, the section picks up those provisions which exclude the admission of evidence for a

<sup>18</sup> S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7660].

<sup>19</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 175–176.

<sup>20</sup> The ‘grid’ system is illustrated by the diagram included in the Introductory Note to Chapter 3 of the uniform Evidence Acts.

particular purpose (eg ss 59, 76, 91, 97 and 98) rather than those which exclude evidence entirely (eg ss 84, 85 and 86).

- By referring to Parts 3.2 to 3.6, the section removes from consideration the provisions which follow—ie, privileges and the mandatory and discretionary exclusions, leaving the latter provisions to operate if the evidence is not excluded by the credibility provisions.

12.18 The amendment also includes a note to clarify that ss 60 and 77 are not relevant in the determination of admissibility for another purpose because they relate to evidence which has been admitted, and are therefore an exception to the sequential grid structure of the Acts.

12.19 The concept of when the credibility rules should apply is well understood by practitioners, but difficult to express in legislation. While ideally the wording of the amended provisions would be simpler, the somewhat cumbersome drafting is necessary to meet the scrutiny of literal interpretation which it will inevitably meet. In day-to-day practice, however, once understood, it should not require laboured consideration. In practice, it will be clear that certain evidence is either solely relevant to credibility or is relevant to credibility because it has been determined or conceded not to be admissible for another purpose under the preceding provisions of the Act.<sup>21</sup>

**Recommendation 12–1** The uniform Evidence Acts should be amended to include a definition of the evidence to which the credibility rule applies and to make consequential amendments to ss 102, 104 and 108A to ensure that the provisions of Part 3.7 apply to evidence:

- relevant only to credibility; and
- relevant to credibility and relevant for some other purpose, but not admissible or capable of being used for that other purpose because of a provision of Parts 3.2 to Parts 3.6 inclusive.

## The definition of substantial probative value

12.20 Section 103(1) of the uniform Evidence Acts provides that:

The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

<sup>21</sup> Unless it is admitted for the credibility purpose and therefore rendered admissible for another purpose by s 60 for example.

12.21 The expression ‘probative value’ is defined to mean:

the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.<sup>22</sup>

12.22 It has been argued that this definition cannot apply to the phrase in s 103 because the definition refers to the relationship between evidence and a fact in issue, rather than to issues of credibility. In *R v RPS*, Hunt CJ at CL suggested that the context in which the phrase appears and the subject matter of s 103

indicate that the definition does not apply ... Evidence adduced in cross-examination must therefore have substantial probative value in the sense that it could rationally affect the assessment of the credit of a witness.<sup>23</sup>

12.23 The issue was raised in IP 28 of whether the construction adopted by the NSW Court of Criminal Appeal in *RPS* should be incorporated into the Act.<sup>24</sup> The proposal put forward in DP 69 was to amend s 103(1) of the uniform Evidence Acts to read:

The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.<sup>25</sup>

### Submissions and consultations

12.24 There is general support for further defining the term ‘substantial probative value’ for the purposes of s 103.<sup>26</sup>

### The Commissions’ view

12.25 While the interpretation of substantial probative value in s 103 in the NSW Court of Criminal Appeal’s decision in *R v RPS* has allowed the courts to give meaning to the section, the Commissions consider that it is preferable to amend s 103 expressly to incorporate that construction. This would limit the need to go beyond the Acts to determine the meaning of its provisions. The amendment is intended to maintain the requirement that the evidence relevant to credibility be substantial in order to be admitted.

<sup>22</sup> Uniform Evidence Acts Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3(1).

<sup>23</sup> *R v RPS* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL and Hidden J, 13 August 1997). The appeal on another point was allowed: *RPS v The Queen* (2000) 199 CLR 620.

<sup>24</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.15]–[9.22].

<sup>25</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 11–2.

<sup>26</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

**Recommendation 12–2** Section 103(1) of the uniform Evidence Acts should be amended to read as follows: ‘The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness’.

### Is the test of substantial probative value too high?

12.26 In *R v Lockyer*, Hunt CJ at CL indicated that ‘substantial probative value’ imposes a higher standard of relevance than ‘significant probative value’, which requires the evidence in question to be ‘important’ or ‘of consequence’.<sup>27</sup>

12.27 It has been suggested in some consultations and submissions that the requirement of substantial probative value is too high and might exclude evidence relevant to credibility, which on its own would not have substantial probative value but in combination with other evidence would do so.<sup>28</sup> This is a matter of particular concern for the defence in criminal proceedings where cross-examination is often the primary means of challenging the prosecution case.<sup>29</sup>

### The Commissions’ view

12.28 Limiting credibility evidence in cross-examination to matters of substantial probative value is designed to confine evidence on collateral issues to that which will have a genuine bearing on the assessment of the evidence. Many matters can be said to go to a witness’ credit or discredit, but will not have an impact on the assessment of the veracity and accuracy of that witness’ evidence. Where the evidence is not of substantial probative value in the assessment of a witness’ credibility, at best it adds unnecessarily to the length of trials. At worst it prejudices the proper assessment of the witness’ credibility by the tribunal of fact and distracts from the facts in issue to be determined. Section 103 provides a formal means which does not exist at common law appropriately to limit cross-examination.

12.29 Concern is expressed that the probative value of a line of cross-examination might not be apparent in the first question asked and may therefore be excluded under the rule. The Commissions consider that this concern is unfounded. The Commissions have not identified any cases in which a line of cross-examination with substantial probative value has been stopped because a single question did not meet that test.<sup>30</sup> In practice, if objection is taken to cross-examination as lacking substantial probative

27 *R v Lockyer* (1996) 89 A Crim R 457, 459. See also S McNicol, ‘Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)’ (1999) 23 *Criminal Law Journal* 339, 344–345.

28 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Confidential, *Submission E 63*, 29 August 2005; Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005.

29 Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005.

30 See *R v Galea* (2004) 148 A Crim R 220 for a recent case in which s 103 was applied to limit cross-examination of a witness by the accused’s counsel.



value, counsel can outline the probative value of the line of questioning,<sup>31</sup> if need be, in the absence of the witness and jury.<sup>32</sup> This allows the court to rule on the line of questioning without prejudicing the forensic technique of the cross-examiner. There is no reason to suppose that where objection is taken, rulings are made without considering the evidence in the context of the case as a whole.<sup>33</sup>

12.30 The Commissions do not recommend any amendment to s 103 to broaden the scope for admission of credibility evidence.

### Matters to which the court may have regard

12.31 Both s 103 and s 108A of the uniform Evidence Acts contain subsections<sup>34</sup> which list, by way of example, the following matters as relevant to the issue of substantial probative value:

- whether the evidence tends to prove that the person in question knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- the period that has elapsed since the events to which the evidence in question relates or, in the case of a representation, the period between the events and the representation.

12.32 Odgers notes that there are many more examples of evidence that may be of substantial probative value. Cross-examination may be permitted regarding such matters as bias, opportunities of observation, powers of perception and memory, special circumstances affecting competency and prior statements inconsistent with testimony.<sup>35</sup> In this context, it was asked in IP 28 whether further examples should be listed in the legislation.<sup>36</sup> In DP 69 the Commissions expressed the view that there was no evidence of significant problems with the limited examples and no clear benefit in adding further provisions.<sup>37</sup>

### Submissions and consultations

12.33 No further submissions have been received on this issue.

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31 See for example *R v Ronen* [2004] NSWSC 1290.

32 Section 189 of the uniform Evidence Acts makes provision for a voir dire to be held in the absence of the jury if a question of admissibility depends on the court finding that a particular fact exists.

33 See for example *El-Azzi v Nationwide News Pty Ltd* [2004] NSWSC 1056.

34 Uniform Evidence Acts ss 103(2) and 108A(2).

35 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3 7760].

36 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.21].

37 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005) [11.33].

### The Commissions' view

12.34 The Commissions maintain that there is no evidence that the lack of other examples in ss 103(2) and 108A(2) is causing any significant problems.<sup>38</sup> Adding further examples carries the danger that attention and debate will tend to focus on the examples rather than the general rule. The Commissions do not recommend that any further examples be added to ss 103(2) or 108A(2).

### Credibility and the character provisions

12.35 Sections 104 and 110 of the uniform Evidence Acts both operate only in criminal proceedings and both contain reference to an accused leading evidence of good character.

12.36 Section 104(4)(a) permits a court to consider granting leave for the prosecution to cross-examine a defendant on credibility when the defendant has adduced evidence that tends to prove that he or she is a person of good character.

12.37 Section 110(1) excludes the operation of the hearsay, opinion, tendency and credibility rules with respect to evidence 'adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character'. Section 110(2) and (3) then excludes the operation of those same rules with respect to rebuttal evidence and cross-examination that seeks to challenge evidence of a defendant's good character. The effect of s 110(2) and (3) is to limit the prosecution's rebuttal evidence to the same features of character as were raised in evidence adduced by the defendant.

12.38 The overlap of these provisions and the different functions of the provisions has been noted.<sup>39</sup> There is an inconsistency in the conditions imposed by s 104(4)(a) with respect to cross-examination of a defendant on credibility, and those imposed under s 110 on the admissibility of evidence to rebut good character evidence adduced by a defendant.<sup>40</sup> For example, in both instances leave is required to cross-examine the defendant. However, s 104 permits cross-examination where evidence has been led which 'tends to prove' the defendant is of good character, while under s 110 the prosecution may cross-examine the defendant only if the defendant has adduced evidence with the positive intention of proving that he or she is a person of good

<sup>38</sup> For example, see *R v Lumsden* [2003] NSWCCA 83.

<sup>39</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005) [11.37]–[11.39].

<sup>40</sup> See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7920]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.50]; S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 357; Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.29]–[9.30].

character.<sup>41</sup> In addition, cross-examination of a defendant under s 110 must respond as a ‘mirror image’ to the good character evidence adduced by the defendant. Section 104(4)(a) does not appear to be confined in this way.

12.39 Further, cross-examination under s 104 must satisfy the requirements of s 103—it must be evidence of ‘substantial probative value’. That requirement is not laid down in s 112, the leave provision applying in relation to s 110.

12.40 In DP 69 the Commissions noted that in practice, the interaction of these provisions is a source of confusion and uncertainty.<sup>42</sup> The Commissions therefore proposed that this anomaly be rectified by the repeal of s 104(4)(a) and the amendment of s 112.<sup>43</sup>

### Submissions and consultations

12.41 The proposals in DP 69 are supported by the Law Society of NSW and by the NSW PDO.<sup>44</sup> The NSW DPP supports the proposal to correct the drafting deficiency in s 112 but makes no comment on the proposal to delete s 104(4)(a).<sup>45</sup>

### The Commissions’ view

12.42 The proposals put forward in DP 69 would mean that where the defendant has put his or her character in issue by leading evidence as to good character, cross-examination on those matters would be controlled by ss 110 and 112. While cross-examination would not be subject to the substantial probative value test, it would only be permitted where the defendant deliberately raises his or her character as probative of the facts in issue. In that instance the defendant effectively concedes the relevance of the issue. On all other aspects of credibility, cross-examination of the defendant will continue to be controlled by ss 103 and 104.

12.43 Amending the Acts to delete s 104(4)(a) will clarify the interaction of the provisions of Parts 3.7 and 3.8 and make the Acts easier to apply. At the same time, a minor drafting inconsistency between the language used in ss 104(2) and 112 should be remedied. As suggested by Associate Professor Sue McNicol, s 112 should be amended, consistently with s 104(2), to substitute the words: ‘A defendant must not be

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41 See *Gabriel v The Queen* (1997) 76 FCR 279.

42 Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

43 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposals 11–3 and 11–4.

44 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

45 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

cross-examined' for the words: 'A defendant is not to be cross-examined'.<sup>46</sup> A draft of the provisions incorporating these changes is set out in Appendix 1.

**Recommendation 12–3** Section 104(4)(a) of the uniform Evidence Acts should be deleted from s 104(4) to remove the overlap between s 104(4)(a) and Part 3.8.

**Recommendation 12–4** For consistency in drafting, s 112 of the uniform Evidence Acts should be amended by substituting 'A defendant must not be cross-examined' for 'A defendant is not to be cross-examined'.

## Leave to cross-examine the defendant

12.44 In IP 28 and DP 69, the differences in the provisions of s 104 as between Tasmania and the other uniform Evidence Act jurisdictions relating to the circumstances in which leave may be granted to cross-examine a defendant in criminal proceedings as to credibility were discussed.

12.45 Section 104(4) of *Evidence Act 2001* (Tas) provides that leave may be granted to cross-examine the defendant as to credibility where:

- (c) the nature or conduct of the defence involves imputations on the character of the prosecutor or any witness for the prosecution.<sup>47</sup>

12.46 Thus, under the *Evidence Act 2001* (Tas), leave may be given where the conduct of the defence includes an attack on the character of the prosecutor or any witnesses for the prosecution. Under the other uniform Evidence Acts, leave is confined to a particular aspect of the conduct of the defence, namely where evidence is adduced by the defendant relevant solely or mainly to the credibility of prosecution witnesses and where that evidence has been admitted. Further, the other uniform Evidence Acts contain a provision which excludes from consideration evidence in relation to:

- the events in relation to which the defendant is being prosecuted; and
- the investigation of the offence for which the defendant is being prosecuted.<sup>48</sup>

12.47 The provision ensures that leave is not to be granted in the situation where the defendant leads evidence that a witness lied in relation to the events in question or

<sup>46</sup> S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 348.

<sup>47</sup> Provisions to similar effect are to be found in *Crimes Act 1958* (Vic) s 399(5)(b).

<sup>48</sup> Section 104(5) in the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW).

where the defendant leads evidence of police misconduct in relation to the investigation of the alleged offence. There is no equivalent in the Tasmanian Act.

12.48 The Law Reform Commissioner of Tasmania explained the reasons for adopting a different approach as follows:

Under the [uniform Evidence Acts], the accused can cross-examine Crown witnesses uphill and down dale with respect to their bad character or his own good character but so long as their answers consist of denials the accused will not be exposed to loss of the character shield. This seems inherently unfair, particularly where the cross-examination relates to the witnesses' possible bad character. The process is equally harrowing, demeaning and potentially damaging for the witness in terms of the jury's perceptions where the witness simply denies the accused's suggestions as where the evidence is actually adduced.<sup>49</sup>

12.49 In DP 69, the Commissions considered the issues of policy which led the Commissions to the view that the Tasmanian approach should not be adopted by the other uniform Evidence Act jurisdictions.<sup>50</sup>

12.50 The view is expressed<sup>51</sup> that the reasons articulated in the interim report of the previous Evidence inquiry (ALRC 26)<sup>52</sup> and by reports of United Kingdom law reform bodies<sup>53</sup> for rejecting a more permissive approach towards allowing cross-examination of defendants remain applicable. Speaking of this approach, the ALRC said:

- it discourages an accused with a criminal record from attacking the credibility of Crown witnesses. If the Crown witnesses' credibility is properly open to attack, then the jury should know about it;
- the admissibility of evidence adverse to the accused will depend on the tactics of the defence. This is wrong. The legal advisers are placed in the invidious position of having to choose between leaving the tribunal of fact in ignorance of the facts behind the evidence given by the prosecution witnesses and revealing such facts, but allowing the prosecution as a result to introduce prejudicial evidence against the accused including evidence of prior convictions. Whether the accused is convicted or not may depend on the way in which this choice is made, but it is not one that legal advisers should be called on to make. A Rule that operates in this way turns a criminal trial into a kind of game;

49 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), 24, fn 34. Where the accused leads evidence of his or her own good character under the uniform Evidence Acts, s 110 lifts the credibility rule for evidence adduced to prove that the defendant is not a person of good character. This is made clearer with the removal of s 104(4)(a).

50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.63]–[11.67].

51 *Ibid.*, [11.68].

52 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411].

53 Criminal Law Revision Committee England and Wales, *Evidence (General)*, Report 11 (1972).

- the sanction will apply whether the attack made is necessary for the accused's defence or not and whether the attacks made on the prosecution witness are true or not;
- if a sanction is required for false attacks on prosecution witnesses, the sanction should not be one which will make it more likely that the accused will be convicted because of prejudice that may be raised against him because of the allegations made in cross-examination to demonstrate his bad character;
- if cross-examination of an accused as to his bad character is not permitted because it would be prejudicial, it does not become any less prejudicial because the accused makes an attack on the character of prosecution witnesses;
- the law allows an attack on the accused's credibility where he does not in his evidence attack the character of a prosecution witness, but his complete defence involves such an attack. If 'Tit for tat' is the justification, the law goes further than is warranted.<sup>54</sup>

12.51 Further, the broader approach, 'could tempt the police to extract confessions by violence from persons of bad character who cannot set up the violence at their trial for fear of exposing their records'.<sup>55</sup>

12.52 In DP 69, the Commissions referred to the means within the uniform Evidence Acts to prevent inappropriate or unwarranted cross-examination through the requirements of s 41 (improper questions) and s 103 (the substantial probative value requirement for cross-examination).<sup>56</sup> The Commissions expressed the view that these are the appropriate means through which to prevent inappropriate cross-examination of prosecution witnesses 'uphill and down dale with respect to their bad character'<sup>57</sup> rather than the admission of prejudicial evidence.

12.53 In DP 69, the Commissions also commented on the argument that it is unfair that the defendant can put allegations and not lose the character shield when those allegations are denied. It was noted that in that situation, in law and fact, there is no evidence before the jury of the witnesses' character. Juries are directed that the questions of counsel are not evidence unless the answers affirmatively adopt a proposition put in the question. It is undoubtedly extremely unpleasant for witnesses to face allegations reflecting badly on their character. The point was made in DP 69, however, that it is both unethical and imprudent for counsel to put such allegations to

54 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411], citing Criminal Law Revision Committee England and Wales, *Evidence (General)*, Report 11 (1972).

55 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411], citing *Curwood v The Queen* (1944) 69 CLR 561.

56 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.71].

57 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), 24.

witnesses if they are without reasonable foundation or there are no reasonable grounds for believing that the suggestion would diminish the witness' credibility.<sup>58</sup>

12.54 The Commissions noted that particular concerns have arisen about attacks on the credibility of witnesses in sexual assault cases, but that these concerns have, to some extent, been addressed by rape shield laws, which are discussed in Chapter 20.

### Submissions and consultations

12.55 Submissions and consultations in response to IP 28 revealed divergent views on whether the Tasmanian provision should be adopted across jurisdictions. The NSW DPP and Office of the Director of Public Prosecutions (Tas) supported the adoption of the Tasmanian provision across jurisdictions.<sup>59</sup>

12.56 The NSW DPP considers it unfair that an accused can cross-examine Crown witnesses in relation to their bad character or the accused's good character when the Crown is prevented from cross-examining an accused as to character unless the accused actually adduced evidence to prove the Crown witness 'has a tendency to be untruthful' and the Crown obtains leave to cross-examine. The NSW DPP submits that if the section is amended in line with the Tasmanian provisions, it would further discourage an accused from cross-examining Crown witnesses as to character.<sup>60</sup>

12.57 The Office of the Director of Public Prosecutions (Tas) considers that these provisions are justifiably fairer to the Crown than those under the other uniform Evidence Acts.<sup>61</sup> Consultations confirm that cross-examination under s 104(4)(c)—on the basis that the defence has raised 'imputations on the character of the prosecutor or any witness for the prosecution'—is very rare.<sup>62</sup>

12.58 The NSW PDO opposes the adoption of the Tasmanian provisions because they appear to mean that

in any case where it was suggested that prosecution witnesses were lying, the accused could be cross-examined about his or her criminal record. It would follow that in many, if not most, trials the defendant's criminal record would be admitted.<sup>63</sup>

12.59 The Law Council of Australia expresses support for the other uniform Evidence Acts' provisions which it believes

ensure a fair trial by allowing an accused to fully test prosecution evidence without running the risk of a prejudicial past being revealed.<sup>64</sup>

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58 See, for example, *The Victorian Bar Inc Practice Rules* (Vic), rr 38–40.

59 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Office of the Director of Public Prosecutions (Tas), *Consultation*, Hobart, 15 March 2005.

60 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

61 Office of the Director of Public Prosecutions (Tas), *Consultation*, Hobart, 15 March 2005.

62 Ibid; Chief Justice P Underwood, *Consultation*, Hobart, 15 March 2005.

63 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

64 Law Council of Australia, *Submission E 32*, 4 March 2005.

12.60 Following the release of DP 69 further submissions have been received, again revealing divergent views. Victoria Police supports the adoption of the Tasmanian provision,<sup>65</sup> while others submit that s 104(4)(b) as it appears in the Commonwealth and NSW Acts should be tightened further by replacing the phrase ‘that tends to prove’ with ‘for the purpose of proving’.<sup>66</sup>

### **The Commissions’ view**

12.61 In the Commissions’ view, the Tasmanian provisions are an inappropriate means of discouraging unwarranted attacks on prosecution witness. They will also be ineffective where the accused elects not to give evidence or does not have a criminal record for dishonesty. The submissions and consultations supporting the adoption of the Tasmanian provisions have not addressed the policy concerns set out in DP 69. The Commissions are not persuaded that there is any reason to depart from the preliminary view expressed in DP 69 that the Tasmanian provisions are not to be preferred. Therefore the Commissions do not recommend the adoption of the Tasmanian provisions in other uniform Evidence Act jurisdictions.

### **Rebutting denials in cross-examination by other evidence**

12.62 The collateral facts rule at common law provides that, subject to certain exceptions, an answer given by a witness to a question in cross-examination relating solely to a collateral issue (such as credit) is final, and further evidence may not be led on the issue. Section 106 of the uniform Evidence Acts was drafted to replicate and slightly extend the common law exceptions to the collateral facts rule.

12.63 Section 106 lifts the credibility rule and allows the following categories of evidence to be adduced, otherwise than from the witness, if the substance of the evidence has been put to the witness and denied:

- the witness’ bias or motive to be untruthful;
- the witness’ ability to be aware of matters to which his or her evidence relates;<sup>67</sup>
- the making of a prior inconsistent statement by the witness;<sup>68</sup>

<sup>65</sup> Victoria Police, *Submission E 111*, 30 September 2005.

<sup>66</sup> Confidential, *Submission E 63*, 29 August 2005. This submission supports retention of the current drafting in the alternative.

<sup>67</sup> Compare s 104(3)(b) which also includes an express reference to the inability to ‘recall’ matters to which the witness’ evidence relates: see further *R v PLV* (2001) 51 NSWLR 736. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8200]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.35].

<sup>68</sup> *Evidence Act 1995* (Cth), ss 43 and 45 impose procedural requirements in relation to cross-examination on a witness’ prior inconsistent statement.



- the witness' conviction of an offence, under Australian law or the law of another country; or
- the making of a knowingly or recklessly false representation by the witness while under an obligation (imposed under Australian law or the law of another country) to tell the truth.<sup>69</sup>

12.64 In IP 28 and DP 69, the issue of whether the uniform Evidence Acts may have 'fallen behind the developments achieved at common law' in this area<sup>70</sup> and become more restrictive than the common law was raised and discussed.<sup>71</sup>

12.65 Some courts have suggested that the list of exceptions to the collateral facts rule under the common law is not closed, and a flexible approach to the rule should be adopted.<sup>72</sup> In *Natta v Canham* a Full Court of the Federal Court held:

A trial judge should not be precluded from determining in an appropriate case that the matter on which a witness' credit is tested is sufficiently relevant to that credit as it bears upon issues in the case that such evidence may be admitted.<sup>73</sup>

12.66 The extent to which the common law allows courts the discretion to admit evidence on collateral issues is still open to debate. This is demonstrated by the recent High Court decision in *Nicholls v The Queen*,<sup>74</sup> in which the majority declined an invitation to redefine the collateral evidence rule to give a broad discretion to admit evidence.<sup>75</sup> The position under the uniform Evidence Acts is, however, clearly limited to the categories of evidence listed in s 106. The concern raised both at common law and under the uniform Evidence Acts is that the restriction of defined categories may prevent the admission of important evidence for reasons of efficiency rather than fairness.

<sup>69</sup> Compare with Uniform Evidence Acts s 103(2)(a), which does not require the witness' obligation to tell the truth to be imposed by law.

<sup>70</sup> *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996), [6].

<sup>71</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.38]–[9.45]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.76]–[11.91]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8120]; S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 350.

<sup>72</sup> *Natta v Canham* (1991) 104 ALR 143; *R v Lawrence* [2002] 2 Qd R 400; *R v Lowrie and Ross* [2000] QCA 405; *Kurgiel v Mitsubishi Motors Aust Ltd* (1990) 54 SASR 125; *R v Milat* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 7 April 1996).

<sup>73</sup> *Natta v Canham* (1991) 104 ALR 143, 161.

<sup>74</sup> *Nicholls v The Queen* (2005) 219 CLR 196.

<sup>75</sup> *Ibid*, expressly: Gleeson CJ, [2]; Kirby J, [204] (referring to the existence of the uniform Evidence Acts, the fact that the uniform Evidence Acts are under consideration in common law jurisdictions, and the inappropriateness of the High Court embarking on a significant task of law reform when adoption of the Acts would solve at least some of the problems); Hayne and Heydon JJ, [289] (rejecting the suggestion of a discretion).

12.67 In *Nicholls*, McHugh J made a number of comments regarding how the collateral evidence rule should be viewed. While made in the course of discussing the common law rule, his Honour's views are relevant to whether s 106 should be amended. He pointed to the pragmatic origin of the rule 'as a rule of convenience—a rule for the management of cases—rather than a fixed rule or principle'<sup>76</sup> and continued:

The finality rule is important to the efficient conduct of litigation. Without it, the principal issues in trials would sometimes become overwhelmed by charge and counter-charge remote from the cause of action being litigated. In many cases, the finality rule also protects witnesses from having to defend themselves against discreditable allegations that are peripheral to the issues. But the common law should not have any *a priori* categories concerning the cases where the collateral evidence rule should or should not be relaxed. It should be regarded as a flexible rule of convenience that can and should be relaxed when the interests of justice require its relaxation. Avoiding miscarriages of justice is more important than protecting the efficiency of trials.<sup>77</sup>

12.68 The judge concluded:

[E]vidence disproving a witness's denials concerning matters of credibility should be regarded as generally admissible if the witness's credit is inextricably involved with a fact in issue. Consistently with the case management rationale of the finality rule, however, a judge may still reject rebutting evidence where, although inextricably connected with the fact in issue, the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. In such cases, the interests of justice do not require relaxation of the general rule that answers given to collateral matters such as credit are final.<sup>78</sup>

12.69 The Commissions adopted McHugh J's reasoning in support of its proposal in DP 69<sup>79</sup> to amend s 106 of the uniform Evidence Acts to 'include a general discretion to allow proof of collateral matters where the probative value outweighs the disadvantages of time, cost and inefficiency'.<sup>80</sup>

### Submissions and consultations

12.70 There is some agreement in submissions and consultations in response to IP 28 that the common law may provide a broader basis on which to admit evidence than

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<sup>76</sup> Ibid, [53].

<sup>77</sup> Ibid, [55].

<sup>78</sup> Ibid, [56].

<sup>79</sup> See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 11–5.

<sup>80</sup> S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 351.

s 106,<sup>81</sup> and there was some support for amending s 106 to add a broader discretion to cover situations where the evidence does not fall within the existing exceptions.<sup>82</sup>

12.71 The NSW DPP submits that (as suggested by Associate Professor McNicol) s 106 should be amended to include a general discretion to allow proof of collateral matters where the court is satisfied that the probative value outweighs the disadvantages of time, cost and inefficiency.<sup>83</sup> The Law Council of Australia agrees with this position and comments that:

Such a provision will focus the attention of the court on the substantial issues in the case rather than upon the requirements of a technical rule ... It would also importantly give the court a discretion to admit expert evidence relating to the credibility of a witness where it was felt this would usefully contribute to an ultimate determination of the material facts in issue.<sup>84</sup>

12.72 In response to DP 69, the Law Society of NSW and the NSW PDO support the proposal to include a guided discretion to allow rebuttal evidence on matters of credit.<sup>85</sup> Justice French expresses support for the amendment of s 106 to cover the kind of situation that arose in *Natta v Canham*.<sup>86</sup>

12.73 However, concern is expressed in consultations in Victoria that the broadening of exceptions to the finality rule would add significantly to the time and cost of trials in the civil area, leading to diminished access to justice.<sup>87</sup>

### The Commissions' view

12.74 The Commissions acknowledge concerns that broadening exceptions to the finality rule has the potential to lengthen some trials. However, the Commissions share the view that more flexibility is needed and that avoiding miscarriages of justice is more important than protecting the efficiency of trials. The Commissions believe that concerns about lengthening trials are addressed by the imposition of a leave requirement where the evidence does not fall into one of the existing categories, and by

81 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

82 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

83 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

84 Law Council of Australia, *Submission E 32*, 4 March 2005. See discussion below regarding expert evidence.

85 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

86 *Natta v Canham* (1991) 104 ALR 143. In that case the plaintiff, who claimed damages in relation to a car accident, denied allegations put in cross-examination that she had made statements to a friend that a 'fake' accident should be staged to earn some 'quick money'. The Full Court of the Federal Court held that evidence to contradict the plaintiff's denials was admissible on the issue of her credibility despite not falling within one of the established exceptions to the collateral facts rule.

87 Victorian Law Reform Commission Roundtable, *Consultation*, Melbourne, 30 August 2005.

the requirement that the evidence be capable of substantially affecting the credibility of the witness.

12.75 The requirement to obtain leave imports the requirements of s 192 and, in particular, the inclusive list of matters to be considered in s 192(2) which provides:

Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

- (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
- (b) the extent to which to do so would be unfair to a party or to a witness; and
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
- (d) the nature of the proceeding; and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

12.76 Adopting a more flexible approach may also reduce the time that can be consumed by arguments as to whether evidence is relevant only to credit or also to facts in issue<sup>88</sup> and as to the precise limits of the current exceptions in subsections (a) to (e).

12.77 Further, as the matters on which evidence is sought to be called under s 106 must be put to the witness in cross-examination, the evidence must have met the requirements of s 103 of being capable of substantially affecting the assessment of the credibility of the witness.<sup>89</sup>

12.78 The Commissions believe the draft amendment to s 106 in Appendix 1 provides the necessary elements of flexibility and control. It also provides a framework for the consideration of case management issues.

## Other s 106 issues

12.79 Another issue raised is whether s 106 should be amended to allow rebuttal evidence in respect of the credibility of a witness to be adduced if the witness has ‘not admitted’ the substance of particular evidence put to the witness on cross-examination,<sup>90</sup> for example, where the witness answers that he or she does not recall.

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88 The difficulty of determining whether a matter is relevant to credibility only or also a fact in issue was discussed in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.3].

89 Ibid, Proposal 11–2.

90 Ibid, Proposal 11–5, [11.92].

There was some opposition to this amendment.<sup>91</sup> In DP 69, the Commissions expressed the preliminary view that unless a broad interpretation is given to the requirement of denial, there will be cases where a witness claims a lack of recollection and other evidence supporting the allegation put to the witness should be received.

12.80 In DP 69, the Commissions addressed another issue raised in relation to s 106. That was whether the phrase ‘a false representation while under a legal obligation ... to tell the truth’ in s 106(2)(e) would enable the admission of evidence to prove that any answer given by a witness in cross-examination was a lie,<sup>92</sup> making all other exceptions in s 106 redundant.<sup>93</sup> The Commissions concluded that, even if that construction is open, it should, applying the rules of statutory construction, be rejected because it would render the rest of the section redundant. It was clearly not the intention of the legislature.<sup>94</sup>

### The Commissions’ view

12.81 The Commissions maintain the view expressed in DP 69 that amendment of s 106 is warranted to include the situation where matters are put to a witness in cross-examination and not admitted. While it is possible courts may give the current requirement of denial a broad interpretation,<sup>95</sup> it would be unwise to rely on this in light of the past strict literal interpretation of a number of other sections. Accordingly, the provision should include the situation in which the witness has denied the substance of the evidence or does not admit or agree to it.

12.82 In relation to the suggested possible interpretation of s 106(2)(e), the Commissions maintain the view that there is no need to change the words of the section to avoid that construction, as the rules of statutory interpretation would prevent that outcome in any event.

12.83 Therefore, the Commissions’ recommended amendments to s 106 are twofold. First, to allow the court to grant leave to lead evidence outside the categories currently listed in the uniform Evidence Acts. Secondly, to allow that evidence may be led where the matter has been put to the witness in cross-examination and either denied or not admitted or agreed to.

91 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

92 C Maxwell, ‘Credibility, Collateral Facts and the Evidence Act’ (1996) 8(7) *Judicial Officers Bulletin* 51, 51–52. Note that the section presumably applies to non-curial situations—eg, to statutory declarations.

93 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.35]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8220]. This point was left open in *R v Spiteri* (2004) 61 NSWLR 369, [50]–[51]: Chief Justice P Underwood, *Consultation*, Hobart, 15 March 2005.

94 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 303, 311, 321; *Norton v Long* [1968] VR 221, 223 applying the maxim, *ut res magis valeat quam pereat*.

95 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.40]–[106.45], relying on *R v Souleyman* (Unreported, New South Wales Supreme Court, Levine J, 5 September 1996).

**Recommendation 12–5** Section 106 of the uniform Evidence Acts should be amended to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination. Leave should not be required to adduce evidence of the kind presently identified in paragraphs (a) to (e) of s106.

## Rebuttal of evidence led on a collateral issue

12.84 Section 108 currently limits the admission of evidence to re-establish credibility to evidence:

- in re-examination from the witness whose credibility has been attacked; and
- in certain circumstances where a prior inconsistent statement has been tendered, prior consistent statements.<sup>96</sup>

12.85 In DP 69, the Commissions posed the question of whether s 108 should be extended to refer to any evidence relevant to rebuttal evidence adduced under s 106 and if so in what way.<sup>97</sup>

## Submissions and consultations

12.86 A diversity of opinion has emerged from submissions and consultations on this issue. The NSW PDO submits that there is no need to extend s 108.<sup>98</sup> The Law Society of NSW submits that s 108 should be extended to permit evidence of a prior consistent statement that tends to rationally rebut evidence adduced under s 106.<sup>99</sup> The NSW DPP supports extension of the section.<sup>100</sup> Victoria Police submits that s 108 should be extended to allow evidence to be led to rebut evidence led under s 106 whether or not the witness has made denials.<sup>101</sup>

## The Commissions' view

12.87 In the Commissions' view it is clearly necessary that the party calling the witness whose credibility is subject to challenge have an opportunity to respond to evidence led in rebuttal of a denial in cross-examination under s 106. The

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<sup>96</sup> The exception in relation to unsworn statements in s 108(2) of the Commonwealth Act is now redundant. See Rec 12–8.

<sup>97</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 11–1.

<sup>98</sup> New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

<sup>99</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>100</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

<sup>101</sup> Victoria Police, *Submission E 111*, 30 September 2005.

Commissions have come to the conclusion, however, that amendment of s 108 is not necessary to allow this to occur. The proposed amendments to s 106 also allow evidence to be led from other witnesses to rebut evidence adduced under s 106.

12.88 Whenever evidence is led by one party from a witness pursuant to s 106, the opposing party will have an opportunity to cross-examine that witness. Where the cross-examiner has evidence capable of rebutting the evidence of that witness, the substance of that evidence can be put to that witness in cross-examination. Evidence which could contradict that witness' evidence will be relevant to his or her credibility and, subject to satisfying the requirements of an amended s 106,<sup>102</sup> will be admissible.<sup>103</sup>

12.89 The following example illustrates how this might occur. The defendant in a criminal trial calls Dave as an alibi witness. Dave is cross-examined by the prosecutor to the effect that he has a motive to lie because he was paid by the defendant's wife Gloria to provide an alibi for the defendant. Dave denies this. The prosecutor puts to Dave that he received a large sum of money from Gloria on a particular day. Dave denies this and says Pamela gave him money on that day in payment for a car he sold to her. Pursuant to s 106, the prosecution then calls evidence from Brian who claims to have seen Gloria give Dave money on that day. Brian is cross-examined by the defence and it is put to him that he is mistaken about the identity of the person giving Dave money. Brian denies that he is mistaken. Under the proposed amendment to s 106 the defendant could, with leave, call Pamela to give evidence that she gave Dave money in payment for a car on the day in question to rebut the denial by Brian that he is mistaken as to whom he saw handing over money.

12.90 Provided s 106 is amended as recommended, and so long as the evidence is denied (or not admitted) by the first witness called pursuant under s 106 and the court grants leave, evidence can be led from another witness to rebut evidence led under s 106. There is, therefore, no need to amend s 108 to allow witnesses to be called to directly rebut evidence given by a witness under s 106. The only reason to extend s 108 would be to allow evidence to be led to rehabilitate the credit of a witness in other ways.

12.91 One such way is already recognised in s 108(3). It allows evidence of prior consistent statements to be led, not to rebut the fact that a prior inconsistent statement was made, but to weigh against the effect of the inconsistent statement in the assessment of the witness' credibility. The question is whether there are any other situations in which evidence should be admissible not to rebut a matter going to credibility, but to rehabilitate the credibility of the witness in another way.

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102 See Rec 12-5.

103 Subject to the discretionary and mandatory exclusions in ss 135-137.

12.92 One other possible area is an existing exception at common law. At common law, where a witness' credit is attacked on the ground of conduct apparently inconsistent with his or her testimony, there is a line of authority which accepts that evidence may be led from another witness (including an appropriately qualified expert) to explain that conduct, to rehabilitate the credibility of a witness.<sup>104</sup> Evidence can be led to explain the effects of long term domestic violence or child sexual abuse to rehabilitate the credibility of a witness whose credibility has been attacked on the grounds of behaviour such as remaining with an abusive partner or delayed reporting of sexual abuse. Unless this evidence can be characterised as going to a fact in issue, it is not currently admissible under the uniform Evidence Acts.<sup>105</sup> However, the amendment recommended below in relation to expert evidence would allow the admission of that evidence.<sup>106</sup>

12.93 Given the avenues available to lead evidence to re-establish credibility through the recommended amendment to s 106 and the expert evidence exception recommended below, the Commissions are of the view that there is no need to extend s 108.

### **Credibility of persons making a previous representation**

12.94 Section 108A addresses the situation where evidence of a previous representation has been admitted and the maker of the previous representation is not called as a witness. Section 108A currently provides that where the previous representation is not subject to the hearsay rule because of a provision of Part 3.2, and has been admitted, evidence relevant to the credibility of the maker of the representation is not admissible unless the evidence has substantial probative value.<sup>107</sup> In DP 69 the Commissions discussed whether s 108A of the uniform Evidence Acts is sufficiently wide to allow the admission of evidence relevant to re-establishing the credit of the person who made the previous representation after evidence has been admitted attacking their credit.<sup>108</sup> The Commissions expressed the view in DP 69 that s 108A applies to evidence led either to attack credit or to rehabilitate credit and therefore no amendment was proposed. This conclusion was not challenged in submissions or consultations on DP 69.

12.95 Since publication of DP 69 other issues concerning the drafting of s 108A have come to the attention of the Commissions which require amendment of the section. Of

104 *R v C* (1993) 60 SASR 467; *R v Johnson* (1994) 75 A Crim R 522, 534; *R v F* (1995) 83 A Crim R 502, 509. Although in each case the evidence sought to be led was held to be inadmissible for other reasons.

105 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), [14.5.3].

106 See Rec 12–9.

107 The words 'substantial probative value' will be replaced with 'capable of substantially affecting the assessment of the credibility of the maker of the representation' as a consequence of Rec 12–2.

108 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.97]–[11.99]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8580].



particular concern is the situation where evidence is led of a previous representation of the defendant in criminal proceedings and the defendant does not give evidence.

12.96 While s 108A is frequently referred to as a permissive section—allowing evidence to be led as to the credit of the maker of a previous representation not called to give evidence,<sup>109</sup> it is in fact a restrictive section. But for s 108A, there would be no control of evidence relevant to credibility of the maker of a previous representation not called to give evidence pursuant to Part 3.7. The other provisions of Part 3.7, in particular the credibility rule, apply to evidence relevant to the credibility of a *witness*. They do not apply to the credibility of a person who is not a witness.<sup>110</sup> When understood in this light there is a good case for expanding the scope of s 108A and providing greater controls on the admission of evidence relevant to the credibility of the maker of a previous representation.

12.97 In criminal proceedings there are several situations in which a previous representation of the defendant may be admitted, namely:

- where the evidence of the previous representation is admitted under the admission provisions;<sup>111</sup>
- where a previous representation of the defendant is admitted for a non-hearsay purpose;<sup>112</sup>
- where a previous representation of the defendant is admitted under an exception to the hearsay rule in Part 3.2.<sup>113</sup>

12.98 In each instance the defendant's credibility may be in issue.

12.99 In the first instance referred to above, where evidence of a previous representation of the defendant has been admitted under the admission provisions in Part 3.4, no restriction is placed on the admissibility of evidence relevant to the credibility of the defendant by Part 3.7. This is because s 108A applies only where 'because of a provision of *Part 3.2*, the hearsay rule does not apply'. In the other two situations referred to, s 108A will apply, either because the hearsay rule does not apply in terms or because the previous representation is admitted under an exception to the hearsay rule, but the only restriction imposed is that the credibility evidence be of substantial probative value. This leaves defendants without the protections afforded by s 104 which would apply if they chose to give evidence. For example, there would be

109 S Odgers, *Uniform Evidence Law* (6th ed, 2004) [1.3.8560].

110 *R v Arthurrell* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 18 September 1997).

111 Part 3.4 of the uniform Evidence Acts.

112 For example, where the evidence is led not to establish the truth or what was said but to establish that the defendant lied in such a way as to demonstrate consciousness of guilt—in which case the hearsay rule in s 59 does not apply in terms.

113 Such as uniform Evidence Acts s 69.

no restriction on the admission of evidence as to the defendant's prior convictions for dishonesty.

12.100 Research has identified two New South Wales decisions which have held that s 108A applies where evidence of a previous representation of the defendant has been led and the defendant does not give evidence.<sup>114</sup> In both instances the previous representation of the defendant was a record of interview tendered by the *prosecution* which contained what could be described as exculpatory statements.<sup>115</sup> The defendants in each case were exposed to the possibility of credibility evidence being led against them not by their own act, but by that of the prosecution.

12.101 In *R v Arthurell*,<sup>116</sup> Hunt CJ at CL considered the operation of s 108A. He found that where exculpatory statements by the defendant in a record of interview had been admitted along with his admissions against interest, evidence relevant to the credibility of the defendant would be admissible against the accused if it met the requirement of substantial probative value under s 108A, subject to ss 135–137.<sup>117</sup>

12.102 In *R v Siulai*,<sup>118</sup> the NSW Court of Criminal Appeal held that evidence of an alibi notice filed on behalf of the appellant, but subsequently contradicted by a formal admission that the appellant was present at the scene, was admissible pursuant to s 108A as relevant to his credibility.<sup>119</sup>

12.103 The above cases demonstrate the potential for s 108A to apply to a defendant in a criminal trial. While the outcome in each case was relatively benign, the potential unfairness to the defendant is clear.

### The Commissions' view

12.104 In the Commission's view the potential operation of s 108A is most unsatisfactory. Defendants are exposed to the possibility of adverse credibility evidence being led against them by the prosecution, not because they have led any evidence, but because the prosecution has led that evidence. That evidence is not then subject to the same limits as would apply where defendants give evidence. The provisions as they stand create a situation where the defendant's right to silence is

114 *R v Siulai* [2004] NSWCCA 152, [11], [79]; *R v Arthurell* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 18 September 1997).

115 Although in the case of *R v Siulai* [2004] NSWCCA 152 the statement in the record of interview that the defendant was not present was conceded by the defendant to be a lie and was in fact tendered by the prosecution as a lie going to consciousness of guilt.

116 *R v Arthurell* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 18 September 1997).

117 Ultimately, the accused in that case gave evidence, so presumably s 108A was not actually applied. See sentencing remarks, *R v Arthurell* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 3 October 1997), 9.

118 *R v Siulai* [2004] NSWCCA 152.

119 The court also found that the evidence would also have been admissible as a lie from which the jury could infer a consciousness of guilt.

compromised because the only way to obtain the protection of s 104 is to give evidence.

12.105 The Commissions are of the view that a defendant should not be placed at any greater disadvantage than would follow if that defendant had given evidence as a witness, particularly where the opportunity to lead evidence relevant only to credibility arises because the prosecution has led evidence of a previous representation of that defendant. The clear intention behind s 108A was to apply the same rules which apply to witnesses giving evidence in court to the makers of previous representations admitted in evidence under an exception to the hearsay rule.<sup>120</sup>

12.106 The Commissions consider that two aspects of s 108A need to be amended:

- section 108A needs to control the admission of credibility evidence whenever evidence of a previous representation is admitted and the maker of the representation is not called; and
- the section needs to apply restrictions on evidence relevant to the credibility of the maker of previous representation equivalent to those which apply to evidence relevant to the credibility of a witness, including the protections afforded by s 104.

12.107 It may be said that s 108A should not apply where the previous representation is constituted solely by an admission against interest, as the credibility of the maker of the representation is not then in issue. The Commissions are of the view that such situations will be rare, and, in that instance, the requirement of relevance should operate to exclude the evidence. A draft of an amended s 108A appears in Appendix 1.

**Recommendation 12–6** Section 108A of the uniform Evidence Acts should be amended to provide that, where the defendant in a criminal trial has not or will not be called to give evidence and evidence of a previous representation of the defendant has been admitted, the same restrictions should apply to evidence relevant to the credibility of a defendant as apply under s 104 when a defendant gives evidence at trial.

## Expert evidence going to credibility

12.108 In DP 69 the Commissions proposed that there be an exception to the credibility rule to allow the admission of expert evidence. This proposal arose out of a concern that, in a number of situations where such evidence would be relevant to the

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120 As demonstrated by the original draft of s 100 in Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

fact-finding process, Part 3.7 operates to exclude its admission. While there is no specific provision which excludes expert opinion evidence relevant to credibility, the provisions of Part 3.7 operate indirectly to exclude such evidence either because it is sought to be led in chief,<sup>121</sup> or because it cannot be led in rebuttal because it is not appropriate to cross-examine on the issue.<sup>122</sup>

12.109 Questions of expert evidence relevant to the credibility of witnesses were also discussed in Chapter 8 of DP 69. There, the Commissions discussed the need to clarify the admissibility of expert opinion evidence on the behaviour and development of children<sup>123</sup> and raised the possibility of further clarification in relation to other topics of expert opinion. However, as noted in DP 69 and Chapter 9 of this Report, in most instances it is the credibility provisions, and not the opinion provisions, that present a significant barrier to the admission of such evidence.

12.110 In Chapter 9 of this Report the Commissions recommend that there be an amendment to the uniform Evidence Acts to clarify that expert opinion evidence can be led on the behaviour and development of children.<sup>124</sup> The Commissions do not recommend any further clarification in relation to other categories of expert evidence. In the Commissions' view it is unnecessary to clarify that such evidence can be admitted.

12.111 The discussion below demonstrates that the recommended exception to the credibility rule should allow the admission of expert evidence in at least two further situations:

- expert opinion evidence in relation to any relevant cognitive impairment of the witness; and
- expert opinion evidence on the effects and experience of family violence where that is relevant to the credibility of a witness.

12.112 At common law there is well established authority for the proposition that expert evidence may be led as to a mental or physical impairment of a witness relevant to assessing his or her credibility.<sup>125</sup> In *Toohy v Metropolitan Police Commissioner*,<sup>126</sup> the House of Lords held that an accused person should be permitted to adduce medical evidence as to the hysterical and unstable nature of the alleged victim of an assault. Lord Pearce commented:

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121 In which case it is excluded by s 102.

122 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [11.100]–[11.110].

123 Including *Evidence Act 2001* (Tas) s 79A.

124 See Rec 9–1.

125 *Toohy v Metropolitan Police Commissioner* [1965] AC 595; *Farrell v The Queen* (1998) 194 CLR 286; *R v Edwards* (1986) 20 A Crim 3 463; *R v Y* (1995) 81 A Crim R 446.

126 *Toohy v Metropolitan Police Commissioner* [1965] AC 595.

Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.<sup>127</sup>

12.113 The statement by Lord Pearce that it is ‘obviously in the interest of justice that such evidence should be available’<sup>128</sup> is one that is hard to dispute, although at times reservations have been expressed about admitting such evidence.<sup>129</sup>

12.114 The admissibility of this evidence under the uniform Evidence Acts is less clear. A broad interpretation of s 106(d), which lifts the credibility rule for evidence that tends to prove that ‘a witness is, or was, unable to be aware of matters to which his or her evidence relates’, could allow the admission of evidence of ‘psychological, psychiatric or neurological considerations’.<sup>130</sup> However, this is still a more limited proposition than the common law in *Toohy*.

12.115 By removing the limits to the categories of credibility evidence which can be led from other witnesses, the revised s 106 provides greater scope to admit the type of opinion evidence admitted at common law. However, the admission of evidence under s 106 is conditional upon the matters being put to the witness in cross-examination and denied (or not admitted). This requirement poses difficulties which could unfairly prevent the admission of important evidence.

12.116 For example, in evidentiary terms, the question of whether a witness has some form of cognitive impairment<sup>131</sup> is a matter of opinion. A witness with cognitive impairment may be able to be questioned about the effects of the condition as they experience them. Objection can be taken, however, to the witness giving evidence that he or she has a certain condition and that the condition is the cause of certain effects, as the witness may not be appropriately qualified to give that evidence. The witness may or may not be able to give evidence that he or she has been told of his or her condition and its effects by a suitably qualified expert. The evidence should not be excluded

127 Ibid, 608.

128 Ibid, 608.

129 For example, *R v Turner* [1975] QB 834, 842; *R v Smith* [1987] VR 907.

130 *R v Souleyman* (Unreported, New South Wales Supreme Court, Levine J, 5 September 1996). See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8200].

131 A term which includes mental illness, intellectual disability and personality disorders.

merely because the cross-examiner is not able to obtain the necessary denial/non-admission from the witness.

12.117 There will also be cases where parties want to lead evidence from an expert relevant to the credibility of their own witness whom they cannot cross-examine. The situations discussed in Chapter 9 are instances of this type of situation, as is *R v Rivkin*.<sup>132</sup>

12.118 Expert evidence on the behaviour and development of children, the long term effects of family violence and the effects of various forms of cognitive impairment may enable the tribunal of fact to better evaluate the credibility of witnesses. This evidence is particularly important to prevent misinterpretation of, and inappropriate inferences based on uninformed reasoning being drawn from, behaviour. The evidence may prevent adverse inferences being drawn as to credibility, or may cast doubt on the credit of the witness as demonstrated in the cases in which *Toohey* has been applied.

12.119 For example, in *Coombe v Bessell*<sup>133</sup> the trial judge drew adverse inferences as to the credibility of the defendant from his manner of speech in giving evidence, and convicted him of assault. On a motion to review it was held that evidence of the defendant's speech impediment was admissible because if it was not revealed, the court would be prevented from properly assessing the evidence.

12.120 In *R v Edwards*<sup>134</sup> a new trial was ordered on the basis that evidence had become available that the main prosecution witness at trial suffered from severe immature histrionic personality disorder. In that case Wallace J commented that 'to fail to have before the jury the psychiatric evidence involved would be to deprive it of all that it was entitled to know for the purpose of arriving at a just verdict'.<sup>135</sup>

12.121 The Commissions came to the preliminary view in DP 69 that such cases need to be addressed by providing a further exception to the credibility rule to allow expert evidence to be called. The solution proposed was to provide that the credibility rule does not apply to expert opinion evidence capable of substantially affecting the assessment of the credibility of the witness, subject to the leave of the court.

12.122 A draft of a new s 108AA was included in DP 69. This includes a provision mirroring that under Proposal 9–1 to clarify that evidence can be led under the section in relation to the development and behaviour of children generally and the development and behaviour of victims of child sexual assault. This clarification is designed to overcome a demonstrated reluctance of courts to accept that the

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132 *R v Rivkin* (2004) 59 NSWLR 284.

133 *Coombe v Bessell* (1994) 4 Tas R 149.

134 *R v Edwards* (1986) 20 A Crim R 463.

135 *Ibid*, 466–467.

development and behaviour of children is a matter of specialised knowledge outside the general knowledge of the community.<sup>136</sup>

### Submissions and consultations

12.123 The Law Society of NSW opposes Proposal 11–6 on the basis that it would add to the time and costs of litigation, with little benefit.<sup>137</sup>

12.124 The NSW DPP,<sup>138</sup> the Intellectual Disability Rights Service,<sup>139</sup> Justice Branson<sup>140</sup> and Justice French<sup>141</sup> support the proposal. The NSW PDO supports the proposed amendment with the exception of the specific reference to evidence of child development.<sup>142</sup> It argues that preference should not be given to any particular kind of expert evidence and points to the importance of expert evidence in relation to the unreliability of eyewitness identification evidence.

12.125 Others express support for an exception to the credibility rule in relation to some expert evidence, but urge the Commission to consider a more limited provision.<sup>143</sup> There is support for ensuring that the uniform Evidence Acts are amended to make admissible the type of evidence admitted in *Toohy*, but to limit any amendment to that situation.<sup>144</sup>

12.126 The Criminal Law Review Division of the New South Wales Attorney General's Department draws attention to the provisions which have been enacted in relation to expert opinion evidence concerning child victims of sexual assault in New Zealand, and the law on this issue in the United States.<sup>145</sup> The New Zealand provision is a very specific one. It allows appropriately qualified child psychiatrists and psychologists to give evidence in child sexual abuse cases as to the intellectual attainment, mental capability and emotional maturity of the complainant, the general level of development of children of the same age group and whether any evidence relating to the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children of the same age group.<sup>146</sup> The New Zealand Court of Appeal has interpreted the provision in such a way as to give it a very confined operation. The concern, both in New Zealand and the United States, has been that

136 See Ch 9.

137 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

138 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

139 Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

140 Justice C Branson, *Consultation*, Sydney, 25 July 2005.

141 Justice R French, *Submission E 119*, 6 October 2005.

142 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

143 Confidential, *Submission E 63*, 29 August 2005; NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

144 Confidential, *Submission E 63*, 29 August 2005.

145 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

146 *Evidence Act 1908* (NZ) s 23G.

expert evidence that the behaviour of the complainant is consistent with that of a child victim of sexual abuse should not be used as evidence that the child was in fact abused. Proper directions should be given to juries to that effect.

12.127 A concern is also expressed in submissions and consultations that the introduction of the exception by allowing expert evidence to be called from both sides may lead to undesirable expert battles.<sup>147</sup> In particular, while supporting the amendment of the uniform Evidence Acts to allow for the admission of expert opinion evidence on the credibility and reliability of victims of family violence, the Women's Legal Service Victoria opposes any provision which will allow defendants to raise questions of credibility and reliability of evidence of victims of violence, merely on the basis of their being a victim of violence.<sup>148</sup>

### **The Commissions' view**

12.128 The Commissions share the concerns expressed as to the potential to add to the time and cost of litigation of the proposed exception to the credibility rule. However, the Commissions maintain that it is clear that the uniform Evidence Acts should provide an exception for expert testimony to prevent injustice to the parties and ensure a proper factual basis for the evaluation of the credibility of witnesses. The issue is then how best to control admissibility and confine that evidence within appropriate limits.

12.129 Several limitations were imposed on the admission of the evidence under Proposal 11–6 in DP 69. The draft s 108AA provided that the evidence:

- must be wholly or substantially based on the specialised knowledge of the witness;
- must be capable of substantially affecting the credibility of the witness; and
- may only be adduced with the leave of the court (importing the considerations in s 192 including whether admission of the evidence will unduly add to the length of the trial, the importance of the evidence and fairness to the parties or a witness).

12.130 Further, s 137 requires the court to exclude evidence which is unfairly prejudicial to a defendant in criminal proceedings, and s 136 allows the court to limit the use the tribunal of fact may make of the evidence. For example, if evidence of the

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147 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005; Victorian Roundtable 30 August 2005.

148 Women's Legal Services Victoria, *Submission E 110*, 30 September 2005 in response to Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 8–2.



behaviour and development of victims of child sexual assault is admitted, the court may direct that the evidence only be used for the credibility purpose and not to reason that, because the behaviour of the complainant is consistent with that of a victim of child sexual abuse, the complainant was abused.<sup>149</sup>

12.131 Creating an exception for expert evidence may mean that in some cases experts with opposing views may be called. The Commissions believe that it is an unavoidable consequence of the adversarial system that each side has the opportunity to call evidence to contradict that of the other, should such evidence be available. The Commissions maintain that it is preferable to allow the tribunal of fact to assess two opinions than remove such opinions from its consideration.

12.132 The Commissions also maintain that clarification of the admissibility of expert evidence relating to the behaviour and development of children is justified on the basis of the demonstrated reluctance of some judicial officers to accept that this is a relevant field of expertise and a matter beyond the ‘common knowledge’ of the tribunal of fact. The inclusion of the provision does not connote that undue prominence should be given to this evidence, and should not be seen as taking away from the generality of the provision.

12.133 In the Commissions’ view, the uniform Evidence Acts should be amended to include a new exception to the credibility rule relating to expert testimony of substantial probative value, subject to the leave of the court. The new provision should be drafted to attract the admissibility requirements of s 79 of the uniform Evidence Acts. A draft provision (s 108AA) is set out in Appendix 1.

**Recommendation 12–7** The uniform Evidence Acts should be amended to include a new exception to the credibility rule which provides that, if a person has specialised knowledge based on the person’s training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge; and (b) could substantially affect the assessment of the credibility of a witness; and (c) is adduced with the court’s leave. The Acts should also include a provision clarifying that the evidence to which the exception applies includes evidence about child development and behaviour (including the effect of sexual abuse).

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149 Providing a means to address the type of concerns which are addressed in a more explicit way by the New Zealand provisions raised in NSW Attorney General’s Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

## Unsworn statements by a defendant

12.134 Sections 105, 108(2) and 110(4) of the *Evidence Act 1995* (Cth) contain provisions addressing credibility issues that could arise where a defendant in criminal proceedings gives an unsworn statement.

12.135 They were included in the *Evidence Act 1995* (Cth) because the right to adduce evidence in these circumstances continued to exist in criminal proceedings in Norfolk Island. However, these rights have now been abolished by the *Evidence Act 2004* (NI).<sup>150</sup> There was broad support for the proposal to repeal these sections given that there is no longer any right to make unsworn statements.<sup>151</sup>

## The Commissions' view

12.136 The Commissions are of the view that these provisions in the *Evidence Act 1995* (Cth) should be repealed. Consequently, s 25 of the *Evidence Act 1995* (Cth), (which preserves the right of defendants under state and territory laws to make unsworn statements) should be repealed together with the above sections.

**Recommendation 12–8** Sections 25, 105, 108(2) and 110(4) of the *Evidence Act 1995* (Cth) should be repealed to reflect the fact that there is no longer provision under Australian law for unsworn statements to be made by a defendant in a criminal trial.

## Credibility issues in sexual offence cases

12.137 All states and territories have passed legislation that deals specifically with the admission of evidence in criminal proceedings where someone is charged with a sexual offence. There are also specific provisions in the *Crimes Act 1914* (Cth) relating to sexual offences created by that Act.<sup>152</sup> The legislation includes the ‘rape shield laws’ which exclude the admission of a complainant’s sexual history, particularly where it is sought to be led on the issue of his or her credibility. As discussed in Chapter 20, these matters remain outside the scheme of the uniform Evidence Acts. It is important to note that those provisions currently operate over and above the credibility provisions of the uniform Evidence Acts by virtue of s 8 of the Acts.

<sup>150</sup> *Evidence Act 2004* (NI) s 25.

<sup>151</sup> Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>152</sup> *Crimes Act 1914* (Cth) Pt IAD (although these provisions are more limited in that they relate only to children).

## 13. Identification Evidence

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### Introduction

13.1 The uniform Evidence Acts address a number of issues concerning 'eyewitness evidence'—that is, evidence which identifies the defendant as being, or resembling someone who was, present at or near a place where an offence for which the defendant is being prosecuted was committed. The evidence must be based wholly or partly on what the person making the identification saw or heard at that place at the time the offence occurred.

13.2 The rules governing the admissibility of identification evidence are in Part 3.9 of the uniform Evidence Acts, which is limited to criminal proceedings. These rules reflect, but strengthen, the common law, creating significant procedural requirements.

13.3 This chapter discusses certain aspects of the provisions dealing with identification evidence, including:

- the definition of 'identification evidence' and whether it covers evidence of resemblance, DNA evidence and exculpatory evidence;

- the requirements relating to identification parades in order for identification evidence to be admissible;
- rules governing identification using pictures kept for the use of police officers ('picture identification evidence');
- directions to the jury regarding identification evidence; and
- the admissibility of 'in-court' or 'dock' identification evidence.

### **Background: identification evidence under the uniform Evidence Acts**

13.4 Eyewitness visual identification evidence is a notoriously problematic class of evidence.<sup>1</sup> Disputes about identity have been the cause of a significant number of miscarriages of justice, both in Australia and abroad.<sup>2</sup> During the 1970s, following a series of high profile cases in the United Kingdom (and elsewhere) in which there was held to have been a miscarriage of justice, and a developing body of psychological research, the common law became increasingly sensitive to the potential unreliability of identification evidence, and its inability to be tested by the normal procedures relied on in an adversarial trial.<sup>3</sup>

13.5 One obvious problem with identification evidence is that it is difficult to secure the accuracy of witness identification for a variety of reasons (for instance, the 'vagaries of human perception and recollection' such as memory distortion and suggestibility; in addition to factors such as stress, rapidity of events, or bad lighting at the time of the initial identification itself).<sup>4</sup> However, the most significant difficulty with identification evidence is that—in contrast with other categories of oral testimony—the confidence or apparent credibility of an eyewitness do not necessarily correlate with the degree of accuracy of this person's identification.<sup>5</sup> In a response to

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1 *Alexander v The Queen* (1981) 145 CLR 395, 426.

2 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 354. See also the cases listed in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [416] and, more generally, Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Ch 15 (Commentary—identification evidence); Departmental Committee on Evidence of Identification in Criminal Cases, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976).

3 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [420]–[423] lists the various psychological factors that can lead to unreliable or distorted memory of identification. See also Departmental Committee on Evidence of Identification in Criminal Cases, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976).

4 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [420]–[421]; *Alexander v The Queen* (1981) 145 CLR 395, 426.

5 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [428]–[429].

the United Kingdom's 'Devlin Committee Report' on eyewitness identification evidence,<sup>6</sup> Lord Gardiner observed:

The danger of identification is that anyone in this country may be wrongly convicted on the evidence of a witness who is perfectly sincere, perfectly convinced that the accused is the man they saw, and whose sincerity communicates itself to the members of the jury who therefore accept the evidence.<sup>7</sup>

13.6 In light of the inherent problems with identification evidence, compounded by the inability accurately to assess it in accordance with normal trial procedures, it is essential that mechanisms exist to ensure that any identification evidence put before a court is as accurate as possible. Accordingly, the uniform Evidence Acts impose procedural requirements governing the way in which identification evidence is obtained prior to trial with a view to enhancing its reliability.<sup>8</sup>

13.7 Part 3.9 of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2004* (NI) draw on, but strengthen and consolidate, the common law preference for identification parades as the most reliable form of identification. The Acts provide that for visual identification evidence to be admissible, the identification of the accused must have taken place at an identification parade, subject to certain exceptions.<sup>9</sup> In effect, this makes the holding of an identification parade a precondition to the admission of all other forms of identification evidence, unless an exception applies.<sup>10</sup> Picture identification is permitted in limited circumstances only and is subject to requirements which seek to remove, or at least to minimise, any unfairness to the accused.<sup>11</sup> Whenever identification evidence is admitted (and its reliability is at issue in the trial), the judge is required to give a warning to the jury that there is a special need for caution in accepting identification evidence.<sup>12</sup>

13.8 The *Evidence Act 2001* (Tas) omits a number of the identification provisions in Part 3.9 of the uniform Evidence Acts. Specifically, s 114 (regulating the identification parade requirements) and s 115 (outlining the conditions for the use of police photographs) do not apply in that jurisdiction. However, the *Evidence Act 2001* (Tas)

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6 Departmental Committee on Evidence of Identification in Criminal Cases, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976).

7 United Kingdom, *Parliamentary Debates* (Hansard), House of Lords, 27 March 1974, vol 350, col 705–706 (Lord Gardiner).

8 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [433].

9 *Evidence Act 1995* (Cth) s 114; *Evidence Act 1995* (NSW) s 114; *Evidence Act 2004* (NI) s 114.

10 This differs from the common law approach, as illustrated by *Alexander v The Queen* (1981) 145 CLR 395, 400 where Gibbs CJ stated: 'it seems to me impossible to say that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade was held'.

11 *Evidence Act 1995* (Cth) s 115; *Evidence Act 1995* (NSW) s 115; *Evidence Act 2004* (NI) s 115.

12 Uniform Evidence Acts s 116. See also *Dhanhoa v The Queen* (2003) 217 CLR 1.

includes a warning in s 116 with respect to evidence falling within the statutory definition of ‘identification evidence’.

## Definition of identification evidence

13.9 The definition of ‘identification evidence’ in the uniform Evidence Acts constrains the operation of the identification evidence provisions:

*identification evidence* means evidence that is:

- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
  - (i) the offence for which the defendant is being prosecuted was committed; or
  - (ii) an act connected to that offence was done;
 at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or
- (b) a report (whether oral or in writing) of such an assertion.

13.10 The definition of ‘identification evidence’ in the Acts does not include identification evidence of a person other than the defendant, evidence about an object or item, and does not extend to civil proceedings. It also requires an ‘assertion by a person’, thus excluding evidence of security surveillance footage or machine-based identification.<sup>13</sup>

## Evidence of resemblance

13.11 At common law, a distinction is made between *evidence of resemblance* (‘evidence that a person shares certain features or attributes in common with the accused or that he or she looks like the accused’)<sup>14</sup> and *evidence of positive identification* (where a witness claims to recognise the defendant as the person seen on the relevant occasion).<sup>15</sup> While both forms of evidence are admissible, evidence of resemblance alone is not sufficient to ground a conviction, and instead forms part of a circumstantial case.<sup>16</sup> Moreover, a judge is not automatically required to warn the jury concerning the dangers of circumstantial identification evidence.<sup>17</sup>

13 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [114.15]. See generally *Smith v The Queen* (2001) 206 CLR 650; *R v Gee* (2000) 113 A Crim R 376.

14 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 383.

15 *Festa v The Queen* (2001) 208 CLR 593, 598–599; *Pitkin v The Queen* (1995) 69 ALJR 612, 614.

16 *Pitkin v The Queen* (1995) 69 ALJR 612, 615.

17 *Festa v The Queen* (2001) 208 CLR 593, [57]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10000].

13.12 In contrast to the approach at common law, the definition of ‘identification evidence’ under the uniform Evidence Acts includes evidence that the defendant ‘resembles’ a person who was present at or near the place where the relevant offence took place. This means that evidence that the defendant ‘looks like’ or has similar features to the perpetrator of an offence will be subject to Part 3.9 of the uniform Evidence Acts, including ss 114 and 116.

13.13 It has been suggested in consultation that evidence of resemblance should not be treated as ‘identification evidence’ under the Acts, and should instead simply form part of the circumstantial case of the party presenting it.<sup>18</sup> However, the Commissions’ view is that the wording adopted in the uniform Evidence Acts leaves no doubt that evidence of resemblance will fall within the definition of ‘identification evidence’ if it fits the other criteria in the section. This is consistent with the fact, discussed earlier, that the reliability of eyewitness identification evidence is not necessarily reflected in the degree of confidence or language used in the testimony by the witness.

13.14 Indeed, in the Interim Report from the previous Evidence inquiry (ALRC 26),<sup>19</sup> a suggestion was made that eyewitness evidence should *only* be permitted if expressed in terms of resemblance because a statement that the defendant ‘looks like’ the perpetrator is the most accurate evidence that a witness can give. If a witness is under pressure to say ‘that’s him’, the witness may become ‘convinced of the accuracy of the identification’.<sup>20</sup>

13.15 That proposal was ultimately rejected in recognition that it may weaken the force of sound identification evidence. There will be cases where the eyewitness can properly give more positive evidence, and such a limitation would prevent the witness from doing so.<sup>21</sup> However, the radical distinction between, and different legal approach to, evidence of resemblance and evidence of positive identification are largely eradicated under the Acts. Notably, both forms of evidence attract a judicial direction under s 116.

13.16 The fact that evidence both of positive identification and of resemblance is subject to the admissibility requirements in Part 3.9 does not detract from the principle that the weight to be given to the evidence, once admitted, is a question for the tribunal of fact. Thus, a fact finder may give less weight to eyewitness evidence that is

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18 Confidential, *Consultation*, Brisbane, 10 August 2005.

19 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985).

20 Ibid, [834].

21 Ibid, [834].

expressed in uncertain terms or where the witness is less certain of his or her testimony.<sup>22</sup>

### Identification and DNA evidence

13.17 Part 3.9 of the uniform Evidence Acts was adopted to respond to the difficulties with eyewitness identification evidence: particularly, the difficulties associated with human perception, memory and recognition and their implications for the reliability of assertions as to the identity of perpetrators of criminal offences.<sup>23</sup>

13.18 Despite this, the definition of ‘identification evidence’ in the uniform Evidence Acts is broad. It has been suggested that the definition may inadvertently encompass evidence based on forensic identification techniques, such as DNA evidence and fingerprint evidence. If this were the case, the admissibility of these forms of evidence would be subject to the requirements in Part 3.9, including the holding of an identification parade before the evidence could be admitted under s 114, and a judicial direction to the jury under s 116.<sup>24</sup>

#### *Submissions and consultations*

13.19 It was asked in IP 28 whether the definition of identification evidence in the uniform Evidence Acts inadvertently encompasses DNA and fingerprint evidence and, if so, whether this position should be remedied.<sup>25</sup> In DP 69, the Commissions concluded that the definition of identification evidence in the Acts does not extend to DNA and fingerprint evidence, and that no amendment is necessary.<sup>26</sup>

13.20 Submissions and consultations in response to IP 28 were varied. The New South Wales Public Defenders Office (NSW PDO) submits that the suggestion that the definition of ‘identification evidence’ covers DNA evidence and fingerprint evidence is ‘ingenious’ but highly unlikely to be accepted by the courts.<sup>27</sup>

13.21 However, another view is that much would depend on the manner in which the evidence is presented in court.<sup>28</sup> The Office of the Director of Public Prosecutions (NSW) (NSW DPP) submitted that, as it would be clearly inappropriate to give directions under s 116 of the uniform Evidence Acts for this type of evidence, the

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22 That is, eg, where the witness states ‘this person looks like the offender’ as opposed to ‘this person is the offender’.

23 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [421].

24 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [10.6].

25 Ibid, Q 10–1.

26 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [12.14].

27 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

28 I Freckelton, *Consultation*, Melbourne, 17 March 2005.



position should be placed beyond doubt by expressly excluding DNA and fingerprint evidence.<sup>29</sup>

13.22 The Law Council of Australia (Law Council) stated that the admissibility of DNA evidence raises complexities which should be dealt with outside Part 3.9 of the uniform Evidence Acts. The Law Council also submitted that the Commissions should consider extending the protection provided by Part 3.9 ‘beyond visual identification by witnesses’.<sup>30</sup>

13.23 In response to DP 69, the Office of the Victorian Privacy Commissioner states that the definition of identification evidence is likely to include fingerprint and other readily identifiable biometric data. It states that it is still open to the courts, if presented appropriately, to accept such biometrics as ‘identification evidence’.<sup>31</sup>

13.24 Another view expressed is that DNA evidence would fall within the definition of ‘identification evidence’ as the wording of the definition is quite broad. The commentator notes that a statement that a person has the same DNA profile as the offender is, in effect, a statement of ‘resemblance’. However, while currently DNA and fingerprint evidence requires a person to make an ‘assertion’ as to resemblance (by asserting the likeness between the data collected and the defendant’s profile), this may not always be the case. He states that it may not be problematic to allow DNA evidence to be admitted with a warning under s 116, but notes that the problem, for now, is largely confined to conjecture.<sup>32</sup>

#### ***The Commissions’ view***

13.25 In the Commissions’ view, the definition of identification evidence in the uniform Evidence Acts does not, and was not intended to, cover DNA or fingerprint evidence used in identification. The Commissions maintain the view, expressed in DP 69, that no change to the definition of identification evidence is necessary. There are two reasons for this.

13.26 The first relates to the intention and policy rationale behind Part 3.9 of the uniform Evidence Acts. The discussion in previous ALRC Reports makes it clear that the identification provisions in Part 3.9 were tailored to respond to specific problems raised by the fallibility of human perception and memory in *eyewitness* identification evidence, by requiring the police to adopt certain techniques to ensure that such

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29 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

30 Law Council of Australia, *Submission E 32*, 4 March 2005.

31 Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

32 J Gans, *Submission E 59*, 18 August 2005.

evidence is as reliable as possible.<sup>33</sup> At the time of the previous Evidence inquiry, DNA technology was not widely available; however, the use of fingerprint evidence was common. Despite this, the discussion in the Reports is limited to issues raised by eyewitness identification evidence, as opposed to identification through forensic procedures.<sup>34</sup>

13.27 Moreover, it seems clear that the structure of Part 3.9, in requiring an identification parade to be conducted as a precondition (subject to certain exceptions) to the admission of other eyewitness identification evidence, would be absurd and illogical if applied to forensic identification evidence.<sup>35</sup>

13.28 Secondly, it is arguable that, when read literally, the definition of ‘identification evidence’ does not encompass DNA, fingerprint and other forensic identification procedures. It would be unusual for a witness, who is outlining the findings of a successful match of forensic identification materials, to give evidence in the form of an assertion along the lines required by the definition: namely, that based on what the witness ‘saw, heard or otherwise perceived’ at the place and time of the offence, the defendant resembles a person who was at or near a place where the offence took place, at the time the offence took place. Rather, experts in DNA and fingerprint analysis make a comparison between samples obtained at the crime scene and samples obtained from the defendant and express opinions about the degree of similarity between the samples. The prosecution then invites the judge or jury to accept the evidence and draw the inference from it that the defendant was in fact present at or near the place concerned.

13.29 Further, the definition of identification evidence specifically requires an assertion by a ‘person’. This has been said to exclude ‘evidence arising from an identification made by a tracker dog or a machine-based identification, such as the tender of security camera photos’.<sup>36</sup> An analogous situation exists with respect to forensic procedures, particularly DNA evidence, which require the use of machinery such as thermal cyclers and chemical primers and reagents to produce a DNA profile.<sup>37</sup> The fact that a person may be called on to give meaning to the forensic evidence before the court, and draw a correlation between that evidence and the defendant’s profile, has

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33 See the discussion of the psychological research on the fallibility of human recollection in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [419]–[421]. These issues are discussed further in [13.47] below in relation to identification parades and picture identification evidence.

34 Ibid; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987). Note also that all of the headings in these ALRC texts refer specifically to eyewitness identification.

35 See Uniform Evidence Acts s 114. This aspect of the structure of the Acts is discussed in greater detail below.

36 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [114.15]. Therefore, the definition may not cover identification based on ‘facial mapping’ using data from facial recognition information technology. However, it has been said that the words ‘or otherwise perceived’ may be intended to cover ‘such unusual cases as identification by touch or identification by the sound of a person’s particular gait’: *R v Adler* (2000) 52 NSWLR 451, [36].

37 See, Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), [39.5].

as yet not been enough to render that expert's statement an 'assertion by a person' for the purposes of the definition. In the Commissions' view, it is not such an 'assertion'.

13.30 There is no judicial authority directly on this point. This is consistent with the view that, despite some academic commentary, the problem is likely to be confined to conjecture.

13.31 Although Part 3.9 of the uniform Evidence Acts does not regulate the admissibility of forensic identification procedures, the Commissions acknowledge the need for controls on the admissibility of such evidence. Currently, this occurs outside the scope of the uniform Evidence Acts. The admissibility of DNA evidence is regulated by Commonwealth, state and territory forensic procedures legislation, such as Part ID of the *Crimes Act 1914* (Cth) (*Crimes Act*).<sup>38</sup> Section 23XX of the *Crimes Act* provides that evidence obtained from a forensic procedure (such as taking a DNA sample) is inadmissible if there has been a breach of, or failure to comply with, its provisions in relation to the forensic procedure or in relation to recording or use of information on the DNA database system.

13.32 The court has a discretion to admit the evidence if it is satisfied, on the balance of probabilities, of matters that justify its admission in spite of the non-compliance; or if the person who is the subject of the forensic evidence does not object to its admission.<sup>39</sup> However, these exclusionary provisions do not apply to DNA evidence obtained outside the framework of Part ID—for example, a crime scene sample or an informally obtained sample.<sup>40</sup> In that case, admissibility will be determined under the uniform Evidence Acts or the other evidence laws of the relevant jurisdiction.

13.33 In the joint report of the ALRC and the Australian Health Ethics Committee (AHEC) of the National Health and Medical Research Council, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96), the ALRC and AHEC noted concerns that, due to the highly probative nature of DNA evidence, judges might tend to exercise their discretion in favour of admission rather than properly balancing each of the relevant interests, including the privacy of the accused.

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38 The corresponding state and territory statutes are: *Crimes (Forensic Procedures) Act 2000* (NSW); *Crimes (Forensic Procedures) Act 2000* (NSW); *Forensic Procedures Act 2000* (Tas); *Crimes Act 1958* (Vic); *Criminal Law (Forensic Procedures) Act 1998* (SA); *Criminal Investigation (Identifying People) Act 2002* (WA).

39 *Crimes Act 1914* (Cth) s 23XX. Sub-section 5 provides a list of matters that a court may consider in making this decision. Sub-section 7 states that if the judge admits the evidence, he or she must inform the jury of the breach or failure to comply with the legislation and give whatever warning about the evidence the judge thinks appropriate in the circumstances. Evidence obtained as a result of a forensic procedure is not admissible in proceedings against a person if it is required to be destroyed under Part ID: *Crimes Act 1914* (Cth) s 23XY.

40 For example, DNA evidence obtained on the analysis of a cigarette butt discarded by the accused at a police station: see *R v White* [2005] NSWSC 60.

This would undermine the value of the protection intended by forensic procedures legislation.<sup>41</sup> Therefore, the ALRC and AHEC recommended that the Commonwealth amend the *Crimes Act* to provide that, with the exception of crime scene samples, law enforcement officers may collect genetic samples only from: (a) the individual concerned, pursuant to Part ID; or (b) a stored sample, with the consent of the individual concerned (or someone authorised to consent on his or her behalf), or pursuant to a court order.<sup>42</sup>

13.34 The proposed changes mentioned above, and the questions about other controls on the admissibility of forensic identification procedures, go beyond the scope of the current Inquiry. For the purposes of the uniform Evidence Acts, the Commissions maintain the view that Part 3.9 does not apply to DNA, fingerprint or other forensic identification evidence, and that no amendment to the statutory definition is required.

### **Exculpatory identification evidence falling outside statutory definition**

13.35 Visual identification evidence that is exculpatory of the accused does not come within the definition of ‘identification evidence’ in the Dictionary of the *Evidence Act 1995* (NSW).<sup>43</sup> The reason for this is that the definition of identification evidence requires an assertion that the accused was or resembles a person *present or near* the place and time of the commission of the offence in question. Evidence that the accused was not at the scene at the relevant time is thus beyond the scope of the definition. Therefore, s 116, which requires directions to be given to a jury only where ‘identification evidence’ (as defined in the Acts) has been admitted, does not apply.

13.36 The issue is thus whether forms of identification evidence falling outside the scope of the definition in the uniform Evidence Acts, but which may nonetheless be unreliable, are subject to any of the Acts’ controls on admissibility.

13.37 Section 165 of the uniform Evidence Acts empowers a judge to issue general warnings to juries about evidence ‘of a kind that may be unreliable’. Section 165(1) provides a non-exhaustive list of types of evidence which may attract a warning. ‘Identification evidence’ is covered in s 165(1)(b) and so may attract a warning under the section.<sup>44</sup>

13.38 In *R v Rose*, Wood CJ at CL and Howie J held that although s 165(1)(b) refers specifically to ‘identification evidence’, there is nothing to preclude a general unreliability warning under s 165 being given with respect to visual identification

41 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), [44.102]. ‘At present, there are no safeguards to prevent covertly obtained biometrics from being used as identification evidence as illustrated in *R v White* [2005] NSWSC 60’: Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

42 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), Rec 41–13.

43 *R v Rose* (2002) 55 NSWLR 701, [284]–[286].

44 See also Ch 8, in relation to hearsay evidence of identification.

evidence that may be unreliable, but which falls outside the scope of the definition of ‘identification evidence’ in the Acts.<sup>45</sup> Such evidence includes visual identification that is exculpatory of the accused. Their Honours stated that visual identification evidence of a particular person is no more reliable because the person being identified is not the accused.<sup>46</sup> They rejected the conclusion of Smart AJ that, because the section specifically refers to ‘identification evidence’ in s 165(1)(b), it was intended that the section would not apply to other kinds of evidence of visual identification.<sup>47</sup>

13.39 The Court in *Rose* noted that trial judges have a discretion to decide whether or not to give a warning under s 165. They stated that in circumstances where identification evidence favours the accused, there would be good reasons for the trial judge to alter the content of the warning to make it appropriate to the case (for example, there would be no reason to warn of the dangers of wrongful conviction).<sup>48</sup>

### ***Submissions and consultations***

13.40 It was asked in IP 28 whether there is concern about the application of the uniform Evidence Acts to identification evidence that is exculpatory of the accused, as outlined above in *Rose*.<sup>49</sup> In DP 69 the Commissions concluded that the current approach to exculpatory identification evidence is adequate and proposed no amendment.<sup>50</sup>

13.41 In response to IP 28, the NSW PDO, while not proposing any amendment to s 165, was critical of the decision in *Rose*. It said that *Rose*, in holding that a s 165 warning can be given to exculpatory eyewitness identification evidence, does not sufficiently take into account the fact that exculpatory identification evidence ‘needs only to raise the possibility of a mistake, whereas identification evidence tendered by the Crown needs to affirmatively prove that the accused was the offender’.<sup>51</sup>

13.42 Another submission considered that the relevant provisions of the uniform Evidence Acts, as interpreted in *Rose*, are adequate and do not require amendment.<sup>52</sup>

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45 *R v Rose* (2002) 55 NSWLR 701, [286], [293].

46 *Ibid*, [289].

47 *Ibid*, [292].

48 *Ibid*, [296]–[297].

49 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–2.

50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [12.23].

51 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

52 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

***The Commissions' view***

13.43 The Commissions maintain the view, expressed in DP 69, that the approach to exculpatory identification evidence as outlined in *Rose* is adequate.

13.44 As noted in *Rose*, visual identification evidence that is exculpatory of the accused may be no more reliable than evidence that is inculpatory of the accused, and is subject to the same concerns relating to the fallibility of human recollection and perception.<sup>53</sup> The fact that the evidence is exculpatory should not mean that all concerns as to reliability of this type of evidence ought properly to be disregarded.<sup>54</sup> The practical burden on the defendant is only to establish 'reasonable doubt', which is a lesser onus than that of the prosecution. However, this provides no justification for adopting a less rigorous approach to the way in which the defendant proves facts which may contribute to that 'reasonable doubt'. It is just as important as for the prosecution that the defendant be required to meet exacting standards in adducing evidence so as to ensure the reliability of all the evidence before the court.

13.45 The application of a s 165 warning to exculpatory identification evidence achieves an appropriate balance between respecting that the burden of proof in criminal trials rests with the Crown, and preserving the public interest in the conviction of the guilty. Unlike the warning in s 116, which must be given whenever the issue of identification is disputed,<sup>55</sup> the warning in s 165 is discretionary. Thus, a trial judge need only issue a warning if he or she feels that the evidence in the particular case is unreliable. Moreover, the content of the warning in s 165 can be adapted to the type of evidence to which it relates. In practice, therefore, a judge can formulate a different warning in respect of exculpatory identification evidence than for inculpatory evidence because, for instance, it will not be necessary to warn the jury of risks of conviction in respect of exculpatory evidence.

13.46 For these reasons, the Commissions consider that the approach to exculpatory identification evidence as interpreted in *Rose* is appropriate and does not require amendment.

**Identification parades**

13.47 At common law, it is recognised that the identification parade is the most reliable mechanism available for identification of suspects. Gibbs CJ stated:

[I]t is most undesirable that police officers who have arrested a person on a charge of having committed a crime should arrange for potential witnesses to identify that person except at a properly conducted identification parade. Similarly, speaking generally, an identification parade should, wherever possible, be held when it is

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53 *R v Rose* (2002) 55 NSWLR 701, [289].

54 *Ibid*, [289].

55 *See Dhanhoa v The Queen* (2003) 217 CLR 1, [19].

desired that a witness should identify a person who is firmly suspected to be the offender.<sup>56</sup>

13.48 Despite its preference for identification parades, the common law stops short of holding that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade had been held.<sup>57</sup> Thus, evidence of identification using photographs or other means is admissible at common law, even if there is no valid reason why an identification parade has not been held. The proper approach at common law is to consider whether the conviction can safely be sustained on the whole of the evidence,<sup>58</sup> with the trial judge having a discretion to exclude identification evidence if its prejudicial effect on the accused is outweighed by its probative value.<sup>59</sup> The use of means of identification other than an identification parade (such as photos) goes to the weight and sufficiency of the evidence, rather than to its admissibility.

