Issue Paper 28
Review of the Evidence Act 1995

Contents

Terms of Reference

TERMS OF REFERENCE
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: 12th July 2004

Philip Ruddock
Attorney-General

Participants

Australian Law Reform Commission

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

Division

Professor David Weisbrot

Professor Anne Finlay (Commissioner in charge)

Mr 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

Miranda Biven (until September 2004)

Legal Officers

Kate Connors

Imogen Goold (until September 2004)

Research Manager

Lani Blackman

Project Assistant

Alayne Harland

Legal Intern

Lucy Couchman

Advisory Committee Members

Judge Peter Berman SC, District Court of New South Wales

Mr Jim Brewster, Federal Magistrate, Federal Magistrates Court of Australia

Mr Simon Daley, Special Counsel Litigation, Australian Government Solicitor

Dr Ian Freckelton, Victorian Bar

Ms Terese Henning, Faculty of Law, University of Tasmania

Justice Roderick Howie, Supreme Court of New South Wales

Associate Professor Jill Hunter, Faculty of Law, University of New South Wales

Mr Andrew Ligertwood, School of Law, University of Adelaide

Mr Stephen Mason SC, Blake Dawson Waldron

Mr Stephen Odgers SC, New South Wales Bar

Mr Wayne Roser, Deputy Senior Crown Prosecutor New South Wales

Justice Tim Smith, Supreme Court of Victoria

Mr Neil Williams SC, New South Wales Bar

Mr Peter Zahra SC, Senior Public Defender, Public Defenders Office New South Wales

Consultants

Associate Professor Jill Hunter, Faculty of Law, University of New South Wales

Ms Miiko Kumar, New South Wales Bar

List of Questions

Chapter 1: Introduction to the Inquiry

1–1 Experience of the operation of the uniform Evidence Acts suggests that there is no need for a wide-ranging review into their operation. Are there any particular areas that are in need of substantial reform?

Chapter 2: The Uniform Evidence Acts

2–1 Should the uniform Evidence Acts be amended to allow more differentiation between rules of evidence applying in jury and non-jury trials and, if so, how?

2–2 Should the application of the *Evidence Act 1995* (Cth) be extended to all proceedings in all Australian courts exercising federal jurisdiction?

Chapter 3: Examination and Cross-Examination of Witnesses

3–1 How does s 29(2) of the uniform Evidence Acts operate in practice? Is this provision sufficient to address the needs of different categories of witness? Should it be a requirement that the party calling the witness apply to the court for a direction that the witness give evidence in narrative form?

3–2 Are concerns raised by the operation of s 38 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

3–3 Are concerns raised by the application (or lack of application) of s 41 of the uniform Evidence Acts, particularly in regard to the types of questions being asked of vulnerable witnesses? Should any concerns be addressed through amendment to the uniform Evidence Acts or by other means?

3–4 Should the uniform Evidence Acts be amended to prohibit an unrepresented accused from personally cross-examining a complainant in a sexual offence proceeding?

3–5 Are there concerns with the operation of s 44 of the uniform Evidence Acts? Does s 44 have the effect of allowing a witness to be questioned in an unfair manner on the prior representations of another person? Should these concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

3–6 Does s 46 of the uniform Evidence Acts adequately deal with the rule in *Browne v Dunn* for the purposes of evidence law? Should the consequences of a breach of the rule available at common law be included in the uniform Evidence Acts? Should the consequences of a breach of the rule be different depending on whether it is a civil or a criminal proceeding?

3–7 Are there any other concerns in relation to the examination, cross-examination and re-examination of witnesses under the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 4: Documentary Evidence

4–1 How have the provisions of the uniform Evidence Acts dealing with documentary evidence operated in practice? Does the operation of these provisions raise concerns and, if so, how should any concerns be addressed?

4–2 Given the development of new forms of information technology, are concerns raised by the application of the uniform Evidence Acts to computer-produced evidence?

4–3 Should s 71 of the uniform Evidence Acts be amended to use a broader term than ‘electronic mail’, which is only one way to transmit data messages between computers? For example, would ‘electronic commerce’, ‘electronic data transfer’ or ‘electronic messaging’ be preferable terms?

4–4 Are concerns raised by the application of s 155 of the uniform Evidence Acts to official reasons for decision? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Chapter 5: The Hearsay Rule and its Exceptions

5–1 Are concerns raised by the application of s 59 of the uniform Evidence Acts to previous representations containing implied assertions? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, to clarify the meaning of 'intended' in relation to implied assertions?

5–2 Should the application of the uniform Evidence Acts to implied assertions be dependant upon the determination of the intention of a person who is, by definition, not before the court?