13.49 Under the uniform Evidence Acts, the common law preference for identification parades becomes a requirement for admissibility of identification evidence. Section 114(2)(a) establishes the general rule that visual identification evidence adduced by the prosecutor is not admissible unless an identification parade that included the defendant was held before the identification was made. There are two exceptions to this general rule: where it would not have been reasonable to have held an identification parade; and where the defendant refused to take part in such a parade.<sup>60</sup>

13.50 Section 114(3) lists non-exhaustive factors which may be taken into account in determining whether it was reasonable to hold an identification parade, including the nature of the offence, the importance of the evidence, and the practicality and appropriateness of holding a parade. It is presumed that it would not have been reasonable to hold a parade if it would have been unfair to the defendant to do so.<sup>61</sup> If a defendant refuses to take part in a parade, that will be enough to make the holding of a parade unreasonable—unless the defendant refuses to participate on the ground that the defendant's lawyer or other nominated person was not present, and it would have been reasonably practicable for that person to be there.<sup>62</sup>

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56 *Alexander v The Queen* (1981) 145 CLR 395, 401.

57 *Ibid*, 401 per Gibbs CJ, 430 per Mason J.

58 *Ibid*, 401, citing *Davies & Cody v The Queen* (1937) 57 CLR 170.

59 *Alexander v The Queen* (1981) 145 CLR 395, 402 per Gibbs CJ, 430 per Mason J.

60 The exceptions are in s 114(2)(b) and (c) respectively. Section 114(2) also requires that identification be made in circumstance where the witness was not intentionally influenced to identify the defendant.

61 Uniform Evidence Acts s 114(4).

62 *Ibid* s 114(5).

### Submissions and consultations

13.51 Some practitioners in jurisdictions which have not yet adopted the uniform Evidence Acts question the focus on identification parades adopted in the Acts. They note that the uniform Evidence Acts apply a ‘platinum standard’ and that any change would raise ‘huge’ resource issues for the police.<sup>63</sup>

13.52 It is suggested that the question of which mechanism is used for identification (and the subsequent reliability of the evidence) should be an issue going to the weight of the evidence, rather than admissibility.<sup>64</sup> It is also suggested that the procedural issues involving mechanisms for identification are better dealt with in police regulations rather than in the uniform Evidence Acts.<sup>65</sup> Scepticism is expressed that an identification parade is better than the use of a photo-board, which provides grounds for cross-examination, and can be filmed.<sup>66</sup>

### The Commissions’ view

13.53 The Commissions’ view is that the structure of the uniform Evidence Acts, particularly the focus on identification parades, enhances the reliability of identification evidence placed before the courts. Admittedly, adoption of the relevant provisions may necessitate change in police practice. However, in light of the notorious unreliability of identification evidence generally and the capacity for it to lead to miscarriages of justice, the Commissions believe that the structure of the Acts should be maintained where possible.

13.54 The common law preference for identification parades was developed in response to research which suggested that identification parades tend to provide more reliable identification than the use of photographs or other techniques. The benefits of identification parades include that they are less suggestive than other methods of ‘picking out’ (such as pointing to a suspect in a prison yard or in the court house); they avoid the prejudicial tendency of photographs to suggest to the witness and/or the jury that the suspect has an existing criminal record; they provide a more holistic means to observe suspects than the static two-dimensional framing of a photo; and they allow the suspect (or their lawyer) to be present to observe the identification process.<sup>67</sup>

13.55 When the identification provisions were enacted in New South Wales and the Commonwealth, they engendered a significant change from the common law and required alterations in police practice. There has not been any suggestion to the

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63 Confidential, *Consultation*, Brisbane, 10 August 2005.

64 Ibid.

65 Ibid.

66 Ibid.

67 See Departmental Committee on Evidence of Identification in Criminal Cases, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976), [5.21]; *Alexander v The Queen* (1981) 145 CLR 395, 401–402; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [435]. Further disadvantages of photographic identification are discussed below.



Commissions that the relevant provisions in the Acts have created an unreasonable burden on police. This observation is fortified by the existence of the exceptions in s 114(2), most notably s 114(2)(b), which obviates the need for an identification parade where it is shown that it would not have been reasonable to hold one.

13.56 Under the uniform Evidence Acts, police use of alternative methods of identification (in circumstances where the exceptions in s 142(2)(b) and (c) do not apply) is no longer merely a matter going to the weight of the evidence, as is the case at common law. This was a conscious policy decision. The use of alternative techniques to identify suspects in the early stages of police procedure can taint all subsequent identification evidence adduced at trial, particularly in cases where there are few witnesses. This is due to the ‘displacement effect’ in memory and observation, whereby witnesses tend to recollect (and subsequently identify as the suspect) the image of any person shown to them through photos or other means, as opposed to the face of the offender they observed at the scene.<sup>68</sup> The adverse consequences of the ‘displacement effect’ make it vital to ensure the reliability of the initial identification procedures to which a witness is exposed. The Commissions believe that it is thus more appropriate for the consequence of the particular identification procedure employed by the police to go to the question of admissibility rather than the question of weight.

13.57 There have been shifts in the approach to identification parades abroad. In the United Kingdom, there have been moves to use ‘video’ identification parades, which are claimed to be cheaper and more effective than live parades.<sup>69</sup> There is, however, an important caveat: the European Court of Human Rights has held that where a video identification parade is held using footage of a person later identified as the perpetrator of a crime, if that footage is obtained covertly, or for another reason it is obtained in circumstances which are not fair and lawful, this gives rise to a violation of that person’s human rights (specifically, their right to privacy under Article 8 of the *European Convention on Human Rights* 1950).<sup>70</sup>

68 See *Alexander v The Queen* (1981) 145 CLR 395, 409. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [421]. More recently, the New South Wales Court of Criminal Appeal discussed the problem of the ‘displacement effect’ in *Clarke v The Queen* (1994) 71 A Crim R 58. This aspect of the case was analysed in D Patch, ‘Clarke’ (1994) 18 *Criminal Law Journal* 296, 297–298.

69 For an explanation of the United Kingdom pilot scheme, VIPER (Video Identification Parade Electronic Recording), see A Hogben, ‘Police, Camera, Action!’ (2003) 14 *Computers & Law* 4. See also: J Dodge, *Police Try Video Identity Parades* (2002) BBC News <<http://news.bbc.co.uk/1/hi/uk/2118319.stm>> at 9 September 2005.

70 *Perry v United Kingdom* (2004) 39 EHRR 3. For analysis of this decision and its significance in relation to video identification parades, see: C Ovey, ‘Human Rights: Article 6(1)—Right to a Fair Trial: Case Comment’ (2003) *Criminal Law Review* 281; ‘Crime and Sentencing: CCTV in Police Custody Suite Used for Video Identification Parade’ (2003) 6 *European Human Rights Law Review* 661.

13.58 In the United States, the emphasis has been on the reliability of sequential, rather than simultaneous, ‘line-ups’<sup>71</sup> (which force victims to compare the suspect with their recollection of the offender as opposed to comparing the participants in the line-up as against each other).<sup>72</sup> However, despite these changes, the identification parade, when properly conducted, is still the most reliable mechanism available for eyewitness identification.

13.59 The Commissions note that the *Evidence Act 2001* (Tas) did not adopt the identification parade requirement in s 114. Thus, in Tasmania, evidence of identification can be admitted without the prior requirement of an identification parade.<sup>73</sup> However, the Commissions maintain the view that the identification provisions in Part 3.9 should be adopted as a whole where possible, in light of the inherent unreliability of identification evidence and its capacity to lead to miscarriages of justice.

## Picture identification

13.60 The difficulties with the use of picture identification in an evidentiary context are well known. In addition to the differences between two-dimensional static photographs and real-life persons, the use of photographic identification denies the accused the opportunity to be present when the identification is made and thus the accused is unable to examine the conditions or safeguards adopted against error.<sup>74</sup> Further, the fact that the police have photographs of the accused in their possession often suggests to a witness and/or the tribunal of fact that the accused ‘has a criminal record, perhaps even a propensity to commit a crime of the kind with which he is charged’ (the so-called ‘rogue’s gallery effect’).<sup>75</sup> Finally, research indicates that witnesses sometimes retain the image of a person shown to them in a photograph, rather than ‘the memory of the original sighting of the offender’ (the ‘displacement effect’).<sup>76</sup>

13.61 Section 115 of the uniform Evidence Acts (other than the *Evidence Act 2001* (Tas)) places limitations on the admissibility of picture identification evidence. Picture identification evidence is defined as ‘identification evidence relating to an

71 This is the term preferred in the United States for identification parades.

72 US Department of Justice—National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999). Note that in the United States, a ‘line-up’ is recognised as the most reliable form of evidence, but line-ups can be based on live line-ups or photographic line-ups. There is no requirement that any particular form of procedure be used. Pre-trial photographic identification and subsequent in-court identification based on pre-trial procedures must be excluded only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification: *Simmons v United States* 390 US 377 (1968), 384.

73 It also did not adopt the regulation of the use of police photographs in s 115. Tasmania has, however, enacted s 116 of the uniform Evidence Acts, dealing with directions to the jury and the associated definition of ‘identification evidence’: *Evidence Act 2001* (Tas) ss 3, 116.

74 *Alexander v The Queen* (1981) 145 CLR 395, 409.

75 *Ibid*, 409.

76 *Ibid*, 409. See also *Clarke v The Queen* (1994) 71 A Crim R 58; D Patch, ‘Clarke’ (1994) 18 *Criminal Law Journal* 296, 297–298.

identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers'.<sup>77</sup>

13.62 Section 115(5) retains a preference for the deployment of identification parades if possible. As such, picture identification evidence adduced by the prosecution is not admissible if the identifying witness examined the pictures while the defendant was in police custody and an identification parade was not held, unless it would have been inappropriate or unreasonable to hold a parade for one of the listed reasons.<sup>78</sup>

13.63 If evidence of a picture identification must be adduced for one of the listed reasons, s 115 seeks to address the possible unfairness to a defendant.<sup>79</sup> Picture identification evidence is not admissible if the pictures examined suggest that they are pictures of persons in police custody.<sup>80</sup> Section 115 also provides, subject to a number of exceptions,<sup>81</sup> that picture identification evidence is not admissible where the defendant was in police custody when the pictures were examined and the picture examined was taken before the defendant was taken into police custody on that occasion.<sup>82</sup> This latter provision seeks to ensure that the police will not use old photographs they may hold of the suspect, thus reducing the impression on the witness or the jury that the suspect has previously been of interest to the police.

### The concept of 'police custody'

13.64 The application of s 115(3) is limited to defendants who are in 'police custody' at the time the identification was made.<sup>83</sup> This means that nothing in the section prohibits the use of old police photographs for the purposes of locating a suspect at the investigation or detection stage before a suspect has been taken into custody, provided the photographs do not depict the suspect overtly in police custody.<sup>84</sup>

13.65 The common law recognises the difference between using photographs during the course of the detection process (to assist the police to know whom they should arrest and charge) and the use of photographs during the course of the evidentiary

<sup>77</sup> *Evidence Act 1995* (Cth) s 115(1); *Evidence Act 1995* (NSW) s 115(1); *Evidence Act 2004* (NI) s 115(1).

<sup>78</sup> Uniform Evidence Acts s 115(5).

<sup>79</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985) (1985), [189].

<sup>80</sup> *Evidence Act 1995* (Cth) s 115(2); *Evidence Act 1995* (NSW) s 115(2); *Evidence Act 2004* (NI) s 115(2).

<sup>81</sup> The exceptions are: where the defendant's appearance changed significantly between the time when the offence was committed and the time when the defendant was taken into custody; and where it was not reasonably practicable to make a picture of the defendant after the defendant was taken into custody: s 115(4).

<sup>82</sup> *Evidence Act 1995* (Cth) s 115(3); *Evidence Act 1995* (NSW) s 115(3); *Evidence Act 2004* (NI) s 115(3).

<sup>83</sup> Uniform Evidence Acts s 115(3)(a) and (b).

<sup>84</sup> *Ibid* s115(2).

process (to establish proof in court that the accused is in fact the offender).<sup>85</sup> Stephen J noted:

For the purposes of the police in the detection process ... the use of photo-identification is of obvious value, despite its inherent defects. It offers to them a quick and convenient means, often the only readily available means, of having an eye-witness pick out the alleged offender from what may be a very large number of possible suspects. To deny its use to the police in the detection process, where it serves a useful, perhaps even essential, purpose, would be to prejudice the attainment of one of the ends of justice, the detection and bringing to trial of offenders.<sup>86</sup>

13.66 The limitation of s 115(3) to persons ‘in police custody’ aims to ensure that the section will not diminish the capacity of the police to continue to use old photographs in the course of the investigatory process.

13.67 In the report of the previous Evidence inquiry, the ALRC considered—as an alternative to the ‘police custody’ requirement—limiting the application of the safeguards in s 115 based on the ‘state of knowledge’ of the police with respect to the suspect and on whether, for example, the person to be identified was a ‘definite suspect’.<sup>87</sup> Stephen J had earlier advocated a similar approach at common law in *Alexander*.<sup>88</sup> However, ultimately it appears to have been concluded that this wording would lead to a similar result in practice to requiring that an accused be in police custody; and that in practical terms the requirement that the suspect be in police custody was necessary in order for the police to hold an identification parade or, alternatively, to obtain another photograph of him or her for the purposes of identification.

13.68 The terms ‘in the custody of a police officer’ and ‘police custody’ found in ss 115(2), (3), (4) and (7) are not defined in the uniform Evidence Acts but have been interpreted as meaning ‘under physical restraint’.<sup>89</sup> The adoption of the wording ‘in police custody’ in order to ensure that police may continue to use photographs at the initial stage of investigation may have implications for the broader operation of s 115. Stephen Odgers SC notes:

Whatever interpretation is given to the term ‘police custody’, it is clear that it does not extend to a situation where the police suspect that the defendant committed a crime but choose to engage in picture identification before asking or compelling the defendant to come to a police station. It follows that, in such circumstances, the picture identification evidence will not be excluded by s 115, no matter how

85 *Alexander v The Queen* (1981) 145 CLR 395, 408–409. Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [435].

86 *Alexander v The Queen* (1981) 145 CLR 395, 409–410.

87 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [838], fn 32; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [188]–[190].

88 *Alexander v The Queen* (1981) 145 CLR 395, 418.

89 *R v McKellar* [2000] NSWCCA 523, [37], [43]. It has also been held that an accused who is in gaol is not ‘in the custody of a police officer’ for the purposes of s 115: *R v Batty* (Unreported, New South Wales Court of Criminal Appeal, McInerney, Abadee and Bruce JJ, 6 August 1997).

unreasonable this decision was (unless the pictures used suggest that they are pictures of persons in police custody).<sup>90</sup>

13.69 It has been stated that, in consequence, the police may be able to avoid the operation of this provision not only during the investigatory stage (as was intended by the legislation) but also after they have identified and located a suspect, by defining a person as voluntarily co-operating or by releasing an arrested person on bail before attempting picture identification.<sup>91</sup>

13.70 The scope of s 115 was considered in *R v McKellar*.<sup>92</sup> In *McKellar*, a police officer investigating a robbery had made intensive efforts to find people in Bourke who were sufficiently similar to the appellant and willing to participate in an identification parade.<sup>93</sup> When he was unsuccessful, the police officer conducted identification using a photograph of the appellant taken by police while the appellant was at the police station following his arrest on another matter. Picture identification took place after the appellant had been released on bail and was held to be no longer in police custody.<sup>94</sup> It was therefore held that the safeguards of s 115(3) did not apply.

13.71 On the facts, there is no indication that the police were deliberately avoiding the application of s 115 in *McKellar*. However, the section does indicate that the definition of ‘police custody’ has a limited operation. Counsel for the appellant argued that the words ‘in the custody of a police officer’ in s 115(5) should be construed in a broad way to cover any kind of ‘legal power or influence over the person’.<sup>95</sup> The New South Wales Court of Criminal Appeal observed that, even under the widest possible interpretation, it is hard to assert that, once the appellant had been released on bail from the police station, the police had any additional ‘legal power or influence’ over the appellant than they had over any other member of the community.<sup>96</sup> Thus, when a defendant is released on bail, the requirements for picture identification in s 115(3) do not apply.<sup>97</sup>

90 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800].

91 Ibid, [1.3.9800] fn 777. Odgers cites, inter alia, *R v Miller* (1980) 25 SASR 170; *R v O'Donoghue* (1988) 34 A Crim R 397.

92 *R v McKellar* [2000] NSWCCA 523.

93 Ibid, [16]. In this he was assisted by the appellant's father, an Aboriginal Community Liaison Officer and a message on local radio stations seeking volunteers.

94 Ibid, [17].

95 Ibid, [33].

96 Ibid, [34]. It was not a condition of the appellant's bail that he attend an identification parade nor could such a condition legitimately have been imposed. The bail determination and the conditions, if any, imposed upon the appellant related to other offences unconnected with the robbery.

97 However, the pictures used still cannot show the defendant in police custody: Uniform Evidence Acts s 115(2).

### ***Submissions and consultations***

13.72 It was asked in IP 28 whether the *Evidence Act 1995* (Cth) should be amended to ensure that the provisions relating to the admission of picture identification evidence where defendants are in ‘police custody’ cannot be avoided by police.<sup>98</sup> In DP 69, the Commissions concluded that no amendment was necessary.

13.73 There were various submissions in response to IP 28. The NSW DPP submitted that the uniform Evidence Acts should be amended in the manner adverted to in IP 28:

This could be partly achieved by including a broad definition of ‘police custody’ which extends to situations where the accused is either under physical restraint or voluntarily co-operating with police. The circumstances in which picture identification evidence is not admissible could be extended beyond situations where the defendant was in police custody when the pictures were examined, so as to further discourage the use of picture identification.<sup>99</sup>

13.74 The NSW PDO observed that, as an accused person is only in the custody of the investigating police for a short time before being either granted bail or taken to prison, the safeguards in s 115 apply only ‘to the short period when the accused is still at the police station’. The NSW PDO submitted that this limitation should be removed.<sup>100</sup>

13.75 In response to DP 69, the Office of the Victorian Privacy Commissioner agrees that the removal of the ‘police custody’ limitation altogether is the best solution, allowing s 115 to apply to all picture identification obtained by the police officers. It submits that this approach is superior to relying on s 138 to catch situations where police act improperly, or redefining the limits of the section based on the subject’s state of knowledge of the police.<sup>101</sup>

13.76 Some judges of the New South Wales District Court have criticised the drafting of s 115(3):

If the intention of s 115(3) is to preclude a jury arriving at an inference adverse to an accused by propensity reasoning then it is clumsily drafted and excludes the use of photographs taken in the course of investigation where defendants have been under observation for months.<sup>102</sup>

13.77 The judges stated that situations involving picture evidence are usually dealt with by an explanation from the bench to the jury as to how the police came into possession of the photograph used—for example, that the picture was the photograph taken by police at arrest or taken prior to arrest but in the course of the investigation.<sup>103</sup>

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98 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–3.

99 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005. The NSW DPP states that it is not implying that it is aware of any occasion on which police have avoided the application of the picture identification provisions.

100 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

101 Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

102 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

103 *Ibid.*

***The Commissions' view***

13.78 The picture identification provisions give primacy to identification evidence from an identification parade and are structured accordingly. The policy objective is to ensure that where a person is in police custody (the police having established the identity of the offender to their satisfaction), any attempt to secure identification evidence should be by an identification parade, that being the best method available for that purpose.<sup>104</sup> However, in the event that it is unreasonable or impracticable to hold an identification parade, s 115 aims to allow the use of police photographs while minimising the prejudicial effect this may have on the accused.

13.79 It would be a serious cause for concern if the police could deliberately avoid the policy objective of s 115. However, it has not been suggested that this, in fact, occurs. Submissions and consultations do not indicate that police deliberately avoid the application of s 115. Admittedly, the effect of *McKellar* is that s 115 does not cover situations where an accused is deemed to be 'voluntarily cooperating' with the police or after a suspect has been charged and released on bail. However, there has been no suggestion that this causes significant unfairness for the defendant, or that the police are systematically avoiding the operation of s 115 by manipulating the temporal window left by these gaps in the operation of the section.

13.80 As noted, s 115 does not apply until the suspect is in police custody. This means that the police may legitimately use photographs as part of the detection process. It is only after a suspect is identified that the police can reasonably be expected either to hold an identification parade or to obtain new photographs of the suspect. This reflects the common law.<sup>105</sup> For this reason, the Commissions do not recommend that the police custody requirement be removed in its entirety. Moreover, the Commissions' view is that the term 'police custody' offers a more practical standard for the application of the provisions than a requirement based on the state of knowledge of the police.

13.81 As a number of New South Wales District Court Judges have noted, the operation of s 115(3) will preclude the police from using photographs taken of the accused while the accused was under police surveillance—even if such surveillance took place many months before an arrest was made.<sup>106</sup> This is because, if the defendant is in the custody of the police when the identification occurs, the police should be able to take a contemporaneous photograph of the defendant to use for identification purposes. Showing to a witness surveillance footage or photographs made by police of a suspect is problematic because it may indicate that the suspect has been under police observation for some time. Thus, this is likely to provoke the same sort of reasoning in

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104 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [838].

105 *Alexander v The Queen* (1981) 145 CLR 395, 408–409.

106 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

the mind of a witness (ie, that the person in the surveillance photographs must have been engaging in nefarious conduct because he or she had come to the attention of the police) as was acknowledged by the New South Wales District Court Judges to be the mischief that s 115 seeks to prevent. Moreover, if the police are using surveillance photos to identify a suspect rather than make a confirmatory identification, or if the defendant is on bail, nothing in the uniform Evidence Acts precludes the use of surveillance photos as long as they do not suggest that the defendant is in police custody.

13.82 The Commissions maintain the view expressed in DP 69 that the scope of s 115 is adequate to cover most cases where real mischief may occur in the use of police photographs. If investigating police deliberately seek to avoid the picture identification constraints, s 138 may be able to be used to exclude the evidence.<sup>107</sup> Given the lack of evidence that the provisions are being systematically avoided, this may be a sufficient safeguard and reduces the need to consider possible reforms to s 115.

## Directions to the jury

13.83 Section 116 of the uniform Evidence Acts states:

- (1) If identification evidence has been admitted, the judge is to inform the jury:
  - (a) that there is a special need for caution before accepting identification evidence; and
  - (b) of the reasons for that need for caution, both generally and in the circumstances of the case.
- (2) It is not necessary that a particular form of words be used in so informing the jury.

13.84 In *Dhanhoa v The Queen*, the High Court noted that, if read literally, s 116 could be taken to mean that a judge is always required to inform the jury that there is a special need for caution before accepting identification evidence whenever identification evidence has been admitted, even if the reliability of the evidence is not in dispute.<sup>108</sup>

13.85 The High Court found that to give s 116 a literal meaning would produce a consequence that is wholly unreasonable and stated that the requirement 'is to be understood in the light of the adversarial context in which the legislation operates, and the nature of the information the subject of the requirement'.<sup>109</sup> So understood, the provision means that directions must be given only where the reliability of the identification evidence is disputed.<sup>110</sup>

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<sup>107</sup> S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800]; Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

<sup>108</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1, [19].

<sup>109</sup> *Ibid*, [22].

<sup>110</sup> *Ibid*, [22].



13.86 In IP 28, it was asked whether s 116 of the uniform Evidence Acts should be amended to clarify that directions to the jury in relation to identification evidence are not mandatory.<sup>111</sup>

13.87 The NSW PDO stated that warnings about identification evidence under s 116 are ‘so fundamental that they should be given whether or not the accused’s counsel remembers to ask for them’ and so it opposes amendment of s 116.<sup>112</sup>

13.88 The NSW DPP submitted that s 116 should be amended to make it clear that directions under s 116 are mandatory only where the reliability of the identification evidence is disputed.<sup>113</sup> The Law Council of Australia noted that any ‘technical demand’ for a mandatory warning under s 116 can be dealt with simply ‘under appellate rules which make it clear that such a technical error cannot give rise to a substantial miscarriage of justice’.<sup>114</sup>

13.89 In ALRC 26, it was proposed that the warning now contained in s 116 be given only on the request of the accused.<sup>115</sup> This was seen as a compromise between the two alternatives, which were both deemed too extreme, of making the warning mandatory or entirely discretionary.<sup>116</sup> Moreover, the wording of the initial proposals indicated that the warning was only to be given where identification evidence was a substantial part of the prosecution’s case, again indicating an intention that the warning was not to be mandatory in all cases involving identification evidence.<sup>117</sup> It was also noted that almost all cases require identification of the suspect to some degree even if the issue of identification is not contested, and that to require a solemn warning from the judge in those cases where identification is not in dispute would be confusing and counterproductive.<sup>118</sup>

13.90 The decision in *Dhanhoa* thus returns the operation of s 116 to how the ALRC originally intended it to operate. The option remains however to amend s 116(1) by, for instance, adding after the words ‘if identification evidence has been admitted’ the words ‘and the reliability of that evidence is in dispute’.

13.91 The Commissions consider that the decision in *Dhanhoa* is clear and has settled the law on this issue. Furthermore, amending the section could create problems of interpretation in the future. For example, it could suggest that other provisions in the

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111 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–4.

112 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

113 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

114 Law Council of Australia, *Submission E 32*, 4 March 2005.

115 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [841], [843].

116 *Ibid*, [841], [843].

117 *Ibid*, [841], [843].

118 *Ibid*, [843].

uniform Evidence Acts, which are assumed to be triggered only in the event that the evidence is in dispute, need to be amended to include similar riders to clarify their operation. This is part of the assumption underlying the adversarial system, and should not need to be enumerated in every instance.

13.92 Therefore, the Commissions maintain the view expressed in DP 69 that the operation of s 116, read in light of *Dhanhoa*, is settled law and does not require amendment.

### In-court identification

13.93 In-court (or ‘dock’) identification is where a witness identifies the defendant in the courtroom or in the dock as being the perpetrator they saw at the scene of a crime. It is generally regarded as the most problematic of all forms of visual identification.<sup>119</sup> Mason J noted in *R v Alexander*:

‘in court’ identification ... is of little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the accused in the dock.<sup>120</sup>

13.94 At common law, in-court identification is usually permitted once evidence of a prior out-of-court identification (usually by way of an identification parade or photographic identification) has been admitted.<sup>121</sup> The in-court identification is used to reinforce the prior identification, which serves as the primary means of identification evidence in the case. Alone, and without a prior form of out-of-court identification, in-court identification is generally held to be of little probative value, although still admissible.<sup>122</sup>

13.95 It has been suggested that there are some advantages of continuing to allow in-court identification—in particular the value of having a witness repeat his or her identification under oath.<sup>123</sup> It is also part of the common law adversarial tradition to require the truth and credibility of all the evidence in a case to be put before the court to be assessed during the course of the trial itself.<sup>124</sup>

119 See *Alexander v The Queen* (1981) 145 CLR 395, 399; *Davies & Cody v The Queen* (1937) 57 CLR 170, 182; *Jamal v The Queen* (2000) 116 A Crim R 45, 53; *Festa v The Queen* (2001) 208 CLR 593, 601. See also: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [433]–[435].

120 *Alexander v The Queen* (1981) 145 CLR 395, 426–427.

121 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [114.10]; *Alexander v The Queen* (1981) 145 CLR 395, 427.

122 *Alexander v The Queen* (1981) 145 CLR 395, 427. See also *R v Saxon* [1998] 1 VR 503, 513; *R v Demeter* [1995] 2 Qd R 626, 629, 632.

123 *Grbic v Pitkethly* (1992) 38 FCR 95, 104.

124 Note that originally it was the in-court identification that was treated as the primary identification, with the out-of-court identification treated as a necessary prior consistent statement. This practice was reversed in the 1980s—see Departmental Committee on Evidence of Identification in Criminal Cases, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976).

13.96 In ALRC 26, the ALRC specifically discussed the problems associated with in-court identification evidence. It was suggested that special rules are needed to address both in-court and photographic identification.<sup>125</sup> However, unlike photographic evidence, which came to have its own separate provisions for determining admissibility, in-court identification was subsumed within the general provisions in Part 3.9 and is not specifically referred to in the definition of ‘identification evidence’ in the uniform Evidence Acts. Nevertheless, it seems clear that the ALRC’s intention was to make those provisions applicable to in-court identification. For instance, it was stated in ALRC 26 that

the primary proposal was that no eyewitness identification evidence would be admissible for the prosecution—whether dock identification or evidence of an out of court identification—unless an identification parade had been held prior to the act of identification.<sup>126</sup>

13.97 Despite initial arguments to the contrary, the New South Wales Court of Criminal Appeal has held on several occasions that s 114 of the *Evidence Act 1995* (NSW) applies to in-court identification evidence.<sup>127</sup>

### Submissions and consultations

13.98 Question 12–1 in DP 69 asked to what extent in-court identification is used in practice and whether this a problem. It also asked whether Part 3.9 of the uniform Evidence Acts should be amended to make it clear that, subject to the exceptions set out in s 114(3), in-court identification is inadmissible.

13.99 The NSW PDO notes that, as currently drafted, Part 3.9 of the uniform Evidence Acts does not specifically address the question of in-court identification:

No doubt the drafters of this provision assumed that practitioners would take it as read that in court identification was impermissible. However this was not the case, and initially the Crown argued that ‘visual identification evidence’ did not include in court identification.<sup>128</sup>

13.100 The NSW PDO states that the present wording of ss 114 and 115 is so complex and dense that it is not easy to ascertain the intention that, generally, in-court identification is not permitted.<sup>129</sup> The NSW PDO submits that a new provision should be inserted into the uniform Evidence Acts, making it clear that in-court identification is inadmissible unless one of the exceptions in s 114 applies—that is, unless there was

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<sup>125</sup> See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [433].

<sup>126</sup> *Ibid*, [830].

<sup>127</sup> *R v Taufua* (Unreported, New South Wales Court of Criminal Appeal, Priestley AP, James and Barr JJ, 11 November 1996); *R v Tahere* [1999] NSWCCA 170.

<sup>128</sup> New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005, citing *R v Taufua* (Unreported, New South Wales Court of Criminal Appeal, Priestley AP, James and Barr JJ, 11 November 1996). See also New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

<sup>129</sup> New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

a prior identification parade or it would not have been reasonable to hold an identification parade.<sup>130</sup> The NSW PDO notes that in-court identification is occasionally relied upon, stating that the author of the submission has conducted two appeals where it was eventually held that there had been impermissible in-court identification.<sup>131</sup>

13.101 One judicial officer notes that in-court identification rarely occurs.<sup>132</sup> However, it is suggested that if there is uncertainty, the Acts should be amended to put beyond doubt the fact that Part 3.9 applies to in-court identification.<sup>133</sup>

13.102 The Law Society of New South Wales agrees that in-court identification rarely occurs in practice. However, it considers that, given the high degree of unreliability of in-court identification and the policy objectives of the uniform Evidence Acts in relation to identification evidence, Part 3.9 should be amended to make it clear that, subject to the exceptions in s 114(3), in-court identification is inadmissible.<sup>134</sup>

13.103 Others suggest that the current definition of identification evidence clearly covers in-court identification and that no amendment is necessary.<sup>135</sup>

### The Commissions' view

13.104 The Commissions' view is that the definition of visual identification evidence in s 114(1) covers in-court identification. This position is supported by the intention of the ALRC as evidenced in ALRC 26,<sup>136</sup> by the recognition of the notorious unreliability of in-court identification evidence,<sup>137</sup> and by the broad wording of the definition of identification evidence in the Acts which has been construed on several occasions by the New South Wales Court of Criminal Appeal to include in-court identification.<sup>138</sup> The Commissions also note submissions and consultations indicating that in-court identification rarely occurs in practice.

13.105 The provisions governing the admissibility of identification evidence in Part 3.9 therefore apply to in-court identification evidence. Thus, holding an identification parade will be a necessary precondition to the admissibility of in-court identification, unless it would not have been reasonable to hold such a parade or the defendant refused to take part in such a parade.<sup>139</sup> If evidence of in-court identification

130 Ibid.

131 Ibid, citing *R v Taufua* (Unreported, New South Wales Court of Criminal Appeal, Priestley AP, James and Barr JJ, 11 November 1996) and *R v Tahere* [1999] NSWCCA 170.

132 Confidential, *Consultation*, Sydney, 27 July 2005.

133 Confidential, *Consultation*, Sydney, 27 July 2005.

134 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. Support was expressed for this submission by the Legal Aid Commission of New South Wales, *Correspondence*, 10 October 2005.

135 J Gans, *Submission E 59*, 18 August 2005; Victoria Police, *Submission E 111*, 30 September 2005.

136 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [433]–[435]; [830].

137 *Alexander v The Queen* (1981) 145 CLR 395, 399.

138 See, eg, *R v Tahere* [1999] NSWCCA 170; *R v Taufua* (Unreported, New South Wales Court of Criminal Appeal, Priestley AP, James and Barr JJ, 11 November 1996); *R v Duncan* [2004] NSWCCA 431, [188].

139 Uniform Evidence Acts s 114(2).

is admitted, and the reliability of the identification is in dispute, the judge is required to give a warning to the jury that there is a special need for caution before accepting identification evidence, and to outline the reasons for that need for caution, both generally and in the circumstances of the case.<sup>140</sup>

13.106 Currently, if it is unreasonable to hold an identification parade within the regime established in s 114, there is no obligation on the police to obtain another form of out-of-court identification in order for in-court identification to be admissible. This is in contrast with the common law, which stresses the importance of obtaining any form of out-of-court identification before admitting in-court identification evidence.<sup>141</sup>

13.107 In light of the extreme unreliability of in-court identification evidence, even as compared to other forms of visual identification, it is arguable that in the event that it would not have been reasonable to hold an identification parade, the police should be required to hold some other out-of-court identification procedure before evidence of in-court identification will be admitted. This could involve, say, photographic identification or another method that involves ‘picking out’ the accused from a number of different persons (such as identification of the accused in prison exercise yards or on the street).

13.108 However, while in many cases the police may seek to obtain this sort of evidence of their own accord, to require it within the context of admissibility would impose significant additional administrative obligations on the police. Given that these forms of identification are likely to be highly unreliable in themselves, the Commissions do not believe this should be required. The uniform Evidence Acts should retain the preference for holding an identification parade as the ideal pre-trial identification procedure before admission of in-court identification.

13.109 The Commissions consider that Part 3.9 of the uniform Evidence Acts adequately addresses the issue of in-court identification evidence and it does not require amendment.

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140 Ibid s 116; *Dhanhoa v The Queen* (2003) 217 CLR 1, [22].

141 *Alexander v The Queen* (1981) 145 CLR 395, 399–400.



## 14. Privileges: Extension to Pre-Trial Matters and Client Legal Privilege

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### Introduction

14.1 A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.<sup>1</sup> Privileges are generally established as a matter of public policy. For example, client legal privilege is premised on the principle that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive fully informed legal advice. Privileges are not only available as part of the rules of evidence, but can also apply outside court proceedings as a substantive doctrine wherever disclosure of information may be compelled, including by administrative agencies.<sup>2</sup> Therefore, privilege may be claimed in the production of documents before a trial (including with respect to an application for discovery or the issue of a subpoena), the answering of interrogatories, the giving of testimony or in the course of an administrative investigation.

14.2 Under the *Evidence Act 1995* (Cth), the following privileges are available:

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<sup>1</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

<sup>2</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466.

- client legal privilege;<sup>3</sup>
- privilege in respect of religious confessions;<sup>4</sup> and
- privilege in respect of self-incrimination in other proceedings.<sup>5</sup>

14.3 In addition, there are three types of evidence which may be excluded in the public interest:

- evidence of reasons for judicial decisions;<sup>6</sup>
- evidence of matters of state (public interest immunity);<sup>7</sup> and
- evidence of settlement negotiations.<sup>8</sup>

14.4 The *Evidence Act 1995* (NSW) contains these and two additional privileges: a professional confidential relationship privilege and a sexual assault communications privilege.<sup>9</sup> The *Evidence Act 2001* (Tas) has the same privileges as the Commonwealth Act. It also contains two additional privileges, ss 127A and 127B, which respectively cover medical communications and communications to a counsellor (by a victim of a sexual offence in the course of receiving counselling or treatment for any harm suffered in connection with the offence). Section 127A operates only in civil proceedings and s 127B operates only in criminal proceedings.

14.5 The privileges under the uniform Evidence Acts (with the exception of s 127, which concerns religious confessions) apply only to the *adducing* of evidence, thus separating the privilege rules under the legislation from the application of the common law in pre-trial evidence gathering processes such as discovery and subpoenas. The Terms of Reference of the previous Evidence inquiry limited the extent to which the ALRC could deal with privileges in the pre-trial context.

14.6 This chapter discusses the effect of the limitation of the privilege provisions of the uniform Evidence Acts to the adducing of evidence at trial and the potential ways in which the Acts could be applied to pre-trial proceedings. The chapter then recommends amendments to some of the client legal privilege sections with the aim of clarifying unclear terms or, in some cases, aligning the Acts with developments at common law

3 *Evidence Act 1995* (Cth) Pt 3.10, Div 1.

4 *Ibid* s 127.

5 *Ibid* s 128.

6 *Ibid* s 129.

7 *Ibid* s 130.

8 *Ibid* s 131.

9 *Evidence Act 1995* (NSW) Pt 3.10, Div 1A and Div 1B (applying to civil matters only). The sexual assault communications privilege available in criminal proceedings is in Chapter 6 of the *Criminal Procedure Act 1986* (NSW). These provisions are discussed in Ch 15.



that are supported by the Commissions. The remaining privileges are discussed in Chapter 15.

### The need for extension of privilege

14.7 Since the commencement of the Commonwealth and New South Wales legislation in 1995, a number of appellate cases have applied the privilege provisions to discovery and inspection of documents on the basis that the uniform Evidence Acts have a derivative application to the common law.<sup>10</sup> However, in *Mann v Carnell*<sup>11</sup> and *Eso v Commissioner of Taxation*,<sup>12</sup> the High Court rejected this approach and found that the uniform Evidence Acts apply to the adducing of evidence only in relevant proceedings. The High Court in *Eso* emphasised the fact that the uniform Evidence Acts had been adopted only by the Commonwealth and certain states. To modify the common law only in those states which had adopted the uniform legislation was considered by the Court to be an unacceptable fragmentation of the common law.<sup>13</sup>

14.8 The introduction of the uniform Evidence Acts has thus created a situation in which two sets of laws operate in the area of privilege. The uniform Evidence Acts govern the admissibility of evidence of privileged communications and information. The common law does not apply. In all other situations the common law rules persist, unless a statute abrogates the privilege.

14.9 This has several consequences:

- within a single proceeding different laws apply at the pre-trial and trial stages;
- different laws also apply in determining privilege applications in the context of warrants and in reviewing decisions of bodies not bound by the uniform Evidence Acts;
- legal practitioners are required to understand and advise on two sets of laws; and
- individuals and bodies are subject to two legal regimes which determine their ability to resist or obtain disclosure of information. Their ability to resist or obtain disclosure of the same information may differ depending on the context in which it is sought.

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10 See *Telstra Corporation v Australis Media Holdings (No 1)* (1997) 41 NSWLR 147; *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360; *Akins v Abigroup* (1998) 43 NSWLR 539; S Odgers, *Uniform Evidence Law* (6th ed, 2004), 451.

11 *Mann v Carnell* (1999) 201 CLR 1.

12 *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

13 *Ibid*, [23].

14.10 This has led to criticism of the uniform Evidence Acts:

The ALRC Reports failed to come to terms in any meaningful way with the practical consequences that would flow from the enactment of detailed provisions governing privilege that would apply only to the admission of evidence once privilege had, under the different common law rules, been determined not to apply to that evidence at the pre-trial process stage.<sup>14</sup>

14.11 Kirby J has stated that a ‘great deal of inconvenience would be avoided if the bringing forward of evidence for use in a later trial (as by responding to an order for discovery, a subpoena or some other ancillary process) were held to fall within the Act’.<sup>15</sup> The Commissions agree that this is an undesirable situation and needs to be addressed. There are different ways of doing so.

**Providing uniformity in the law of privilege in Australia**

14.12 Common law privileges are not merely rules of evidence. Some are free standing common law rights available in all contexts to resist disclosure of information unless abrogated or altered by statute. In order to eliminate the dual regimes created by the uniform Evidence Acts and the common law without diminishing the availability of the common law privileges there are three principal options:

- repeal the privilege provisions of the uniform Evidence Acts and replace them with a provision preserving the common law;
- extend the reach of the uniform Evidence Act provisions to all situations in which the common law applies; or
- remove the privilege provisions from the uniform Evidence Acts and enact a separate Privileges Act with application to all situations in which the common law applies.

14.13 Each option has its own difficulties. The first option would detract from the integrity and completeness of the uniform Evidence Acts. It would also mean the loss of the codification and structure the Acts provide in this area, and in that sense would be a backwards step. It also fails to address the issue of statutory privileges which have no common law equivalent such as the professional confidential relationship privilege and the sexual assault communications privilege.

14.14 The second option would allow uniformity in relation both to the privilege provisions of the Acts which replace common law privileges and to those which create statutory privileges. However, the option involves extending the reach of the uniform evidence Acts beyond their ordinary operation and therefore raises difficulties of

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14 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 416.

15 *Mann v Carnell* (1999) 201 CLR 1, 45.

drafting. In order successfully to replace the common law in all jurisdictions it would also require that the Act be taken up in all states and territories. The Commonwealth lacks power to legislate generally in this area.

14.15 The third option would eliminate some of the difficulty in drafting provisions in the uniform Evidence Acts. However, it shares the disadvantages of the first option in that it would detract from the integrity and completeness of the uniform Evidence Acts. It would also require mirror legislation to be passed in all the states and territories so as effectively to replace the common law.

14.16 While the Commissions are committed to the goal of greater uniformity and are hopeful that the uniform Evidence Acts will be taken up in all Australian jurisdictions, they must confront the practical reality that achieving ultimate uniformity of the law of privilege is dependent on matters beyond the reach of the legislative power of the governments for which this Report is prepared.

14.17 Therefore, the Commissions must consider the best means to achieve the more modest goal of increasing uniformity within uniform Evidence Act jurisdictions beyond that currently provided by the Acts. There are two interrelated issues involved:

- how far to extend the application of the Acts; and
- how best to achieve this.

### **Extending privileges in uniform Evidence Act jurisdictions**

#### ***Scope of the extension of privilege***

14.18 The areas in which the common law applies in uniform Evidence Act jurisdictions can be broadly categorised as follows:

- pre-trial disclosure processes such as discovery, subpoenas and orders to deliver up documents (such as might arise on an injunction application);
- execution of warrants, particularly those authorising seizure of documents;
- hearings before boards of inquiry and tribunals, and disclosure processes issued by those bodies; and
- enforcement of compulsory disclosure powers of government agencies.

14.19 Ultimately, courts are called upon to resolve disputed claims for privilege arising from their own processes, and those arising in other contexts. Therefore, in order to allow courts in uniform Evidence Act jurisdictions to apply a single set of privilege laws, the uniform Evidence Act provisions would need to extend to each of

the above situations. Given the underlying policy behind the statutory privileges created by the Acts, there is a need to extend the operation of the Acts to some or all of these categories.

***Federal and state legislative powers***

14.20 The extension of the uniform Evidence Acts beyond their current sphere of operation raises constitutional issues, particularly in relation to the *Evidence Act 1995* (Cth).

14.21 Commonwealth legislation must be supported by Commonwealth legislative power under the *Australian Constitution*. As presently drafted, the *Evidence Act 1995* (Cth) applies in federal courts, with parts of the Act also extending more broadly to Australian courts. The application of the Act in federal courts can be supported by s 51(xxxix) of the *Constitution* as incidental to the power in s 71 to create federal courts. Certain sections of the *Evidence Act 1995* (Cth) are given extended operation by s 5 of the Act, which provides that the sections listed therein apply in an Australian court. The provisions which have extended operation pursuant to s 5 are independently supported by separate heads of Commonwealth legislative power, such as s 51(xxv).<sup>16</sup>

14.22 As noted above, the Commonwealth does not have any general power to legislate with respect to privilege outside federal courts. Therefore, as with the extended operation given to sections of the *Evidence Act 1995* (Cth) by s 5, any extension of the privilege provisions must be supported by some other head of Commonwealth legislative power. This can be done by confining the extension of the *Evidence Act 1995* (Cth) to:

- pre-trial disclosure processes in federal courts;
- the execution of warrants issued under Commonwealth legislation;
- hearings before, and any compulsory processes of, boards of inquiry and tribunals created by or under Commonwealth legislation; and
- enforcement of compulsory disclosure powers of Commonwealth government agencies.

14.23 In this way the extended application will be supported by the same heads of legislative power which support the provisions requiring disclosure. The Commonwealth could potentially rely on other legislative powers to extend the operation of the privilege provisions to all matters in which a state court exercises federal jurisdiction. Such an extension would however, be undesirable. In Chapter 2,

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<sup>16</sup> *Australian Constitution* s 51(xxv) confers the power to legislate with respect to the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states.

the Commissions argue that the best path to uniformity is through the participation of all states and territories in the uniform Evidence Acts scheme, rather than by mandating the application of the *Evidence Act 1995* (Cth) to all proceedings in all Australian courts exercising federal jurisdiction.

14.24 Federal jurisdiction is enlivened in a number of ways, not all of which will necessarily be apparent at the commencement of proceedings.<sup>17</sup> Extending the operation of the Commonwealth privilege provisions to all matters within federal jurisdiction could lead to uncertainty in relation to the law to be applied, and, given that judicial officers and practitioners would need to be familiar with both the Acts' provisions and the policy underlying the Acts, it could be confusing and unworkable.

14.25 The 'autochthonous expedient', whereby state courts are invested with federal jurisdiction,<sup>18</sup> has operated in Australia almost since federation. In practice, the federal judicial system has always relied heavily on the state court systems to exercise federal jurisdiction. One of the major benefits of this system is that it avoids issues of lack of jurisdiction and enables federal and non-federal issues to be considered in a single proceeding. An integral part of this arrangement has been that the laws of each state, including the laws relating to procedure, evidence, and the competency of witnesses apply to a state court exercising federal jurisdiction, except as otherwise provided by the *Australian Constitution* or the laws of the Commonwealth.<sup>19</sup> Allowing state courts to operate in the same manner regardless of whether they are hearing matters in state or federal jurisdiction avoids uncertainty and the need to consider complicated questions of jurisdiction.

14.26 It was submitted during the course of the Inquiry that it would be helpful to the Commonwealth and Commonwealth agencies to have a single law of privilege applying in whichever jurisdiction they operate.<sup>20</sup> Again the Commonwealth could legislate to extend the privilege provisions, or indeed the whole Commonwealth Act, to proceedings in which the Commonwealth or a Commonwealth agency is a party. However, this could undermine another long established principle that, in proceedings in which the Commonwealth is a party, the rights of parties shall as nearly as possible be the same as in a suit between subject and subject.<sup>21</sup>

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17 For example, a matter arising under Commonwealth legislation may only be raised in the defence, and an issue arising under the *Australian Constitution* or involving its interpretation may be raised on appeal. The Commonwealth may be joined as a party at a later stage of proceedings.

18 *Judiciary Act 1903* (Cth) s 39. See *R v Kirby; Ex Parte the Boilermakers' Society of Australia* (1956) 94 CLR 254.

19 *Judiciary Act 1903* (Cth) s 79.

20 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

21 *Judiciary Act 1903* (Cth) s 64.

14.27 The uniform Evidence Act states are not subject to the same legislative constraints as the Commonwealth. However, the extension of the privilege in the state Acts is limited by two factors—the broad concept of connection with the state,<sup>22</sup> and avoiding inconsistency with Commonwealth legislation.<sup>23</sup> Therefore the state legislation would need to be drafted to apply to:

- pre-trial disclosure processes in state courts;
- the execution of warrants issued under state legislation;
- hearings before, and disclosure processes issued by, boards of inquiry and tribunals created by or under state legislation; and
- compulsory disclosure powers of state government agencies.

14.28 A combination of the state and federal laws would effectively replace common law privilege within uniform Evidence Act states. The *Evidence Act 1995* (Cth) would apply in federal courts and in other clearly identified circumstances.<sup>24</sup>

### ***The means of extending the operation of the provisions***

#### ***Court Rules***

14.29 There have been attempts in uniform Evidence Act jurisdictions to extend the operation of the provisions through the use of court rules.

14.30 In New South Wales, the Supreme Court and the District Court have amended their rules to provide specifically that the *Evidence Act 1995* (NSW) applies pre-trial.<sup>25</sup> Since the enactment of the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW), privileged documents are defined in the Dictionary of the Rules as information that could not be adduced under Part 3.10 of the *Evidence Act 1995* (NSW).<sup>26</sup> The rules apply Part 3.10 of the *Evidence Act 1995* (NSW) to discovery, interrogatories, subpoenas, notices to produce and oral examinations. These rules apply the Act only to civil proceedings and not, for example, to subpoenas in criminal matters.

14.31 In the Federal Court, O 33, r 11 of the *Federal Court Rules* (Cth) states that where the court, by subpoena or otherwise, orders any person to produce any document or thing, and any person makes and substantiates sufficient lawful objection to

22 The extension of the privilege should not exceed the legislative power of the state as set out in its own Constitution: see *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

23 In order to avoid invalidity under s 109 of the *Australian Constitution*.

24 Such as where a state court is called upon to determine a claim for privilege in relation to a warrant issued under Commonwealth legislation.

25 Previously this occurred through the *Supreme Court Rules* Pts 23, 24, 36 and 75, and the *District Court Rules* Pts 22, 22A and 29.

26 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.1].

production on grounds of privilege, the court shall not compel production of that document or thing except to the court for the purpose of ruling on the objection. Under the rule, a 'ground of privilege' means a ground on which a person may rely to make an objection under Part 3.10 of the *Evidence Act 1995* (Cth).<sup>27</sup>

14.32 The effect of this extension in the Federal Court is presently unclear. It was previously assumed that O 33, r 11 had the effect of applying the *Evidence Act 1995* (Cth) pre-trial, as is the case under the New South Wales Supreme Court rules.<sup>28</sup> However, in the recent case of *Seven Network Limited v News Limited*,<sup>29</sup> the Full Federal Court found that such an application was not the intention of the rule. The Court held that the rule is limited to circumstances in which the order to produce the document or thing is made to facilitate its being immediately adduced in evidence, and not to the production of documents under subpoena before the commencement of the trial.<sup>30</sup>

14.33 The incorporation of the provisions of the uniform Evidence Acts through court rules achieves only a limited extension to pre-trial processes in civil proceedings. The soundness of using rules as the means to achieve this end has been questioned, although much will depend on the scope of the rule making power granted by the relevant legislation.

#### ***Inserting a mutatis mutandis provision in the uniform Evidence Acts***

14.34 Another option for extending the operation of Part 3.10 would be to leave the provisions of the Part as they are and insert a single provision requiring the provisions to be applied where disclosure is required as if the objection to production were an objection to giving or adducing evidence. The provisions applying to proceedings would thus apply *mutatis mutandis*.<sup>31</sup> Such a section could be drafted in the following terms:

Where:

- (1) a person is required by a disclosure requirement to give information or produce a document which would result in the disclosure of a communication, document or information of a kind referred to in Part 3.10;<sup>32</sup> and
- (2) that person objects to giving such information or providing such document;

<sup>27</sup> See also *Supreme Court Rules* (ACT) O 34, r 3.

<sup>28</sup> A LeSurdo, *Legal Professional Privilege in the Pre-Trial Compulsion Process* (2005) 43(9) *Law Society Journal* 75, 76.

<sup>29</sup> *Seven Network Limited v News Limited* [2005] FCAFC 125.

<sup>30</sup> *Ibid*, [17] (Branson J).

<sup>31</sup> *Mutatis mutandis* means 'the necessary changes being made'.

<sup>32</sup> Or such provisions of Part 3.10 as are to be extended.

such objection shall be considered and determined by the application of those provisions of Part 3.10 as if the objection to give information or produce the document was an objection to the giving or adducing of evidence of them.

14.35 A ‘disclosure requirement’ could then be defined to include some or all of the situations not currently covered by the Act, within the confines of the jurisdictional limits outlined above.

14.36 If ‘disclosure requirements’ is defined to cover claims for privilege which are determined by courts in the first instance—such as pre-trial disclosure processes issued by the court; warrants; and claims to resist the compulsory powers of government agencies—the drafting is simplified. Each claim of privilege can be tied to the determination of questions by the court.

14.37 However, if ‘disclosure requirements’ includes the compulsory powers of quasi-judicial bodies, such as tribunals and boards of inquiry, a number of issues arise:

- such a provision will sit uneasily with the current application provision in s 4 of the uniform Evidence Acts, which confines the operation of the Acts to courts (as defined). A consequential amendment might be required to clarify the situation;
- who determines the claim for privilege? What if the statute establishing the body hearing the matter provides that the body is not bound by the rules of evidence? Arguably common law privileges still apply because they are not merely ‘rules of evidence’; and
- the *mutatis mutandis* provision would need to make it clear that the uniform Evidence Act privileges apply in respect of such bodies unless they are expressly excluded, in the same manner as the common law privileges must be excluded.

14.38 This raises another problem with this approach—the interaction of the uniform Evidence Acts with provisions in other legislation which abrogate the common law privileges in certain circumstances. If the uniform Evidence Acts are extended to replace the common law, to achieve the same outcome the provisions in other legislation abrogating the common law will need to exclude the operation of the Acts.

### ***Amending Part 3.10***

14.39 The third option for extending the operation of the privilege provisions is to amend Part 3.10 of the uniform Evidence Acts to provide that the provisions are not confined to the adducing of evidence. For example, s 118 of the *Evidence Act 1995* (Cth) could be redrafted in the following terms:

A federal court is not to require disclosure of information by any compulsory process if, on objection by a client, the court finds that it would result in disclosure of:



- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, a lawyer or another person,

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

‘Compulsory process’ could then be defined to include the various contexts in which the provisions are to apply.

14.40 Alternatively, additional sections could be inserted in Part 3.10 applying specifically to pre-trial and non-curial disclosure requirements. The sections could establish the procedure by which privilege is to be claimed, and then replicate the existing privilege provisions as to the basis on which claims for privilege are to be determined.

14.41 The considerations raised in relation to the *mutatis mutandis* provision, regarding the overarching application of the Acts and their interaction with the provisions of other legislation, apply equally to amending Part 3.10.

## Conclusion

14.42 There are a number of imperfect options available to achieve varying degrees of uniformity in the law of privilege. The Commissions are of the view that the best way to achieve uniformity is to enact mirror legislation at the Commonwealth, state and territory levels. Clearly, as more jurisdictions enact a uniform Evidence Act, there will be greater scope for uniformity in areas, such as the law of privilege, where significant difference now exists. In the interim, uniform Evidence Act jurisdictions will have to determine the means and extent to which uniform Evidence Act privileges are to apply in pre-trial and other contexts.

## Client legal privilege

14.43 At common law, legal professional privilege (now characterised as client legal privilege under the uniform Evidence Acts) protected confidential communications between a lawyer and client from compulsory production in the context of court and similar proceedings.

14.44 The rationale for the creation of the privilege was to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between

clients and lawyers, to enable lawyers to give proper advice and representation to their clients.<sup>33</sup> The privilege may also be considered a human right. Wilson J in *Baker v Campbell* commented that ‘the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and ... [the] privilege ... is an important element in that protection’.<sup>34</sup>

14.45 On balance, the benefits of this freedom are considered to outweigh the alternative benefit of having all the information available to the court to assist in decision-making. In *Baker v Campbell*, Deane J described legal professional privilege as ‘a fundamental and general principle of the common law’.<sup>35</sup> The protection only applies where it is intended for a proper purpose—communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected.<sup>36</sup>

14.46 In the Interim Report of the previous Evidence inquiry (ALRC 26), the rationale for the privilege was set out according to the types of communications it protected.

- *Communications between the Lawyer and Client.* Privilege attaches where advice only is sought in addition to the situation where litigation is pending or anticipated. The privilege has been regarded as that of the client and the rationale has been the need for frank and complete communication between lawyer and client so that the client can receive adequate assistance in the protection, enforcement or creation of legal rights.
- *Third Party Communications.* Three arguments were advanced for this protection. First, it was argued that it is necessary that the client be able to prevent disclosure by the lawyer of anything obtained by him or her when employed by the client. If information obtained by a solicitor for promoting his or her client’s cause were not privileged, it would be impossible to employ a solicitor to obtain the evidence and information necessary to support a case. Secondly, the lawyer’s brief should not be subject to compulsory disclosure. Thirdly, it was argued to be contrary to the interests of justice to compel a litigant to disclose to the other side before trial the evidence to be adduced.<sup>37</sup>

14.47 In *Baker v Campbell*, the High Court stated:

The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his [or her] legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance,

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<sup>33</sup> *Baker v Campbell* (1983) 153 CLR 52.

<sup>34</sup> *Ibid.*, 91. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

<sup>35</sup> *Baker v Campbell* (1983) 153 CLR 52, 116–117.

<sup>36</sup> See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Evidence Act 1995* (Cth) s 125.

<sup>37</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

something which would be coincidental in the case of other confidential relationships.<sup>38</sup>

14.48 At common law, the doctrine is subject to a number of key modifications, including the extension of the privilege to investigative and administrative proceedings, such as notices to produce information under s 264 of the *Income Tax Assessment Act 1936* (Cth).<sup>39</sup>

### The test

14.49 A key development in the common law in this area was the shift from a ‘sole purpose’ test to a ‘dominant purpose’ test. Until 1995, for a communication to be protected, it had to be made for the sole purpose of contemplated or pending litigation, or for obtaining or giving legal advice, as enunciated in *Grant v Downs*.<sup>40</sup> In 1999, the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation*<sup>41</sup> overruled *Grant v Downs*, holding that the common law test for legal professional privilege is the dominant purpose test. This is in line with the ALRC’s previous recommendation and with the uniform Evidence Acts.<sup>42</sup>

14.50 Section 118 creates a privilege for legal advice. In ALRC 26, the ALRC recommended changing the name of the privilege from the common law term, ‘legal professional privilege’, to ‘client legal privilege’, reflecting the view of Murphy J in *Baker v Campbell*:

The privilege is commonly described as legal professional privilege, which is unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client’s privilege, so that it may be waived by the client, but not by the lawyer.<sup>43</sup>

14.51 Section 118 provides that evidence is not to be adduced if, on objection by the client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between two or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;

<sup>38</sup> *Baker v Campbell* (1983) 153 CLR 52, 128; See also *ibid*, [878].

<sup>39</sup> *Baker v Campbell* (1983) 153 CLR 52. See S McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 189–190.

<sup>40</sup> *Grant v Downs* (1976) 135 CLR 674.

<sup>41</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

<sup>42</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [881].

<sup>43</sup> *Baker v Campbell* (1983) 153 CLR 52, 85. See also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [438].

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

14.52 Section 119 establishes a ‘litigation privilege’, protecting confidential communications between a client and another person, or a lawyer acting for a client and another person, or the contents of a confidential document that was prepared for the dominant purpose of a client being provided with legal services related to an Australian or overseas proceeding or anticipated proceeding in which the client is or may be a party. The ALRC considered that confidential communications between a lawyer or client and third parties are a part of adversarial litigation and therefore should also be protected by client legal privilege.<sup>44</sup>

14.53 Legal professional privilege at common law can be claimed in civil proceedings at the interlocutory stage, during the course of a criminal or civil trial, and in non-judicial proceedings.<sup>45</sup> *Baker v Campbell* established that the doctrine applies ‘in the absence of some legislative provision restricting its application ... to all forms of compulsory disclosure of evidence’.<sup>46</sup>

14.54 While the scope of legal professional privilege at common law is expansive, it only applies to communications given or received for the dominant purpose of giving legal advice or the provision of legal services. Associate Professor Sue McNicol has described the history of legal professional privilege under Australian law as follows:

Prior to the enactment of the *Evidence Act 1995* (Cth), legal professional privilege was governed by the sole purpose test at common law due to the 1976 decision of the High Court in *Grant v Downs*. Then, since 1983 in Australia, legal professional privilege has applied not only in curial and quasi-curial contexts, but also in non-curial contexts, such as administrative and investigative proceedings, and in the extra-judicial processes of search and seizure and in proceedings before bodies having the statutory power to require the giving of information. This was mainly due to the landmark 4:3 decision of the High Court in *Baker v Campbell* which proclaimed legal professional privilege as more than just a mere rule of evidence capable of applying in judicial proceedings but as a fundamental and substantive common law principle capable of applying to all forms of compulsory disclosure, unless some legislative provision expressly or impliedly abrogated it. Then, in 1995, the *Evidence Act* (Cth) created a privilege, known as client legal privilege, with a dominant purpose test that applies only in the ‘adducing of evidence’ in a curial context (in the Federal courts to which the Act applies) and remained silent on other, especially pre-trial contexts. Such a course of action has led to both much litigation and confusion, especially on the question whether the Act has an indirect or implied effect on pre-trial contexts.<sup>47</sup>

14.55 In the case of client legal privilege, one evidence text notes that in all but a small proportion of cases, all of the privilege issues will arise in relation to pre-trial

<sup>44</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

<sup>45</sup> S McNicol, *Law of Privilege* (1992), 52.

<sup>46</sup> *Baker v Campbell* (1983) 153 CLR 52, 132 (Dawson J).

<sup>47</sup> S McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 189–190.

procedures.<sup>48</sup> McNicol notes that most claims of privilege are raised in the interlocutory stages of civil proceedings.<sup>49</sup>

14.56 To overcome this ongoing problem with the operation of the uniform Evidence Acts, in DP 69 the Commissions proposed that the client legal privilege provisions of the uniform Evidence Acts should apply to pre-trial discovery and the production of documents in response to a subpoena. The Commissions further proposed that the uniform Evidence Acts be extended to apply to other non-curial contexts including search warrants and notices to produce documents.<sup>50</sup>

### ***Submissions and consultations***

14.57 This proposal received widespread support.<sup>51</sup> The Law Society of New South Wales notes that the privilege has been extended to pre-trial matters in New South Wales and that there is no suggestion that any difficulty has arisen in this context.

It is clear that there is a need for legislative uniformity throughout Australia, as well as the need to limit the disparity between the common law and the regulated position both nationally and on a state by state basis.<sup>52</sup>

14.58 The Criminal Bar Association of the Victorian Bar considers that, given the objective of uniformity, it is preferable for the privilege to be provided for in the uniform Evidence Acts, rather than rules of court.<sup>53</sup>

14.59 The Australian Securities and Investments Commission (ASIC) supports the proposal. However, it notes that care should be taken in extending the privilege to ensure that the extension does not apply client legal privilege beyond the scope of legal professional privilege as it is currently recognised at common law.<sup>54</sup>

14.60 The Commonwealth Director of Public Prosecutions (CDPP) opposes the proposal. In its view, to include provisions relevant to non-court investigative

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48 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 416.

49 S McNicol, *Law of Privilege* (1992), 52.

50 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–1.

51 C Ying, *Submission E 88*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Justice R French, *Consultation*, Perth, 5 October 2005; Justice C Branson, *Consultation*, Sydney, 25 July 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005. Submissions to IP 28 were also supportive of the proposal: *ibid*, [13.35]–[13.38].

52 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

53 Criminal Bar Association of Victoria, *Submission E 114*, 22 September 2005.

54 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

processes will involve a departure from the approach of the uniform Evidence Acts generally. That approach is to exclude provisions about extra-curial matters. For example, matters not included in the *Evidence Act* are the obtaining of identification evidence and the obtaining of confessions, both of which are dealt with in detail in the *Crimes Act 1914* (Cth). To extend the operation of the uniform Evidence Acts to investigative processes would mean that the common law test of legal professional privilege would continue to be applied to criminal investigations in non-Evidence Act jurisdictions but the uniform Evidence Act provisions would apply in uniform Evidence Act jurisdictions.

14.61 Where the investigation is being carried out by a federal agency different tests will be applicable. In the CDPP's view, this may be problematic and is arguably worse than the present situation. The CDPP is of the view that client legal privilege is currently abused in investigations being carried out in Australia, and favours a review of the operation of legal professional privilege/client privilege in all jurisdictions.<sup>55</sup>

14.62 The Australian Federal Police supports the standardisation of the rules for client legal privilege in relation to pre-trial court processes, such as subpoenas and discovery, but is cautious in relation to extension to investigatory practices and procedure. It argues that there should be a separate review into extension of privilege to non-curial activities.<sup>56</sup>

### ***The Commissions' view***

14.63 The Commissions strongly support the view that a dual system of client legal privilege operating in any one jurisdiction is undesirable. It is the clear position of the courts in Australia since *Baker v Campbell*<sup>57</sup> that legal professional privilege is a fundamental right that applies to court, administrative and investigative proceedings. The Commissions' view is that, in the interests of clarity and uniformity, the client legal privilege sections of the uniform Evidence Acts should be extended to apply to these pre-trial contexts, as currently regulated by the common law rules of legal professional privilege.

14.64 The current system has resulted in extensive confusion and on-going litigation. Attempts to extend the privilege to some pre-trial matters via the rules of court have led to further litigation. As will be discussed further below, client legal privilege is a heavily litigated area of law and, as a doctrine, continues to develop in response to changing business and legal practices. Should the common law continue to operate pre-trial and the uniform Evidence Acts at trial, there is likely to be an increasing disparity between the two systems which can only add to the complexity of the law in this area.

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<sup>55</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

<sup>56</sup> Australian Federal Police, *Submission E 92*, 20 September 2005.

<sup>57</sup> *Baker v Campbell* (1983) 153 CLR 52.

14.65 Therefore, it is the Commissions' view that the client legal privilege sections of the uniform Evidence Acts should apply to pre-trial contexts and to any situation where a person is requested to produce a document.<sup>58</sup>

14.66 Some of the options available to achieve this are discussed above. The Commissions do not make any specific recommendation about how this recommendation should be implemented. The draft amendments to Part 3.10 included in Appendix 1 contain only those amendments flowing from other recommendations.

***Particular difficulties with investigatory agencies***

14.67 In relation to the concerns raised by ASIC and the Australian Federal Police, the Commissions note that the investigatory powers of agencies are currently bound by the common law rules of legal professional privilege, unless abrogated expressly or by necessary implication.<sup>59</sup> It is not proposed that the application of the uniform Evidence Acts to pre-trial processes extend the protection beyond that conferred by the common law privilege. As the Acts and common law have only minor differences,<sup>60</sup> it is unlikely current practices of investigators will change significantly. As noted above, the civil courts in New South Wales currently apply the *Evidence Act 1995* (NSW) sections to pre-trial matters via rules of court. The Commissions have not been told of any problems with this approach.

14.68 Some legislation that gives administrative agencies investigative powers, such as those exercised by the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO), seeks to abrogate legal professional privilege. In *Daniels v ACCC*, the High Court held that s 155 of the *Trade Practices Act 1974* (Cth)<sup>61</sup> does not abrogate legal professional privilege, because the privilege is an important common law right that can only be abrogated expressly or by necessary implication.<sup>62</sup>

14.69 The ALRC considered this issue in its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95).<sup>63</sup> In that Report, the ALRC

58 One particular concern regarding s 123 in the pre-trial context, raised in DP 69, is addressed below.

59 The Australian Federal Police have general guidelines between themselves and the Law Council of Australia for the execution of search warrants on lawyer's premises where a claim of legal professional privilege is made.

60 Particularly, if the recommendations for amendment in this Report are adopted.

61 This provision gives the ACCC wide powers to require the production of documents, written information and/or evidence to be given by any person who has documents or information that relate to a suspected contravention of the *Trade Practices Act*.

62 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11].

63 Australian Law Reform Commission, *Principled Regulation: Federal and Civil Administrative Penalties in Australia*, ALRC 95 (2002), Ch 19.

acknowledged that there may be circumstances where it is appropriate that legal professional privilege not be available due to the particular investigatory difficulties of commercial regulators (such as ASIC or the ACCC). However, the ALRC said that the approach to that difficulty should be abrogation of the privilege by clear legislative statement. The ALRC argued that, given the importance of these issues, parliament should consider and debate the circumstances where legal professional privilege should not be available.<sup>64</sup> ALRC 95 also noted the huge disparity between the investigative powers of regulators and advocated that a review be undertaken of federal investigative powers and the operation of legal professional privilege with a view to providing greater certainty and consistency.<sup>65</sup> The Commissions support that finding, and consider that the concerns of regulators and investigators regarding the scope of client legal privilege must be addressed through their own legislation, leaving the uniform Evidence Acts to remain of general application.

**Recommendation 14–1** The client legal privilege provisions of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

## Definitions

14.70 In DP 69, the Commissions identified some drafting difficulties with the client legal privilege provisions of the uniform Evidence Acts.<sup>66</sup> Section 117 defines the terms used within the division dealing with client legal privilege. Two proposals were made to change the definition of ‘client’ and ‘lawyer’ under the Act.<sup>67</sup>

### Definition of client

14.71 Under the Division, the term ‘client’ includes:

- (a) an employer (not being a lawyer) of a lawyer;
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is:
  - (i) the Commonwealth or a State or Territory; or

<sup>64</sup> Ibid, [19.48].

<sup>65</sup> Ibid, Rec 19–4.

<sup>66</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.50]. See S McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 417.

<sup>67</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposals 13–2 and 13–3.



- (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

14.72 Under this definition of ‘client’, a private employer of a lawyer may not be a lawyer, whereas a government employer is not so restricted and may be a lawyer.

14.73 Following IP 28, it was put to this Inquiry that, provided sufficient independence is established, there is no sound policy reason why legal advice cannot be provided to a lawyer, that lawyer being a client of a lawyer in their employ.<sup>68</sup> With increasing fields of specialisation, it is not unreasonable to think that law firms will want to seek advice on particular matters, perhaps from their own specialists.<sup>69</sup>

14.74 The previous Evidence inquiry did not make specific reference to this issue and, in the drafting of the Bill, the proviso that a private employer of a lawyer not be a lawyer was added.

14.75 In the pre-uniform Evidence Act case of *Waterford v Commonwealth*, the High Court considered the issue of whether the government could claim legal professional privilege in respect of legal advice from its own salaried legal officers, and found that the privilege did apply.<sup>70</sup> Although this case involved a specific context of government employees exercising statutory functions, the Court also considered the case of the employed legal advisor more generally. Independence and competence were established as the basis on which the privilege could be granted. To show the requisite independence, Deane J said that salaried legal advisors should be ‘persons who, in addition to any academic or other practical qualifications, were listed on a roll of current practitioners, held a current practising certificate, or worked under the supervision of such a person’.<sup>71</sup>

14.76 In the case of government employees, Brennan J drew a distinction between salaried employees of government and non-government agencies. His Honour considered that the professional independence of government lawyers was protected by

<sup>68</sup> S McNicol, *Consultation*, Melbourne, 17 March 2005.

<sup>69</sup> Ibid.

<sup>70</sup> *Waterford v Commonwealth* (1987) 163 CLR 54.

<sup>71</sup> Ibid, 360 cited in S McNicol, *Law of Privilege* (1992), 78.

the statutes under which lawyers in the public service are employed.<sup>72</sup> It is presumably on this basis that the distinction currently drawn in the uniform Evidence Acts is based.

14.77 In *Australian Securities and Investments Commission v Rich*,<sup>73</sup> Austin J stated that independence may be construed as something to be proved as a matter of fact in each circumstance. He cited with approval the summation of DeBelle J in *Southern Equities Corporation Ltd (in Liq) v Arthur Andersen & Co (No 6)* that

the question whether the relationship between the employed solicitor and his employer is such that the communications between them will give rise to legal professional privilege is a question of fact. The party claiming the privilege has the onus of proving that fact.<sup>74</sup>

14.78 Provided the requisite independence exists between the lawyer employer and the legal advisor, it is arguable that the privilege should apply.<sup>75</sup> In DP 69, the Commissions argued that the increasing complexity of legal practice is such that it is appropriate for legal advice provided to a private lawyer employee to be covered by the privilege. It was proposed that s 117(a) of the uniform Evidence Acts be amended to allow that a 'client' is an employer of a lawyer, which may include lawyers who employ other lawyers.<sup>76</sup>

### ***Submissions and consultations***

14.79 This proposal received significant support in submissions.<sup>77</sup> The Law Society of New South Wales notes that in the context of increasing specialisation, law firms frequently seek advice from their own specialist lawyers, for example, in employment and tax areas. The proposed amendment would make the situation consistent with that of a government employer.<sup>78</sup>

14.80 The New South Wales Public Defenders Office (NSW PDO) opposes the proposal on the basis that, in public policy terms, the decision-making process in the Director of Public Prosecutions (DPP) office should be as transparent as possible.<sup>79</sup> However, the Commissions do not believe this amendment will reduce the transparency of the DPP, as that agency is already likely to be covered by s 117(c).

<sup>72</sup> *Waterford v Commonwealth* (1987) 163 CLR 54, 356 cited in S McNicol, *Law of Privilege* (1992), 78.

<sup>73</sup> *Australian Securities and Investments Commission v Rich* [2004] NSWSC 1089, [41].

<sup>74</sup> *Southern Equities Corporation Ltd (in Liq) v Arthur Andersen & Co (No 6)* [2001] SASC 398, [11].

<sup>75</sup> The issue of independence and competence is discussed further below.

<sup>76</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–2.

<sup>77</sup> Justice R French, *Submission E 119*, 6 October 2005; Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

<sup>78</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>79</sup> New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

14.81 The Commissions remain of the view that it is unnecessary for the uniform Evidence Acts to draw a distinction between government and private lawyers in allowing a client to be an employee of the lawyer. The Commissions recommend that, for the purposes of the client legal privilege provisions of the uniform Evidence Acts (Part 3.10), a client of a lawyer be defined as a person who engages a lawyer to provide professional legal services, or who employs a lawyer for that purpose, including under a contract of service (for example, as in-house counsel). The suggested amendments to the definition of ‘client’ in s 117(1)(a) implement this recommendation.

**Recommendation 14–2** Section 117(1)(a) of the uniform Evidence Acts should be amended to allow that a ‘client’ of a lawyer be defined as a person who engages a lawyer to provide professional legal services, or who employs a lawyer for that purpose, including under a contract of service (for example, as in-house counsel).

### Definition of lawyer

14.82 Section 117(1) defines a lawyer as including an employee or agent of a lawyer. The Acts further define a lawyer as meaning a barrister or solicitor.<sup>80</sup> The issue of whether that definition of ‘lawyer’ means that a person must hold a current practising certificate was raised in a number of consultations throughout this Inquiry. It is an increasingly common scenario that in-house lawyers employed by a corporation or government department do not have a practising certificate.<sup>81</sup>

14.83 It has been unclear under the Acts whether ‘a barrister or solicitor’ means that the lawyer must hold a current practising certificate or whether it is sufficient to be admitted as either type of legal practitioner on the roll of the relevant court.

14.84 In DP 69, the Commissions considered this issue at some length. At the time of writing the Discussion Paper, Crispin J in the Australian Capital Territory Supreme Court had found in *Vance v McCormack* that privilege only attached where the lawyer concerned held a current practising certificate or had a statutory right to practice.<sup>82</sup> Crispin J based this finding on the rationale for legal professional privilege,<sup>83</sup> being the public interest in proper representation of clients. Where a legal advisor has no right to

<sup>80</sup> Uniform Evidence Acts s 3.

<sup>81</sup> See, eg, S McNicol, *Consultation*, Melbourne, 17 March 2005.

<sup>82</sup> *Vance v McCormack* (2004) 154 ACTR 12. This case concerned advice given by legal and military officers employed by the Department of Defence.

<sup>83</sup> Crispin J determined that this case concerned an application for an order to produce documents for inspection pre-trial, so the common law of legal professional privilege applied rather than the uniform Evidence Acts.

represent a client, no privilege should attach.<sup>84</sup> His Honour noted that, in Australian jurisdictions, the statutory right to *practise* law generally depends on the holding of a practising certificate.<sup>85</sup> The only other example of a statutory right to practise noted by his Honour was that conferred on certain Commonwealth officers by the *Judiciary Act 1903* (Cth) or Acts granting powers to the holders of specified positions such as a Director of Public Prosecutions or Solicitor-General.

14.85 In August 2005, the ACT Court of Appeal overturned this decision, finding that Crispin J had erred by applying the common law test rather than the *Evidence Act 1995* (Cth) test when considering if the documents were covered by client legal privilege.<sup>86</sup>

14.86 In considering the definition of ‘lawyer’ under s 117, the Court of Appeal found that a practising certificate was an important indicator, but not conclusive on the issue of whether the legal advice was sufficiently independent to constitute legal advice under the *Evidence Act* requirements.<sup>87</sup>

Admission to practise of itself carries with it an obligation to conform to the powers of the Court to remove or suspend a legal practitioner for conduct that the Court considers justifies such a determination. Under s 55D(1)(b) of the *Judiciary Act 1903* (Cth), a person whose name is on the roll of barristers, solicitors or legal practitioners of the Supreme Court of a State or Territory is entitled to practise as a barrister or solicitor in any Territory unless suspended or disentitled by Court order ... The person remains bound to uphold the standards of conduct and to observe the duties undertaken upon admission to the roll of practitioners. The holding of a practising certificate reinforces that regime and makes it more immediately applicable but the underlying obligations subsist even if a current practising certificate is not held.<sup>88</sup>

14.87 The Court of Appeal noted that the privilege under s 118 is limited to communications for the dominant purpose of providing legal advice. Therefore, government lawyers who provide policy or other types of advice will not be covered when they act in those other capacities.<sup>89</sup> It concluded that the possession of a certificate will be a very relevant fact in determining whether or not an employed lawyer is providing independent, professional legal advice sufficient to make a claim of client legal privilege.

To make the holding of a practising certificate a pre-condition for such a claim, however, seems to us to go beyond the requirements of the *Evidence Act* and to amount to appellable error.<sup>90</sup>

84 *Vance v McCormack* (2004) 154 ACTR 12, [38]–[40].

85 *Ibid* [28], citing, eg, *Legal Practitioners Act 1970* (ACT) s 22; *Legal Profession Act 1987* (NSW) s 25; *Legal Practice Act 1996* (Vic) s 314.

86 *Commonwealth v Vance* [2005] ACTCA 35. The ACT Court of Appeal found that *Supreme Court Rules 1937* (ACT) O 34, r 3 applied the *Evidence Act 1995* (Cth) pre-trial.

87 *Ibid*, [20].

88 *Ibid*, [21].

89 *Ibid*, [28].

90 *Ibid*, [30].

14.88 The Court cited *Australian Hospital Care v Duggan (No 2)* in support of this finding.<sup>91</sup> That case concerned advice given by an in-house company lawyer who had been admitted to practise and held a practising certificate in the past, but did not hold a current Victorian practising certificate. In that case, Gillard J extensively outlined the case law establishing independence as a crucial element of the features that must be present for legal professional privilege to apply in respect of a confidential communication between a private sector employer and its own employee lawyer.<sup>92</sup>

[I]n my opinion there [are] sufficient dicta to support the proposition that the employee legal adviser when performing his role in a communication concerning a legal matter must act independently of any pressure from his employer and if it is established that he was not acting independently at the particular time then the privilege would not apply or if there was any doubt the court should in those circumstances look at the documents.<sup>93</sup>

14.89 Gillard J came to the conclusion that ‘the facts of qualification and entitlement to practice are safeguards against a legal practitioner failing to act independently’ but were not conclusive.

In some circumstances the failure to have a practising certificate would carry substantial weight on the question of lack of independence but each case must depend on its own particular circumstances and no doubt a court would be more concerned with the qualifications and experience of the lawyer in question more so than the question of registration.<sup>94</sup>

### **Overseas lawyers**

14.90 In *Kennedy v Wallace*,<sup>95</sup> the Full Federal Court considered whether legal professional privilege<sup>96</sup> applies to advice obtained from an overseas lawyer. Allsop J (with whom Black CJ and Emmett J agreed on this point) found that the rationale of the privilege—serving the public interest in the administration of justice—and its status as a substantive right, mean it should not be limited to serving the administration of justice only in Australia.<sup>97</sup> His Honour stated that the nature of modern commercial life

91 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131.

92 Ibid, [35]–[59]. See, eg, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v Commonwealth* (1987) 163 CLR 54.

93 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131, [54]. This view was also espoused in *Australian Securities and Investments Commission v Rich* [2004] NSWSC 1089. See also Brennan J in *Waterford v Commonwealth* (1987) 163 CLR 54, 71: ‘If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. ... Independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted’.

94 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131, [99].

95 *Kennedy v Wallace* (2004) 142 FCR 185.

96 This case concerned the common law as it was in relation to a pre-trial application.

97 *Kennedy v Wallace* (2004) 142 FCR 185, 220.

and the increasingly global interrelationship of legal systems ‘make the treatment of the privilege as a jurisdictionally specific right, in my view, both impractical and contrary to the underlying purpose of the protection in a modern society’.<sup>98</sup> The Court held that it is unnecessary to show that the overseas lawyer has the same ethical and legal responsibilities as an Australian lawyer.

### ***Submissions and consultations***

14.91 In DP 69, the Commissions proposed that the current definition of a lawyer as a ‘barrister or solicitor’ in the Dictionary of the Acts be amended to read a ‘person admitted to practi[s]e as a legal practitioner, barrister or solicitor in an Australian jurisdiction or in any other jurisdiction’.<sup>99</sup> This proposal was designed to clarify that a practising certificate is not a pre-requisite for privilege to arise under the Acts and to adopt the position of the common law regarding advice from foreign lawyers as outlined in *Kennedy v Wallace*.

14.92 This proposal was generally supported in submissions.<sup>100</sup> The NSW PDO supports the proposal that lawyers practising overseas be included for the purpose of client legal privilege.<sup>101</sup> The Law Society of New South Wales agrees that it is the substance of the relationship that is of importance rather than a strict requirement to hold a practising certificate. The Society also agrees with the view of Allsop J in *Kennedy v Wallace* that client legal privilege should not be a jurisdictionally specific right.<sup>102</sup>

14.93 In consultations, the issue was raised whether there will be difficulties in extending the privilege to communications with lawyers in jurisdictions where the rules regarding admission of legal practitioners are not comparable with those in Australia or where the concept of legal professional privilege does not exist.<sup>103</sup>

14.94 Both ASIC and the Australian Government Attorney-General’s Department note that the terms used in the definition of a ‘lawyer’ should be consistent with the National Legal Profession Model Bill endorsed by the Standing Committee of

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98 Ibid, 220.

99 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–3.

100 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Australian Government Solicitor, *Submission E 28*, 18 February 2005.

101 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

102 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

103 NSW Law Society Litigation Law and Practice Committee, *Consultation*, Sydney, 26 August 2005; Justice R French, *Consultation*, Perth, 5 October 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

Attorneys-General (SCAG).<sup>104</sup> At the time of writing, New South Wales, Victoria and Queensland have enacted the model laws.<sup>105</sup> Under the Model Bill, an Australian lawyer is a person who is admitted to the legal profession,<sup>106</sup> and a legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.<sup>107</sup>

14.95 Victoria Police does not oppose the proposed definition, but suggests that consideration be given to including a definition of ‘police prosecutor’ in the Dictionary to clarify the role of qualified police members in summary courts.<sup>108</sup> Given that the arrangements for police prosecutors differ across jurisdictions, the Commissions note that this suggestion could be taken up by individual states and territories adopting the uniform Evidence Acts, if required.

### **Commissions’ view**

14.96 The Commissions support the view of the ACT Court of Appeal in *Commonwealth v Vance*, that it is the substance of the relationship that is of importance, rather than a strict requirement that the lawyer hold a practising certificate. It is at the time of admission that professional standards and obligations are conferred on a practitioner and it is these professional obligations that serve as a mark of the lawyer’s independence. The foundation for the availability of the privilege goes beyond the individual services provided to the client—the privilege is also granted to ‘enhance the function of the adversarial system of justice’.<sup>109</sup> On this basis, the privilege should be flexible enough to take into account changing practices and contexts in which lawyers are employed.

14.97 The impetus to limit the privilege to lawyers with current practising certificates may stem from fears that lawyers providing general policy or risk management advice might have the entirety of their work covered by the privilege. However, as noted by the ACT Court of Appeal, the dominant purpose test remains the ultimate limitation on the operation of the privilege. The Commissions believe that, provided the communication meets the test of being provided for the dominant purpose of providing legal advice,<sup>110</sup> or being provided with professional legal services,<sup>111</sup> relating to an

104 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005; Attorney-General’s Department, *Submission E 117*, 5 October 2005.

105 See *Legal Profession Act 2004* (Qld), *Legal Profession Act 2004* (Vic) and *Legal Profession Act 2004* (NSW). Other states and territories are expected to follow.

106 See, for example, *Legal Profession Act 2004* (NSW) s 5.

107 Ibid s 6.

108 Victoria Police, *Submission E 111*, 30 September 2005.

109 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10340].

110 As provided for under the uniform Evidence Acts s 118.

111 As provided for under the uniform Evidence Acts s 119.

Australian or overseas proceeding, the fact that the lawyer does not have a practising certificate will not extend the scope of the privilege to an unwarranted degree.

14.98 The Commissions agree that the privilege under the uniform Evidence Acts should apply to advice sought from an overseas lawyer, for the reasons stated by Allsop J in *Kennedy*. The concerns regarding a possible extension of the privilege to lawyers in jurisdictions that are not governed in a similar manner to the Australian legal profession are noted. However, in *Kennedy*, Black CJ and Emmett J took the view that, in the ordinary case of a client consulting a lawyer about a legal problem, proof of those facts will be a sufficient basis for a conclusion that legitimate legal advice is being sought and given, irrespective of a comparison with the particular legal and ethical obligations of an Australian lawyer.<sup>112</sup> Allsop J took a similar view stating that if a lawyer is admitted to practise in a foreign country, it seems unnecessary to require evidence about legal ethical practices and controls by foreign courts.

If a person is a lawyer in country X and legal advice is sought from that person, one can conclude that the client needs or desires such advice in the facilitation of the orderly and lawful arrangement of his or her affairs as a member of our ‘community’, not using community in any narrow sense.<sup>113</sup>

14.99 The Commissions’ view is that, should unusual facts about the status of a lawyer arise in a particular case, it will be open to the court to find that the prerequisite of the communication being made for the dominant purpose of providing legal advice will not have been made out. It will also be open to the party seeking the information to make a case that if client legal privilege was not available in the jurisdiction in which the communication was made, then it was not a confidential communication for the purpose of the uniform Evidence Acts. These are all matters which can be dealt with on a case-by-case basis.

14.100 The Commissions agree with the submissions stating that the definition of a lawyer in the uniform Evidence Acts should be consistent with that under the Model Legal Profession Bill. The recommendation below has been drafted to achieve this effect.

**Recommendation 14–3** The definition of a ‘lawyer’ in the Dictionary of the uniform Evidence Acts should be amended to provide that a lawyer is a person who is admitted to the legal profession in an Australian jurisdiction or in any other jurisdiction.

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<sup>112</sup> *Kennedy v Wallace* (2004) 142 FCR 185, 192.

<sup>113</sup> *Ibid*, 142.



### **Communications with third parties under the common law**

14.101 In DP 69, the Commissions outlined significant development under the common law regarding the extension of legal advice privilege to cover communications with third parties. This change reflects divergence between the common law and the uniform Evidence Acts (which were intended to replicate the common law in this regard). The Commissions noted in DP 69 that, if the proposal to extend the client legal privilege sections of the Acts to pre-trial proceedings is adopted, the question arises whether the Acts should remain as they are now, or be amended to mirror common law developments.<sup>114</sup>

14.102 In 2004, in *Pratt Holdings v Commissioner of Taxation*, the Full Federal Court held that a third party's communication with a client, even where there is no litigation pending, could potentially be protected by legal professional privilege.<sup>115</sup> Previously, it was thought that the protection would only apply where the third party was not independent, but was acting as the client's agent in making the communication.

14.103 Two related issues arose in *Pratt*. First, as noted above, the chief question was whether communication with a third party, who was not operating as an agent, could be protected. Secondly, under the common law, as with the uniform Evidence Acts, legal professional privilege encompasses both a communication or advice privilege and a litigation privilege. The rationale for the two types of privilege, as expressed in ALRC 26, is noted above. With the extension of the concept of an 'agent' under *Pratt*, the question is asked whether the distinction between the two types of privilege is meaningful.

14.104 In *Pratt* the court considered whether legal professional privilege can extend to cover documents prepared by a firm of accountants for the client. These documents were prepared on the basis that the client would provide them to a firm of solicitors for legal advice.

14.105 At first instance, Kenny J articulated the principles relating to legal professional privilege:

The common law in Australia is, therefore, that legal professional privilege attaches to:

- (1) confidential communications passing between a client and a client's legal advisor, for the dominant purpose of obtaining or giving legal advice ('legal advice privilege'); and

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114 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.91].

115 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

- (2) confidential communications passing between a client, the client's legal advisor and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation ('litigation privilege').<sup>116</sup>

14.106 Kenny J rejected Pratt Holdings' claim to privilege over the accountant's documents on the basis that, under the advice privilege, a client's communication with a third party could only be protected if the third party was 'not truly a third party but, rather, the client's "agent" in making the communication'.<sup>117</sup>

14.107 On appeal, the Full Federal Court rejected this position. The Court took the view that, even though the accountants' firm was not the client's 'agent', this did not mean that the firm's communications with the client could not be privileged.<sup>118</sup> Finn J argued that it is not the relationship between the parties but the function which the third party performs which is of importance. Where that function is to enable the client to make the communication necessary to obtain legal advice, the third party 'has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege'.<sup>119</sup>

14.108 Stone J argued that the requirement that a third party be an agent leads to an artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. In her Honour's view, provided the dominant purpose requirement is met, there is no reason why privilege should not extend to the communication to the expert by the client.<sup>120</sup>

14.109 Finn and Stone JJ considered that it may be difficult for a person seeking legal advice to communicate the problem in respect of which advice is sought without input from a third party.<sup>121</sup>

Extending legal professional privilege to protect communications made for the dominant purpose of obtaining legal advice does not require all communications between legal adviser and client to be protected. If, however, the policy implicit in the rationale for legal professional privilege is not to be subverted, the dominant purpose criterion must be applied recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he or she is to be able to instruct the legal adviser appropriately.<sup>122</sup>

116 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2003) 195 ALR 717, [39]. See V Morfuni, 'Legal Professional Privilege and the Government's Right to Access Information and Documents' (2004) 33 *Australian Taxation Review* 89, 107.

117 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2003) 195 ALR 717, [54]. See also J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60 from which the quotation is taken.

118 J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60.

119 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [42].

120 *Ibid.*, [106].

121 *Ibid.*, [42], [104]; see V Morfuni, 'Legal Professional Privilege and the Government's Right to Access Information and Documents' (2004) 33 *Australian Taxation Review* 89, 108.

122 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87] (Stone J).

14.110 Both judges viewed the dominant purpose test as the appropriate limitation on the availability of privilege. Stone J argued that the rationale in *Pratt* will not be likely to extend the boundaries of client legal privilege as the dominant purpose test will still need to be met. Her Honour noted, for example, that advice about commercially advantageous ways to structure a transaction are extremely unlikely to attract privilege because the purpose of the advice will, in most cases, be independent of the need for legal advice. Even if the parties intend that the advice will be submitted to a lawyer for comment, the purpose is still unlikely to be considered the dominant purpose for seeking the advice.<sup>123</sup>

***Maintaining a distinction between advice and litigation privilege***

14.111 It is suggested that the decision in *Pratt* is indicative of a move away from distinguishing between legal advice and litigation privilege.

Arguably, the Full Court's approach represents a significant extension of the advice privilege, to a point where there is now little theoretical distinction between the advice privilege and the litigation privilege.<sup>124</sup>

14.112 On this view the correct formulation of client legal privilege would be 'a communication made for the dominant purpose of providing legal services'.<sup>125</sup> The High Court's description of legal professional privilege in *Daniels* is cited as support for this position.

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communication between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.<sup>126</sup>

14.113 By determining that the case could be decided under the head of legal advice privilege, the Full Federal Court in *Pratt* did not have to resolve this issue. However, Stone J indicated that the High Court's exposition of the rationale for legal professional privilege in *Daniels* was consistent with the appellants' submission that there is a single rationale in Australia for legal professional privilege. Her Honour found that the rationale applies both to litigation privilege and legal advice privilege, although she did not accept that adopting a single rationale should lead to a refusal to distinguish between the categories.<sup>127</sup>

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123 Ibid, [107].

124 J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60.

125 S McNicol, *Consultation*, Melbourne, 17 March 2005.

126 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 564.

127 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [86].

14.114 In DP 69, the Commissions accepted the reasoning of Finn and Stone JJ in *Pratt*—that the policy upon which the privilege is granted is consistent with allowing a third party to prepare documentation for the client for the dominant purpose of providing legal advice. It was therefore proposed that s 118(c) be amended to provide that legal advice privilege extends to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice.<sup>128</sup>

### ***Submissions and consultations***

14.115 The Australian Government Solicitor (AGS) supports the proposal, stating:

It is not apparent to us that it will spark an increase in colourable claims for privilege—any more than would be the situation with clients seeking to include unnecessary documents in material sent to their solicitor for advice.<sup>129</sup>

14.116 The proposal was also supported by the NSW DPP,<sup>130</sup> the NSW PDO<sup>131</sup> and in consultation.<sup>132</sup>

14.117 The Law Society of New South Wales supports the amendment, but notes that s 118(a) may also need to be amended to provide that both documents created by a third party and communications with third parties are covered by the privilege.<sup>133</sup>

### ***The Commissions' view***

14.118 The ALRC's view in the previous Evidence inquiry was that the justifications for allowing privilege for third party communications (as outlined above) should be limited to a situation where litigation is pending or in contemplation, and do not apply to the advice context.<sup>134</sup> However, there have been considerable developments in common law thinking since that time.

14.119 In *Pratt*, Kenny J at first instance argued that the precedents were clear, but acknowledged the artificiality and narrowness of the Australian position. After surveying other jurisdictions, her Honour said that the 'more functional' approach adopted in the United States and in Canada (and, to a lesser extent, in New Zealand) may produce a more rational, or less artificial, result.

In the United States and Canada, a finding that a party is an agent for advice privilege purposes is resolved by finding that a communication was made by the agent for the dominant purpose of obtaining legal advice where the communicator was not acting

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128 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–4.

129 Australian Government Solicitor, *Submission E 94*, 16 September 2005.

130 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

131 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

132 Justice R French, *Consultation*, Perth, 5 October 2005.

133 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

134 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [882].

entirely independently and ‘under his own steam’. On the other hand, this more flexible approach puts some strain on the orthodox understanding of privilege, by extending its scope to a wider range of ‘agency situations’ than that presently accepted in English and Australian law.<sup>135</sup>

14.120 The Full Court’s judgment has been contrasted with the English position:

[T]he current position under Australian law [after *Pratt*] appears more coherent and, in its more vigorous use of the dominant purpose requirement, more attuned to the realities of the increasing intermingling of commercial advice with managerial and operational issues in the undertakings of commercial corporations.<sup>136</sup>

14.121 Where the uniform Evidence Acts are intended to mirror the common law it is important that they do not fall behind developments in judicial thinking that are consistent with the overall philosophy on which the relevant provisions are based. The Commissions believe this is one of those examples. The Commissions are of the view, as espoused by Stone J in *Pratt*, that there remain crucial differences between the two types of client legal privilege. Legal advice privilege exists to protect the relationship between a lawyer and client; litigation privilege respects the important functions of the adversarial system. Therefore the distinction should not be abandoned.

14.122 Section 118(c) should be amended to provide that the legal advice privilege extends to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice. It is not recommended to extend the privilege to all communications with a third party as suggested by the Law Society of New South Wales as this may extend unduly the scope of the privilege and result in a greater blurring of the advice and litigation privileges.

**Recommendation 14–4** Section 118(c) of the uniform Evidence Acts should be amended to replace the words ‘the client or a lawyer’ with ‘the client, a lawyer or another person’.

### Loss of client legal privilege

14.123 Client legal privilege can be lost in circumstances such as: where a party has died; where the court would be prevented from enforcing an order of an Australian court; where the communication affects the right of a person; through waiver of the privilege; where the communication may be adduced by a criminal defendant; where

<sup>135</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2003) 195 ALR 717, [72].

<sup>136</sup> T Wilson, ‘The House of Lords Clarifies Purpose and Scope of Advice Privilege’ (2005) 32(3) *Brief* 21, 22.

there are joint clients; and where the communication is made in furtherance of the commission of an offence or fraud.

### **Consent**

14.124 Section 122 concerns loss of client legal privilege by consent, either by express or implied waiver of the privilege. The section is drafted as a general rule, whereby the evidence can be adduced if a client or party has knowingly and voluntarily disclosed the substance of the evidence. There are a number of exceptions to this rule including where the evidence has been disclosed under duress or under compulsion of law.

14.125 The basis for the test of ‘knowingly and voluntarily disclosed’ was to address uncertainty about the effect of voluntary disclosure by the client, and not to allow waiver where a person may have inadvertently disclosed or been compelled to disclose the communication.<sup>137</sup>

14.126 In *Newcastle Wallsend Coal Co Pty Limited v Court of Coal Mines Regulation*, it was held that giving a recording of interview to a client for the sole purpose of checking its accuracy and prohibiting retention of a copy was not ‘knowing and voluntarily disclosing’.<sup>138</sup> However, loss of privilege did occur where a record of interview was given to a witness for his or her own purposes and without the condition that it not be disclosed. In *Department of Public Prosecutions (Cth) v Kane* it was held that inadvertent disclosure of a document due to a clerical mistake did not constitute a ‘knowing and voluntary’ disclosure.<sup>139</sup> This was also the position in *Ampolex v Perpetual Trustee Co Limited* where it was held that disclosure by mistake does not amount to voluntary disclosure.<sup>140</sup>

### **Waiver at common law**

14.127 The approach in s 122 is different to the common law, where traditionally waiver is imputed where the circumstances are such that it is unfair for the client to say that the privilege has not been waived.<sup>141</sup> What is unfair in the circumstances is determined by the conduct of the client.

14.128 In *Attorney-General (NT) v Maurice*, Mason and Brennan JJ stated the principle as follows:

[I]n order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one

137 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].

138 *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351, 389.

139 *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468, 481.

140 *Ampolex v Perpetual Trustee Co Limited* (1996) 40 NSWLR 12, 18–19.

141 A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

part of a protected communication should result in waiver as to the rest of the communication on that subject matter.<sup>142</sup>

14.129 Waiver may be express or implied. Waiver of the privilege is implied or imputed where it is considered that particular conduct is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect.<sup>143</sup> In *Goldberg v Ng*, it was said that the basis of an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. That act or omission will ordinarily involve or relate to a limited (actual or purported) disclosure of the contents of the privileged material.<sup>144</sup>

14.130 *Mann v Carnell* focused the common law test on inconsistency, rather than fairness alone.

What brings about the waiver is the inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and the maintenance of confidentiality; not some overriding principle of fairness operating at large.<sup>145</sup>

14.131 In *DSE (Holdings) Pty Ltd v Interan Inc*, Allsop J noted that by subordinating the notion of fairness to possible relevance in the assessment of the inconsistency between the act and the confidentiality of the communication, *Mann v Carnell* produced an important change to the existing law.<sup>146</sup>

14.132 This approach was recently restated by the Federal Court in *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs*,<sup>147</sup> where it was found that waiver occurs ‘when a party does something inconsistent with the confidentiality otherwise contained in the communication’.<sup>148</sup>

### ***Inconsistent interpretation of s 122***

14.133 The courts have interpreted s 122 inconsistently, in some cases attempting to import the common law notion of fairness into the section.

14.134 In *Telstra Corporation v Australasia Media Holdings (No 2)*,<sup>149</sup> it was held appropriate to extend the scope of the section to include ‘imputed’ waivers and,

142 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 488.

143 *Mann v Carnell* (1999) 201 CLR 1, 13, citing *Goldberg v Ng* (1995) 185 CLR 83, 95.

144 *Goldberg v Ng* (1995) 185 CLR 83, 96.

145 *Mann v Carnell* (1999) 201 CLR 1, 13. See also A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

146 *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [14].

147 *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392. See also M Edelstein, ‘Legal Professional Privilege’ (2004) 78(11) *Law Institute Journal* 54, 57.

148 *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392, [17].

149 *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 351.

accordingly, apply notions of fairness in accordance with previous common law decisions. This was also the position taken in *Perpetual Trustees (WA) v Equiscorp Pty Limited*.<sup>150</sup>

14.135 Conversely, in *Adelaide Steamship Pty Ltd v Spalvins*,<sup>151</sup> the Full Federal Court held that notions of fairness (the common law) do not apply under s 122.

14.136 However, in *Telstra Corporation v BT Australasia Pty Ltd*,<sup>152</sup> the majority of the Full Federal Court found that consent under s 122 can be taken to extend beyond express consent (to include consent that was real and voluntary, although implied) and therefore that the section can be taken to apply to imputed consent.<sup>153</sup> The AGS submits that this would give s 122 a similar operation to the *Mann v Carnell* inconsistency waiver.<sup>154</sup>

14.137 In *Carnell v Mann*, the Full Federal Court stated that ‘the application of the section may well, in any given case, produce an entirely different outcome to that which would follow under the common law doctrine’.<sup>155</sup>

14.138 The major issue identified by the Commissions in DP 69 was whether the prescriptive approach taken in the legislation fails to allow sufficient room for flexibility.<sup>156</sup> One suggested advantage of the common law approach is that it allows the court to decide that there has been an imputed waiver of privilege despite the fact that there has not been an ‘express intentional general waiver of privilege’.<sup>157</sup>

14.139 Stephen Odgers SC has argued that when the courts do not incorporate notions of fairness into s 122,

the provision might result in loss, or retention, of the privilege in circumstances where fairness to the parties would suggest a different result. If that were the case, the adoption of the more flexible common law approach may be preferable, despite the consequent uncertainty it produces.<sup>158</sup>

14.140 In contrast, it has been suggested that one of the disadvantages of applying fairness considerations is that the assessment is too subjective. What is unfair or fair to

150 *Perpetual Trustees (WA) v Equiscorp Pty Limited* [1999] FCA 925.

151 *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360.

152 *Telstra Corporation v BT Australasia* (1998) 85 FCR 152.

153 *Ibid*, 168.

154 Australian Government Solicitor, *Submission E* 28, 18 February 2005. Although in *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [5], [95] Allsop J was of the view that the majority test in *Telstra* was based on the traditional common law considerations of fairness, and therefore narrowed by *Mann v Carnell*.

155 *Carnell v Mann* (1998) 89 FCR 247, 257.

156 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.132].

157 S McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 202.

158 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11040].



one person could be completely the opposite to another. McHugh J argued this point at length in his dissenting judgement in *Mann v Carnell*:

To use an 'unfairness' test for determining waiver after disclosure to a third party also changes the fundamental nature of privilege. It changes privilege from something which inheres in communications as a matter of law to a state of affairs which exists between the parties as a kind of equitable estoppel.<sup>159</sup>

14.141 In DP 69, the Commissions acknowledged that there were a number of difficulties with s 122 as it is presently drafted. In particular, the Commissions accepted criticism of the section as inflexible because it does not take into account factual situations where there may be other conduct inconsistent with the maintenance of the privilege beyond a knowing and voluntary disclosure.

14.142 The Commissions proposed that s 122(2) of the uniform Evidence Acts be amended to allow that evidence may be adduced where a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence or has otherwise acted in a manner inconsistent with the maintenance of the privilege.<sup>160</sup>

#### ***Submissions and consultations***

14.143 This proposal received widespread support.<sup>161</sup> The Criminal Law Committee of the Law Society of New South Wales does not support the proposal on the basis that the operation of s 122 has not presented any problems in practice. The Committee argues that the addition of a new test would make the provision unnecessarily complex and could lead to unintended consequences.<sup>162</sup>

14.144 The Committee also makes a number of drafting recommendations in relation to the proposed draft of s 122 that was contained in Appendix 1 of DP 69.<sup>163</sup> The Commissions have substantially reviewed the drafting of that proposal since DP 69, and the comments of the Committee have been noted in that process.

159 *Mann v Carnell* (1999) 201 CLR 1, 40.

160 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–5.

161 Justice R French, *Submission E 119*, 6 October 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Australian Government Solicitor, *Submission E 28*, 18 February 2005. The NSW PDO states that it does not oppose the proposal: New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

162 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

163 *Ibid.*

***The Commissions' view***

14.145 Section 122 as it is presently drafted is concerned with the *intention* of the holder of the privilege. At common law, the intention of the holder of the privilege may or may not be relevant; rather, it is the *behaviour* of the holder of the privilege that is of concern.<sup>164</sup>

14.146 The Commissions continue to favour the inclusion of additional criteria for waiver of 'an act inconsistent with the maintenance of the privilege'.<sup>165</sup> This view is supported by a majority of submissions. In the Commissions' view, the test of inconsistency under *Mann v Carnell* sits well with the underlying rationale the ALRC expressed for s 122—that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end.<sup>166</sup> The addition of that criterion for waiver gives the court greater flexibility to consider all the circumstances of the case.

14.147 The Commissions therefore recommend that the uniform Evidence Acts be amended to align s 122 (which sets out when client legal privilege under the uniform Evidence Acts is lost because of consent, or voluntary disclosure) more closely with the common law as set out in *Mann v Carnell*.<sup>167</sup> A draft provision is set out in Appendix 1.

**Recommendation 14–5** Section 122(2) of the uniform Evidence Acts should be amended to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege. The existing provisions should remain in a form appropriate to give guidance as to what acts are or are not acts inconsistent with the maintenance of the privilege.

***Section 123: Loss of client legal privilege***

14.148 Section 123 of the uniform Evidence Acts states that:

In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

- (a) confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person;
- or

<sup>164</sup> S McNicol, *Consultation*, Melbourne, 17 March 2005. For example, *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392 which held that waiver can take place even where there is no subjective intention on the part of the client to waive the privilege.

<sup>165</sup> This approach received some support in consultations: A Palmer, *Consultation*, Melbourne, 16 March 2005.

<sup>166</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].

<sup>167</sup> *Mann v Carnell* (1999) 201 CLR 1.

- (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

14.149 The result of s 123 is that the right of a party to claim client legal privilege is lost where the evidence is sought to be adduced by an accused in a criminal proceeding, unless the accused is seeking the evidence from a co-accused.<sup>168</sup> In most cases, the party claiming the privilege will be the prosecution.

14.150 In ALRC 26, the ALRC said that the privilege should be lost when it would result in the withholding of evidence relevant to the defence of an accused.<sup>169</sup> This position was based on the 1972 case of *R v Barton*,<sup>170</sup> which established an exception to legal professional privilege in criminal matters, where an otherwise privileged document might establish the innocence of the accused.<sup>171</sup>

14.151 In ALRC 38, following submissions which argued that the original statement was too broad, the recommendation was narrowed from the position in *Barton* to evidence *adduced* by a defendant in a criminal proceeding. The ALRC's proposed provision also did not operate in respect of communications made between associated defendants and their lawyers. In ALRC 38, the ALRC stated: 'it is proposed that the privilege should not apply to communications to the prosecution unless a client/legal adviser relationship is shown to exist between those involved in the communications'.<sup>172</sup>

14.152 In *Carter v The Managing Partner Northmore Hale Davy and Leake* (a common law case), the High Court disapproved of *Barton*, holding that a person who is in possession of documents, which are subject to legal professional privilege, cannot be compelled to produce them on a subpoena issued on behalf of an accused person in criminal proceedings, even though they may establish the innocence of the accused or materially assist his or her defence.<sup>173</sup>

14.153 In *R v Pearson*,<sup>174</sup> the New South Wales Court of Criminal Appeal considered s 123. Gleeson CJ observed that counsel had agreed that the practical effect of s 123 (when read together with s 118) was that client legal privilege does not stand in the

168 *R v Pearson* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996).

169 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].

170 *R v Barton* [1972] 2 All ER 1192.

171 S McNicol, *Law of Privilege* (1992), 101.

172 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [195].

173 *Carter v The Managing Partner Northmore Hale Davy and Leake* (1995) 183 CLR 121.

174 *R v Pearson* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996).

way of obtaining access to subpoenaed documents ‘in circumstances where a legitimate forensic purpose of the accused at a criminal trial is served by being given access to such documents for the purpose of potential use at the trial’.

14.154 In its submission following IP 28, the NSW DPP noted that the current position is not entirely clear because the ALRC Reports did not canvass this particular issue and, despite the comments in *Pearson*, s 123 has not been the subject of any further judicial consideration.<sup>175</sup>

14.155 In *Director of Public Prosecutions (Cth) v Kane*,<sup>176</sup> the CDPP made a claim for legal professional privilege regarding an advice prepared by one of its solicitors. Section 123 was not considered in depth because it was conceded that an application for a stay was not a ‘criminal proceeding’ under the *Evidence Act 1995* (NSW). However, Hunt CJ at CL stated that, under s 123, the ability to uphold the privilege against a defendant (which was available under the common law) was now lost. His Honour further noted that in order to override client legal privilege the communication must be relevant to the defendant’s criminal proceedings.<sup>177</sup> The communication sought was not deemed to be relevant to the committal proceedings.

14.156 As it presently stands, s 123 overrides client legal privilege in relation to evidence that is adduced by a defendant in criminal proceedings, and not, for example, the pre-trial production of documents on subpoena. As noted above, there is some confusion on this point arising from the decision in *Pearson*. Legal professional privilege under the common law might still provide a basis for resisting production of documents to an accused in criminal proceedings on the basis of the decision in *Carter*.

14.157 In DP 69, the Commissions noted that if the client legal privilege sections of the uniform Evidence Acts are extended to pre-trial matters, s 123 will remove the current common law right to claim legal professional privilege over documents prepared for the purpose of providing legal advice to the Director of Public Prosecutions. The NSW DPP submits that privilege arises most commonly in the context of pre-trial subpoenas, rather than in the context of the adducing of evidence by the defence at trial.<sup>178</sup>

14.158 The DPP could lose the common law right to claim legal professional privilege in relation to confidential documents containing advice from Crown Prosecutors, the private bar and the DPP’s solicitors. If the DPP did lose the right to claim privilege, the NSW DPP anticipates that ‘the defence will routinely subpoena

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175 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

176 *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468.

177 *Ibid*, 478.

178 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

such documents on the basis that it is “on the cards” that the advices will serve some legitimate forensic purpose in relation to the proceedings’.<sup>179</sup>

A fertile area for pre-trial applications will be created when our expectation is that very rarely, if ever, will the legal advice to the Director contain any relevant material which has not already been disclosed to the defence (in other documents, such as the statements of witnesses) pursuant to the prosecutor’s duty of disclosure.<sup>180</sup>

14.159 The NSW DPP submits that, if the uniform Evidence Acts are extended to pre-trial proceedings, s 123 should be amended to preserve the existing common law legal professional privilege of the prosecutor in pre-trial proceedings.

14.160 Section 123 overrides the client legal privilege created by s 118 or s 119. Client legal privilege only applies to communications between staff of a prosecutor or Crown prosecutors where a client and legal advisor relationship is shown to exist. It was noted in ALRC 26 that where s 123 renders client legal privilege unavailable, it does not mean that communications cannot be otherwise protected in appropriate cases, possibly by the operation of public interest immunity or a confidential communications privilege.<sup>181</sup>

14.161 ALRC 26 did not directly canvass the issue of whether s 123 allows the defendant to obtain legal advice provided to a prosecutor. However, it may be inferred from the above comment regarding public interest immunity that it was not envisaged that the defence would be able to adduce any such communication.

14.162 The extension of s 123 to pre-trial contexts may also have an impact beyond the difficulties for prosecutors described above. It would effectively overturn the decision in *Carter* and remove the basis on which any person could claim the privilege in response to a subpoena to produce documents from an accused. This would go against the narrowing of the proposal in ALRC 38, which expressly sought to limit the section to evidence adduced by a defendant in a criminal proceeding.

14.163 On that basis, two alternate proposals were put forward for consideration in DP 69. The first proposal addressed the issue of the availability of the privilege to a prosecutor. That is, if Proposal 13–1 in DP 69 is adopted, s 123 should be amended to preserve the availability of client legal privilege to any legal advice provided to a prosecutor. In the alternative, the Commissions asked whether, if Proposal 13–1 is adopted, s 123 could be exempted from the general extension of the client legal

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179 Ibid.

180 Ibid.

181 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [886].

privilege sections to pre-trial matters and continue to apply only to evidence adduced at trial.<sup>182</sup>

### ***Submissions and consultations***

14.164 The Australian Government Attorney-General's Department supports the view that client legal privilege should be available to advice provided to the prosecuting authorities in the same way, and to the same general extent, that it applies to any other legal advice.<sup>183</sup> The Australian Federal Police also supports the general intent of both proposals.<sup>184</sup>

14.165 The CDPP, whilst noting that it does not support extension of the *Evidence Act* to pre-trial matters, favours the first proposal rather than the alternative. In its view, there should be a clear statement that the privilege does not apply to confidential communications between prosecutors and the Director, rather than limiting the application of s 123.<sup>185</sup> The NSW DPP echoes this position.<sup>186</sup>

14.166 The Law Society of New South Wales supports the alternative proposal. It is of the view that defendants should be able to access any evidence that is exculpatory. The Society also notes that communications between staff of a prosecutor or Crown prosecutors that do not attract client legal privilege as a result of the operation of s 123 would, in appropriate cases, be protected by other means such as public interest immunity.<sup>187</sup>

14.167 The NSW PDO does not support the proposal on the basis that an accused should be able to access information in relation to charges. It believes the amendment is unnecessary as an accused seeking to use such material will face considerable hurdles. The accused will have to satisfy the judge that there is a legitimate forensic purpose in obtaining access to the material, and if there is sensitive material in the advice, a claim for public interest immunity could be made. The NSW PDO also argues that, in most cases, it would be very difficult for the accused to establish the relevance of material in the advice. If the material sought to be protected contains no relevant material, access to and use of the material will not be permitted. If the material sought to be protected is relevant to the case, then under the prosecution's duty of disclosure it should have been disclosed to the accused in any event.<sup>188</sup>

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182 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–6 and Alternative Proposal 13–6.

183 Attorney-General's Department, *Submission E 117*, 5 October 2005.

184 Australian Federal Police, *Submission E 92*, 20 September 2005.

185 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

186 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

187 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

188 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

***The Commissions' view***

14.168 The Commissions agree that it would be undesirable if the extension of the privilege sections of the uniform Evidence Acts to pre-trial proceedings had the effect of abrogating client legal privilege in relation to any legal advice given to the DPP. The policy foundation of client legal privilege—frank and complete communication between lawyer and client—applies equally to the DPP. Given the obligation on the prosecution to reveal all material evidence, significant court time could be spent in applications by the defence to gain access to advice that will have little bearing on the substantive issues in the case. Counsel or solicitors may also feel constrained in the provision of their advice for the DPP if such information could be made available later.

14.169 The extension of s 123 to pre-trial contexts may also have an impact beyond the difficulties for prosecutors described above. It would effectively overturn the decision in *Carter* and remove the basis on which any person could claim the privilege in response to a subpoena to produce documents from an accused. This would go against the narrowing of the proposal in ALRC 38, which, as mentioned above, expressly sought to limit the section to evidence adduced by a defendant in a criminal proceeding. Whilst the first proposal would address the concerns raised by prosecutors, it leaves open the issue of the otherwise privileged material of other parties being open to access by the accused. The Commissions are concerned that there has not been adequate time to explore the full impact of such a change, and recommend keeping the original limitation on s 123 intended by the previous Evidence inquiry. Therefore if Recommendation 14–1 is adopted, s 123 should remain only applicable to the adducing of evidence at trial by an accused in a criminal proceeding.

**Recommendation 14–6** If Recommendation 14–1 is adopted, s 123 of the uniform Evidence Acts should remain applicable only to the adducing of evidence at trial by an accused in a criminal proceeding.

**Client legal privilege and government agencies**

14.170 In response to IP 28, the New South Wales Ombudsman submits that serious thought should be given to whether client legal privilege should continue to be a basis for denying a ‘watchdog body’ access to documents.<sup>189</sup> The submission states that

it is open to question whether in fact client professional privilege is either necessary or effective in achieving its objective of ensuring frank and candid communication where public sector agencies and public officials are concerned. Further, the

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189 NSW Ombudsman, *Submission E 13*, 27 January 2005.

experience of the NSW Ombudsman has shown that the privilege can be abused and often serves little or no good purpose in practice.<sup>190</sup>

14.171 To address these issues, the New South Wales Ombudsman proposes two options for amending the uniform Evidence Acts:

- incorporation of provisions of the uniform Evidence Acts that clearly abrogate the privilege in relation to investigations being conducted by watchdog bodies set up by Commonwealth, state or territory governments; or
- amendments to the uniform Evidence Acts to provide that information and documents relating to accountability of government may not be withheld from disclosure to a statutory watchdog—for example, information and documents relating to the affairs of an agency or the conduct of public officials which: (i) contain or disclose information likely to contribute to positive and informed debate about issues of serious public interest; and (ii) contain or disclose information likely to assist the investigation of alleged misconduct or illegality by public sector agencies or officials.<sup>191</sup>

14.172 In DP 69, the Commissions accepted the New South Wales Ombudsman's argument that the rationale for client legal privilege must be balanced against the clear public interest in open and accountable government. This balancing act has been discussed in many of the major cases where legal professional privilege has been claimed by government agencies, for example, in *Waterford v Commonwealth*.<sup>192</sup>

14.173 The uniform Evidence Acts are Acts of general application. An analogy can be drawn between the investigatory concerns of the Ombudsman and the arguments raised by regulatory agencies such as ASIC and the ACCC in relation to their investigations. As noted above, ALRC 95 acknowledged that there may be times when the public interest in the conduct of investigations overrides the public interest in client legal privilege. In those circumstances, the ALRC recommended that the privilege be expressly abrogated.<sup>193</sup> It expressed a preference for the view that such action be taken in the legislation of the agencies concerned, not the uniform Evidence Acts.

14.174 In DP 69, the Commissions asked whether the uniform Evidence Acts should abrogate client legal privilege in relation to investigations being conducted by watchdog agencies, such as the Commonwealth Ombudsman and state and territory ombudsmen. Alternatively, should the client legal privilege sections of the Acts be

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190 Ibid.

191 Ibid. A number of other examples were given in the submission.

192 *Waterford v Commonwealth* (1987) 163 CLR 54.

193 Australian Law Reform Commission, *Principled Regulation: Federal and Civil Administrative Penalties in Australia*, ALRC 95 (2002), [19.48].



amended to create an exception for information and documents relating to the accountability of government?<sup>194</sup>

### ***Submissions and consultations***

14.175 There is general agreement in submissions and consultations that the abrogation of client legal privilege in relation to investigations by watchdog agencies is a matter for the particular statutes establishing those agencies.<sup>195</sup>

14.176 The AGS endorses the view of the Commissions in DP 69 and states that there is no reason to amend the uniform Evidence Acts. The AGS advises that at the Commonwealth level, s 9(4) of the *Ombudsman Act 1976* (Cth) abrogates client legal privilege (and legal professional privilege) with respect to the Ombudsman's power to obtain information or documents that would disclose legal advice given to a Commonwealth Minister, Commonwealth Department or prescribed authority.<sup>196</sup>

14.177 The Police Integrity Commission (PIC) also supports this view. It submits that, in relation to its own investigatory powers, the abrogation of client legal privilege is set out in detail within the legislation that sets out the Commission's functions and powers. It also notes that under this approach, the privilege is not uniformly abrogated against all of the PIC's powers, but more commonly in those powers that relate to hearings held for the purpose of an investigation. It considers that this permits the limitation or abrogation of privileges to be accomplished with some particularity and then only to the extent necessary with reference to the particular nature and functions of the relevant body.<sup>197</sup>

14.178 However, the NSW PDO submits that client legal privilege should be abrogated in relation to investigations conducted by watchdog agencies, such as the Ombudsman, but only in so far as it applies to legal professional privilege claimed on behalf of a government agency.<sup>198</sup> This view is shared by Victoria Police.<sup>199</sup>

### ***The Commissions' view***

14.179 The Commissions remain of the view expressed in DP 69, that any abrogation of client legal privilege in relation to the particular investigatory difficulties of an

194 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 13–1.

195 Justice R French, *Submission E 119*, 6 October 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Justice C Branson, *Consultation*, Sydney, 25 July 2005; Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

196 Australian Government Solicitor, *Submission E 28*, 18 February 2005.

197 Police Integrity Commission, *Submission E 99*, 16 September 2005.

198 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

199 Victoria Police, *Submission E 111*, 30 September 2005.

agency should be expressly provided for in the legislation of that agency. It is noted in one submission that the extent of the abrogation must be limited to the extent necessary for each agency to carry out its own statutory purpose.<sup>200</sup> A provision placed in an Act of general application could result in unnecessary abrogation of the privilege in some instances.

14.180 On that basis, it is recommended that no change be made to the uniform Evidence Acts in this regard.

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200 Justice R French, *Submission E 119*, 6 October 2005.

## 15. Privilege: Other Privileges

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### Introduction

15.1 This chapter considers the confidential relationship, sexual assault and medical communications privileges available under the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas).

15.2 The chapter also makes a number of recommendations aimed at addressing criticisms of the certification process available under the sections dealing with the privilege against self-incrimination. Finally, the chapter considers the types of evidence that may be excluded in the public interest and the exclusion of evidence of settlement negotiations.

### Privileges protecting other confidential communications

#### Professional confidential relationship privilege

15.3 Under the common law, the only relationship in which communications are protected from disclosure in court is that between a lawyer and a client. In ALRC 26, the ALRC proposed the creation of a further discretionary privilege that would cover confidential professional relationships. Such a privilege would cover communications and records made in circumstances where one of the parties is under an obligation (legal, ethical or moral) not to disclose them.

15.4 The ALRC determined that there are many relationships in society where a public interest could be established in maintaining confidentiality.<sup>1</sup> These relationships could include, for example, doctor and patient, psychotherapist and patient, social worker and client or journalist and source.<sup>2</sup> In ALRC 26, the Commission noted that, for example, there are circumstances in which confidentiality is crucial to the furtherance of an accountant and client relationship.<sup>3</sup> Given the controversial nature of some of these categories, and the aim of the uniform Evidence Acts to allow as much evidence as possible to be made available in court proceedings, the ALRC proposed that such a privilege be granted at the discretion of the court, stating:

The public interest in the efficient and informed disposal of litigation in each case will be balanced against the public interest in the retention of confidentiality within the relationship and the needs of particular and similar relationships.<sup>4</sup>

15.5 This proposal was not adopted as part of the *Evidence Act 1995* (Cth). However, the *Evidence Act 1995* (NSW) provides for a professional confidential relationship privilege.<sup>5</sup> Section 127A of the *Evidence Act 2001* (Tas) provides an absolute privilege for medical communications in civil proceedings.

15.6 In 1993, the Law Reform Commission of Western Australia (LRCWA) recommended the enactment of a general discretion to protect information disclosed in the course of a confidential relationship. The recommendation was based on s 35 of the *Evidence Amendment Act (No 2) 1980* (NZ) and was similar to the ALRC's recommendation, proposing that the court weigh the public interest in having the evidence disclosed against the public interest in the preservation of confidentiality between the confider and the professional.<sup>6</sup> This proposal has not been adopted in Western Australia to date.

### Confidential relationship privilege: New South Wales

15.7 Under s 126A of the *Evidence Act 1995* (NSW), a 'protected confidence' for the purpose of the section means a communication made by a person in confidence to another person (the confidant):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

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1 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [911].

2 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [201].

3 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [955].

4 Ibid, [955]. See also Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), xxi.

5 *Evidence Act 1995* (NSW) Pt 3.10, Divs 1A. The *Evidence Act 2004* (NI) follows the NSW model and has a qualified confidential relationship privilege.

6 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Relationships* Project No 90 (1993), 129–130.

## 15.8 Section 126B provides:

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
  - (a) a protected confidence, or
  - (b) the contents of a document recording a protected confidence, or
  - (c) protected identity information.
- (2) The court may give such a direction:
  - (a) on its own initiative, or
  - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
  - (a) the probative value of the evidence in the proceeding,
  - (b) the importance of the evidence in the proceeding,
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
  - (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
  - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

15.9 Although the ALRC's reports were canvassed in the context of the New South Wales amendments, Odgers cites the source of the privilege as the New South Wales Attorney General's Department 1996 Discussion Paper *Protecting Confidential Communications from Disclosure in Court Proceedings*.<sup>7</sup> The discretionary approach to such a privilege, as advocated by the ALRC, was adopted in the New South Wales amendments.

The evidence must be excluded if there is a likelihood that harm would be or might be caused, whether directly or indirectly, to the person who imparted the confidence and the nature and extent of that harm outweighs the desirability of having the evidence given or the documents produced.<sup>8</sup>

15.10 Division 1A does not create a true privilege, but allows the court a discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence.<sup>9</sup> The court must balance the matters set out in s 126B(4), including the probative value of the evidence in the proceeding and the nature of the offence, with the likelihood of harm to the protected confider in adducing the evidence, and then decide if it is appropriate to give a direction under the section.

15.11 There have not been a significant number of cases concerning Division 1A. In *Urquhart v Latham*, Campbell J considered how the test in s 126B should be exercised. His Honour noted that 'there is a policy concerning the protection of confidences which underlies s 126B, which requires matters favouring the protection of professional confidences, of the type defined in s 126A, to be taken into account in the exercise of discretions about what evidence should be admitted in a hearing'.<sup>10</sup>

15.12 The limits of the term 'acting in a professional capacity' have not been tested yet in New South Wales. Odgers notes that the types of relationships referred to in the definition of a protected confidence could include doctor/patient, nurse/patient, psychologist/client, therapist/client, counsellor/client, social worker/client, private investigator/client and journalist/source.<sup>11</sup> It was the intention of the ALRC in its original proposal that the privilege be sufficiently flexible to allow the court to protect information in a range of relationships where confidentiality is particularly important.<sup>12</sup>

15.13 One relationship which has been brought to the attention of the Inquiry is that of medical and social researchers and their interviewees.<sup>13</sup> It is envisaged by the

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7 Attorney General's Department (NSW), *Protecting Confidential Communications from Disclosure in Court Proceedings*, DP (1996); see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11860].

8 New South Wales, *Parliamentary Debates* Legislative Council, 22 October 1997 (J Shaw—Attorney General), 1120; see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

9 *Evidence Act 1995* (NSW) s 126B; see also *Wilson v New South Wales* [2003] NSWSC 805, [18].

10 *Urquhart v Lanham* [2003] NSWSC 109, [15].

11 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11900].

12 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [956].

13 Justice R French, *Submission E 119*, 6 October 2005. See also R Chalmers and M Israel, *Caring For Data: Law Professional Codes and the Negotiation of Confidentiality in Australian Criminological Research* (2005), Criminology Research Council.

Commissions that this type of relationship may, depending on the nature of the research undertaken, fall under the confidential relationship privilege.

15.14 In supporting the adoption of a discretionary privilege for confidential relationships, the LRCWA identified the advantages of the privilege as providing greater flexibility for the courts to assess the individual merits of each case, and placing all confidential relationships (other than that between a lawyer and a client) on an equal footing. Some of the disadvantages were noted to be that the 'balancing test' could be difficult to assess in some cases, that the provision could not guarantee confidentiality and that it is undesirable to create further means whereby relevant evidence can be excluded from the court.<sup>14</sup>

### ***Journalists' sources***

15.15 Since the publication of DP 69, the issue of protection of journalists' sources has received significant media attention. Under the common law, courts have consistently refused to grant journalists a privilege or lawful excuse under which they can refuse to reveal their sources.<sup>15</sup> The journalists' code of ethics prohibits a journalist from revealing a source once a commitment to confidentiality has been made. At the time of writing, legal proceedings had commenced against two *Herald Sun* journalists for protecting the source of leaked government documents regarding changes to veterans entitlements.<sup>16</sup> The Attorney-General of Victoria has indicated his support for a uniform national approach to journalists' sources.<sup>17</sup> The Australian Government Attorney-General has also announced that the issue would be considered by the Government.<sup>18</sup>

15.16 Journalism is a profession which falls under ss 126A and 126B of the *Evidence Act 1995* (NSW). The adoption of the New South Wales provisions has been mooted by a number of submitters as a possible way forward in Australia as a basis on which a journalist may legally protect a source's identity. Since its enactment, few cases have considered the application of s 126B to journalists' sources. *NRMA v John Fairfax Publications* applied the section to a journalist and source relationship. In that case,

14 Law Reform Commission of Western Australia *Report on Professional Privilege for Confidential Communications* Project 90 (1993), 125–127.

15 G Price, 'Pack your toothbrush': Journalists, Confidential Sources and Contempt of Court' (2003) 8(4) *Media & Arts Law Review* 259, 260.

16 AAP, *Court Rejects Ruddock Request on Scribes* (2005) *The Age* <[www.theage.com.au](http://www.theage.com.au)> at 15 November 2005.

17 *National Evidence Laws Needed to Protect Journalists: Hulls* (2005) FindLaw <[www.findlaw.com.au](http://www.findlaw.com.au)> at 10 November 2005.

18 S Maiden, 'Journalists may get legal protection' *The Australian*, 6/9/06, 7. Attempts by the Australian Government Attorney-General to intervene in the case on the basis that the Federal Government was planning to legislate for greater protection of journalists sources were rejected by the Victorian County Court: see AAP, *Court Rejects Ruddock Request on Scribes* (2005) *The Age* <[www.theage.com.au](http://www.theage.com.au)> at 15 November 2005.

Macready M considered the discretionary factors in 126B. On the first question of whether any harm would come about as a result of the revealing of the information, the Master stated that, in the circumstances, giving the evidence was likely to lead to proceedings against the protected confider. The initiation and running of proceedings might cause harm, 'although if the proceedings are justified, the relevance of the harm is lessened'.<sup>19</sup> The Master then considered the actionable breaches of the *Corporations Act* and other causes of action based on a directors' code of conduct (which was the information that the source has disclosed). Finally, Master Macready took into account policy considerations based on the desirability of the flow of information and the centrality of keeping the identity of sources confidential to achieve this end. In that case, it was determined that the interests of justice in the plaintiff having an effective remedy outweighed the possible harm which could be caused to the reputation of journalists and their ability to obtain information if they were forced to reveal sources.<sup>20</sup>

15.17 The New Zealand Evidence Bill 2005<sup>21</sup> includes a specific privilege protecting journalists' sources, as well as a general confidential relationship privilege. The provision is a qualified privilege, and applies a balancing test similar to s 126B. Clause 64(1) of the Bill provides a general presumption that where a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered. However, a judge may order that subsection (1) does not apply if satisfied that the public interest in the disclosure of evidence of the identity of the informant outweighs any likely adverse effect of the disclosure on the informant or any other person; and also outweighs the public interest in the communication of facts and opinion to the public by the news media and, in the ability of the news media to access sources of facts.<sup>22</sup>

15.18 The New Zealand Law Commission recommended this section in its 1999 report on Evidence.<sup>23</sup> The Commission based this recommendation on the need to promote a free flow of information, which is a vital component of a democratic system. Whilst the original proposal was to have journalists' sources fall under the general confidential communications privilege, the Commission decided that a specific qualified privilege would give greater confidence to a source that his or her identity would be protected.<sup>24</sup>

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19 *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563, [161].

20 *Ibid.*

21 At the time of writing, the Bill was under consideration by the Justice and Electoral Parliamentary Committee: see <<http://www.clerk.parliament.govt.nz/Programme/Committees/Submissions/jeevidence.htm>>.

22 Clause 64(2).

23 New Zealand Law Commission, *Evidence: Reform of the Law*, Report 55 Vol 1 (1999), 82.

24 *Ibid.*, 82.



**DP 69 proposal**

15.19 In DP 69, the Commissions proposed the addition of a qualified confidential relationship privilege to the *Evidence Act 1995* (Cth) for the same reason it was supported in the previous Evidence inquiry.

The provision of a discretionary privilege would allow the competing public interests to be taken into account when the court is assessing whether evidence ought in the circumstances to be compelled from witnesses, thus allowing the courts to be sensitive to the individual needs of witnesses and of relationships.<sup>25</sup>

15.20 Most consultations undertaken supported the adoption of a qualified confidential relationship privilege. Practitioners and judges were unaware of areas in which the operation of either privilege has caused concern in New South Wales.<sup>26</sup> Given the support expressed for the New South Wales provision, the Commissions argued it was in the interests of consistency and uniformity for the Commonwealth Act to adopt the New South Wales confidential communications provisions.<sup>27</sup> The Commissions further proposed that this privilege apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.<sup>28</sup>

**Submissions and consultations**

15.21 A number of submissions were opposed to this proposal.<sup>29</sup> The Australian Securities and Investment Commission (ASIC) argues that the major policy rationale for legal professional privilege does not apply in the case of other professional relationships as it is not a fundamental requirement of the justice system that a client be free to obtain professional advice other than legal advice. Furthermore, not all other professions are subject to the same rigorous regime of professional obligations as legal practitioners, including the overriding obligation to the court. If privilege were extended to other professionals such as accountants, this would provide more avenues for abuse and pose greater difficulties for ASIC in its attempt to uncover the full facts. ASIC submits that if privileges are to be extended beyond the obtaining of legal advice, any such extension should be confined to particular areas, such as sexual

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25 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [918].

26 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.198].

27 Ibid, Proposal 13–7.

28 Ibid, Proposal 13–8.

29 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005 (the Criminal Law Committee opposed the privilege however the Litigation Law and Practice Committee supported it); Law Institute of Victoria, *Submission E 116*, 27 September 2005.

assault communications and medical communication privilege, but should not be extended to include business and commercial areas.<sup>30</sup>

15.22 This view was shared by the Commonwealth Director of Public Prosecutions (CDPP), which recommends that confidential relationships privilege not be enacted. In the CDPP's view, it is difficult to see that the interests of justice are served by introducing provisions which could operate to inhibit evidence being tendered to a court. Further, the policy rationale for legal professional privilege does not apply to relationships other than lawyer and client. The CDPP states that claims for legal professional privilege are currently abused in criminal investigations in Australia and the extension of a confidential relationship privilege to other professional relationships would be potentially open to the same abuse.<sup>31</sup>

15.23 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) supports the adoption of the New South Wales provisions in the Commonwealth Act. However, the submission does not support extension of the privilege to the investigatory stage, as it could adversely impact on the ability of investigatory agencies to gather relevant material and identify leads for investigation.<sup>32</sup>

15.24 On the issue of protection of journalists' sources, the Press Council of Australia expresses support for the uniform Evidence Acts to adopt a provision based on the New Zealand Evidence Bill. However, as an alternative position, the Council supports adopting a provision equivalent to that in the *Evidence Act 1995* (NSW).<sup>33</sup> The Media, Entertainment and Arts Alliance expresses a similar view in its submission, arguing that, although little litigation has occurred around s 126A and therefore it is unclear the extent of the protection it offers, 'there is a strong argument for not reinventing the wheel'. The Alliance further supports the extension of the privilege to pre-trial processes, noting that, in most cases, issues of contempt arise at this stage of the proceedings.<sup>34</sup>

15.25 Corrs Chambers Westgarth makes a submission to the Inquiry on behalf of a number of major news and broadcasting services. In that submission, it is proposed that the uniform Evidence Acts be amended to give journalists a legal right to refuse to disclose the identity of confidential sources other than in exceptional circumstances. These circumstances include the protection of national security, prevention of the commission of a serious crime or protection of the physical safety of any person where it is in the public interest to allow disclosure. The submission further argues that it should be presumed that disclosure is unnecessary, and that journalists should be provided with protection from search and seizure powers which may lead to disclosure of a confidential source. The submission bases this proposal on the fundamental nature

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30 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

31 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

32 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005. The Australian Federal Police expressed a similar concern: Australian Federal Police, *Submission E 92*, 20 September 2005.

33 Australian Press Council, *Submission E 58*, 17 August 2005.

34 The Media Entertainment and Arts Alliance, *Submission E 64*, 30 August 2005.

of the journalist's undertaking not to reveal sources, and the role of the media in encouraging political discussion, and scrutiny of the democratic process.<sup>35</sup> The submission notes a number of important cases where anonymous journalists' sources have exposed matters of public significance such as the Watergate investigations, and in Australia, the Khemlani loans affair and the political corruption which resulted in the Fitzgerald Inquiry in Queensland.<sup>36</sup>

15.26 The Office of the Victorian Privacy Commissioner submits that in considering the competing interests in privacy related matters, matters additional to the public interest test should be considered. These additional matters should include the effect of disclosure on the privacy of third parties, the availability of other, less privacy-invasive means of obtaining the information, and express consideration of ways to ameliorate the harm, such as using pseudonyms and holding hearings in camera.<sup>37</sup>

15.27 The Litigation Law and Practice Committee of the New South Wales Law Society supports the proposal, and its extension to pre-trial contexts. It notes that s 126A does not create a true privilege, but rather a discretion to direct that evidence not be adduced. It would be inappropriate for the privilege not to apply to pre-trial matters, such as discovery, where the issues relating to protected confidences are most likely to arise.<sup>38</sup>

15.28 The Australian Government Attorney-General's Department submits that the Government supports the introduction of a qualified professional confidential communications privilege. However it considers that clearer direction should be given to the court in how to exercise its discretion, in particular by specifying certain circumstances in which the privilege would not apply. The Australian Government's preferred approach is that the legislation should create a presumption that a confidential communication will be protected from disclosure. However, the protection will not apply where: disclosure is required in the interests of justice, including interests of national security; there is a need to protect classified material (subject to appropriate safeguards to protect against the disclosure of sensitive information in evidence); the communication was made in furtherance of the commission of a fraud or other serious criminal offence, or participation in serious and organised crime; or the disclosure is necessary to demonstrate the innocence of an accused. It would be a

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35 Corrs Chambers Westgarth on behalf of News Limited and others, *Submission E 112*, 30 September 2005.

36 Ibid.

37 Office of the Victorian Privacy Commissioner, *Submission E 115*, 30 September 2005.

38 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005. (Note that the Criminal Law Committee opposed the proposal.) The proposal was also supported by Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Justice R French, *Submission E 119*, 6 October 2005; CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 96*, 22 September 2005.

matter for the court to determine whether one of the circumstances applies or the interests of justice otherwise require the disclosure of the information, in which case the court could direct a witness to answer the relevant question.<sup>39</sup>

15.29 One area in which the proposal will have a significant impact is in relation to Family Court proceedings. The Commissions were told in a number of consultations that psychiatrists' and doctors' reports are often subpoenaed in child residency matters. This is sometimes crucial information for the court when making a parenting order. There were concerns raised that a confidential relationship privilege could prevent courts obtaining access to this information.<sup>40</sup> The Family Law Council submits that other relevant information that the court may need to access includes files from state and territory child welfare agencies, medical records and school counsellors' records. In the Council's view, it is imperative that the court has access to this information. If a parent is able to claim privilege, it may hamper the operation of the paramountcy principle in the *Family Law Act 1975* (Cth) and limit the information the court has available to make the best possible decision.<sup>41</sup> The Family Law Council also has concerns about the effect of the privilege on projects such as the Family Court's Magellan project, which involves disputes which include allegations of serious physical and sexual abuse against children. The project is based on information sharing between agencies to reach fast resolution in matters, and a confidential relationship privilege may impinge on its successful operation.<sup>42</sup>

15.30 However, the Family Court of Australia agrees that, in the interests of uniformity and consistency, the Commonwealth Act should include a provision allowing the court to direct that evidence should not be adduced where it would disclose confidences made in the context of a professional relationship. In order to overcome the problem identified by the Family Law Council, the Family Court proposes that an additional balancing criterion be applied to the *Evidence Act 1995* (Cth) stating that in family law proceedings concerning children, the best interests of the child should be a paramount consideration. The Family Court also suggests that provision be made for the situation where a child is the protected confider. This will allow a representative of the child to make the claim for privilege on behalf of the child.<sup>43</sup>

### ***Commissions' view***

15.31 The Commissions agree there is an ongoing tension between the codes of ethics and professional duties of many professions in Australia and the legal duty to reveal to the courts information said in confidence. In many of these relationships, there is a clear public interest that can be demonstrated in protection of a confidence, such as the

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39 Attorney-General's Department, *Submission E 117*, 5 October 2005.

40 Federal Magistrate S Lindsay, *Consultation*, Adelaide, 5 October 2005.

41 The 'paramountcy principle' requires that the court treat the best interests of the child as the paramount consideration in deciding children's issues: see Ch 20.

42 Family Law Council, *Submission E 77*, 13 September 2005.

43 Family Court of Australia, *Submission E 80*, 16 September 2005.

encouragement of people to seek treatment or the provision of information that could expose corruption or maladministration in government. However, the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter. The legal protection of professional confidential communications thus raises a 'difficult mix of fundamental private and public interests'.<sup>44</sup> The Commissions believe that the ALRC's original reasoning for proposing a confidential relationship privilege remains sound.

15.32 The Commissions agree that an analogy cannot be drawn between the lawyer and client relationship and other professional relationships. Client legal privilege affords an absolute protection because it is always considered to be in the interests of justice that a client knows that any facts relating to past events revealed to a lawyer will remain confidential.

15.33 A qualified professional confidential relationship privilege acknowledges that it *may* be in the interests of justice to protect the confidentiality of a particular relationship in the circumstances of that case. The view of ASIC regarding the potential abuse of such a privilege is noted. However, the Commissions believe that the fact that the privilege is discretionary, and that parties are able to make an argument as to why the material should be disclosed, will allow a judge to circumvent illegitimate attempts to claim the privilege.

15.34 The different formulation of a confidential relationship privilege as proposed by the Australian Government Attorney-General's Department is noted. However, given the support expressed for the New South Wales provisions, and the lack of submissions indicating there is a serious problem with them, the Commissions believe it is in the interests of consistency and uniformity for the Commonwealth Act to adopt the New South Wales confidential professional relationship privilege provisions.<sup>45</sup> These provisions should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena, and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

15.35 The Commissions agree that in family law proceedings concerning children, the interests of the child may outweigh the harm that may be caused, whether directly or indirectly, to the person who imparted the confidence. The Commissions support the suggestion of the Family Court that, in the adoption of s 126A in the Commonwealth *Evidence Act*, explicit reference should be made to consideration of the paramountcy principle in family law proceedings concerning children. The Commissions also note

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44 V Mullen, *Protection of Confidential Sources and Communications* (1996) Briefing Paper No 3/96, NSW Parliamentary Library Research Service, 4.

45 These provisions are contained in the *Evidence Act 1995* (NSW) Pt 3.10, Div 1A.

that, in family law proceedings, a child's interests are often represented by independent counsel. Provision should therefore be made for a representative of the child to make the claim for privilege on behalf of the child. It has been noted in consultations that additional hearing time will now be required to hear argument over whether the privilege applies to subpoenaed documents.<sup>46</sup> The Commissions acknowledge that the addition of a new privilege in the family law jurisdiction will have some resource implications for the Family Court, but believe the wider benefits of the adoption of the privilege in the Commonwealth *Evidence Act* outweigh this concern. If adopted, the Family Court and the Australian Government should monitor the resource implications resulting from the proposal.

15.36 The Commissions therefore recommend that the uniform Evidence Acts be amended to provide for a professional confidential relationship privilege as set out in this recommendation. The proposed provisions are modelled (with some modifications) on the privilege available under Part 3.10 Division 1A of the *Evidence Act 1995* (NSW). The principal elements of this privilege should be as follows.

- (a) The privilege should protect:
  - (1) *protected confidences*—communications made in the course of a professional relationship, whenever made, where the person to whom the communication was made was under an express or implied obligation of confidence. The *Evidence Act 1995* (NSW) definition of *protected confidence* (in s 126A) should be clarified to ensure that the confidentiality obligations are not restricted to those arising under law; and
  - (2) *protected identity information*—the *Evidence Act 1995* (NSW) definition of this concept (in s 126A) should be clarified so that it only relates to information from which the identity of the person making the confidential communication can reasonably be ascertained.
- (b) The court should be able to give such a direction on application by the person who made the confidential communication, or the person to whom it was made (whether or not a party).
- (c) In determining whether to give a direction, the court should be required to balance the nature and extent of the likely harm that would or might be caused to the person who made the confidential communication by adducing the evidence against the desirability of the evidence being given. However, if it finds that the former outweighs the latter, the court should be required to give the direction.

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46 Federal Magistrate S Lindsay, *Consultation*, Adelaide, 5 October 2005.

- (d) The uniform Evidence Acts should include a non-exhaustive list of factors that the court should be required to take into account under these provisions. That list should be the same as in the *Evidence Act 1995* (NSW).
- (e) The court should not be entitled to make an order where the person who made the confidential communication has consented to the evidence being given, or where the communication was made (or the document prepared) in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty. This provision should be similar to s 125(1)(a).<sup>47</sup>
- (f) The court should have the power to make appropriate orders to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, as provided in the *Evidence Act 1995* (NSW).

15.37 A draft of Part 3.10 Division 1A is included in Appendix 1. However, the draft does not deal with the implementation of Recommendation 15–3 regarding extension of privilege for the reasons discussed in Chapter 14.

**Recommendation 15–1** The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division 1A of the *Evidence Act 1995* (NSW) should therefore be adopted under Part 3.10 of the *Evidence Act 1995* (Cth).

**Recommendation 15–2** If Recommendation 15–1 is adopted, Part 3.10, Division 1A of the *Evidence Act 1995* (Cth) should include that in family law proceedings concerning children, the best interests of the child should be a paramount consideration and that, where a child is the protected confider, a representative of the child may make the claim for privilege on behalf of the child.

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47 The Commissions' view is that s 125(1)(b) is not relevant to this privilege.

**Recommendation 15–3** The professional confidential relationship privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings

***Medical communications privilege: Tasmania***

15.38 Under s 127A(1) of the *Evidence Act 2001* (Tas), a medical practitioner must not divulge, in any civil proceeding, any communication made to him or her in a professional capacity by the patient that was necessary to prescribe treatment or act for the patient (unless the sanity of the patient is the matter in dispute).

15.39 This privilege was carried over from the *Evidence Act 1910* (Tas) and can also be found in the evidence legislation in Victoria and the Northern Territory.<sup>48</sup> In these jurisdictions, the privilege is only available in civil proceedings.

15.40 As noted in Chapter 2, in addition to its participation in the joint review, the VLRC is also undertaking a review of the laws of evidence currently applying in Victoria. The VLRC has consulted widely on whether a medical communications privilege should remain in Victoria or whether a confidential relationship privilege is the preferred model. It should be noted that the VLRC has received submissions from health practitioners, nurses and pharmacists supporting the adoption of a confidential relationship privilege rather than a strict medical communications privilege.<sup>49</sup>

15.41 The ALRC considered this privilege in ALRC 26 and found three main benefits—protecting patients’ privacy, encouraging people to seek treatment, and promoting the public interest in effective treatment of patients. Associate Professor Sue McNicol has criticised the privilege on the grounds that, particularly in personal injury matters, doctor-patient privilege could well constitute an impediment to the fact-finding process.<sup>50</sup> She further argues that the grant of the privilege is unlikely to induce or encourage patients to visit doctors, and therefore there is no sound policy rationale for the privilege.<sup>51</sup>

<sup>48</sup> See *Evidence Act 1958* (Vic) s 28(2) and *Evidence Act 1939* (NT) s 12(2) .

<sup>49</sup> Australian Nursing Federation (Vic Branch), *Submission E 125*, 19 September 2005; Australian Dental Association (Vic Branch), *Submission E 124*, 16 September 2005; Pharmaceutical Society of Australia Ltd (Vic Branch), *Submission E 123*, 14 September 2005; Australian Naturopathic Practitioners Association, *Submission E 121*, 14 September 2005. It is noted that the Australian Medical Association did support retention of the medical communications privilege in Victoria: Australian Medical Association (Vic), *Submission E 129*, 30 September 2005.

<sup>50</sup> S McNicol, *Law of Privilege* (1992), 345.

<sup>51</sup> *Ibid*, 348.



15.42 The ALRC noted that many of the arguments in favour of the privilege focused more on a right to privacy than on whether problems are caused by the absence of the privilege or benefits that would follow from its implementation.<sup>52</sup> The ALRC found that this rationale suggests a need for a power to excuse medical witnesses in certain cases, rather than to provide a blanket privilege or primary rule of privilege with exceptions.<sup>53</sup> It contrasted the position of a doctor with that of a lawyer. While each relationship is aided by confidentiality, and confidentiality will encourage people to seek professional services, different considerations apply to doctors and lawyers. Unlike the doctor's role, the lawyer's role cannot be performed if he or she can be compelled to give evidence against a client.<sup>54</sup> As such, the ALRC proposed that the doctor–client relationship should fall under the general privilege proposed to cover confidential relationships.

15.43 The LRCWA similarly found that the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all relevant information available to them so as to justify the creation of a privilege.<sup>55</sup>

#### ***Commissions' view***

15.44 In DP 69, the Commissions did not support the inclusion of a medical relationship privilege in the *Evidence Act 1995* (Cth) for the same reasons it was not supported in the previous Evidence inquiry. It was considered that proper protection of confidential medical communications could occur under the confidential relationship privilege. On that basis no recommendation regarding adoption of a medical communications privilege is made.

#### **Sexual assault communications privilege**

15.45 Sexual assault communications are communications made in the course of the confidential relationship between the victim of a sexual assault and a counsellor. From the mid-1990s onwards, ongoing reform of sexual assault laws and procedure included the enactment of legislation to limit disclosure of these communications.<sup>56</sup> The question whether these communications are privileged may arise where records of counselling session are subpoenaed, or where evidence of a communication is sought to be adduced in a proceeding.

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52 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [911].

53 Ibid, [915].

54 Ibid, [916].

55 Law Reform Commission of Western Australia *Report on Professional Privilege for Confidential Communications* Project 90 (1993), [6.42].

56 M Heath, *The Law and Sexual Offences Against Adults in Australia* (2005) Australian Institute of Family Studies, 15.

15.46 Every state and territory except Queensland now has some restriction on access to counselling communications.<sup>57</sup> A number of the provisions are based on the model developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in its 1999 report on *Sexual Offences Against the Person*.<sup>58</sup> Most jurisdictions allow the court to examine the evidence and then determine whether disclosure should be ordered, based on whether the public interest in protecting the confidentiality of the communication is substantially outweighed by the interest in its disclosure. In the ACT, Western Australia and South Australia, the court can only consider an application for disclosure once it has been satisfied by the applicant that there is a legitimate forensic purpose for the application.<sup>59</sup> Only Tasmania provides an absolute protection for such communications.<sup>60</sup>

### ***Rationale for the privilege***

15.47 The issue of the confidentiality of sexual assault communications emerged in the 1990s. Commentators at the time noted that, as an unintended consequence of the ‘rape shield’ provisions limiting questioning of a complainant’s sexual history and conduct, subpoenas in criminal proceedings were increasingly being used by defence counsel to access counsellors’ notes. The notes were sought with a view potentially to impugn the complainant’s story.<sup>61</sup>

15.48 The Model Criminal Code Officers Committee (MCCOC) suggests a number of public policy reasons in favour of a sexual assault communications privilege. It argues that sexual assault counsellors now serve a crucial role in the justice system and that it is not unreasonable to assume that, if counselling notes are not confidential, complainants will not seek counselling, or will not be entirely frank during counselling sessions. This will reduce the efficacy of the counselling process. Further, if complainants do not use the services of counsellors then the likely result will be lower reporting of sexual offences and withdrawal of complaints. If notes are not protected, sexual assault counselling services may adopt practices—such as minimal record keeping or making dummy files—that both inhibit the counselling relationship, and mitigate against the accountability of the counsellor.<sup>62</sup>

57 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s54; *Criminal Procedure Act 1986* (NSW), s296–396; *Evidence Act 1939* (NT) s56; *Evidence Act 1929* (SA) s67D–67F; *Evidence Act 2001* (Tas) s 127B; *Evidence Act 1958* (Vic) Division 2A s32B–32G; *Evidence Act 1906* (WA) s 19A–19L.

58 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 278–286.

59 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s54; *Evidence Act 1906* (WA) s 19A–19L; *Evidence Act 1929* (SA) s67D–67F; see M Heath, *The Law and Sexual Offences Against Adults in Australia* (2005) Australian Institute of Family Studies, 15.

60 *Evidence Act 2001* (Tas) s 127B (although the provision only applies to criminal proceedings).

61 G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law, 2.

62 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 277–279.

15.49 The MCCOC also suggests that records of counselling will have very limited relevance in cases involving allegations of sexual assault. Sexual assault counsellors argued that sexual assault counselling is concerned with the emotional and psychological responses of the complainant to the assault. As such, the ‘facts’ surrounding the assault are likely not to be discussed, and the exploration of feelings will undermine the forensic reliability of what is recorded.<sup>63</sup>

15.50 Sexual assault communications are also seen as deserving of protection because of the nature of the crime itself, which is widely considered a more distressing and intimate crime than other crimes involving physical injury. In supporting a privilege for sexual assault communications, the Supreme Court of Canada drew a distinction between sexual assault communications and other communications in a doctor/patient context.

A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong.<sup>64</sup>

### ***Different models of sexual assault counselling privilege***

15.51 While some form of protection is afforded to sexual assault counselling communications in each state and territory, the models adopted by different jurisdictions differ markedly. The main point of divergence is whether the privilege is qualified or absolute. Within that distinction, there is a further differentiation as to whether an absolute or qualified privilege applies in preliminary criminal proceedings such as committal proceedings.

15.52 A further issue encountered in this area is whether the privilege provisions apply in the context of inspection of documents produced on subpoena. A number of provisions were drafted in terms of ‘adducing evidence’. This means that the provisions do not apply to prevent counselling records being subpoenaed and inspected.<sup>65</sup>

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63 Ibid, 279. This view was shared by some members of the Canadian Supreme Court in *R v O'Connor v* [1995] 4 SCR 411.

64 *M(A) v Ryan* (1997) 143 DLR (4th), 11(h)–12(a) (McLachlin J); see G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law.

65 *Atlas v Director of Public Prosecutions* (2001) 3 VR 211. See also the discussion below of the decision in *R v Young* (1999) 46 NSWLR 681.

*An absolute or qualified privilege?*

15.53 A common argument against the availability of a sexual assault communications privilege is that an accused must be able to access all available evidence that may be used in his or her defence. A mandatory prohibition or absolute privilege is supported on the basis that the policy arguments in favour of non-disclosure of the material are sufficiently strong to support a statutory exclusion of the type given to client legal privilege.<sup>66</sup> Annie Cossins and Ruth Pilkington have argued that the effect of disclosure, and its impact on complainants reporting or proceeding with claims of sexual assault, are serious impediments to the effective administration of justice.<sup>67</sup> In Canada, L'Heureux-Dube J drew this conclusion in *R v Osolin*:

If the net result is to discourage witnesses from reporting and coming forward with evidence, then, in my view, it cannot be said that such practices would advance either the trial process itself or enhance the general goals of the administration of justice.<sup>68</sup>

15.54 The MCCOC rejects any analogy between client legal privilege and a sexual assault communications privilege. It argues that the client/lawyer relationship is central to the operation of the law, and therefore requires the highest level of protection. While the outcomes of a failure to protect confidences between a complainant and a sexual assault counsellor may be regrettable if offenders are not brought to justice, the absence of a privilege does not affect the operation of the legal system.<sup>69</sup> Further, the MCCOC's view is that an accused must have the right to seek production of and access to records, as a fundamental aspect of criminal procedure. In the MCCOC's view, a blanket prohibition will promote stay applications and increase the prospects of successful appeals against conviction on the ground that the particular conviction is unsafe and unsatisfactory.<sup>70</sup>

15.55 The MCCOC supports a qualified privilege, in which competing public interests are balanced. However, the MCCOC considers that the prohibition on the production of notes at committal is justified on the basis that once production and access to the material is gained for the purposes of bail proceedings or committal, the immunity is defeated for the purposes of the trial. The MCCOC also considers that the differentiation is consistent with other provisions in some states that limit the defence's scope to cross-examine a complainant at committal.<sup>71</sup> This model has been adopted in New South Wales and a number of other states, and was recently recommended by the Victorian Law Reform Commission.<sup>72</sup>

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66 A Cossins and R Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19(2) *University of New South Wales Law Journal* 222, 264.

67 *Ibid*, 264.

68 *R v Osolin* (1994) 109 DLR (4th) 478, 497.

69 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 281.

70 *Ibid*, 283.

71 *Ibid*, 283.

72 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) Recs 77–86.

***Qualified privilege: New South Wales***

15.56 A qualified privilege for sexual assault communications is available under Part 3.10 Division 1B of the *Evidence Act 1995* (NSW) and Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW). Originally, Division 1B of the *Evidence Act 1995* (NSW) was inserted by the *Evidence Amendment (Confidential Communications) Act 1997* (NSW) and applied in both civil and criminal proceedings. In 1999, part of Division 1B was re-enacted as (the then) Part 7 of the *Criminal Procedure Act 1986* (NSW) and Division 1B was amended and confined to apply only in civil proceedings.<sup>73</sup>

15.57 The chief reason for re-enacting the provisions in the *Criminal Procedure Act* was the decision in *R v Young*.<sup>74</sup> It was held in that case that Division 1B applied only to the adducing of evidence and could not protect sexual assault communications in relation to discovery and the production of documents.

15.58 Division 1B now applies only to the adducing of evidence in civil proceedings ‘in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding’.<sup>75</sup> Further, the privilege only applies where the evidence is found to be privileged under Chapter 6 of the *Criminal Procedure Act*.<sup>76</sup> This effectively limits the privilege in civil proceedings to circumstances where a criminal proceeding has been brought and a privilege claim has been made and determined in that proceeding.

15.59 At the time of enacting the confidential relationship privilege, the New South Wales Government argued that communications between a sexual assault victim and a counsellor require a particular privilege.<sup>77</sup> At trial, the *Criminal Procedure Act* provides that evidence of counselling communications<sup>78</sup> is not be disclosed or admitted unless the defence can show the evidence has *substantial probative value* and that the public interest in protecting the confidentiality of the communications is *substantially outweighed* by the public interest in allowing disclosure. The requirement that the public interest in protection be substantially outweighed by the public interest in allowing disclosure is a higher test than, for example, the similar balancing exercise

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73 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 444. The sections were renumbered in 2001 as Chapter 6, Part 5, Division 2 of the *Criminal Procedure Act* by the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW).

74 *R v Young* (1999) 46 NSWLR 681.

75 *Evidence Act 1995* (NSW) s 126H(1).

76 *Ibid* s 126H(2).

77 New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 1997, 1121 (J Shaw—Attorney General).

78 Documentary or otherwise.

under the confidential relationship privilege.<sup>79</sup> In preliminary criminal proceedings, such as committal proceedings, there is an absolute prohibition on records being sought or evidence being adduced.<sup>80</sup>

15.60 Central to the granting of the privilege is the existence of a counselling relationship. Under s 296(5) of the *Criminal Procedure Act*, a definition of 'counselling' is given which includes a requirement that the counsellor has undertaken study or has relevant experience, and that support, encouragement, advice, therapy or treatment is given.<sup>81</sup> The counselling must also be given in relation to any harm the person may have suffered. Under s 295(1), 'harm' includes physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation or fear).

### ***Absolute privilege: Tasmania***

15.61 The privilege for communications to sexual assault counsellors under s 127B of the *Evidence Act 2001* (Tas) differs from the privilege under the *Criminal Procedure Act* as the former provides absolute protection of the communications unless the complainant consents to their production. Section 127B applies only to criminal proceedings and was enacted following a review of sexual offences in Tasmania.<sup>82</sup> After examining the New South Wales legislation, the Tasmanian government determined that, given the nature of the material, an absolute protection is warranted.<sup>83</sup>

### ***Victorian Law Reform Commission report***

15.62 In August 2004, the VLRC released its final report on sexual offences.<sup>84</sup> In that report, the VLRC considered both the New South Wales and Tasmanian models of sexual assault counselling privilege. Although considerable support was received for the Tasmanian approach of an absolute privilege, the VLRC recommended that the Victorian evidence legislation adopt a model closer to the New South Wales provisions. Under this recommendation, a counselling communication must not be disclosed except with the leave of the court.<sup>85</sup> Where a person objects to production of a document which records a counselling communication, he or she cannot be required to produce the document unless the document is produced for examination by the court for the purposes of ruling on the objection. Before ordering production, the court must be satisfied that:

<sup>79</sup> G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law, 10.

<sup>80</sup> *Criminal Procedure Act 1986* (NSW), s 297.

<sup>81</sup> This broad definition of a counselling relationship was adopted following the decision of the New South Wales Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289, which narrowed the definition of the word 'counselling' to a clinical context: G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law, 14.

<sup>82</sup> Taskforce on Sexual Assault and Rape in Tasmania, *Report* (1998), Rec 20.

<sup>83</sup> Chief Justice P Underwood, *Consultation*, Hobart, 15 March 2005.

<sup>84</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

<sup>85</sup> *Ibid*, Rec 77.

- the contents of the document have substantial probative value;
- other evidence of the contents of the document or the confidence is not available; and
- the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication.<sup>86</sup>

15.63 Following the NSW and MCCOC model, the VLRC also recommended an absolute privilege in committal proceedings. This is the way the privilege currently operates in South Australia<sup>87</sup> and the ACT.<sup>88</sup> The VLRC argues that these recommendations strike the right balance between protection of the communication and the rights of the accused.

Our recommendations will allow evidence of confidential communications to be accessed by counsel and used in evidence where specified criteria are satisfied. These criteria balance the competing public interests of ensuring a fair trial for the accused and preserving the confidentiality of protected communications to the greatest extent possible.<sup>89</sup>

### ***Submissions and consultations***

15.64 In DP 69, the Commissions proposed the adoption in the *Evidence Act 1995* (Cth) of a qualified sexual assault communications privilege, as enacted in Division 1B of the *Evidence Act 1995* (NSW) and Chapter 6 the *Criminal Procedure Act 1986* (NSW).

15.65 As was the case following IP 28, the Commissions received support for a qualified privilege protecting sexual assault communications.<sup>90</sup> However, the Commissions also heard strong support for an absolute privilege, from both academics and from sexual assault counsellors.<sup>91</sup> One academic argued that the public interest

<sup>86</sup> Ibid, Rec 78.

<sup>87</sup> *Evidence Act 1929* (SA) s 67F.

<sup>88</sup> *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 57.

<sup>89</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.89].

<sup>90</sup> Eastern and Central Sexual Assault Service, *Submission E 61*, 24 August 2005; Family Law Council, *Submission E 77*, 13 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005; Magistrates' Court of Victoria, *Submission E 127*, 22 September 2005; Justice R French, *Consultation*, Perth, 5 October 2005; R Carroll and M Harries, *Consultation*, Perth, 7 October 2005.

<sup>91</sup> A Cossins, *Consultation*, Sydney, 3 August 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005; H Astor, *Consultation*, Sydney, 2 August 2005; Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005.

supports a need for victims of sexual assault to enjoy open and trusting relationships with counsellors, without the possibility that their communications will later be subject to scrutiny in court. This possibility, which is still present under qualified privilege, threatens the relationship of trust between a victim and his or her counsellor.<sup>92</sup>

15.66 Women's Legal Services Victoria argues that, in making the privilege qualified, the proposal will create disincentives for victims of sexual assault to seek counselling and may inhibit them from reporting the assaults to police. From a public policy perspective, both those outcomes are undesirable.<sup>93</sup> One sexual assault service agreed with this position, noting that the possibility of counselling session notes being viewed by the judge, and potentially by the defence, is a source of anxiety and distress for many victims (and counsellors).

Allowing the court to access these notes continues the invasions of privacy that those that have been sexually assaulted routinely experience: beginning with violations of their bodily integrity at the time of the assault and persisting through the responses of the health and legal systems.<sup>94</sup>

15.67 Annie Cossins echoed this view, advising the Inquiry that her support for an absolute privilege was based on the fact that the notes serve little forensic purpose, and that some complainants will refuse to go to court if they know that the notes are going to be read, even if only by the trial judge.<sup>95</sup>

15.68 The advantage of the absolute privilege is that it addresses the policy concern of preventing subpoenas from being issued by the defence. Sexual assault counselling centres continue to be required to appear in court and argue privilege.<sup>96</sup> In this Inquiry, one service stated that counselling services use a substantial proportion of their limited resources defending subpoenas in court. Whilst those applications are usually successful, the cost is significant to the counselling service.<sup>97</sup>

15.69 One prosecutor notes that despite the rape shield laws, in an 'oath on oath' case, the character of the complainant is still often very much part of the case. In his view, it is problematic to be able to delve into one side's rehabilitative processes without the same capacity to delve into the accused's background.<sup>98</sup>

15.70 The New South Public Defenders Office (NSW PDO) does not support enactment of a sexual assault communications privilege in the *Evidence Act 1995* (Cth), however, should one be recommended by the Inquiry, a qualified privilege is

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92 H Astor, *Consultation*, Sydney, 2 August 2005.

93 Women's Legal Services Victoria, *Submission E 110*, 30 September 2005.

94 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

95 A Cossins, *Consultation*, Sydney, 3 August 2005. This view was supported in other consultations: NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005; R Carroll and M Harries, *Consultation*, Perth, 7 October 2005.

96 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

97 NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005.

98 Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005.



preferable.<sup>99</sup> The Law Society of New South Wales also does not support a sexual assault communications privilege, on the basis that defendants should be able to access any information that is exculpatory.<sup>100</sup>

### ***The Commissions' view***

15.71 The Commissions agree with the finding of the VLRC (and the conclusion of the MCCOC) that such legislation serves the important public interest of encouraging people who have been sexually assaulted to seek therapy and may also encourage people who are sexually assaulted to report the crime to the police.<sup>101</sup>

15.72 As noted above, the MCCOC rejected an absolute privilege on the basis that a blanket prohibition would promote stay applications and increase the prospects of a successful appeal against conviction on the ground that the conviction was unsafe and unsatisfactory.<sup>102</sup> The VLRC also notes in its Sexual Offences Interim Report that a complete prohibition on access to notes may result in some people being able to appeal successfully against their conviction.<sup>103</sup>

15.73 The decision to prevent what could otherwise be relevant information from consideration by a court is not one that should be taken lightly, especially in the context of a criminal trial. The strong view has been put that a failure to allow this evidence at least to be considered by a judge may result in a miscarriage of justice. In this Inquiry, the Commissions were told that it cannot be assumed that all sexual assault complainants are telling the truth.<sup>104</sup> Another view is that matters communicated to a rape crisis counsellor by a complainant shortly after the event might include relevant evidence that contradicts a later version of events.<sup>105</sup> In the VLRC Inquiry, the Criminal Bar Association of Victoria submitted that disclosure of counselling notes can reveal that the complainant is mentally ill, that alleged sexual misconduct did not occur, that the complainant has a documented motive to lie or that a child's disclosure has been 'infected' by a person in authority.<sup>106</sup>

15.74 It is the view of the Commissions, however, that this concern regarding a possible miscarriage of justice can be overstated. In a majority of cases, attacks on a complainant on the basis of disclosures made in a counselling context will be directed

99 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

100 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

101 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71].

102 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 283.

103 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 204.

104 G Brady, *Consultation*, Sydney, 26 August 2005.

105 P Bayne, *Consultation*, Canberra, 9 March 2005.

106 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.84].

to the complainant's credibility. As has been discussed earlier, disclosures made in a counselling context may well be misleading for a credit purpose due to the nature of the counselling relationship, the nature of the particular offence, and to the variances in the way that counsellors take notes.

15.75 Counsellors' notes are generally made for the purpose of providing therapy to the client, and not as a record of the assault. As part of the counselling process, a victim of a sexual assault is likely to discuss feelings of his or her own shame and guilt, and may disclose prior assaults or be unclear about the events surrounding the assault.<sup>107</sup>

15.76 This Inquiry has heard that, depending on the policies of the counselling service and the individual counsellor's preference, notes may be taken as a stream of consciousness or they may have the views of the counsellor interspersed with those of the client. The actual 'evidence' or facts of the case may be quite different to what is represented in the notes.<sup>108</sup> In most counselling practices, a client does not have an opportunity to check the notes that are taken, and so will not be able to correct the counsellor if an inaccurate version of his or her comments are recorded. Their forensic value cannot be equated to a police statement or other account.

15.77 Sexual assault is one of the most under-reported crimes in Australia. In its Interim Report, the VLRC found that it has the lowest reporting rate of any crime.<sup>109</sup> Studies have estimated that at least 85 per cent of sexual assaults never reach the criminal justice system, and, of those that do, very few reach trial.<sup>110</sup> The VLRC argues that concerns about the fairness of the criminal justice process contribute to substantial under-reporting of sexual offences and may discourage people from giving evidence against alleged offenders at committal and at trial.<sup>111</sup>

15.78 Rape crisis centres have estimated that for twenty five per cent of clients the knowledge that sexual assault counselling notes can be subpoenaed had influenced the decision whether they would seek counselling or not.<sup>112</sup> Similar evidence was presented to the New South Wales Government prior to the enactment of the privilege in the original Division 1B of the *Evidence Act 1995* (NSW).<sup>113</sup> The Australian Institute of Criminology has recently prepared a report studying the reasons behind a

107 K Biber and J Hunter, 'Sexual Assault Victims Deserve Confidentiality' *Sydney Morning Herald*, 13 May 2005, 10.

108 R Carroll and M Harries, *Consultation*, Perth, 7 October 2005.

109 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 59.

110 M Heath, *The Law and Sexual Offences Against Adults in Australia* (2005) Australian Institute of Family Studies, 3, citing a number of domestic and international studies undertaken between 1996 and 2003.

111 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxii.

112 This figure is cited in A Cossins and R Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19(2) *University of New South Wales Law Journal* 222, 226.

113 New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 1997, 1120 (J Shaw—Attorney General).

woman's decision to seek help from various services following a sexual assault.<sup>114</sup> The report found that, amongst other issues, two key concerns influencing the decision whether to report an assault to the police are confidentiality, fear of the assault becoming public knowledge, and the possibility of a defence lawyer being able to access details of medical and sexual histories.<sup>115</sup> One woman reported:

What stopped me was what was going to come out in the trial; knowing that the defence lawyer had researched all about me, like my medical history and employment, and the offender would hear all about me.<sup>116</sup>

15.79 It is clearly of the utmost importance that, in trying to make the legal system more supportive of the needs of complainants, the fundamental principles of a fair trial are not overridden. The VLRC commented:

Prosecution for a sexual offence has very serious consequences for the accused, including life-long stigma and the possibility of a lengthy prison sentence if convicted. It is vital to safeguard the presumption of innocence and ensure that the criminal justice system treats people accused of offences fairly. However, the Commission does not accept the argument that this is the sole purpose of the criminal justice system. The community has an interest in encouraging people to report sexual crimes and in apprehending and dealing with those who commit them.<sup>117</sup>

15.80 The Commissions are of the view that sexual assault communications fall into a special category outside that of other confidential professional communications. As concluded by the MCCOC, the Commissions believe it is reasonable to assume that an inability to protect the confidentiality of communications with a counsellor is likely to discourage sexual assault victims from going to counsellors. It is equally clear that sexual assault counselling is a vital part of ensuring that victims are helped appropriately to recover from an assault and also that they pursue complaints.