5–3 Are concerns raised by the operation of s 60 of the uniform Evidence Acts, for example, in relation to the admissibility and use of prior inconsistent statements or the factual basis of expert opinion evidence? Is the general discretion to limit use of evidence in s 136 capable of addressing any such concerns? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–4 Should s 60 of the uniform Evidence Acts apply to second-hand hearsay evidence admitted for a non-hearsay purpose; or should its operation be limited to first-hand hearsay, as suggested by the decision of the High Court in *Lee v The Queen*? Should the operation of s 60 in this regard be clarified or modified through amendment of the uniform Evidence Acts and, if so, how?

5–5 Are concerns raised by the application of s 65 of the uniform Evidence Acts to previous representations made by persons who are taken to be unavailable to give evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–6 Are concerns raised by the limited scope of the 'circumstances' that may be taken into account under ss 65(2)(b) and (c) of the uniform Evidence Acts in assessing the reliability of a previous representation? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–7 Is there significant uncertainty about the scope of the term 'the matter' in s 65(9)? Should this be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–8 Are concerns raised by the High Court's interpretation in *Graham v The Queen* of 'fresh in the memory' for the purposes of s 66 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–9 Does the concept of 'fresh in the memory' need to be re-examined, for example, in the light of more recent psychological research into memory loss or change or into the prevalence of delay in complaints of child or other sexual assault? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–10 Are particular concerns raised by application of s 66 of the uniform Evidence Acts to evidence of identification? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–11 Are concerns raised by the application of s 69 of the uniform Evidence Acts to opinion contained in business records? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

5–12 Are concerns raised by the operation of s 72 of the uniform Evidence Acts in providing an exception to the hearsay rule applying to certain contemporaneous statements? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, by restricting the operation of s 72 to first-hand hearsay?

5–13 Should s 75 of the uniform Evidence Acts be amended to require that the evidence be based on the knowledge of the person who gives it or on information that the person has and believes?

5–14 Are concerns raised by the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in proceedings under the *Native Title Act 1993* (Cth)? Should any concerns be addressed through amendment of the *Evidence Act 1995* (Cth) or by other means and, if so, how?

5–15 Should there 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? If so, what restrictions, if any (eg, age of child, time limits), and discretions, if any, should be included? Should documents such as drawings or stories also be admissible? Must the child be available for cross-examination if the statements are admitted?

5–16 How has s 67 of the uniform Evidence Acts, requiring notice where hearsay evidence is to be adduced, operated in civil proceedings? What concerns, if any, have been raised, and how should these be addressed?

5–17 How have procedures under s 67 been affected by civil rules of court in relation to discovery and notices to admit facts and documents?

5–18 Should the hearsay provisions of the uniform Evidence Acts be amended to allow hearsay evidence to be admitted in civil proceedings, with or without the consent of the parties?

5–19 Are there any other concerns in relation to hearsay evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 6: The Opinion Rule and its Exceptions

6–1 Do concerns exist with regard to the admission of lay opinion evidence under s 78 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

6–2 Should the uniform Evidence Acts be amended to introduce additional criterion for the admissibility of expert evidence in scientific or technical fields?

6–3 Alternatively, should the uniform Evidence Acts be amended to remove threshold admissibility rules for expert opinion evidence, leaving judges to decide on the weight to be given to such evidence?

6–4 Do concerns exist with regard to the admission of so-called ‘ad hoc’ expert opinion evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

6–5 Do concerns exist with regard to 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? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

6–6 Is there insufficient understanding amongst 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 and, if so, how should this be remedied?

6–7 Do concerns exist with regard to the admission of expert opinion evidence about an ultimate issue or expert opinion by way of submission or argument? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

6–8 Do concerns exist with regard to the admission of expert opinion evidence on matters of common knowledge, for example, in relation to expert identification evidence or motor vehicle accident reconstruction? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

6–9 Should the *Evidence Act 1995* (Cth) be amended to clearly allow for the admission of expert evidence regarding the credibility or reliability of child witnesses? Does s 79A of the *Evidence Act 2001* (Tas) achieve this purpose, or is further clarification required?

6–10 Are there any other concerns in relation to opinion evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 7: Admissions

7–1 What, if any, concerns are raised by the definition given to the term 'in course of official questioning' by the High Court in *Kelly v R*? Do these concerns require amendment of s 85 of the uniform Evidence Acts or the definition of 'official questioning'?

7–2 Does the test under s 85(2) of the uniform Evidence Acts require clarification to indicate whether it is a subjective or objective test?

7–3 Should s 90 of the uniform Evidence Acts define the circumstances in which it would be unfair to admit an admission against a defendant?