15.81 It has been the finding of other inquiries that have considered this issue that the balancing of the interests of justice is best served by allowing a judge to determine the admission of sexual assault communications by reference to a set of determined criteria. The Commissions support the argument that a qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the accuser. Under the public interest test, the notes will only be admissible where they have substantial probative value and the public interest in protecting the confidentiality of the document is substantially outweighed by the public interest in allowing its inspection.

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114 D Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (2005) Australian Institute of Criminology, Canberra.

115 Ibid, 36.

116 Ibid, 49.

117 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxii.

15.82 The Commissions agree with the VLRC that confidential sexual assault communications should not be disclosed in committal proceedings. It should be left to the trial judge to determine any issues of disclosure or admissibility. Enactment of the privilege as it currently stands in New South Wales would achieve this effect.

15.83 It is therefore recommended that the *Evidence Act 1995* (Cth) be amended to adopt a sexual assault communications privilege, consistent with that provided for under Division 2 of Part 5, Chapter 6 of the *Criminal Procedure Act 1986* (NSW). This privilege should apply in both civil and criminal matters, as was the intention of the original New South Wales legislation.

15.84 The Commissions further propose that the confidential communications privilege and the sexual assault communications privilege apply to pre-trial processes. This is currently what occurs in New South Wales. It is noted that the extension of these provisions will resolve the difficulty in *R v Young* and allow the sexual assault communications privilege sections currently located in Chapter 6 of the *Criminal Procedure Act 1986* (NSW) to be re-enacted in the *Evidence Act 1995* (NSW). A draft of how this might be achieved in the Commonwealth Evidence Act is included in Appendix 1. This draft does not completely implement Recommendation 15–6 for the reasons discussed in Chapter 14 regarding the extension of Part 3.10 generally.

**Recommendation 15–4** Part 3.10 of the *Evidence Act 1995* (Cth) and Part 3.10, Division 1B of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault communications privilege based on the wording of Division 2 of Part 5, Chapter 6 of the *Criminal Procedure Act 1986* (NSW) applicable in both civil and criminal proceedings. The amendment should include a general discretion privilege and an absolute privilege in preliminary criminal proceedings.

**Recommendation 15–5** If Recommendation 15–4 is accepted, Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW) should be repealed.

**Recommendation 15–6** The sexual assault communications privilege should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

## Religious confessions

15.85 A specific privilege in respect of religious confessions was not recommended by the ALRC in its earlier inquiry because it was considered that confessions fell under

the confidential communications privilege.<sup>118</sup> Such a privilege was nevertheless enacted in s 127 of the uniform Evidence Acts. The religious confessions privilege applies in pre-trial matters, as it relates not only to the adducing of evidence but also allows a member of the clergy (of any religion and religious denomination) to refuse to divulge that a religious confession was made or the contents of the confession.<sup>119</sup>

15.86 The Commissions are of the view that the findings of the ALRC in ALRC 26 were correct in proposing that a relationship between a cleric and a member of a church should fall within the broader confidential relationships privilege and not be treated separately. This would allow the court to consider all the circumstances in which the communication was made, and balance the need for confidentiality against the need for disclosure.<sup>120</sup>

15.87 It would also overcome the definitional problems which could arise from attempting to define who is a member of the 'clergy' for the purpose of the Acts, and what is a 'religious confession'. Although the uniform Evidence Acts contain a broad definition of religious confession that takes into account the practices of different religions and religious denominations, the Commissions received one submission that suggested that not all religious practices could fall under this definition.<sup>121</sup>

15.88 It was noted in ALRC 26 that in practice the need for the court to exercise the discretion to order disclosure of a religious confession would rarely arise because it would be unusual for a party in litigation to find out about a communication to a cleric.<sup>122</sup> The Commissions do not recommend any amendment to s 127 at this time. However, should Recommendation 15-1 be adopted, the Commissions are of the view that the Standing Committee of Attorneys-General (SCAG) should consider whether s 127 is still a necessary part of the uniform Evidence Acts.

### **Privilege in respect of self-incrimination in other proceedings**

15.89 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.<sup>123</sup> Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which

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118 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), proposed s 109.

119 *Evidence Act 1995* (Cth) s 127.

120 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [908]–[909].

121 Christian Science Committee on Publication Federal Representative for Australia, *Submission E 81*, 15 September 2005.

122 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [909].

123 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).

15.90 Section 128(1) of the uniform Evidence Acts applies where a witness objects to giving particular evidence that ‘may tend to prove’ that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty.<sup>124</sup> Under s 128(2):

Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:

- (a) that he or she need not give the evidence; and
- (b) that, if he or she gives the evidence, the court will give a certificate under this section; and
- (c) of the effect of such a certificate.

15.91 Section 128(5) states:

If the court is satisfied that:

- (a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
- (b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
- (c) the interests of justice require that the witness give the evidence;

the court may require the witness to give the evidence.

15.92 In this regard, the Acts differ from the common law, which grants an absolute right to claim the privilege.<sup>125</sup> If the witness chooses to give evidence or is compelled to give evidence under s 128(5), the court must give the witness a certificate which grants that person use and derivative use immunity in relation to the particular

124 Clause 3 of Pt 2 of the Dictionary in the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) defines a ‘civil penalty’ as a penalty (other than a criminal penalty) arising under Australian law or a law of a foreign country. The protection of a certificate does not appear to extend to use of the evidence for administrative purposes, such as cancellation of a licence or a banning order under the *Corporations Act 2001* (Cth). Administrative actions have been traditionally held by the courts to have a protective purpose, rather than that of a penalty or punishment: eg, *ASC v Kippe* (1996) 67 FCR 499. However, in relation to the common law privilege against self-exposure to a penalty, the High Court has found that disqualification orders may have both a protective and a penal purpose, and therefore the privilege may apply: *Rich v Australian Securities and Investments Commission* (2004) 209 ALR 271.

125 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.05].

evidence (except in criminal proceedings in respect of the falsity of the evidence).<sup>126</sup> A form of certificate granted under s 128 is contained in Form 1 of the *Evidence Regulations* (Cth).<sup>127</sup> Regulation 7 of both the Commonwealth and the New South Wales Regulations states that a certificate can, but need not be, in accordance with Form 1.<sup>128</sup>

15.93 Where the court has denied a claim for privilege and where, after the giving of evidence, the court finds that there were indeed reasonable grounds for the claim, the witness must also be given a certificate.<sup>129</sup> The section does not apply to defendants in criminal proceedings who give evidence that they did, or omitted to do, an act which is a fact in issue, or that they had a state of mind the existence of which is a fact in issue. Corporations cannot claim the privilege under s 128.<sup>130</sup>

15.94 The process of certification in s 128 was based on a model adopted in the (then) Australian Capital Territory Court of Petty Sessions. ALRC 26 noted that the procedure was invoked around 25 times a year and elicited useful additional information from witnesses.<sup>131</sup> Section 128 differs from the ALRC's original proposal, which provided only for an optional certificate, and did not allow a court to compel a witness to give the evidence.<sup>132</sup>

15.95 In DP 69, it was noted that concerns with s 128 centred on the procedure of certification, rather than the aims or scope of the section. Judges, in particular, told the Inquiry that the process under s 128 is cumbersome and hard to explain to witnesses. They also argued that the necessity to invoke the process in relation to each question is clumsy. It should be the broader 'subject matter' of the evidence (rather than 'particular evidence') that is protected, for example, 'the use of cocaine by the witness when living in Kings Cross in 1997–98'. They further argued that it should be sufficient for a judge to confirm the grant of the certificate in the record of proceedings, rather than having to create an actual document; and that the Acts should

126 Under the *Evidence Act 1995* (Cth) the protection afforded under the certificate only extends to any proceeding in a NSW court. However, under s 128(10) and 128(11) of the *Evidence Act 1995* (Cth), a certificate given under the NSW Act operates as though it were given under the federal Act, thereby extending the protection to any Australian court. That extended effect also applies to the direct and derivative use immunities contained in s 128(7).

127 And in the equivalent *Evidence Regulations* (NSW).

128 See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13060].

129 Uniform Evidence Acts s 128(4).

130 Ibid s 187.

131 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [861].

132 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [215].

require a prosecutor to keep a permanent record of all certificates granted under s 128 in any proceedings.<sup>133</sup>

15.96 The Commissions agreed in DP 69 that s 128 should be amended to clarify its procedures. Submissions were sought on how these changes might best be achieved.

### ***Submissions and consultations***

15.97 The CDPP is supportive of amendments that would allow more flexibility in the use of certificates, as is ASIC.<sup>134</sup> The Law Society of New South Wales agrees that there would be benefits in streamlining the process under s 128.<sup>135</sup>

15.98 The Law Institute of Victoria (LIV) is critical of the ‘reasonable grounds’ test in s 128, and argues that the operation of an absolute right to claim the privilege should prevail. The LIV is supportive of the suggestion that a witness should be able to make a claim in relation to particular topics to avoid the need repeatedly to make claims in response to particular topics.<sup>136</sup>

15.99 The Family Court of Australia submits that the current s 128(2) procedure of inducing rather than compelling self-incriminatory evidence is problematic. In the view of the Family Court, s 128(2) enables an unscrupulous witness to obtain an unintended forensic advantage in subsequent criminal proceedings by volunteering information to the court that it does not really need or want and which would not have been compelled under the exception in s 128(5). An induced or volunteered answer under s 128(2) will arm the witness with an indemnity certificate giving him or her both use and derivative use immunity in respect of the evidence (except in the criminal proceeding in respect of the false giving of evidence). The protection extends to the use of the evidence as a prior inconsistent statement. This will have the practical effect of putting any later prosecuting authority in the position of having to prove affirmatively that the evidence relied on in the proceeding is derived from a legitimate source wholly independent of the induced testimony.<sup>137</sup>

15.100 The Family Court further submits that the effect of paragraph (b) of s 128(5) is that an answer cannot be compelled, even in the interests of justice, where the court is satisfied that the evidence could prove that the witness has committed a criminal or civil offence under a foreign law. The Family Court argues that the paragraph is nearly always overlooked and probably has a much wider operation than the legislature

133 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.223]–[13.226], see Proposal 13–9 and Question 13–2.

134 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005;

135 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

136 Law Institute of Victoria, *Submission E 116*, 27 September 2005.

137 Family Court of Australia, *Submission E 80*, 16 September 2005.



intended. Almost every criminal offence and most civil breaches have international counterparts. Giving s 128(5)(b) its full scope would therefore render the certificate procedure almost useless in most cases.<sup>138</sup>

15.101 Finally, the Family Court questions the application of the process under s 128(1) to affidavits. Under the *Family Law Rules 2004*, evidence in chief at a hearing or trial is required to be given by affidavit unless the witness refuses to swear one. No specific provision is made in the Rules for a witness to take objection on the grounds that the witness may incriminate himself or herself.<sup>139</sup>

### ***The Commissions' view***

15.102 The Family Court's concerns in regard to parties volunteering information in family law proceedings for their own advantage are noted. As s 128 is presently drafted, once a party objects to giving evidence, the court is required to make a determination if there are reasonable grounds to the objection. Under s 128(2), if the court finds that there are reasonable grounds for the objection, the court is not to compel the witness to give evidence, but must inform him or her that if he or she does give the evidence, a certificate will be given. This process allows the witness to consider giving the evidence in exchange for a certificate, before the test under s 128(5), as to whether the evidence can be compelled, is applied.

15.103 The Family Court's concern has not been raised elsewhere. In ALRC 26, the ALRC considered that the appropriate balance between the rights of the individual and the state could be struck by a procedure whereby a witness could be encouraged to testify but the state would be prevented from using that evidence against him or her in later proceedings.<sup>140</sup> This view was endorsed by the New Zealand Law Commission in its consideration of the privilege against self-incrimination in 1996.<sup>141</sup> Whilst the ALRC's proposal was later modified to allow that a witness could also be compelled to give the evidence, the option of voluntarily giving the evidence in exchange for a certificate remained. It is not considered that a sufficient problem has been identified at this stage to warrant fundamental reconsideration of the provision.

15.104 In relation to the criticisms of s 128(5)(b) by the Family Court, an exception for an offence or civil penalty against or arising under a law of a foreign country was not part of the ALRC's original proposal. However, because the legislated section was drafted in such a way that a person could be compelled to give evidence (which was not part of the ALRC proposal) it was considered that, as an Australian court cannot

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138 Ibid.

139 Ibid.

140 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [860].

141 New Zealand Law Commission, *The Privilege Against Self-Incrimination: A Discussion Paper* (1996), 119.

guarantee that any certificate of immunity issued by it will be respected in a foreign jurisdiction, the court should not use its discretion to overrule a legitimate claim of privilege in this regard. The width of the provision is not as great as asserted in the submission of the Family Court. It is not the existence of equivalent offences in foreign jurisdictions which removes the court's ability to compel answers in the interests of justice—it is the risk of incrimination in relation to such offences. That risk will usually only exist where the evidence relates to actions within a foreign country.

15.105 It has been noted by the New Zealand Law Commission that a court faces real difficulties in determining whether claims based on a liability arising overseas are legitimate.<sup>142</sup> The Evidence Bill, which at the time of writing this Report is presently under consideration by the New Zealand Parliament, confines the privilege to offences under New Zealand law. However, in the case of an offence in another jurisdiction, the Bill grants the judge a discretion to direct that the person cannot be required to provide the information if the judge thinks that it would be unreasonable to require the person to incriminate himself or herself by providing the information.<sup>143</sup> Although the concerns of the Family Court are noted, the Commissions support the policy behind the current s 128(5)(b). The underlying policy of s 128 is that the privilege against self-incrimination should only be overridden when an immunity is available to the witness in relation to other proceedings.

15.106 The Commissions believe that the best way to clarify the procedure under s 128 is by simplifying the order in which the process of certification is outlined in the section. This would involve moving the current s 128(5), where the court may require the witness to give evidence, closer to s 128(2), where the witness makes the objection.<sup>144</sup> In addition, rather than the current practice, where a certificate is required to be issued for each question, the Commissions support the view that 'particular evidence' under the section should be defined to include 'evidence both in response to questions and evidence on particular topics'.

15.107 Rather than including the requirements for the court to inform the witness of his or her rights and the effect of the section, it will be simpler for the section to provide:

- that the witness may object to giving the evidence on the grounds that it may incriminate him or her (or make him or her liable to a civil penalty);
- that the court shall determine whether or not that claim is based on reasonable grounds;

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142 Ibid, 77.

143 See Evidence Bill 2005 (NZ) cl 56(1)(b) and cl 57.

144 S McNicol, *Consultation*, Melbourne, 17 March 2005.

- if the claim is reasonable, that the court can then tell the witness that he or she may choose to give the evidence or the court will consider whether the interests of justice require that the evidence be given;
- if the evidence is given, either voluntarily or under compulsion, that a certificate shall be granted preventing the use of that evidence against the person in another proceeding.

15.108 The general provisions regarding the duty of the court to inform witnesses and parties of their rights in relation to privileges under Part 3.10 will remain applicable.<sup>145</sup> A recommended provision based on these amendments is contained in Appendix 1.

**Recommendation 15–7** Section 128 of the uniform Evidence Acts should apply where a witness objects to giving evidence either to a particular question, or a class of questions, on the grounds that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law or a law of a foreign country or is liable to a civil penalty under such law. The section should provide that:

- (a) the court is to determine whether or not that claim is based on reasonable grounds;
- (b) if the court is so satisfied, the court must inform the witness that the witness may choose to give the evidence or the court will consider whether the interests of justice require that the evidence be given;
- (c) the court may require that the witness give the evidence if the interests of justice so require, but must not do so if the evidence would tend to prove that the witness has committed an offence against or arising under a law of a foreign country or is liable to a civil penalty under a law of a foreign country; and
- (d) if the evidence is given, either voluntarily or under compulsion, a certificate is to be granted preventing the use of that evidence against the person.

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145 See s 132 of the uniform Evidence Acts.

### Application of s 128 to pre-trial proceedings

15.109 Section 128 provides a mechanism for allowing a witness to object to answering questions on the grounds that to do so may expose the witness to the risk of criminal and other proceedings. Its policy aim is premised on the desirability of encouraging witnesses to testify. The common law privilege against self-incrimination can be invoked in pre-trial and non-curial contexts. The policy considerations supporting a certification procedure in relation to evidence do not support the extension of the certification procedure to pre-trial matters. In this case, the common law rules regarding the privilege against self-incrimination will continue to apply.<sup>146</sup>

### Definition of ‘use in any proceeding’ and ‘court’

15.110 Section 128(7) of the *Evidence Act 1995* (Cth) states:

In any proceeding in an Australian court:

- (a) evidence given by a person in respect of which a certificate under this section has been given; and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

15.111 The term ‘proceeding’ is not defined, although ‘Australian court’ is given a wide definition.<sup>147</sup> Odgers argues that both concepts should be given a liberal interpretation based on the underlying protective purpose of granting the privilege.<sup>148</sup> Section 128(7) is mirrored in the other uniform Evidence Acts, although, for example, under the *Evidence Act 1995* (NSW), the section applies to ‘any proceeding in a NSW court’.

### Application to a retrial

15.112 One issue raised by the term ‘any proceeding’ is the status of a retrial. In *R v Cornwell*,<sup>149</sup> the accused was granted a certificate under s 128 in his first trial for evidence given by him that might incriminate him in relation to other possible charges. The jury at the trial could not decide on a verdict and a re-trial commenced before Blackmore DCJ in the District Court of New South Wales. Blackmore DCJ determined that the trial before him was a different proceeding for the purposes of s 128(7). Therefore, the certificate issued by Howie J in the Supreme Court of New South Wales would apply to the proceeding in the District Court, preventing the tendering of the evidence that was the subject of the certificate. The issue was whether a retrial could be

<sup>146</sup> Although see Recommendation 15–10 below.

<sup>147</sup> S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13100]. See discussion of what is meant by ‘proceeding’ in Ch 2.

<sup>148</sup> Ibid, [1.3.13100].

<sup>149</sup> *R v Cornwell* [2004] NSWSC 45.

considered a ‘proceeding’ for the purpose of a s 128 certificate or whether it is part of the original proceedings.<sup>150</sup>

15.113 Following Blackmore DCJ’s ruling, the parties appeared before Howie J regarding the issuing of the certificate from the first trial. The Crown contended that the certificate should not be issued because of the defence delay in seeking it and the use to be made of it in the District Court proceedings.

15.114 Howie J considered whether there was any basis on which the certificate could be limited or amended to prevent its use in keeping the evidence out of the retrial. He found that there was no ground to refuse the certificate on the basis of events that ‘occurred after the accused was told he must answer the questions asked but that a certificate would be issued in respect of those answers’.<sup>151</sup> The process set out by s 128 is mandatory, not discretionary, once the requirements of the section are met.

15.115 Howie J expressed concern about the situation in *Cornwell*, stating that it was difficult to see ‘any justifiable policy which would permit an accused to give evidence in a trial on the basis that some or all of it could not be used against him in any subsequent proceedings for the same offence’.<sup>152</sup> On this basis, he suggested that either it is incorrect to include a retrial in the definition of a ‘proceeding’ for the purpose of s 128(7) or the section needs to be amended.<sup>153</sup>

It is clear from the reasons for judgment and the transcript of proceedings that the purpose of issuing the certificate was to protect the applicant from prosecution for other offences not charged before the Court ... As the Crown has sought to lead evidence of uncharged criminal activity as part of its case in proving the offence charged, it seemed to me that the applicant was entitled to defend himself free of running the risk of his evidence being used against him in subsequent proceedings for criminal activity for which he was then not being tried. It was not my intention, nor was it ever suggested during the course of argument, that the certificate could be used by the accused to protect himself from the use of his evidence in a proceeding for the charge in respect of which the evidence was given.<sup>154</sup>

### ***Submissions and consultations***

15.116 To correct the situation in *Cornwell*, in DP 69 it was proposed that s 128(7) of the uniform Evidence Acts be amended to clarify that a ‘proceeding’ under that section

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150 Ibid.

151 Ibid, [12].

152 Ibid, [11].

153 Ibid, [18].

154 Ibid, [9]–[10].

does not include a retrial for the same offence or an offence arising out of the same circumstances.<sup>155</sup>

15.117 In submissions, the CDPP and the NSW DPP agreed that s 128 should be amended to reflect the view of Howie J in *Cornwell*.<sup>156</sup> However, other submissions argued that the decision of Blackmore DCJ in *Cornwell* is an anomaly because of the facts in that case, and one that is likely to be corrected by the courts without the need for legislative amendment.<sup>157</sup>

15.118 The Commissions believe it is worthwhile to clarify s 128(7) to reflect this position and eliminate the possibility for further confusion. The proposed provision is set out in Appendix 1.

**Recommendation 15–8** Section 128(7) of the uniform Evidence Acts should be amended to clarify that a ‘proceeding’ under that section does not include a retrial for the same offence or an offence arising out of the same circumstances.

### *Definition of a ‘NSW Court’*

15.119 As noted in Chapter 2, the definition of an Australian court in the *Evidence Act 1995* (Cth) is broader than the definition of a NSW court in the *Evidence Act 1995* (NSW). A ‘NSW court’ is defined in the Dictionary as the Supreme Court or another court created by parliament including a body, other than a court, that is required to *apply* the rules of evidence.<sup>158</sup> The definition of an Australian court under the Commonwealth Act includes a person or body authorised under an Australian law to hear, receive and examine evidence (regardless of whether the rules of evidence must be applied). This means that the protection offered by a s 128 certificate under the *Evidence Act 1995* (NSW) is more limited than under the Commonwealth Act as it does not extend to tribunals that are not required to, but may, apply the rules of evidence, such as disciplinary tribunals and other administrative bodies.<sup>159</sup>

15.120 In DP 69, the Commissions expressed the view that the current definition of a ‘NSW court’ under the *Evidence Act 1995* (NSW) unduly limits the application of s 128 certificates. In order to reflect the policy basis of the section, the ambit of the

<sup>155</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–11.

<sup>156</sup> Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

<sup>157</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

<sup>158</sup> The definition of a ‘Tasmanian court’ is substantially the same in *Evidence Act 2001* (Tas) s 3.

<sup>159</sup> S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13100].

protection of a certificate under the uniform Evidence Acts should be the same. As under the *Evidence Act 1995* (Cth), the protection offered by a s 128 certificate should extend to administrative tribunals and disciplinary bodies authorised to receive and examine evidence. The Commissions proposed amendment of the Dictionary of the *Evidence Act 1995* (NSW) to reflect the position under the *Evidence Act 1995* (Cth) in this regard.<sup>160</sup>

15.121 Few submissions address this proposal. However, there is support for the change from the NSW DPP and the Law Society of New South Wales.<sup>161</sup> The Commissions have noted a concern that an amendment to the definition of a ‘NSW Court’ in the Dictionary of the *Evidence Act 1995* (NSW) could affect the application of the Act to bodies beyond those to which it was intended to apply. As the desired outcome of the amendment was only that a certificate under the *Evidence Act 1995* (NSW) have the same scope as under the Commonwealth Act, it is suggested that the amendment be given effect by amendment to s 128(7) of the *Evidence Act 1995* (NSW) instead. A draft provision is located Appendix 1.

**Recommendation 15–9** Section 128(7) of the *Evidence Act 1995* (NSW) should be amended to provide that for the purposes of that provision a ‘NSW court’ means ‘any New South Wales court or any person or body authorised by a New South Wales law, or by consent of the parties, to hear, receive and examine evidence’.

### Application of s 128 to ancillary proceedings

15.122 As noted above, at common law, the privilege against self-incrimination is a fundamental right recognised within the legal system. It has been said that the rule ‘is not simply a rule of evidence, but a basic and substantive common law right’.<sup>162</sup> The application of both the common law privilege and the procedure available under s 128 to proceedings which involve asset preservation or searching orders, such as *Mareva* and *Anton Piller* orders,<sup>163</sup> has been the subject of considerable case law and confusion.

<sup>160</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–12. See also Rec 2–1.

<sup>161</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

<sup>162</sup> *Reid v Howard* (1995) 184 CLR 1, 11–12.

<sup>163</sup> Both types of orders are interim orders designed to preserve the ‘status quo’ for parties to a matter while they await a judgement or further orders. A ‘*Mareva* order’ is a freezing order which is designed to

15.123 The High Court established in *Reid v Howard* that a defendant could object to a compulsory disclosure order by invoking the privilege against self-incrimination.<sup>164</sup> This decision was in line with the House of Lords decision in *Rank Film Distribution Ltd v Video Information Centre*<sup>165</sup> where it was decided that a person who was the subject of an *Anton Piller* order or a *Mareva* order could invoke the privilege against self-incrimination.

15.124 In a number of cases, s 128 was held to apply to ancillary proceedings in the context of orders made ancillary to asset preservation orders requiring an affidavit of assets.<sup>166</sup> Part of a court's power to grant asset preservation orders is the ability to require a person against whom such an order is made to attend court for an oral examination as to his or her assets. This examination usually occurs following the preparation of an affidavit of assets. In New South Wales, the Equity Division of the Supreme Court attempted to overcome the decision in *Reid v Howard* and to use the process under s 128 to require a party to provide an affidavit of assets.<sup>167</sup>

15.125 In *Bax Global (Australia) Pty Ltd v Evans*, Austin J described the practice of the Equity Division of the New South Wales Supreme Court. The court attempted to protect an affidavit of assets by using the following procedure when granting a s 128 certificate.

The Court initiates the disclosure procedure by making an order that a disclosure affidavit be prepared and delivered to the judge's associate in a sealed envelope, together with directions that the affidavit not be filed or served on any other party, and that the further hearing be notified to the Director of Public Prosecutions. At that hearing the judge opens the envelope and inspects the affidavit. Any affidavit or oral evidence to support the witness' objection is then adduced, and submissions are heard as to whether for the purposes of s 128(2) there are reasonable grounds for the objection, even though at that stage the plaintiff's counsel has not had access to the affidavit which is the subject of the objection. The judge then rules on that question ... Once the affidavit has been read, the s 128 certificate is given and attached to it.

If the witness elects not to give the evidence, then the Court hears any further submissions as to whether it should require the witness to give the evidence under s 128(5), and makes a determination accordingly. If the Court decides to require the witness to give the evidence, then it follows the procedure for the reading of the affidavit as outlined above. If the Court decides not [to] require the witness to give the evidence, the judge directs that all copies of the affidavit be returned to the witness' legal representative and authorises their destruction.<sup>168</sup>

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prevent a respondent from removing assets from the jurisdiction prior to judgment. An *Anton Piller* order is a search order allowing inspection and seizure of evidence which is in danger of being destroyed, concealed or removed, and that is needed to prove the applicants claim: P Biscoe, *Mareva and Anton Piller Orders: Freezing and Search Orders* (2005), [1.1].

164 *Reid v Howard* (1995) 184 CLR 1.

165 *Rank Film Distribution Ltd v Video Information Centre* [1981] 2 All ER 76.

166 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.10].

167 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.88].

168 *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538, [41]–[46].



15.126 In *Ross v Internet Wines Pty Ltd*,<sup>169</sup> the New South Wales Court of Appeal disapproved of the practice in *Bax*. The Court held, in effect, that a respondent could not be compelled to disclose assets before any claim to the privilege against self-incrimination was adjudicated upon. Giles JA (with whom Spigelman CJ and McColl JA agreed) held that

it is impermissible for the court to substitute for a person's fundamental common law right the statutory balance of rights, supplemented by court-devised additional protection by way of artificially making the disclosing party a witness, closure of the Court, limitations on who can see the disclosure affidavit, or if the privilege is upheld and no certificate is granted return of the affidavit to its maker; all not pursuant to statute but by the court devising procedure intended to inhibit the direct or derivative use against the person of information tending to incriminate.<sup>170</sup>

15.127 It was also unclear whether the use of the term 'witness' in s 128 includes a person who is not giving evidence in court. In *Ross v Internet Wines Pty Ltd*, the Court of Appeal was prepared to assume (but not decide) that a deponent of a disclosure affidavit would fall within the scope of 'witness' envisaged by s 128(1).<sup>171</sup>

15.128 The Supreme Court of New South Wales, in *Pathways Employment Services v West*,<sup>172</sup> considered the *Bax* practice in some detail. Campbell J questioned whether the approach taken in *Bax* is correct, because in essence it is the court directing the defendant to become a witness only so that the privilege against self-incrimination can be compromised.<sup>173</sup>

It is only by the active involvement of the Court, in setting a time and place for a special hearing which otherwise would never occur, that the first defendant would become a witness. I am not persuaded that these are circumstances within the scope of the circumstances for which Parliament intended section 128 of the *Evidence Act 1995* to provide an exception to the privilege against self-incrimination.<sup>174</sup>

15.129 Campbell J commented that there was no coherence in the interaction between the law concerning privilege against self-incrimination and the law concerning compulsory disclosure of information for the purpose of civil proceedings.<sup>175</sup> His Honour noted that 'a conflict has been long apparent between the policy underlying the privilege against self-incrimination and the policy that underlies the procedures,

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169 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436.

170 *Ibid*, 452.

171 *Ibid*, 451. Although see *In the Marriage of Atkinson* (1997) 136 FLR 347, where Lindenmayer J held that litigants in the Family Court who are required to file affidavits prior to a hearing may make an application under s 128: J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.82].

172 *Pathways Employment Services v West* (2004) 212 ALR 140.

173 *Ibid*, [40].

174 *Ibid*, [40].

175 *Ibid*, [46].

originally equitable, of discovery and interrogatories'.<sup>176</sup> For example, there are inherent tensions between the privilege against self-incrimination and the desire to prevent its use by a criminal defendant to avoid discovery and interrogatories in associated civil proceedings for the recovery or administration of property.<sup>177</sup>

15.130 Campbell J argued that the Commissions' present Inquiry was an appropriate place to consider and clarify the application of s 128 (or similar powers in other legislation where the privilege is abrogated) to ancillary proceedings for the compulsory disclosure of information in civil matters.<sup>178</sup>

15.131 In *Macquarie Bank Ltd v Riley Street Nominees Pty Ltd*,<sup>179</sup> Campbell J made orders designed to meet the requirements of the Court of Appeal decision in *Ross v Internet Wines*. One of the orders stated that if the respondents considered that the order to produce an affidavit of assets may incriminate them, they had to file and serve within seven days an affidavit setting out their claim to the privilege against self-incrimination. If that claim for privilege was upheld, then the respondents did not need to disclose that information.

### ***Proposal to abrogate the privilege***

15.132 A committee of the Council of Chief Justices of Australia and New Zealand is currently investigating the question of the harmonisation of rules of court, practice notes and forms in relation to *Mareva* orders and *Anton Piller* orders. Following the release of IP 28, the Committee made a submission to the Inquiry suggesting that, to overcome the problems identified in the case law, the uniform Evidence Acts be amended to abrogate the privilege so that an order for disclosure must be obeyed.<sup>180</sup>

15.133 This position has been adopted in a number of other jurisdictions. Following the decision in *Rank Films*,<sup>181</sup> the *Supreme Court Act 1981* (UK) was amended to provide that privilege against self-incrimination cannot be invoked in civil proceedings for intellectual property infringement. These are the kinds of proceedings where *Anton Piller* orders are most commonly made. The section provides a use immunity for any statements that are elicited in the course of obeying the order but no use immunity for any documents that are produced.<sup>182</sup>

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176 Ibid, [12].

177 Ibid, [13].

178 Ibid, [49].

179 *Macquarie Bank Ltd v Riley Street Nominees Pty Ltd* [2005] NSWSC 162.

180 Committee of the Council of Chief Justices of Australia and New Zealand, *Submission E 52*, 22 April 2005.

181 *Rank Films Distributors v Video Information Centre* [1982] AC 380.

182 *Supreme Court Act 1981* (UK) s 72.

15.134 In New Zealand, the new Evidence Bill<sup>183</sup> will follow the United Kingdom approach and prevents parties to *Anton Piller* orders from claiming the privilege against self-incrimination. Under cl 59 of the Bill, there is no privilege for pre-existing documents. However, the privilege can be claimed if the party is required to answer potentially self-incriminating questions or supply information in compliance with the order. If satisfied that self-incrimination is reasonably likely if a party provides the information sought by the order, the judge must make an order that the information provided not be used in any criminal proceeding against the person providing the information.

***DP 69 proposal***

15.135 In DP 69, the Commissions noted there are a number of potential ways in which the uniform Evidence Acts could be amended to require a person to provide information that is sought pursuant to the granting of a *Mareva* order or *Anton Piller* order.

15.136 For example, s 128 could be amended to abrogate the privilege in civil proceedings generally, where any order is made against an individual or a question is put to an individual. Alternatively, the privilege could be specifically abrogated where an order is made requiring an individual to disclose assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. The information would not, however, be available to be used against that individual in any criminal proceeding or in any proceeding that would expose the individual to a penalty (except a proceeding for perjury or contempt of court). In DP 69, the Commissions considered that a general abrogation of the privilege in civil proceedings is unwarranted and preferred the limited abrogation of the privilege to specific types of orders to rectify the present problem with s 128.

15.137 A draft provision, s 128A, was set out in Appendix 1 of DP 69.<sup>184</sup> This provision had the effect that a person is not excused from complying with a court order on the ground that compliance with it may tend to prove that the person has committed an offence or is liable to a civil penalty. Any information given in those proceedings could not be used against the relevant person in any subsequent proceedings under the provision.

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183 At the time of writing the Bill was under consideration by the Justice and Electoral Parliamentary Committee see:  
<<http://www.clerk.parliament.govt.nz/Programme/Committees/Submissions/jeevidence.htm>>.

184 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.236]–[13.237]; Appendix 1.

15.138 Since DP 69 was published, the *Civil Procedure Act 2005* (NSW) has come into force. Section 87 of that Act extends the certificate procedure under s 128 to interlocutory proceedings. It has been put to the Inquiry that this may mean that the process under *Bax* will now be allowed, meaning the court can compel a person to comply with the order and then issue a certificate.<sup>185</sup> Nonetheless, it is suggested that, as a matter of policy, explicit abrogation of the privilege in relation to these orders is preferable.

### ***Submissions and consultations***

15.139 The NSW DPP supports the Commissions' proposal, although some minor drafting amendments are suggested.<sup>186</sup> ASIC also supports the proposal.<sup>187</sup> The NSW PDO argues that, as the proposed provisions relate only to forfeiture proceedings, abrogation of the privilege is better dealt with in statutes dealing with those processes.<sup>188</sup>

15.140 The CDPP is concerned that the proposal can operate to give immunity from prosecution to a person who is being asked to comply with legitimate court orders. It opposes any provision which allows a person to give such evidence without the consequence that they may face prosecution. The CDPP is also concerned that the Commissions' draft proposal contains a derivative use immunity. In its view, this can be open to abuse. A person can 'engineer' a compulsory disclosure so that the prosecution in any subsequent trial is obliged to prove that none of its evidence derives directly or indirectly from the compulsory disclosure.<sup>189</sup>

15.141 A general concern is expressed that the words used in the Commissions' proposal are too broad and could capture, for example, any orders for discovery.<sup>190</sup> One Federal Court judge submits that any abrogation of the privilege and accompanying immunity must not defeat the object of the provision—which is ultimately to assist in the proper resolution of the dispute. For example, in relation to an *Anton Piller* order, a person can be obliged to provide material falling under the *Copyright Act 1968* (Cth). Under the proposal in DP 69, that information can be obtained compulsorily, but then a person will be able to claim privilege in the proceedings instituted as a result of information obtained from the execution of the order.<sup>191</sup>

15.142 Since DP 69 was published, the Committee of the Council of Chief Justices of Australia and New Zealand has given further consideration to these issues. The Committee revised its original submission to the Inquiry and submits that Australia should follow New Zealand. The privilege against self-incrimination should not apply

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185 P Biscoe, *Consultation*, Sydney, 28 July 2005.

186 Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

187 Australian Securities & Investments Commission, *Submission E 97*, 20 September 2005.

188 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

189 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

190 P Biscoe, *Consultation*, Sydney, 28 July 2005.

191 Justice C Branson, *Consultation*, Sydney, 25 July 2005.

to documents which existed prior to the making of an order for disclosure and should apply only to documents which are brought into existence in compliance with the order. The Committee further submits that, unlike the position in New Zealand, both *Anton Pillar* orders and *Mareva* orders should be encompassed in the amendments.<sup>192</sup> The Committee proposes that provisions having the following effect be inserted in the uniform Evidence Acts, following s 187.<sup>193</sup>

**187A No Privilege Against Self-Incrimination for Pre-Existing Documents**

At no stage of any proceeding is any person entitled to refuse or fail to comply with an order for production of a pre-existing document or thing that was not created pursuant to a court order, or to object to the inspection or admissibility of evidence of such a document or thing, on the ground that to do so might tend to incriminate the person or make the person liable to a civil penalty.

**187B No Privilege Against Self-Incrimination Re Disclosure Orders etc in Civil Proceedings**

- (1) At no stage of a civil proceeding is a person entitled to refuse or fail to comply with an order of the court requiring the person to do one or more of the following:
  - (a) disclose information
  - (b) permit the premises to be searched
  - (c) permit inspection, copying or recording of documents or things
  - (d) secure or deliver up or permit removal of documents or things.
- (2) If the court finds, on application being made at any time, that the evidence of any information, document or thing disclosed found or obtained in direct or indirect compliance with the court order might tend to incriminate the person or make the person liable to a civil penalty, the court is to cause the witness to be given a certificate under this section in respect of the evidence. Evidence in respect of which a certificate has been given under this section cannot be used against a person in any criminal or civil penalty proceedings in [*an Australian court*][*a [name of State] court*].
- (3) Subsection (2) does not apply to a pre-existing document or thing referred to in section 187A.
- (4) Subsection (2) does not apply to a criminal proceeding in respect of the falsity of the information disclosed in compliance with the court order.
- (5) If a person has complied with an order of the kind referred to in subsection (1) made by an Australian court to which subsection (1) does not apply, subsections (2), (3) and (4) apply in the same way as if the order was made by a court to which subsection (1) applies.

<sup>192</sup> Justice K Lindgren (on behalf of a Committee of the Council of Chief Justices of Australia and New Zealand), *Submission E 75*, 14 September 2005.

<sup>193</sup> Section 187 abrogates the privilege against self-incrimination for corporations.

### *The Commissions' view*

15.143 The availability of the privilege against self-incrimination in the context of compulsory disclosure orders needs to be addressed. The Commissions agree with the Committee of the Council of Chief Justices that the express abrogation of the privilege against self-incrimination is required in relation to orders made in a civil proceeding requiring a person to disclose information about assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. This must be accompanied by a protection in relation to the subsequent use of that information.

15.144 The Commissions support the submission of the Committee that a distinction should be drawn between a witness testifying or preparing a document in response to an order (for example, an affidavit), and orders for the production of documents already in existence. At common law, unless abrogated expressly or by necessary implication, the privilege against self-incrimination applies to any documents that an individual is required to produce.<sup>194</sup> However, some case law recognises that some documents can be considered to be 'real evidence', which is not protected by the privilege.

15.145 In *Environment Protection Authority v Caltex Refining Co Pty Ltd (Caltex)*, Mason CJ and Toohey J explained the distinction as follows:

It is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt ... [documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings.<sup>195</sup>

15.146 McHugh J in *Caltex* cited Lord Templeman in *Istel v Tully*<sup>196</sup> to the effect that 'it was difficult to see why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents that are in his possession or power and which speak for themselves'.<sup>197</sup>

15.147 In its report on *Abrogation of the Privilege against Self-Incrimination*, the Queensland Law Reform Commission found that one of the justifications for abrogation of the privilege could be, in the case of information in documentary form, whether the document was in existence at the time the requirement to provide the information was imposed.<sup>198</sup>

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194 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 36.

195 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.

196 *Istel v Tully* [1993] AC 45, 53.

197 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 555.

198 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 62–63.

15.148 In the United States, pre-existing documents that must be kept as part of a requirement of a regulatory scheme are not protected by the privilege.<sup>199</sup> After considering the United States case law, the New Zealand Law Commission similarly recommended that the privilege should not apply to pre-existing documents or real evidence. The fact that there is no compulsion at the time of creation means that the likelihood of compulsion causing the evidence to be unreliable, or for the information to be created from an abuse of power, is minimal.<sup>200</sup> Under cl 59 of the New Zealand Evidence Bill, there is no privilege for pre-existing documents, as the section relates only to the giving of ‘incriminating information’ which is defined as information prepared or created after and in response to the requirement of an order.<sup>201</sup>

15.149 The Commissions note the drafting concerns that were raised in submissions in relation to the proposed s 128A that was contained in DP 69. The Commissions recommend that the section still contain a use and derivative use immunity over the information, which is consistent with the provisions of the current s 128. There were also concerns about proposed s 128A being used to prevent the production of documents obtained as a result of a search order being used in later criminal proceedings. This will be overcome by the proposal to limit the availability of the privilege to documents prepared for the purpose of the order, and not pre-existing documents.

15.150 The Commissions therefore recommend that the uniform Evidence Acts should be amended to provide that the privilege against self-incrimination cannot be claimed in respect of orders made in a civil proceeding requiring a person to disclose information about assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. However, evidence obtained in compliance with such orders should not then be able to be used against the person in a criminal or civil penalty proceeding against the person, where the court finds that the evidence might tend to incriminate the person, or make the person liable to a civil penalty. This use immunity should only apply to documents or information created pursuant to the court order, and not to a pre-existing document or thing.

15.151 The Commissions note that it is not clear at present how such a recommendation would interact with the new s 87 of the *Civil Procedure Act 2005* (NSW). Any amendments to that section that are required should be considered if Recommendation 15–10 is adopted. The Commissions have not included a draft provision for the implementation of this recommendation in Appendix 1.

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199 *Shapiro v United States* 335 US 1 (1948). See also New Zealand Law Commission, *The Privilege Against Self-Incrimination: A Discussion Paper* (1996), 61.

200 *Ibid*, 63.

201 Evidence Bill 2005 (NZ) cl 47.

**Recommendation 15–10** The uniform Evidence Acts should be amended to provide that the privilege against self-incrimination cannot be claimed in respect of orders made in a civil proceeding requiring a person to disclose information about assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. However, it should be provided that evidence obtained in compliance with such orders cannot be used against the person in a criminal or civil penalty proceeding against the person, where the court finds that the evidence might tend to incriminate the person, or make the person liable to a civil penalty. This use immunity should only apply to documents or information created pursuant to the court order, and not to a pre-existing document or thing.

## Evidence excluded in the public interest

15.152 A claim of public interest immunity may be made under the common law and is also available under s 130 of the uniform Evidence Acts. Public interest immunity can be distinguished from privilege in that, in the case of privileges, only a party who can claim the privilege is able to invoke it. By contrast, a claim of public interest immunity can be made by the state, a non-governmental party to the proceedings, or by the court on its own motion.

15.153 The common law formulation of public interest immunity is stated in *Sankey v Whitlam*:

[T]he court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so.<sup>202</sup>

15.154 Hunter, Cameron and Henning note that the grounds of what constitutes public interest under the common law are not closed, but generally relate to the interests of central government.<sup>203</sup> Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.<sup>204</sup> As noted below, s 130 of the uniform Evidence Acts applies the privilege to ‘matters of state’.

15.155 In its previous Evidence inquiry, the ALRC found no serious inadequacies in the common law approach to public interest immunity, and recommended as little

<sup>202</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).

<sup>203</sup> J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].

<sup>204</sup> *Ibid*, [8.102].



interference with the supervisory role of the courts as possible.<sup>205</sup> However, the ALRC did recommend a change from the accepted common law formula that requires the judge, when determining whether to grant public interest immunity, to balance the competing interests at a general level.<sup>206</sup> The ALRC supported a more specific formula balancing ‘the nature of the injury which the nation or public service is likely to suffer, and the evidentiary value and importance of the documents in the particular litigation’.<sup>207</sup>

15.156 Section 130(1) substantially reflects the ALRC’s recommendations. It provides:

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

15.157 The ‘public interest’ in s 130 has been defined as requiring ‘a dimension that is governmental in character’.<sup>208</sup> In *New South Wales v Ryan*,<sup>209</sup> the Full Federal Court held that there was no relevant difference, in relation to a public interest immunity claim for Cabinet papers, between the common law, as determined in *Sankey v Whitlam*,<sup>210</sup> and the provisions of s 130.

15.158 The ALRC has recently examined the operation of s 130 in the context of the protection of classified and security sensitive information in court proceedings. In the Report *Keeping Secrets* (ALRC 98), it was estimated that public interest immunity arises as an issue in less than one per cent of cases across all courts.<sup>211</sup> The ALRC also found that the public interest immunity procedure worked effectively, although the procedures for invoking its use were thought by some to require clarification.<sup>212</sup>

15.159 In ALRC 98, the ALRC noted that one unresolved issue is whether the uniform Evidence Acts require a provision to enable a judge’s ruling on whether the immunity claim would be upheld to be obtained in advance of the trial (and to allow time for an appeal from that ruling).<sup>213</sup> At the time, the ALRC considered that the

205 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [864].

206 See *Sankey v Whitlam* (1978) 142 CLR 1.

207 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [866], citing *Alister v The Queen* (1983) 50 ALR 41, 44–45.

208 *R v Young* (1999) 46 NSWLR 681, 693.

209 *New South Wales v Ryan* (1998) 101 LGERA 246. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [130.40].

210 *Sankey v Whitlam* (1978) 142 CLR 1.

211 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.192].

212 *Ibid*, [8.192]–[8.205].

213 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [868].

decision in *Sankey v Whitlam*—where reference is made to the duty to defer inspection to enable the Attorney-General to appeal—provided a precedent for raising challenges in this area, and no specific proposal was made.<sup>214</sup> The availability of advance rulings for evidentiary issues is discussed further in Chapter 16.

15.160 In ALRC 98, the ALRC recommended enhancing the regime for the protection of classified and security sensitive information through the enactment of specific procedures in a National Security Information Procedures Act rather than by amending s 130 of the *Evidence Act 1995* (Cth).<sup>215</sup>

### ***Submissions and consultations***

15.161 In DP 69, the Commissions proposed that s 130 of the uniform Evidence Acts apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.<sup>216</sup>

15.162 There is support for the proposal.<sup>217</sup> The NSW PDO argues that it makes no sense for different rules for public interest immunity to apply pre-trial or in the course of the proceedings.<sup>218</sup> The AFP expresses a general view that a further inquiry into privilege and investigatory powers be undertaken before the privilege is extended.<sup>219</sup>

15.163 The Australian Government Solicitor (AGS) raises, in the context of the public interest immunity provisions, the issue of courts using information attracting public interest immunity in considering whether the applicant party to the proceeding has been, or is, accorded procedural fairness. Upholding the public interest immunity claim excludes the information from evidence.<sup>220</sup> However, having had access to the information, there are reported cases where the court has taken advantage of that access by considering the information, in effect, as evidence for the purpose of deciding whether the other party has been, or can be, accorded procedural fairness.<sup>221</sup>

15.164 In the view of the AGS, this type of case shows that, at the moment, there is a gap between the existing powers of a court under the *Evidence Act* in upholding a

214 Ibid, [868].

215 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.208]–[8.211]. The *National Security Information (Criminal Proceedings) Act 2004* (Cth) commenced operation in December 2004.

216 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 13–13.

217 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005.

218 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

219 Australian Federal Police, *Submission E 92*, 20 September 2005.

220 By virtue of s 134.

221 *Chu Sing Wun v The Minister for Immigration & Ethnic Affairs* (1997) 78 FCR 314; *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562.

public interest immunity privilege claim and what might be necessary to do justice to the parties in a particular case. In particular, there is no provision of the *Evidence Act* that permits a court to have regard to material in adjudicating matters where material cannot be provided to the other party. Some courts currently purport to do this under their inherent powers.<sup>222</sup> The AGS does not suggest a particular amendment to the *Evidence Act* but merely points out that this gap exists. It notes that the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), as they apply to what is defined as a ‘civil proceeding’, may have an important bearing on the extent of the gap, and any new provisions that might be needed to eliminate it.<sup>223</sup>

### ***The Commissions’ view***

15.165 A claim for public interest immunity may be made at trial or in the course of pre-trial procedures.<sup>224</sup> In the interests of uniformity, the Commissions recommend extending the operation of s 130 to pre-trial proceedings. As s 130 is essentially a restatement of the common law, with a non-exhaustive formula indicating how the competing interests are to be balanced, this should not result in any significant change in practice. In the case of tribunals and investigative agencies, public interest immunity is often preserved by the inclusion of statutory provisions.<sup>225</sup> For the reasons discussed in Chapter 14, the Commissions have not included any draft provisions to implement this recommendation.

15.166 The Commissions note that the newly enacted *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) will create a different regime for the protection of national security information. That Act may replace use of s 130 as a method of protecting this type of information in a number of proceedings, potentially including the type noted by the AGS. Under that Act, a civil proceeding means any proceeding in a court of the Commonwealth, a state or territory, other than a criminal proceeding.<sup>226</sup> As noted above, not all public interest immunity claims relate to matters of national security. However, at this time, and in the absence of further comment on this issue, the Commissions do not recommend a change to s 130 to take account of this issue.

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222 *Nicopoulos v Commissioner for Corrective Service*, [87]–[92].

223 Australian Government Solicitor, *Submission E 65*, 29 August 2005.

224 S McNicol, *Law of Privilege* (1992), 378.

225 *Australian Securities and Investments Commission Act 2001* (Cth) s 127(1); *Administrative Appeals Tribunal Act 1975* (Cth) ss 28(2), (3), 36A–36D; S McNicol, *Law of Privilege* (1992), 378.

226 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 15A.

**Recommendation 15–11** Section 130 of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.

### Exclusion of evidence of settlement negotiations

15.167 Section 131 of the uniform Evidence Acts provides that evidence is not to be adduced of a communication that is made in connection with an attempt to negotiate a settlement, including communications made with third parties. The section applies only to civil matters, and not in relation to negotiations concerning criminal charges.

15.168 A number of exceptions apply to this general statement, including: where the parties consent; where the substance of the evidence has been partly or wholly disclosed; where the communication included a statement that the communication was not intended to be confidential; or where making the communication or preparing the document affects a right of a person. The exceptions were developed along similar lines to those established under the common law.

15.169 In ALRC 26, the ALRC noted that the primary rationale given for the protection was the public interest in encouraging settlement of disputes.<sup>227</sup> The Acts mirror a similar ‘without prejudice’ privilege available at common law, where the judge may exercise his or her discretion to admit evidence of settlement negotiations as part of the inherent jurisdiction of the court. As under the Acts, the court must be satisfied that the communication is genuinely intended to be an attempt at settlement.<sup>228</sup>

15.170 Matters where the court has admitted evidence of settlement negotiations under s 131 include:

- an offer of compromise on the matter of costs, as it fell within the exclusion under s 131 relating to liability for costs;<sup>229</sup>
- a letter headed ‘Without Prejudice’ which suggested a willingness to settle but did not suggest a specific compromise of the dispute. It was held not to be an attempt to negotiate a settlement of a proceeding,<sup>230</sup> and

<sup>227</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [890].

<sup>228</sup> B Leader, ‘Public Interest Privilege’ (Paper presented at Australasian Government Solicitors Conference, 19 November 1992), 1.

<sup>229</sup> *Bruinsma v Menczer* (1995) 40 NSWLR 716.

<sup>230</sup> *GPI Leisure Corporation v Yuill* (1997) 42 NSWLR 225.

- an offer of settlement in regards to costs which reserved the right for it to be tendered in court.<sup>231</sup>

15.171 In *The Silver Fox Pty Ltd v Lenard's Pty Ltd (No 3)*, it was found that the wording of s 131 was clear.

Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations—whether private or by mediation—are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression ‘without prejudice’ or by a mediation agreement.<sup>232</sup>

15.172 In response to IP 28, the Commercial Bar Association of Victoria suggested that these decisions are consistent with what would be the expected results at common law and are evidence of the straightforward application of the provisions under the Acts.<sup>233</sup>

15.173 One issue that was raised in response to IP 28 was whether s 131 covers negotiations that take place in the course of mediation. In DP 69, the Commissions asked whether there are any difficulties with the operation of s 131 of the uniform Evidence Acts and, in particular, if there are any difficulties with statements made during mediation, that may not be covered by the privilege.<sup>234</sup>

15.174 There is some support in the case law for the proposition that mediation agreements fall within the scope of s 131. In *Lewis v Nortex Pty Ltd* objections were taken on the basis of s 131 with regards to certain documents that had been used in the course of mediation.<sup>235</sup> Hamilton J stated that ‘there is no doubt in this case that the documents fall within s 131(1) ... It is common ground that it is a document that was

231 *Bloom v Mini Minors* (Unreported, Supreme Court of New South Wales, McClelland J, 28 August 1996).

232 *The Silver Fox Company Pty Ltd v Lenard's Pty Ltd (No 3)* (2004) 214 ALR 621, [36].

233 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [13.269]; Commercial Bar Association of the Victorian Bar, *Submission E 37*, 8 March 2005.

234 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Question 13–13.

235 *Lewis v Nortex Pty Ltd* [2002] NSWSC 1245.

prepared in connection with a formal mediation ... in order to resolve the dispute between these embattled parties’.<sup>236</sup>

15.175 Communications made in a mediation that is ordered by a court are often privileged under the legislation of that court,<sup>237</sup> and have been found to be excluded from s 131. For example, in *Rajski v Tectran Pty Ltd*, Palmer J noted that s 131(1) deals with evidence which may have otherwise attracted the ‘without prejudice privilege’ rules concerning communications between parties for the purposes of negotiating a dispute.<sup>238</sup> He held that s 131 is ‘not intended to apply to the special process of settlement negotiation provided by a mediation ordered by the court under the provisions of Part 7B of the *Supreme Court Act*’ and that the rules in Part 7B of *Supreme Court Act* ‘override the general provisions of the Act’.<sup>239</sup>

### **Submissions and consultations**

15.176 Few submissions were received on this issue. It was noted that there is not a great deal of case law on s 131 and mediation. This may mean that the section works well, is not often invoked, or that it is not being utilised by mediators to protect communications.<sup>240</sup>

15.177 The Commissions were told in consultations that most mediators tend to rely on the specific confidentiality provisions located in other state and federal statutes, such as the *Family Law Act 1975* (Cth), the *Community Justice Centres Act 1983* (NSW) and the *Farm Debt Mediation Act 1994* (NSW) to protect them from having to disclose matters discussed in mediation rather than s 131. Confidentiality agreements are also a feature of most specific mediation contracts (where the parties agree to keep the content of the mediation proceedings confidential on a ‘without prejudice’ basis). Many mediators are aware of the common law ‘without prejudice’ privilege provisions, although it was noted that the extent of the common law privilege on settlement negotiations is uncertain (for example, whether it extends to documents prepared before or produced as a result of the mediation).<sup>241</sup>

15.178 It was also noted that issues may arise from the manner in which an agreement was reached in mediation. For example, a party may allege misconduct or duress on the part of a mediator or the other party. It was put to the Commissions that it is not clear if the exceptions in s 131 covers that situation, although it may fall under the exceptions

236 Ibid, [3].

237 See, for example, *Federal Court of Australia Act 1976* (Cth) s 53B, which states that evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible in any court (whether exercising federal jurisdiction or not); or in any proceedings before a person authorised by a law of the Commonwealth or of a state or territory, or by the consent of the parties, to hear evidence.

238 *Rajski v Tectran Pty Ltd* [2003] NSWSC 476.

239 *Rajski v Tectran Pty Ltd* [2003] NSWSC 476, [16]. Part 7B of the *Supreme Court Act* (NSW) has now been replaced by Part 4 of the *Civil Procedure Act 2005* (NSW).

240 R Carroll and M Harries, *Consultation*, Perth, 7 October 2005.

241 H Astor, *Consultation*, Sydney, 2 August 2005.

in s 131(f), where the making of the agreement is in issue, or paragraph (j), where the communication was made in furtherance of a fraud or offence.<sup>242</sup>

***Commissions' view***

15.179 From the Commissions' survey of the case law, it appears reasonably well settled that evidence of matters discussed at mediations falls within s 131. While the section could be amended to adopt the terms of a mediation privilege as expressed in Acts such as the *Federal Court of Australia Act 1976* (Cth), in the absence of strong submissions suggesting that such action is necessary, it is the view of the Commissions that amendment of s 131 is unwarranted.

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242 Justice R French, *Consultation*, Perth, 5 October 2005.





## 16. Discretionary and Mandatory Exclusions

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### Introduction

16.1 Part 3.11 of the uniform Evidence Acts contains a list of provisions which operate to give the court certain discretionary and mandatory powers to exclude or limit the use of otherwise admissible evidence on policy grounds.<sup>1</sup> These provisions derive in large part from the common law discretions to exclude evidence; however, their application differs in accordance with the policy changes effected by the uniform Evidence Acts.<sup>2</sup>

16.2 The uniform Evidence Acts adopt the same basic structure as the common law for determining the admissibility of evidence: the test of relevance is the threshold consideration; the exclusionary rules and their exceptions are then applied; and finally, the residual 'discretions'<sup>3</sup> to exclude on policy grounds are applied. However, within this basic structure the uniform Evidence Acts have effected significant changes.

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1 Section 90, which is located in Part 3.4 of the uniform Evidence Acts, provides a discretion to exclude evidence of an admission on the ground of unfairness. See Ch 10 for a discussion of this provision.

2 Note that this list is exhaustive. The common law residual exclusions no longer apply in uniform Evidence Act jurisdictions.

3 This term is used in a broad sense, as s 137 is a mandatory exclusion rule. See the discussion later in this chapter regarding the 'discretionary' aspect of s 137.

16.3 In the Interim Report for the previous Evidence inquiry (ALRC 26), the ALRC criticised the common law process for determining admissibility on the following bases:

The courts in their differing definitions of what is relevant evidence have failed to articulate the factors that must be considered and balanced. The rule that relevant evidence is admissible and irrelevant evidence inadmissible is the major rule controlling what evidence is received. To leave the decision to ‘gut’ reaction is not good enough. All rules of exclusion are open to criticism.<sup>4</sup>

16.4 The Report went on to outline how each of the common law exclusionary rules applying to particular types of evidence was ‘inflexible and out of date’, unnecessarily excluding evidence of considerable probative value and failing to provide appropriate protections where needed.<sup>5</sup>

16.5 In order to balance the various purposes to be served by the rules of evidence and to avoid the perceived technicalities and anomalies of the common law, the uniform Evidence Acts adopt a more flexible approach to the admissibility of evidence. The threshold test of relevance is lower and the remaining rules of admissibility are more relaxed in relation to some categories of evidence (for example, hearsay evidence). As a consequence, increased emphasis is placed on the provisions in Part 3.11 of the Acts.<sup>6</sup> Hence, the provisions contained in Part 3.11 of the uniform Evidence Acts play a more important role in determining the admissibility of evidence than the discretionary exclusions at common law. This chapter examines how these provisions are operating in practice and how any concerns about their operation should be addressed.

## **Exclusions pursuant to ss 135 and 137**

16.6 Section 135 of the uniform Evidence Acts provides that in civil and criminal proceedings:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

16.7 Section 137 provides that, in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

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4 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [503].

5 *Ibid.*, [503].

6 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [53].

16.8 The discretion to exclude evidence on the grounds that it is misleading, confusing or unduly wasteful of the court's time derives from the common law power to exclude evidence on the grounds of legal relevance, known as the 'relevance discretion'.<sup>7</sup> The discretion to exclude evidence where its probative value is outweighed by the risk of unfair prejudice derives from the common law *Christie*<sup>8</sup> discretion, which enables the trial judge in criminal trials to exclude evidence which is likely to produce incorrect verdicts by misleading or prejudicing the jury.<sup>9</sup>

16.9 Although it is clear from the wording of the provisions that the court may (or must) exclude evidence on these grounds of its own motion, in practice the party seeking exclusion bears the onus of proof in relation to the grounds of exclusion.<sup>10</sup>

### General discretion to exclude evidence

#### *Relevance and the discretion to exclude*

16.10 Both at common law and under the uniform Evidence Acts, relevance is a fundamental requirement for admissibility: evidence that is relevant to a fact in issue is admissible, subject to any other rule of evidence; evidence that is not relevant to a fact in issue is inadmissible.<sup>11</sup>

16.11 At common law, the distinction is drawn between 'logical' relevance (which requires only that the evidence is capable of affecting, directly or indirectly, the probability of the existence of a fact in issue) and 'legal' relevance (which involves additional considerations such as the probative value of the evidence, the likelihood of the evidence misleading the jury, and other factors such as time and cost).<sup>12</sup> Hence the requirement of legal relevance may be used to exclude evidence of minimal probative value or evidence which might be misleading, unfairly prejudicial,<sup>13</sup> or unduly wasteful of the court's time.<sup>14</sup>

7 Ibid, [51]. See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.30]–[14.32], for a discussion of 'misleading or confusing' and 'undue waste of time'.

8 *R v Christie* [1914] AC 545.

9 *R v Duke* (1979) 22 SASR 46; *R v BD* (1997) 94 A Crim R 131; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [954].

10 In contrast, the requirement of legal relevance at common law places the burden on the party seeking to adduce the evidence to justify its admission. However, a party seeking exclusion by virtue of the common law *Christie* discretion bears the onus of proof.

11 This principle is enacted in s 56 of the uniform Evidence Acts.

12 See, eg, *R v Stephenson* [1976] VR 376.

13 It is noted that authorities are divided on the question of whether evidence can be excluded on the ground of unfair prejudice in civil cases at common law: see, eg, *Polycarpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49.

14 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [639].

16.12 In ALRC 26, the common law notion of ‘legal relevance’ was criticised on the ground that it conceals the policy considerations underpinning exclusion.<sup>15</sup> Hence the ALRC proposed adopting the test of logical relevance, in combination with the provision subsequently enacted as s 135. It stated that the proposed approach

articulates the mental processes inherent in existing law. This is done by two provisions—one defining relevance in terms of being capable of affecting the assessment of the probabilities and the other spelling out in a judicial discretion the policy considerations, presently concealed, which lie behind any decision on the relevance of evidence.<sup>16</sup>

16.13 In accordance with the ALRC recommendation, s 55 of the uniform Evidence Acts provides that evidence will be relevant where it ‘could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding’.<sup>17</sup> By the adoption of the broad notion of logical relevance and the enactment of a discretion to exclude evidence on grounds reflecting common law legal relevance, the Acts therefore draw a deliberate distinction between the factual and policy questions involved in determining admissibility.

### ***Probative value***

16.14 The uniform Evidence Acts define ‘probative value’ as ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’. This is similar to the definition of relevance in s 55, which provides that relevant evidence is ‘evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings’. Therefore, probative value is assessed at least in part by reference to the degree of relevance of a piece of evidence to a particular fact in issue.<sup>18</sup>

16.15 It is noted in Chapter 3 that the factors involved in determining probative value will vary depending on the type of evidence in question and the context in which it is sought to be adduced. For example, the factors relevant to the probative value of credibility evidence will differ from those relevant to the probative value of hearsay evidence.<sup>19</sup> Further, where there is a paucity of evidence on a relevant issue, the probative value of the evidence in that context is likely to be higher than it otherwise would be.<sup>20</sup> Hence, probative value has been described as a ‘floating standard’, its content being dependent on legal and factual context.<sup>21</sup>

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15 Ibid, [640].

16 Ibid, [640].

17 A determination of relevance pursuant to s 55 of the uniform Evidence Acts assumes that the tribunal of fact will accept the evidence and does not require consideration of factors such as prejudice or reliability: *Papakosmas v The Queen* (1999) 196 CLR 297, [81].

18 *R v Lockyer* (1996) 89 A Crim R 457, 459.

19 See discussion in Ch 3.

20 *R v Lockyer* (1996) 89 A Crim R 457.

21 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 312.

***Credibility and reliability of evidence***

16.16 Pursuant to s 56 of the uniform Evidence Acts, relevance is determined on the assumption that the evidence will be accepted by the tribunal of fact.<sup>22</sup> A comparison of the Acts' definitions of relevance and probative value, with the notable absence of the words 'if it were accepted' from the latter, indicates that an assessment of probative value is not necessarily predicated on the assumption that the evidence will be accepted.<sup>23</sup> The question is open as to whether probative value is determined solely on the basis of the degree of relevance or whether the court is permitted to consider the credibility and reliability of the evidence. This issue has arisen mostly in the context of jury trials, and hence the relevant question has been whether the judge may consider whether the jury should accept the evidence.

16.17 Authorities have been divided on this issue. The more restrictive view is illustrated in the following statement by Hunt CJ at CL in *R v Carusi*:

The power of the trial judge to exclude evidence ... does not permit the judge, in assessing what its probative value is, to determine whether the jury should or should not accept the evidence of the witness upon which the Crown case depends. The trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect.<sup>24</sup>

16.18 In *Adam v The Queen*, Gaudron J also expressed the view (in obiter dicta) that an assessment of probative value is made on the degree of relevance, reasoning that as a matter of logic:

The omission from the dictionary definition of 'probative value' of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition.<sup>25</sup>

16.19 However, in *Papakosmas v The Queen*, McHugh J took the opposite view, stating that 'an assessment of probative value necessarily involves considerations of reliability'.<sup>26</sup> His Honour so concluded on two bases: first, as a matter of statutory interpretation, the absence of the words 'if it were accepted' must be significant; and secondly, the rationale underpinning the ALRC recommendation to adopt logical (as opposed to legal) relevance as the initial threshold for admissibility was to make

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22 *Adam v The Queen* (2001) 207 CLR 96, [22].

23 *Ibid*, [59].

24 *R v Carusi* (1997) 92 A Crim R 52, 66. In this case, Hunt CJ at CL was referring to the common law *Christie* discretion. However, this comment reflects the more restrictive view adopted in relation to s 135: see, eg, *R v Le* (2002) 54 NSWLR 474, [94].

25 *Adam v The Queen* (2001) 207 CLR 96, [60].

26 *Papakosmas v The Queen* (1999) 196 CLR 297, [86].

evident the policy considerations (such as procedural fairness and reliability) underpinning the decision to admit or exclude particular evidence. His Honour considered that such policy considerations were therefore matters intended to be dealt with by ss 135–137.<sup>27</sup>

16.20 In *R v Rahme*, Hulme J supported the view expressed by McHugh J, stating that it is inconsistent with the general canons of construction to treat the omission of the words ‘if it were accepted’ as insignificant.<sup>28</sup> His Honour reasoned further that where a witness’ credibility is in doubt, this will affect the question of whether his or her evidence could rationally affect the probability of the existence of any fact in issue.

The need to consider the ‘extent’ in the context of ‘rationally affect’ to my mind argues for an assessment of the credibility of the author and the likelihood of the evidence being accepted.<sup>29</sup>

16.21 On the other hand, it can be argued that factors affecting the reliability or credibility of evidence constitute a legitimate ground for exclusion where the court considers that the tribunal of fact, with the benefit of appropriate directions, may misuse or overestimate the weight of the evidence. This view was supported by Simpson J in *R v Cook*:

There will be occasions when an assessment of the credibility of the evidence will be inextricably entwined with the balancing process. That means that particular caution must be exercised to ensure that the balancing exercise is not confused with the assessment of credibility, a task committed to the jury ... The credibility exercise, in those circumstances, is to determine whether the evidence given by (or on behalf of) the accused is capable of belief by the jury. If it is, then its prejudicial effect must be considered. If it is not, then the balancing exercise may well result in an answer favourable to the Crown. That is essentially because any prejudice arising to an accused from putting a preposterous explanation to the jury would not be unfair prejudice.<sup>30</sup>

16.22 For a discussion of the interrelationship between probative value and unfair prejudice, see Chapter 3.

### ***Unfair prejudice***

16.23 Unfair prejudice forms a ground for exclusion or limitation pursuant to ss 135, 136 and 137 of the uniform Evidence Acts. Although its application will differ depending on the context, its meaning is the same in each of these sections.<sup>31</sup>

16.24 The Acts provide no guidance as to the meaning of ‘unfair prejudice’. However, as noted earlier in the chapter, unfair prejudice establishes the basis for exclusion

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27 Ibid, [81].

28 *R v Rahme* [2004] NSWCCA 233, [220].

29 Ibid, [222].

30 *R v Cook* [2004] NSWCCA 52, [43].

31 *R v BD* (1997) 94 A Crim R 131, 139. See also discussion in Ch 3.

pursuant to the *Christie* discretion at common law.<sup>32</sup> The Interim Report in the previous Evidence inquiry indicates that the statutory concept carries a definition similar to its common law counterpart.

By risk of unfair prejudice is meant the danger that the fact finder may use the evidence to make a decision on an improper, perhaps emotional basis, ie on a basis logically unconnected with the issues in the case. Thus the evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decisions on something other than the established proposition of the case. Similarly, on hearing the evidence the fact-finder would be satisfied with a lower degree of probability than would otherwise be required.<sup>33</sup>

16.25 While the common law may provide some guidance as to its meaning, the statutory concept must be applied in light of the policy changes effected by the uniform Evidence Acts.

16.26 There is consensus in the authorities that evidence will not be unfairly prejudicial simply because it damages the defence's case<sup>34</sup> or because it has low probative value.<sup>35</sup> Evidence will be prejudicial if it tends to prove the opponent's case, but will not be *unfairly* prejudicial unless there is some potential for misuse by the tribunal of fact. As illustrated in the following discussion regarding procedural considerations, evidence will not be unfairly prejudicial for the purposes of Part 3.11 simply because it would not have been admissible at common law.

#### ***Unfair prejudice arising from procedural considerations***

16.27 In light of the fact that the uniform Evidence Acts have relaxed the rules of admissibility, particularly in the extension of the exceptions to the hearsay rule where the maker of a hearsay representation is unavailable for cross-examination, it has been a matter of contention as to whether unfair prejudice can arise from procedural considerations. This issue was not explicitly addressed in the previous Evidence inquiry and authorities are divided on the issue. The more restrictive view, that unfair prejudice relates solely to the misuse of evidence by a tribunal of fact, was favoured by McHugh J in *Papakosmas v The Queen*, who stated:

Some recent decisions suggest that the term 'unfair prejudice' may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995 ... I am inclined to think that the learned judges have been too much influenced by the common law attitude to

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32 *R v Christie* [1914] AC 545.

33 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [644].

34 *Papakosmas v The Queen* (1999) 196 CLR 297, [91]; *R v BD* (1997) 94 A Crim R 131, 139.

35 *R v Lockyer* (1996) 89 A Crim R 457, 460.

hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons ... [ss 135, 136 and 137] confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility.<sup>36</sup>

16.28 Prior to *Papakosmas*, courts appeared to proceed upon the assumption that unfair prejudice was not limited to misuse of evidence by a tribunal of fact and could encompass procedural disadvantages. For example, in *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike*,<sup>37</sup> evidence of a transcript of a bankrupt otherwise admissible pursuant to s 63 (an exception to the hearsay rule in civil proceedings where the maker is unavailable) was excluded pursuant to s 135(a) on the basis that the opposing party was unable to cross-examine the declarant on a crucial issue in the litigation. In *Commonwealth v McLean*,<sup>38</sup> hearsay evidence otherwise admissible pursuant to s 64 (an exception to the hearsay rule in civil proceedings where the maker is available) was excluded pursuant to s 135(a) on the basis that other evidentiary rulings in the case prevented the opposing party from properly challenging the reliability of the evidence.

16.29 Subsequent to the caution issued by McHugh J in *Papakosmas*,<sup>39</sup> the New South Wales Court of Appeal considered the issue in *Ordukaya v Hicks*.<sup>40</sup> The trial judge had found that it was not reasonably practicable to call the 92 year old defendant to give evidence and hence admitted into evidence a statutory declaration made by the defendant pursuant to s 64. The plaintiff sought unsuccessfully to have the evidence excluded pursuant to s 135(a) and subsequently appealed on the ground that the trial judge ought to have exercised the discretion as the denial of the opportunity to cross-examine the maker of the statement was unfairly prejudicial.

16.30 The majority declined to exercise the discretion to exclude the evidence, stating that the removal of the hearsay rule as an obstacle to admitting particular evidence will necessarily be prejudicial to the opposing party, but that this will not necessarily create prejudice which is unfair to the point that it outweighs the probative value of the evidence.<sup>41</sup> The majority therefore concluded that the mere inability to cross-examine the maker of a hearsay statement does not justify exclusion of the evidence. However, it held that the inability to cross-examine is a matter which can be taken into account by the trial judge in assessing the weight to be given to such evidence.<sup>42</sup> On the reasoning of the court in *Ordukaya*, evidence is more likely to be excluded on this

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36 *Papakosmas v The Queen* (1999) 196 CLR 297, [97].

37 *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike* (Unreported, Federal Court of Australia, Beaumont J, 1 September 1995).

38 *Commonwealth v McLean* (1996) 41 NSWLR 389.

39 *Papakosmas v The Queen* (1999) 196 CLR 297.

40 *Ordukaya v Hicks* [2000] NSWCA 180.

41 *Ibid*, [38]–[39].

42 *Ibid*, [41].



ground where the tribunal of fact is a jury, as the question arises whether the jury will be able to assess correctly the weight of the evidence in the absence of testing by cross-examination.

16.31 The approach adopted by the majority in *Ordukaya* was cited with approval in *R v Suteski*, where Wood CJ at CL stated:

I see no reason why the inability ... to cross-examine ... should not have been relevant for s 135 and s 137 of the *Evidence Act*. However, the bare fact that a defendant cannot cross-examine a witness is not necessarily decisive of the issue which arises in relation to these provisions ... The decisions mentioned clearly depend upon their particular facts, that is, upon the character of the evidence involved and upon the nature or strength of the potential prejudice to the defendant. Each case, in my view, needs to be examined individually by reference to the well understood balancing exercise.<sup>43</sup>

16.32 In *Roach v Page (No 11)*,<sup>44</sup> Sperling J considered that the inability to test the truth of a representation is a legitimate ground for excluding or limiting the use of evidence. However, whether this fact will result in limitation or exclusion in a particular case depends on the basis upon which the hearsay rule did not apply. Where hearsay evidence has been admitted pursuant to an exception to the hearsay rule because of the unavailability of the maker, there are ‘special reasons’ for not excluding or limiting the use of the evidence on that ground.<sup>45</sup> Conversely, where the maker of the hearsay representation is available to give evidence and has not been called, this is a legitimate consideration in favour of finding that there has been unfair prejudice.<sup>46</sup>

#### ***Warnings as to unreliability and limiting directions to the jury***

16.33 Although they are placed in a separate Part of the Acts, the warning provisions in s 165 of the uniform Evidence Acts are linked to the exclusionary provisions in ss 135–137, as they share the goal of reducing the risks of misuse or mis-estimation of the probative value of the evidence by the tribunal of fact.<sup>47</sup>

16.34 Authorities have generally accepted that warnings and directions to the jury about the permissible uses of evidence or the potential unreliability of evidence can operate to reduce the risk of unfair prejudice. Accordingly, it has been held that the potentially mitigating effects of a warning or limiting direction should be taken into

<sup>43</sup> *R v Suteski* (2002) 56 NSWLR 182, [126]–[127].

<sup>44</sup> *Roach v Page (No 11)* [2003] NSWSC 907.

<sup>45</sup> *Ibid*, [74].

<sup>46</sup> *Ibid*, [74].

<sup>47</sup> In ALRC 26, it was said that the obligation to give the proposed statutory warning (enacted as s 165) would arise where the evidence is unreliable or where its probative value might be overestimated: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1017].

account when the court is considering whether to exclude or limit the use of evidence pursuant to ss 135, 136 or 137.<sup>48</sup>

16.35 The Commissions note in Chapter 18 that there is some doubt as to the effectiveness of warnings and limiting directions to the jury. It is therefore necessary to interrogate the assumptions about jury behaviour underpinning these aspects of the law in light of empirical and psychological research. See Chapter 18 for a more detailed discussion of this issue.

## **Exclusion of unfairly prejudicial evidence in criminal proceedings**

### ***Relationship between ss 135 and 137***

16.36 Sections 135 and 137 both require the court to balance the probative value of evidence with any unfair prejudice that may arise from the admission of that evidence. However, there are important differences between the two sections. First, s 137 is a mandatory exclusion rule, whereas s 135 provides the judge with a discretion to exclude evidence. Despite the fact that s 137 is contained in Part 3.11 of the uniform Evidence Acts, entitled ‘Discretions to exclude evidence’, the mandatory status of s 137 has been acknowledged in the higher courts. In *R v Blick*, Sheller JA observed:

When an application is made by a defendant pursuant to s 137 to exclude evidence, the first thing the judge must undertake is the balancing process of its probative value against the danger of unfair prejudice to the defendant. It is probably correct to say that the product of that process is a judgment of the sort which, in terms of appellate review, is analogous to the exercise of a judicial discretion ... Even so ... there seems to me to be a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected.<sup>49</sup>

16.37 The term ‘discretions’ is often used by the courts as shorthand to refer to the cluster of provisions in Part 3.11 of the uniform Evidence Acts, including the mandatory exclusion in s 137. This is, in part, a reflection of the terminology employed at common law (the equivalent exclusions are often labelled ‘residual discretions’). However, more importantly, it is a reflection of the fact that s 137 is akin to a discretion. It involves an exercise of judgment as to the application of broad principles, to be exercised in relation to all types of evidence. It is also of note that the common law *Christie* ‘discretion’ also mandates exclusion of evidence once it has been determined that the evidence is more prejudicial than probative.<sup>50</sup>

48 See, eg, *R v Lock* (1997) 91 A Crim R 356; *Symss v The Queen* [2003] NSWCCA 77; *R v BD* (1997) 94 A Crim R 131; *Papakosmas v The Queen* (1999) 196 CLR 297, [94].

49 *R v Blick* (2000) 111 A Crim R 326, [19]–[20].

50 *R v Swaffield* (1998) 192 CLR 159, [64].

16.38 The difference in wording between the two sections (s 135 requires that the unfair prejudice *substantially outweigh* the probative value, whereas s 137 requires only that the former *outweigh* the latter) also indicates that there is a heavier onus on the party seeking exclusion under s 135 than under s 137. Further, s 137 appears to have a wider application: s 135 talks of ‘the evidence’ being ‘unfairly prejudicial’, whereas s 137 talks more generally of ‘danger of unfair prejudice’. It has been held that this difference in wording means that, where s 137 is being considered, an assessment of unfair prejudice can take into account the likely prejudicial impact of any evidence the opponent may seek to adduce in order to challenge or explain the initial piece of evidence.<sup>51</sup>

16.39 As noted above, s 135 applies to evidence adduced by both parties in civil and criminal proceedings, and provides a discretion to exclude evidence which at common law might have been excluded by the legal relevance threshold. In contrast, s 137 applies only in criminal cases to evidence adduced by the prosecution and mandates the exclusion of evidence in order to avoid the risk of wrongful convictions. That a party seeking exclusion pursuant to s 135 should bear a heavier onus than an accused seeking exclusion of evidence pursuant to s 137 is consonant with the policies underpinning the uniform Evidence Acts. Parties should generally be able to produce the probative evidence available to them,<sup>52</sup> however the courts should be particularly careful when considering evidence that might prejudice defendants in criminal trials.<sup>53</sup> However, it is important to note that the tests are weighted neither in favour of nor against exclusion. As stated in ALRC 26, ‘the trial judge should balance probative value and the danger of prejudice without any preconceptions’.<sup>54</sup>

### The Commissions’ view

#### *Definition of terms in ss 135 and 137*

16.40 In IP 28, opinion was sought as to whether the grounds for exclusion in ss 135 and 137 require further definition.<sup>55</sup>

16.41 Some concern is expressed that the term ‘unfair prejudice’ is unclear.<sup>56</sup> The Office of the Director of Public Prosecutions (NSW) (NSW DPP) submits:

[T]here is no objection to including a definition of ‘unfair prejudice’ reflecting the more restrictive view of the meaning of the term reflected in the judgement of

51 *R v Cook* [2004] NSWCCA 52.

52 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [82].

53 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [35].

54 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [957].

55 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–3, [12.25].

56 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

McHugh J in *Papakosmas v The Queen*; and by making it clear that the term excludes procedural unfairness.<sup>57</sup>

16.42 In contrast, other submissions consider that it is unnecessary and potentially counter-productive to attempt legislative definition of the grounds for exclusion. The NSW Young Lawyers Civil Litigation Committee submits that

no such definition is required, as these concepts have been long employed at common law and are well understood. Attempting to define the circumstances would be difficult, would probably require a catch-all phrase in any event, and would unnecessarily clutter the Act.<sup>58</sup>

16.43 The New South Wales Public Defenders Office (NSW PDO) submits that it will not be productive to define these terms, and that any attempt to define them is likely to narrow their meaning.<sup>59</sup> Similarly, the Law Society of New South Wales submits that the term unfair prejudice ‘needs to be a broadly stated principle so as to cover the majority of cases and possible factual circumstances arising’.<sup>60</sup>

16.44 In DP 69, the Commissions concluded that the grounds of exclusion in ss 135 and 137 do not require legislative definition, principally on the basis that doing so carries the risk of narrowing their meaning, thereby fettering the application of the sections.<sup>61</sup>

16.45 The Commissions acknowledge that there has been uncertainty as to whether unfair prejudice can arise from procedural considerations. As noted above, one of the objects of these provisions is to prevent the tribunal of fact from being exposed to evidence that is likely to mislead it or play upon its emotions or prejudices. In the Interim Report for the previous Evidence inquiry, the ALRC referred not only to unfair prejudice arising from evidence which might inflame emotions, but also to unfair prejudice resulting from mis-estimation by the fact-finder of the weight to be given to particular evidence.<sup>62</sup> An inability to test the reliability of evidence may carry with it the danger of such mis-estimation. It is therefore consistent with the policy basis for this discretion that the inability to test evidence may constitute a legitimate ground for its exclusion where this will affect the ability of the fact-finder to assess rationally the weight of the evidence.

16.46 Whether the inability to test the evidence will in fact give rise to unfair prejudice will depend on a number of factors, including: the basis on which the hearsay rule did

57 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

58 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

59 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

60 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

61 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.47], [14.60].

62 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [644].

not apply;<sup>63</sup> the possible significance of cross-examination;<sup>64</sup> and whether there are other means of assessing the reliability of the evidence.<sup>65</sup> However, the mere fact that a party is unable to test the evidence by cross-examination will not of itself constitute unfair prejudice, and that the provisions in Part 3.11 must be exercised in accordance with the policy changes effected by the uniform Evidence Acts.

16.47 A related question is whether reliability or credibility can be taken into account in balancing the probative value of evidence against the risk of unfair prejudice arising from admission. Consistent with the adversarial system and the policy underpinning the uniform Evidence Acts that parties should be able to ‘produce the probative evidence that is available to them’,<sup>66</sup> the Commissions are of the view that questions of credibility and reliability should generally be left to be determined by the tribunal of fact. Factors affecting the reliability or credibility of evidence usually emerge during the course of the trial, particularly in cross-examination. However, where the reliability or credibility of the evidence is such that its weight is likely to be overestimated by the tribunal of fact because of an inability to test the evidence by cross-examination or for some other reason, then these may be considerations relevant to the decision to exclude or limit the use of the evidence.<sup>67</sup>

#### *Clarification of the mandatory nature of s 137*

16.48 Concern has been expressed that the title of Part 3.11 of the uniform Evidence Acts (‘Discretions to exclude evidence’) is misleading given that s 137 is not a discretion but a mandatory exclusion. Submissions and consultations indicate that this has caused some confusion in the courts, and that some judicial officers regard the provision as a discretionary.<sup>68</sup>

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<sup>63</sup> *Roach v Page (No 11)* [2003] NSWSC 907.

<sup>64</sup> See, eg, *R v Clark* (2001) 123 A Crim R 506. In this case, it was held that the inability to cross-examine a deceased witness about statements made regarding her state of mind and the nature of her relationship with the accused did not give rise to unfair prejudice, as cross-examination would not have affected what the statements were intended to convey. Further, the witnesses who heard the representations were all available for cross-examination.

<sup>65</sup> See, eg, *R v Dean* (Unreported, New South Wales Supreme Court, Dunford J, 12 March 1997). Note also that s 108A of the Uniform Evidence Acts allows evidence relevant only to the credibility of the maker of a hearsay statement to be admitted where the maker is unavailable and the evidence has substantial probative value.

<sup>66</sup> Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [46].

<sup>67</sup> Note that an important consideration in the balancing test will be the extent to which a warning can cure or mitigate the danger of unfair prejudice: *R v Lisoff* [1999] NSWCCA 364.

<sup>68</sup> New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

16.49 The Commissions proposed in DP 69 that the heading of Part 3.11 should be amended to read ‘Discretionary and mandatory exclusions’.<sup>69</sup> This proposal is supported unanimously in submissions and consultations.<sup>70</sup>

16.50 In order to clarify that s 137 is a mandatory exclusion, the Commissions are of the view that the heading in Part 3.11 of the uniform Evidence Acts should be amended to read ‘Discretionary and mandatory exclusions’.

**Recommendation 16–1** In order to reflect the fact that s 137 is not a discretion to exclude evidence but a mandatory exclusion, the heading at Part 3.11 ‘Discretions to exclude evidence’ of the uniform Evidence Acts should be amended to read ‘Discretionary and mandatory exclusions’.