7–4 Are there any other concerns in relation to the rules regarding admissions under the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 8: Tendency and Coincidence Evidence

8–1 Is the definition of 'tendency evidence' in the uniform Evidence Acts satisfactory and, if not, how should it be defined?

8–2 Are any concerns raised by the operation of s 97 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

8–3 What, if any, concerns are raised by the operation of s 98 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

8–4 Should the tendency and coincidence rules be extended beyond the adducing of evidence revealing the tendency of the accused? Are ss 97 and 98 of assistance in other situations, where there is no need to err on the side of safety? Should the rules apply to witnesses? Should the rules apply in civil cases?

8–5 Does the requirement in s 101 of the uniform Evidence Acts adequately protect a defendant from the potential prejudicial effect of tendency or coincidence evidence?

8–6 Should s 101 of the uniform Evidence Acts be amended to:

(a) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'no rational explanation' test articulated by the majority of the High Court in *Pfennig v The Queen*; or

(b) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'interests of justice' test articulated by McHugh J in *Pfennig v The Queen*; or

(c) specify matters to which a court should have regard in determining whether the probative value of the tendency or coincidence evidence in question substantially outweighs its prejudicial effect? If so, what matters might be relevant in this regard?

8–7 Does s 95 of the uniform Evidence Acts adequately limit the use of evidence that is admitted for a purpose other than tendency or coincidence, for example, character evidence?

8–8 Should s 101 of the uniform Evidence Acts be amended to provide that, where the probative value of tendency or coincidence evidence substantially outweighs any prejudicial effect it may have, it must not be ruled inadmissible merely because it may be the result of concoction, collusion or suggestion? If so, should this provision relate only to proceedings involving offences by the same accused against multiple child victims, or should it apply generally to all offences?

8–9 Should there be special provisions applying to the revelation of other incidents where a series of sexual offences are alleged by child complainants, or any complainants?

Chapter 9: The Credibility Rule and its Exceptions

9–1 Do any concerns arise as a result of the High Court's interpretation of s 102 of the uniform Evidence Acts in *Adam v The Queen*? Should s 102 be amended to address any concerns and, if so, how?

9–2 Are there concerns with the interpretation of 'substantial probative value' in s 103 of the uniform Evidence Acts and, if so, how should any concerns be addressed?

9–3 What concerns, if any, arise from the interaction between ss 104 and 110 of the uniform Evidence Acts? How should any concerns be addressed?

9–4 Should s 104 of the *Evidence Act 1995* (Cth) be amended to mirror s 104 of the *Evidence Act 2001* (Tas)? What benefits, if any, might be achieved by adopting the formulation of s 104 set out in the *Evidence Act 2001* (Tas)?

9–5 Should s 106 of the uniform Evidence Acts be amended to allow rebuttal evidence in respect of the credibility of a witness to be adduced if the witness has 'not admitted', rather than denied, the substance of particular evidence put to the witness on cross-examination?

9–6 Should s 106 of the uniform Evidence Acts be amended to expand the categories of rebuttal evidence relevant to a witness' credibility that are admissible and, if so, could this be achieved by amending s 106 of the Acts to: (i) indicate that the existing list of categories is not intended to be exhaustive; or (ii) expressly allow other types of rebuttal evidence relevant to a witness' credibility to be admitted where a court is satisfied that it is in the interests of justice for it to be admissible?

9–7 Is the formulation of s 108(2) of the uniform Evidence Acts satisfactory? Does s 108 cover all situations of fabrication and reconstruction and, if not, how should this matter be addressed?

9–8 Should s 108 of the uniform Evidence Acts be amended to allow the admission of evidence to explain or contradict evidence admitted under s 108A relevant to the credibility of a person whose hearsay representation has been admitted into evidence and, if so, what changes to s 108 would be required to achieve this result?

9–9 Are there any other concerns in relation to the operation of the credibility rule and its exceptions under the uniform Evidence Act and, if so, what are those concerns and how should they be addressed?

Chapter 10: Identification Evidence

10–1 Does the definition of identification evidence in the uniform Evidence Acts inadvertently encompass DNA and fingerprint evidence? If so, is this a problem and how should it be remedied?

10-2 Are concerns raised by the application of the uniform Evidence Acts to identification evidence that is exculpatory of the accused and, if so, how should any concerns be addressed?

10–3 Should the *Evidence Act 1995* (Cth) be amended to ensure that the provisions relating to the admission of picture identification evidence where defendants are in 'police custody' are not able to avoided by police and, if so, how?

10–4 Should s 116 of the uniform Evidence Acts be amended to clarify that directions to the jury in relation to identification evidence are not mandatory and, if so, how?