***Should s 135 be made mandatory?***

16.51 In IP 28, opinion was sought as to whether s 135 should be amended so that its application is mandatory.<sup>71</sup>

16.52 Submissions and consultations do not indicate a clear preference one way or the other. Some submissions and consultations favour retaining the existing discretion.<sup>72</sup> Other consultations consider that it is anomalous to have a provision which allows the court to admit evidence despite a finding that the probative value of the evidence is outweighed by the unfair prejudice.<sup>73</sup> The NSW Young Lawyers Civil Litigation Committee submits that:

Section 135 should be made mandatory, as a corollary of a finding of such danger is the exclusion of the evidence. Particularly as it is highly unlikely (and as a matter of policy is very undesirable), that a Court would consider allowing such evidence after ruling that it is inherently dangerous.<sup>74</sup>

<sup>69</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 14–1.

<sup>70</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

<sup>71</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–2.

<sup>72</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 32; P Greenwood, *Consultation*, Sydney, 11 March 2005.

<sup>73</sup> Justice C Branson, *Consultation*, Sydney, 25 July 2005; Evidence Acts Review Workshop for the Judiciary, *Consultation*, Sydney, 30 April 2005.

<sup>74</sup> NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

16.53 In DP 69, the Commissions concluded that such an amendment is not warranted.<sup>75</sup> The Commissions remain of this view on two grounds.

16.54 First, such an amendment is considered undesirable on policy grounds. The application of s 135 is significantly broader than s 137: the former applies in both civil and criminal cases and to evidence tendered by both parties, whereas the latter applies only to evidence tendered by the prosecution in criminal proceedings. Section 135 also contains additional grounds for exclusion. As noted earlier, the broader application of s 135 and the more stringent test for exclusion reflect the policy that criminal proceedings involve special considerations.<sup>76</sup> Given the breadth of its application, the Commissions do not consider that it would be appropriate to render exclusion pursuant to s 135 mandatory.

16.55 Secondly, there is no evidence that the discretionary nature of the section is causing problems in practice. It is unlikely that a court would admit evidence where its probative value is substantially outweighed by any unfair prejudice. If a court were to do so, it would be required to explain why it had elected not to exercise the discretion. If necessary, the matter could then be dealt with on appeal.

### **General operation**

16.56 The primary concerns expressed in submissions and consultations relate to the increased reliance placed on the provisions in Part 3.11 of the uniform Evidence Acts to control admissibility. Some judicial officers and practitioners consider that these provisions do not provide sufficient protection against the admission of unreliable or prejudicial evidence in light of some of the more relaxed rules of admissibility.<sup>77</sup> Another concern expressed is that some judicial officers are reluctant to take a robust approach to the use of these provisions, particularly in relation to undue waste of the court's time.<sup>78</sup> In some consultations it is indicated that the exclusionary provisions are more likely to be used in jury trials than they are in non-jury civil trials or family court proceedings.<sup>79</sup> On the other hand, some judicial officers and practitioners express the

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75 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.53].

76 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [8].

77 Justice K Lindgren, *Submission E 102*, 23 September 2005; K Arenson, *Submission E 67*, 13 September 2005; M Buss, *Submission E 90*, 18 September 2005.

78 B Donovan, *Consultation*, Sydney, 21 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; Victoria Legal Aid, *Submission E 113*, 30 September 2005.

79 J Garbett, *Consultation*, Sydney, 28 February 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005; B Donovan, *Consultation*, Sydney, 21 February 2005.

view that the provision is being used effectively and on a regular basis,<sup>80</sup> and that any concerns in relation to the operation of these provisions are not amenable to legislative solution.<sup>81</sup>

16.57 Concerns regarding the increased emphasis placed on the provisions in Part 3.11 are expressed on a number of grounds. First, it is submitted that the application of discretionary provisions to control the admission of evidence (hearsay evidence in particular) is ‘ad hoc’ and leads to significant uncertainty for both parties as to what evidence will be admissible at trial.<sup>82</sup> Secondly, it is submitted that such discretionary provisions cause difficulty because they are not readily amenable to appellate review:

There is a strong rebuttable presumption at the appellate court level that any exercise of discretion has not been abused. Hence, in all but the most extreme cases, a judge’s exercise of discretion to admit or exclude evidence will not be overturned on appeal.<sup>83</sup>

16.58 In the Issues Paper for the previous Evidence inquiry, the ALRC acknowledged that judicial discretion in relation to the admissibility of evidence has long been subject to criticism, and that courts have often taken the view that it is preferable to exclude evidence by virtue of a general rule and cause injustice in a particular case than to sacrifice the predictability and stability conferred by that rule.<sup>84</sup> It was noted, however, that much of the debate surrounding the use of discretions in evidence is premised on a false polarisation between discretions and detailed rules.<sup>85</sup> The ALRC commented that, despite fervent arguments against the use of discretion, in practice it is commonplace:

The laws of evidence generally involve the judges in decisions which, while not defined in terms of discretion, involve mental exercises of a similar nature to those involved in applying a guided discretion. Decisions on whether particular evidence tendered in a trial is relevant or not, whether evidence of previous misconduct is admissible, whether hearsay evidence is admissible as part of the *res gestae* and whether a record was ‘contemporaneous’ involve the trial judge in drawing a line in the circumstances of the particular case by applying broadly stated principles.<sup>86</sup>

16.59 The ALRC noted that those seeking greater flexibility in the rules of evidence were not suggesting the introduction of an arbitrary or unfettered discretion. It considered that the discretion could be guided,<sup>87</sup> enabling greater certainty while also introducing a measure of flexibility.<sup>88</sup> The ALRC therefore formulated the more

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80 S Finch, *Consultation*, Sydney, 3 March 2005; Judicial Officers of the Supreme Court of the ACT, *Consultation*, Canberra, 8 March 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005; Office of the Director of Public Prosecutions (ACT), *Consultation*, Canberra, 24 August 2005.

81 Commonwealth Director of Public Prosecutions, *Submission E 108*, 16 September 2005.

82 K Arenson, *Submission E 67*, 13 September 2005.

83 *Ibid.*

84 Australian Law Reform Commission, *Reform of Evidence Law*, IP 3 (1980), [58].

85 *Ibid.*, [121].

86 *Ibid.*, [105].

87 It used as an example Rule 803 of the *Federal Rules of Evidence* (US), which provided a discretion to admit hearsay evidence if ‘the interests of justice will best be served by admission’.

88 Australian Law Reform Commission, *Reform of Evidence Law*, IP 3 (1980), [121].



relaxed admissibility rules with the intention that the provisions enacted in Part 3.11 would operate to meet the competing purposes of evidence law and to maximise the possibility of justice being done in every case. The benefits of such an approach are described by one commentator as follows:

The notion of discretion embodies the idea that many decisions of admissibility are difficult decisions dependent on a myriad of factors, some better appreciated by trial judges on the spot than appellate judges removed from the fray, and that it is conducive to better decision-making to recognise these difficulties by the express isolation of such a notion. This is not to say that judges have a free choice. Every discretion must be exercised to ensure that decisions of fact are reached in accordance with those principles upon which our procedural system depends.<sup>89</sup>

16.60 The provisions in Part 3.11 of the uniform Evidence Acts are not unfettered or arbitrary: they must be exercised on the grounds specified in the legislation and in accordance with the principles developed by the law. Importantly, they are subject to appellate review on the grounds that they have not been exercised in accordance with principle. The Commissions do not consider that there is evidence to support the argument that the uniform Evidence Acts have led to ad hoc or unprincipled decision-making which is impervious to review.<sup>90</sup> It is suggested that many of the criticisms levelled at the reliance on these provisions in the uniform Evidence Acts scheme stem from a reluctance to abandon common law notions of admissibility. As articulated by McHugh J in *Papakosmas v The Queen*,<sup>91</sup> this reluctance is evident in the numerous attempts of judicial officers and practitioners to read the common law into the uniform Evidence Acts admissibility provisions in order to avoid reliance on the provisions in Part 3.11.<sup>92</sup>

16.61 In DP 69, the Commissions expressed the view that the principal problems with the operation of ss 135–137 relate to judicial practice and are not amenable to legislative solutions.<sup>93</sup> It was therefore recommended that educational programs should be implemented which focus on the policy underlying the uniform Evidence Acts' approach to the admissibility of evidence.<sup>94</sup> One suggestion put forward in consultations in order to increase familiarity with the 'grid' structure of the Acts and to

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89 A Ligertwood, *Australian Evidence* (4th ed, 2004), [2.25].

90 In relation to the question of predictability, the Commissions note that it is recommended that the uniform Evidence Acts be amended to provide the court with the express power to give advance rulings in relation to the admissibility of evidence and other evidentiary questions. See Rec 16–2.

91 *Papakosmas v The Queen* (1999) 196 CLR 297.

92 *Ibid*, [93]. This view was supported in consultation: J Gans, *Consultation*, Melbourne, 17 August 2005.

93 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [3.47], [14.45].

94 *Ibid*, Proposal 3–1.

avoid the ‘tortured’ readings of the admissibility provisions is to place a textual reference to Part 3.11 in particular sections of the Acts.<sup>95</sup>

16.62 The Commissions consider that this is not a desirable approach, given the danger that significance might be attached to the absence of such a reference in other provisions. Continuing education programs for members of the judiciary and legal profession regarding the policy underpinning the uniform Evidence Acts’ admissibility provisions, combined with the passage of time allowing for increased familiarity with the Acts, can achieve the desired shift in practice to ensure that the provisions in Part 3.11 operate as intended.<sup>96</sup>

### General discretion to limit the use of evidence

16.63 Section 136 of the uniform Evidence Acts provides the trial judge with a discretion in both civil and criminal proceedings to limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or misleading or confusing to the tribunal of fact.

16.64 As noted earlier in this chapter, the term ‘unfair prejudice’ carries the same meaning in ss 135, 136 and 137, and hence the preceding discussion of that concept applies. However, unlike the other two provisions, s 136 does not involve a balancing test and this will affect the manner in which the section applies. In this respect, it has been said that s 136 bears some resemblance to the common law fairness discretion,<sup>97</sup> although it has been made clear that there is no residual discretion to exclude evidence on the ground of unfairness to the accused under the uniform Evidence Acts.<sup>98</sup>

16.65 Authorities have emphasised that, when determining whether s 136 should be applied to limit the use of evidence, regard should be had to the policy changes effected by the uniform Evidence Acts. The High Court addressed this issue in *Papakosmas v The Queen*,<sup>99</sup> emphasising that the mere fact that evidence would not have been admissible at common law does not of itself create unfair prejudice. In this case, evidence of recent complaint of sexual assault was admitted as truth of the facts asserted pursuant to s 66 of the uniform Evidence Acts.<sup>100</sup> At common law, evidence of recent complaint is admissible for its credibility use but not for its hearsay use.<sup>101</sup> On appeal, the defendant argued that the trial judge should have exercised the discretion in

95 J Gans, *Consultation*, Melbourne, 17 August 2005; Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

96 See Rec 3–1.

97 J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005), [16.5]. The common law fairness discretion is also known as the *Lee* discretion: *R v Lee* (1950) 82 CLR 133.

98 *R v Em* [2003] NSWCCA 374.

99 *Papakosmas v The Queen* (1999) 196 CLR 297.

100 Section 66 provides an exception to the hearsay rule in criminal proceedings in respect of previous representations relating to facts which were fresh in the memory of the maker at the time those representations were made.

101 *Crofts v The Queen* (1996) 186 CLR 427.

s 136 to limit the use of the recent complaint evidence to that which would have been permissible at common law (and that the use of recent complaint evidence should generally be so limited). The High Court rejected this argument, holding that it amounted to ‘an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded’.<sup>102</sup> The High Court considered that there may be circumstances in which it would be appropriate to limit the use of complaint evidence, however such circumstances did not arise in the present case.<sup>103</sup>

16.66 Section 136 is often invoked where hearsay evidence is admissible pursuant to s 60, which provides that evidence admitted because it is relevant for a non-hearsay purpose is also admissible for a relevant hearsay purpose. Section 60 is of general application, whereas other exceptions to the hearsay rule apply to particular species of evidence. Concern has been expressed that ‘the narrowness of [s 136] does not provide much of a safety net’ against the potentially far-reaching effects of s 60.<sup>104</sup> In *Roach v Page (No 11)*,<sup>105</sup> Sperling J opined that ‘special considerations’ operate in relation to s 60, as its legislative purpose is not to facilitate proof but rather to avoid distinctions having to be made between using evidence for one purpose but not another.<sup>106</sup> Hence, his Honour expressed the view that there may be a stronger case for limiting the use of evidence where it has been admitted pursuant to ss 60 or 77 (a similarly broad provision which lifts the opinion rule in relation to evidence containing an opinion which is admissible for a purpose other than proof of the existence of the facts about which the opinion was expressed).

16.67 The difficulty a tribunal of fact may have distinguishing between the permissible and non-permissible uses of evidence may be taken into account when the court is considering whether to limit the use of the evidence or exclude it altogether. For example, in *R v Dann*, the trial judge admitted relationship evidence, but warned the jury that it could not use that evidence for a tendency purpose.<sup>107</sup> On appeal, it was held that the evidence should have been excluded pursuant to s 137 because, despite the warning given, the distinction between the relationship use and the tendency use was too difficult to grasp in the circumstances of the case.

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102 *Papakosmas v The Queen* (1999) 196 CLR 297, [39].

103 *Ibid*, [40].

104 *R v Welsh* (1996) 90 A Crim R 364, 369, per Wood CJ at CL.

105 *Roach v Page (No 11)* [2003] NSWSC 907.

106 *Ibid*, [74].

107 *R v Dann* [2000] NSWCCA 185.

### Submissions and consultations

16.68 In IP 28, opinion was sought as to the general operation of s 136.<sup>108</sup> In particular, it was asked whether s 136 was operating effectively to limit the operation of s 60.<sup>109</sup> In response to submissions and consultations (outlined below), DP 69 recommended that no changes should be made.<sup>110</sup> Relatively few submissions were received in response.

16.69 Judicial officers and legal practitioners provide a range of perspectives on the operation of s 136. Some practitioners express the view that s 136 has not been used much by judicial officers to limit the use that can be made of evidence that is relevant for more than one purpose.<sup>111</sup> In relation to expert evidence, the view is expressed that s 136 is not often used to control the use made of the factual content of such evidence, but that this does not create any problems in practice as the judge can deal with it as a matter of weight to be given to the evidence.<sup>112</sup> In contrast, some judicial officers and practitioners consider that the section is being used frequently enough.<sup>113</sup>

16.70 One concern expressed in relation to s 136 is the uncertainty of the scope of the grounds for exclusion. In particular, it is said that there is uncertainty as to whether the inability to cross-examine on evidence admissible for a hearsay purpose creates unfair prejudice.<sup>114</sup>

16.71 In relation to the interaction between ss 60 and 136, some judicial officers and practitioners suggest that the section is operating effectively to limit the operation of s 60.<sup>115</sup> In contrast, others suggest that s 136 is insufficient to limit the use of unreliable evidence pursuant to s 60.<sup>116</sup> One former judicial officer submits:

Applications under s 136 are costly in time and money. Furthermore, because such decisions involve the exercise of a discretion, there is the potential for inconsistent decisions on similar facts.<sup>117</sup>

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108 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–10.

109 See *Ibid*, Q 12–11.

110 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.95], [14.97].

111 S Finch, *Consultation*, Sydney, 3 March 2005; NSW Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.

112 Judicial Officers of the Supreme Court of the ACT, *Consultation*, Canberra, 8 March 2005; ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

113 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; B Donovan, *Consultation*, Sydney, 21 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; Judicial Officers of the Supreme Court of the ACT, *Consultation*, Canberra, 8 March 2005.

114 P Bayne, *Consultation*, Canberra, 9 March 2005.

115 Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

116 H Sperling, *Submission E 54*, 11 July 2005; Justice K Lindgren, *Submission E 102*, 23 September 2005.

117 H Sperling, *Submission E 54*, 11 July 2005.

16.72 Another commentator expresses concern that s 136 is an ‘inelegant’ or unnecessarily complicated method of controlling problems created by the breadth of s 60.<sup>118</sup>

16.73 One judicial officer expresses concern that, where counsel fails to raise s 136 in relation to expert evidence which is admitted, s 60 may operate automatically such that the evidence can also be used as proof of the truth of the facts asserted.<sup>119</sup>

### **The Commissions’ view**

16.74 The principal criticism put forward in submissions and consultations is that s 136 is not sufficient to limit the operation of s 60. The Commissions are of the view that this criticism stems in part from concerns about the discretionary nature of the provision<sup>120</sup> and in part from concerns about the breadth of the exception contained in s 60. The Commissions consider that the scope of the exclusionary grounds contained in s 136 is sufficiently broad to limit the hearsay use of evidence admitted pursuant to s 60 where this is considered necessary. This is particularly so in light of the fact that, unlike ss 135 and 137, no balancing test is required to be undertaken. See Chapter 7 for a more detailed discussion of this issue.

16.75 In relation to the concern that the automatic operation of s 60 might disadvantage parties where counsel fails to seek limitation pursuant to s 136, the Commissions consider that this is a matter of trial practice in an adversarial system. If an opposing party elects not to object to the operation of s 60, the party tendering the evidence is generally entitled to proceed on the basis that objection is not taken. If a trial judge considers that it is necessary to seek clarification on this issue, he or she should seek confirmation from counsel that the failure to avert to s 136 indicates that no such objection is taken.

16.76 The Commissions concluded in DP 69 that the problems identified with s 136 in relation to the scope of the exclusionary grounds would not be ameliorated by legislative amendment.<sup>121</sup> The Commissions remain of this view and no recommendation for change is made. As noted in the above discussion of ss 135 and 137, the Commissions consider that the principal concerns raised by this section relate to judicial practice and are best remedied by judicial and practitioner education

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118 P Bayne, *Consultation*, Canberra, 9 March 2005.

119 Justice K Lindgren, *Submission E 102*, 23 September 2005.

120 These concerns are addressed in the discussion of ss 135 and 137 earlier in the chapter.

121 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.97].

focusing on the policy underpinning the uniform Evidence Acts' approach to the admissibility of evidence.<sup>122</sup>

### Exclusion of improperly or illegally obtained evidence

16.77 Section 138(1) provides that, in civil and criminal proceedings, evidence that was obtained improperly or illegally 'is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence' given the manner in which it was obtained.

16.78 Section 138 does not define 'improperly' obtained evidence. However, s 138(2) identifies some of the circumstances in which an admission will be considered to have been improperly obtained and s 139 provides that the failure of an investigating official to caution a suspect prior to questioning will render the statement 'improperly obtained'.

16.79 Section 138 provides a non-exhaustive list of the factors that a court may take into account in conducting the balancing exercise specified in s 138(1). Section 138(3) provides:

Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;<sup>123</sup> and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

16.80 Section 138 differs from the exclusions and limitations contained in ss 135–137 in that it is principally concerned with broader considerations of public policy, whereas

<sup>122</sup> See Rec 3–1.

<sup>123</sup> For further discussion of s 138(3)(c), see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.68]–[14.70].

the latter provisions are concerned with considerations of fairness to the individual defendant in the particular trial.<sup>124</sup>

16.81 The exclusion contained in s 138 derives from the *Bunning v Cross*<sup>125</sup> discretion at common law, but differs from the latter in the following respects:

- the *Bunning v Cross* discretion places the onus on the accused to prove misconduct and justify the exclusion. In contrast, s 138 requires the party seeking exclusion to establish that the evidence was improperly or illegally obtained. Once this is done, the onus is on the party seeking admission to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained;<sup>126</sup>
- s 138 applies to derivative evidence<sup>127</sup> and evidence of an admission;<sup>128</sup>
- s 138 is guided by a non-exhaustive list of the factors which must be taken into account in the exercise of the discretion;<sup>129</sup> and
- s 138 applies to both civil and criminal proceedings.<sup>130</sup>

16.82 In ALRC 26, the relative merits of the various options available for dealing with illegally or improperly obtained evidence (including a test focusing on the reliability of the evidence, a strict rule of exclusion, and various discretionary approaches) were evaluated.<sup>131</sup> The ALRC considered that mandatory exclusion was too extreme, particularly given that police officers are sometimes faced with situations in which the legal requirements are vague or unclear.<sup>132</sup>

16.83 The ALRC acknowledged the concerns expressed by Stephen and Aickin JJ in *Bunning v Cross* that

to treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite

<sup>124</sup> See J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005), [16.1].

<sup>125</sup> *Bunning v Cross* (1978) 141 CLR 54.

<sup>126</sup> *R v Coombe* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ at CL, Smart and McInerney JJ, 24 April 1997).

<sup>127</sup> Uniform Evidence Acts s 138(1)(b).

<sup>128</sup> *Ibid* s 138(2).

<sup>129</sup> *Ibid* s 138(3).

<sup>130</sup> *Ibid* s 138(1); *Nicholas v The Queen* (1998) 193 CLR 173, [197].

<sup>131</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [960]–[964].

<sup>132</sup> *Ibid*, [964].

erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it.<sup>133</sup>

16.84 In order to provide safeguards against the above concern and to avoid some of the uncertainties as to the application of the common law discretion, the ALRC considered that the discretion should be guided by the inclusion of a list of factors to be taken into account, reflecting ‘the fundamental dilemma ... between the public interest in admitting reliable evidence (and thereby convicting the guilty) and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the judicial system’.<sup>134</sup> These factors include an assessment of the gravity of the misconduct, whether it constitutes part of a wider pattern of misconduct, and other available accountability mechanisms.<sup>135</sup>

16.85 In addition, the ALRC recommended that the onus and standard of proof be shifted:

[T]he policy considerations supporting non-admission of the evidence suggest that, once misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded under the *Bunning v Cross* discretion. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations.<sup>136</sup>

### Submissions and consultations

16.86 In IP 28, opinion was sought as to whether the operation of s 138 raises any concerns.<sup>137</sup> In particular, it was asked whether the factors to be taken into account in s 138(3) require clarification.<sup>138</sup>

16.87 The primary concern expressed in relation to s 138 pertains to the factors in s 138(3) and how they should apply to the balancing test. While some judicial officers express the view that these factors are facilitative and do not create any difficulties,<sup>139</sup> other commentators express concern that it is uncertain what weight ought to be given to each factor<sup>140</sup> and whether the factors weigh in favour of or against admission.<sup>141</sup> One view is that the section should be amended so as to specify how the factors in

133 *Bunning v Cross* (1978) 141 CLR 54, 79.

134 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].

135 Uniform Evidence Acts s 138(3).

136 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].

137 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–7.

138 *Ibid*, Qs 12–8, 12–9.

139 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

140 J Garbett, *Consultation*, Sydney, 28 February 2005.

141 G Bellamy, *Consultation*, Canberra, 8 March 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; S Tilmouth, *Consultation*, Adelaide, 11 May 2005.



s 138(3) should be applied to the balancing test.<sup>142</sup> Another view is that such difficulties should not be resolved via legislative amendment, and that judicial education is a preferable solution.<sup>143</sup>

16.88 One submission considers that although the section works well in practice, for reasons of principle the wording should be altered so as to render presumptively inadmissible any evidence obtained as a result of any illegal action.<sup>144</sup>

16.89 In contrast, Victoria Police expresses concern that shifting the onus of proof onto the prosecution may impact upon evidence gathered by undercover operations.<sup>145</sup> In consultation, it is suggested that the onus of proof should be reversed so as to reflect the discretion at common law.<sup>146</sup>

16.90 Civil Liberties Australia (CLA) submits that illegally obtained evidence should not be subject to a discretionary test on the bases that: it leads to uncertainty of outcome; in practice, trial judges exercise the discretion predominately in favour of the state; and appellate courts seldom overturn the decision not to exclude illegally or improperly obtained evidence. CLA also submits that this problem is exacerbated in small communities where the magistrate is likely to have an association with the police officers, and is therefore less likely to exercise the discretion against the police officers. CLA considers that there should be mandatory exclusion of illegally obtained evidence where the laws infringed were intended to protect individual liberty, freedom and privacy. It states:

We recommend that s 138(1) be amended such that a judge may rule evidence admissible only if there are strong and compelling reasons why the illegally obtained evidence should be admitted, and the reasons for the admission must be set out in writing.<sup>147</sup>

### The Commissions' view

16.91 The Commissions concluded in DP 69 that no case for legislative amendment of s 138 had been made out.<sup>148</sup> The Commissions remain of this view, and note that very few submissions were made in response to the DP 69 in relation to this issue.

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142 G Bellamy, *Consultation*, Canberra, 8 March 2005.

143 J Garbett, *Consultation*, Sydney, 28 February 2005.

144 Confidential, *Submission E 31*, 22 February 2005.

145 Victoria Police, *Submission E 111*, 30 September 2005.

146 G Bellamy, *Consultation*, Canberra, 8 March 2005.

147 Civil Liberties Australia (ACT), *Submission E 109*, 16 September 2005.

148 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.79].

16.92 Although some concern is expressed with the discretionary nature of s 138, the Commissions consider that the policy basis for s 138, as expressed in ALRC 26 and ALRC 38, remains sound. A form of balancing test is the only way to meet the competing policy concerns involved. In particular, the shifting of the onus of proof onto the prosecution in s 138 emphasises that crime control considerations should be balanced equally with the public interest in deterring police illegality, protecting individual rights and maintaining judicial legitimacy.

16.93 The list of factors that the court must consider, articulated in s 138(3), emphasises these competing concerns and reinforces that the court must find a positive reason for exercising the discretion in favour of admissibility. Although some concern is expressed that it is unclear how these factors should be applied and what weight should be given to them, the Commissions consider that it would be inappropriate to attempt to guide the balancing test legislatively. This is particularly so given that the weight to be given to any particular factors listed in s 138(3) will vary depending on which of the other factors in that subsection arise in the context of a particular case.

16.94 One issue raised in DP 69 was the relevance of the ‘seriousness of the offence’ to the balancing process.<sup>149</sup> In *R v Dalley*, the majority held that the more serious the offence, the more likely it is that the public interest requires the admission of the evidence.<sup>150</sup> In a dissenting judgment, Simpson J stated that:

In my opinion it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence. That a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness.<sup>151</sup>

16.95 Submissions and consultations express some concern regarding the majority interpretation of this provision.<sup>152</sup> In accordance with the policy articulated in ALRC 26,<sup>153</sup> the Commissions are of the view that the correct approach is that the more serious the offence, the more weight should be given to the public interest in admitting evidence which might result in the apprehension of criminal offenders. However, this does not mean that breaches of the law will necessarily be condoned where the offence is a serious one. The nature of the offence is only one of the factors which the court is to take into account in the exercise of this discretion. Whether illegally or improperly obtained evidence is admitted will also depend on factors such as the nature of the impropriety or illegality. Where the infringement involves isolated or accidental non-compliance, the weight to be given to the nature of the offence may

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149 Ibid, [14.68].

150 *R v Dalley* (2002) 132 A Crim R 169, [3].

151 Ibid, [97].

152 New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005; S Tilmouth, *Consultation*, Adelaide, 11 May 2005.

153 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].

be greater than if the infringement involves a serious and deliberate breach of procedure. Hence, the fact that the offence charged is serious is by no means determinative of how the discretion in s 138 will be exercised.

16.96 This approach to the interpretation of s 138(3)(c) is also supported by the fact that s 138 addresses the public interest supporting exclusion by placing the onus on the prosecution to justify admission in the event that impropriety or illegality is found.

### Advance rulings

16.97 Traditionally, rulings on evidentiary questions and determinations of admissibility take place during the course of the trial. However, a number of jurisdictions permit the courts to determine preliminary questions prior to the commencement of trial.<sup>154</sup> Further, some jurisdictions empower the courts to make ‘advance rulings’ in relation to questions of admissibility, including whether evidence should be excluded on the basis of judicial discretion, either before the trial commences or before the issue arises for determination.<sup>155</sup>

16.98 The uniform Evidence Acts are silent on the issue of advance rulings. After their enactment, authorities in New South Wales proceeded on the assumption that the Acts allowed for advance rulings in relation to the admissibility of evidence.<sup>156</sup> However, these authorities were recently overruled by the High Court in *TKWJ v The Queen*,<sup>157</sup> where it held that the uniform Evidence Acts only permit advance rulings to be made in some cases where leave, permission or direction is sought.<sup>158</sup>

16.99 In *TKWJ*, counsel for the defence informed the Crown prosecutor that he intended to raise evidence of the accused’s good character. The Crown prosecutor indicated that if the defence took this course of action, the Crown would seek to rebut the evidence of good character with evidence of matters that were the subject of a related charge. On this basis, defence counsel decided not to adduce evidence of good character. The accused appealed his subsequent conviction on the grounds that there had been a miscarriage of justice as he had been unfairly denied the benefit of adducing evidence of good character. He argued that his counsel at trial ought to have

154 Eg, *Criminal Procedure Act 1986* (NSW) s 130; *District Court Rules 1973* (NSW) Pt 53 rr 10 and 11; *Crimes Act 1958* (Vic) s 391B; *Criminal Code 1924* (Tas) s 361A.

155 *Crimes Act 1958* (Vic) s 391B; *Criminal Code 1924* (Tas) s 361A.

156 See *R v PKS* (Unreported, New South Wales Court of Criminal Appeal, Wood CJ at CL, Sully and Ireland JJ, 1 October 1998); *R v Robinson* (2000) 111 A Crim R 388.

157 *TKWJ v The Queen* (2002) 212 CLR 124.

158 Ibid. The operation of s 192 of the uniform Evidence Acts is discussed in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [14.98]–[14.105].

sought an advance ruling on whether the Crown's character evidence would have been excluded pursuant to ss 135 or 137.

16.100 A majority of the High Court held that the uniform Evidence Acts do not confer the power to give an advance ruling as to how the discretions in ss 135 or 137 will be exercised, and that 'a discretion can only be exercised if and when it is invoked'.<sup>159</sup> However, the Court held that it may be appropriate to give an advance ruling on a matter in respect of which the uniform Evidence Acts requires leave, permission or direction to be sought, as s 192 gives the court the discretion to give such leave, permission or direction 'on such terms as the court thinks fit'.<sup>160</sup> However, it held that such a power is limited. Gaudron J said:

Although it may be appropriate in some cases to give an 'advance ruling' as to a matter in respect of which the *Evidence Act* requires leave, permission or direction, it is to be remembered that counsel ultimately bears the responsibility of deciding how the prosecution and defence cases will be run. Thus, it is that 'advance rulings', even if permitted ... may give rise to a risk that the trial judge will be seen as other than impartial. Particularly is that so in the case of advance rulings that serve only to enable prosecuting or defence counsel to make tactical decisions. If there is a risk that an 'advance ruling' will give rise to the appearance that the trial judge is other than impartial, it should not be given.<sup>161</sup>

16.101 The rationale for the view that judges cannot exercise a 'discretion',<sup>162</sup> in advance is that ss 135–137 must be exercised in the context of the other evidence adduced at trial. In an adversarial system, the judge is not in possession of all the facts at the beginning of the trial, as the facts emerge during the course of the trial as evidence is adduced by both parties. Hence, in exercising a 'discretion' to exclude evidence in advance, the judge will depend on the ability of counsel to anticipate the nature and extent of the evidence to be adduced at trial or upon an assumption that the evidence will be the same as that adduced at the committal proceedings.<sup>163</sup> The risk is that, once the occasion for the exercise of the discretion actually arises, the foreshadowed decision may no longer seem appropriate.<sup>164</sup>

16.102 On the other hand, advance rulings may serve the interests of justice by adding to the overall efficiency of the trial.<sup>165</sup> Crispin J articulated the benefits of advance rulings as follows:

159 *TKWJ v The Queen* (2002) 212 CLR 124, [40].

160 *Ibid.*, [43] per Gaudron J; [101] per Gummow J; [114] per Hayne J. Gleeson CJ and McHugh J found it unnecessary to decide the question: [11], [14], [87].

161 *Ibid.*, [43].

162 This term is used loosely, as s 137 is in fact a mandatory exclusion. However, in this context it is appropriate to refer to it as a 'discretion' as the issue in the discussion is the exercise of judgment based on broad principles, which is the discretionary aspect of s 137.

163 *R v TR and VG* (2004) 180 FLR 424.

164 *Ibid.*, [6].

165 *Adam v The Queen* (2001) 207 CLR 96, [52].

There are some cases in which substantial inconvenience, expense and perhaps even unfairness might ensue if there were to be no indication as to the likely exercise of discretion. Such an approach may require counsel to prepare for trial and make tactical decisions without knowing whether a substantial body of evidence is likely to be admitted, the Crown may be unable to make any sensible assessment as to the prospects of obtaining a conviction, counsel for the accused may be unable to offer any sensible advice as to the appropriate plea and the opening addresses may have to omit any explanation of the relevance of evidence subsequently admitted. Furthermore, if the trial judge subsequently rules that the evidence should be excluded in the case of one accused but not the other, it may be necessary to then discharge the jury and order that the accused be tried separately. That would involve a substantial waste of time and money, create unnecessary risks of prejudice to both the Crown and the accused and leave jurors with the feeling that their time had been wasted.<sup>166</sup>

### Submissions and consultations

16.103 In DP 69, the Commissions proposed that the uniform Evidence Acts should be amended to give the court the power to give advance rulings.<sup>167</sup>

16.104 Submissions and consultations express unanimous support for this proposal.<sup>168</sup> The NSW PDO states:

In *TKWJ v The Queen* the High Court held that the power of a court to give advance rulings was extremely limited. This decision was an unfortunate one. The power to make advance rulings was extremely useful, especially in cases where an accused was contemplating partially raising good character, or making an attack on the character of a Crown witness. The practical demise of the ‘advance ruling’ has meant that in many cases, an accused is not prepared to run the risk of partially raising character.<sup>169</sup>

16.105 One senior practitioner considers that advance rulings are beneficial to avoid the need to ‘chase evidentiary rabbits’.<sup>170</sup> Another practitioner expresses the view that the proposal is excellent and should be extended further to issues of culpability.<sup>171</sup>

16.106 One judicial officer considers that, despite the criticisms of the High Court of the ‘advance’ exercise of discretion, ss 135–137 require the court to make a judgment

<sup>166</sup> *R v TR and VG* (2004) 180 FLR 424, [6].

<sup>167</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 14–2.

<sup>168</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; C McDonald, *Consultation*, Darwin, 31 March 2005; P Greenwood, *Submission E 47*, 11 March 2005.

<sup>169</sup> New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

<sup>170</sup> P Greenwood, *Submission E 47*, 11 March 2005.

<sup>171</sup> C McDonald, *Consultation*, Darwin, 31 March 2005.

in advance in any case, and that it is often difficult to predict during the voir dire whether evidence will have the significance that counsel indicates.<sup>172</sup>

### The Commissions' view

16.107 Although the High Court found that there was nothing in the uniform Evidence Acts to support the existence of the power to give advance rulings as to the exercise of the 'discretion' to exclude evidence, the Commissions are of the view that there is nothing in the uniform Evidence Acts which indicates that courts are precluded from giving advance rulings. This is consistent with the adversarial context in which the Acts operate. It is also consistent with the practice in jurisdictions such as Victoria, where advance rulings are given in criminal trials before evidence is called.

16.108 The power to give advance rulings carries significant benefits in relation to the efficiency of trials. It allows counsel to select witnesses and prepare for trial with greater certainty. Without such a power, tactical decisions, particularly in relation to character evidence, are based on speculation.

16.109 The Commissions consider that there are strong arguments of policy and practice in favour of removing the prohibition imposed by the High Court in *TKWJ v The Queen*.<sup>173</sup> This view is supported unanimously in submissions and consultations. It is therefore recommended that the uniform Evidence Acts should be amended so as to provide the court with the express power, in civil and criminal proceedings, to give advance rulings in relation to the admissibility of evidence and other evidentiary questions. This power should extend to evidentiary questions arising out the uniform Evidence Acts and other laws affecting the admissibility of evidence. A draft provision providing for advance rulings is set out in Appendix 1.

**Recommendation 16–2** The uniform Evidence Acts should be amended to provide that, in civil and criminal proceedings, the court may, if it thinks fit, give an advance ruling or make an advance finding in relation to any evidentiary issue.

172 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

173 *TKWJ v The Queen* (2002) 212 CLR 124.

## 17. Judicial Notice

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### Introduction

17.1 As a general rule, parties to a court proceeding must prove all facts pertinent to their case. This process of discovering truth by a rational investigation is considered essential to the conduct of a just and fair hearing.<sup>1</sup> However, as with many areas of knowledge and endeavour, there are exceptions to this general rule. In the case of proving facts in court, the following exceptions are seen to promote just and efficient disposition of cases:

- the admission into evidence of facts that are formally admitted or agreed to by the parties; and
- the admission into evidence of facts of which the presiding judge may take 'notice'.

17.2 The second exception is known as the doctrine of 'judicial notice'. Judicial notice is considered 'the great exception' to the relatively modern rule that a tribunal of fact must, in coming to a decision, rely only on facts that are formally proved.<sup>2</sup> Put another way, the doctrine of judicial notice obviates the need for a party formally to

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<sup>1</sup> This was not always so, see J Stone and W Wells, *Evidence: Its History and Policies* (1991), Ch 1.

<sup>2</sup> 'Before the end of the eighteenth century this change was complete and the modern rule prohibiting [juries] from acting on their own knowledge was fully established': Ibid, 153.

prove certain facts in issue.<sup>3</sup> The advantage of judicial notice to the parties and to the court is the shortcut in time, effort and expense.

## Judicial notice at common law

17.3 In DP 69, the Commissions outline briefly how ‘judicial notice’ operates at common law and the reasons for its existence.<sup>4</sup> At common law judicial notice may be taken of

facts, which a judge can be called upon to receive and to act upon, either from his [or her] general knowledge of them, or from inquiries to be made by himself [or herself] for his [or her] own information from sources to which it is proper for him [or her] to refer.<sup>5</sup>

17.4 Judicial notice can be summarised as covering two broad types of fact:

- matters of such common knowledge that they are rarely contentious. These cover broad classes of indisputable scientific, medical, cultural, and historical facts, including: the laws of physical nature; well-known social habits and usages; and notorious historical events, such as World War II;<sup>6</sup> and
- matters the court may be assumed to know already by virtue of its stature and expertise, such as the validity of legislation put before it.<sup>7</sup>

17.5 Under the uniform Evidence Acts, ‘judicial notice’ is provided for in three sections of the Act: ss 143, 144 and 145. The sections are intended to reflect, and simplify, the common law.<sup>8</sup> Each section covers a range of facts that are so commonly acknowledged that they cannot reasonably be open to dispute.

17.6 In DP 69, the Commissions do not put forward any proposals in relation to ss 143, 144 and 145. Indeed, there was little support for any reform of the three sections, which suggests to the Commissions that the sections are working well.

## Section 143: Judicial notice of matters of law

17.7 Section 143 covers judicial notice of legislation. Legislation in this context means statutes, subordinate legislation and executive government proclamations and orders. Parties do not need formally to prove that such laws exist, or the process by

<sup>3</sup> Ibid, 155.

<sup>4</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [15.1]–[15.3].

<sup>5</sup> *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191, 212 (Sumner LJ).

<sup>6</sup> J Stone and W Wells, *Evidence: Its History and Policies* (1991), 155–162.

<sup>7</sup> Ibid, 155.

<sup>8</sup> See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [973]; J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 37.



which such legislation came into operation. Under s 143, a judge may take ‘judicial notice’ of the legislation’s legitimate content and operation.

### The Commissions’ view

17.8 In DP 69, no proposal is made for amendment of s 143. This elicited no submissions or consultations in response to DP 69. The Commissions consider that s 143 is operating satisfactorily and make no recommendation for change.

## Section 144: Judicial notice of matters of common knowledge

### What is ‘common knowledge’ for the purpose of judicial notice?

17.9 Section 144 mirrors the common law doctrine of judicial notice as it relates to matters of common knowledge.<sup>9</sup> Section 144(1) provides:

Proof is not required about knowledge that is not reasonably open to question and is:

- (a) common knowledge in the locality in which the proceeding is being held or generally; or
- (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

17.10 The main difference between paragraphs (a) and (b) is that the latter may require reference to an official document to discover or confirm a fact of which judicial notice has been taken. No such inquiry is needed for facts that form part of the ‘common knowledge’ referred to in paragraph (a).<sup>10</sup> Examples of the two types include: in relation to paragraph (a), the existence of the Internet; and in relation to paragraph (b), a ‘meteorological document to prove when the sun rose on a particular day’.<sup>11</sup>

17.11 Common knowledge covers facts, both of local and general knowledge, which are so widely recognised that requiring proof of them would be a superfluous exercise. Common knowledge can encompass a vast number of facts that can change with time and place, including those created by advancements in science, technology and medicine.

<sup>9</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 39. In *Gattellaro v Westpac Banking Corporation* (2004) 204 ALR 258, [17] the High Court commented on the scope of s 144: ‘In New South Wales there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the *Evidence Act 1995* (NSW), s 144’.

<sup>10</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 40.

<sup>11</sup> S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.600]. Odgers also notes that the provision ‘should permit reference to street directories, encyclopaedias, authoritative texts and the like’. Compare J Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript, 51–52.

17.12 While matters of common knowledge falling within s 144 need not be proved formally, parties to a proceeding are not precluded from leading formal evidence of such matters.<sup>12</sup>

### **How does a judge acquire ‘common knowledge’?**

17.13 Section 144(2) allows a judge to acquire common knowledge or knowledge sourced in an authoritative document in any way that the judge thinks fit. A court (including a jury, if there is one) must take such knowledge into account (s 144(3)).

17.14 If a judge intends to take judicial notice of such matters, he or she must, to ensure that a party is not unfairly prejudiced, give the parties the opportunity to make submissions as to how this knowledge should be acquired or taken into account (s 144(4)). Section 144(4) thus acts as a safeguard on the use of judicial notice by allowing the parties to have some input into the process of the judge acquiring ‘common knowledge’ and reinforces the judge’s obligation to accord natural justice to the parties.

### **Issues Paper 28**

17.15 The submissions received in response to IP 28 indicate that s 144(4) is operating effectively.<sup>13</sup> One submission noted that ‘the purpose of s 144(4) is to ensure that the parties are given an opportunity to address whatever facts judicial notice is to be taken of, not to prevent them from being taken notice of at all’.<sup>14</sup>

### **Discussion Paper 69**

17.16 The only issue raised in DP 69 for further comment was the question whether there should be an additional legislative provision allowing judges to take account of ‘social facts’. Question 15–1 stated:

Should the provisions relating to judicial notice allow judges to take account of social facts? Are there more effective ways of dealing with this issue?<sup>15</sup>

17.17 This issue was raised in a submission from Kylie Burns of Griffith University Law School in response to IP 28. She raises the possibility that social facts, being statements about human behaviour, nature of society and its institutions and social values, should be included in the judicial notice provisions.<sup>16</sup>

17.18 Kylie Burns’ submission, while identifying some merit in including ‘social facts’ in evidential rules relating to judicial notice, also cautions that the incorporation

12 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [13.10].

13 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005.

14 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

15 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 15–1.

16 K Burns, *Submission E 21*, 18 February 2005.

of social facts into formal evidential rules ‘could prove administratively difficult and costly to implement.’<sup>17</sup>

### ***Submissions and consultations***

17.19 Four submissions and one consultation address Question 15–1.<sup>18</sup> No other issues are raised in submissions and consultations in relation to the judicial notice chapter in DP 69.

17.20 No submissions or consultations support the specific inclusion of ‘social facts’ into the statutory rules pertaining to judicial notice. While Victoria Police ‘does not oppose’ social facts being incorporated into the judicial notice provisions, it suggests that judicial notice of such facts is currently addressed adequately under s 144.<sup>19</sup>

17.21 Professor Kathy Mack of Flinders University Law School, the New South Wales Public Defenders Office (NSW PDO), and a judicial officer suggest that the more effective way of dealing with ‘social facts’ is through expert/opinion evidence.<sup>20</sup>

17.22 Professor Mack notes:

Allowing expert evidence as indicated in Proposal 8–1 and Question 8–2 [of DP 69] are examples of useful steps to rectify gaps and misunderstandings in allegedly common or general knowledge.<sup>21</sup>

17.23 A concern is also expressed that if ‘social facts’ are specifically incorporated into the judicial notice provisions, it may allow a judge’s subjective views on ‘normative’ social values to creep, unexamined and unchallenged, into the judge’s decision-making.<sup>22</sup>

17.24 The NSW PDO comments:

Social facts can be proved, for example by expert evidence. If judges take judicial notice of ‘social facts’, which have not been proved in evidence, there is a real risk of injustice, because the parties are unlikely to have addressed their arguments on all the material being taken into account in judicial decision making.<sup>23</sup>

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17 Ibid.

18 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; M Leong, *Submission E 72*, 27 September 2005; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005; Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005; Victoria Police, *Submission E 111*, 30 September 2005.

19 Victoria Police, *Submission E 111*, 30 September 2005.

20 K Mack, *Submission E 82*, 16 September 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005; Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

21 K Mack, *Submission E 82*, 16 September 2005.

22 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

23 Ibid.

17.25 A judicial officer notes that judicial officers are rarely invited to take judicial notice, and this usually occurs, if at all, in final submissions. Sometimes the facts are notorious, and the request will be uncontested. If there is going to be a debate about whether judicial notice can be taken, the issue is argued in court and can be resolved by giving leave to adduce evidence in relation to the fact claimed. If a fact is close to notorious, it is usually easily proved by admissible evidence.<sup>24</sup>

### **The Commissions' view**

17.26 As discussed above, s 144(4) gives parties the opportunity to respond if judicial notice is taken of a matter of common knowledge. Arguably, this includes a matter which can be classified as a 'social fact'. Hence, s 144(4) can be an effective way of dealing with such matters.

17.27 The Commissions consider that s 144 is operating effectively in practice and make no recommendation for change.

## **Section 145: Judicial notice of matters of state**

17.28 Section 145 provides that:

This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

17.29 No submissions or consultations to DP 69 raised any issues in relation to s 145. It appears that s 145 is operating well in practice and the Commissions make no recommendation for change.

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<sup>24</sup> Judicial Officer of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

## 18. Comments, Warnings and Directions to the Jury

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### Introduction

18.1 In jury trials, the general rule is that questions of law are determined by the judge and questions of fact are determined by the jury. However, the judge controls the framework within which the fact-finding process occurs: first, in the application of the rules of admissibility (particularly in the exercise of a discretion to exclude evidence); and secondly, in directing the jury as to the legal rules that it must apply to the evidence. The latter task encompasses a responsibility to direct the jury about any legal limits on the use it may make of the evidence<sup>1</sup> and to give an appropriate warning or caution where there are potential 'dangers' involved in acting upon particular evidence.<sup>2</sup> The trial judge may also make comments about the evidence and, to some extent, express opinions as to what conclusions appear appropriate.<sup>3</sup>

18.2 The matters about which a warning will be required are usually those with which the court is said to have 'special experience' not possessed by members of the

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1 For example, inferences that must not be drawn from the evidence or purposes for which the evidence must not be used.

2 *Longman v The Queen* (1989) 168 CLR 79, 95–96.

3 There are some limitations on the scope of permissible judicial comment and judges should exercise caution in expressing opinions to the jury: see *Azzopardi v The Queen* (2001) 205 CLR 50, [52].

jury.<sup>4</sup> Warnings must therefore be given in terms which convey that they are binding directions of law.<sup>5</sup> The duty of a trial judge to give appropriate and adequate warnings stems from the overriding duty to ensure a fair trial.<sup>6</sup> Hence the failure to give an appropriate warning may lead to a miscarriage of justice.<sup>7</sup> In contrast, a comment is usually given where it is considered that the matters referred to are within the common understanding or experience of the members of the jury, but which they may have overlooked or forgotten.<sup>8</sup> Comments are not binding on the jury and should be given in terms that make this clear.<sup>9</sup>

18.3 The uniform Evidence Acts do not contain a comprehensive guide as to what comments, warnings and directions may be permitted or required. However, the Acts expressly provide for the following: comments on the failure of an accused to give evidence or call a witness (s 20); warnings about ‘evidence of a kind that may be unreliable’ (s 165); and warnings in relation to identification evidence (s 116).<sup>10</sup> Other comments, warnings and directions in relation to evidence are provided for by the common law and other pieces of substantive and procedural legislation.<sup>11</sup>

18.4 This chapter does not attempt a comprehensive review of comments, warnings and directions to the jury, as this is considered to be beyond the scope of the present Inquiry. The chapter will focus on the warnings expressly provided for in the uniform Evidence Acts,<sup>12</sup> and those common law warnings which submissions and consultations indicate are areas of significant concern.

## **A targeted inquiry into the operation of the jury system**

18.5 As noted above, the scope of the present Inquiry does not permit a thorough analysis of judicial comments, warnings and directions to juries.<sup>13</sup> However, in light of the issues raised in this chapter, it is evident that a comprehensive analysis of the common law and the various pieces of Commonwealth, state and territory legislation<sup>14</sup> relating to judicial directions is required. Submissions and consultations support the

4 *Crampton v The Queen* (2000) 206 CLR 161, [126].

5 *Azzopardi v The Queen* (2001) 205 CLR 50.

6 *Conway v The Queen* (2002) 209 CLR 203, [90].

7 *Ibid*, [90].

8 *Crampton v The Queen* (2000) 206 CLR 161, [126].

9 *Azzopardi v The Queen* (2001) 205 CLR 50.

10 For a discussion of s 116, see Ch 13.

11 This is because the uniform Evidence Acts are intended to be of general application, and it is considered that provisions pertaining to particular categories of witness or offence are generally more conveniently located in the substantive and procedural legislation regulating those topic areas. See discussion in Ch 2.

12 It is not considered necessary to replicate the discussion in IP 28 and DP 69 regarding the operation of s 20 and the scope of permissible judicial comment in relation to the failure to give evidence or call a witness.

13 For ease of reference, in this section, ‘comments, warnings and directions’ will hereinafter be referred to as ‘directions’.

14 Including the uniform Evidence Acts, legislation relating to particular offences and categories of witness, and court practice and procedure rules.

need for a review of judicial directions and of the operation of the jury system generally.<sup>15</sup>

18.6 In the adversarial legal system, trial by jury is often identified as a touchstone of the democratic administration of justice, providing a check against arbitrary or oppressive exercise of power by the State.<sup>16</sup> However, alongside notions of the jury as a ‘protector of liberty’, there is an uneasy ambivalence within the legal profession regarding the competence and comprehension of lay jurors. The concerns commonly expressed are exemplified in the following comment by a judicial officer of the South Australian Court of Criminal Appeal:

Each judge has his own style ... but, whatever the style I wonder how much of a summing up the jury ever understands? For how long is the average juror able to concentrate on what the Judge is saying? Not much and not for long, I fear. Judges may overlook that jurors are laymen who before their jury duty know little, if anything of the Courts system and even less of the law which we administer in the Courts. Yet they are expected to grasp, at one hearing, the most complex legal concepts! I’ll bet not one juror in a hundred does grasp them!<sup>17</sup>

18.7 The tension between the expectations placed upon juries—impartially and accurately to evaluate the evidence before them, taking into consideration only those factors which the law permits—and the anxiety about their abilities to perform their task is evident in the extensive body of directions perceived to be necessary in order for the jury to undertake adequately its fact-finding task.<sup>18</sup> It was noted by the ALRC in the Interim Report of the previous Evidence inquiry (ALRC 26) that some of the directions considered necessary to prevent juries from misusing or overestimating the weight of evidence ‘require a mental skill and rationality ... that is very high indeed’.<sup>19</sup> It has been said that ‘jurors are rarely brilliant and rarely stupid, but they are treated as both at once’.<sup>20</sup>

18.8 While doubts are often expressed about whether juries understand and heed judicial directions, the law operates on the assumption that they do.<sup>21</sup> This is illustrated, for example, by the assumption that a warning about the unreliability of evidence can operate to reduce the danger that the jury will misuse or overestimate the probative value of the evidence, thereby reducing any unfairly prejudicial effect it might have.<sup>22</sup>

15 Western Australian Bar Association, *Consultation*, Perth, 6 October 2005; Office of the Director of Public Prosecutions (NT) and Witness Counselling Service, *Consultation*, Darwin, 15 August 2005; Victim Support Australasia, *Consultation*, Sydney, 4 July 2005; Victoria Legal Aid, *Submission E 113*, 30 September 2005.

16 For a discussion of jury ideology, see M Findlay, *Jury Management in New South Wales* (1994).

17 *R v Hill* [1999] SASC 359, [23].

18 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [70].

19 *Ibid*, [72].

20 W Urbom, ‘Toward Better Treatment of Jurors by Judges’ (1982) 61 *Nebraska Law Review* 409, 425.

21 See, eg, *R v Glennon* (1992) 173 CLR 592.

22 Refer to discussion in Ch 16.

It is also illustrated by the stringency of the warning requirements and the readiness of appellate courts to find a miscarriage of justice arising from a single misdirection.<sup>23</sup> Given that a significant proportion of the content of evidentiary and procedural law is premised on assumptions about the abilities and behaviour of juries,<sup>24</sup> it is crucial that these assumptions be evaluated critically in light of empirical research.<sup>25</sup>

18.9 Due to legal restrictions protecting the secrecy of jury deliberations and limiting disclosures by jurors, the scope of empirical research on juries has been significantly limited.<sup>26</sup> Nonetheless, there is a considerable body of research, emanating predominately from the United States,<sup>27</sup> examining the psychology of jury decision-making. This research has, for the most part, been based on the observation of shadow or mock juries; the questioning of other participants involved in the trial,<sup>28</sup> or the self-completed questionnaires of actual jurors.<sup>29</sup> The limitations imposed by such methodologies have been acknowledged.<sup>30</sup> However, the findings of such research are still instructive. Primarily, they indicate a need to adapt trial processes to 'fit the capacities of the integral players'<sup>31</sup> and to reassess the evidentiary and procedural laws which are premised on unrealistically high or low assessments of juror competence.<sup>32</sup>

18.10 Research findings show that, although most jurors are conscientious in their attempts to do so, they have difficulties understanding or following particular types of judicial directions.<sup>33</sup> However, this does not amount to a conclusion of juror

23 This is discussed in more detail later in this chapter.

24 It is not, however, suggested that the laws of evidence are the 'child of the jury': see discussion in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [49]–[79].

25 See D Boniface, 'The Common Sense of Jurors v the Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials' (2005) 28(1) *University of New South Wales Law Journal* 261; M Nolan, 'More Creativity, Less Criticism: An 'Evidence Based' Approach to Jury Reform' (2003) 15(3) *Legaldate* 5.

26 For example, s 68B of the *Jury Act 1977* (NSW) prohibits unauthorised disclosures during a trial and disclosures for gain after a trial about the deliberations of the jury in a trial. The extent to which jury secrecy is protected varies between jurisdictions: see New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986), [11.1]–[11.16].

27 The legal restrictions on disclosure by jurors are less stringent in some states of the United States of America, and hence there has been more direct investigation of juror opinions: see New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986), [11.13]–[11.14].

28 For example, judges and legal practitioners.

29 W Young, Y Tinsley and N Cameron, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) 24 *Criminal Law Journal* 89, 89–90; P Darbyshire, 'What Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' (2001) *Criminal Law Review* 970, 971.

30 See M Findlay, *Jury Management in New South Wales* (1994), 19; P Darbyshire, 'What Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' (2001) *Criminal Law Review* 970, 971; New South Wales Law Reform Commission, *Majority Verdicts*, Report 111 (2005), [2.50]–[2.54].

31 Parliament of Victoria—Law Reform Committee, *Jury Service in Victoria* (1997), [2.10].

32 J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71, 111. The tension between the exhortation to judges to give clear, concise and relevant instructions to the jury and the obligation to give particular directions in accordance with legal requirements is highlighted by the *Longman* warning examined later in this chapter.

33 For a review of these studies, see J Lieberman and J Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677; J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71; P Darbyshire, 'What



incompetence. Studies have found that juror comprehension varies depending on the subject matter of the direction.<sup>34</sup> Directions regarding subject matter which is new, difficult or counter-intuitive to jurors' commonsense are less likely to be effective than directions regarding subject matter with which jurors are generally familiar.<sup>35</sup>

18.11 Unsurprisingly, juror comprehension has also been found to vary depending on the manner in which the directions are presented. Directions which use technical language, complex grammatical structures and abstract concepts without context are less likely to be understood.<sup>36</sup> Studies have therefore concluded that juror comprehension can be improved by revising the content, form and timing of the directions in accordance with psychological and psycho-linguistic research.<sup>37</sup>

18.12 Another significant finding is that the ability of jurors to follow directions varies depending on the type of direction given. A number of studies have shown that directions to disregard inadmissible evidence or to limit the use of evidence are less likely to be effective than other types of directions, and can in fact be counter-productive.<sup>38</sup> A number of competing psychological theories have been used to explain the failure of these types of directions.<sup>39</sup> Although it has been conceded that further work needs to be done in order to locate the 'true theoretical source of limiting instruction failures', some researchers contend that social psychological research can assist to find ways in which to increase the effectiveness of these instructions.<sup>40</sup>

18.13 While research carried out in overseas jurisdictions is instructive, its applicability to the Australian context is likely to be limited by jurisdictional differences in legal culture and procedure.<sup>41</sup> The findings of jury research will vary according to such factors as: the composition of jury panels;<sup>42</sup> the average length of the

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Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' (2001) *Criminal Law Review* 970.

34 J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71, 79.

35 Ibid, 79–80.

36 Ibid, 82–83.

37 Ibid, 82–84; P Darbyshire, 'What Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001' (2001) *Criminal Law Review* 970, 973.

38 J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71, 86–87; J Lieberman and J Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677, 703.

39 For a summary of this research, see J Lieberman and J Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677.

40 Ibid, 704–705; J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71, 107–109.

41 New Zealand Law Commission, *Juries in Criminal Trials*, Preliminary Paper 37 (Volume 2) (1999), [1.2].

42 This will vary between jurisdictions, as out-of-court selection procedures and empanelment processes differ: see discussion in Chapter 4 of New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986).

charge to the jury;<sup>43</sup> and the extent to which judges make comments in relation to the evidence.<sup>44</sup> These differences must be taken into account in assessing the utility of overseas research. However, they may also serve as a useful comparator in assessing the effectiveness of different procedures adopted.<sup>45</sup>

18.14 A number of significant jury research projects have been conducted in Australia, however there has been minimal direct investigation of juror opinion.<sup>46</sup> The most recent and relevant empirical research on the comprehension of jurors was conducted by the New Zealand Law Commission (NZLC) as part of a review of criminal procedure.<sup>47</sup> The research included post-trial interviews with jurors about their understanding of the issues in the case and about the collective decision-making process. The research confirmed the finding that jurors have difficulties understanding and following judicial directions. The NZLC concluded that this finding did not indicate that juries are inherently incompetent in performing the task assigned to them, but that the present system does not give juries the tools to enable them to perform their job effectively.<sup>48</sup>

18.15 More recently, the Australian Institute of Judicial Administration (AIJA) has established an advisory committee which is currently examining jurisdictional variations in the approach taken by trial judges to instructing juries, and is attempting to identify a 'best practice' in order to maximise the accuracy, clarity and comprehensibility of jury instructions. This project will focus largely on practical issues, such as the utility of model directions and aids such as flow charts.<sup>49</sup>

18.16 It is generally agreed that there needs to be more empirical research in Australia into jurors' understanding of and reaction to judicial directions, and other aspects of the trial process.<sup>50</sup> Justice Eames has remarked that 'in the absence of such research, it is a

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43 Jury charges are significantly shorter in jurisdictions such as New Zealand and the United States than in Australian jurisdictions: see G Eames, 'Towards a Better Direction—Better Communication with Jurors' (2003) 24 *Australian Bar Review* 36, 43, 46.

44 There is greater scope for judicial comment in jurisdictions such as Australia and the United Kingdom than in the United States: see *Ibid*, 48–49.

45 For example, one commentator suggests that aspects of the Canadian challenge for cause procedure warrant consideration in Australia in order to facilitate the selection of an impartial and representative jury: L McCrimmon, 'Challenging a Potential Juror for Cause: Resuscitation or Requiem?' (2000) 23(1) *University of New South Wales Law Journal* 127, 146.

46 See M Findlay, *Jury Management in New South Wales* (1994); New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986); Parliament of Victoria—Law Reform Committee, *Jury Service in Victoria* (1997); M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001); New South Wales Law Reform Commission, *Majority Verdicts*, Report 111 (2005).

47 New Zealand Law Commission, *Juries in Criminal Trials*, Preliminary Paper 37 (Volume 2) (1999).

48 W Young, Y Tinsley and N Cameron, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) 24 *Criminal Law Journal* 89, 100.

49 G Eames, 'Towards a Better Direction—Better Communication with Jurors' (2003) 24 *Australian Bar Review* 36, 39.

50 *Ibid*; New South Wales Law Reform Commission, *Majority Verdicts*, Report 111 (2005), [4.59]–[4.64]; M Nolan, 'More Creativity, Less Criticism: An 'Evidence Based' Approach to Jury Reform' (2003) 15(3) *Legaldate* 5.

field in which anecdote, self-assurance and self-delusion abound within the ranks of the legal profession and the judiciary'.<sup>51</sup> One commentator has suggested that, in addition to interviewing jurors, jury deliberations should be made more transparent and jurors should be required to give reasons for their decisions.<sup>52</sup>

Jury decision-making should not be regarded as sacrosanct, beyond critical examination. Empirical research, and our understanding of jury deliberations in general, remains hindered by secrecy requirements imposed upon common law jurors in Australia and elsewhere. Meaningful jury reform requires the piercing of this veil of secrecy, aided by greater efforts by judges to use existing powers to help juries achieve verdicts in a fair manner and according to the law.<sup>53</sup>

18.17 The Commissions are of the view that, in order to effect meaningful law reform in this area, a more fundamental and comprehensive investigation of the operation of the jury system is required. This includes a review of issues such as eligibility and empanelment; juror attitudes towards jury service; juror perception of the courtroom and jury-room environment; judicial approaches to communication; jurors' understanding of judicial directions; and the laws enforcing juror secrecy. Reform of the relevant laws, including those of evidence and procedure, should be considered in light of psychological and empirical research relating to jury practices. Any future inquiry should address the need to increase the quality and consistency of trial practice across the various Australian jurisdictions. A joint inquiry involving law reform bodies from a number of jurisdictions, as has been the case in the present Inquiry, would facilitate such an outcome.

**Recommendation 18–1** The Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including such matters as eligibility, empanelment, warnings and directions to juries.

## Warnings about unreliable evidence

18.18 Historically, certain categories of witnesses were regarded as unreliable, and the common law required the trial judge to warn the jury about the dangers of relying on such evidence where it was uncorroborated. These categories included: complainants in sexual assault cases,<sup>54</sup> accomplices,<sup>55</sup> and child witnesses.<sup>56</sup> The rationale for

51 G Eames, 'Towards a Better Direction—Better Communication with Jurors' (2003) 24 *Australian Bar Review* 36, 39.

52 See discussion in M Nolan, 'More Creativity, Less Criticism: An 'Evidence Based' Approach to Jury Reform' (2003) 15(3) *Legaldate* 5, 6.

53 *Ibid.*, 6.

54 *Kelleher v The Queen* (1974) 131 CLR 534.

55 *Davies v Director of Public Prosecutions* [1954] AC 378.

56 *Hargan v The King* (1919) 27 CLR 13.

corroboration warning requirements was explained by Brennan J in *Bromley v The Queen* as follows:

The courts have had experience of the reasons why witnesses in the three accepted categories [accomplices, children, sexual assault complainants] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses. The experience of the courts has shown also that the reasons which may lead one suspect witness to give untruthful evidence are not necessarily the same as the reasons why another suspect witness may do so.<sup>57</sup>

18.19 Corroboration warnings generally require the trial judge to do the following: identify the risks of unreliability of the particular type of evidence; direct the jury that it is dangerous to act upon such evidence where it is uncorroborated; define corroboration and draw the jury's attention to any other evidence adduced at trial which may be capable of corroborating the suspect evidence; and finally, instruct the jury that it may still act upon the suspect testimony alone if it is convinced of its accuracy beyond reasonable doubt.<sup>58</sup>

18.20 Warnings about the potential unreliability of categories of witnesses such as women and children are now recognised as discriminatory and based on prejudice rather than empirical evidence.

18.21 The common law corroboration warning requirements were criticised in ALRC 26 on the following basis:

The present law is too rigid and technical. There is a strong case for saying that it does not adequately serve the rationale of minimising the risk of wrongful convictions. Warnings can be required when not necessary and avoided when they should be given in the circumstances of the particular case. In addition, warnings in their present form distract attention from the issue of the reliability of the evidence in question. Finally, the directions to be given are so complex that they are likely to be ignored ... What is required is a simpler regime, under which the trial judge must consider whether a direction appropriate to the circumstances should be given.<sup>59</sup>

18.22 Two options for reform were identified. The first was the abolition of the warning requirements and the introduction of an unguided discretion whereby trial judges could give warnings wherever it was considered appropriate to do so. The second was the introduction of a guided discretion, whereby categories of potentially unreliable evidence were retained, but the trial judge would only be required to give a warning if it were considered necessary in the circumstances of the case.<sup>60</sup> The ALRC preferred the latter for two reasons: first, accumulated judicial experience regarding certain types of evidence should be used; secondly, there was a risk that the

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57 *Bromley v The Queen* (1989) 168 CLR 79, 324.

58 A Ligertwood, *Australian Evidence* (4th ed, 2004), [4.5].

59 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1015].

60 *Ibid.*, [1017].

introduction of an unguided discretion might simply lead to the redevelopment of the existing corroboration warnings regime.<sup>61</sup>

18.23 The ALRC recommendation included an exhaustive list of categories of evidence in respect of which a warning may be required. This list included categories corresponding to those which required corroboration warnings at common law<sup>62</sup> and new categories (such as hearsay evidence) in order to compensate for the more relaxed admissibility provisions. The ALRC recommended that the judge's common law powers to give appropriate warnings and directions remain intact, suggesting that these general powers would be available to cover any new category of unreliable evidence that may emerge.<sup>63</sup>

18.24 In accordance with the recommendations in ALRC 26 and ALRC 38, s 164 of the uniform Evidence Acts abolishes the common law corroboration warning requirements,<sup>64</sup> and a more flexible warnings regime is introduced in s 165. However, s 165 differs from the provision proposed by the ALRC<sup>65</sup> in that it contains an inclusive list of categories of evidence in respect of which a warning may be given, and therefore applies generally to 'evidence of a kind that may be unreliable'. Pursuant to s 165, the trial judge has the discretion to refuse to give a warning if there are 'good reasons' for doing so. In addition, the statutory warning does not require that any particular form of words be used. The provision therefore shifts the emphasis away from generalised warnings towards the particular risk in the circumstances of the case. However, the Acts do not prohibit the trial judge from giving a traditional corroboration warning,<sup>66</sup> and s 165(5) specifically retains the power of the trial judge to give common law warnings and directions (except where otherwise provided).

18.25 While traditional corroboration warnings can still be given, legislation has been passed in most Australian jurisdictions, including uniform Evidence Act jurisdictions, to prohibit or restrict the ability of trial judges to warn that a particular class of witness, notably sexual assault complainants and children, is inherently unreliable.<sup>67</sup> These reforms were implemented to reflect improved understanding of the reliability of the evidence given by children and sexual assault complainants. However, they have been significantly undermined by the development of a new class of common law warnings which bear many of the hallmarks of the traditional corroboration warning.

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61 Ibid, [1009].

62 Note that the ALRC draft provision retained the category of sexual assault complainants, however this category was omitted from s 165(1) of the uniform Evidence Acts: Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix A (cl 140 of draft Evidence Bill 1987).

63 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1017].

64 Except in relation to perjury and similar offences: s 164(2).

65 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix A (cl 140 of draft Evidence Bill 1987).

66 *Conway v The Queen* (2002) 209 CLR 203, [53].

67 See discussion below.

18.26 The expansion of the common law judicial warnings began with the decision of the High Court in *Bromley v The Queen*.<sup>68</sup> In this case, the court considered that a warning was required in respect of the unreliability of a particular witness who did not fall within one of the established categories requiring a corroboration warning. The court rejected the argument that the corroboration doctrine should be extended to cover witnesses of that category, but held that a judicial warning should be given wherever the unreliability of a particular witness has not been exposed adequately in cross-examination.<sup>69</sup>

18.27 The doctrine in *Bromley* was subsequently extended in *Longman v The Queen*, where it was held that a warning must be given to the jury ‘whenever ... necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case’.<sup>70</sup> The result has been to reinstate a near mandatory warning regime in relation to a number of categories of evidence, including: evidence of delayed complaint in sexual assault cases,<sup>71</sup> unrecorded admissions to investigators,<sup>72</sup> prosecution evidence given by prison informers,<sup>73</sup> and identification evidence.<sup>74</sup> These warning requirements have survived the statutory prohibitions on general warnings relating to particular classes of witnesses, as they purport to address the particular risk in the circumstances of the case in which they are given.<sup>75</sup>

18.28 The uniform Evidence Acts preserve the common law powers and obligations of the trial judge to give warnings, and there has been a steady expansion in the number of warnings that may be required in addition to those provided for by the uniform Evidence Acts.

## The statutory warning

18.29 The uniform Evidence Acts introduce a more flexible warning regime, intended to replace the common law corroboration warning requirements. Section 164 abolishes the common law warning requirements. Section 165 provides:

- (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
  - (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
  - (b) identification evidence;
  - (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;

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<sup>68</sup> *Bromley v The Queen* (1989) 168 CLR 79.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Longman v The Queen* (1989) 168 CLR 79, 87.

<sup>71</sup> *Ibid.*

<sup>72</sup> *McKinney v The Queen* (1991) 171 CLR 468.

<sup>73</sup> *Pollitt v The Queen* (1992) 174 CLR 558.

<sup>74</sup> *Domican v The Queen* (1992) 173 CLR 555.

<sup>75</sup> *Robinson v The Queen* (1999) 197 CLR 162.

- (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
  - (e) evidence given in a criminal proceeding by a witness who is a prison informer;
  - (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;
  - (g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.
- (2) If there is a jury and a party so requests, the judge is to:
- (a) warn the jury that the evidence may be unreliable; and
  - (b) inform the jury of matters that may cause it to be unreliable; and
  - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in giving the warning or information.

18.30 Section 165(5) expressly preserves the common law power of the judge to give a warning or inform the jury. This has been interpreted by the courts as also preserving the judge's common law obligations to give a warning.<sup>76</sup> Hence, even if a warning is not required pursuant to s 165(1)–(4), the trial judge may still be required to give a warning at common law.

18.31 The *Evidence Act 1995* (NSW) contains additional sections which preclude the giving of warnings in relation to the reliability of children's evidence except in accordance with s 165B of that Act.<sup>77</sup>

### ***When a statutory warning is required***

18.32 Where a warning is requested pursuant to s 165, the trial judge may refuse the request on two grounds: first, the evidence is not 'of a kind that may be unreliable' according to s 165(1); and secondly, the evidence is 'of a kind that may be unreliable'

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<sup>76</sup> *R v PLV* (2001) 51 NSWLR 736.

<sup>77</sup> *Evidence Act 1995* (NSW) ss 165A, 165B. This is discussed later in this chapter. See Rec 18–2.

but there are ‘good reasons’ for not giving a warning.<sup>78</sup> Where a party fails to make a request pursuant to s 165, the trial judge may nonetheless be obliged to give a warning if the evidence is ‘of a kind that may be unreliable’ and the warning is necessary to ensure a fair trial.<sup>79</sup> The failure to give an appropriate or adequate warning in accordance with the requirements of s 165(1)–(4) may constitute a miscarriage of justice.<sup>80</sup>

18.33 The obligation to give a statutory warning may arise in respect of evidence falling within the categories listed in s 165(1) and also in respect of other evidence of a ‘kind that may be unreliable’.<sup>81</sup> The uniform Evidence Acts provide no indication of the breadth of the test of unreliability, nor do they specify what might constitute ‘good reasons’ for refusing to give a warning. While it is generally agreed that the scope of s 165(1) is not as broad as a literal reading of the provision might suggest,<sup>82</sup> the case law is divided in the approach taken to limiting the circumstances in which an obligation is said to arise. One approach has been to read down the scope of ‘unreliability’ and hence application of s 165(1); another has been to take a broader view of the application of s 165(1) and focus on any ‘good reasons’ for refusing to give a warning in the particular circumstances of the case.

18.34 Where the evidence comes within one of the categories listed in s 165(1), a question arises as to whether the section applies automatically or whether there must also be circumstances indicating that the evidence might actually be unreliable. The predominant view is the latter,<sup>83</sup> illustrated in the following statement by Heydon JA in *R v Clark*:

[T]he issue is not limited to whether [B] is a witness within the language of par (d), but whether the evidence which he, being a s 165(1)(d) witness, gave was ‘of a kind’ that might be unreliable ... Whether [B’s] evidence was of that kind depends on the circumstances.<sup>84</sup>

18.35 Limiting the obligation through the application of s 165(1) compels the trial judge to consider whether the particular evidence may be unreliable, as opposed to assuming that a warning should be given in respect of every piece of evidence which is

78 It has been held that a trial judge who refuses to give a warning requested pursuant to s 165 must usually state his or her reasons for doing so: *R v Beattie* (1996) 40 NSWLR 155; *R v Taranto* [1999] NSWCCA 396.

79 *R v Williams* (1999) 104 A Crim R 260, [34]. Note that a common law warning may be required irrespective of request. See the discussion of *Longman v The Queen* (1989) 168 CLR 79 later in this chapter.

80 *R v Flood* [1999] NSWCCA 198, [18].

81 As discussed later in this chapter, the trial judge may also be obliged to give a common law warning in relation to evidence which does not fall within the scope of s 165(1).

82 In *R v Stewart* (2001) 52 NSWLR 301, Spigelman CJ stated that ‘the acknowledgment in s 165(5), that there will be other circumstances in which a judge will be required to warn or inform the jury with respect to these matters, suggests that the word ‘kind’ must be read down in some way’: [16].

83 See, eg, *R v Fowler* (2003) 151 A Crim R 166; *R v Harbulot* [2003] NSWCCA 141. For cases taking the broader approach, see, eg, *R v V* (1998) 100 A Crim R 488; *R v Mayberry* [2000] NSWCCA 531.

84 *R v Clark* (2001) 123 A Crim R 506, [70]. See also *R v Stewart* (2001) 52 NSWLR 301, per Spigelman CJ.



‘of a kind’ which may be unreliable unless the circumstances of the case indicate that the ‘good reasons’ exception may be invoked. This more contextualised approach accords with the policy expressed in ALRC 26, shifting away from the attitude that warnings should be given as a matter of course.

It has been suggested that as all evidence may be unreliable or may be given incorrect weight, the judge will have to give a warning in respect of any evidence within the categories listed. It is thought, however, that this should not occur because the section, properly construed, clearly assumes that evidence coming within the categories may be reliable and unlikely to be given incorrect weight. It makes it clear that it is not enough to demonstrate that evidence comes within one or more of the categories. Before the judge must consider giving a warning, it must also be shown that the evidence may be unreliable or open to misestimation.<sup>85</sup>

18.36 In relation to evidence falling outside the categories listed in s 165(1), authorities have also been divided as to the scope of the section’s application. Some authorities have taken a broad view, holding that the section applies where a party points to an aspect of the evidence which suggests that it may be unreliable, such as inconsistencies in a particular witness’ testimony.<sup>86</sup> However, recent authorities demonstrate a trend towards a more restrictive approach.

18.37 Given that ‘evidence given by all witnesses may be unreliable’,<sup>87</sup> some authorities have accepted as a matter of logic that ‘the idiosyncrasies and particular potential deficiencies of a given witness do not of themselves make that witness a member of a “kind”’.<sup>88</sup> However, other cases have narrowed the application of s 165 by reference to the rationale underpinning the common law warnings.

Where a matter which might adversely affect the reliability of evidence in a trial would readily be understood and appreciated by a jury because it falls within their general experience and understanding and where the court has no special knowledge about the matter or no reasons to doubt that the jury will appropriately assess its weight, the evidence is not ‘of a kind that may be unreliable’ and the section does not apply.<sup>89</sup>

18.38 The latter approach is consistent with the respective functions of the trial judge and jury in relation to findings of fact. In practical terms, this also accords with ‘the desirability of containing a summing up to an acceptable length; of ensuring its

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85 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1019].

86 See, eg, *R v V* (1998) 100 A Crim R 488; *R v Mayberry* [2000] NSWCCA 531.

87 *R v Baartman* (2001) 124 A Crim R 371, [62].

88 See, eg, *R v Clark* (2001) 123 A Crim R 506, [71]; *R v Stewart* (2001) 52 NSWLR 301, per Spigelman CJ.

89 *R v Stewart* (2001) 52 NSWLR 301, [98].

immediate relevance to the actual trial; [and] of avoiding unnecessary judicial input into the fact finding process'.<sup>90</sup>

### Submissions and consultations

18.39 In IP 28, the ALRC and NSWLRC sought comment in relation to the drafting, content and operation of s 165.<sup>91</sup> In DP 69, the Commissions noted that this question attracted relatively little attention in submissions and consultations.<sup>92</sup>

18.40 One practitioner considers that s 165 generally works well.<sup>93</sup> The Law Council also endorses the flexible and non-technical approach of s 165 warnings.<sup>94</sup>

18.41 In contrast, the New South Wales Public Defenders Office (NSW PDO) submits that s 165 'has proved to be a blunt and ineffective instrument when compared to the common law rules relating to corroboration'.<sup>95</sup>

18.42 The NSW PDO supports the inclusion in s 165(1) of the following categories: evidence from witnesses of bad character, and evidence from a person affected by drugs and alcohol.<sup>96</sup>

18.43 One judicial officer submits that, where tendency and coincidence evidence is admissible, it may be desirable to amend s 165 to require or permit the judge to warn the jury about the possibility of concoction or collusion.<sup>97</sup>

18.44 The NSW PDO and the New South Wales Law Society both submit that s 165(2) should be amended to include the following additional directions:

- (d) that it would be dangerous to act on the evidence of an unreliable witness which is not supported by other independent evidence; and
- (e) the evidence of a number of witnesses all criminally concerned in the events giving rise to the proceedings do not provide independent support for each other.<sup>98</sup>

18.45 The Office of the Director of Public Prosecutions (NSW) (NSW DPP) submits that guidance as to the timing of a warning under s 165 is desirable:

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<sup>90</sup> *R v BWT* (2002) 54 NSWLR 241, [35].

<sup>91</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–5.

<sup>92</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [16.70].

<sup>93</sup> T Game, *Consultation*, Sydney, 25 February 2005.

<sup>94</sup> Law Council of Australia, *Submission E 32*, 4 March 2005.

<sup>95</sup> New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

<sup>96</sup> *Ibid.*

<sup>97</sup> Confidential, *Submission E 31*, 22 February 2005.

<sup>98</sup> The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; New South Wales Public Defenders Office, *Submission E 50*, 21 April 2005.

Section 165 should be amended to indicate that, unless the court is satisfied that it is in the interests of justice to give the warning at some other time, the warning given by the trial judge pursuant to the section, must be given immediately before or immediately after the giving of the evidence that is the subject of the warning.<sup>99</sup>

18.46 The Law Council submits that it might be appropriate to develop uniform model directions (and particularly warnings required under s 165) for criminal cases in uniform Evidence Act jurisdictions. It notes that, should such directions be developed, care must be taken to ensure that they do not achieve a mandatory (and hence technical) status.<sup>100</sup>

18.47 The New South Wales Department of Health Child Protection and Violence Unit submits that the Acts should be amended to provide that the judge must not warn, or suggest to the jury in any way, that the law regards complainants in sexual assault cases as an unreliable class of witness.<sup>101</sup>

18.48 The Intellectual Disability Rights Service submits that witnesses with an intellectual disability are vulnerable to prejudicial assessments of their competence, reliability and credibility. It recommends the introduction of a provision to prevent a court from warning or informing a jury that evidence given by a witness with an intellectual disability is unreliable because of the witness' disability.<sup>102</sup>

### **The Commissions' view**

18.49 In DP 69, the Commissions concluded on the basis of submissions and consultations that the s 165 warnings are operating satisfactorily in practice and that no case for legislative change in the present Inquiry had been made out.<sup>103</sup> The Commissions remain of this view.

18.50 The Commissions note that authorities have diverged as to the scope of the statutory test of unreliability. While it is acknowledged that the section is broadly drafted, submissions and consultations have not raised this as an issue and do not indicate that this is a matter of significant concern in practice. The Commissions therefore recommend no change in this respect.

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99 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

100 Law Council of Australia, *Submission E 32*, 4 March 2005.

101 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

102 Intellectual Disability Rights Service, *Submission E 101*, 23 September 2005.

103 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [16.70]–[16.75].

18.51 A number of submissions suggest the inclusion of additional categories of evidence in s 165(1). However, the Commissions do not consider that a case for such amendment has been made out. Currently, s 165(1) provides that warnings may be given in respect of ‘evidence of a kind that may be unreliable’ generally, and hence may apply to the categories suggested. Given that the section is not limited, it is considered that insufficient need has been demonstrated for the express inclusion of the suggested categories.

18.52 It is also suggested in submissions that the uniform Evidence Acts should be amended to preclude the giving of generalised warnings in relation to sexual assault complainants and witnesses with an intellectual disability. The Commissions note in Chapter 2 that the uniform Evidence Acts are intended to be Acts of general application, and should generally not contain provisions relating to specific categories of witness or offence. It is acknowledged that in some instances it will be appropriate to include provisions which apply only to particular categories of witness, but that the approach taken will vary depending on the nature of the provision in question. While the Commissions have made a recommendation similar to those proposed in relation to children’s evidence,<sup>104</sup> it is considered that there are particular considerations in favour of the inclusion of the recommended provision. These are outlined later in this chapter. An important consideration weighing against the inclusion of provisions relating to sexual assault complainants and intellectually disabled witnesses at the present time is that there is not inter-jurisdictional uniformity in relation to these issues.<sup>105</sup> However, the Commissions have recommended that all Australian jurisdictions should work towards harmonisation of provisions relating to issues such as children’s evidence and offence-specific evidentiary provisions.<sup>106</sup> The inclusion of the proposed provisions in the uniform Evidence Acts may be considered desirable at some stage in the future.

18.53 The Commissions have recommended a targeted inquiry into the jury system, including judicial warnings. While the Commissions are of the view that no case for change to s 165 has been made out in the present Inquiry, it is considered that these warnings should be reviewed in light of a more comprehensive analysis of other common law and statutory directions. The submissions suggesting amendment of s 165(2) in order to reflect the common law corroboration warnings would be appropriately reviewed in that context.

18.54 Suggestions have been made that guidance should be provided as to when warnings should be given and that model uniform directions should be developed. It is considered that these are issues which require further consideration in light of empirical research regarding the effect of directions on juries, in particular the factors

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104 See Rec 18–2.

105 In contrast, the recommended provision relating to children’s evidence is already provided for in the *Evidence Act NSW* (1995), and hence there is a practical prospect of achieving uniformity in this area.

106 See Rec 2–2.

which either impede or enhance juror comprehension. Again, this is a matter appropriately dealt with in the recommended inquiry.<sup>107</sup>

## Children's evidence

18.55 The common law traditionally regarded children as an unreliable class of witness, requiring that trial judges warn juries that it is dangerous to convict on the uncorroborated evidence of a child, even where the child is deemed competent to give sworn evidence.<sup>108</sup> This requirement grew from a perception that children are prone to fantasy, highly suggestible, and likely to give inaccurate accounts of events.<sup>109</sup>

18.56 Contrary to such beliefs, research conducted in recent years demonstrates that children's cognitive and recall skills are not inherently less reliable than that of adults.<sup>110</sup> In their joint report *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84), the ALRC and The Human Rights and Equal Opportunity Commission (HREOC) noted:

Recent research into children's memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued ... The presumed gulf between the reliability of evidence from children and that from adults appears to have been exaggerated ... Children, including very young children, are able to remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful.<sup>111</sup>

18.57 The Report emphasised that the reliability of an individual child's memories and perceptions, both at the time of initial questioning and at a later date, is likely to be influenced by factors such as the manner and context in which the child is questioned.<sup>112</sup> It noted that the use of misleading and suggestive questioning techniques adversely affects the ability of young children to recall events accurately, and that the most effective way of eliciting accurate and more detailed information is through the use of non-leading cues.<sup>113</sup> The Report also found that younger children may have difficulties when questioned about particular times and dates, and hence may be unable to recount events in chronological order, but that this has no bearing on the accuracy of the description of the events reported.<sup>114</sup> Overall, the Report emphasised that research

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107 See Rec 18–1.

108 *Hargan v The King* (1919) 27 CLR 13.

109 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.15].

110 See *Ibid*, [14.19].

111 *Ibid*, [14.19]–[14.20].

112 *Ibid*, [14.21].

113 *Ibid*, [14.21].

114 *Ibid*, [14.24].

confirms that children's evidence is not generally less reliable than that of adults, but that its reliability may be influenced by particular factors.

18.58 In order to reflect contemporary understanding of children's cognitive and recall skills, the common law corroboration warning requirement in respect of child witnesses was abolished by statute in all Australian jurisdictions.<sup>115</sup> In some jurisdictions, legislative provisions were enacted to prohibit trial judges from warning or suggesting that children are an unreliable class of witness.<sup>116</sup>

18.59 Section 165 of the uniform Evidence Acts provides that a trial judge is to give a warning in respect of evidence 'of a kind that may be unreliable' where a party so requests, unless there are good reasons for not giving the warning. Section 165(1)(c) expressly includes 'age' as a factor which may cause evidence to be unreliable.