10–5 Are there any other concerns in relation to identification evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 11: Privilege

11–1 Should the uniform Evidence Acts make express provision for client legal privilege to apply in contexts such as pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and s 264 notices under the *Income Tax Assessment Act 1936* (Cth)?

11–2 Should the uniform Evidence Acts make express provision for other privileges to apply in contexts such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts?

11–3 Do the definitions of 'client', 'lawyer' and 'party' in s 117 of the uniform Evidence Acts require reconsideration or redrafting?

11–4 Is there a need to amend the uniform Evidence Acts to address the issue of whether a copy of a document can be privileged where the original document is not privileged?

11–5 Should s 118 of the uniform Evidence Acts be amended to read 'for the dominant purpose of the client seeking or obtaining legal advice from the lawyer' rather than the current wording referring to the 'lawyer providing legal advice'?

11–6 Does the term 'another person' as used in s 119 of the uniform Evidence Acts require definition in s 117? If so, how should it be defined?

11–7 Are concerns raised by the operation of s 122 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

11–8 Are concerns raised by the operation of s 125, in particular with respect to proof of misconduct? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

11–9 Should the *Evidence Act 1995* (Cth) adopt the provisions of Division 1A of the *Evidence Act 1995* (NSW) in relation to professional confidential relationships?

11–10 Should the sexual assault communications privilege available under Part 7 of the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) be included in the *Evidence Act 1995* (Cth)?

11–11 Should the sexual assault communications privilege available under s 127B of the *Evidence Act 2001* (Tas) be included in the *Evidence Act 1995* (Cth)?

11–12 Are any general concerns raised by the issuing of certificates under s 128 of the uniform Evidence Acts?

11–13 Are there concerns raised by the application of s 128 to ancillary proceedings for the compulsory disclosure of information in civil matters? Should these concerns be addressed through amendment of the uniform Evidence Acts or by other means?

11–14 Are there any concerns about the definition of 'any proceeding in an Australian court' under s 128 of the uniform Evidence Acts?

11–15 Are there any concerns about the definition of a ‘fact in issue’ under s 128(8) of the uniform Evidence Acts?

11–16 Is there a need to revisit the application of s 128 of the uniform Evidence Acts to documents as well as testimony?

11–17 Are there any concerns raised by s 187 of the uniform Evidence Acts and, if so, how should such concerns be addressed?

11–18 Are concerns raised by the operation of s 130 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

11–19 Are there any other concerns in relation to privileges and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Chapter 12: Discretions to Exclude Evidence

12–1 How has s 135 of the uniform Evidence Acts operated in practice? Does the operation of s 135 raise any concerns and, if so, how should any concerns be addressed?

12–2 Should s 135 be made mandatory, so that the court ‘must refuse to admit evidence’ if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time?

12–3 Does s 135 require amendment to define the circumstances in which evidence is ‘unfairly prejudicial’, ‘misleading or confusing’ or will ‘cause or result in undue waste of time’?

12–4 Are concerns raised by the operation of s 137 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the Acts and, if so, how?

12–5 Should s 11(2) of the uniform Evidence Acts be amended to include a general obligation to ensure a fair trial?

12–6 Should a general discretion to exclude evidence to ensure a fair trial, such as appears in s 90, apply to all evidence adduced by the prosecution?

12–7 How has s 138 of the uniform Evidence Acts operated in practice? Does the operation of s 138 raise any concerns and, if so, how should such concerns be addressed?

12–8 Are the factors that a court may take into account in s 138(3) sufficient? Should there be any amendment to the factors and, if so, how?

12–9 Do any of the factors in s 138(3) require clarification, for example s 138(3)(c) in relation to the influence of the nature of the relevant offence?

12–10 Has s 136 of the uniform Evidence Acts operated to limit the use of evidence that has multiple relevance? Does the operation of s 136 raise any concerns and, if so, how should any concerns be addressed?

12–11 Is s 136 being used to limit the operation of s 60? If so, in what circumstances are trial judges limiting the use of hearsay evidence admitted for a non-hearsay purpose? What concerns, if any, have been raised? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

12–12 How has s 192 of the uniform Evidence Acts operated in practice? Does the operation of s 192 raise any concerns and, if so, how should such concerns be addressed?

Chapter 13: Judicial Notice

13–1 Are there any concerns about the operation of the judicial notice provisions in Part 4.2 of the uniform Evidence Acts and, if so, how should such concerns be addressed?

13–2 Are there any concerns about the operation of the procedural requirements in s 144(4) of the uniform Evidence Acts, which provide for a judge to give a party the opportunity to make submissions relating to the acquiring or taking into account of common knowledge? If so, how might those concerns be addressed?

Chapter 14: Directions to the Jury

14–1 Are any concerns raised by the operation of s 20 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how? For example, should 'comment' be defined? Should the content of the judicial comment be defined?

14–2 Are any concerns raised by judicial comment on the failure of a spouse, de facto spouse, parent or child of a defendant to give evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

14–3 Should the prohibition on prosecution comment in s 20(2) of the uniform Evidence Acts be removed? Should such removal be subject to a requirement that the prosecution apply for leave before commenting?

14–4 Should the uniform Evidence Acts be amended to provide for comment on the adverse inferences that may be drawn from the failure to call evidence and, if so, how? Should such comment be limited to civil proceedings?

14–5 How has s 165 of the uniform Evidence Acts operated in practice? What, if any, concerns are raised by the operation of s 165? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

14–6 Should further categories of evidence be included in s 165(1)?

14–7 Should the required content of warnings to the jury under s 165(2) be amended and, if so, how?

14–8 How have ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW) operated in practice? Should the *Evidence Act 1995* (Cth) be amended to include more specific provisions on warnings to juries regarding the evidence of children, similar to those that appear in the *Evidence Act 1995* (NSW)?

14–9 Should the uniform Evidence Acts be amended to provide for other common law warnings such as the *Longman* direction and, if so, how?

14–10 Has s 164 been effective in abolishing warnings in relation to corroboration?

14–11 What other concerns are raised by judges' directions to the jury? What other, if any, directions should be included in the uniform Evidence Acts?

Chapter 15: Matters Outside the Uniform Evidence Act

15-1 Are there any concerns about the relationship between the uniform Evidence Acts and the rape shield provisions in state and territory legislation?

15–2 Should the uniform Evidence Acts be amended specifically to include provisions dealing with the admission of evidence of sexual reputation or experience? If so, what form should these provisions take?

15–3 Is there a need for a Commonwealth *Evidence (Children) Act* that incorporates relevant evidentiary and procedural laws that should apply to child witnesses?

15–4 Are there particular evidentiary rules relating to child witnesses that should instead be incorporated into the *Evidence Act Act 1995* (Cth)?

15–5 Are there categories of evidentiary provisions, for example those contained in state or territory criminal procedures or evidence legislation or in the *Evidence Act 2001* (Tas), which should be incorporated in the uniform Evidence Acts?

15–6 Does s 82 of the *Native Title Act 1993* (Cth) operate to address satisfactorily the evidentiary difficulties faced by applicants in native title proceedings?

15–7 Is there a need to clarify the circumstances in which s 82(1) of the *Native Title Act* allows the court to set aside the operation of the rules of evidence in native title proceedings and, if so, how?

15–8 Are there any other concerns in relation to native title proceedings and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

15–9 Should the *Family Law Act 1975* (Cth) or the *Evidence Act 1995* (Cth) be amended to ensure that, in proceedings under Part VII of the *Family Law Act*, rules of evidence may be dispensed with where this is in the best interests of the child?

15–10 Are there any other concerns in relation to family law proceedings and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

1. Introduction to the Inquiry

Contents

Background

1.1 On 12 July 2004, the Attorney-General of Australia asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry into the operation of the *Evidence Act 1995* (Cth) (*Evidence Act*). 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 into the operation of the *Evidence Act 1995* (NSW) in almost identical terms.

1.2 The Inquiry commenced on the eve of the tenth anniversary of the *Evidence Act*. That Act was itself the product of an extensive research effort by the ALRC. In 1979, the ALRC received Terms of Reference 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;[1] and a final report, *Evidence* (ALRC 38) in 1987, which also contained draft legislation.[2]

1.3 The NSWLRC also conducted an inquiry into the law of evidence that commenced in 1966. It published two reports,[3] a working paper,[4] and three discussion papers[5] 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.[6]

1.4 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.[7]

1.5 In 1991, the Commonwealth and New South Wales governments each introduced legislation substantially based on—but with some differences 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.

1.6 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'. The Commonwealth Act applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The New South

---

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

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

3 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).

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

5 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).

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

7 Ibid, [1.7].

Wales Act applies in proceedings, federal or state, before New South Wales courts and some tribunals.[8]

1.7 In 2001, Tasmania passed legislation[9] that essentially mirrors that of the uniform legislation, although there are some differences.[10] Similarly, Norfolk Island also passed mirror legislation in 2004.[11]

1.8 No other state or territory has yet adopted similar legislation—although 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'.[12]

1.9 In those states and territories that have not adopted the uniform legislation, the law of evidence is a mixture of statute[13] and common law together with applicable rules of court.

1.10 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.[14] 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 law applying under the uniform legislation, except for those provisions that have a wider reach.