18.60 Despite changes to the law removing the corroboration warning requirements, the ALRC and HREOC found in their 1997 Report that it remained standard practice in many jurisdictions for judges to warn juries about the unreliability of children's evidence.<sup>117</sup> Submissions to that inquiry emphasised that in giving such warnings, judges were often guided by their individual assumptions and prejudices about child witnesses, rather than by modern research findings.<sup>118</sup> The ALRC and HREOC therefore recommended that judges should be prohibited from warning or suggesting to the jury that children are an unreliable class of witness or that their evidence is suspect; and that judicial warnings about the evidence of a particular child witness should only be given where a party so requests and it can be shown that there are 'exceptional circumstances' warranting the warning. It specified that 'exceptional circumstances' should not depend on the mere fact of the witness being a child, but on objective evidence that the particular child's evidence may be unreliable.<sup>119</sup>

18.61 Similarly, in the 1997 Report of the Wood Royal Commission into the New South Wales Police Service (Wood Royal Commission Report), concerns were expressed that some members of the judiciary were continuing to give inappropriate warnings in respect of children's evidence, and that s 165 of the uniform Evidence Acts might not be effective to prevent a return to the practice of giving such warnings

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115 Uniform Evidence Acts s 164; *Criminal Code Act 1899* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Evidence Act 1958* (Vic) s 23(2A); *Evidence Act 1939* (NT) s 9C. In South Australia, the corroboration requirement has been abolished in relation to the sworn evidence of children: *Evidence Act 1929* (SA) s 12A.

116 *Evidence Act 1995* (NSW) ss 165(6), 165A, 165B; *Evidence Act 1958* (Vic) s 23(2A), (2B); *Criminal Code Act 1899* (Qld) s 632(3) (not restricted to children as a class of witness, but applies to 'any class of persons'); *Evidence Act 1906* (WA) s 106D (for indictable offences); *Evidence Act 1939* (NT) s 9C; *Evidence Act 2001* (Tas) s 164(4). Section 15YQ(a) of the *Crimes Act 1914* (Cth) and s 70 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) prohibit the giving of warnings that children are an unreliable class of witness in sexual offence proceedings.

117 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.70].

118 *Ibid.*, [14.71].

119 *Ibid.*, Rec 100.

as a matter of course.<sup>120</sup> The Report recommended the implementation of the recommendations made by the ALRC and HREOC in relation to judicial warnings and child witnesses.<sup>121</sup> The *Evidence Act 1995* (NSW) was amended in accordance with the recommendations of the Wood Royal Commission Report in 2001.<sup>122</sup>

18.62 The *Evidence Act 1995* (NSW) now contains the following provisions in relation to judicial warnings and child witnesses:

- s 165A prohibits trial judges from warning or suggesting to juries that children as a class are unreliable witnesses or that it is generally dangerous to convict on the uncorroborated evidence of any child witness;<sup>123</sup> and
- s 165(6) provides that warnings in relation to the reliability of a child's evidence can only be given in accordance with s 165B. Section 165B provides for the following warning in respect of the evidence of a particular child witness:
  - (2) A judge in any proceedings in which evidence to which this section applies is given may:
    - (a) warn or inform the jury that the evidence of the particular child may be unreliable because of the child's age, and
    - (b) warn the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.
  - (3) Such a warning or information may be given only:
    - (a) if a party has requested that it be given, and
    - (b) if that party has satisfied the court that there are circumstances particular to that child in those proceedings that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.
  - (4) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

18.63 In DP 69, the Commissions proposed that the uniform Evidence Acts be amended to include provisions similar to ss 165(6), 165A and 165B of the *Evidence*

<sup>120</sup> Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.139].

<sup>121</sup> Ibid, Rec 90. The Wood Royal Commission considered a draft recommendation made by the ALRC and HREOC: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *A Matter of Priority: Children and the Legal Process*, DRP 3 (1997), Draft Rec 5.8. The ALRC and HREOC inquiry was completed after the Wood Royal Commission report was released. Recommendation 100 of ALRC 84 was in similar terms to the draft recommendation in DRP 3.

<sup>122</sup> See *Evidence Legislation Amendment Act 2001* (NSW).

<sup>123</sup> Section 164(4) of the *Evidence Act 1910* (Tas) contains a provision similar to s 165A(1) of the New South Wales Act, prohibiting judges from warning or suggesting to a jury that it is unsafe to convict a person on the uncorroborated evidence of a child because children are classified by law as unreliable witnesses.

*Act 1995* (NSW).<sup>124</sup> Submissions and consultations demonstrate considerable support for this proposal.<sup>125</sup> A number of submissions and consultations confirm that, despite research which demonstrates that children's evidence is not inherently unreliable,<sup>126</sup> traditional misunderstandings still pervade the courtroom and affect the decisions made by judicial officers and jurors.<sup>127</sup>

### The Commissions' view

18.64 Despite the fact that research shows that the evidence of children is not inherently less reliable than that of adults, it has been found that the credibility of children's evidence is still often underestimated by juries and the community generally.<sup>128</sup> Given that such misconceptions still appear to be prevalent, the Commissions consider that there are grounds for adopting a provision prohibiting judges from giving general warnings about the unreliability of child witnesses, as provided in s 165A of the *Evidence Act 1995* (NSW). However, given that statutory prohibitions on the giving of general warnings in relation to particular categories of witness have not successfully displaced the common law practice of doing so,<sup>129</sup> it is also necessary to adopt a specific warnings provision, similar to that provided in s 165B of the *Evidence Act 1995* (NSW).

18.65 As noted in Chapter 2, one of the policies underpinning the Inquiry is that the uniform Evidence Acts should be of general application and should generally not include provisions relating to specific offences or categories of witness. However, it is acknowledged that in some instances it will be appropriate to include provisions which apply only to particular categories of witness.<sup>130</sup> The Commissions note in Chapter 2 that it is impossible to be entirely consistent in relation to this policy, and the approach taken will vary depending on the nature of the particular provision.<sup>131</sup>

18.66 In this Report, the Commissions consider a number of suggested amendments to the uniform Evidence Acts relating specifically to child witnesses. In Chapter 20, the Commissions have not recommended that recently enacted evidentiary provisions

124 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 16–1.

125 A Cossins, *Consultation*, Sydney, 3 August 2005; Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; H Astor, *Consultation*, Sydney, 2 August 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005; K Mack, *Submission E 82*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005. No submissions or consultations opposed the proposal.

126 R Shackel, *Submission E 105*, 27 September 2005.

127 T Beregi, *Submission E 79*, 16 September 2005.

128 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), [1.42]. See also the discussion in Ch 9 of this Report regarding the need for expert opinion evidence regarding the behaviour and development of children.

129 See the discussion later in this chapter relating to the *Longman* and *Crofts* warnings.

130 The uniform Evidence Acts currently contain some provisions which apply only to specific categories of witness: uniform Evidence Acts ss 18–19, 31.

131 See also discussion in Ch 20.



relating specifically to child witnesses be included in the Acts. This conclusion is reached on the basis that many of these provisions are closely linked with particular types of proceedings<sup>132</sup> or complex procedural issues.<sup>133</sup> It is considered that these provisions are more conveniently located in procedural and proceeding-specific legislation. However, the proposed amendments presently under consideration can be distinguished from those considered in Chapter 20, as they are not procedural in nature and apply to all types of proceedings in which there is a jury. Further, it is appropriate to locate them in the uniform Evidence Acts because they qualify the operation of s 165 of the Acts and reinforce the policy underpinning s 165 that warnings should only be given where the circumstances of the case indicate that they are warranted. A final consideration in favour of including such an amendment in the uniform Evidence Acts is that the provision is already located in the *Evidence Act 1995* (NSW), and hence there is a practical prospect of achieving uniformity in this area.<sup>134</sup> The Commissions therefore consider that these provisions are appropriately located within the uniform Evidence Acts.

18.67 The Commissions note that support has been expressed for the New South Wales provisions generally, but that the drafting of s 165B has raised some concerns. In its *Report on Child Sexual Assault Prosecutions*, the New South Wales Legislative Council Standing Committee on Law and Justice expresses some concern that s 165B(2)(a) might be interpreted as allowing a trial judge to give a warning about the reliability of a particular child's evidence solely on account of the child's age.<sup>135</sup> The Committee recommended that s 165B be amended to provide that such warnings are only to be given where it can be shown that there are 'exceptional circumstances', which circumstances cannot be established by the mere fact that the witness is a child.<sup>136</sup>

18.68 The Commissions consider that it is desirable for legislative amendment to reflect contemporary understanding of the reliability of children's evidence, and agree that s 165B as currently worded may not be sufficient to displace ongoing presumptions of the unreliability of child witnesses.<sup>137</sup> In light of this, the Commissions recommend that provisions similar to those contained in ss 165A and 165B of the *Evidence Act 1995* (NSW) should be included in the uniform Evidence

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132 For example, family law proceedings.

133 For example, the use of technology in the courtroom.

134 See Rec 2–2 in Ch 2.

135 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), [4.19]. See also J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005), [23.88].

136 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), Rec 26; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 100.

137 It is noted that as yet there is no case law dealing with s 165B.

Acts, but that the sections should explicitly provide that age alone is insufficient to establish unreliability. Section 165B of the *Evidence Act 1995* (NSW) should also be amended to mirror the recommended provision. A draft provision is included in Appendix 1.

18.69 Further, in order to ensure that the recommended legislative amendments achieve their desired purpose, the National Judicial College of Australia, the Judicial College of Victoria, the Judicial Commission of New South Wales and the state and territory law societies and bar associations should consider conducting educational programs regarding the cognitive and behavioural development of children and the implications of this for the reliability of the evidence of child witnesses.<sup>138</sup>

**Recommendation 18–2** The uniform Evidence Acts should be amended to include provisions dealing with warnings in respect of children’s evidence similar to those contained in ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW). Section 165B should be amended to make it clear that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child.

## Common law warnings

18.70 While it is beyond the scope of the present Inquiry to conduct a comprehensive analysis of common law warnings, submissions and consultations indicate that there are two aspects of the common law which are causing significant concern and warrant attention in the present Inquiry. The first relates to the *Longman* and *Crofts* warnings which are commonly given where there has been a delay in the reporting of a sexual assault. The *Longman* warning requires the trial judge to warn the jury in relation to: first, the forensic disadvantage to the accused arising from delay; and secondly, the effects of delay on the reliability of the witness’ evidence. While given most frequently in sexual assault cases, the *Longman* warning may be required in any case where there has been a delay in reporting or prosecuting an offence.<sup>139</sup> The *Crofts* warning, which is given only in sexual assault cases, requires the trial judge to warn the jury that delay in complaint can be used to impugn the credibility of the complainant.

<sup>138</sup> See Rec 3–1.

<sup>139</sup> For example, in *Carr v The Queen* (2001) 117 A Crim R 272, the defendant was charged with armed robbery nine years after the alleged commission of the offence. The Tasmanian Court of Criminal Appeal overturned the conviction and ordered a new trial on the basis that the trial judge had not adequately directed the jury as to the potential prejudicial effects of delay. In *R v Johnston* (1998) 45 NSWLR 362, Spigelman CJ said: ‘Cases involving alleged sexual assault are only one example of criminal proceedings in which the conduct of a defence can be adversely affected by delay’ and said that the *Longman* warning is required ‘whenever it appears to a trial judge that delay, whether occasioned by delay in reporting a crime or otherwise, may have affected the fairness of a trial’: *Ibid*, 370, 375.

18.71 The second related area of concern is that the common law has effectively established rules of practice requiring warnings to be given in relation to particular categories of evidence.<sup>140</sup> As a result, there has been a significant increase in the extent of appellate intervention into this area.

### Delay in complaint

18.72 It was noted earlier in this chapter that sexual assault complainants are among the classes of witness considered by the common law to be inherently unreliable. Sexual assault allegations were said to be ‘very easy to fabricate, but extremely difficult to refute’.<sup>141</sup> The court was therefore required to warn the jury of the dangers involved in acting upon the testimony of sexual assault complainants where it was uncorroborated. Based on the medieval doctrine of ‘hue and cry’, the common law also assumed that a genuine sexual assault victim would make a complaint at first opportunity, and the failure to do so was considered relevant to the complainant’s credibility.<sup>142</sup>

18.73 Research conducted in recent decades has discredited these assumptions. In particular, the assumption that a ‘real rape victim’ will make a complaint at the earliest possible opportunity has been shown to be false.<sup>143</sup> In response to such research, legislative provisions were enacted to remove the common law requirement that judges warn juries that it would be unwise or dangerous to convict an accused of a sexual offence on the basis of the uncorroborated evidence of the complainant.<sup>144</sup> Legislation was also enacted in a number of jurisdictions to require the judge to warn the jury that delay in complaint does not necessarily indicate that the allegation is false and that a person may have a good reason for delaying in making a complaint.<sup>145</sup>

18.74 However, these legislative reforms have been significantly undermined by the development of the *Longman* and *Crofts* warnings, which have arguably reinstated a

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140 These categories are referred to earlier in this chapter.

141 See, eg, *R v Henry* (1968) 53 Cr App R 150, 153.

142 In medieval times, the failure of a woman who alleged rape to raise an immediate ‘hue and cry’ was taken as evidence of consent. In *Kilby v The Queen* (1973) 129 CLR 460, the High Court rejected the argument that an inference of consent can be drawn from the complainant’s failure to make an immediate complaint, but held that evidence of complaint is relevant to the complainant’s credibility.

143 For details of this research see Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.43].

144 Some jurisdictions have abolished corroboration warning requirements in respect of all witnesses: uniform Evidence Acts s 164; *Criminal Code 1899* (Qld) s 632; *Evidence Act 1906* (WA) s 50. Other jurisdictions abolish compulsory corroboration warnings specifically in relation to sexual assault complainants: *Evidence Act 1929* (SA) s 341(5); *Crimes Act 1958* (Vic) s 61; *Sexual Offences (Evidence and Procedure) Act 1993* (NT) s 4(5)(a). Further, legislation has been enacted in Victoria to prohibit the trial judge from warning the jury that the law regards sexual assault complainants as an unreliable class of witness: *Crimes Act 1958* (Vic) s 61(1)(a).

145 *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Code 1924* (Tas) s 371A; *Criminal Procedure Act 1986* (NSW) s 294; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD.

mandatory warnings regime in respect of sexual assault complainants who delay in reporting. The common law warnings in this area raise two broad concerns: first, they risk reinstating the traditional beliefs and prejudices about sexual assault complainants; and secondly, they have created significant difficulties in practice for trial judges and appellate courts.

18.75 In light of these developments, the impact of the laws of evidence on the prosecution of sexual offences, particularly the judicial warnings routinely given in these cases, has been the subject of significant criticism in recent years. Notably, in 2002 the New South Wales Legislative Council Standing Committee on Law and Justice published its *Report on Child Sexual Assault Prosecutions*,<sup>146</sup> in 2004 the Victorian Law Reform Commission (VLRC) completed its Final Report *Sexual Offences: Law and Procedure*,<sup>147</sup> and in 2005 the Tasmania Law Reform Institute (TLRI) released an Issues Paper *Warnings In Sexual Offence Cases Relating To Delays In Complaint*.<sup>148</sup> Further, in December 2004 the New South Wales Attorney General established a Criminal Justice Sexual Offences Taskforce to examine proposed reforms for the prosecution of sexual offences.<sup>149</sup> The proposals emanating from some of these inquiries is discussed below.

### **Longman warning**

18.76 In *Longman v The Queen*, the complainant alleged that her step-father had sexually abused her between the ages of six and ten.<sup>150</sup> The first complaint was made approximately twenty years after the date of the last alleged assault. There was no independent evidence corroborative of the complainant's allegations. At trial, defence counsel requested that the trial judge give the jury a warning about acting on the uncorroborated evidence of the complainant. The trial judge refused to give the warning on the basis that he was prevented from doing so by virtue of s 36BE of the *Evidence Act 1906* (WA). This section abolished the corroboration warning requirements in relation to sexual assault complainants, and prohibited judges from giving such warnings unless justified in the particular circumstances of the case.

18.77 The High Court held that the trial judge has an obligation to give a warning whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case, and that this obligation was unaffected by the relevant legislative provision.<sup>151</sup> It held that the purpose of the provision was to prohibit the giving of indiscriminate warnings as to the unreliability of sexual assault complainants as a class of witness, but that it did not prevent the trial judge from giving a warning or

146 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002).

147 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

148 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005).

149 At the time of writing it was expected that the Taskforce would complete its report in December 2005.

150 *Longman v The Queen* (1989) 168 CLR 79.

151 *Ibid.*, 87.

making a comment in relation to the particular circumstances of the case which might render the complainant's evidence unreliable. The majority noted:

[Section 36BE(1)(a)]<sup>152</sup> does not affect the requirement to warn about other perceptible risks of miscarriage of justice. A warning may be required because of the circumstances of the case other than, albeit in conjunction with, the sexual character of the issues which the alleged victim's evidence is tendered to prove ... By force of [s 36BE(1)(a)] alleged victims of sexual offences no longer form a class of suspect witnesses, but neither do they form a class of especially trustworthy witnesses. Their evidence is subject to comment in the same way as the evidence of alleged victims in other criminal cases.<sup>153</sup>

18.78 The majority held that there were several circumstances in the case which warranted a comment (as distinct from a warning) by the trial judge, including: the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the alleged events, the fact that the complainant had been asleep prior to the alleged assaults, and the absence of complaint. However, the Court considered that:

There is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning ... That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial.<sup>154</sup>

18.79 The High Court therefore held that the jury should have been warned that, as the evidence of the complainant could not be tested adequately after the passage of time, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy.<sup>155</sup>

18.80 An additional ground for giving a warning was identified in the judgments of Deane and McHugh JJ. Deane J considered that a warning was required because the circumstances of the case indicated that there was a possibility that the complainant had imagined the alleged assaults—'the possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between periods of sleep, cannot be ignored'<sup>156</sup>—and that questioning the complainant at the time of the alleged assaults may have assisted to distinguish fantasy from reality.

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152 This section has been repealed and replaced by s 50 of the *Evidence Act 1906* (WA).

153 *Longman v The Queen* (1989) 168 CLR 79, 87.

154 *Ibid.*, 90–91.

155 *Ibid.*, 91.

156 *Ibid.*, 101.

Further, it was considered that the long passage of time may have operated to harden the fantasy into the absolute conviction of reality.<sup>157</sup> Similarly, McHugh J held that:

The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to ‘remember’ is well documented. The longer the period between an ‘event’ and its recall, the greater the margin for error ... Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine.<sup>158</sup>

18.81 The requirements of *Longman* have since been reaffirmed and extended by a number of recent High Court cases. In *Crampton v The Queen*, the complainant’s evidence was uncorroborated and there was a nineteen year delay in complaint.<sup>159</sup> The trial judge had directed the jury that it should assess the evidence of the complainant with care, particularly in light of the delay and the fact that the delay was potentially disadvantageous to the accused. Defence counsel had not referred to any evidence which the accused was unable to lead because of the delay and made no objection to the direction given at trial. The majority of the High Court held that the *Longman* warning given by the trial judge was inadequate as it was insufficiently emphatic.<sup>160</sup> As in *Longman*, the Court held that the trial judge should have instructed the jury that, by reason of the delay, it would be dangerous to convict on the complainant’s evidence *alone* without close scrutiny of the evidence.<sup>161</sup> Significantly, the majority also held that the trial judge ought explicitly to have mentioned the considerations raised by McHugh and Deane JJ in *Longman* regarding the fallibility of memory and the risk of fantasy.<sup>162</sup>

18.82 In *Doggett v The Queen*,<sup>163</sup> the complainant alleged that she had been sexually abused over a period of seven years (between 1979 and 1986), and made a statement to the police to that effect in 1998. There was substantial corroborating evidence, including a taped telephone conversation in which the accused made admissions of a general nature, and evidence from the complainant’s mother and brother supporting her allegations (including the fact that she had complained to her mother of the assaults in 1990). At trial, defence counsel did not request a *Longman* warning, presumably on the grounds that the warning would have been put in corroboration terms (as in *Longman* and *Crampton*) and hence would have drawn the jury’s attention to the corroborating evidence.<sup>164</sup>

18.83 The majority held that the need for a *Longman* warning where there has been a substantial delay in complaint is not obviated by the existence of corroborating

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157 Ibid, 101.

158 Ibid, 107–108.

159 *Crampton v The Queen* (2000) 206 CLR 161.

160 Ibid, [45].

161 Ibid, [45].

162 Ibid, [45].

163 *Doggett v The Queen* (2001) 208 CLR 343.

164 Ibid, [9].

evidence.<sup>165</sup> Kirby J agreed with this proposition, and further stated that warnings should be given in cases of long delay wherever the dangers described by Deane and McHugh JJ in *Longman* (that ‘the memory of even an honest witness might become contaminated’) exist.<sup>166</sup>

18.84 Gleeson CJ and McHugh J dissented on the grounds that defence counsel had not sought to make an issue of forensic disadvantage arising from delay at trial and had not sought a warning.<sup>167</sup> Further, their Honours did not consider that the circumstances of the case warranted a warning. Gleeson CJ pointed out that ‘a warning that it would be unsafe to convict on the uncorroborated evidence of the complainant would have had no practical relationship to the task confronting the jury’ as the evidence was corroborated.<sup>168</sup> McHugh J pointed out that the circumstances of the case were significantly different to those of *Longman*.

As a general proposition, it cannot be dangerous to convict on the evidence of a person whose evidence is corroborated. Nor did the jury need to be warned that it was dangerous to convict on her evidence because of delay or the circumstances of the alleged offences. That would be tantamount to introducing a new class of suspect witness into the law. Moreover, the delay in this case was not nearly as long as in *Longman* and the circumstances were very different ... there was no chance that the complainant’s evidence was honest but erroneous because of the time that had passed ... It would be a mistake to think that, in every case where there has been a delay—even a long delay—a trial judge is bound as a matter of law to direct the jury that the accused had lost the opportunity of investigating the circumstances surrounding the offences ... Jurors don’t need judges to tell them that the accused is not in as good a position to defend the charge as he or she would have been if the complaint had been made promptly.<sup>169</sup>

18.85 In *R v BWT*, counsel for the accused sought a *Longman* warning in relation to unspecified forensic disadvantage arising from delay. The trial judge commented to the jury that the delay in complaint ‘may have resulted in some difficulties for the accused’ and that this was a matter of ‘commonsense’.<sup>170</sup> On appeal it was argued that the direction given was inadequate as it was cast as a caution rather than a warning and was insufficiently emphatic as to the dangers of convicting as a result of the delay.

18.86 The New South Wales Court of Criminal Appeal held that, although it considered the direction given by the trial judge adequate in the circumstances of the case (particularly in light of the fact that the accused had not identified any forensic disadvantage suffered or made any significant argument in relation thereto), it was

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165 Ibid, [46].

166 Ibid, [124].

167 Ibid, [8]–[9], [58].

168 Ibid, [14].

169 Ibid, [81]–[83].

170 *R v BWT* (2002) 54 NSWLR 241.

bound by High Court authorities to hold that the trial judge had misdirected the jury on two grounds: first, the direction was cast in terms of a comment rather than a warning; and secondly, the direction did not convey that the accused *had in fact* suffered forensic disadvantage due to the delay. Wood CJ at CL commented that the combined effect of *Longman*, *Crampton*, and *Doggett* has been ‘to give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant’s evidence’ and therefore that a warning to this effect must be given irrespective of whether the accused has in fact been prejudiced in this way.<sup>171</sup> His Honour considered that, while a warning may be necessary, casting it in such unequivocal terms is misleading in cases where the accused is in fact guilty or in cases where the absence of contemporaneity has not deprived the defendant of the opportunity to call rebuttal evidence—for example, in cases where, no matter what inquiries are made, the case is word against word.<sup>172</sup> On this basis, Wood CJ at CL said that it would be preferable to give the warning in terms that the defendant ‘might have been forensically disadvantaged’, rather than ‘has been forensically disadvantaged’.<sup>173</sup>

18.87 As to the required content of the *Longman* warning, Sully J stated in *BWT* that:

The approach of the majority Justices in both *Crampton* and *Doggett* seems to me to entail that a trial Judge who is framing a *Longman* direction must ensure that the final form of the direction to the jury covers in terms the following propositions: *first*, that because of the passage of time the evidence of the complainant cannot be adequately tested; *secondly*, that it would be, therefore, dangerous to convict on that evidence alone; *thirdly*, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy; *fourthly*, that the jury cannot be so satisfied without having first scrutinised the evidence with great care; *fifthly*, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant’s evidence; and *sixthly*, that every stage of the carrying out of that scrutiny of the complainant’s evidence must take serious account of the warning as to the dangers of conviction.<sup>174</sup>

18.88 It is of note that this warning is remarkably close to the full corroboration warning previously required at common law. Although earlier authorities interpreted the requirements of the *Longman* warning less strictly,<sup>175</sup> the above statement by Sully J was endorsed by Kirby J in *Dyers v The Queen* as ‘a correct statement of the present law ... It is, and it is expressed to be, strict’.<sup>176</sup>

18.89 Kirby J observed in *Doggett* that ‘the criterion for the provision of a warning as stated in *Longman* is not mathematically precise’.<sup>177</sup> Indeed, there has been uncertainty as to the kind of delay that will necessitate the warning. As indicated in the following

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171 Ibid, [14].

172 Ibid, [19]–[20].

173 Ibid, [31].

174 Ibid, [95].

175 See, eg, *R v Johnston* (1998) 45 NSWLR 362.

176 *Dyers v The Queen* (2002) 210 CLR 285, [55].

177 *Doggett v The Queen* (2001) 208 CLR 343, [127].



statement by Sully J in *R v BWT*, this uncertainty means that some judges feel compelled to give warnings where they are not considered necessary in order to ‘appeal-proof’ decisions.

While that state of affairs continues, it seems to me that the only prudent approach of a trial Judge is one that regards any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction. That consideration should concentrate upon two related factors, namely, the actual lapse of time involved in the particular case; and the actual risk of relevant forensic disadvantage in the particular case. It seems to me that, as matters stand, a trial Judge would be well advised to give a *Longman* direction unless it is possible to conclude reasonably: first, that the particular time lapse is so small that any reasonable mind would regard it as, in context, trifling; and secondly, that the risk of relevant forensic disadvantage would be seen by any reasonable mind as ... ‘far-fetched or fanciful’.<sup>178</sup>

18.90 This uncertainty has been compounded by the conflation of the two limbs of the *Longman* warning. In *Robinson v The Queen*, the High Court held that a three year delay gave rise to a requirement for a warning:

[T]here were particular features of the case which demanded a suitable warning. Without seeking to describe these features exhaustively, they included the age of the complainant at the time of the alleged offences, the long period that elapsed before complaint, which in turn meant that it was impossible for a medical examination to verify or falsify the complaint, and the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred ... An important aspect of the inconsistency and uncertainty about the matter of penetration was that the complainant said he was asleep when the first act of penetration occurred, and that he woke up while it was going on. Finally, some features of the history of complaint may have indicated a degree of suggestibility on the part of the complainant.

Taken together with the absence of corroboration, these matters created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt.<sup>179</sup>

18.91 The above passage suggests that a shorter period of delay will attract the requirement for a *Longman* warning where there are other factors perceived as affecting the reliability of the witness’ evidence. In considering the two limbs of *Longman* as factors which may in combination create the need for a warning, the High Court appears to have exacerbated the uncertainty as to the kind of delay that will necessitate a warning. It also appears to have moved a considerable way from the rationale underpinning the majority judgment in *Longman*, whose legitimate concern was that after a period of considerable delay (in that case, a delay exceeding twenty years), an accused may face significant obstacles in mounting a defence. In light of

<sup>178</sup> *R v BWT* (2002) 54 NSWLR 241, [95].

<sup>179</sup> *Robinson v The Queen* (1999) 197 CLR 162, [25]–[26]. See also *R v Omarjee* (1995) 79 A Crim R 355; *R v Miletic* [1997] 1 VR 593.

research which demonstrates that there is no logical nexus between delay in complaint and the credibility of the complainant,<sup>180</sup> forensic disadvantage potentially arising from delay is an issue which must be considered independently of the credibility of the complainant. Further, as noted by the Tasmania Law Reform Institute (TLRI), the matters identified by Deane and McHugh JJ as warranting a warning reflect discredited assumptions as to the reliability of memory, particularly that of children.<sup>181</sup> Hence, unless there is positive evidence demonstrating otherwise, it is generally misleading and unfair to a complainant to give warnings on the latter basis.<sup>182</sup>

18.92 There is also uncertainty regarding the necessary strength and delivery of the warning.<sup>183</sup> Some authorities have emphasised that no particular words are required as long as the essential purpose of the warning is performed.<sup>184</sup> However, other authorities have held that it will be essential to use the words ‘dangerous to convict’ in most cases of delay.<sup>185</sup> In *R v SJB* it was held that the failure to use the words ‘dangerous to convict’ can give rise to a miscarriage of justice, even if the trial judge has met the requirements of the *Longman* warning in every other respect.<sup>186</sup> Similarly, in *R v GJH*, the appeal was upheld on the grounds that, although the warning was comprehensive, it was not firm enough and the words ‘dangerous to convict’ were necessary in the circumstances of the case.<sup>187</sup> In *R v Roddom*, the appeal was upheld on the ground that the trial judge had undermined the effect of the warning by also referring to the complainant’s reasons for delay.<sup>188</sup>

18.93 The giving of the warning in the terms ‘dangerous to convict’ has been criticised on the basis that it encroaches improperly on the fact-finding task and risks being perceived by the jury as a ‘not too subtle encouragement by the trial judge to acquit’.<sup>189</sup> The view is supported in submissions and consultations.<sup>190</sup> The view is also expressed that the words ‘dangerous to convict’ are unnecessary in this context, and that the

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180 This research is discussed briefly earlier in this chapter.

181 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.22]. This is discussed in more detail below.

182 This is discussed in further detail below.

183 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.3].

184 See, eg, *R v Kesisyan* [2003] NSWCCA 259; *R v Glennon (No 2)* (2001) 7 VR 631.

185 *R v SJF* [2002] NSWCCA 294, [30]. In this case it was held that the words ‘dangerous to convict’ were not necessary as there was no delay between the last alleged assault and the complaint.

186 *R v SJB* (2002) 129 A Crim R 54, [53].

187 *R v GJH* (2000) 122 A Crim R 361.

188 *R v Roddom* [2001] NSWCCA 168.

189 *R v BWT* (2002) 54 NSWLR 241, [34].

190 Confidential, *Consultation*, Brisbane, 10 August 2005; H Astor, *Consultation*, Sydney, 2 August 2005; Confidential, *Consultation*, Sydney, 27 July 2005; Office of the Director of Public Prosecutions (NT) and Witness Counselling Service, *Consultation*, Darwin, 15 August 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005. Some judicial officers express the view that they are compelled to use the words ‘dangerous or unsafe to convict’: Confidential, *Consultation*, Brisbane, 10 August 2005.

warning need only refer the jury to the factors which might reasonably be regarded as creating forensic disadvantage.<sup>191</sup>

18.94 The uncertainty as to its application, combined with the prescriptions of the High Court in *Longman*, *Crompton* and *Doggett*, means that trial judges are left with little discretion as to whether to give a *Longman* warning.<sup>192</sup> In *R v LTP*, Dunford J expressed the view that

it is preferable to give the directions, even if the judge considers one or more of them unnecessary in the particular case, rather than have convictions upset on appeal because of the failure to give them.<sup>193</sup>

18.95 In seeking to appeal-proof decisions, trial judges are often motivated by concern about the consequences for the complainant of the conviction being overturned on appeal, such as having to undergo a retrial.<sup>194</sup> However, the unintended effect of this ‘if in doubt warn’ policy may be to give the appearance of judicial imprimatur to the recasting of sexual assault complainants as a suspect class of witness.<sup>195</sup>

18.96 Further, the effective removal of the discretion of the trial judge, who is arguably in a far better position than an appellate court to determine whether a warning is necessary in the particular circumstances of the case, operates to undermine his or her capacity to give practical advice to guide jurors.

So much depends upon what counsel said in their addresses; upon incidents in the course of the trial, the significance of which at the time, and their apparent impression upon the jury, the transcript cannot reveal. So much, too, depends upon the judge's view of what guidance the particular jury should have in the particular case; upon how far he may think it unnecessary to go over matters on which counsel addressed; or, on the other hand, on how far he may think he should bring into sharper focus matters which counsel blurred. And much depends on how far he may think it desirable, after advocacy is spent, to redress the balance.<sup>196</sup>

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191 A Cossins, *Consultation*, Sydney, 3 August 2005; J Gans, *Consultation*, Melbourne, 17 August 2005; NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005. However, the view is also expressed that the words ‘dangerous to convict’ are not problematic and are necessary in some cases: G Brady, *Consultation*, Sydney, 26 August 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

192 This view is supported in consultations: J Gans, *Consultation*, Melbourne, 17 August 2005; Confidential, *Consultation*, Brisbane, 10 August 2005.

193 *R v LTP* [2004] NSWCCA 109, [47].

194 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.11]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.121].

195 See discussion in Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.12].

196 *Jones v Dunkel* (1959) 101 CLR 298, 314. Note that this was not a case dealing with warnings in relation to delay in complaint.

18.97 The giving of warnings in circumstances where they are of little relevance is in fact likely to be counter-productive, potentially confusing the jury and detracting from the trial judge's ability to emphasise the issues relevant to the particular case. It is therefore difficult for trial judges, particularly in sexual assault cases where a multitude of warnings is required,<sup>197</sup> to give directions which are clear, intelligible, relevant and brief, and which are also insulated from appeal.<sup>198</sup>

18.98 It was noted earlier that the High Court has held that a *Longman* warning may be required, irrespective of whether counsel has requested that a warning be given.<sup>199</sup> In *R v MM*, Levine J expressed concern about the development of a 'forensic culture' in which counsel remain silent on the issue of warnings during the trial on the assumption that a deficiency in any directions will be considered to go to the 'heart of the matter' and amount to a miscarriage of justice.<sup>200</sup> This is problematic in that it dilutes the responsibility of trial counsel to raise potential errors at the time of summing up, which also potentially allows defence counsel to reserve deliberately non-direction or misdirection as an avenue of appeal in the event of a conviction.<sup>201</sup>

18.99 Another practical difficulty arises where counsel strategically chooses not to seek a warning or in fact requests that one not be given. Sully J pointed out in *BWT* that the trial judge has two choices in these circumstances, neither of them satisfactory: the first is to accede to the request not to give the *Longman* warning and face the likelihood that any resulting conviction will be overturned on appeal due to the failure to give the warning; the second is to override counsel's request in order to insulate the conviction against appeal, thereby undermining any tactical decision made by counsel and potentially disadvantaging the defendant.<sup>202</sup>

### ***Proposals for reform***

18.100 Broadly, there are two options for reform to address the concerns raised in relation to the *Longman* warning. The first is to legislate to abolish the warning in its entirety. The second is to legislate to clarify, modify or limit its operation.

18.101 The principal arguments in support of abolishing the warning altogether are that: first, the warning in relation to forensic disadvantage arising from delay is unnecessary as any such prejudice will be made plain to the jury by defence counsel during the course of the trial; and secondly, the warning in relation to the fallibility of memory and the risk of fantasy has no basis as it reflects discredited assumptions as to the reliability of sexual assault complainants—children in particular.

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197 In *R v BWT* (2002) 54 NSWLR 241, Wood CJ at CL identified a list of eight directions required to be given in sexual assault cases: [32].

198 Ibid, [35].

199 *R v DBG* (2002) 133 A Crim R 227, [333]–[338].

200 *R v MM* (2004) 145 A Crim R 148, [36].

201 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.1].

202 *R v BWT* (2002) 54 NSWLR 241, [115].

18.102 In favour of legislating to clarify or limit the warning, it can be argued that, although the current operation of *Longman* is problematic, such warnings may be necessary in some circumstances in order to ensure that the accused receives a fair trial.

18.103 In its 2004 Report *Sexual Offences*, the VLRC recommended that the *Longman* warning should be restricted to circumstances where there is evidence to justify the giving of such a warning and proposed the following legislative amendment:<sup>203</sup>

- (c) The judge must not state, or suggest in any way to the jury that it is dangerous or unsafe to convict the accused, unless satisfied that:
  - (i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a delay in reporting; or
  - (ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances of the particular case.
- (d) If the judge is satisfied in accordance with sub-section (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.
- (e) In giving a jury warning pursuant to sub-section (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'.<sup>204</sup>

18.104 It also recommended a legislative provision to prohibit the trial judge from making any comment on the reliability of the evidence given by the complainant unless the circumstances of the case indicate that such comment is necessary to ensure a fair trial.<sup>205</sup>

18.105 In its Issues Paper, *Warnings in Sexual Offence Cases Relating to Delays in Complaint*, the TLRI questioned whether the VLRC proposal would operate to displace the requirement to give the *Longman* warning in its current form. It did so on two bases: first, it does not proscribe the use of the 'dangerous to convict' formula, and it is therefore possible that judges will adhere to this formulation in order to avoid appeal; and secondly, the VLRC proposal permits a *Longman* warning to be given where there is evidence of some specific forensic disadvantage suffered by the accused, and this proposal will not necessarily displace the reasoning in *Longman*, *Crampton* and *Doggett* that an accused necessarily suffers a forensic disadvantage by

203 The New South Wales Legislative Council Standing Committee on Law and Justice made a similar recommendation that trial judges be prohibited from giving a *Longman* warning where there is no evidence or good reason to suppose that the accused was prejudiced by the delay in complaint: New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), Rec 23.

204 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 170.

205 Ibid, Rec 170.

reason solely of the delay.<sup>206</sup> It suggested that reform in this area might need to take a more mandatory or prescriptive form as

the cases to date demonstrate a clear trend on the part of trial judges to ‘retreat to the safety’ of issuing *Longman* warnings whether truly warranted or not in order to insulate their jury directions against appeal.<sup>207</sup>

18.106 The TLRI suggested two alternatives to the VLRC proposal. First, it suggested a legislative amendment which states that: (a) no presumption is to be applied that delay in complaint alone has disadvantaged the accused; and (b) a warning in *Longman* terms is only to be given where the existence of a specific forensic disadvantage is established on the balance of probabilities (and that disadvantage is not established by the mere fact of delay). Alternatively, it suggests a provision which states that a *Longman* warning can only be given where there are ‘exceptional circumstances’ (which cannot be established by delay alone).<sup>208</sup>

### ***Submissions and consultations***

18.107 In DP 69, the Commissions asked whether the recommendations proposed by the VLRC or the TLRI in relation to the *Longman* warning (or any other models) should be adopted under the uniform Evidence Acts.<sup>209</sup>

18.108 Some support is expressed for the view that there is no need for *Longman* warnings to be given, as these are matters that defence counsel can bring to the attention of the jury during the course of the trial and again in the closing address to the jury.<sup>210</sup> On the other hand, some contend that *Longman* deals with fundamental issues of fairness that go beyond arguments between the parties, and that information as to the effects of delay on the ability of an accused to prepare a defence must be conveyed with the imprimatur of the court.<sup>211</sup>

18.109 There is considerable support in submissions and consultations for abolishing the warning in its current form and legislating to clarify the operation of the warning, limiting its application to cases where defence counsel demonstrates that a particular forensic disadvantage has been incurred.<sup>212</sup> It is argued that if the accused is

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206 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.6].

207 Ibid, [3.1.6].

208 Ibid, [3.1.5].

209 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005) Q 16–1.

210 H Astor, *Consultation*, Sydney, 2 August 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005; NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005; Women’s Legal Services (NSW), *Submission E 40*, 24 March 2005.

211 G Brady, *Consultation*, Sydney, 26 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Confidential, *Consultation*, Brisbane, 10 August 2005.

212 Legal Aid Queensland, *Consultation*, Brisbane, 10 August 2005; Confidential, *Consultation*, Sydney, 27 July 2005; H Astor, *Consultation*, Sydney, 2 August 2005; A Cossins, *Consultation*, Sydney, 3 August 2005.

not required to point to some particular disadvantage, as opposed to nebulous disadvantage arising from delay, such warnings will continue to be given as a matter of course.<sup>213</sup>

18.110 Some submissions express a preference for the TLRI proposal.<sup>214</sup> In particular, Victoria Police supports the recommendations made by the TLRI on the basis that they

provide more clarity for judges in giving directions to juries and also provide a platform for fewer grounds for appeal as it has been noted that appeals have been escalating on the basis of inadequate warnings.<sup>215</sup>

18.111 On the other hand, the view is expressed that in practice it will be difficult for an accused to prove that there has been a forensic disadvantage, because the delay will have deprived the accused of the opportunity to investigate any exculpatory evidence at the time of the alleged commission of the offence.<sup>216</sup>

18.112 The New South Wales Attorney General's Department (NSW AGD) agrees that a warning will be necessary in some cases, but that the unequivocal manner in which the *Longman* warning is given has wrongly created an irrebuttable presumption that the accused has in fact been prejudiced. It considers that any legislative amendment should give the trial judge the discretion to give the warning where there is 'inordinate delay [such as 20 years]' and a corresponding lack of detail in the charge of the alleged offence.<sup>217</sup> The NSW AGD also notes that where there is delay in the complaint, the prosecution faces the same forensic difficulties as the defendant. It argues that any warning in relation to delay should also address the difficulties faced by the prosecution in cases where there is credible evidence supporting the evidence of the complainant.<sup>218</sup>

18.113 The NSW DPP also considers that the *Longman* warning is problematic in that it is 'unequivocal', and submits:

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2005; J Gans, *Consultation*, Melbourne, 17 August 2005; NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

213 A Cossins, *Consultation*, Sydney, 3 August 2005.

214 K Mack, *Submission E 82*, 16 September 2005; Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

215 Victoria Police, *Submission E 111*, 30 September 2005.

216 Victoria Legal Aid, *Submission E 113*, 30 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005.

217 For example, where an indictment charge alleges 'that X did have sexual intercourse with a child between 10 and 16 years between 1 February 1986 and 16 August 1986'.

218 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

The more logical approach in relation to the effect of delay is that represented in *R v GPP* [2001] NSWCCA 493 which would permit the warning to be given in terms that the delay “might have created forensic difficulties” for the accused in meeting the complaint. Alternatively it might be confined to the case where there is at least some positive evidence of disadvantage to the accused presented to the jury.<sup>219</sup>

18.114 On the other hand, the NSW PDO submits:

These proposals would restrict judicial comment to a direction that the evidence of the complainant be considered with great care. This direction in isolation is meaningless ... The key direction in the *Longman* direction is that it would be dangerous to convict the accused on the evidence of the complainant alone.<sup>220</sup>

18.115 Victoria Legal Aid considers that the concerns raised by the *Longman* warning are not amenable to legislative solution. It suggests that there should be judicial education programs to assist judges to determine when it is appropriate to give a warning and to tailor the warning to the particular circumstances of the case:

[T]hese outcomes result from judicial difficulties or errors in applying the common law. Judicial error in applying the common law is something that can and should be properly addressed by a Court of Appeal. It is difficult to see how the abolition or limiting of the *Longman* warning will lead to fewer appeals. Given the overriding obligation of the court to ensure a fair trial and to make whatever comments appropriate in the circumstances in the interests of justice, appeals are likely to remain a significant feature of our criminal justice system. VLA firmly believes that this is not only desirable but also entirely appropriate.<sup>221</sup>

### ***The ALRC & VLRC's view***

18.116 Given the myriad concerns regarding the current operation of the common law *Longman* warning outlined above, the ALRC and VLRC are of the view that this area of the law requires amendment. The pressing need for reform is indicated by a number of judicial statements in appellate judgments<sup>222</sup> and is supported in a considerable number of submissions and consultations. The considerations involved in each of the two limbs of the *Longman* warning differ significantly, and hence it is proposed to address these on an individual basis.

### ***Forensic disadvantage***

18.117 In relation to the first limb of *Longman*, the ALRC and VLRC are of the view that where there is forensic disadvantage arising from lengthy delay, a warning may be necessary in the circumstances of a particular case in order to ensure that an accused receives a fair trial. However, the ALRC and VLRC consider that the concerns raised above indicate the need for legislative amendment to limit the circumstances in which the warning is given and to clarify its operation.

219 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

220 New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

221 Victoria Legal Aid, *Submission E 113*, 30 September 2005.

222 See above discussion for the relevant authorities.



18.118 As noted earlier in this chapter and in Chapter 2, one of the policies underpinning the present Inquiry is that the uniform Evidence Acts should be of general application and should generally not contain provisions which apply only to specific offences or specific categories of witness. Therefore, the question arises as to whether it is appropriate to address the concerns raised by the *Longman* warning in the uniform Evidence Acts or in legislation dealing specifically with sexual assault offences.

18.119 The forensic disadvantage which may be occasioned to an accused by delay arises independently of the nature of the proceedings, and accordingly the courts have held that a *Longman* warning may be required in any case where the conduct of the defence has been affected by delay.<sup>223</sup> The nature of sexual assault prosecutions is such that delay is more likely to arise in this context, however it is clearly not confined to such cases. Although some of the authorities discussed earlier in this chapter conflate the issue of delay with the reliability or credibility of sexual assault complainants, the ALRC and VLRC are of the view that this is erroneously done. The enactment of a statutory provision of general application may therefore assist to reinforce the fact that forensic disadvantage, for this purpose, is an issue which should be considered independently of the credibility of the complainant. The ALRC and VLRC therefore consider that it is an issue appropriately dealt with in uniform evidence legislation.

18.120 While it will be necessary in some cases to give a warning in relation to forensic disadvantage arising from delay, the breadth of the application of the *Longman* warning is problematic. There is considerable evidence that *Longman* warnings in relation to the effects of delay are given almost routinely, and in circumstances where the delay is of relatively short duration.<sup>224</sup> As a matter of policy, warnings should only be given in cases where they are considered appropriate and necessary in order to assist the jury to evaluate fairly the evidence before it. Warnings should also be tailored to the circumstances of the individual case. The giving of warnings in a ritualistic fashion with no apparent relevance to the circumstances of the case is likely to operate to the disadvantage of both parties, obscuring issues of greater significance.

18.121 The ALRC and VLRC are of the view that there should not be an irrebuttable presumption of forensic disadvantage arising from delay, and that warnings in relation to forensic disadvantage arising from delay should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.

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223 See, eg, *Carr v The Queen* (2001) 117 A Crim R 272; *R v Johnston* (1998) 45 NSWLR 362.

224 See, eg, *Robinson v The Queen* (1999) 197 CLR 162; *R v Miletic* [1997] 1 VR 593; *R v Omarjee* (1995) 79 A Crim R 355.

18.122 The ALRC and VLRC note that some submissions have argued that the nature of delay means that the accused will necessarily have suffered a forensic disadvantage. However, the general or nebulous disadvantage that an accused might suffer need not in most cases be the subject of a judicial warning, as this is an issue that can be raised by counsel in address. It is not necessary that it be underscored by the trial judge. The prosecution will have also suffered a general disadvantage due to the delay, which impacts on the ability to satisfy the burden of proof. Where the delay is of considerable length, such as the delay which arose in *Longman*, the accused will often face an identifiable significant forensic disadvantage. However, the judge should not give a warning simply because there has been a delay which gives rise to hypothetical disadvantage. A warning should not be given unless the delay has placed the defendant at a significant forensic disadvantage and the particular risks of prejudice must be identifiable.

18.123 In giving such a warning, the trial judge should identify the particular circumstances which have created the forensic disadvantage and explain their significance for the accused's case. In order to avoid unnecessary technicality and to ensure that such warnings are tailored to the circumstances of the individual case, no particular formula or words should be required. Where the substance of the warning requirement has been complied with, there should not be scope for appellate review on technical questions of form. However, this would not prevent an appellate court from finding that a miscarriage of justice had occurred as a result of a warning considered to be substantively inadequate in the circumstances of the particular case.

18.124 Further, the trial judge should not suggest or use words to the effect that it is 'dangerous or unsafe to convict'. These words constitute an unnecessary encroachment on the fact-finding task and are open to the risk of being interpreted as a direction to acquit. The TLRI suggests that it might be necessary to adopt a proscriptive approach to reform in this area, in order to displace the practice of using the 'dangerous to convict' formula. The ALRC and VLRC agree that it is appropriate and necessary to prohibit the use of this phrase.

18.125 In light of the practical problems faced by trial counsel and appellate courts due to the fact that the *Longman* warning is currently required whether or not requested or desired by trial counsel, the Commissions consider that the warning should be subject to a request requirement. Appellate courts will retain the power to overturn a decision on appeal on the basis that the failure to give a warning has resulted in a miscarriage of justice. However, it is intended that when considering such questions, appellate courts will have regard to the requirements of the legislative provision, rather than the common law previously applied. Where forensic disadvantage arising from delay has not been raised as a significant issue at trial, or where defence counsel has deliberately not requested a warning, these are considerations which will weigh against

the upholding of an appeal on this ground, unless it can be established that defence counsel was incompetent.<sup>225</sup>

***Factors affecting the reliability and credibility of the witness' recollection***

18.126 The second limb of the *Longman* warning requires the trial judge to warn the jury about the risk of fantasy and the potential for delay, emotion, prejudice or suggestion to distort recollection.<sup>226</sup> As noted earlier in this chapter, the considerations raised by Deane and McHugh JJ reflect discredited assumptions about the reliability of sexual assault complainants, children in particular, which cannot be sustained in light of recent empirical findings. Research demonstrates that while memory of ordinary events is affected by the passage of time, memory involving emotional or traumatic events differs significantly in relation to retention and accuracy. Specifically, studies have shown that memories of emotionally arousing events are likely to be more accurate and retained for longer than memories of ordinary non-emotional events, although peripheral details (such as precise dates and times) may not be recollected.<sup>227</sup> In light of such research findings, the ALRC and VLRC consider that there is limited scope for such a warning to be given.

18.127 The scope of the second limb of the *Longman* warning has been expanded beyond the considerations identified above, and the warning is given in relation to other factors said to affect the reliability of the complainant's evidence.<sup>228</sup> While the Commissions recognise that it is necessary for the trial judge to retain the power to give warnings in relation to questions of reliability where these may not be apparent to the jury, it is generally inappropriate to give warnings about the particular aspects of a witness' evidence which may render it more or less credible. This is in accordance with the policy endorsed earlier in this chapter, that warnings should only be given where they reflect special judicial experience or where they alert the jury to matters which it would not otherwise readily understand or appreciate.

18.128 If there are factors affecting the reliability of the complainant's evidence which may not be readily apparent to the jury, a warning may be sought pursuant to s 165(1)–(4) of the uniform Evidence Acts.<sup>229</sup> Where the warning relates to the reliability of the evidence of a child, the warning should be given pursuant to the

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225 *R v Birks* (1990) 19 NSWLR 677.

226 *Crampton v The Queen* (2000) 206 CLR 161, [42].

227 For details of this research, see the discussion in Ch 8 regarding psychological research in relation to emotional and traumatic memory. See also discussions earlier in this chapter regarding the evidence of child witnesses and in Ch 9 regarding expert opinion evidence in relation to child behaviour and development.

228 See the discussion earlier in this chapter of *Robinson v The Queen* (1999) 197 CLR 162.

229 In particular, see s 165(1)(c).

provision recommended by the Commissions earlier in this chapter.<sup>230</sup> Appendix 1 contains a draft provision reflecting the intent of Recommendation 18–3.

18.129 In order to ensure that warnings as to the effects of delay and other factors on the reliability of memory are not given unnecessarily or inappropriately, the Commissions recommend that the National Judicial College of Australia, the Judicial College of Victoria, the Judicial Commission of New South Wales and the state and territory law societies and bar associations consider conducting educational programs regarding the nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault. This should include education on the nature of memory of traumatic and emotional events.<sup>231</sup>

**Recommendation 18–3** The ALRC and the VLRC recommend that the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.

The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.

No particular form of words need be used in giving the warning. However, in warning the jury, the judge should not suggest that it is ‘dangerous to convict’ because of any demonstrated forensic disadvantage.

### *The NSWLRC’s view*

18.130 The NSWLRC does not support Recommendation 18–3 and has prepared the following text in support of its view.

18.131 In the view of the NSWLRC, *Longman* should not be codified. *Longman* warnings are dictated by the requirements of a fair trial. These operate at a more fundamental level than the rules of evidence: they do not belong in evidence legislation.<sup>232</sup> Moreover, their attempted reduction to statutory form would threaten the flexibility essential to their proper application and development. Such reduction would also introduce a new point of divergence between those jurisdictions that have enacted the uniform Evidence Acts and those that have not. In addition, the NSWLRC regards the particular restatement of *Longman* in Recommendation 18–3 as inadequate since it fails to give due weight to the risk of forensic disadvantage that must be suffered by an

230 See Rec 18–2.

231 See Rec 3–1.

232 See discussion in Ch 2.

accused in given circumstances by reason of delay occurring between the events alleged to give rise to criminal liability and the complaint giving rise to the instant proceedings.

***Delay and the right to a fair trial***

18.132 In exceptional cases, undue delay in the institution or continuance of criminal proceedings resulting in prejudice to the accused empowers the court to grant a permanent stay of the proceedings where such proceedings amount to an abuse of the court's process.<sup>233</sup> However, as Brennan J pointed out in *Jago v District Court of NSW*:

To admit a power to stay a case permanently for delay causing prejudice seems wrongly to undervalue the efficacy of the orders, rulings and directions of a trial judge in removing unfairness to an accused caused by delay or other misconduct by the prosecution.<sup>234</sup>

18.133 More commonly, therefore, delay calls for the exercise of the court's power to control its own proceedings or to issue directions.<sup>235</sup> It is in the latter class of case that the *Longman* warning arises. In all cases, however, the necessity for a response to the delay arises from the same consideration: if the proceedings were not stayed or if the court did not make a particular order or if it failed to issue a warning, the accused would not receive a fair trial. As Brennan J said: 'By the flexible use of the power to control procedure and by the giving of *forthright* directions to a jury, a judge can eliminate or virtually eliminate unfairness'.<sup>236</sup>

18.134 The reason why a *Longman* warning is essential to a fair trial becomes apparent from a consideration of its purpose. *Longman* requires a trial judge to warn a jury of the perceptible risk of forensic disadvantage that the defendant suffers as a result of the delay in question.<sup>237</sup> This is because an appreciation of how delay can, in the circumstances, prejudice defendants in now presenting their case is, or may be, outside the ordinary experience of the jury.<sup>238</sup> The effect of delay is, however, known to the trial judge, whose experience enables him or her to identify the relevant forensic disadvantages to which the facts give rise.<sup>239</sup> Depending on the circumstances, these may be more or less palpable. On the one hand, they may range from the death of a crucial witness to the loss of particular documents that could help identify the whereabouts of the accused on a particular date. On the other hand, they may focus

233 *Jago v District Court of New South Wales* (1989) 168 CLR 23.

234 *Ibid.*, 49.

235 *Ibid.*, 47, 49. See also *R v Johnston* (1998) 45 NSWLR 362, 375; *R v Kesisyan* [2003] NSWCCA 259, [5].

236 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 49.

237 See *Longman v The Queen* (1989) 168 CLR 79; *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343; *R v BWT* (2002) 54 NSWLR 241; *Dyers v The Queen* (2002) 210 CLR 285, [54]–[57].

238 See *R v Johnston* (1998) 45 NSWLR 362, 375.

239 See *Crampton v The Queen* (2000) 206 CLR 161, [132].

more on the general deterioration in ‘the whole quality of justice’ that has taken place as a result of the delay,<sup>240</sup> such as the lost opportunity of investigating the circumstances surrounding the alleged offences and the difficulty of now adequately testing the complainant’s evidence.<sup>241</sup> While it is true that the risk often cannot be quantified and will be uncertain in its significance, it is nevertheless real and substantial.<sup>242</sup> Indeed, much of the jurisprudence of the High Court and of state Courts of Criminal Appeal has recently been directed to correcting the erroneous perception that such disadvantage is ‘nebulous’.

18.135 Once this is appreciated, the relationship between a *Longman* warning and the requirement of a fair trial becomes clear. The presumption of innocence requires that a person must be able to test the prosecution case against him or her. This is absolutely fundamental to the notion of what constitutes a fair trial. It applies whether the person is guilty or innocent, for that is only determined by the verdict of the tribunal *at the end* of the trial. This is the underlying reason for the NSWLRC’s unequivocal support for the decision in *Longman*. The NSWLRC notes that the criticisms that have been made of *Longman* do not address this fundamental issue, but tend to focus on other arguments. In the first place, it is objected that where delay has clearly led to prejudice in testing the prosecution case, the warning is unnecessary since the prejudice is obvious to the jury. But this overlooks the fact that a jury may well not appreciate that other, unknown circumstances bearing on the issues in the trial might well also adversely affect the testing of the case.

18.136 More commonly, criticisms of *Longman* centre on its supposed undermining of legislative reforms dealing with delay in the making of complaints in sexual assault cases—reforms rightly designed to avoid placing witnesses into stereotypical classes with given results.<sup>243</sup> But *Longman* is not directed to this point. It is not concerned with evidence but with the incidents of a fair trial, a vital question of general importance by no means confined to sexual assault cases. Thus, a *Longman* warning is not directed to issues of credibility. For example, the fact that the complainant’s evidence is corroborated does not remove the necessity for a warning about forensic disadvantage in the overall circumstances of the case.<sup>244</sup> It remains true, of course, that, in an appropriate case,<sup>245</sup> the trial judge must warn the jury that the delay affects the reliability of the witness’ evidence, for example by distorting recollection, perhaps in specific ways such as those mentioned by Deane and McHugh JJ in their separate judgments in *Longman*.<sup>246</sup>

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240 *R v Lawrence* [1982] AC 510.

241 *Longman v The Queen* (1989) 168 CLR 79, 91, 108–109; *Crampton v The Queen* (2000) 206 CLR 161, [45], [130]–[132], [140]; *Doggett v The Queen* (2001) 208 CLR 343, [51]; *R v Percival* [2003] NSWCCA 409, [7].

242 See *Crampton v The Queen* (2000) 206 CLR 161, [132].

243 See [18.72]–[18.75].

244 *Doggett v The Queen* (2001) 208 CLR 343.

245 *Ibid.*, [127].

246 See [18.80].

18.137 Where delay carries this particular risk of forensic disadvantage, it cannot be ignored. Research on child or complainant memory suggesting that, because the experiences are so emotional or traumatic, complainants in sexual assault cases are reliable historians in respect of what is generally alleged<sup>247</sup> cannot, as a matter of logic, justify the conclusion that therefore delay is immaterial or low risk. In any event, so far as it states generalisations about memory retention and accuracy, the research is of limited relevance in the context of *Longman* warnings. This is because of the lack of clarity in the memory, to which complainants themselves often testify, relates particularly to issues of when and where events took place, the very ‘peripheral’ matters that the research suggests complainants will not retain with accuracy. Yet these are often vital to testing the reliability of the complaint and identifying potential witnesses, and, as such, are forensically more significant than what is alleged. To ignore the real forensic disadvantage to which delay gives rise in now testing these issues is only justified by assuming that the complainant is truthful and reliable, the very matter sought to be tested. It is impossible to approach a trial and trial procedures upon such a basis.

18.138 Moreover, it is essential to appreciate that where a trial judge must warn about the risk of contamination of memory as a result of the lapse of time, it is quite wrong to focus simply on the memory of the complainant. The complainant is not the only witness whose memory is likely to be adversely affected by the passage of time. Further, the class of possible relevant, and potentially highly relevant, witnesses is not limited to those who have given evidence, whether for the prosecution or the defence. Persons able to give relevant evidence may well not be identified or, if identified and even called to give evidence (whether for prosecution or defence), may be unable to recall relevant events or, even more problematically, may not have reliable recall of those events. Indeed, the longer the delay the more likely it is that any recall will be unreliable or so vague as to be forensically useless.

### ***Specific proposals in Recommendation 18–3***

18.139 The NSWLRC’s response to the content of Recommendation 18–3 is informed by our understanding of the essential nature of a *Longman* warning. We are, of course, aware of the difficulty of stating the law in this area with precision. Levine J has recently warned:

In this extraordinarily fragile area of the law great attention must be paid to the particular case in hand and statements made by appellate judges in relation to the one ‘*Longman* appeal’ might be indisputably correct in the context of that appeal, but not necessarily constitute authority for the disposition of another appeal.<sup>248</sup>

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<sup>247</sup> See [18.55], [18.72], [18.124].

<sup>248</sup> *R v MM* (2004) 145 A Crim R 148, [33].

18.140 Nevertheless, we are of the view that the following propositions are sound in principle.

18.141 First, whether or not a *Longman* warning must be given depends on the risk of forensic disadvantage in the overall factual context.<sup>249</sup> While the period of delay that will necessitate a warning cannot be specified in advance with any certainty,<sup>250</sup> substantial delay (such as 20 years) must generally give rise to a risk of forensic disadvantage.<sup>251</sup> In contrast, short delay will generally,<sup>252</sup> but not invariably,<sup>253</sup> mean that the warning does not have to be given. The proposal in Recommendation 18–3 that legislation should provide that the mere passage of time does not necessarily establish forensic disadvantage not only underestimates the effect of substantial delay on forensic disadvantage but also unduly restricts the flexibility of a *Longman* warning by seemingly creating a presumption against its application in such cases.

18.142 Secondly, where the facts call for it, a *Longman* warning must be given, even if the accused does not ask for it.<sup>254</sup> Recommendation 18–3 would, however, only allow the warning to be given where it is requested. In the view of the NSWLRC, the fairness of the trial cannot be compromised in this way—for example, by a careless failure to apply for the warning. Nor can it be compromised by suggesting that it is sufficient to leave it to defence counsel to draw to the jury’s attention the forensic disadvantages that the accused suffers in a particular case by reason of relevant delay. How could a trial judge in summing up fail to mention such disadvantages where they are an essential part of the accused’s case?

18.143 Thirdly, provided its substance is conveyed,<sup>255</sup> the content of a *Longman* warning is otherwise determined by the circumstances of the case.<sup>256</sup> This is necessarily so since the nature of forensic disadvantage will vary from case to case. The NSWLRC does not agree with the proposition that *Longman* warnings are, in any sense, ‘ritualistic’.<sup>257</sup>

18.144 Fourthly, given its source in the requirement of a fair trial, a *Longman* warning must be emphatic and bear the imprint of the court’s authority.<sup>258</sup> For this reason, and because (as we have pointed out in the last paragraph) a *Longman* warning takes its content from the facts of the case, the NSWLRC cannot support the proposition in Recommendation 18–3 that a judge should always be prevented from

249 *R v BWT* (2002) 54 NSWLR 241, [95]. Compare *R v MM* (2004) 145 A Crim R 148, [14].

250 *Dyers v The Queen* (2002) 210 CLR 285, [57].

251 See, eg, *Doggett v The Queen* (2001) 208 CLR 343; *R v BWT* (2002) 54 NSWLR 241, [95].

252 See, eg, *R v GAR* [2003] NSWCCA 224, [55]; *R v Collins* [2001] NSWCCA 386.

253 See, eg, *R v Heuston* (2003) 140 A Crim R 422, [43]–[52]; *R v Scott* [2004] NSWCCA 254, [95]–[102].

254 *Doggett v The Queen* (2001) 208 CLR 343. Consider *R v Saengsai-Or* (2004) 61 NSWLR 135. Compare *R v Fowler* (2003) 151 A Crim R 166.

255 See *R v Kesisyian* [2003] NSWCCA 259.

256 *R v Johnston* (1998) 45 NSWLR 362, 375.

257 *R v Jacobs* (2004) 151 A Crim R 452, [297].

258 Consider *Dyers v The Queen* (2002) 210 CLR 285, [55]–[56]; *R v LTP* [2004] NSWCCA 109; *R v BWT* (2002) 54 NSWLR 241. Compare *R v MM* (2004) 145 A Crim R 148.



suggesting that it is ‘dangerous to convict’ because of a demonstrated forensic disadvantage. The warning that it is dangerous to convict is not a direction to acquit. It must be remembered that these words are invariably followed by the qualification that the jury may nevertheless convict if after careful scrutiny of all the evidence, considering the circumstances relevant to its evaluation and bearing in mind the warning, they are nevertheless persuaded beyond reasonable doubt of the accused’s guilt.<sup>259</sup> Indeed, where there has been a *demonstrated* forensic disadvantage it will often be dangerous to convict because it will have been demonstrated that the evidence in the particular relevant respects has not been able to be tested adequately. The demonstration of the forensic disadvantage is, therefore, the trigger that *requires* the warning.

### ***The NSWLRC’s conclusion***

18.145 The NSWLRC recognises that *Longman* warnings have generated several appeals in recent years, particularly in the context of sexual offences that have allegedly been committed many years before trial. No challenge has, however, been made to the necessity, in principle, for a warning about forensic disadvantage in such (or other) cases. Nor, as we have endeavoured to show, could such a challenge be successfully mounted since it would ultimately have to dispute the relevance of forensic disadvantage arising from delay to the incidents of a fair trial. In short, the High Court of Australia was correct in its conclusion about the importance of this issue and in the necessity for an emphatic direction to ensure a fair trial. Certainly, the NSWLRC remains unpersuaded that the High Court was mistaken. The NSWLRC notes that delay is, unsurprisingly, a factor relevant to fair trial guarantees in international human rights instruments.<sup>260</sup>

18.146 To the extent to which *Longman* warnings create particular problems in terms of their formulation and overlap with other warnings that courts must give in sexual assault cases,<sup>261</sup> the NSWLRC is of the view, in accordance with the general approach in this Report, that those problems ought to be addressed in offence-specific reviews or legislation.<sup>262</sup> More generally, the NSWLRC agrees with Victoria Legal Aid that concerns about *Longman* warnings are not generally amenable to legislative solution.<sup>263</sup> In our view, a trial judge must (subject, of course, to appellate review) retain a strong discretion, in the interests of justice, to warn about the perceptive risk of forensic disadvantage that is caused by delay in the circumstances and that may not be within the experience of the jury. The importance of such a warning is underscored, as

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259 *Longman v The Queen* (1989) 168 CLR 79, 91.

260 See R Clayton and H Tomlinson, *The Law of Human Rights* (2000).

261 See *R v BWT* (2002) 54 NSWLR 241, [32].

262 See [2.40]–[2.41], [18.51]. And see *Ibid*, [35].

263 See [18.113].

Kirby J has pointed out, by the reluctance of Australian courts, in comparison with those in overseas jurisdictions, to grant permanent stays of proceedings to protect defendants from the injustices that can arise in attempting to mount a defence to criminal charges years or decades after an alleged offence has occurred.<sup>264</sup>

### ***Crofts warning***

18.147 As noted earlier in this chapter, the common law requirement to give corroboration warnings in respect of certain classes of witness was abolished in most Australian jurisdictions. Even after corroboration requirements were abolished, courts continued to direct juries that delay or absence of complaint could be used as a factor in determining a complainant's credibility (known as a *Kilby* direction).<sup>265</sup> In *Kilby v The Queen*, the High Court observed that evidence of recent complaint is not evidence of the facts alleged, but goes to the credibility of the complainant as it demonstrates consistency of conduct. However, the court also held as a corollary that where there has been a failure to make a complaint at the earliest available opportunity, this fact may be used to impugn the credibility of the complainant.<sup>266</sup>

18.148 Legislation was subsequently passed in a number of Australian jurisdictions to require the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.<sup>267</sup> Although provisions of this kind were designed to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects have arguably been negated by the High Court decision in *Crofts v The Queen*.<sup>268</sup>

18.149 In *Crofts*, the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault.<sup>269</sup> The trial judge directed the jury, as required by s 61(1)(b) of the *Crimes Act 1958* (Vic), that delay in complaint does not necessarily indicate that the allegation of sexual assault is false and that there are good reasons why a complainant might delay making a complaint. Counsel for the accused requested that the trial judge balance the statutory direction with a *Kilby* direction that lack of recent complaint could be used to found an inference that the allegation was false. The trial judge refused on the ground that he was prohibited from doing so by virtue of s 61(1)(a) of the *Crimes Act 1958* (Vic), which provides that the judge must not warn or suggest in any way that the law regards sexual assault complainants as an unreliable class of witness.

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264 *Crampton v The Queen* (2000) 206 CLR 161, [129].

265 *Kilby v The Queen* (1973) 129 CLR 460.

266 *Ibid.*, 472.

267 These provisions were outlined earlier in this chapter. Note that in 1997, Victoria amended this formulation because it was considered that the use of the word 'necessarily' implies that delay may mean that the allegation is false. Section 61(1)(b) of the *Crimes Act 1958* (Vic) now requires that in cases where there is a suggestion of delay, the judge 'must inform the jury that there may be good reasons why victims of sexual assault may delay or hesitate in complaining about it'.

268 *Crofts v The Queen* (1996) 186 CLR 427.

269 *Ibid.*

18.150 The High Court held that s 61(1)(a) does not preclude the court from giving a *Kilby* direction or from commenting that delay in complaint of sexual assault may affect the credibility of the complainant.<sup>270</sup> It considered that the purpose of s 61(1) and like provisions is to 'restore the balance' and rid the law of stereotypical notions as to the unreliability of sexual assault complainants, but not to immunise complainants from critical comment where such is necessary in order to secure a fair trial for the accused.<sup>271</sup>

18.151 The Court held that the trial judge erred in refusing to give the *Kilby* direction, as the giving of the s 61(1) direction without the *Kilby* direction was 'unbalanced' and unnecessarily favoured the complainant.<sup>272</sup> The Court held that a *Kilby* warning must be given where the delay is 'substantial'.<sup>273</sup> Two qualifications were placed on this requirement: first, the warning need not be given where the facts of the case and the conduct of the trial do not suggest the need for a warning to restore the balance of fairness (for example, where there is an explanation for the delay); and secondly, the warning must not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable.<sup>274</sup>

18.152 Authorities support the view that, where there is a legislative provision which requires the trial judge to instruct the jury that there may be reasons for delay in complaint, the trial judge is required 'as a general rule' to direct the jury that it is entitled to take into account delay in assessing the complainant's credibility (whether or not the complainant is the sole witness).<sup>275</sup> Although the failure to give a *Crofts* warning or the failure to give the warning adequately is not necessarily fatal, it may result in the overturning of a conviction on the basis of a potential miscarriage of justice.<sup>276</sup>

18.153 One of the primary criticisms of the *Crofts* warning is that the premise on which it is given reflects discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants. The assumption that the failure to make an early complaint reflects on the credibility of a complainant is based on the historical common law expectation that a true sexual assault victim will make a 'hue and cry' immediately after the assault.<sup>277</sup> However, modern research in this area demonstrates the contrary. Delay or absence of complaint is a common feature of sexual assault,

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270 Ibid, 450–451.

271 Ibid, 451.

272 Ibid, 452.

273 Ibid, 450.

274 Ibid, 451.

275 See, eg, *R v Markuleski* (2001) 52 NSWLR 82, [175].

276 Ibid, [187].

277 *Kilby v The Queen* (1973) 129 CLR 460.

particularly in cases where the complainant was a child at the time the offences occurred and in cases where the offender is known to the complainant.<sup>278</sup>

18.154 Further, statistics indicate that most sexual assaults are committed by a person known to the victim, usually a person who is trusted and in a position of power in relation to the victim. This contributes to the low reporting rates for such offences.<sup>279</sup> Studies also show that sexual assault generally is less likely to be reported to law enforcement agencies than any other type of violence against the person.<sup>280</sup> It has been noted that the failure to report may be perceived as an ‘adaptive and rational response’ in some cases: women in a prior relationship with the offender may fear the repercussions of reporting, such as disapproval of family and friends, reprisals from the offender, fear that the complaint will not be taken seriously, or concern that the chances of a successful prosecution are negligible.<sup>281</sup>

18.155 While there may be individual cases where delay also accompanies a false complaint, research indicates that there is no logical nexus between delay in complaint and fabrication, particularly as it has been shown that delay in complaint is typical.<sup>282</sup> Where there is no firm basis for suggesting that the delay in complaint bears a relation to the credibility of the complainant, the giving of a *Crofts* warning is therefore misleading and unfairly disadvantageous to the complainant.<sup>283</sup>

18.156 Further, the giving of such warnings in cases where there is no positive link between delay and credibility effectively reinstates the traditional stereotypical views that sexual assault complainants are unreliable and prone to fabrication. Rather than ‘balancing’ the provisions which prohibit judges from stating that sexual assault complainants are an inherently unreliable class of witness or which explain that there are legitimate reasons why a sexual assault victim would not make an immediate complaint, the warning essentially negates their protective effects.<sup>284</sup> Further, the

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278 For details of this research, see Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [2.43].

279 Research indicates that people who are sexually assaulted by someone known to them are less likely to report the offence than those who are assaulted by strangers: *Ibid*, [1.12]; D Lievore, *Non-reporting and Hidden Recording of Sexual Assault in Australia* (2002) Australian Institute of Criminology, 5.

280 D Lievore, *Non-reporting and Hidden Recording of Sexual Assault in Australia* (2002) Australian Institute of Criminology, 3.

281 *Ibid*, 7.

282 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002). See also NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005; Women’s Legal Services (NSW), *Submission E 40*, 24 March 2005; A Cossins, *Consultation*, Sydney, 3 August 2005.

283 J Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003).

284 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 15; J Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), [51]; New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), [4.175].

giving of two contradictory warnings renders both warnings redundant and risks confusing the jury.<sup>285</sup>

18.157 The *Crofts* warning has also attracted many of the same criticisms as the *Longman* warning. It is uncertain what length of delay will enliven the requirement to give the warning. Hence, as a practical matter, it has been said that trial judges should give the warning ‘as a general rule’, even in cases where reasons have been advanced for the delay in complaint.<sup>286</sup> In its research for its Final Report, the VLRC found that some judges were giving the *Crofts* warning even in cases where there was no delay in complaint.<sup>287</sup>

18.158 Some of the above concerns are illustrated by the following comment by Howie J in *R v LTP*, where his Honour indicated that although he felt that it was inappropriate to give the *Kilby* direction, the court was constrained by the High Court authorities.

I do not understand how any inference can legitimately be drawn about the veracity of a young child simply from the fact that the child does not complain about sexual misconduct at the first reasonable opportunity especially where that conduct is perpetrated by a close family member. Certainly courts should not be encouraging such a line of reasoning on the basis of some supposed collective experience or understanding of the behaviour of children in such a situation. Further, I believe that there is very good reason to doubt that the *Kilby* direction accords with a more modern, if not more enlightened, understanding of the impact of sexual assaults upon adult victims. In any event, there is in my view absolutely no justification for applying such a highly questionable view of the reasonable conduct of traumatised adult females to young children. However, like the Chief Judge, I must respect the line of authority that holds that such a direction should generally be given regardless of the age of the complainant or his or her relationship with the accused.<sup>288</sup>

### ***Proposals for reform***

18.159 The VLRC recommended the adoption of a legislative provision which prohibits the judge from stating or suggesting in any way to the jury that the credibility of a complainant is affected by a delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning.<sup>289</sup>

18.160 The TLRI questioned whether the VLRC proposal would actually operate to displace the *Crofts* warning, on the basis that the warning in *Crofts* was said by the High Court to be required because of the particular circumstances of that case, rather

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285 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.6].

286 Ibid, [2.1.16].

287 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.88].

288 *R v LTP* [2004] NSWCCA 109, [123].

289 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 170.

than by considerations at large. The facts of *Crofts* itself, on the view of the High Court, would arguably satisfy the VLRC's proposed provision. It argued that given the evidence that delay in or failure to make complaint is normal in sexual assault cases, it should only be in exceptional circumstances that delay or failure to complain can have any legitimate bearing on the truthfulness of the account of the complainant. The TLRI proposed that trial judges in sexual assault cases should be precluded from giving *Crofts* warnings unless there are 'exceptional circumstances', namely: (a) where it can be shown on the balance of probabilities that the delay can be attributed to fabrication; or (b) delay has a genuine and identifiable connection, apart from the mere fact of delay, to the credibility of the complainant.<sup>290</sup>

18.161 The New South Wales Legislative Council Standing Committee on Law and Justice recommended that legislation be amended so as to prohibit entirely the giving of the *Crofts* warning.<sup>291</sup>

### ***Submissions and consultations***

18.162 In DP 69, the Commissions asked whether the recommendations proposed by the VLRC or the TLRI in relation to the *Crofts* warnings (or any other models) should be adopted under the uniform Evidence Acts.<sup>292</sup>

18.163 A significant number of submissions and consultations support legislative amendment to limit the giving of the *Crofts* warning. The NSW DPP considers that the *Crofts* warning should be limited. It submits that without some firm basis for the suggestion that the delay might have affected the complainant's credibility, or some evidence pointing to actual prejudice to the accused, the credibility of the complainant is unfairly undermined.<sup>293</sup>

18.164 The NSW AGD submits that legislation should be amended to provide that the warning cannot be given unless there is sufficient evidence to justify the warning in the particular circumstances of the case. It submits:

[T]here is a real question as to whether the issue of delay in sexual assault is a matter particularly within the knowledge of the judiciary, or whether it should be left for the jury to determine. Do judges have any greater insight than members of the public about these issues? In the past this may have been the case, as sexual assault was not generally discussed in the public arena. However, issues surrounding sexual assault,

290 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.6].

291 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), Rec 22.

292 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 16–1.

293 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

including delayed complaint, are routinely addressed in newspapers, novels, countless television programs and by people in their everyday life.<sup>294</sup>

18.165 Some submissions and consultations favour the TLRI proposals.<sup>295</sup> Dympna House and Rosemount Youth and Family Services submit:

[W]e prefer the recommendations of the Tasmania Law Reform Institute. As studies have shown, there are many good reasons why victims of sexual assault and child sexual assault delay in disclosing the offences perpetrated on them, none of which make it less likely that the person's account of what occurred will be truthful. As delay in complaint is a feature of so many of these cases, a warning to the jury should not be given unless the delay, on the balance of probabilities, suggests fabrication of the account. Also, in many cases the jury could be assisted by having access to expert evidence on common reasons for delay in complaint in sexual assault matters.<sup>296</sup>

18.166 Victoria Police also prefers the TLRI recommendations on the basis that they provide more clarity for judges in giving directions to juries and therefore may reduce the number of appeals on the ground of misdirection.<sup>297</sup>

18.167 Some submissions and consultations express the view that there is no basis for giving the *Crofts* warning, as research shows that delay in complaint has no relevance to the credibility of the complainant. They recommend that the warning be abolished.<sup>298</sup> Women's Legal Service Victoria submits:

[W]e believe that *Crofts* warnings should never be given. Any suggestion that complainants of sexual assault are less credible because they have delayed in reporting the assault is contrary to research about the responses of sexual assault victims and therefore completely inappropriate purely from the perspective of assisting the jury to reach a correct decision. Further, any warning that encourages juries to impugn the credit of sexual assault complainants generally promotes dangerous and destructive attitudes in the community and should not be given.<sup>299</sup>

18.168 In contrast, the New South Wales Law Society opposes amendments constraining the giving of the *Crofts* warning.<sup>300</sup> Victoria Legal Aid also opposes the proposal that the defendant should have to demonstrate that the delay has some bearing

294 NSW Attorney General's Department Criminal Law Review Division, *Submission E 95*, 21 September 2005.

295 Confidential, *Consultation*, Sydney, 27 July 2005; K Mack, *Submission E 82*, 16 September 2005.

296 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

297 Victoria Police, *Submission E 111*, 30 September 2005.

298 A Cossins, *Consultation*, Sydney, 3 August 2005; Women's Legal Services Victoria, *Submission E 110*, 30 September 2005; NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005; Women's Legal Services (NSW), *Submission E 40*, 24 March 2005.

299 Women's Legal Services Victoria, *Submission E 110*, 30 September 2005.

300 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

on the credibility of the witness on the basis that the defence generally has no knowledge as to the reasons for delay by a complainant.<sup>301</sup>

### *The Commissions' view*

18.169 In the Commissions' view, the *Crofts* warning is highly problematic as it reflects assumptions about sexual assault complainants which are outdated and empirically unsustainable. The research discussed earlier in this chapter demonstrates that there is no logical nexus between delay in complaint and the credibility of the complainant, and hence there is no foundation for such a warning to be given.

18.170 While there may be cases in which delay in complaint accompanies fabrication, there is nothing inherent in delay that makes it likely that the complainant is being untruthful. On the contrary, delay in reporting sexual assault is well within the spectrum of expected responses to sexual assault.<sup>302</sup> Rather than balancing the statutory direction explaining that there are reasons why a sexual assault complainant might delay in reporting an assault, the *Crofts* warning undermines the purport of those legislative provisions and unfairly disadvantages the prosecution.

18.171 Further, in an oath against oath trial, as sexual assault cases almost invariably are, the credibility and reliability of the complainant's evidence is likely to be one of the central issues.<sup>303</sup> Given that this is the case, it is questionable whether there is any need for the judge to give a warning or make a comment in relation to the credibility of the complainant. In cases where there is evidence to support the suggestion that the delay in complaint bears some relation to the credibility of the complainant, such matters should be the subject of counsel's address, rather than the subject of a judicial warning.<sup>304</sup>

18.172 The Commissions consider that these criticisms should be dealt with in offence-specific legislation, as the basis upon which the warning is given (and also upon which it is argued that the warning should be abolished) relates specifically to understandings about sexual assault complainants as a particular category of witness. While an analogous situation may well arise in the context of other non-gendered offences, for example a non-sexual assault, the arguments supporting the abolition of *Crofts* would not apply: that is to say, delay in reporting other kinds of offences is not necessarily a typical or practical response. The Commissions have recommended a targeted inquiry into juries, including a comprehensive review of jury directions, and

301 Victoria Legal Aid, *Submission E 113*, 30 September 2005.

302 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.35]–[2.36]; A Cossins, *Consultation*, Sydney, 3 August 2005.

303 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.12]; J Dunford, 'Looking Forward—The Direction of Criminal Law' (2004) Summer 2004/2005 *Bar News* 46, 51; D Lievore, *Victim Credibility in Adult Sexual Assault Cases* (2004) Australian Institute of Criminology.

304 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), [4.175].



consider that this is a matter that would be appropriately addressed in such an inquiry.<sup>305</sup>

18.173 The Commissions are also of the view that the routine giving of the *Crofts* warning cannot be attributed solely to judicial attempts to insulate decisions from appeal. It is also indicative of the fact that many legal practitioners and judicial officers remain largely uninformed of the nature of sexual assault and the reasons for delayed complaint.<sup>306</sup> In support of this proposition, the VLRC found that it is not uncommon for trial judges to make comments expressing unfavourable personal opinions regarding complainants' sexual morality and credibility.<sup>307</sup> Although it is not considered appropriate to amend the uniform Evidence Acts in order to address the concerns raised by the *Crofts* warning, the Commissions consider that it is appropriate to recommend judicial and practitioner education on the nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault.<sup>308</sup>

### Appeals on non-directions and misdirections

18.174 It is noted earlier in this chapter that the common law, building on the doctrine articulated by the High Court in *Bromley* and *Longman*, has developed new rules of practice requiring warnings to be given in relation to a number of categories of evidence. These warnings bear remarkable similarities to the mandatory corroboration warnings, as they are rigidly applied and their content is often technical and complex.

18.175 The failure to give an adequate warning may found a successful appeal if it is shown that the failure has resulted in a miscarriage of justice. The strict pronouncements of the High Court, combined with the uncertainties as to the requirements of the warning in order to avoid a miscarriage of justice, mean that this area has recently proved a fertile ground for successful appeals. Commentators have noted that:

In the past, appeal courts took a dim view of defence appeals based on a trial judge's failure to direct (or direct strongly enough) on a potential weakness in the evidence, championing the need to defer to choices made by trial judges with direct experience of the matter at hand ... However, the recent trend is sharply in the other direction. Indeed, arguably, the most significant single development in the law of criminal evidence in recent years has been an explosion in the number and stringency of

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305 See Rec 18–1.

306 This view is supported in consultations: A Cossins, *Consultation*, Sydney, 3 August 2005.

307 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.140]–[7.143].

308 Consultations indicate support for such a recommendation: H Astor, *Consultation*, Sydney, 2 August 2005; A Cossins, *Consultation*, Sydney, 3 August 2005. See Rec 3–1.

mandatory requirements for judicial warnings about unreliable evidence in jury trials.<sup>309</sup>

18.176 Further, while criminal appeal rules generally provide that a court may dismiss an appeal, notwithstanding that a ground of appeal has been made out, if it considers that no substantial miscarriage of justice has actually occurred,<sup>310</sup> appellate courts have shown an increasing reluctance to exercise this power in relation to warnings.<sup>311</sup> In *Conway v The Queen*, Kirby J explained:

The strictness observed in such matters reflects an acceptance that, in one sense, a single misdirection can amount to a form of miscarriage of justice. The strictness also accepts that a jury is as enigmatic as a sphynx. While it is assumed, for practical reasons, that a jury obeys the judge's directions on the law and its application to the evidence, the precise effect of a particular instruction can never be known. The weight given to particular directions, found to have been legally erroneous, is therefore a matter of appellate speculation.<sup>312</sup>

18.177 The law in relation to what constitutes a miscarriage of justice and when the proviso is applicable appears to be unsettled.<sup>313</sup> However, it is apparent that there has developed an assumption, particularly in New South Wales, that a misdirection or non-direction in relation to *Longman* will result in a substantial miscarriage of justice. This is illustrated in the following comment made by Greg James J in *R v WRC*:

Even though ... conviction on all or most of the counts in both trials would be inevitable or nearly inevitable, the present state of the law requires that unless there is a direction which approaches nearly enough to the Longman requirements so that the jury could be seen to have the requisite understanding, the appeal should be allowed.<sup>314</sup>

18.178 A further concern is that courts have shown an increased willingness to review points of error not raised at trial. Generally, courts are reluctant to allow appellants to argue points which were not raised at trial.<sup>315</sup> In an adversarial system where parties are represented, it is generally assumed that decisions taken by counsel during the course of the trial are tactical decisions to which their clients are bound.<sup>316</sup> It is considered that unfairness does not arise simply because tactics taken at trial have operated to the disadvantage of the accused.<sup>317</sup> However, the High Court decision in *Doggett v The Queen*, that a *Longman* warning was required despite the fact that counsel had not sought one for tactical reasons, indicates that appellate courts will more readily interfere where the appeal relates to a misdirection or non-direction. The

309 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 344.

310 See *Criminal Appeal Act 1912* (NSW) s 6(1).

311 *Conway v The Queen* (2002) 209 CLR 203, [89].

312 *Ibid*, [90].

313 *TKWJ v The Queen* (2002) 212 CLR 124, [70].

314 *R v WRC* (2002) 130 A Crim R 89, [121].

315 *Vakautu v Kelly* (1989) 167 CLR 568.

316 *R v Birks* (1990) 19 NSWLR 677.

317 *TKWJ v The Queen* (2002) 212 CLR 124, [16].

concerns raised by this aspect of the warning are highlighted in the discussion of the *Longman* warning earlier in this chapter.

18.179 In response to the substantive and procedural concerns raised by the *Longman* and *Crofts* warnings, the TLRI considered whether it might be desirable to repeal s 165(5), which expressly preserves the power of the trial judge to give common law warnings.<sup>318</sup> It noted that the repeal of the section would not remove the power of the court to give common law warnings,<sup>319</sup> but considered that such an amendment might encourage trial judges to use the statutory warning provisions instead of the common law warnings. It noted that the primary benefits of the statutory warnings are that: first, s 165(2) provides that a party must request the warning; secondly, s 165(2) is not formulated as a ‘dangerous to convict’ warning; and thirdly, s 165(3) enables the trial judge to decline to give a warning where there are ‘good reasons’ for doing so.<sup>320</sup>

18.180 The TLRI considered that the fair trial imperative, which in some cases requires a warning to be given irrespective of request, could be accommodated by inserting a provision into the uniform Evidence Acts requiring the court to make the parties aware of the right to request a warning.<sup>321</sup>

18.181 Given that the repeal of s 165(5) would not effect any legal change, the Commissions did not consider in DP 69 that such an amendment would be desirable. However, the Commissions considered two alternative solutions: the first is to subject s 165(5) to a request requirement, as applies to warnings under s 165(2); the second is to amend the uniform Evidence Acts to provide that the judge’s common law obligations to give warnings continue to operate unless all the parties agree that a warning should not be given. It was also suggested, in the event that either of the above solutions were adopted, that a legislative provision be included in the uniform Evidence Acts to require the trial judge to raise the issues regarding warnings with the parties and satisfy himself or herself that the parties are aware of their rights in this regard.<sup>322</sup>

18.182 One benefit arising from such amendments is that it would become routine for the trial judge to ask counsel to consider what warnings they will seek and to identify any such warnings prior to charging the jury. If the judge is concerned that counsel has erroneously failed to seek a particular warning, the judge can question counsel to ensure that the question has been considered and place on the record

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318 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.1].

319 See Ch 2 for a discussion of the relationship between the common law and the uniform Evidence Acts.

320 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.1].

321 *Ibid*, [3.1.2].

322 Section 132 of the uniform Evidence Acts provides a possible model for such a provision.

counsel's reason for not seeking the warning. Another benefit of either approach is that they might assist to clarify the role of the trial judge (and hence reduce the volume of appeals) in the situation where counsel has made a tactical decision at trial not to request a warning. Neither approach would exclude appellate intervention where the failure of counsel to request a particular warning has resulted in a miscarriage of justice.<sup>323</sup>

### ***Submissions and consultations***

18.183 In DP 69, the Commissions asked whether the uniform Evidence Acts should be amended to require that, where the parties are represented, warnings (including warnings given under s 165(5)) are only required to be given on request of one of the parties. The Commissions asked, in the alternative, whether the uniform Evidence Acts should be amended to provide that a trial judge's obligation to give warnings at common law continues to operate unless all the parties agree that such a warning should not be given.<sup>324</sup> It was also asked, in relation to the above questions, whether the uniform Evidence Acts should be amended to provide that the court is required to inform the parties of their rights in relation to common law warnings.<sup>325</sup>

18.184 Support is expressed in submissions and consultations for all of the above suggestions. Some submissions favour an amendment providing that warnings should only be given where requested.<sup>326</sup> Other submissions and consultations favour the suggestion that the trial judge's obligation to give warnings at common law should continue to operate unless the parties agree that the warning should not be given.<sup>327</sup> These submissions and consultations generally do not address why one or the other approach is preferred.

18.185 One submission supports the suggestion that the court should be required to inform the parties of their rights in relation to common law warnings.<sup>328</sup> On the other hand, the view is expressed that there is no need for the court to do so.<sup>329</sup>

18.186 One submission expresses the view that subjecting s 165(5) to a request requirement would be unlikely to produce a significant change in practice, as most experienced defence lawyers would request warnings as a matter of course.<sup>330</sup>

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323 *TKWJ v The Queen* (2002) 212 CLR 124.

324 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 16–2.

325 *Ibid*, Q 16–3.

326 Christian Science Committee on Publication Federal Representative for Australia, *Submission E 81*, 15 September 2005; K Mack, *Submission E 82*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

327 Eastern and Central Sexual Assault Service, *Submission E 61*, 24 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005; New South Wales Public Defenders Office, *Submission E 89*, 19 September 2005.

328 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

329 K Mack, *Submission E 82*, 16 September 2005; Victoria Police, *Submission E 111*, 30 September 2005.

18.187 A number of submissions and consultations do not support amending the uniform Evidence Acts so that warnings need only be given on request. The primary concern expressed is that the court retains primary responsibility for ensuring that an accused receives a fair trial, and that there is a danger that inexperienced or incompetent counsel might omit to request a warning.<sup>331</sup>

### *The Commissions' view*

18.188 The number of submissions received in relation to these questions indicates that the common law warnings are widely acknowledged to be causing a significant problem in practice. Although significant support is expressed in submissions and consultations for the suggested amendments, the Commissions are of the view that neither of the suggestions in DP 69 provide a satisfactory solution to the problems identified.

18.189 The primary aim of such amendments would be to encourage counsel to raise the issue of warnings at trial, rather than raising the matter for the first time on appeal. However, they would not prevent appeal courts from overturning convictions in almost every case in which it is considered that there has been a misdirection. An analysis of the authorities indicates that a significant aspect of the problem in this area, aside from the stringency of some of the warning requirements, is the assumption that the failure to give an adequate warning will almost inevitably amount to a substantial miscarriage of justice. The Commissions therefore consider that a more fundamental reform, perhaps codification of judicial warnings, is required in order to reduce the number of appeals on this point. Such reform may also require review of some aspects of the legislation dealing with criminal appeals.<sup>332</sup>

18.190 The Commissions therefore make no recommendation for change in the present Inquiry. However, it is considered that this is an issue which requires further consideration. As discussed earlier in this chapter, the Commissions have recommended a targeted inquiry into juries generally, including a comprehensive review of jury directions. This is a matter appropriately addressed in such an inquiry.<sup>333</sup>

330 Rosemount Youth and Family Services, *Submission E 107*, 15 September 2005.

331 Victoria Legal Aid, *Submission E 113*, 30 September 2005; G Brady, *Consultation*, Sydney, 26 August 2005; Legal Aid Queensland, *Consultation*, Brisbane, 10 August 2005.

332 For example, Justice Dunford has suggested that one solution to deal with the upsurge in conviction appeals relating to technical errors by trial judges is to amend the criminal appeal legislation to provide expressly that a conviction appeal should be dismissed, even if a ground of appeal has been established, if the court is satisfied of the guilt of the appellant beyond reasonable doubt: J Dunford, 'Looking Forward—The Direction of Criminal Law' (2004) Summer 2004/2005 *Bar News* 46, 54.

333 See Rec 3–1.



## 19. Aboriginal and Torres Strait Islander Traditional Laws and Customs

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### Introduction

19.1 This chapter discusses two questions concerning the evidence of Aboriginal or Torres Strait Islander (ATSI) witnesses.<sup>1</sup> The first is whether the uniform Evidence Acts should be amended to include a provision dealing specifically with the admissibility of evidence of ATSI traditional laws and customs.<sup>2</sup> The second is whether there should be a new form of privilege with respect to evidence that, if disclosed, would render an ATSI witness liable to punishment under traditional laws

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1 In this Report, and specifically in this chapter, the term 'Aboriginal and Torres Strait Islander persons' (or, if more appropriate, 'Aboriginal or Torres Strait Islander persons') is used to describe Australian indigenous persons. This term is consistent with advice received by the Commissions from Aboriginal and Torres Strait Islander persons and with the advice on the use of non-discriminatory and accurate language in New South Wales Department of Health, *Communicating Positively: A Guide to Appropriate Aboriginal Terminology* (2004), 9.

2 The definition of 'traditional laws and customs' is discussed below.

and customs. Other aspects of evidence law and practice applicable to ATSI witnesses are discussed elsewhere in this Report.<sup>3</sup>

## Evidence of traditional laws and customs

### The ALRC's 1986 report on traditional law and customs

19.2 In 1986, the ALRC released a report, *The Recognition of Aboriginal Customary Laws* (ALRC 31). The report presented a wide-ranging set of recommendations on the recognition of Aboriginal customary laws in relation to, among other things: marriage, children and family property; criminal law and sentencing; local justice mechanisms for Aboriginal communities; and traditional hunting, fishing and gathering rights.

19.3 In ALRC 31, consideration was given to ways in which the laws of evidence and procedure adversely impact on the proof of Aboriginal 'customary law'.<sup>4</sup> The term 'customary law' was not defined in ALRC 31. Instead it was noted that narrow legislative definitions 'misrepresent the reality':

Exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted ... But it is clear that definitional questions should not be allowed to obscure the basic issues of remedies and recognition. It will usually be sufficient to identify Aboriginal customary laws in general terms, where these are recognised for particular purposes.<sup>5</sup>

19.4 In this Report, the Commissions have adopted the term 'traditional laws and customs'. This term is consistent with the language used in the *Native Title Act 1993* (Cth). Section 223 of the *Native Title Act* refers to 'traditional laws acknowledged, and the traditional customs observed'.<sup>6</sup> The rules constituting traditional laws and customs relate to 'rights and interests' (for instance, in relation to land) and therefore have 'normative content'.<sup>7</sup> However, while native title proceedings are an important area in which this category of evidence is relevant, the Commissions emphasise that it is not intended automatically to incorporate, within the rubric of the uniform Evidence Acts, the judicial interpretation of 'traditional laws and customs' which has developed in the *Native Title Act* context.<sup>8</sup>

19.5 It was observed in ALRC 31 that the rules of evidence give rise to two main difficulties in proving traditional laws and customs: first, the distinction between matters of fact and matters of opinion (the 'opinion rule'); and, secondly, the insistence

<sup>3</sup> In particular, see Ch 5 in relation to the giving of evidence in narrative form.

<sup>4</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), Ch 24, [614]–[642].

<sup>5</sup> *Ibid*, [101].

<sup>6</sup> *Native Title Act 1993* (Cth) s 223.

<sup>7</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38].

<sup>8</sup> Rather, as explained later in this chapter at [19.101]–[19.106], it is intended that 'traditional laws and customs' will be construed more broadly. See also C McDonald, *Consultation*, Darwin, 16 August 2005; Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005.



on first-hand evidence based on personal knowledge of matters of fact (the ‘hearsay rule’).<sup>9</sup>

19.6 After considering the application of these rules of evidence, the ALRC concluded:

It is not satisfactory that the evidence of traditionally oriented Aborigines about their customary laws and traditions should be inadmissible in law unless it can be forced into one of the limited exceptions to the hearsay and opinion evidence rules, or that it should be admitted in practice only by concession of the court or counsel ... Both overseas and Australian experience (in the courts and in land claims) demonstrates the importance of Aboriginal testimony about their customary laws. Such testimony has its difficulties, but so does anthropological evidence. The best evidence seems to be a combination of both, with expert evidence providing a framework within which the Aboriginal evidence can be understood and assessed.<sup>10</sup>

19.7 Despite the problems highlighted in ALRC 31, the ALRC did not favour excluding the operation of the laws of evidence, as this would have the disadvantage of

leaving arguments about admissibility unstructured, and depriving the courts of the assistance which satisfactory rules might give. Only if the existing rules, however modified to assist with proof of Aboriginal customary laws, can be shown to be wholly unsuitable for present purposes, would their wholesale exclusion be appropriate.<sup>11</sup>

19.8 The ALRC concluded that deficiencies and uncertainties in the application of the rules of evidence to traditional laws and customs should be remedied, recommending that legislation be enacted to provide that

evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence:

- has special knowledge or experience of the customary laws of the community in relation to that matter; or
- would be likely to have such knowledge or experience if such laws existed.<sup>12</sup>

19.9 This recommendation is referred to in this chapter as ‘the ALRC 31 recommendation’.

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9 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [615].

10 Ibid, [642].

11 Ibid, [627].

12 Ibid, [642]. The ALRC also recommended that legislation provide that such evidence is admissible, notwithstanding that the question of Aboriginal customary laws is a fact in issue in the case.

19.10 The ALRC stated that such a provision would not make undesirable inroads into the laws of evidence and noted that other discretions to exclude evidence would be retained. Any more extensive provision, excluding the laws of evidence entirely in relation to the proof of Aboriginal customary laws or traditions, was considered unnecessary.<sup>13</sup>

### Interaction of hearsay and opinion rules with the ATSI oral tradition

19.11 The hearsay and opinion rules have significant implications for the reception of evidence from ATSI witnesses. Peter Gray has written:

Perhaps the greatest clash between Aboriginal and Anglo-Australian systems of knowledge is in relation to the form knowledge takes. Oral traditions and history are usually the basis of Aboriginal connection with land and, accordingly, are of major importance to land claims and native title applications. As well as the dreamings, genealogies, general historical stories and land use information will be transmitted orally in most Aboriginal communities. Yet the Anglo-Australian legal system is the 'most prohibitively literate of institutions'.<sup>14</sup>

19.12 Similarly, Justice Nicholson of the Federal Court has written extra-judicially:

No judge could experience [a native title] hearing without being highly conscious that the non-Aboriginal record was highly documented and orderly but that the history of the Aboriginal peoples has an alternative derivation.<sup>15</sup>

19.13 The central problem—namely, the discord between the rationale underpinning the hearsay and opinion rules in the common law system and the ATSI oral tradition of knowledge—is recognised in a number of the submissions and consultations.<sup>16</sup>

19.14 *De Rose v South Australia*<sup>17</sup> (*De Rose*) provides an example of the evidentiary problems associated with oral histories. In *De Rose*, O'Loughlin J considered the admissibility of a witness statement indicating that the witness was told by a deceased Aboriginal person, when speaking of the land subject to a native title claim, that 'this is your grandmother's country'. O'Loughlin J held that it would not be appropriate to admit the witness statement under ss 62 and 63 of the uniform Evidence Acts<sup>18</sup> as evidence of the fact that it was the grandmother's country.<sup>19</sup>

13 Ibid, [642].

14 P Gray, 'Do the Walls Have Ears?: Indigenous Title and Courts in Australia' (2000) 5(1) *Australian Indigenous Law Reporter* 1.

15 R Nicholson, 'The Use of History in Proving Native Title: A Judge's Perspective' (2003) *Early days: Journal of the Royal Western Australian Historical Society* 315, 320–321.

16 See, eg, The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Cape York Land Council, *Consultation*, Cairns, 12 August 2005; C McDonald, *Consultation*, Darwin, 16 August 2005; Justice C Branson, *Consultation*, Sydney, 25 July 2005.

17 *De Rose v South Australia* [2002] FCA 1342.

18 Sections 62 and 63 provide an exception to the hearsay rule for first-hand hearsay in civil proceedings if the maker is not available.

19 *De Rose v South Australia* [2002] FCA 1342, [263].

19.15 O’Loughlin J referred generally to evidentiary problems relating to the receipt into evidence of statements made by ATSI people to a witness. For example, under the ordinary rules of evidence, it would not usually be possible to prove the place of birth of older generations by means only of oral evidence.<sup>20</sup> However, many ATSI people, particularly those living in remote areas, have no such written records of their birth.<sup>21</sup>

### **Contexts in which evidence of traditional laws and customs is adduced**

19.16 There are several contexts in which it is necessary to adduce evidence of ATSI traditional laws and customs. The most common currently is in proceedings under the *Native Title Act*; however, this is not the only area in which this issue arises. Indeed, it is likely that it will become increasingly important in other areas of law, particularly as native title claims will ultimately expire.<sup>22</sup>

19.17 Evidence of ATSI traditional laws and customs is also relevant to areas of law such as criminal law defences, sentencing, coronial matters, succession, family law, and placement of children.<sup>23</sup> Other legal contexts in which the admissibility of evidence of ATSI traditional laws and customs may be important include proceedings arising under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and similar state and territory legislation, such as the *Aboriginal Heritage Act 1988* (SA).<sup>24</sup>

### ***Criminal law defences***

19.18 Evidence of ATSI traditional laws and customs has been used as an element of various defences under criminal law, including consent, duress, provocation and honest claim of right.<sup>25</sup> For example, in *R v Judson*, the defence in a sexual assault case relied on evidence showing that the conduct of the accused was consistent with the relevant traditional laws and customs, in order to prove that the complainant had consented or

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20 Ibid, [264].

21 Ibid, [265]. O’Loughlin J noted that s 73 of the uniform Evidence Acts addresses some, but not all, of these problems by providing that the hearsay rule does not apply to evidence of reputation concerning marriage; cohabitation; a person’s age; or family history or a family relationship. See also *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 (discussed below).

22 This point is stressed by C McDonald, *Consultation*, Darwin, 16 August 2005. He notes that after native title claims have expired, the issues concerning evidence of traditional laws and customs will remain relevant in other areas of law.

23 The following examples are cited and discussed in V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia.

24 As in the Hindmarsh Island Bridge cases: Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005. This dispute involved several inquiries and numerous court cases including the High Court cases: *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

25 V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 61–62.

that the defendants held an honest belief that she had consented.<sup>26</sup> In *Lofty v The Queen*, the Supreme Court of the Northern Territory held that it was proper to inform the jury that the conduct of the complainant constituted a grave breach of ATSI traditional laws and customs when assessing the gravity of provocation.<sup>27</sup>

### **Sentencing**

19.19 Evidence of traditional laws and customs may be taken into account when sentencing offenders.<sup>28</sup> This most often occurs when an ATSI person has been (or will be) subjected to traditional punishment by his or her own community, in addition to any punishment provided by the criminal justice system.<sup>29</sup> Traditional punishments may include traditional spearings, physical beatings, or banishment. Evidence on the nature and likelihood of the traditional punishment (for instance, the degree of harm likely to be caused) may be used as a mitigating factor in sentencing.<sup>30</sup> Evidence about traditional laws and customs can also be used to explain a person's state of mind at the time of the offending behaviour.<sup>31</sup>

19.20 As Kearney J explained in 1996, this is appropriate because in ATSI 'communities', and particularly in remote ATSI settlements,

the continued unity and coherence of the [ATSI] group of which the particular accused is a member is essential, and must be recognised in the administration of criminal justice by a process of sentencing which takes due account of it, and the impact of a member's criminal behaviour on it.<sup>32</sup>

### **Family law and placement of children**

19.21 When determining the best interests of the child, the *Family Law Act 1975* (Cth) requires a court to take into account the background of a child, 'including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders'.<sup>33</sup>

<sup>26</sup> *R v Judson* (Unreported, District Court of Western Australia, 26 April 1996).

<sup>27</sup> *Lofty v The Queen* [1999] NTSC 73.

<sup>28</sup> See, eg, H Douglas, 'Customary Law, Sentencing and the Limits of the State' (2005) 20(1) *Canadian Journal of Law and Society* 141, 144–149. Also, the ALRC is at the time of publication conducting an inquiry into the sentencing of federal offenders which addresses, among other things, sentencing of ATSI offenders; see Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Ch 29.

<sup>29</sup> See V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 16–24.

<sup>30</sup> See, eg, *R v Minor* (1992) 59 A Crim R 227; *R v Wilson Jagamara Walker* (Unreported, Northern Territory Supreme Court, 10 February 1996). For a comprehensive case digest see V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 25–60.

<sup>31</sup> See, eg, *Hales v Jamilmira* (2003) 13 NTLR 14; *Jane Miyatawuy* (1996) 87 A Crim R 574.

<sup>32</sup> *Joshua v Thomson* (1996) 119 FLR 296, 307.

<sup>33</sup> *Family Law Act 1975* (Cth) s 68F(2)(f).

19.22 The Family Law Council has referred to the outcomes of the Family Court of Australia's Children's Cases Program (CCP).<sup>34</sup> On this basis, the Family Law Council suggested it would be desirable to consider whether courts should be given an express power to receive information relevant to the exercise of their family law jurisdiction in parenting cases involving ATSI people.

19.23 The Family Law Council recommended that the Attorney-General of Australia bring 'the issue of admissibility of evidence relating to cultural practices' to the attention of the ALRC in its review of the *Evidence Act 1995* (Cth).<sup>35</sup>

### **Evidence in native title proceedings**

19.24 Much commentary about the interplay between the rules of evidence and the ATSI oral tradition has centred on native title proceedings. In submissions and consultations, it was recognised that native title was a particular area of concern (though not the only area of concern) regarding the admission of evidence by ATSI witnesses.<sup>36</sup>

19.25 When the *Mabo* case was heard by the Supreme Court of Queensland,<sup>37</sup> the Meriam people faced difficulty in presenting evidence of their traditional customs. In the vicinity of 300 objections were made to the evidence given by Eddie Mabo of what his grandfather had told him about the traditional laws and customs of the Meriam people, and the rights and interests he had, on the ground that this evidence was hearsay.<sup>38</sup>

19.26 Subsequently, there has been much case law and commentary concerning the admission and use of such evidence in native title proceedings under the *Native Title Act*. Determinations under the *Native Title Act* require that, in order to establish rights and interests in relation to land or waters, an applicant must prove a continuing connection to the land or waters by reference to the relevant traditional laws and customs.<sup>39</sup> The primary issue in establishing traditional laws and customs is whether the law or custom has, in substance, been handed down from generation to generation:

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34 Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze* (2004), 29. The CCP is discussed in Ch 20.

35 Ibid, Rec 6.

36 See, eg, The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Cape York Land Council, *Consultation*, Cairns, 12 August 2005.

37 The decision of the Supreme Court of Queensland is reported as *Mabo v Queensland* [1992] 1 Qd R 78.

38 G McIntyre, *Background Paper: Aboriginal Customary Law—Can it be Recognised?* (2005) Law Reform Commission of Western Australia, 55.

39 See *Native Title Act 1993* (Cth) s 223.

that is, whether it can be shown to have its root in the tradition of the relevant ATSI group.<sup>40</sup> This has been described as ‘a historical exercise’, as much as a legal one.<sup>41</sup>

19.27 Some of the most important issues in native title proceedings ‘can only be resolved upon evidence which in other circumstances may be regarded as hearsay’.<sup>42</sup> Findings about traditional laws and customs practised more than 150 years ago must necessarily rely on evidence other than that of the direct personal observations of witnesses. Similarly, genealogical connections to ancestors living at or prior to European settlement cannot be proved by reference to official records.<sup>43</sup>

19.28 In *Yarmirr v Northern Territory (No.2)*, Olney J confirmed that ss 73(1)(d) and 74(1) of the uniform Evidence Acts relating to evidence of reputation concerning history and family relationships and of reputation concerning the existence, nature or extent of a public or general right

enable the Court to have regard both to the evidence of witnesses who have recounted details concerning relationships and traditional practices which have been passed down to them by way of oral history and to matters recorded by ethnographers and other observers.<sup>44</sup>

19.29 However, these provisions may not always be sufficient to allow the admission into evidence of oral histories and accounts. Such evidence continues to be challenged as hearsay and may not readily fit within the categories of admissible hearsay in the uniform Evidence Acts. For example, there may be disputes about whether particular evidence is of ‘reputation concerning’ a ‘general right’, in the terms of s 74(1), if it is only a building block in showing the rights of a group of ATSI people in respect of certain land.

19.30 A judicial officer provided another example in a submission to this Inquiry. He suggested that an ATSI witness might say:

When I was a child my late father [X] told me that his father [Y] was an initiated man who came from somewhere in the area of [A] and had two wives, one of whom was [Z], the mother of my father. He told me that his father [Y] roamed around the following places: B, C and D.<sup>45</sup>

19.31 The judicial officer noted that, while some parts of this witness’ statement may be seen to concern matters covered by s 73 (whether a person was married and family history or family relationship), it is questionable whether any part of the statement is

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40 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, [127].

41 H Ketley and C Ozich, ‘“Snapshots of Adventitious Content”: The Assessment of Oral and Historical Evidence in Native Title Claims’ in C Choo and S Holbach (eds), *History and Native Title* (2003) 83, 83.

42 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 544.

43 Ibid, 544. See also Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), Ch 36, on the problems of using genetic testing and genetic information to prove ‘Aboriginality’.

44 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 544.

45 Confidential, *Submission E 51*, 22 April 2005.

evidence of ‘reputation concerning’ those matters. Further, the parts relating to initiation and, perhaps less clearly, where Y came from, lie outside the ambit of the section.<sup>46</sup>

19.32 In *Ward v Western Australia*, Lee J said:

In a proceeding in which native title is in issue any rules of evidence applied to the proceeding must be cognisant of the evidentiary difficulties faced by Aboriginal people in presenting such claims for adjudication and the evidence adduced must be interpreted in the same spirit, consistent with the due exercise of the judicial power vested in the court under the Constitution ...

Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice ...<sup>47</sup>

### ***Section 82 of the Native Title Act***

19.33 Prior to the 1998 amendments to the *Native Title Act*, s 82 of that Act ‘explicitly acknowledged the need for different processes to cater for special needs, such as oral tradition’.<sup>48</sup> The *Native Title Act* at that time provided that the Federal Court of Australia, in conducting native title proceedings, was ‘not bound by technicalities, legal forms or rules of evidence’.

19.34 However, in 1998, s 82 of the *Native Title Act* was amended to state:

#### *Rules of evidence*

- (1) The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.

#### *Concerns of Aboriginal peoples and Torres Strait Islanders*

- (2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.

19.35 Section 82 of the *Native Title Act* operates in conjunction with the Federal Court Rules, which state that the Court may ‘make any order it considers appropriate relating to evidentiary matters’ including an order ‘relating to the presentation of evidence about a cultural or customary subject’.<sup>49</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> *Ward v Western Australia* (1998) 159 ALR 483, 504, referring to the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

<sup>48</sup> Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

<sup>49</sup> *Federal Court Rules* (Cth) O 78 r 31(3)(f).

19.36 However, the *Native Title Act* provides no guidance on the factors which may justify an order setting aside the rules of evidence. In *Daniel v Western Australia*, Nicholson J held that, in adopting this statutory amendment, Parliament ‘evinced an intention that the rules of evidence should apply to native title applications except where the court orders otherwise’ and that it ‘requires some factor for the court to otherwise order’.<sup>50</sup> In *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland*, the Federal Court interpreted s 82(1) of the *Native Title Act* to mean that the rules of evidence would apply ‘unless there are circumstances which persuade the Court that the rules should not, or to a limited extent, apply to all of the evidence sought to be tendered or particular categories of that evidence’.<sup>51</sup>

19.37 The *Native Title Act* does not allow the Court to dispense generally with the rules of evidence in native title proceedings. In *Harrington-Smith v Western Australia (No.8)*, Lindgren J noted that, for s 82 to be invoked, it is ‘not a sufficient reason that the rules of evidence render certain evidence inadmissible: the terms of s 82 reflect an acceptance by the Parliament that this will be so, and that the position, should not, as a matter of course, be relieved from’.<sup>52</sup>

19.38 In *De Rose v South Australia*, O’Loughlin J used s 82 of the *Native Title Act* to allow hearsay evidence to be admitted. In doing so, O’Loughlin J highlighted the practical evidentiary issues facing native title applicants. He stated that, given that much of the evidence in native title cases is dependent on past events and the actions of earlier generations,

there is a compelling justification, in appropriate cases, to allow Aboriginal witnesses to give evidence of their beliefs that are based on what they have been told by members of the older generations who are now dead or are otherwise unable to give direct evidence.<sup>53</sup>

19.39 In particular, it was held that, in relation to the admission of historical and anthropological evidence, s 82 of the *Native Title Act* may be used to ‘ensure that applicants are not required to meet an evidentiary burden that is, in the circumstances that are unique to every native title application, impossible to meet’.<sup>54</sup> A judicial officer has stated that it should be accepted that, by amending s 82,

Parliament did not intend to make it impossible for applicants for a determination of native title to establish the existence of native title. To think otherwise would be to attribute to the Parliament a cynical attempt to have an Act which purported to

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<sup>50</sup> *Daniel v Western Australia* (2000) 178 ALR 542, 552.

<sup>51</sup> *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548, [7].

<sup>52</sup> *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483, 499. Similarly, Sackville J concluded that the 1998 amendments were intended to ensure that the law of evidence should apply in all but exceptional circumstances; if there was a certain looseness of approach in the past, ‘it should have ceased with the enactment of the new s 82’: *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [18]–[20]. See also Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

<sup>53</sup> *De Rose v South Australia* [2002] FCA 1342, [270].

<sup>54</sup> *Ibid.*, [370].



provide a regime under which determination whether native title does or does not exist might be made, yet to frustrate the achievement of that purpose.<sup>55</sup>

19.40 The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (the Yamatji Aboriginal Corporation) observed that the additional factor required to allow the rules of evidence to be dispensed with in native title proceedings ‘remains an enigma with no judicial determination of what this entails’.<sup>56</sup> The Yamatji Aboriginal Corporation submitted that s 82 and its subsequent interpretation are

ambiguous and adverse to the flexible development of the courts’ own rules of evidence. For Aboriginal claimants there is uncertainty as to whether their oral tradition evidence is admissible.<sup>57</sup>

### Evolution of the law

19.41 The law in Australia may be moving towards greater acceptance of oral evidence of ATSI traditional laws and customs. Peter Gray observes that the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia*<sup>58</sup> and that in *Ward v Western Australia*<sup>59</sup>

may have opened a new chapter in the attitude of common law courts to the use of indigenous oral accounts and the operation of the hearsay rule. The recognition of the intrinsic value of oral traditions, and of oral evidence of them, might even mark the beginning of the creation of a special exception to the hearsay rule, relating to evidence of land tenure systems, and entitlements under them, in oral cultures.<sup>60</sup>

19.42 Gray notes that, while the provisions of the *Evidence Act 1995* (Cth) are more liberal than the common law rules, they are ‘potentially restrictive of any attempt to create new exceptions’. He states that the solution may lie in a recognition of oral traditions as a category of real evidence and not hearsay at all.<sup>61</sup>

19.43 A recent decision of the Federal Court is consistent with a move in this direction. In *Gumana v Northern Territory of Australia*, Selway J considered the hearsay restrictions in the uniform Evidence Acts.<sup>62</sup> He noted that the hearsay rule in s 59 of the uniform Evidence Acts is subject to a number of exceptions:

First, where the evidence is of a fact, rather than what is said about the fact, then it is not hearsay. This is reflected in s 74 of the *Evidence Act* which provides that evidence can be given in relation to ‘evidence of reputation concerning the existence, nature or

55 Confidential, *Submission E 51*, 22 April 2005.

56 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

57 Ibid.

58 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

59 *Ward v Western Australia* (1998) 159 ALR 483.

60 P Gray, ‘Do the Walls Have Ears?: Indigenous Title and Courts in Australia’ (2000) 5(1) *Australian Indigenous Law Reporter* 1, 10.

61 Ibid, 11.

62 *Gumana v Northern Territory of Australia* (2005) 141 FCR 457.

extent of a public or general right'. In my view evidence of a 'custom' or tradition including evidence of what is believed about a custom or tradition is evidence of a fact and is not hearsay. It can be treated as evidence of 'reputation' for this purpose. In my view there is no prohibition under the *Evidence Act* of the admissibility of that evidence. Evidence can be given pursuant to s 74 of the *Evidence Act* of the 'reputation' of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period...<sup>63</sup>

19.44 Selway J stated that it did not seem necessary to categorise evidence of ATSI traditional laws and customs as a special exception to the usual rules of evidence, even assuming that it were possible to do so under the *Evidence Act 1995* (Cth). His Honour held that such evidence is 'direct evidence of a fact in issue—the existence of tradition or custom and of rights pursuant to it'.<sup>64</sup>

19.45 Selway J also considered it 'doubtful' whether evidence of 'reputation' can be given by an outside expert who carries out an investigation only for the purpose of giving evidence in a particular case. In such a case, the evidence may not properly be characterised as evidence of 'reputation', but only as evidence of what that person has been told (that is, hearsay).<sup>65</sup>

## Submissions and consultations

### *Responses to IP 28*

19.46 In IP 28, questions were asked concerning the admissibility of evidence of traditional laws and customs, with a focus on native title proceedings and the operation of s 82 of the *Native Title Act*.<sup>66</sup>

19.47 Submissions and consultations confirmed that concerns about evidence of traditional laws and customs are not limited to the context of native title proceedings.<sup>67</sup> Consultations highlighted the many contexts in which evidence of traditional laws and customs is adduced.<sup>68</sup>

19.48 The Yamatji Aboriginal Corporation submitted that, because the written word dominates the Anglo-Australian legal culture, the spoken word is undervalued. Further, current statutory mechanisms used to reconcile differences between the two cultures can operate in a manner that is disadvantageous to native title claimants.<sup>69</sup>

63 Ibid, [157].

64 Ibid, [158].

65 Ibid, [159].

66 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 5–14, 15–6 to 15–8.

67 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005.

68 Department of Justice (NT), *Consultation*, Darwin, 31 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005; S Cox, *Consultation*, Darwin, 31 March 2005; Justice S Southwood, *Consultation*, Darwin, 30 March 2005; M Johnson, *Consultation*, Darwin, 30 March 2005.

69 Yamatji Marlipa Barna Baba Maaaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

19.49 However, it is also clear that practices in some jurisdictions are more flexible than the strict legal position might imply. For example, in the Northern Territory, there appears to be operating an assumption in some cases that evidence of traditional laws and customs, taken from ATSI elders or ‘lawmen’, is not considered hearsay. Rather, it is treated (to the extent that the basis of admissibility is considered) as expert opinion evidence or as ‘real’ evidence.<sup>70</sup>

19.50 There was some support for the implementation of the ALRC 31 recommendation,<sup>71</sup> and there were suggestions that such a recommendation would be well received by the Northern Territory legal community,<sup>72</sup> which is experienced in receiving such evidence.

19.51 The President of the Human Rights and Equal Opportunity Commission (HREOC) referred to the Hindmarsh Island Bridge case, in which arguments about ‘women’s business’ arose.<sup>73</sup> It was observed that, in the context of arguments about the existence and scope of this evidence, the second clause of the ALRC 31 recommendation—that is, the words ‘or would be likely to have such knowledge or experience *if such laws existed*’ (emphasis added)—would apply to allow the evidence to be admitted. Otherwise, the evidence would be inadmissible, except by consent, despite being central to the facts in issue.<sup>74</sup>

19.52 In relation to evidence used as the factual basis of expert opinion evidence, an Aboriginal Land Council observed:

The circumstances in which Aboriginal people divulge information on which an expert’s opinion is often based should be borne in mind: the divulgence of information to known and trusted experts in an informal setting is quite different to the artificiality and pressure of a court situation. The fact that a statement made by an Aboriginal informant to an expert in the former situation is not repeated directly in direct evidence should not automatically disqualify that statement from going before the fact-finder.<sup>75</sup>

19.53 This Aboriginal Land Council submitted that the court’s concern should be the reliability of the information sought to be admitted through an expert’s report, rather than the mere fact that a statement has been made out of court.<sup>76</sup> In relation to the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in native title proceedings, it observed that

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70 Department of Justice (NT), *Consultation*, Darwin, 31 March 2005.

71 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005. The ALRC 31 recommendation is outlined at [19.8].

72 Justice S Southwood, *Consultation*, Darwin, 30 March 2005.

73 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005.

74 Ibid.

75 Confidential, *Submission E 49*, 27 April 2005.

76 Ibid.

Aboriginal societies do not relegate information passed on via oral tradition to a second class form of knowledge (as do the current provisions of the Evidence Act); what is significant is the fact of the transmission, its source and to whom it has been passed.<sup>77</sup>

19.54 The Land Council considered that sufficient protection is provided by the discretionary provisions in ss 135 and 136 of the uniform Evidence Acts to address the concerns of parties regarding the appropriate weight to be given to hearsay evidence dealing with matters of ATSI traditional laws and customs.<sup>78</sup>

19.55 The Yamatji Aboriginal Corporation is critical of the current operation of s 82 of the *Native Title Act* and proposes reform to address admissibility and to ensure proper weight is accorded to evidence of oral tradition. Specifically, the Yamatji Aboriginal Corporation proposed that the *Evidence Act 1995* (Cth) be amended to provide that:

- the *Native Title Act* is subject to the provisions of the *Evidence Act 1995* (Cth);
- the rules of evidence in native title proceedings should be approached in light of the evidentiary difficulties inherent in adjudicating ATSI claims, and courts should interpret that evidence in the same spirit;
- ATSI oral knowledge (tradition) evidence is admissible as real evidence in all native title proceedings;
- in conducting proceedings, the court is not bound by technicalities, legal forms or rules of evidence in relation to evidence given by an ATSI witness relating to oral knowledge or oral tradition; and
- the court must conduct proceedings in a manner that consistently integrates the culture and custom of ATSI groups.<sup>79</sup>

19.56 Similarly, another ATSI body (a Land Council) submitted that the change to s 82 of the *Native Title Act* has removed recognition of the *sui generis* nature of native title claim proceedings and places greater emphasis on an adversarial claims process, to the disadvantage of ATSI native title claimants.<sup>80</sup> This Land Council submitted that the *Native Title Act* should be amended to reinsert the original s 82 or a provision reflecting the provisions in the *Federal Court Rules* (Cth), which permit the court to ‘make any order it considers appropriate relating to evidentiary matters’.<sup>81</sup>

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77 Ibid.

78 Ibid.

79 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

80 Confidential, *Submission E 49*, 27 April 2005.

81 Ibid; *Federal Court Rules* (Cth) O 78 r 31(3)(f).

19.57 By contrast, the State of South Australia submitted that s 82 of the *Native Title Act* is satisfactory in its present form and that no amendment is required.<sup>82</sup> It submits that s 82 enables judges to approach the admission of hearsay evidence based on an evaluation of all the circumstances of the case and that, in cases such as *De Rose*, judges have been prepared to use s 82 ‘to admit evidence that might conventionally be considered hearsay’.<sup>83</sup>

19.58 A judicial officer suggested that the experience of judges in native title proceedings is that, while the hearsay evidence of ATSI witnesses is often objected to, ruled inadmissible or its use is made subject to limitations:

After a time, the parties resisting the making of a determination that native title exists seem to cease objecting, and a vast body of first-, second- and third-hand hearsay comes to be admitted.<sup>84</sup>

19.59 The need to make rulings on such evidence can greatly prolong native title proceedings, and in the judicial officer’s view, the effective conduct of native title proceedings is dependent on the commonsense of the lawyers who practise in this area—‘the simple fact is that a practical course must be, and is found, and in one way or another, the indigenous witnesses manage to tell their story’.<sup>85</sup>

19.60 The judicial officer argued that s 82 of the *Native Title Act* should be amended so as to be consistent with both:

- (a) the possibility of proof of native title in a reasonable and practicable way; and
- (b) protection of the rights of interests opposed to recognition of native title.<sup>86</sup>

### ***Responses to DP 69***

19.61 The Commissions made the following proposal in DP 69:

The uniform Evidence Acts should be amended to provide an exception to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.<sup>87</sup>

19.62 There is widespread support for this proposal. Several organisations support this proposal on the basis that it addresses the problems already identified in relation to the

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82 State of South Australia, *Submission E 19*, 16 February 2005.

83 Ibid.

84 Confidential, *Submission E 51*, 22 April 2005.

85 Ibid.

86 Ibid.

87 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Proposal 17–1.

admission of ATSI evidence.<sup>88</sup> The Northern Land Council favours the proposal, indicating that it would allay their concerns about the operation of s 82 of the *Native Title Act*.<sup>89</sup>

19.63 The Australian Government Attorney-General's Department (AGD) states that there 'may be merit' in the proposal subject to the qualification that 'the exception should not unduly prejudice another party to the proceedings'.<sup>90</sup>

19.64 A judicial officer of the Federal Court agrees with the proposal, subject to the reservation of the discretion under s 135.<sup>91</sup> On the other hand, another Federal Court judge argues that proof of ATSI traditional laws and customs is so distinct that it requires its own form of regulation, separate from the uniform Evidence Acts.<sup>92</sup> Another Federal Court judge states that it is important to retain flexibility in dealing with evidence of ATSI traditional laws and customs.<sup>93</sup>

### The Commissions' view

#### *Recommendation to amend uniform Evidence Acts*

19.65 It was stated in ALRC 31 that a provision dealing with proof of traditional laws and customs would have advantages, apart from the basic one of rendering relevant ATSI evidence admissible, in that it would:

- deal with the problem of 'experiential' evidence given about ATSI traditional laws and customs by persons without formal academic qualifications but with long-standing contact and experience with ATSI communities; and
- avoid any objection to evidence based on the 'ultimate issue' rule, the 'common knowledge' rule, as well as the problem of opinions based in part on hearsay.<sup>94</sup>

19.66 These problems were addressed to some extent by the introduction of the uniform Evidence Acts. The question is whether sufficient reason still exists—in view of the relevant provisions of the uniform Evidence Acts and the case law which has developed since the ALRC 31 recommendation was made—to recommend that the uniform Evidence Acts be amended to provide that evidence of ATSI traditional laws and customs is not inadmissible simply by reason of it being hearsay or opinion evidence.

88 See, eg, The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Cape York Land Council, *Consultation*, Cairns, 12 August 2005; Director of Public Prosecutions (NSW), *Submission E 87*, 16 September 2005; NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005.

89 Northern Land Council, *Consultation*, Darwin, 15 August 2005.

90 Attorney-General's Department, *Submission E 117*, 5 October 2005.

91 Justice R French, *Submission E 119*, 6 October 2005.

92 Judicial Officers of the Federal Court of Australia, *Consultation*, Melbourne, 18 August 2005.

93 *Ibid.*

94 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [642].

19.67 The Commissions believe that without statutory amendment, the laws of evidence will continue to present undesirable barriers to the admission and use of evidence of traditional laws and customs. Submissions and consultations indicate that the admission of such evidence is often contested, and divergent judicial approaches are developing to resolve these disputes.<sup>95</sup>

19.68 Statutory amendment of the hearsay and opinion rules, in respect of evidence of traditional laws and customs, would also clarify the law. As noted above, the present case law discloses some inconsistency in the way in which the hearsay rule is applied to evidence of traditional laws and customs. It is true that, often, improvised solutions are reached when one counsel stops objecting to such evidence on hearsay grounds.<sup>96</sup> However, that approach is neither durable nor adequate. First, it places too much reliance on the attitudes taken by particular individuals (judges and counsel) involved in the case. Secondly, as has been pointed out by Ketley and Ozich, courts may take a liberal approach in admitting evidence, but then accord it little or no weight.<sup>97</sup>

19.69 The Commissions therefore recommend amendments to provide exceptions to the hearsay and opinion evidence rules for evidence relevant to ATSI traditional laws and customs (see Recommendations 19–1 and 19–2 below). These recommendations are reflected in the draft provisions set out in Appendix 1 (new ss 73A and 78A).

19.70 Moreover, as is discussed below, the Commissions recommend including the elements of a definition of ‘traditional laws and customs’ for the purposes of the uniform Evidence Acts (see Recommendation 19–3).

#### ***Exception to the hearsay rule***

19.71 Following ALRC 31, provisions were introduced in the uniform Evidence Acts which obviated some of the hearsay obstructions to admission of evidence of ATSI traditional laws and customs. In particular, the hearsay exceptions in ss 73 and 74 allow some evidence of traditional laws and customs to be admitted, despite the hearsay rule in s 59. Also of assistance is s 60 which lifts the hearsay rule for evidence relevant for a non-hearsay purpose.

95 Compare, for instance, the approach of Selway J in *Gumana v Northern Territory of Australia* (2005) 141 FCR 457, [158], where evidence of ATSI traditional laws and customs which, on one view was objectionable on hearsay or opinion grounds, was held to be admissible as ‘direct evidence of a fact in issue’ with the more restrictive approach taken by Sackville J in *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004, [18]–[20].

96 This point was made by a judicial officer with experience in native title proceedings: Confidential, *Submission E 51*, 22 April 2005.

97 H Ketley and C Ozich, “‘Snapshots of Adventitious Content’: The Assessment of Oral and Historical Evidence in Native Title Claims” in C Choo and S Holbach (eds), *History and Native Title* (2003) 83, 94.

19.72 However, as Chief Justice Black of the Federal Court stated extra-judicially in 2002, despite the more flexible hearsay provisions of the uniform Evidence Acts, there remains

a serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous traditions.<sup>98</sup>

19.73 Moreover, while courts sometimes apply the hearsay rule flexibly with respect to evidence of traditional laws and customs, it has been observed that ‘the ghost of hearsay—the preference of the written over the spoken word—still impacts negatively on the assessment of Aboriginal oral historical evidence’.<sup>99</sup> In the Commissions’ view, these problems should be addressed by amending the uniform Evidence Acts. This is consistent with the conclusions of a background paper prepared for the Law Reform Commission of Western Australia, which suggested the need for a ‘general statutory relaxation of the complex common law requirements for proof of Aboriginal customary law’.<sup>100</sup> It is also consistent with the preponderance of views expressed in consultations and submissions on this issue.

19.74 Amending the uniform Evidence Acts to provide an exception to the hearsay rule for evidence relevant to ATSI traditional laws and customs would make the rules of evidence more responsive to the ATSI oral tradition. Currently, a large proportion of evidence of ATSI traditional laws and customs could be objected to on hearsay grounds. The amendment proposed by the Commissions would shift the focus from whether there is a technical breach of the hearsay rule, to whether the particular evidence is reliable.<sup>101</sup> The amendment would be broad enough, for instance, to cover the kind of evidence referred to at [19.30] above.

19.75 The Commissions recommend that the hearsay rule be amended in accordance with Recommendation 19–1 below.

### ***Exception to the opinion rule***

19.76 As with the problems relating to hearsay, a number of the provisions in the uniform Evidence Acts deal with problems identified in ALRC 31 in relation to evidence of ATSI traditional laws and customs being caught by the opinion rule.

98 M Black, ‘Developments in Practice and Procedure in Native Title Cases’ (2002) 13(1) *Public Law Review* 16, 22.

99 H Ketley and C Ozich, “‘Snapshots of Adventitious Content’: The Assessment of Oral and Historical Evidence in Native Title Claims” in C Choo and S Holbach (eds), *History and Native Title* (2003) 83, 85.

100 G McIntyre, *Background Paper: Aboriginal Customary Law—Can it be Recognised?* (2005) Law Reform Commission of Western Australia, 55. The Law Reform Commission of Western Australia’s inquiry into recognition of Aboriginal customary laws is continuing.

101 This responds to the concern expressed in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [642]. As reflected in the submission of an Aboriginal Land Council, this is also a more appropriate and fair criterion to apply in determining whether such evidence should be admitted: Confidential, *Submission E 49*, 27 April 2005.



Particularly useful in this regard have been s 79, which allows specialised knowledge to be based on a person's training, study *or* experience, and s 80, which abolishes the ultimate issue and common knowledge rules.

19.77 However, the Commissions believe that some relaxation of the opinion rule is necessary to permit a member of an ATSI group to give opinion evidence about the laws and customs of that group, without the ATSI member first having to establish that he or she has 'specialised knowledge based on [his or her] training, study or experience' within the meaning of s 79. The Commissions therefore recommend a statutory amendment that would provide for an exception to the opinion rule for evidence of an opinion expressed by a member of an ATSI group about the existence or non-existence, or the content, of traditional laws and customs of that group.<sup>102</sup>

19.78 In other words, the recommended amendment would differentiate between, on the one hand, members of an ATSI group who are competent to give evidence on the traditional laws and customs of that ATSI group by virtue of their membership of, and involvement with, that ATSI group; and, on the other hand, people who are not members of the ATSI group in question and therefore whose competence to give such evidence must be dependent on their having the requisite 'specialised knowledge based on [their] training, study or experience' (within the meaning of s 79). ATSI witnesses who fall within the new provision would still give evidence subject to the safeguards provided by s 55 (relevance) and the discretionary and mandatory exclusions in ss 135–137.

19.79 Thus, the new provision recommended by the Commissions would not cover a person who is not a member of a particular ATSI group but who nevertheless has specialised knowledge of the traditional laws and customs of the ATSI group. An obvious example of a person fitting that description would be an anthropologist who has studied the ATSI group in question. In this regard, Recommendation 19–1, if adopted, would not modify the status quo in respect of this category of witness. That is, such a witness could still give evidence about the relevant traditional laws and customs provided that he or she satisfied s 79 of the uniform Evidence Acts.<sup>103</sup> In the Commissions' view, it is important to maintain this requirement so as to ensure that witnesses who are not members of a particular ATSI group nevertheless have an

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102 See Rec 19–2 and the draft of s 78A in Appendix 1.

103 Section 79 states: 'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.

appropriate level of expertise on which their opinion about the traditional laws and customs of the group is based.<sup>104</sup>

19.80 There is one obvious concern: Recommendation 19–2, if adopted, may provide a means for circumventing the opinion rule for a witness (X), who is a member of an ATSI group, but (for whatever reason) has had little or no contact with that group and thus could not rationally base his or her opinion on his or her contact with that group. The answer to this concern is that X would still have to satisfy the relevance requirement in s 55. That is, if X's opinion evidence is not based on X's experience, dealings or connection with the ATSI group, it is to difficult to imagine how X's evidence could 'rationally affect ... the assessment of the probability of a fact in issue', namely the existence, non-existence or content of the ATSI group's traditional laws and customs.<sup>105</sup>

19.81 One further matter considered by the Commissions is the fact that this recommendation only relates to members of an ATSI group. It is prudent to consider, therefore, whether the proposed amendment to the uniform Evidence Acts is inconsistent with anti-discrimination legislation. The Commissions believe that the proposed amendment would clearly not be inconsistent with the relevant legislation. In particular, the proposed amendment does not appear to constitute unlawful racial discrimination within the meaning of the *Racial Discrimination Act 1975* (Cth) because the provision does not have

the purpose or effect of *nullifying or impairing* the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>106</sup> (emphasis added)

19.82 The critical words are those emphasised above. That is, it could not reasonably be maintained that the proposed amendment would have the purpose or effect of 'nullifying or impairing' any right or freedom of ATSI people. Instead, as outlined above, to the extent that the proposed amendment impacts on the rights and freedoms of ATSI people, its purpose and effect is to recognise and make provision for the enjoyment of those rights and freedoms. Further, even if there is a perceived inconsistency between the proposed amendment to the uniform Evidence Act and s 9 (or s 10<sup>107</sup>) of the *Racial Discrimination Act*, it is likely that the proposed amendment

104 This is consistent with a view expressed in submissions and consultations that expert witnesses (such as anthropologists) ought to be properly qualified to give expert opinion evidence on traditional laws and customs: Cape York Land Council, *Consultation*, Cairns, 12 August 2005.

105 Naturally, of course, if X could satisfy the test in s 79 that his or her opinion is based on specialised knowledge, then this would provide an alternative means of adducing the evidence.

106 These words are used to define unlawful racial discrimination: *Racial Discrimination Act 1975* (Cth) ss 9(1) and 9(1A)(c).

107 Ibid s 10(1) provides: 'If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin'.

would constitute a ‘special measure’ within s 8(1) of the *Racial Discrimination Act*, thereby avoiding any inconsistency between the two Acts.<sup>108</sup>

19.83 The Commissions hold the same view in relation to the relevant state and territory anti-discrimination legislation.<sup>109</sup>

***Suggestion to consider amendment of Native Title Act***

19.84 The recommendation to include provisions specific to evidence of ATSI traditional laws and customs in the uniform Evidence Acts is consistent with the Commissions’ policy that the Acts should be of general application to all criminal and civil proceedings.<sup>110</sup> As discussed above, issues concerning the admission of evidence of traditional laws and customs arise in many different types of proceedings—from native title, family and other civil proceedings, through to criminal prosecutions.

19.85 The Commissions believe that, if adopted, Recommendations 19–1, 19–2 and 19–3 will assist greatly in solving the problems identified, including in the area of native title. However, certain evidentiary problems are particular to native title proceedings and these may not be fully addressed by the Commissions’ recommendation. That is, Recommendation 19–1 lifts the hearsay rule only for evidence of traditional laws and customs and not, for example, for evidence about family relationships that is relevant to showing a continuing connection with land.

19.86 In this context, the Commissions consider that there are strong arguments that s 82 of the *Native Title Act* should also be amended. Submissions and consultations dealing with s 82 and its relationship with the *Evidence Act 1995* (Cth),<sup>111</sup> and the Commissions’ own research, lead to the conclusion that s 82 of the *Native Title Act* is not operating effectively and should be reviewed. The provision does not provide

108 Ibid s 8(1) provides that the relevant Part of that Act ‘does not apply to, or in relation to, the application of special measures’ within the meaning of Art 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Article 1(4) of the Convention states: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’

109 See: *Anti-Discrimination Act 1977* (NSW) Pt 2; *Equal Opportunity Act 1995* (Vic) s 6(i), Pts 3, 4 *Anti-Discrimination Act 1991* (Qld) s 7(g), Pt 5; *Equal Opportunity Act 1984* (SA) Pt 4; *Equal Opportunity Act 1984* (WA) ss 36, 51; *Anti-Discrimination Act 1998* (Tas) s 16(a), Pt 5; *Discrimination Act 1994* (ACT) s 7(1)(h), Pt 4; *Anti-Discrimination Act 1992* (NT) ss 19(1)(a), 20, Pt 5.

110 See Ch 2.

111 Cape York Land Council, *Consultation*, Cairns, 12 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Confidential, *Submission E 49*, 27 April 2005; Confidential, *Submission E 51*, 22 April 2005.

sufficient guidance or certainty on the admissibility of evidence in native title proceedings.

19.87 Therefore, the Commissions suggest that consideration be given to amending s 82 of the *Native Title Act*. However, the Commissions consider that a recommendation to amend the *Native Title Act*, albeit only with respect to its evidentiary provisions, would fall outside their terms of reference and so make no recommendation in this regard.

### **Breadth of evidence to which the exception should apply**

19.88 In DP 69, the question was asked whether the amendment in Proposal 17–1 should apply to a broader category of evidence such as evidence based on ‘oral knowledge’ or ‘oral tradition’ and, if so, how such a term should be defined.<sup>112</sup>

19.89 This question arose out of concern that the term ‘traditional laws and customs’ might be overly restrictive. For instance, in the native title context, there was a concern expressed in DP 69 that ‘traditional’ has been interpreted to mean the normative rules of ATSI societies existing before the assertion of sovereignty by the British Crown.<sup>113</sup> Similarly, there was a concern that the kind of evidence referred to at [19.30] above may not be sufficiently direct evidence of traditional law or customs to fit within the amended provision.<sup>114</sup>

19.90 Essentially, therefore, there are two questions:

- (1) Is ‘traditional laws and customs’ the appropriate term to use in the uniform Evidence Acts?
- (2) Should the category of evidence covered by the recommended amendment be broadened to include, for instance, ‘oral knowledge’ or ‘oral tradition’?

### **Submissions and consultations**

19.91 Responses to Question 17–1 were varied. Taken as a whole, the submissions and consultations disclose a preference for adopting the term ‘traditional laws and customs’ in the uniform Evidence Acts, provided that this term is defined broadly enough to include the types of material most relevant for the purpose.

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112 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 17–1.

113 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].

114 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [17.67].

19.92 The Australian Government Attorney General's Department (AGD) 'favour[s] the use of broader legislative terminology to allow for the use and recognition of more contemporary Indigenous knowledge'. The AGD prefers the term 'oral knowledge' to 'oral traditions', in that the former is 'certainly a more apt term for describing the information that is retained and transmitted in Indigenous communities'.<sup>115</sup>

19.93 The Law Society of New South Wales submits that it is important that the proposed exception to the hearsay and opinion rule be 'broad enough to cover the kinds of evidence based on Aboriginal and Torres Strait Islander oral knowledge'. However, the Law Society expresses 'no preference as to any particular term', instead seeing the solution as requiring the adoption of 'an appropriate broad-based definition' of traditional laws and customs (or whatever alternative phrasing is ultimately used in the uniform Evidence Acts).<sup>116</sup>

19.94 The Cape York Land Council favours using the term 'traditional laws and customs', stating that it is broader and therefore preferable to the term 'customary laws'.<sup>117</sup> The Council takes a similar position to the Law Society of New South Wales, stressing that it is crucial that whatever term is adopted in the uniform Evidence Acts, it must be defined broadly. The Council urges that this definition include evidence of 'beliefs' of the relevant ATSI group.<sup>118</sup>

19.95 The Northern Land Council also urges that the term 'traditional laws and customs' be used in the uniform Evidence Acts, as the term has tended to be interpreted broadly in other contexts. The Northern Land Council further states that it is not necessary to distinguish between 'oral knowledge' and 'oral tradition' because the two tend to be related.<sup>119</sup> On the other hand, Justice French does not favour the terms 'oral knowledge' and 'oral tradition' because they would be likely to generate substantial difficulties of definition, both in themselves and in their basis relationship.<sup>120</sup>

19.96 Some express qualified support for the adoption of the term 'traditional laws and customs' in the Acts. Colin McDonald QC endorses the use of this wording in the uniform Evidence Acts. He cautions that it should be made clear that judicial interpretation of the *Native Title Act* should not automatically be adopted as the

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115 Attorney-General's Department, *Submission E 117*, 5 October 2005.

116 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

117 Cape York Land Council, *Consultation*, Cairns, 12 August 2005.

118 Ibid.

119 Northern Land Council, *Consultation*, Darwin, 15 August 2005.

120 Justice R French, *Submission E 119*, 6 October 2005.

appropriate construction for the uniform Evidence Acts.<sup>121</sup> The Office of the Solicitor-General for the Northern Territory<sup>122</sup> stresses that it is important not to allow the construction of ‘traditional laws and customs’ to elide with ‘tradition’ as the latter term was construed in the *Yorta Yorta*<sup>123</sup> case.

19.97 Colin McDonald QC also emphasises that ‘community’ is a problematic and ‘artificial’ descriptor in relation to ATSI people.<sup>124</sup> The Office of the Solicitor-General for the Northern Territory expresses a similar concern.<sup>125</sup> McDonald refers to a judgment of Muirhead J, in which his Honour said:

Examination of dictionary definitions of ‘community’ is not rewarding, eg ‘the people of a district as a whole’, ‘a body of people organized into a political, municipal, or social unity’ (Oxford Dictionary). In today’s society we find many groups ordinarily called communities living in towns or districts, eg the Greek community, the Vietnamese community, the Aboriginal community. Thus in determining the community whose wishes and needs require consideration, the [Liquor] Commission [of the Northern Territory] must embrace all groups. Generally individual group needs and wishes will be diverse and in conflict.<sup>126</sup>

19.98 For this reason, McDonald argues that the term ATSI ‘group’, in preference to ATSI ‘community’, should be used in the Acts.<sup>127</sup>

19.99 However, a representative of the Far East Gippsland Indigenous Community implies that the uniform Evidence Acts are irreconcilable with ATSI traditional laws and customs:

Fitting indigenous laws and customs into hearsay and opinion *exceptions* will create more problems than it will solve. Recommending a broader category of evidence based on ‘oral knowledge or tradition’ also fails to do justice to the full range of Indigenous problems when confronted by evidence rules.<sup>128</sup>

No alternative solution was proposed.

### The Commissions’ view

19.100 The Commissions believe that ‘traditional laws and customs’ is the most appropriate term to adopt in the uniform Evidence Acts. This view seems uncontroversial in light of the consultations and submissions on this issue. The

121 C McDonald, *Consultation*, Darwin, 16 August 2005; Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005.

122 Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005.

123 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

124 C McDonald, *Consultation*, Darwin, 16 August 2005.

125 Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005.

126 *R v Liquor Commission of the Northern Territory; Ex parte Pitjantjatjara Council Inc* (1984) 31 NTR 13, 19.

127 C McDonald, *Consultation*, Darwin, 16 August 2005.

128 A Blackburn, *Submission E 85*, 16 September 2005 (emphasis in original; footnote omitted).

Commissions are concerned to ensure that the wording adopted in the Acts covers the full range of matters within the scope of this concept.<sup>129</sup>

19.101 The most effective way to address this concern is to define the term in the uniform Evidence Acts, enumerating a non-exhaustive list of matters that fall within the ambit of ‘traditional laws and customs’. The Commissions believe that matters which the Acts should articulate explicitly as being within this ambit are evidence relating to the ‘customary laws, traditions, customs, observances, practices, knowledge and beliefs’ of an ATSI group. Subject to one exception, these are the same matters as were proposed in the draft statutory definition in DP 69.<sup>130</sup> The difference is that the definition here recommended also includes within the ambit of ‘traditional laws and customs’ the ‘knowledge’ of members of an ATSI group. This alteration has been made to take into account the widespread view that this is an important component of ATSI traditional laws and customs, in contrast with the Anglo-Australian legal system.<sup>131</sup>

19.102 The Commissions acknowledge that the rules of evidence have not been sufficiently responsive to some of the inherent differences in ATSI traditional laws and customs, as against the Anglo-Australian law. In the context of the Federal Court’s native title jurisdiction, Dr Ann Genovese has written:

[D]espite the court in many cases being cognisant of the particular difficulties and evidentiary burdens experienced by indigenous parties, prevailing legal norms about the nature of acceptable sources and histories, and direction to prefer one over the other, continues to hamper indigenous claims.<sup>132</sup>

19.103 The Commissions believe that the broad definition of ‘traditional laws and customs’ in Recommendation 19–3 will go some way to addressing this concern. By also incorporating the ‘observances, practices, knowledge and beliefs’ of an ATSI group, the uniform Evidence Acts will be better able to receive more diverse evidence which can be used to prove the existence and content of particular traditional laws or customs.

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129 This desire is reflected in several of the consultations and submissions: Cape York Land Council, *Consultation*, Cairns, 12 August 2005; The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; C McDonald, *Consultation*, Darwin, 16 August 2005.

130 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Appendix 1.

131 Given the oral derivation of ATSI traditional laws and customs, an assessment of their existence and content must rely on adducing such evidence of ‘knowledge’ from appropriately informed witnesses. See, eg, Attorney-General’s Department, *Submission E 117*, 5 October 2005; Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

132 A Genovese, *The Use of History in Native Title: Historical Perspectives* (2003) unpublished manuscript, 8–9.

19.104 Finally, it should be noted that a suggestion was made in DP 69 that the proposed amendment ought arguably to apply to other cultures represented in the Australian community that have primarily an oral tradition—for example, Polynesian, Melanesian and Micronesian cultures.<sup>133</sup> The view adopted by the Commissions in DP 69 was that ATSI people constitute a special category because they are unable, under Australian municipal law, to enjoy certain interests (for instance, under native title) before first proving traditional laws and customs.

19.105 In the absence of dissenting opinions emerging from the consultations and submissions, the Commissions continue to hold the view that it is unnecessary at this time to extend the application of the proposed amendment to other cultures which have a primarily oral tradition. Therefore, the Commissions recommend that the uniform Evidence Acts be amended in accordance with Recommendation 19–3 below.

**Recommendation 19–1** The uniform Evidence Acts should be amended to provide an exception to the hearsay rule for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.

**Recommendation 19–2** The uniform Evidence Acts should be amended to provide an exception to the opinion evidence rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

**Recommendation 19–3** The definition of ‘traditional laws and customs’ in the uniform Evidence Acts should include ‘the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander persons’.

## Privilege and traditional laws and customs

19.106 In DP 69, comment was sought on the question whether the uniform Evidence Acts should be amended to allow courts to excuse a witness from answering a question which tends to incriminate the witness under his or her ATSI traditional laws and customs and, if so, on what basis and subject to what criteria.<sup>134</sup>

133 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [17.68]. This issue arose from the Evidence Acts Review Workshop for the Judiciary, *Consultation*, Sydney, 30 April 2005.

134 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), Q 17–2.



19.107 One preliminary matter should be dealt with: what is here being considered is a new form of *privilege*, as distinct from a broad exemption from giving evidence *per se*. The distinction has been explained as follows:

This exemption [i.e. privilege] is one from the normal obligation of a citizen to provide the judicial arm of the state with the information and documents which are required for the determination of the litigation. The exemption is associated with but should be distinguished from the exemption accorded by the law to particular persons from the obligation to give any evidence at all in certain proceedings. This immunity from compellability or incompetence ... attaches to a person by reason of that person's status, for example as a spouse of an accused person. [Privilege] concerns the right of a party to refuse to disclose certain confidential communications to a tribunal or other person; not the right to refuse to attend before that tribunal and to give evidence whatsoever.<sup>135</sup>

19.108 It should be noted that in Chapter 15, the Commissions recommend that the uniform Evidence Acts be amended to include a confidential professional relationships privilege. However, this privilege is unlikely to apply to evidence tending to incriminate a witness under his or her ATSI traditional laws and customs as the privilege requires, among other things, that there be a communication made in the course of a professional relationship.

### **Consideration of privilege in ALRC 31**

19.109 A similar issue was addressed in ALRC 31, where there was consideration of whether an ATSI witness should be compelled to answer questions in court where the answer would disclose a past violation of ATSI traditional laws and customs which might bring 'shame' to the witness, or render the witness liable to some form of retaliation.<sup>136</sup>

19.110 The ALRC stated in ALRC 31:

There have been instances of Aboriginal people seeking to avoid disclosing evidence on the grounds that it might 'incriminate' them under their customary laws. To refuse to extend the privilege to cover incrimination under customary laws would appear to deny the significance of customary laws in the lives of many Aborigines. To allow the privilege to be raised in matters of foreign law but not in matters of Aboriginal customary laws also seems unjustified.<sup>137</sup>

19.111 The ALRC considered that a court should not compel an ATSI witness to answer questions tending to incriminate the witness under ATSI traditional laws and customs unless there are good reasons for so doing. However, it concluded that an

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135 J Heydon, *Cross on Evidence* (7th ed, 2004), [25005].

136 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [662]–[665].

137 *Ibid.*, [664].

absolute privilege, applicable in all cases, is not desirable because there are other ways of protecting confidential or secret information (including the proposal made in ALRC 26 for a confidential communications privilege).<sup>138</sup>

19.112 The ALRC recommended:

The courts should be given power to excuse a witness from answering a question which tends to incriminate the witness under his or her customary laws. This power should be exercised unless the court finds that the desirability of admitting the evidence outweighs the likelihood of harm to the witness, to some other person concerned, or to the Aboriginal community itself.<sup>139</sup>

19.113 The factors recommended to be taken into account in making a determination under the privilege provision were to include:

- the importance of the evidence to the proceeding;
- other ways of obtaining the information in question;
- the nature of the proceeding;
- whether the witness is a party to the proceeding; and
- the power of the court to prevent disclosure of the evidence in other ways.<sup>140</sup>

### **Consideration of privilege in this Inquiry**

#### ***Submissions and consultations***

19.114 Submissions and consultations, taken as a whole, do not favour the establishment of a new form of privilege with respect to evidence that, if disclosed, would render an ATSI witness liable to punishment under traditional laws and customs.<sup>141</sup> Various reasons were given as to why this approach would be inappropriate.

19.115 The Law Society of New South Wales agrees

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138 See Ch 15.

139 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [665].

140 Ibid, [665].

141 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; Northern Land Council, *Consultation*, Darwin, 15 August 2005; Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005; N Grati, *Submission E 73*, 15 September 2005.

that a court should not compel a witness to answer questions tending to incriminate the witness under Aboriginal and Torres Strait Islander customary laws unless there are good reasons for doing so...<sup>142</sup>

19.116 However, it does ‘not favour an absolute privilege that would apply in all cases ... because there are other ways of protecting confidential or secret information’.<sup>143</sup>

19.117 Some submissions and consultations stress the importance of retaining, and indeed enhancing, the flexibility in the current approach. In the experience of a number of employees of the Cape York Land Council, current practice is flexible enough to accommodate the concern of an ATSI witness not to incriminate himself or herself under traditional laws and customs.<sup>144</sup> The Northern Land Council also observes that, currently, courts and counsel do not force the issue if an ATSI witness states that he or she does not want to answer a particular question.<sup>145</sup> The Office of the Solicitor-General for the Northern Territory makes a similar point, noting that a court could move into closed session, excluding men or women as appropriate to the relevant traditional law or custom.<sup>146</sup>

19.118 Given that the current approach is operating effectively, it is submitted that there is no need for an amendment to create this new form of privilege which, in any case, would be difficult to define.<sup>147</sup> It is also suggested that the establishment of such a privilege might have unintended consequences, such as making it more difficult to expose violence in ATSI communities.<sup>148</sup>

19.119 Reference has also been made to the practice in foreign jurisdictions. For instance, in one United States court (with jurisdiction over people from the Navajo Nation), a judge can speak informally with a native American witness, prior to this witness giving evidence, about problems which may arise from the giving of such evidence because of the witness’ customary or traditional law.<sup>149</sup>

142 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005.

143 Ibid.

144 Cape York Land Council, *Consultation*, Cairns, 12 August 2005.

145 Northern Land Council, *Consultation*, Darwin, 15 August 2005.

146 Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005. Another consultation stressed the flexibility of courts generally to adopt culturally sensitive practices in the reception of evidence from ATSI witnesses: M Johnson, *Consultation*, Darwin, 30 March 2005.

147 Northern Land Council, *Consultation*, Darwin, 15 August 2005; Solicitor-General for the Northern Territory, *Consultation*, Darwin, 15 August 2005.

148 NSW Rape Crisis Centre, *Consultation*, Sydney, 4 August 2005.

149 N Grati, *Submission E 73*, 15 September 2005, citing J Zion, *Indian Tradition and Custom in Adjudication under Rules of Evidence* (1997) <<http://www.tribal-institute.org/articles/zion1.htm>> at 8 November 2005.

***The Commissions' view***

19.120 The Commissions believe that two critical and interrelated questions arise in relation to the mooted new form of privilege.

- (i) What is the essential nature of the mischief which is sought to be addressed?
- (ii) Does a statutory amendment to the uniform Evidence Acts creating a new form of privilege constitute the best means of addressing this threat without unintended adverse consequences?

19.121 In relation to question (i), the nature of the potential mischief seems clear. In ALRC 31, the ALRC expressed concern about an ATSI witness being compelled to give evidence if, in so doing, this person risks incriminating himself or herself under ATSI traditional laws and customs.<sup>150</sup> This concern is echoed in a number of the submissions and consultations.<sup>151</sup>

19.122 The Commissions are of the view that this accurately describes the nature of the potential mischief. Moreover, the Commissions believe that it is highly undesirable that this mischief, which is here expressed as a hypothetical, eventualise. For an ATSI witness, such an eventuality would be harmful and unfair. Also, for the criminal justice system more generally, there are also strong policy grounds in favour of avoiding this situation.<sup>152</sup> That is, it is likely that the risk of this occurring would discourage ATSI witnesses from giving evidence in the first place.<sup>153</sup>

19.123 Question (ii) asks a practical question: whether a new form of privilege is likely to be the best means to address the threat identified. As earlier noted, in 1986, the ALRC recommended that courts be given the power to excuse a witness from answering a question which 'tends to incriminate the witness under his or her customary laws', but the decision was made not to recommend the establishment of an absolute privilege.<sup>154</sup>

19.124 Consistent with the view expressed in ALRC 31, the Commissions do not recommend the establishment of a new form of privilege. However, the Commissions

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150 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [664].

151 The Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales, *Submission E 103*, 22 September 2005; A Au, *Submission E 83*, 16 September 2005.

152 The origins and policy justifications for the privilege against self-incrimination generally are discussed in detail by McHugh J in *Azzopardi v The Queen* (2001) 205 CLR 50, [119]–[163].

153 See S McNicol, *Law of Privilege* (1992), 139, where it is noted that one of the 'modern' rationales for the privilege against self-incrimination is 'to encourage witnesses to come forward who are otherwise loath to do so'.

154 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [665].

do not now see the need, which was perceived by the ALRC in 1986,<sup>155</sup> to grant an additional, specific power to the courts (which, as earlier explained, would be in the nature of a privilege) to excuse an ATSI witness from answering a question which may incriminate him or her under his or her traditional laws and customs.

19.125 A number of the consultations and submissions highlight that the courts currently deal adequately with the issue. The Commissions agree that this is the case. Judicial officers possess the power under each court's inherent jurisdiction to obviate the risk of ATSI witnesses incriminating themselves under traditional law or custom.<sup>156</sup> It appears that judicial officers are exercising that power.<sup>157</sup>

19.126 Moreover, the methods available to judicial officers—such as closing the court to men in respect of material which, for reasons of traditional law or custom, should only be seen by women (or vice versa); or, modifying the mode of questioning—are adaptable to the exigencies of the particular situation.<sup>158</sup> In contrast, privilege is a blunt instrument which operates to preclude the admission of evidence which, if appropriate safeguards are engaged to protect an ATSI witness from this form of self-incrimination, ought rightly to be admitted because it is probative and reliable.<sup>159</sup>

19.127 A further reason against legislating to create a new form of privilege is that it may disadvantage the very people which the amendment is intended to protect. That is, if the privilege is created, it seems likely that there will be greater pressure on ATSI witnesses to avail themselves of the privilege or not to give evidence on the particular matter.<sup>160</sup> However, such evidence can (and often is) useful to the case of an ATSI witness who is also a litigant or a criminal defendant.<sup>161</sup> Particularly given that

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155 See *Ibid*, [665].

156 See, eg, *Federal Court Rules* (Cth) O 78 r 4(1), which provides that 'the Court may give the directions and make the orders it considers appropriate to take account of the cultural or customary concerns of a party to the proceeding or another person'.

157 See H Douglas, 'Customary Law, Sentencing and the Limits of the State' (2005) 20(1) *Canadian Journal of Law and Society* 141, 145–146; R Nicholson, 'The Use of History in Proving Native Title: A Judge's Perspective' (2003) *Early days: Journal of the Royal Western Australian Historical Society* 315, 321. Justice Nicholson, writing in the context of native title cases, explains that the *Native Title Act 1993* (Cth) and the *Federal Court Rules* (Cth) 'enable the court to give directions to ensure that a hearing of an application progresses in a culturally appropriate manner'.

158 See M Black, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13(1) *Public Law Review* 16, 23–25; Northern Land Council, *Consultation*, Darwin, 15 August 2005; Cape York Land Council, *Consultation*, Cairns, 12 August 2005.

159 See, generally (ie, not in the specific context of evidence given by ATSI witnesses), J Heydon, *Cross on Evidence* (7th ed, 2004), [25005], [25040].

160 Such pressure, which may increasingly be felt in civil actions where the witness is also a party, has been noted by S McNicol, *Law of Privilege* (1992), 152, citing *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547.

161 This was the case, for instance, in the Hindmarsh Island Bridge litigation. See, especially, *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

submissions and consultations have not disclosed strong support for the creation of a new form of privilege, and that they have in fact shown that there are cogent reasons against adopting such a privilege, it may cause new problems to put an ATSI witness in a position where, if he or she does claim the privilege, he or she may be unable to adduce the evidence at all.

19.128 For these reasons, the Commissions do not recommend that the uniform Evidence Acts be amended to create a new form of privilege which would excuse an ATSI witness from answering a question which tends to incriminate the witness under his or her traditional laws or customs.

## 20. Matters Outside the Uniform Evidence Acts

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### Introduction

20.1 In the uniform Evidence Act jurisdictions, the Acts work in conjunction with evidentiary provisions contained in a range of other federal, state and territory legislation. These evidentiary provisions include those dealing with, for example, the privilege against self-incrimination in the context of regulatory proceedings;<sup>1</sup> warnings to be given to juries in relation to lack of complaint in sexual offence proceedings;<sup>2</sup> protection of complainants in sexual offence proceedings ('rape shield' provisions); protection of child witnesses; and evidence in family law proceedings.

20.2 The Inquiry is directed to consider whether, in view of the desirability of clarity, effectiveness and uniformity in evidence law, some of these evidentiary provisions should be incorporated into the uniform Evidence Acts and, if so, in what form.

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1 See Ch 15.

2 See Ch 18.

20.3 As is noted in IP 28, it is beyond the practical scope of the Inquiry to examine in detail all evidentiary provisions and their relationship with the uniform Evidence Acts.<sup>3</sup> This chapter focuses on three areas that were highlighted as being of particular significance in this Inquiry. These are:

- the ‘rape shield’ provisions contained in state and territory criminal procedure legislation;
- provisions dealing with child witnesses; and
- evidence in family law proceedings.

20.4 The discussion and conclusions in this chapter are informed by the Commissions’ common policy position with regard to matters that should be incorporated in the uniform Evidence Acts and matters that should be enacted elsewhere. This policy is discussed in detail in Chapter 2.

20.5 The policy position is based on the propositions that: (i) uniformity in evidence laws should be pursued unless there is good reason to the contrary; (ii) the uniform Evidence Acts should be a comprehensive statement of the laws of evidence (the evidence law ‘pocket bible’); and (iii) the uniform Evidence Acts should be of general application to all criminal and civil proceedings.

## Uniform Evidence Acts and other legislation

20.6 Section 8 of the *Evidence Act 1995* (Cth) deals with the operation of other Acts. Section 8(1) states:

This Act does not affect the operation of the provisions of any other Act, other than sections 68, 79, 80 and 80A of the *Judiciary Act 1903*.

20.7 It has been held that, where a court is not required to observe the rules of evidence, s 8(1)<sup>4</sup> is intended to have the effect that the *Evidence Act 1995* (Cth) does not operate so as to impose that obligation.<sup>5</sup>

20.8 The effect of the reference to the *Judiciary Act 1903* (Cth) is said to be that those provisions which had allowed courts exercising federal jurisdiction to apply the local rules of evidence are significantly modified in their operation by the *Evidence Act 1995* (Cth). The practical result is that:

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3 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.4].

4 When considered together with s 9(1) which provides: ‘For the avoidance of doubt, this Act does not affect an Australian law so far as the law relates to a court’s power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding’.

5 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397, 409.



- federal courts and Australian Capital Territory (ACT) courts apply only the rules of admissibility and rules relating to the competence and compellability of witnesses contained in the *Evidence Act 1995* (Cth) to the exclusion of state and territory law that is inconsistent with the Act; and
- state and other territory courts apply only those parts of the *Evidence Act 1995* (Cth) which are specifically provided to apply to all Australian courts.<sup>6</sup>

20.9 The *Evidence Act 1995* (NSW) provides simply: ‘This Act does not affect the operation of the provisions of any other Act’.<sup>7</sup> This means, for example, that evidentiary provisions contained in the *Criminal Procedure Act 1986* (NSW) are not affected by the New South Wales Act.

20.10 The *Evidence Act 1995* (Cth) applies in the courts of the ACT. While the ACT Legislative Assembly may enact evidence legislation, any such legislation will not apply if it is inconsistent with the Commonwealth Act.<sup>8</sup> Therefore, the ACT effectively may not enact new laws which would make inadmissible evidence that is admissible under the *Evidence Act 1995* (Cth), as this would be inconsistent with s 56 of the Act. In consultations, concern was expressed that a range of ACT evidentiary provisions may be challengeable on this basis.<sup>9</sup> These include evidentiary provisions in relation to sexual offences and child witnesses.

## Rape shield laws

20.11 All states, the ACT and Northern Territory have passed legislation which deals specifically with the admission of evidence in criminal proceedings where someone is charged with a sexual offence.<sup>10</sup> These ‘rape shield laws’ are said to have three principal aims. These are to:

- prohibit the admission of evidence of a complainant’s sexual reputation;
- prevent the use of sexual history evidence to establish the complainant as a ‘type’ of person who is more likely to consent to sexual activity; and

<sup>6</sup> See also Ch 2; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.900].

<sup>7</sup> *Evidence Act 1995* (NSW) s 8.

<sup>8</sup> *Evidence Act 1995* (Cth) s 8.

<sup>9</sup> Judicial Officers of the Supreme Court of the ACT, *Consultation*, Canberra, 8 March 2005; ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

<sup>10</sup> Uniform Evidence Act jurisdictions: *Crimes Act 1914* (Cth) ss 15YB–15YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2001* (Tas) s 194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53. Non-uniform Evidence Act jurisdictions: *Evidence Act 1929* (SA) s 34I; *Evidence Act 1958* (Vic) s 37A; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

- exclude the use of a complainant's sexual history as an indicator of the complainant's truthfulness.<sup>11</sup>

20.12 All Australian rape shield laws take the form of an exclusionary rule and share a similar procedural scope.<sup>12</sup> However, there are a number of differences between federal, state and territory rape shield laws.<sup>13</sup> All the laws protect the complainant in relation to the offence charged but do not extend to other witnesses, except in the case of the Commonwealth provisions, which protect every child witness in sexual offence proceedings.<sup>14</sup>

20.13 All existing rape shield laws are associated with other provisions regulating the cross-examination of witnesses and the adducing and admission of evidence of witnesses' sexual history by any party. The exception is in Western Australia, where the law only applies to defence evidence.<sup>15</sup> These provisions may also deal with specific warnings or directions to be given by judges in sexual offence cases.<sup>16</sup> Aspects of the examination of witness and the giving of directions, including in sexual offence proceedings, are dealt with in Chapters 5 and 18.

20.14 All states and the ACT have provisions which make evidence relating to the sexual reputation of a complainant inadmissible.<sup>17</sup> These provide no exceptions to their exclusionary rule. The justification for making evidence of sexual reputation completely inadmissible is said to be that 'evidence of reputation, even if relevant and therefore admissible, is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances'.<sup>18</sup>

20.15 However, Northern Territory legislation allows evidence of the sexual reputation of the complainant to be admitted with the leave of the court, if the court is satisfied that the evidence has substantial relevance to the facts in issue.<sup>19</sup> Similarly, the federal law allows evidence of a child witness' or child complainant's sexual reputation to be admitted with the leave of the court, if the court is satisfied that the evidence is substantially relevant to facts in issue in the proceeding.<sup>20</sup>

11 T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Eastal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 76, 82.

12 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.

13 These differences were highlighted by the High Court in *Bull v The Queen* (2000) 201 CLR 443.

14 *Crimes Act 1914* (Cth) ss 15YB–15YC.

15 *Evidence Act 1906* (WA) ss 36A–36BC. See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.

16 For example, *Criminal Procedure Act 1986* (NSW) s 294.

17 *Ibid* s 293(2); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50; *Evidence Act 1958* (Vic) s 37A(1)(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1929* (SA) s 34I(1)(a); *Evidence Act 1906* (WA) s 36B.

18 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 219.

19 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).

20 *Crimes Act 1914* (Cth) s 15YB.

20.16 Australian jurisdictions have adopted different approaches in relation to evidence of the ‘sexual activities’,<sup>21</sup> ‘sexual experience’<sup>22</sup> or ‘sexual experiences’<sup>23</sup> of the complainant.

20.17 The most important distinction is between New South Wales, where the admissibility of such evidence depends on whether it falls within specific statutory exceptions,<sup>24</sup> and the other jurisdictions, where the evidence is inadmissible unless the leave of the court is obtained. Admissibility in the latter jurisdictions is a matter for the judge’s discretion, although the exercise of the discretion is subject to various conditions laid down by the legislation.<sup>25</sup>

20.18 A further distinction may be drawn within the ‘discretionary models’. In Victoria, Western Australia, the Northern Territory and Tasmania, the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the accused. In the remaining jurisdictions, the sexual experience or conduct provisions do not apply to ‘recent’ sexual activity between the complainant and the accused.<sup>26</sup>

### Concerns about the rape shield laws

20.19 There are concerns about the operation of the rape shield laws, many of which have been canvassed in reports by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), the New South Wales Law Reform Commission and the Victorian Law Reform Commission.<sup>27</sup>

20.20 These reports have canvassed concerns about whether a mandatory or discretionary model is preferable for dealing with the admission of evidence of a

21 *Criminal Procedure Act 1986* (NSW) s 293(3); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2); *Evidence Act 1929* (SA) s 34I(1)(b); *Evidence Act 1958* (Vic) s 37A(1)(2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b).

22 *Criminal Procedure Act 1986* (NSW) s 293(3); *Evidence Act 2001* (Tas) s 194M(1)(b).

23 *Evidence Act 1906* (WA) s 36BC.

24 *Criminal Procedure Act 1986* (NSW) s 293(4).