1.11 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 Melbourne barrister defending a client charged with a federal crime before the

---

8 As discussed below, the Acts leave room, in some circumstances, for the operation of the common law, together with other relevant legislation and rules of court.

9 This legislation came into effect on 1 July 2002.

10 *Evidence Act 2001* (Tas).

11 *Evidence Act 2004* (NI).

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

13 Each jurisdiction has an evidence Act and other relevant legislation.

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

Victorian Supreme Court would use that state's evidence law; but would use the Commonwealth Act if appearing before the Federal Court on a different matter the following day. In carrying out its review of the *Evidence Act 1995* (Cth), the ALRC is directed in the Terms of Reference to have regard to the desirability of promoting greater harmonisation of the laws of evidence of Australia.[15]

Inquiry with the New South Wales Law Reform Commission

1.12 The project was conceived from the outset as a 'joint venture' with the NSWLRC. The Terms of Reference direct the ALRC to 'work in association with the New South Wales Law Reform Commission with a view to producing agreed recommendations'.

1.13 The two commissions will work closely together during the Inquiry, with involvement by commissioners and staff from both institutions. This Issues Paper is being published by the ALRC in consultation with the NSWLRC. In the course of the Inquiry, there may be a division of work on different topics between the two commissions. The aim is to produce a joint report.

1.14 There has also been liaison between the ALRC and the Tasmania Law Reform Institute and the Victorian Law Reform Commission. It is envisaged that there will be on going cooperation with each of these institutions during the course of the Inquiry given the interest of each jurisdiction in the review.

The scope of the Inquiry

Terms of Reference

1.15 The Terms of Reference are reproduced at the beginning of this Issues Paper. The operative part of the Terms of Reference requires the ALRC to pay particular regard to:

- the examination and re-examination of witnesses, before and during proceedings;
- the hearsay rule and its exceptions;

---

15 See the discussion later in this chapter on the desirability or otherwise of requiring all state courts, when exercising federal jurisdiction, to apply the *Evidence Act 1995* (Cth).

- the opinion rule and its exceptions;
- the coincidence rule;
- the credibility rule and its exceptions; and
- privileges, including client legal privilege.

1.16 The ALRC is also directed to consider the relationship between the *Evidence Act* 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.

1.17 Accordingly, in the course of the Inquiry, there may be issues about whether some matters not included within the purview of the current legislation ought to be so included. For example, the *Criminal Procedure Act 1986* (NSW) contains a number of evidentiary provisions that are not contained in the uniform Evidence Acts.[16]

1.18 In undertaking the Inquiry, the ALRC is 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 *Evidence Act*, together with the application of the rules of evidence contained in the Act to pre-trial procedures.

Definition of 'law of evidence'

1.19 For the purpose of this Inquiry, the ALRC has adopted the definition of evidence utilised by the ALRC when it considered these matters in the 1980s. The ALRC stated that:

> any review of the laws of evidence requires a consideration of any rules of law which have an impact on the admission and handling of evidence. This is so notwithstanding the fact that some of these rules, for example, res judicata, may go beyond purely evidentiary matters.[17]

1.20 The ALRC indicated that, in adopting that approach, it would consider those rules that either directly or indirectly:

- control what evidence may be received;

---

16 See Chs 11, 15.

17 Australian Law Reform Commission, *Reform of Evidence Law*, IP 3 (1980), 2.

- control the manner in which evidence is presented and received;
- control how evidence is to be handled and considered once it is received and what conclusions, if any, are to be drawn from particular classes of evidence;
- specify the degree of satisfaction that the tribunal of fact must attain in determining whether a fact in issue is established and the consequences if such level of satisfaction is not reached.[18]

1.21 Chapter 2 discusses the policy behind the ALRC's original recommendations.

Terminology

1.22 The Terms of Reference ask the ALRC to consider the operation of the *Evidence Act 1995* (Cth). This requires consideration of the decisions of the High Court, the Federal and Family Courts, the Federal Magistrates Court, and the courts of the Australian Capital Territory. However, given that the Commonwealth Act has counterparts in New South Wales, Tasmania and Norfolk Island, relevant decisions about the meaning of a particular provision may arise in a New South Wales, Tasmanian or Norfolk Island court in relation to evidence legislation in these jurisdictions.[19] The ALRC considers that such decisions form part of the review since they indicate how the present legislation is operating and may highlight deficiencies in it.

1.23 Accordingly, in this Issues Paper, 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 among the statutes, this will be done expressly.[20]

Breadth of the Inquiry

1.24 The ALRC's original evidence inquiry was lengthy and comprehensive. Although the topics identified in the Terms of Reference for this Inquiry are broad, the ALRC has not interpreted this to mean that all aspects of the *Evidence Act* must be reviewed again. Rather, the ALRC is

---

18 Ibid, 2.

19 *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas).

20 There is no separate discussion of the Norfolk Island legislation in this Issues Paper.

interested to identify those parts of the *Evidence Act* that may benefit from some fine-tuning in the light of experience. In meetings and consultations to date, the ALRC has not heard that there are major structural problems with the legislation or that the policy underpinning it generally is no longer relevant. On the contrary, there are two sort of concerns about the impact of any large-scale revision of the *Evidence Act*.

1.25 First, there are concerns that the commencement of the Commonwealth *Evidence Act 1995* and the *Evidence Act 1995* (NSW) required a significant reskilling of judicial officers and legal practitioners. It is said that this reskilling has now occurred and that judicial officers and practitioners who appear in court are largely familiar with the operation of the legislation. Any major changes, it is said, would require yet another significant educative effort.

1.26 Second, there are concerns that any major changes in the uniform Evidence Acts would lead to a spate of litigation, with attendant cost considerations, to test the meaning of any new or reworded sections. This could lead to significant uncertainty until the meaning is settled by the courts.

1.27 Unless there is a strong call in submissions and consultations for a more wide-ranging reappraisal, it is not the intention of this Inquiry to carry out a review as extensive as that of the original ALRC effort. However, at this point in the Inquiry, the ALRC does not wish to close off any specific avenues for reform and therefore invites a response as to the priorities of the Inquiry.

Question 1–1 Experience of the operation of the uniform Evidence Acts suggests that there is no need for a wide-ranging review into their operation. Are there any particular areas that are in need of substantial reform?

Organisation of this paper

1.28 This Issues Paper largely follows the organisation and structure of the *Evidence Act* itself, with the inclusion of some additional topics in Part E.

Part A: Introduction and Background

1.29 Part A contains introductory and background material to the Inquiry and the uniform Evidence Acts. Chapter 2 describes the Acts and their relationship with the common law and other legislation. The chapter also discusses the policy framework behind the uniform legislation. The chapter notes that one of the central approaches to evidence recommended by ALRC 38, and adopted in the uniform Evidence Acts, was not to distinguish between jury and non-jury trials. It asks whether the Acts should be amended to allow greater differentiation between rules of evidence applying in jury and non-jury trials.

Part B: Adducing Evidence

1.30 Part B is concerned with the adducing of evidence from witnesses and the use of documents in court proceedings. Chapter 3 discusses a number of issues in relation to the examination and re-examination of witnesses with the primary focus being the rules governing cross-examination of witnesses. The uniform Evidence Acts introduced significant changes with respect to the proof of documents. Chapter 4 notes these changes and seeks information about how they have worked in practice. The chapter also discusses new forms of information and whether the uniform Evidence Acts are well equipped to deal with these.

Part C: Admissibility of Evidence

1.31 This Part examines the rules for whether evidence that is adduced in a hearing is admissible. Chapter 5 considers hearsay evidence. The hearsay rule excludes witnesses' accounts of events where trial processes are unavailable to test the reliability of the evidence. It has been suggested that the hearsay provisions of the uniform Evidence Acts may benefit from clarification. Chapter 6 examines the opinion rule and its exceptions and, in particular, the use of expert opinion evidence. Chapter 7 discusses the rules surrounding admissions and confessions. Chapter 8 considers tendency and coincidence evidence, which is also known as propensity and similar fact evidence. The chapter asks whether the uniform Evidence Acts adequately protect a defendant from the potential prejudicial effect such evidence. Chapter 9 discusses the credibility rule and its exceptions. Evidence relevant to credibility may include character evidence of a witness, evidence of inconsistent or consistent statements and evidence that shows a witness'

capacity for observation. The chapter discusses certain concerns about the credibility rule and its operation, in particular, the admissibility of complaints in sexual assault proceedings, and in the cross-examination of an 'unfavourable' witness. Chapter 10 discusses identification evidence and notes the divergence between the Commonwealth and New South Wales legislation and the Tasmanian *Evidence Act 2001* (Tas).

Part D: Privileges

1.32 Chapter 11 discusses privilege under the uniform Evidence Acts. In particular, there are questions about whether the legislation should extend to pre-trial matters. 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 chapter also considers confidential communications privilege, which exists under the *Evidence Act 1995* (NSW) but not under the Commonwealth legislation.