25 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 51–53; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b), (2)–(3); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2)–(3); *Evidence Act 1929* (SA) s 34I(2)–(3); *Evidence Act 2001* (Tas) s 194M(2); *Evidence Act 1958* (Vic) s 37A(3); *Evidence Act 1906* (WA) s 36BC(2).

26 See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 223–224; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4) (acts which are ‘substantially contemporaneous’); *Evidence Act 1929* (SA) s 34I(1)(b) (‘recent sexual activities with the accused’).

27 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

complainant's sexual experience;<sup>28</sup> and whether the New South Wales legislation<sup>29</sup> is too restrictive, so that it excludes not only irrelevant but also relevant material concerning the complainant's sexual experience.<sup>30</sup>

20.21 The MCCOC report considered the relative merits of the mandatory and discretionary approaches in some detail.<sup>31</sup> The report referred to the 'undoubted difficulties encountered with the New South Wales model' and the fact that the rest of Australia and other common law jurisdictions have rejected the mandatory model. MCCOC stated that it was 'attracted to a strictly circumscribed discretionary model'.<sup>32</sup> MCCOC therefore recommended that the Model Criminal Code should contain a provision that prohibits, in the trial of a sexual offence, questioning of a complainant as to prior sexual experience unless leave of the court is obtained.<sup>33</sup>

### Relationship with the uniform Evidence Acts

20.22 The uniform Evidence Acts do not affect the operation of federal, state or territory rape shield laws.<sup>34</sup> The rape shield laws operate alongside provisions of the uniform Evidence Acts that regulate the admission of evidence generally, including evidence of sexual reputation or sexual experience. Evidence of sexual reputation or sexual experience may be inadmissible under the rape shield laws, the uniform Evidence Acts, or both.

20.23 For example, leaving aside the operation of rape shield laws, where evidence of a complainant's sexual reputation or experience is sought to be adduced as relevant to the complainant's credibility, it may be excluded under s 102 of the uniform Evidence Acts unless it is relevant for another purpose or falls within one of the exceptions to the credibility rule. The operation of the credibility rule is discussed in Chapter 12.

20.24 Evidence of a complainant's sexual reputation or sexual experience may be admissible under the exception to the credibility rule provided by s 103 of the uniform Evidence Acts. This section provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness (including the complainant in a sexual offence case) if the evidence has substantial probative value. However, the evidence may still be ruled inadmissible under rape shield laws, depending on the applicable law and the exercise of judicial discretion (where available).

28 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 237–245.

29 *Crimes Act 1900* (NSW) s 409B. These provisions were re-enacted without significant change in *Criminal Procedure Act 1986* (NSW) s 293.

30 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [1.8].

31 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 237–243.

32 *Ibid*, 243. MCCOC also stated that it favours 'the variant that extends the discretionary regime to all incidents of sexual contact between the complainant and the accused'.

33 *Ibid*, 245.

34 Uniform Evidence Acts s 8(1).

20.25 In some circumstances, evidence of a complainant's sexual reputation or experience may be subject to the tendency rule. As discussed in Chapter 11, s 97 of the uniform Evidence Acts provides that evidence of character, reputation, conduct or a tendency is not admissible to prove a person's tendency to act in a particular way or have a particular state of mind, unless the court thinks that the evidence would have significant probative value.

20.26 Again, even where such evidence is admissible under the uniform Evidence Acts, the evidence may be ruled inadmissible under rape shield laws. Conversely, evidence about prior consensual sexual activity involving the complainant and the accused may be admissible under exceptions in the rape shield laws, but still constitutes tendency evidence for the purposes of s 97 of the uniform Evidence Acts. If so, in order to be admissible, notice has to be given to the other party and the evidence must have significant probative value.

### Locating rape shield laws

20.27 In some states and territories, rape shield provisions are contained in legislation dealing with criminal procedure<sup>35</sup> or with evidence and procedure in sexual offence cases specifically.<sup>36</sup> Some non-uniform Evidence Act jurisdictions have rape shield provisions in general evidence legislation.<sup>37</sup>

20.28 Tasmania is the only uniform Evidence Act jurisdiction to include rape shield provisions in evidence legislation. In 1996, the Tasmanian Law Reform Commissioner's Special Committee on Evidence recommended that, if Tasmania were to adopt the uniform Evidence Act, then s 102A of the *Evidence Act 1910* (Tas) containing Tasmania's rape shield provisions should be transferred to Chapter XIV of the *Criminal Code Act 1924* (Tas).<sup>38</sup> However, the provisions were instead re-enacted in Tasmania's uniform evidence legislation.<sup>39</sup>

20.29 As discussed in IP 28, in the interest of uniformity between Australian jurisdictions, and to ensure consistency between rape shield provisions and those of the uniform Evidence Acts, there may be good reasons to recommend including provisions dealing specifically with the admission of evidence of sexual reputation or experience in the uniform Evidence Acts. However, as each jurisdiction which is part of the

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35 *Criminal Procedure Act 1986* (NSW).

36 *Criminal Law (Sexual Offences) Act 1978* (Qld); *Sexual Offences (Evidence and Procedure) Act 1983* (NT); *Evidence (Miscellaneous Provisions) Act 1991* (ACT). The ACT legislation deals with a range of other matters, including evidence of children and the use of audio-visual links in proceedings.

37 *Evidence Act 1929* (SA); *Evidence Act 1958* (Vic); *Evidence Act 1906* (WA).

38 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), Rec 5, [6.1.3].

39 *Evidence Act 2001* (Tas) s 194M.

uniform Evidence Acts scheme has enacted different rape shield provisions, uniform rape shield provisions would need to be developed.<sup>40</sup>

20.30 In IP 28, opinion was sought as to whether there were concerns about the relationship between the uniform Evidence Acts and the rape shield provisions in state and territory legislation and whether the uniform Evidence Acts should be amended specifically to include provisions dealing with the admission of evidence of sexual reputation or experience.<sup>41</sup>

20.31 In DP 69, it was suggested that, while it might be desirable to include rape shield provisions in the uniform Evidence Acts,

given the differences in the approach taken to the rape shield provisions between NSW and other States (and the unlikelihood of achieving identical provisions) inclusion of these provisions in the Evidence Act is not practicable.<sup>42</sup>

20.32 Another view was that rape shield and similar provisions should not be introduced into the uniform Evidence Acts because the Acts should not contain provisions applicable only to specific offences.<sup>43</sup>

20.33 The Commissions' common policy position is that uniformity in evidence laws should be pursued unless there is good reason to the contrary. Uniformity in rape shield laws could be advanced by an agreed recommendation for enactment in federal, state and territory evidence laws.

20.34 In DP 69, the Commissions noted that developing recommendations on uniform rape shield laws would require review of the effectiveness of the provisions in each jurisdiction and review by the Commissions of previous recommendations for reform of rape shield laws. Such a project is beyond the terms of reference of the current Inquiry. However, the Commissions support harmonisation of rape shield laws in principle. Once agreement is reached on the content of uniform rape shield laws, the desirable location for those provisions can be determined.<sup>44</sup>

### ***Submissions and consultations***

20.35 The Commissions received one submission that was critical of this approach. It argues strongly that there should be greater uniformity to ensure that the special

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<sup>40</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.33].

<sup>41</sup> Ibid, Qs 15–1, 15–2.

<sup>42</sup> Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

<sup>43</sup> G Bellamy, *Consultation*, Canberra, 8 March 2005. See discussion in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [18.30]–[18.34].

<sup>44</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [18.38].

problems faced by children giving evidence, and all witnesses giving evidence of experiences of sexual assault, are adequately addressed.

At the very least, a proposed uniform act could incorporate these by reference or identify the common elements that do exist and include those, plus incorporating additional local provisions. It would be far better for the combined law reform commissions to take the opportunity for national leadership created by this reference and propose national provisions. A further inquiry is not really needed. The special needs of these vulnerable witnesses is well established, as are the continuing obstacles and limited implementation of the many evidentiary reforms ... Failing to address the distinctive and well-documented obstacles faced by these witnesses implicitly supports a view that their needs are not significant enough to be addressed in comprehensive uniform legislation.<sup>45</sup>

20.36 It was also noted that the lack of uniformity in protective provisions for sexual assault complainants supports the placement of such provisions in the uniform Evidence Acts.

Some protective provisions do not exist at all in Commonwealth law, except for children in connection with specific crimes. Although the report attempts to argue that some protection is provided by a sort of patchwork of the general provisions, this is unduly complex and uncertain in scope.<sup>46</sup>

### ***The Commissions' view***

20.37 In Chapter 2 of this Report, the Commissions note the general policy that the uniform Acts should be of general application to all criminal and civil proceedings and should generally not include provisions of application only to specific offences or categories of witness. However, the chapter also acknowledges that strict adherence to this policy is not practicable, and that the balance of convenience and policy principle will differ from case to case.

20.38 For example, even though this may be considered 'offence specific', it is proposed that a sexual assault communications privilege be included in the uniform Evidence Acts. The Commissions believe a distinction may be drawn between the privilege and other special measures designed to assist witnesses in a particular type of matter. In the case of a sexual assault communications privilege, it is not the nature of the witness which causes him or her to need special protection, it is the recognition by law of the benefit to the public in (where it is in the interests of justice) protecting the confidentiality of the relationship between a complainant and a counsellor. It is therefore appropriate for the privilege to be legislated for alongside the other relationships whose confidentiality is similarly recognised at law, those being client legal privilege and the confidential professional relationship privilege.

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<sup>45</sup> K Mack, *Submission E 82*, 16 September 2005.

<sup>46</sup> *Ibid.*

20.39 Whilst another option would be to recommend the enactment of the different rape shield laws in the uniform Evidence Acts of each jurisdiction, this approach carries dangers for the objective of the uniform Evidence Acts. Arguably, the more non-uniform provisions included, the less the incentive to maintain uniformity in the existing provisions.

20.40 The Commissions remain of the view that it is consistent with the structure of the uniform Evidence Acts and their intended application for specific evidentiary provisions relating to sexual offence cases to remain outside the Acts.<sup>47</sup> In Chapter 2, the Commissions recommend that all Australian jurisdictions should work towards the harmonisation of provisions relating to issues such as children's evidence and offence-specific evidentiary provisions, and in particular those relating to sexual assault.<sup>48</sup> Part of this work could include an inquiry into the content and operation of federal, state and territory rape shield laws, with a view to achieving uniformity. In Chapter 2, the Commissions suggest that the Standing Committee of Attorneys-General (SCAG) establish an expert advisory committee to assist the process of continuing amendment to the uniform Evidence Acts as the need arises.<sup>49</sup> This group could undertake an inquiry into the operation of federal, state and territory rape shield laws.

## Evidence and child witnesses

20.41 Concerns about the effects of evidentiary and procedural rules on child witnesses have led to the enactment of new evidentiary provisions since the introduction of the uniform Evidence Acts.

20.42 In the Report of the inquiry into children and the legal process, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84), the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) found that across all jurisdictions, the structures, procedures and attitudes to child witnesses within all these legal processes frequently discount, inhibit or silence children as witnesses.<sup>50</sup> In ALRC 84, the ALRC and HREOC made a number of recommendations aimed at remedying this situation, including: allowing pre-recording of children's testimony; the use of closed circuit television and other evidentiary assistance; reductions in delays between committals and hearings; changes to the rules of competency and admission of hearsay statements of children.<sup>51</sup> As noted below, the Commonwealth and a number of states and territories have adopted many of these recommendations.

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47 As noted above, in 1996, the Tasmanian Law Reform Commissioner's Special Committee on Evidence recommended that, if a uniform Evidence Act were adopted in Tasmania, Tasmania's rape shield provisions should be transferred to crimes legislation: Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), rec 5, [6.1.3].

48 Recommendation 2–4.

49 See [2.30].

50 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.2].

51 Ibid, Ch 14.



20.43 Increased recognition of the difficulties faced by children in the legal system can be attributed to a number of factors, including greater appreciation of the rights of the child (and, in particular, the adoption by Australia of the *Convention on the Rights of the Child* in 1990); expanded research into the psychological development of children; and greater experience of child witness testimony primarily derived from the increased number of prosecutions of child sex offences.<sup>52</sup>

20.44 Most Australian jurisdictions have enacted procedural provisions intended to assist children to give evidence in a manner that reduces stress and trauma and thereby to assist the court to have access to relevant evidence. For example, Part IAD of the *Crimes Act 1914* (Cth) provides, in relation to sexual offences, for the giving of evidence by child witnesses (under the age of 18) by closed-circuit television (CCTV), video recording or other alternative means, and that a child witness may be accompanied by an adult when giving evidence. The *Evidence (Children) Act 1997* (NSW) includes similar provisions for alternative means of giving evidence and provision for adult accompaniment. These apply in relation to a broader range of court and tribunal proceedings, but only for child witnesses under the age of 16.<sup>53</sup>

20.45 If there is a need for specific rules of evidence applying to child witnesses, it can be argued that it is not appropriate to provide for these rules within the uniform Evidence Acts. The uniform Evidence Acts attempt to provide broad, general rules of evidence that can be applied regardless of the type of case involved. As noted in IP 28, many of the existing specific rules for child witnesses apply to particular types of proceedings, rather than having general application, and may be better placed in the legislation specific to those offences, or in a more general *Evidence (Children) Act* (as is the case in New South Wales and Tasmania).<sup>54</sup>

20.46 Another issue is whether evidentiary provisions relating specifically to child witnesses should be separated from procedural rules. In developing the draft Evidence Bill, the ALRC narrowly defined what was to be considered as a law of evidence and covered by the Bill. Rules relating to the gathering of evidence before a trial, and the manner in which the evidence would be given, were defined as procedural rules and excluded from the ALRC's consideration.<sup>55</sup> It can be noted, however, that while the central part of the statute, Chapter 3, deals with the admissibility of evidence, a number of procedural provisions concerning witnesses and the manner in which evidence is to be given,<sup>56</sup> are contained in Chapter 2 of the Acts.

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52 See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.4].

53 See also *Evidence (Children and Special Witnesses) Act 2001* (Tas) which applies to children under the age of 17.

54 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.39].

55 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), Ch 2.

56 For example, s 29 which relates to the giving of evidence in narrative form: see Ch 5.

20.47 While it seems appropriate that procedural rules relating to child witnesses should be contained in legislation outside the uniform Evidence Acts, there are questions about whether specific evidentiary rules should be located with the procedural rules or included in the uniform Evidence Acts, for example, as exceptions to general rules of evidence.

20.48 For example, the *Evidence (Children) Act 1997* (NSW) was established as a comprehensive regime for children giving evidence in criminal proceedings. Its provisions combine a number of existing measures that had been set out in the *Crimes Act 1901* (NSW) with new measures recommended by the New South Wales Children's Evidence Task Force and supported by the Wood Royal Commission.<sup>57</sup> It is largely concerned with procedures to assist children in giving evidence, such as provision for the use of CCTV and the availability of support persons for children. However, it also deals with some admissibility issues, including the admissibility of a previous representation of a child made in the course of an interview.<sup>58</sup>

20.49 While it would have been possible to include all evidentiary provisions relating to child witnesses in the *Evidence (Children) Act*, provisions relating to warnings to be given by judges in jury trials involving the evidence of child witnesses were inserted into the *Evidence Act 1995* (NSW) in 2001.<sup>59</sup> Section 5 of the *Evidence (Children) Act* clearly states that the Act is intended to work alongside and in addition to the *Evidence Act 1995* (NSW).

20.50 Similarly, at the federal level, one option would be to enact a Commonwealth version of *Evidence (Children) Act* to incorporate existing provisions from Part IAD of the *Crimes Act 1914* (Cth) and any other provisions that should apply to children giving evidence in federal proceedings.

20.51 In DP 69, the Commissions did not propose that evidentiary provisions relating specifically to child witnesses be included in the uniform Evidence Acts. This view was based on a number of reasons.

- Existing evidentiary provisions relating specifically to child witnesses are closely linked with complex procedural issues and the use of technology—for example, video recording, CCTV and screens.<sup>60</sup> This may make the provisions more suitable for inclusion in an *Evidence (Children) Act* rather than in the uniform Evidence Acts.

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57 Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 November 1997, 2450 (B Langton—Minister for Transport and Minister for Tourism). See also Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), Ch 15.

58 *Evidence (Children) Act 1997* (NSW) Pt 3.

59 *Evidence Act 1995* (NSW) ss 165(6), 165A, 165B.

60 G Bellamy, *Consultation*, Canberra, 8 March 2005.

- Some evidentiary provisions concerning children's evidence are directed to proceedings in relation to specific offences (such as sexual offences). The inclusion of such provisions would be inconsistent with the Commissions' policy that the uniform Evidence Acts should be of general application.
- More pragmatically, any recommendation for the enactment of evidentiary provisions relating specifically to child witnesses would require the development of uniform provisions. While there may be more consistency in federal, state and territory laws concerning children's evidence than in rape shield laws, this is still a major project and beyond the resources and timetable of the current Inquiry.<sup>61</sup>

### The Commissions' view

20.52 In relation to children's evidence more generally, the Commissions' remain of the view that it is unnecessary for all provisions relating specifically to child witnesses to be included in the uniform Evidence Acts. Many of the existing provisions are closely linked with particular types of proceedings or complex procedural issues and it is considered in these cases that the provisions are more conveniently located in specific legislation dealing with procedural matters. As noted above in Chapter 2, the Commissions recommend that all Australian jurisdictions should work towards the harmonisation of provisions relating to issues such as children's evidence.<sup>62</sup> Whether this will result in provisions being placed in the uniform Evidence Acts or remaining in acts of specific application is a matter for future consideration.

### Family law proceedings

20.53 Family law proceedings raise a particular set of evidentiary concerns, notably in connection with evidence in children's cases. Evidence in family law proceedings before the Family Court of Australia is governed by both the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth).

20.54 The *Family Law Act* contains a number of important evidentiary provisions. Most significantly, s 100A provides that evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child is not inadmissible solely because of the law against hearsay. The *Family Law Act* also contains evidentiary provisions dealing with, among other things:

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61 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005), [18.55]–[18.58].

62 Recommendation 2–3.

- the admissibility of admissions made at a meeting or conference conducted by a family and child counsellor or court mediator;<sup>63</sup>
- the admissibility of admissions made by a person attending a post-separation parenting program;<sup>64</sup>
- the court's power requiring any person to give evidence material to the parentage of a child;<sup>65</sup>
- the competence and compellability of husbands and wives in proceedings under the Act;<sup>66</sup>
- children swearing affidavits, being called as witnesses or being present in court;<sup>67</sup>
- protecting witnesses from offensive or oppressive questioning;<sup>68</sup>
- means of proving birth, parentage, death or marriage;<sup>69</sup> and
- restrictions on the examination of children.<sup>70</sup>

20.55 As discussed above, s 8 of the *Evidence Act 1995* (Cth) ensures that these provisions are unaffected by the Act. In addition, s 111D of the *Family Law Act* states that regulations may provide for rules of evidence with effect, despite any inconsistency with the *Evidence Act 1995* (Cth), in proceedings dealing with property, spousal maintenance and maintenance agreements.

### Evidence and the paramouncy principle

20.56 One issue of contention concerning the relationship between the *Evidence Act 1995* (Cth) and the *Family Law Act* has been the extent to which the Family Court is bound by the rules of evidence in children's matters—especially in light of the 'paramouncy principle'. The paramouncy principle requires that the court treat the best interests of the child as the paramount consideration in deciding children's issues.<sup>71</sup>

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63 *Family Law Act 1975* (Cth) s 19N.

64 *Ibid* s 70NI.

65 *Ibid* s 69V.

66 *Ibid* s 100.

67 *Ibid* s 100B.

68 *Ibid* s 101.

69 *Ibid* s 102.

70 *Ibid* s 102A.

71 See G Watts, 'Is the Family Court Bound by the Rules of Evidence in Children Matters?' (1999) 13(4) *Australian Family Lawyer* 8.

20.57 A number of decisions prior to 1995 held that rules of evidence may be put aside if the welfare of the child was likely to be advanced by the admission of the evidence.<sup>72</sup> Some decisions limited this principle, noting that statutory provisions relating to evidence could not be overridden by concerns for the welfare of the child.<sup>73</sup>

20.58 Since these decisions, the enactment of comprehensive rules of evidence in the *Evidence Act 1995* (Cth) and amendments to the paramouncy provisions made by the *Family Law Reform Act 1995* (Cth) have changed the law and, arguably, left little room for the paramouncy principle to operate.<sup>74</sup> In particular, the *Family Law Reform Act 1995* has been said to have restricted the scope of the paramouncy principle. Rather than applying in general to children's matters, it now applies only to the decision about whether or not to make a particular parenting order.<sup>75</sup>

20.59 The High Court, in *Northern Territory v GPAO*, interpreted this restriction to mean that the paramouncy principle has no overriding effect on the rules of procedure and evidence, as these are not part of the 'ultimate issue' of deciding whether to make a particular parenting order.<sup>76</sup> McHugh and Callinan JJ stated that the paramouncy principle is to be applied when the evidence is complete and is 'not an injunction to disregard the rules concerning the production or admissibility of evidence'.<sup>77</sup> Kirby J, in dissent, queried how confining the operation of the principle to the 'ultimate issue' could accord with the need for a court to have all necessary and relevant evidence before it in order to make a decision based on the best interests of the child.<sup>78</sup>

20.60 In *CDJ v VAJ*,<sup>79</sup> the High Court again considered the application of the paramouncy principle—this time to the admission of further evidence on appeal before the Full Court of the Family Court. The judgments of the High Court in *CDJ v VAJ* are said to support the view that, even if the paramouncy principle does not apply expressly in statute, the child's best interests will remain a significant or 'powerful' consideration in judicial decisions.<sup>80</sup>

20.61 In December 2004, the Family Law Council released a discussion paper on the paramouncy principle. The Family Law Council discussion paper asks whether, taking account of the observations of the High Court in *CDJ v VAJ* and the differences of view in *Northern Territory v GPAO*, there are any decisions where the paramouncy

72 See, eg, *Hutchings v Clarke* (1993) 16 Fam LR 452.

73 See, eg, *Wakely v Hanns* (1993) 17 Fam LR 215.

74 R Chisholm, "'The Paramount Consideration': Children's Interests in Family Law" (2002) 16 *Australian Journal of Family Law* 87, 96.

75 *Ibid*, 109–110.

76 *Northern Territory v GPAO* (1999) 196 CLR 553.

77 *Ibid*, 629.

78 *Ibid*, 638–639.

79 *CDJ v VAJ (No 1)* (1998) 197 CLR 172.

80 Family Law Council, *The 'Child Paramouncy Principle' in the Family Law Act* (2004), 18.

principle: (a) does not currently apply but should be made to apply; or (b) currently does apply but should be made not to apply.<sup>81</sup>

20.62 The Family Law Council discussion paper also asks: (a) whether the law should be amended to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances; and (b) whether there are specific applications of the paramountcy principle where it would be appropriate to list other factors which should be considered while treating the best interests of the child as paramount.<sup>82</sup> At the time of writing, the Family Law Council was considering the submissions which would form the basis of their advice to the Attorney-General.<sup>83</sup>

20.63 The *Family Law Act* also contains a number of other provisions that can override the provisions of the *Evidence Act* (Cth).<sup>84</sup> These include:

- hearsay statements of a child about a welfare related matter;<sup>85</sup>
- the admissibility of admissions made at a meeting or conference conducted by a family and child counsellor or court mediator;<sup>86</sup>
- the court's power to require a person to give evidence about parentage;<sup>87</sup>
- the competence and compellability of spouses;<sup>88</sup>
- children swearing affidavits, testifying or being present in court;<sup>89</sup>
- protecting witnesses from offensive or oppressive questioning;<sup>90</sup>
- proving birth, parentage, death or marriage;<sup>91</sup> and
- restrictions on the physical and mental examination of children.<sup>92</sup>

### The Children's Cases Program

20.64 In March 2004, the Family Court commenced a pilot for a new Children's Cases Program (CCP), involving cases in the Sydney and Parramatta registries. The object of

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81 Ibid, 31, Q 1.

82 Ibid, 31, Qs 1, 2.

83 Family Law Council, *Submission E 77*, 13 September 2005.

84 By virtue of s 8 of the uniform Evidence Acts. See Ch 2.

85 *Family Law Act 1975* (Cth) s 100A.

86 Ibid s 19N.

87 Ibid s 69V.

88 Ibid s 100.

89 Ibid s 100B.

90 Ibid s 101.

91 Ibid s 102.

92 Ibid s 102A. See Family Court of Australia, *Submission E 80*, 16 September 2005.

the Program is to promote a movement towards a more permissive application of the rules of evidence.

20.65 Practice Directions state that all evidence is to be conditionally admitted and that the judge will determine the weight to be given to the evidence.<sup>93</sup> However, parties to cases in the CCP do not waive their right to appeal an order on the ground of inappropriate weight having been given to evidence.<sup>94</sup> No objections are to be taken to the evidence of a party or a witness, or the admission of documents, photographs, videos, tape recordings and so on, other than on the grounds of privilege, illegality or other such serious matters.<sup>95</sup>

20.66 The Family Court's brochure on the CCP explains that, for example, the judge can take 'hearsay' evidence into account in coming to a decision but that, if the hearsay relates to an important matter, the judge will usually require direct evidence.<sup>96</sup>

20.67 In March 2005, Paul Boers wrote that the private profession's response to the CCP has been 'mixed' and that waiver of the rules of evidence is the main source of concern.

There is a view that the Court's task is now more difficult. Instead of relying upon lawyers to draft affidavit material which complies with the rules of evidence, and then deal with objections, the judge now has to consider everything that is admitted and then decide whether: it is relevant; it is otherwise admissible under the remaining rules of evidence; it is reliable; and what weight should it be given?<sup>97</sup>

20.68 Under the proposed Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth),<sup>98</sup> a number of sections of the *Evidence Act 1995* (Cth) will not apply to 'child related' proceedings or (with the agreement of the parties) property and other matters. These reforms are aimed at providing a more conciliatory and less adversarial approach to the resolution of family disputes. The sections that will not apply include:

- Divisions 3, 4 and 5 of Part 2.1 (general rules about giving evidence, examination-in-chief, re-examination and cross-examination), other than ss 26, 30, 36 and 41 (questioning of witnesses, interpreters, examination of a person without a subpoena or other process, and improper questions);

<sup>93</sup> *Practice Direction No 2 of 2004: The Children's Cases Program* (Cth), [5.7].

<sup>94</sup> *Ibid*, [5.8].

<sup>95</sup> *Ibid*, [5.9].

<sup>96</sup> Family Court of Australia, *The Children's Cases Program: A New Way of Working with Parents and Others in Children's Cases* (2004), 5.

<sup>97</sup> P Boers, *The Less Adversarial Approach to Determining Children's Cases* (2005) FindLaw Australia <<http://www.findlaw.com.au/articles>> at 19 April 2005.

<sup>98</sup> At the time of writing, the Standing Committee on Legal and Constitutional Affairs had considered an exposure draft of the Bill. The Committee tabled its report entitled *Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* on Thursday 18 August 2005.

- Parts 2.2 and 2.3 (which deal with documents and other evidence, including demonstrations, experiments and inspections);
- Parts 3.2 to 3.8 (hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).<sup>99</sup>

20.69 However, the court will be able to apply one of more of these provisions if:

- the court considers it necessary in the best interests of a child or children concerned to do so where there is an issue relating to children's proceedings;<sup>100</sup>
- the court considers it necessary or expedient in all the circumstances to do so.<sup>101</sup>

20.70 The Standing Committee on Legal and Constitutional Affairs has noted concerns regarding the potential impact of no longer having the certainty of the rules of evidence in determining the admissibility and weight to be given to certain types of evidence. However, the Committee was overall supportive of the changes proposed by the Bill.<sup>102</sup>

### Submissions and consultations

20.71 The Family Law Council supports the Commissions' view that the evidentiary provisions to support less adversarial procedures in parenting cases are best placed in the *Family Law Act*. The Council noted that this has been the approach of the Australian Government to the proposed changes to the *Family Law Act*.<sup>103</sup>

20.72 The Family Court also agrees that the *Family Law Act* should remain the primary location for evidentiary provisions applicable to family law proceedings.

This is consistent with the policy position of the government and accords with the practical reality that the *Family Law Act* is where family law practitioners and the increasing number of unrepresented parties are likely to turn first to find relevant rules and procedures. It also reflects the specialist nature of the Court's work and the need for a level of flexibility and a degree of control over the application of the rules of procedure and evidence in the search for the 'best interests' solution.<sup>104</sup>

20.73 However, the Court noted that there are family law matters where, notwithstanding the proposal no longer to apply the rules of evidence, a strict

99 Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) s 60KG.

100 Under Pt VII of the *Family Law Act 1975* (Cth).

101 Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) s 60KG(2).

102 Standing Committee on Legal and Constitutional Affairs *Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005), [4.63]–[4.64].

103 Family Law Council, *Submission E 77*, 13 September 2005.

104 Family Court of Australia, *Submission E 80*, 16 September 2005.



application of the provisions of the *Evidence Act 1995* (Cth) will still be appropriate, such as cases involving allegations of child sexual assault or domestic violence.<sup>105</sup>

### The Commissions' view

20.74 The Commissions agree that the *Family Law Act* should remain the primary location for evidentiary provisions applicable to family law proceedings. This is bolstered by the Commissions' policy position that the uniform Evidence Acts should remain Acts of general application. The increasing trend towards less adversarial dispute resolution in family law matters means that there will be ongoing reform of family law processes and evidentiary issues. These policy decisions should be made outside of the rubric of the uniform Evidence Acts.

### Other evidentiary provisions

20.75 There are other evidentiary provisions contained in state and territory criminal procedures or evidence legislation which might be included in the uniform Evidence Acts.

20.76 For example, the *Criminal Procedure Act 1986* (NSW) contains provisions dealing with the admissibility of admissions by suspects in criminal proceedings. Section 281 of the *Criminal Procedure Act* provides that evidence of certain admissions made in the course of official questioning are not admissible unless a tape recording is available to the court, and that the hearsay rule and the opinion rule of the uniform Evidence Acts do not prevent the admission and use of such recordings. Other jurisdictions have similar provisions.<sup>106</sup>

20.77 The *Criminal Procedure Act* also contains detailed provisions dealing with the compellability of spouses to give evidence in certain proceedings,<sup>107</sup> evidentiary aspects of certain depositions and written statements,<sup>108</sup> sexual assault communications privilege,<sup>109</sup> and warnings to be given to juries in relation to lack of complaint in sexual offence proceedings.<sup>110</sup>

20.78 The *Evidence Act 2001* (Tas) also contains a range of provisions that are not present in either the Commonwealth or New South Wales legislation—although, in some instances, equivalent provisions may be found elsewhere in those jurisdictions' statute books. The additional Tasmanian provisions include those dealing with:

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105 Ibid.

106 For example, *Crimes Act 1914* (Cth) s 23V; *Crimes Act 1958* (Vic) s 464H.

107 *Criminal Procedure Act 1986* (NSW) s 279.

108 Ibid ss 284–289.

109 See Ch 15.

110 See Ch 18.

- procedures for proving certain matters, which are not provided for in the other uniform Evidence Acts;<sup>111</sup>
- the admissibility of depositions on one charge in the trial of another;<sup>112</sup>
- the production and use in evidence of certain depositions;<sup>113</sup> and
- the powers of a court or judge to order examination of witnesses on interrogatories or otherwise.<sup>114</sup>

20.79 The evidence legislation of other states or territories also contains other kinds of evidentiary provisions that might be incorporated in the uniform Evidence Acts. For example, Queensland, Western Australia and the Northern Territory all have evidence legislation which provides, in similar terms, for evidentiary certificates with respect to DNA evidence used in criminal proceedings.<sup>115</sup>

### The Commissions' view

20.80 Other than those mentioned elsewhere,<sup>116</sup> the Commissions received few other comments supporting the enactment in the uniform Evidence Acts of provisions already contained in state or territory criminal procedures or other legislation. Accordingly, the Commissions make no recommendation for change in this regard.

20.81 The Commissions remain mindful that such provisions should only be incorporated into the uniform Evidence Acts if uniformity can be achieved in their terms. Should a great number of non-uniform provisions be placed into the Acts, there is little incentive for jurisdictions to maintain uniformity on other existing provisions, and the overarching purpose of the Acts will be lost. In the interests of continued uniformity, Chapter 2 recommends that SCAG adopt an Intergovernmental Agreement providing for a procedure whereby proposed amendments to the uniform Evidence Acts in any particular jurisdiction must be considered and approved by SCAG before implementation.<sup>117</sup>

111 *Evidence Act 2001* (Tas) ss 177A–177D.

112 *Ibid* s 181A.

113 *Ibid* ss 194A–194B.

114 *Ibid* ss 194C–194I.

115 *Evidence Act 1977* (Qld) s 95A; *Evidence Act 1906* (WA) s 50B; *Evidence Act 1939* (NT) s 24.

116 For example, in relation to confidential communications privilege (see Ch 15); warnings in jury trials involving the evidence of child witnesses (see Ch 18); expert evidence in relation to the development and behaviour of children (see Ch 9).

117 Recommendation 2–2.

# Appendix 1: Selected Draft Provisions

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## Selected draft provisions

**Note:** These provisions relate to the *Evidence Act 1995* (Cth) and/or the *Evidence Act 1995* (NSW). Reference should be made to the discussion in the text to determine if a particular provision is jurisdiction specific.

### 13 Competence: lack of capacity

- (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

Note: The person may be competent to give unsworn evidence.

- (2) A person ~~who because of subsection (1) is not competent to give sworn evidence is competent to must not~~ give unsworn evidence if unless the court has told the person that it is important to tell the truth.
- (a) ~~the court is satisfied that the person understands the difference between the truth and a lie; and~~
- (e) ~~the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.~~
- (3) ~~A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts.~~
- (4) A person is not competent to give evidence (sworn or unsworn) about a fact if:
- (a) for any reason (including a physical disability) the person is incapable of hearing lacks the capacity to or understanding, or of communicating a reply to give an answer that can be understood to, a question about the fact; and

- (b) that incapacity cannot be overcome.

Note 1: The person may be competent to give evidence about other facts.

Note 2: See section 31 for deaf or mute witnesses.

- (5) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (6) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
- (7) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by information from a person who has relevant specialised knowledge based on the person's training, study or experience.

#### **14 Compellability: reduced capacity**

A person is not compellable to give evidence on a particular matter if the court is satisfied that:

- (a) substantial cost or delay would be incurred in ensuring that the person would be capable of ~~hearing or~~ understanding, or of ~~communicating replies giving an answer that can be understood~~ to, questions on that matter; and
- (b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

#### **29 Manner and form of questioning witnesses and their responses**

- (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
- (2) The court may, either of its own motion or on application, direct that a ~~A-witness may~~ give evidence wholly or partly in narrative form, ~~if:~~
- ~~(a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and~~
- ~~(b) the court so directs.~~
- (3) Such a direction may include directions about the way in which evidence is to be given in that form.
- (4) *not amended.*

## 41 Improper questions

- (1) The court ~~may~~must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if it is of the opinion that the question (referred to as a *disallowable question*) is:
  - (a) is misleading or confusing; or
  - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
  - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
  - (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.
- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
  - (a) any relevant condition or characteristic of the witness, including age, personality and education; and
  - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.
- (3) A question is not a disallowable question merely because:
  - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness; or
  - (b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness to the question.
- (7) A person must not, without the express permission of a court, print or publish a question that the court has disallowed under this section.

- (8) This section does not limit any other power of the court to give a direction in relation to a question or questioning.

Note: Sections 29 and 42 (among others) give the court power to control the questioning of witnesses.

## Chapter 3—Admissibility of evidence

### *INTRODUCTORY NOTE*

#### *Outline of this Chapter*

This Chapter is about whether evidence adduced in a proceeding is admissible.

Part 3.1 sets out the general inclusionary rule that relevant evidence is admissible.

Part 3.2 is about the exclusion of hearsay evidence, and exceptions to the hearsay rule.

Part 3.3 is about exclusion of opinion evidence, and exceptions to the opinion rule.

Part 3.4 is about admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule.

Part 3.5 is about exclusion of certain evidence of judgments and convictions.

Part 3.6 is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.

Part 3.7 is about exclusion of evidence relevant only to credibility, and exceptions to the credibility rule.

Part 3.8 is about character evidence and the extent to which it is admissible as exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

Part 3.9 is about the requirements that must be satisfied before identification evidence is admissible.

Part 3.10 is about the various categories of privilege that may prevent evidence being adduced.

Part 3.11 gives courts discretions to exclude evidence even ~~if~~ if it would otherwise be admissible.

More than one of these provisions may apply to particular evidence. For example, a witness may give evidence that her doctor told her that her child has contracted mumps. If adduced to prove that the child had mumps, that evidence would be hearsay (a report of what the doctor said: see section 59) and opinion (the doctor's opinion is that the child has mumps: see section 76). If, because of the application of some other provision of Part 3.2, the hearsay rule does not operate to exclude the evidence, the opinion rule may exclude it.

The following diagram shows how this Chapter applies to particular evidence:

*diagram not reproduced*

## 59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an *asserted fact*.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.
- (3) *not amended.*

Note:

Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60);
- first-hand hearsay:
  - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
  - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- contemporaneous statements about a person's health etc. (section ~~72~~66A);
- business records (section 69);
- tags and labels (section 70);
- ~~telecommunications~~electronic communications (section 71);
- Aboriginal and Torres Strait Islander traditional laws and customs (section 73A);
- marriage, family history or family relationships (section 73);
- public or general rights (section 74);
- use of evidence in interlocutory proceedings (section 75);
- admissions (section 81);
- representations about employment or authority (subsection 87(2));
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

*Examples: not amended*

## 60 Exception: evidence relevant for a non-hearsay purpose

- (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the asserted fact ~~intended to be asserted by the representation.~~

- (2) Subsection (1) applies whether or not the evidence is of a previous representation that was made by a person who had personal knowledge of an asserted fact.

Note 1 Subsection (2) overcomes the effect of the decision in *Lee v The Queen* (1998) 157 CLR 394 on the interpretation of section 60.

Note 2 Section 60 does not apply to evidence of an admission (see section 82).

## **61 Exceptions to the hearsay rule dependent on competency**

- (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it ~~was not competent to give evidence about the fact because he or she was incapable of giving a rational reply to a question about the fact~~ lacked the capacity, for any reason (including a physical disability) to understand, or to give an answer that can be understood to, a question about the fact.
- (2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note: For the admissibility of such contemporaneous representations, see section ~~72~~ 66A.

- (3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

## **64 Exception: civil proceedings if maker available**

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to:
- (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.



Note: Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- (a) that person; or
- (b) a person who saw, heard or otherwise perceived the representation being made;

~~if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.~~

- (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

## **65 Exception: criminal proceedings if maker not available**

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
  - (a) made under a duty to make that representation or to make representations of that kind; or
  - (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
  - (c) made in circumstances that make it highly probable that the representation is reliable; or
  - (d) against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation is reliable.

Note: Section 67 imposes notice requirements relating to this subsection.

(3) to (9) not amended

**66 Exception: criminal proceedings if maker available**

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
  - (a) that person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

- (2A) In determining whether the occurrence of an asserted fact was fresh in the memory of a person, the matters that the court may take into account, in addition to the period of time between the occurrence of the asserted fact and the making of the representation, include:
  - (a) the age and health of the person; and
  - (b) the nature of the event concerned.

Note: Subsection (2A) overcomes the effect of the decision in *Graham v The Queen* (1998) 195 CLR 606 on the interpretation of subsection (2).

(3) and (4) *not amended*

**66A Exception: contemporaneous statements about a person's health etc.**

The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

**71 Exception: ~~telecommunication~~ electronic communications**

The hearsay rule does not apply to a representation contained in a document recording ~~a message that has been transmitted by an electronic mail or by a fax, telegram, lettergram or telex communication~~ so far as the representation is a representation as to:

- (a) the identity of the person from whom or on whose behalf the ~~message communication~~ was sent; or

- (b) the date on which or the time at which the ~~message communication~~ was sent; or
- (c) the ~~message's~~ destination of the communication or the identity of the person to whom the ~~message communication~~ was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about ~~telexes, lettergrams and telegrams~~ electronic communications.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

**~~72 Exception: contemporaneous statements about a person's health etc.~~**

~~The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.~~

**73A Exception: Aboriginal and Torres Strait Islander traditional laws and customs**

The hearsay rule does not apply to a previous representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

**78A Exception: Aboriginal and Torres Strait Islander Persons**

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

**79 Exception: opinions based on specialised knowledge**

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:
  - (a) the development and behaviour of children generally;

- (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

## 82 Exclusion of evidence of admissions that is not first-hand

- (1) Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:
  - (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or
  - (b) it is a document in which the admission is made.
- (2) Section 60 does not apply in a criminal proceeding to evidence of an admission.

## 85 Criminal proceedings: reliability of admissions by defendants

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
  - (a) to or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence in the course of official questioning; or
  - (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) and (3) *not amended*

## 89 Evidence of silence

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
  - (a) to answer one or more questions; or
  - (b) to respond to a representation;

put or made to the party or other person by an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence person in the course of official questioning.

- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
- (4) In this section:  
*inference* includes:
  - (a) an inference of consciousness of guilt; or
  - (b) an inference relevant to a party's credibility.

## 98 The coincidence rule

- (1) Evidence that 2 or more ~~related~~ events occurred is not admissible to prove that, ~~because of the improbability of the events occurring coincidentally,~~ a person did a particular act or had a particular state of mind ~~if on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:~~
  - (a) the party adducing the evidence ~~has not given~~ gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; ~~or and~~
  - (b) the court thinks that the evidence ~~would not will~~, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.
- ~~(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:~~
  - ~~(a) they are substantially and relevantly similar; and~~
  - ~~(b) the circumstances in which they occurred are substantially similar.~~
- (3) Paragraph (1)(a) does not apply if:
  - (a) the evidence is adduced in accordance with any directions made by the court under section 100; or

- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

## Part 3.7—Credibility

### 101A Credibility evidence

A reference in this Part to evidence relevant to the credibility of a witness or other person is a reference to evidence that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant because it affects the assessment of the credibility of the witness or person and is relevant for some other purpose but is not admissible for, or cannot be used for, the other purpose because of a provision of Parts 3.2 to 3.6 inclusive.

Note: Sections 60 or 77 will not be relevant to the application of paragraph (b) because they cannot apply to evidence that is yet to be admitted.

### 102 The credibility rule

Evidence that is relevant ~~only~~ to a witness's credibility is not admissible.

Note 1: Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104);
- ~~evidence in response to unsworn statements (section 105);~~
- evidence in rebuttal of denials (section 106);
- evidence to re-establish credibility (section 108);
- evidence based on specialised knowledge (section 108AA);
- character of accused persons (section 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Note 2: Section 108A makes provision as to the admission of evidence that is relevant ~~only~~ to the credibility of a person who has made a previous representation.

### 103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence ~~has substantial probative value~~ could substantially affect the assessment of the credibility of the witness.
- (2) Without limiting the matters to which the court may have regard ~~in deciding whether the evidence has substantial probative value for the purposes of subsection (1),~~ it is to have regard to:

- (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

#### **104 Further protections: cross-examination of accused**

- (1) This section applies only in a criminal proceeding and ~~so~~ applies in addition to section 103.
- (2) A defendant must not be cross-examined about a matter ~~that is relevant only because it is relevant to the assessment of the defendant's credibility~~, unless the court gives leave.
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
  - (a) is biased or has a motive to be untruthful; or
  - (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or
  - (c) has made a prior inconsistent statement.
- (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) ~~about any matter that is relevant only because it is relevant to the defendant's credibility unless:~~
  - ~~(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or~~
  - ~~(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.~~
- (5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:
  - (a) the events in relation to which the defendant is being prosecuted; or
  - (b) the investigation of the offence for which the defendant is being prosecuted.

- (6) Leave is not to be given under subsection (2) for cross-examination by another defendant unless:
  - (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and
  - (b) that evidence has been admitted.

#### **105 ~~Further protections: defendants making unsworn statements~~**

- (1) ~~This section applies only in a criminal proceeding in which a defendant has, under a law of a State or Territory, made an unsworn statement.~~
- (2) ~~Evidence that is relevant only to the defendant's credibility may be adduced from a person other than the defendant if:~~
  - (a) ~~the evidence has substantial probative value; and~~
  - (b) ~~subsection (4) or (5) applies.~~
- (3) ~~Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:~~
  - (a) ~~whether the evidence tends to prove that the defendant knowingly or recklessly made a false representation when the defendant was under an obligation to tell the truth; and~~
  - (b) ~~the period that has elapsed since the acts or events to which the evidence relates were done or occurred.~~
- (4) ~~The evidence may be adduced if it is relevant to whether the defendant:~~
  - (a) ~~is biased or has a motive to be untruthful; or~~
  - (b) ~~is, or was, unable to be aware of or recall matters to which his or her statement relates; or~~
  - (c) ~~has made a prior inconsistent statement.~~
- (5) ~~The evidence may, if the court gives leave, be adduced if the defendant has:~~



- (a) ~~suggested in his or her statement that he or she is of good character, either generally or in a particular respect; or~~
- (b) ~~suggested in his or her statement that a witness called by the prosecutor has a tendency to be untruthful, and the suggestion is relevant solely or mainly to the witness's credibility.~~
- (6) A reference in paragraph (5)(b) to a suggestion by the defendant does not include a reference to a suggestion about conduct relating to:
  - (a) ~~the events in relation to which the defendant is being prosecuted; or~~
  - (b) ~~the investigation of the offence for which the defendant is being prosecuted.~~

~~Note: The NSW Act has no equivalent provision for section 105.~~

## 106 Exception: rebutting denials by other evidence

- (1) The credibility rule does not apply to evidence relevant to a witness's credibility adduced with the court's leave otherwise than from the witness if, in cross-examination of the witness that tends to prove that a witness:
  - (a) the substance of the evidence was put to the witness; and
  - (b) the witness denied the substance of the evidence or did not admit or agree to it.
- (2) Leave under subsection (1) is not required in relation to evidence that tends to prove that the witness:
  - (a) is biased or has a motive for being untruthful; or
  - (b) has been convicted of an offence, including an offence against the law of a foreign country; or
  - (c) has made a prior inconsistent statement; or
  - (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
  - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;.

~~if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.~~

**108 Exception: re-establishing credibility**

- (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.
- (2) ~~The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105, if the court gives leave to adduce that evidence.~~
- (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
  - (a) evidence of a prior inconsistent statement of the witness has been admitted; or
  - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement.

**108AA Exception: evidence of persons with specialised knowledge etc**

- (1) If a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that:
  - (a) is wholly or substantially based on that knowledge; and
  - (b) could substantially affect the assessment of the credibility of a witness; and
  - (c) is adduced with the court's leave.
- (2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:
  - (a) the development and behaviour of children generally;
  - (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

**108A Admissibility of evidence of credibility of person who has made a previous representation**

(1) If:

- (a) ~~because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and~~
- ~~(b)~~ evidence of ~~the~~ a previous representation has been admitted; and
- (eb) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding;

evidence that is relevant ~~only~~ to the credibility of the person who made the representation is not admissible unless the evidence ~~has substantial probative value~~ could substantially affect the assessment of the credibility of the person.

(2) Without limiting the matters to which the court may have regard ~~in deciding whether the evidence has substantial probative value~~ for the purposes of subsection (1), it is to have regard to:

- (a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and
- (b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

(3) If, in a criminal proceeding, a previous representation of a defendant is admitted and the defendant has not been called, and will not be called, to give evidence in the proceeding, evidence that is relevant to the credibility of the defendant is not admissible unless the evidence could substantially affect the credibility of the defendant and the court gives leave.

(4) Despite subsection (3), leave is not required for evidence relevant to the credibility of the defendant in relation to whether the defendant:

- (a) is biased or has a motive to be untruthful; or
- (b) is or was unable to be aware of or recall matters to which his or her previous representation relates; or
- (c) has made a prior inconsistent statement.

- (5) The prosecution must not be given leave under subsection (3) unless evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.
- (6) A reference in paragraph (5) to evidence does not include a reference to evidence of conduct in relation to:
  - (a) the events in relation to which the defendant is being prosecuted; or
  - (b) the investigation of the offence for which the defendant is being prosecuted.
- (7) Leave is not to be given to another defendant under subsection (3) unless the previous representation of the defendant which has been admitted includes evidence adverse to the defendant seeking leave.

### **110 Evidence about character of accused persons**

- (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.
- (2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.
- (3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.
- (4) ~~A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.~~

~~Note: Subsection (4) is not included in section 110 of the NSW Act.~~

## 112 Leave required to cross-examine about character of accused or co-accused

A defendant ~~is not to be~~ must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

## 117 Definitions

- (1) In this Division:

**client** includes the following:

- (a) ~~an employer (not being a lawyer) of a lawyer a person who engages a lawyer to provide professional legal services, or who employs a lawyer to provide professional legal services (including under a contract of service);~~  
engages a lawyer to provide professional legal services, or who employs a lawyer to provide professional legal services (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is:
  - (i) the Commonwealth or a State or Territory; or
  - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

**confidential communication** *not amended.*

**confidential document** *not amended.*

**lawyer** *not amended.*

**party** *not amended*

- (2) *not amended.*

## 118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, ~~or a lawyer~~ or another person;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

## 122 Loss of client legal privilege: consent and related matters

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (4), this Division does not prevent the adducing of evidence if the client or party has acted in a way that is inconsistent with its relying on section 118, 119 or 120 in relation to the evidence.
- (3) Without limiting subsection (2), a client or party is taken to have so acted if:
  - (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- ~~(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:~~
  - ~~(a) in the course of making a confidential communication or preparing a confidential document; or~~
  - ~~(b) as a result of duress or deception; or~~
  - ~~(c) under compulsion of law; or~~
  - ~~(d) if the client or party is a body established by, or a person holding office under, an Australian law to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.~~

- (3A) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.
- (3) ~~Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.~~
- (4) A client or party is not taken to have acted in a manner inconsistent with its relying on section 118, 119 or 120 in relation to particular evidence merely because:
- (a) the substance of the evidence has been disclosed:
    - (i) in the course of making a confidential communication or preparing a confidential document; or
    - (ii) as a result of duress or deception; or
    - (iii) under compulsion of law; or
    - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held; or
  - (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
  - (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (4) ~~Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:~~
- (a) ~~a lawyer acting for the client or party; or~~
  - (b) ~~if the client or party is a body established by, or a person holding an office under, an Australian law—the Minister, or the Minister of the State or Territory, administering the law, or the~~

part of the law, under which the body is established or the office is held.

(5) Subsections (2) and (4) do not apply to:

- (a) ~~a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or~~
- (b) ~~a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.~~

(6) *not amended.*

## **Division 1A—Professional confidential relationship privilege**

### **126A Definitions**

(1) In this Division:

***harm*** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

***protected confidence*** means a communication made by a person in confidence to another person (in this Division called the ***confidant***):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

***protected confider*** means a person who made a protected confidence.

***protected identity information*** means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.



**126B Exclusion of evidence of protected confidences**

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
  - (a) a protected confidence; or
  - (b) the contents of a document recording a protected confidence; or
  - (c) protected identity information.
- (2) The court may give such a direction:
  - (a) on its own initiative; or
  - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
  - (a) the probative value of the evidence in the proceeding;
  - (b) the importance of the evidence in the proceeding;
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or

extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;

- (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;
  - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.
- (4A) In a proceeding under the *Family Law Act 1975* (Cth), the court must regard the best interests of the child as the paramount consideration in determining whether to give a direction under this section.
- (5) The court must state its reasons for giving or refusing to give a direction under this section.

### **126C Loss of professional confidential relationship privilege: consent**

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

### **126D Loss of professional confidential relationship privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
  - (a) the fraud, offence or act was committed; and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

### **126E Ancillary orders**

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera; and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

### **126F Application of Division**

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.
- (2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.
- (3) This Division does not apply to a protected confidence within the meaning of Division 1B.
- (4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

Note: The NSW Act includes section 126F(3).

## **Division 1B—Sexual assault communications privilege**

### **126G Interpretation**

#### **Definitions**

- (1) In this Division:

***harm*** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

***preliminary criminal proceeding*** means any of the following:

- (a) a committal proceeding;
- (b) a proceeding relating to bail (including a proceeding during the trial or sentencing of a person);

whether or not in relation to a sexual assault offence.

***principal protected confider*** means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made.

**protected confidence** is defined in section 126H.

**protected confider**, in relation to a protected confidence, means:

- (a) the principal protected confider; or
- (b) any other person who made the protected confidence.

**sexual assault offence** means:

- (a) an offence referred to in section 15Y of the *Crimes Act 1914* (Cth); or
- (b) an offence (including an offence against a law of a State or Territory) prescribed by the regulations for the purposes of this definition.

**Document recording a protected confidence**

- (2) In this Division, a reference to a document recording a protected confidence:
  - (a) is a reference to any part of the document that records a protected confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence made by a protected confider; and
  - (b) includes a reference to a copy, reproduction or duplicate of that part of the document.

**Electronic documents**

- (3) For the purposes of this Division, if a document recording a protected confidence is stored electronically and a written document recording the protected confidence could be created by use of equipment that is usually available for retrieving or collating such stored information, the document stored electronically is to be dealt with as if it were a written document so created.

**126H What is a protected confidence?**

- (1) In this Division:

**protected confidence** means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence.

- (2) A counselling communication is a protected confidence for the purposes of this Division even if it:

- (a) was made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred; or
  - (b) was not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence.
- (3) For the purposes of this section, a communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication or to otherwise further the counselling process.
- (4) In this section:  
  
**counselling communication** means a communication:
  - (a) made in confidence by a person (the **counselled person**) to another person (the **counsellor**) who is counselling the person in relation to any harm the person may have suffered; or
  - (b) made in confidence to or about the counselled person by the counsellor in the course of that counselling; or
  - (c) made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process; or
  - (d) made in confidence by or to the counsellor, by or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.
- (5) For the purposes of this section, a person **counsels** another person if:
  - (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and
  - (b) the person:
    - (i) listens to and gives verbal or other support or encouragement to the other person; or
    - (ii) advises, gives therapy to or treats the other person,  
whether or not for fee or reward.

**126I Evidence of sexual assault communications not to be required to be produced, or adduced in or in connection with, preliminary criminal proceedings**

- (1) A person cannot be required (whether by subpoena or any other procedure) to produce a document recording a protected confidence in, or in connection with, any preliminary criminal proceedings.
- (2) Evidence is not to be adduced in any preliminary criminal proceedings if it would disclose:
  - (a) a protected confidence; or
  - (b) the contents of a document recording a protected confidence.

**126J Evidence of sexual assault communications may be required to be produced in, or in connection with, proceedings, or adduced, with leave**

- (1) A person who objects to production of a document recording a protected confidence on the ground that it is privileged under this Division cannot be required (whether by subpoena or any other procedure) to produce the document for inspection by a party in, or in connection with, a proceeding unless:
  - (a) the document is first produced for inspection by the court for the purposes of ruling on the objection; and
  - (b) the court is satisfied (whether on inspection of the document or at some later stage in the proceeding) that:
    - (i) the contents of the document will, either by themselves or having regard to other evidence adduced or to be adduced by the party seeking production of the document, have substantial probative value; and
    - (ii) other evidence of the protected confidence or the contents of the document is not available; and
    - (iii) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in allowing inspection of the document.
- (2) Without limiting the matters that the court may take into account for the purposes of subparagraph (1)(b)(iii), the court must take into account the likelihood, and the nature or extent, of harm that would be

caused to the principal protected confider if the document is produced for inspection.

(3) Evidence is not to be adduced in a proceeding if it would disclose:

(a) a protected confidence; or

(b) the contents of a document recording a protected confidence;

unless the court gives leave to adduce the evidence.

(4) The court must not give leave to adduce evidence that discloses a protected confidence or the contents of a document recording a protected confidence unless the court is satisfied that:

(a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value; and

(b) other evidence of the protected confidence or the contents of the document recording the protected confidence is not available; and

(c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value.

(5) Without limiting the matters that the court may take into account for the purposes of paragraph (4)(c), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the evidence that discloses the protected confidence or the contents of the document recording the protected confidence is adduced.

(6) The court must state its reasons for requiring production or giving or refusing to give leave under this section.

(7) A protected confider who is not a party to the relevant proceedings may, with the leave of the court, appear in the proceeding.

(8) If there is a jury, the court is to hear and determine any objection or application referred to in subsection (1) or (3) in the absence of the jury.

**126K Notice required before evidence is produced for inspection or adduced**

- (1) A document recording a protected confidence is not to be required to be produced for inspection by a party in, or in connection with, a proceeding unless the party seeking production of the document has given reasonable notice in writing that production has been sought to:
  - (a) each other party; and
  - (b) if the protected confider is not a party—the protected confider.
- (2) Evidence disclosing a protected confidence or the contents of a document recording a protected confidence is not to be adduced in a proceeding unless the party adducing the evidence has given reasonable notice in writing of the party's intention to adduce the evidence to:
  - (a) each other party; and
  - (b) if the protected confider is not a party—the protected confider.
- (3) Notice given under this section to a protected confider who is not a party must:
  - (a) advise the protected confider that he or she may, with the leave of the court, appear in the proceedings concerned; and
  - (b) in the case of notice given under paragraph (1)(b)—advise the protected confider of the day on which the document is (by the subpoena or other procedure concerned) to be produced; and
  - (c) in the case of notice given under paragraph (2)(b)—advise the protected confider of the day (if known) when the proceedings are to be heard.
- (4) In a criminal proceeding, it is sufficient compliance with a requirement under paragraph (1)(b) or (2)(b) to give notice to a protected confider who is not a party and who is the principal protected confider if the party gives reasonable notice that the party has sought production, or of the party's intention to adduce the evidence, to the informant and the informant gives, or uses the informant's best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice.
- (5) Despite subsections (1) and (2), a document recording a protected confidence may, with the leave of the court, be required to be produced for inspection, or evidence disclosing a protected confidence



or the contents of a document recording a protected confidence adduced, although notice has not been given to a protected confider who is not a party (not being the principal protected confider) as required by those subsections.

(6) In this section:

*informant*, in relation to a criminal proceeding with respect to an offence, means any of:

- (a) the police officer who instituted the proceeding;
- (b) the officer within the meaning of the *Public Service Act 1999* (Cth) who instituted the proceeding;
- (c) the Director of Public Prosecutions.

### **126L Effect of consent**

- (1) This Division does not prevent the production of any document recording a protected confidence or the adducing of evidence disclosing a protected confidence or the contents of a document recording a protected confidence in, or in connection with, a proceeding if the principal protected confider to whom the proceeding relates has consented to the production of the document or adducing of the evidence.
- (2) Consent is not effective for the purposes of this section unless:
  - (a) the consent is given in writing; and
  - (b) the consent expressly relates to the production of a document or adducing of evidence that is privileged under this Division or would be so privileged except for a limitation or restriction imposed by this Division.

### **126M Loss of sexual assault communications privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of a communication made, or the production or adducing of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
  - (a) the fraud, offence or act was committed, and

- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

### **126N Ancillary orders**

- (1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:
- (a) order that all or part of the evidence be heard or document produced in camera; and
  - (b) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider; and
  - (c) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of any protected confider; and
  - (d) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.

- (2) In this section:

**protected identity information** means information about, or enabling a person to ascertain, the private, business or official address, email address or telephone number of a protected confider.

### **128 Privilege in respect of self-incrimination in other proceedings**

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
  - (b) is liable to a civil penalty.
- (1A) The court must determine whether there are reasonable grounds for the objection.

- (2) ~~Subject to subsection (5), if~~ If the court ~~finds~~ determines that there are reasonable grounds for the objection, the court ~~is not to require the witness to give that particular evidence, and~~ is to inform the witness:
- (a) ~~that he or she~~ the witness need not give the evidence unless the court requires the witness to do so under subsection (5); and
  - (b) ~~that, if he or she~~ the witness gives the evidence (including because of a requirement under subsection (5)), the court will give a certificate under this section; and
  - (c) of the effect of such a certificate.
- ~~(3) If the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.~~
- (4) The court is also to cause a witness to be given a certificate under this section if:
- ~~(a) the objection has been overruled; and~~
  - ~~(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.~~
- (5) If the witness does not give the evidence but the court is satisfied that:
- ~~(a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and~~
  - (ba) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
  - (eb) the interests of justice require that the witness give the evidence;
- the court may require the witness to give the evidence.
- (5A) If the witness gives the evidence (including because of a requirement under subsection (5)), the court is to cause the witness to be given a certificate under this section in respect of the evidence.
- (5B) The court is also to cause a witness to be given a certificate under this section if:
- (a) the objection has been overruled; and

- (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (6) ~~If the court so requires, it is to cause the witness to be given a certificate under this section in respect of the evidence.~~
- (7) *not amended.*
- (7A) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the offence or an offence arising out of the same facts.
- (8) to (13) *not amended*

### **Part 3.11—Discretions to exclude evidence Discretionary and mandatory exclusions**

#### **161 ~~Telexes~~ Electronic communications**

- (1) If a document purports to contain a record of ~~a message transmitted by telex~~ an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the ~~message communication~~:
  - (a) ~~was so transmitted~~ sent or made as appears from the document; and
  - (b) ~~was sent or made by or on behalf of the person from by whom or on whose behalf it purports appears from the document to have been sent or made~~; and
  - (c) ~~was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made it purports to have been sent~~; and
  - (d) ~~was received at the destination to which it purports appears from the document to have been sent~~; and
  - (e) if it appears from the document that the sending of the communication concluded at a particular time—was so received at that destination at that time—at the time at which its transmission to that destination was concluded.
- (2) ~~This section~~ A provision of subsection (1) does not apply if:
  - (a) the proceeding relates to a contract; and

- (b) all the parties to the proceeding are parties to the contract; and
- (c) ~~subsection (1)~~ the provision is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

### **165A Warnings in relation to children's evidence**

- (1) A judge in proceedings in which evidence is given by a child before a jury must not do any of the following:
  - (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
  - (b) give a warning about the reliability of the evidence of the child solely on account of the age of the child;
  - (c) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a child witness.
- (2) Subsection (1) does not prevent the judge from:
  - (a) warning or informing the jury that the evidence of the particular child may be unreliable because of the child's age; and
  - (b) warning the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.
- (3) The judge must not give a warning, or inform the jury, as mentioned in subsection (2) unless:
  - (a) a party has requested the judge to do so; and
  - (b) the judge is satisfied that there are circumstances particular to the child that affect the reliability of the child's evidence and that warrant giving a warning or the information.
- (4) The court is not to be satisfied that there are circumstances particular to the child as mentioned in paragraph (3)(b) merely on the basis of the child's age.
- (5) This section does not by implication affect any other power of a judge to give a warning to, or to inform, the jury.

**165B Delay in prosecution**

- (1) This section applies in a criminal proceeding where there is a jury.
- (2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account.
- (3) For the purposes of this section, delay includes delay between the alleged offence and its being reported but the mere lapse of time is not to be regarded as a significant forensic disadvantage for the purposes of subsection (2).
- (4) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (5) It is not necessary that a particular form of words be used in giving the warning or information, but the judge must not suggest to the jury that it would be dangerous to convict the defendant because of the delay.
- (6) The judge may not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect a power of the judge to give any other warning to, or otherwise to inform, the jury.

**192A Advance rulings and findings**

Where a question arises in a proceeding, being a question about:

- (a) the admissibility of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced;

the court may, if it thinks appropriate, give a ruling or make a finding in relation to the question before the evidence is adduced.

## Dictionary

### Section 3

#### Part 1—Definitions

~~de facto partner spouse~~ is defined in clause 7A of Part 2 of this Dictionary.

- (a) ~~of a man, means a woman who is living with the man as his wife on a genuine domestic basis although not married to him; and~~
- (b) ~~of a woman, means a man who is living with the woman as her husband on a genuine domestic basis although not married to her.~~

electronic communication means:

- (a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or
- (b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

~~fax~~, in relation to a document, ~~means a copy of the document that has been reproduced by facsimile telegraphy.~~

lawyer means a ~~barrister or solicitor~~ person admitted to the legal profession in an Australian jurisdiction or in any other jurisdiction.

traditional laws and customs, in relation to an Aboriginal or Torres Strait Islander group (including a kinship group), includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

#### Part 2—Other expressions

##### 4 Unavailability of persons

- (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:
  - (a) the person is dead; or

- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or
  - (ba) the person is mentally or physically unable to give evidence about the fact and the inability cannot reasonably be overcome; or
  - (c) it would be unlawful for the person to give evidence about the fact; or
  - (d) a provision of this Act prohibits the evidence being given; or
  - (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
  - (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- (2) In all other cases the person is taken to be available to give evidence about the fact.

### **7A References to de facto partners**<sup>1</sup>

- (1) A reference in this Act to a *de facto partner* means a person in a relationship as a couple with another person to whom he or she is not married.
- (2) For the purpose of determining whether a relationship between 2 persons is a relationship as a couple, the matters that the court may take into account include:
  - (a) the duration of the relationship;
  - (b) the extent to which the persons have a mutual commitment to a shared life; and
  - (c) the reputation and public aspects of the relationship.

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<sup>1</sup> Note that in ss 18 and 20 the term 'de facto spouse' is to be replaced with the term 'de facto partner'. (This footnote is explanatory only and is not intended to be included in any amendment to the uniform Evidence Acts.)



## Selected draft provisions: *Evidence Act 1995* (NSW) only

### 128 Privilege in respect of self-incrimination in other proceedings

...

(7) In any proceeding in a NSW court:

- (a) evidence given by a person in respect of which a certificate under this section has been given, and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note: This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an “Australian Court” instead of a “NSW court”.

(7A) In subsection (7):

**NSW court means:**

- (a) a NSW court; and
- (b) a person or body authorised by a NSW law, or by consent of the parties, to hear, receive and examine evidence.

## Dictionary

### Section 3

#### Part 1 Definitions

NSW court means:

- (a) the Supreme Court, or
- (b) any other court created by Parliament,

~~(including such a court exercising federal jurisdiction)~~ and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

Note: The Commonwealth Act does not include this definition.

## Appendix 2. List of Submissions

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<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Action Group into the Law Enforcement Implications of Electronic Commerce	E93	16 September 2005
Associate Professor K Arenson	E67	13 September 2005
Australian Government Attorney-General's Department	E117	5 October 2005
A Au	E83	16 September 2005
Australian Broadcasting Corporation	E112	30 September 2005
Australian Customs Service	E24	21 February 2005
Australian Dental Association (Vic Branch)	E124	16 September 2005
Australian Federal Police	E92	20 September 2005
Australian Government Solicitor	E28	18 February 2005
Australian Government Solicitor	E65	29 August 2005
Australian Government Solicitor	E94	16 September 2005
Australian Government Solicitor	E118	6 October 2005
Australian Government Treasury	E120	7 October 2005
Australian Institute of Mining and Metallurgy	E38	21 December 2004
Australian Medical Association (Vic)	E129	30 September 2005
Australian Naturopathic Practitioners Association	E121	14 September 2005
Australian Nursing Federation (Vic Branch)	E125	19 September 2005
Australian Press Council	E58	17 August 2005
Australian Subscription Television & Radio Association	E112	30 September 2005
Australian Securities & Investments Commission	E33	7 March 2005
Australian Securities & Investments Commission	E97	20 September 2005
Professor M Bagaric	E55	19 July 2005
T Beregi	E79	16 September 2005
A Blackburn	E85	16 September 2005
K Burns	E21	18 February 2005
M Buss	E90	18 September 2005

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Christian Science Committee on Publication Federal Representative for Australia	E81	15 September 2005
Civil Liberties Australia (ACT)	E109	16 September 2005
Clayton Utz	E20	17 February 2005
Commercial Bar Association of the Victorian Bar	E37	March 2005
Commercial Radio Australia	E112	30 September 2005
Committee of the Council of Chief Justices of Australia and New Zealand	E52	22 April 2005
Commonwealth Director of Public Prosecutions	E108	16 September 2005
Confidential	E4	3 September 2004
Confidential	E5	6 September 2004
Confidential	E31	22 February 2005
Confidential	E49	27 April 2005
Confidential	E51	22 April 2005
Confidential	E63	29 August 2005
Corrs Chambers Westgarth on behalf of News Limited et al	E112	30 September 2005
CPA Australia and Institute of Chartered Accountants in Australia	E27	23 February 2005
CPA Australia and Institute of Chartered Accountants in Australia	E96	22 September 2005
Criminal Bar Association of Victoria	E114	22 September 2005
Criminal Law Committee of the Law Society of South Australia	E35	7 March 2005
Criminal Law Committee and the Litigation Law and Practice Committee of the Law Society of New South Wales	E103	22 September 2005
A Davidson	E7	20 December 2004
Eastern and Central Sexual Assault Service (Sydney)	E61	24 August 2005
G Edmond	E78	15 September 2005
John Fairfax Holdings Limited	E112	30 September 2005
Family Court of Australia	E80	16 September 2005
Family Law Council	E77	13 September 2005
Family Mediation Centre	E128	23 September 2005
Free TV Australia Ltd	E112	30 September 2005
Justice R French	E3	8 October 2004

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Justice R French	E119	6 October 2005
J Gans	E59	18 August 2005
S Gardner	E18	17 February 2005
E Geraghty	E68	15 September 2005
N Grati	E73	15 September 2005
P Greenwood	E47	11 March 2005
Justice K Handley	E62	26 August 2005
K Hanscombe	E46	29 March 2005
T Harcourt	E66	31 August 2005
A Hogan	E1	16 August 2004
M Hoyne	E42	21 March 2005
A Hughes	E76	27 September 2005
Intellectual Disability Rights Service	E101	23 September 2005
J Kakos	E41	10 March 2005
ES Kerkyasharian	E15	4 February 2005
H Kharbanda	E30	23 February 2005
Justice M Kirby	E44	16 March 2005
A Kirkham	E36	3 March 2005
M Kollington	E56	1 December 2004
Law Council of Australia	E32	4 March 2005
Law Institute of Victoria	E116	27 September 2005
Law Society of South Australia	E69	15 September 2005
Legal Services Commission of South Australia	E29	22 February 2005
M Leong	E72	27 September 2005
Justice K Lindgren (on behalf of a Committee of the Council of Chief Justices of Australia and New Zealand)	E75	14 September 2005
Justice K Lindgren	E102	23 September 2005
Professor K Mack	E82	16 September 2005
Magistrates' Court of Victoria	E127	22 September 2005
B Marchione	E11	17 January 2005
J Martin	E84	16 September 2005
B May	E91	19 September 2005
Media Entertainment and Arts Alliance	E64	30 August 2005
L McGrath	E10	7 January 2005

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L McGrath	E70	15 September 2005
K McIntosh	E74	15 September 2005
Justice G Mullane	E53	10 May 2005
New South Wales Attorney General's Department Criminal Law Review Division	E95	21 September 2005
New South Wales Deputy Ombudsman	E25	16 February 2005
New South Wales Disability Discrimination Legal Centre	E98	22 September 2005
New South Wales District Court Judges	E26	22 February 2005
New South Wales Health Department Child Protection and Violence Prevention Unit	E23	21 February 2005
New South Wales Ombudsman	E13	27 January 2005
New South Wales Public Defenders Office	E50	21 April 2005
New South Wales Public Defenders Office	E89	19 September 2005
New South Wales Young Lawyers Civil Litigation Committee	E34	7 March 2005
News Limited	E112	30 September 2005
C Nolan	E86	16 September 2005
C O'Donnell	E2	26 December 2004
C O'Donnell	E9	2 September 2004
C O'Donnell	E60	20 August 2005
Office of the Director of Public Prosecutions (NSW)	E17	15 February 2005
Office of the Director of Public Prosecutions (NSW)	E87	16 September 2005
Office of the Victorian Privacy Commissioner	E115	30 September 2005
Optometrists Association Australia (Vic Division)	E39	9 December 2004
Magistrate J Orchiston	E48	12 April 2005
Pharmaceutical Society of Australia Ltd (Vic Branch)	E123	30 September 2005
J Phibbs	E100	19 September 2005
Police Integrity Commission	E99	16 September 2005
R Rana	E8	22 December 2004
Records Management Association of Australasia	E122	9 September 2005
Relationships Australia (Vic)	E126	19 September 2005

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Rights Australia Inc	E45	24 March 2005
Rosemount Youth and Family Services	E107	15 September 2005
D Ross	E57	20 July 2005
R Shackel	E105	27 September 2005
Justice T Smith	E6	16 September 2004
Justice T Smith	E12	20 January 2005
Special Broadcasting Service	E112	30 September 2005
The Hon H Sperling QC	E54	11 July 2005
State of South Australia	E19	16 February 2005
Professor D Thomson	E130	8 September 2005
K Turcotte	E106	27 September 2005
I Turnbull	E43	23 March 2005
Victoria Legal Aid	E22	18 February 2005
Victoria Legal Aid	E113	30 September 2005
Victoria Police	E111	30 September 2005
P Waight	E104	16 September 2005
M Wellham	E71	15 September 2005
Professor C Williams	E14	3 February 2005
Women's Legal Services (NSW)	E40	24 March 2005
Women's Legal Services Victoria	E110	30 September 2005
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	E16	9 February 2005
C Ying	E88	16 September 2005





## Appendix 3. List of Consultations

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<i><b>Name</b></i>	<i><b>Location</b></i>
Magistrate Bob Abood, Local Court of New South Wales	Sydney
Aboriginal Interpreter Service (Northern Territory)	Darwin
ACT Bar Association	Canberra
Mr John Adams QC, Office of the Director of Public Prosecutions Northern Territory	Darwin
Judge Ann Ainslie-Wallace, District Court of New South Wales	Sydney
The Hon Austin Asche AC QC, Northern Territory Law Reform Committee	Darwin
Professor Hilary Astor, University of Sydney	Sydney
Justice Roslyn Atkinson, Supreme Court of Queensland	Brisbane
Attorney-General's Department of South Australia	Adelaide
Attorney-General's Department of Western Australian	Perth
Justice Robert Austin, Supreme Court of New South Wales	Sydney
Australian Government Attorney-General's Department	Canberra
Australian Government Solicitor	Canberra
Associate Professor Peter Bayne, Australian National University	Canberra
Mr Geoff Bellamy	Canberra
Mr David Bennett QC, Solicitor-General for the Commonwealth	Sydney
Mr Peter Biscoe QC, New South Wales Bar	Sydney
Ms Gillian Braddock SC, Western Australian Bar Association	Perth
Judge Sarah Bradley, District Court of Queensland	Cairns
Mr Grant Brady, New South Wales Bar	Sydney
Justice Catherine Branson, Federal Court of Australia	Sydney
Ms Sonia Brownhill, Office of Solicitor-General of the Northern Territory	Darwin
Mr Richard Bruxner, Northern Territory Law Reform Committee	Darwin

Mr Damien Bugg QC, Office of the Commonwealth Director of Public Prosecutions	Canberra
Justice John Byrne, Supreme Court of Queensland	Brisbane
Cape York Land Council	Cairns
Ms Robyn Carroll, University of Western Australia	Perth
Judge Jennifer Coate, Children's Court of Victoria	Melbourne
Mr Darryl Coates SC, Office of the Director of Public Prosecutions (Tasmania)	Hobart
Justice David Collier, Family Court of Australia	Sydney
Justice Terence Connolly, Supreme Court of the ACT	Canberra
Dr Annie Cossins, University of New South Wales	Sydney
Ms Susan Cox QC, Northern Territory Legal Aid Commission	Darwin
Mr Brian Devereaux, Legal Aid Queensland	Brisbane
Mr Brian Donovan QC, New South Wales Bar (now Judge Donovan)	Sydney
Justice James Douglas, Supreme Court of Queensland	Brisbane
Justice John Dowsett, Federal Court of Australia	Brisbane
Mr John Ebert, Australian Taxation Office	Sydney
Justice Clifford Einstein, Supreme Court of New South Wales	Sydney
Mr Stephen Finch SC, New South Wales Bar	Sydney
Dr Ian Freckelton, Victorian Bar	Melbourne
Justice Robert French, Federal Court of Australia	Perth
Mr Tim Game SC, New South Wales Bar	Sydney
Dr Jeremy Gans, University of Melbourne	Melbourne
Magistrate James Garbett, Local Court of New South Wales	Sydney
Justice Malcom Gray, Supreme Court of the ACT	Canberra
Mr Phillip Greenwood SC, New South Wales Bar	Sydney
Justice Thomas Grey, Supreme Court of South Australia	Adelaide
Judge M Griffin SC, District Court of Queensland	Brisbane
Master David Harper, Supreme Court of the ACT	Canberra
Dr Maria Harries, University of Western Australia	Perth

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Justice Peter Heerey, Federal Court of Australia	Melbourne
Ms Terese Henning, University of Tasmania; Tasmania Law Reform Institute	Hobart
Mr Charles Heunemann, Managing Director, SurfControl	Sydney
Chief Justice Terence Higgins, Supreme Court of the ACT	Canberra
Mr Graham Hiley QC, Queensland Bar Association	Brisbane
Mr John Hockley, Western Australian Bar	Perth
Mr Paul Holdenson QC, Victorian Bar	Melbourne
Ms Robyn Holder, Victims Support Australasia	Sydney
Justice Cate Holmes, Supreme Court of Queensland	Brisbane
Justice Roderick Howie, Supreme Court of New South Wales	Sydney
Mr Tom Howe, Australian Government Solicitor	Canberra
Human Rights and Equal Opportunity Commission	Sydney
Associate Professor Jill Hunter, University of New South Wales	Sydney
Chief Magistrate Marshall Irwin, Magistrates Court of Queensland	Brisbane
Mrs Sheryl Jackson, Queensland University of Technology	Brisbane
Mr Mark Johnson, Northern Territory Bar	Darwin
Justice Susan Kenny, Federal Court of Australia	Melbourne
Justice Susan Kiefel, Federal Court of Australia	Brisbane
Professor Michael Lavarch, Dean, Queensland University of Technology	Brisbane
Law Institute of Victoria	Melbourne
Law Reform Commission of Western Australia	Perth
Law Society of New South Wales	Sydney
Law Society of New South Wales, Litigation Law and Practice Committee	Sydney
Law Society Northern Territory	Darwin
Law Society of South Australia	Adelaide
Law Society of Western Australia	Perth

The Hon Linda Lavarch, Attorney-General of Queensland	Brisbane
Legal Aid Office (ACT)	Canberra
Mr Ron Levy, Northern Land Council	Darwin
Mr Andrew Ligertwood, Reader in Law, University of Adelaide	Adelaide
Justice Kevin Lindgren, Federal Court of Australia	Sydney
Federal Magistrate Stuart Lindsay, Federal Magistrates Court of Australia	Adelaide
Mr Gavin Loughton, Australian Government Solicitor	Canberra
Professor Kathy Mack, Flinders University	Adelaide
Mr George Mancini, Criminal Law Committee, Law Society of South Australia	Adelaide
Mr Wayne Martin QC, Western Australian Bar	Perth
Mr Stephen Mason, Blake Dawson Waldron	Sydney
Mr Colin McDonald QC, Northern Territory Bar	Darwin
Justice John McKechnie, Supreme Court of Western Australia	Perth
Mr John McKenna SC, Queensland Bar	Brisbane
Associate Professor Sue McNicol, Monash University	Melbourne
New South Wales Bar Association	Sydney
New South Wales Law Reform Commission	Sydney
New South Wales Crown Prosecutors	Sydney
Justice Robert Nicholson AO, Federal Court of Australia	Perth
Northern Territory Department of Justice	Darwin
Northern Territory Law Reform Committee	Darwin
Northern Territory Legal Aid Commission	Darwin
Mr Stephen Odgers SC, New South Wales Bar	Sydney
Magistrate Jillian Orchiston, Local Court of New South Wales	Sydney
Associate Professor Andrew Palmer, University of Melbourne	Melbourne
Mr Tom Pauling QC, Solicitor-General of the Northern Territory	Darwin
Professor Martine Powell, Deakin University	Melbourne
Queensland Bar Association	Brisbane
Queensland Law Reform Commission	Brisbane

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Mr Richard Refshauge QC, Office of the Director of Public Prosecutions (ACT)	Canberra
Ms Paula Rogers, Queensland Law Reform Commission	Brisbane
Mr Wayne Roser, New South Wales Crown Prosecutor	Sydney
Justice Donnell Ryan, Federal Court of Australia	Melbourne
Ms Judy Ryan, Federal Magistrates Court of Australia	Sydney
Ms Soraya Ryan, Legal Aid Queensland	Brisbane
Judge MJ Shanahan, District Court of Queensland	Brisbane
Ms Marie Shaw QC, Criminal Law Committee, Law Society of South Australia (now Judge Shaw of the District Court of South Australia)	Adelaide
Mr Bob Sibley, Queensland University of Technology	Brisbane
Mr Paul Sykes, Australian Government Solicitor	Canberra
South Australian Department of Justice	Adelaide
Justice Stephen Southwood, Supreme Court of the Northern Territory	Darwin
Dr Cameron Spenceley, Law of the Jungle Pty Ltd	Sydney
Justice Hal Sperling, Supreme Court of New South Wales	Sydney
Justice Janine Stevenson, Family Court of Australia	Sydney
Supreme Court of Victoria Litigation Committee	Melbourne
Tasmania Law Reform Institute	Hobart
Mr Mark Tedeschi QC, New South Wales Crown Prosecutor	Sydney
Professor Don Thomson	Melbourne
Mr Sydney Tilmouth QC, South Australian Bar (now Judge Tilmouth of the District Court of South Australia)	Adelaide
Mr Jon Tippet QC, Northern Territory Bar Association	Darwin
Chief Justice Peter Underwood, Supreme Court of Tasmania	Hobart
Victorian Bar Association	Melbourne
Victorian Law Reform Commission Roundtables with the Victorian legal community	Melbourne

Victorian Supreme Court and County Court Judges Roundtable	Melbourne
Justice Frank Vincent, Supreme Court of Victoria	Melbourne
Mr Ian Viner AO QC, Western Australian Bar	Perth
Justice Mark Weinberg, Federal Court of Australia	Melbourne
The Hon Rod Welford, (former) Attorney-General of Queensland	Brisbane
Western Australian Bar Association	Perth
Western Australian Department of Justice	Perth
Western Australian Director of Public Prosecutions	Perth
Mr Neil Williams SC, New South Wales Bar Association	Sydney
Ms Karen Willis, New South Wales Rape Crisis Centre	Sydney
Justice Margaret Wilson, Supreme Court of Queensland	Brisbane
Chief Judge Pasty Wolfe, District Court of Queensland	Brisbane
Ms Donna Woodburne, New South Wales Crown Prosecutor	Sydney
Ms Carolyn Woodman, Witness Counselling Service	Darwin
Mr Peter Zahra SC, New South Wales Public Defenders Office	Sydney

## Appendix 4. Abbreviations

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ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ALRC 26	Australian Law Reform Commission, <i>Evidence</i> , ALRC 26 (Interim) (1985)
ALRC 31	Australian Law Reform Commission, <i>The Recognition of Aboriginal Customary Laws</i> , ALRC 31 (1986)
ALRC 38	Australian Law Reform Commission, <i>Evidence</i> , ALRC 38 (1987)
ALRC 84	Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, <i>Seen and Heard: Priority for Children in the Legal Process</i> , ALRC 84 (1997)
ALRC 92	Australian Law Reform Commission, <i>The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1902 and Related Legislation</i> , ALRC 92 (2001)
ALRC 95	Australian Law Reform Commission, <i>Principled Regulation: Federal and Civil Administrative Penalties in Australia</i> , ALRC 95 (2002)
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ATSI	Aboriginal and Torres Strait Islander or Aboriginal or Torres Strait Islander (depending on context)
CCP	Children's Cases Program of the Family Court of Australia
CCTV	Closed-circuit television
CDPP	Commonwealth Director of Public Prosecutions
CLA	Civil Liberties Australia
DDA	<i>Disability Discrimination Act 1992</i> (Cth)
DNA	Deoxyribonucleic acid
DP 69	Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, <i>Review of the Uniform Evidence Acts</i> , ALRC DP 69, NSWLRC DP 47, VLRC DP (2005)
EDI	Electronic data interchange
HREOC	Human Rights and Equal Opportunity Commission
IP	Internet Protocol
IP 28	Australian Law Reform Commission, <i>Review of the Evidence Act 1995</i> , IP 28 (2004)

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IDRS	Intellectual Disability Rights Service
IRC	Internet relay chat
LAN	Local area network
Law Council	Law Council of Australia
Law Society SA	Criminal Law Committee of the Law Society of South Australia
LRCWA	Law Reform Commission of Western Australia
MCCOC	Model Criminal Code Officers Committee
NSW AGD	New South Wales Attorney General's Department
NSW DPP	Office of the Director of Public Prosecutions (NSW)
NSWLRC	New South Wales Law Reform Commission
NSW PDO	New South Wales Public Defenders Office
NTLRC	Northern Territory Law Reform Committee
NZLC	New Zealand Law Commission
PAN	Personal area network
PDA	Personal digital assistant
QLRC	Queensland Law Reform Commission
SCAG	Standing Committee of Attorneys-General
SMS	Short message service
TCP	Transmission control protocol
TLRI	Tasmania Law Reform Institute
uniform Evidence Acts	<i>Evidence Act 1995</i> (Cth); <i>Evidence Act 1995</i> (NSW); <i>Evidence Act 2001</i> (Tas); and <i>Evidence Act 2004</i> (NI)
UNCITRAL	United Nations Commission on International Trade Law
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
VHF	Very high frequency
Wood Royal Commission Report	Royal Commission into the New South Wales Police Service, <i>Final Report</i> , vol 5 (1997)
Yamatji Aboriginal Corporation	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation



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