Part E: Other Topics

1.33 This Part discusses a range of other topics. Under the uniform Evidence Acts courts have the discretion to exclude evidence in both civil and criminal proceedings on a number of grounds. Chapter 12 seeks information on how these discretions have worked in practice. Chapter 13 considers judicial notice, an area of the legislation that largely mirrored the common law, and asks whether this concept has raised any concerns in practice. Chapter 14 discusses the issue of directions for the jury and whether concerns are raised by the operation of relevant provisions of the uniform Evidence Acts. It also considers whether there is a need for the legislation to be amended to provide for directions in relation to further categories of evidence. Chapter 15 considers the relationship between the uniform Evidence Acts and other legislation and whether there are concerns that significant areas of evidence law are dealt with in other legislation. The chapter looks at particular topics including children as witnesses, rape shield laws, and evidence in native title and family law proceedings.

Process of reform

Advisory Committee

1.34 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.[21] Meetings also include representatives of the NSWLRC.

1.35 The Advisory Committee met for the first time on 16 September 2004, and will meet again several times during the course of the Inquiry to provide general advice and assistance to the ALRC. The Committee has particular value in helping the Inquiry to identify the key issues for Inquiry, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee also will assist with the development of reform proposals as the Inquiry progresses. However, ultimate responsibility for the Report and recommendations of the Inquiry remains with the Commissioners of the ALRC and the NSWLRC.

Community consultation

1.36 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.[22] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.[23] This is similarly the case with the NSWLRC.

1.37 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 into the former category

---

21 The members of the Advisory Committee are listed in the front of this Issues Paper.

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

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

and hence interest has been expressed mainly by practitioners, the judiciary and legal academics. Consultations have included public forums and 'round table' discussions with these groups. It is likely that consultations will include broader groups during the next phases of the Inquiry.

1.38 In releasing the Terms of Reference for the Inquiry, the Federal Government asked the ALRC to consult with the other members of the uniform Evidence Act scheme—the Australian Capital Territory and Tasmania; with other states and territories as appropriate and with other relevant stakeholders, in particular the courts, their client groups and the legal profession.

1.39 The ALRC provided details of, and invited participation in, the Inquiry to courts and legal professional bodies throughout Australia and has held some 15 meetings. These included consultations with members of the judiciary in a range of jurisdictions. In addition, the ALRC has had the benefit of submissions from the New South Wales judiciary responding to an invitation from the NSWLRC.

1.40 There are several ways in which those with an interest in this Inquiry may participate. First, individuals and organisations may indicate an expression of interest in the Inquiry by contacting the ALRC or applying online at <www.alrc.gov.au>. Those who wish to be added to the ALRC's mailing list will receive notices, press releases and a copy of each consultation document produced during the Inquiry.

1.41 Second, individuals and organisations may make written submissions to the Inquiry, both after the release of the Issues Paper and again after the release of the Discussion Paper. There is no specified format for submissions. The Inquiry will gratefully accept anything from handwritten notes and emailed dot-points, to detailed commentary on matters concerning the uniform Evidence Acts. The ALRC also receives confidential submissions. Details about making a submission may be found at the front of this Issues Paper.

1.42 The ALRC strongly urges interested parties, and especially key stakeholders, to make submissions prior to the publication of the Discussion Paper. Once the basic pattern of proposals is established it is hard for the Inquiry to alter course radically. Although it is possible for the Inquiry to abandon or substantially modify proposals for which there has been little

support, it is more difficult to publicise, and gauge support for, novel approaches suggested to us late in the consultation process.

1.43 Third, the ALRC maintains an active program of **direct consultation** with stakeholders and other interested parties. The ALRC is based in Sydney, but in recognition of the national character of the ALRC, consultations will be conducted around Australia during the Inquiry. Any individual or organisation with an interest in meeting with the Inquiry in relation to the issues being canvassed in the Inquiry is encouraged to contact the ALRC.

Timeframe for the Inquiry

1.44 The ALRC's standard operating procedure is to produce two community consultation papers prior to producing the final Report—namely, an Issues Paper and a Discussion Paper.

1.45 This **Issues Paper** is the first document produced in the course of this Inquiry, and is intended to identify the main issues relevant to the Inquiry, provide some background information, and encourage informed public participation. As discussed earlier, the ALRC and the NSWLRC have made some assumptions about the likely breadth of the Inquiry. However, this is not meant to inhibit full and open discussion of the issue and policy choices. There may be other passages that imply a tentative conclusion about a policy choice. Unless there is a statement to the contrary, such an implication is unintended. At this early stage, the Inquiry is genuinely open to all approaches.

> In order to be considered for use in the Discussion Paper, submissions addressing the questions in this Issues Paper must reach the ALRC by **Friday, 18 February 2005**. Details about how to make a submission are set out at the front of this publication.

1.46 The Issues Paper will be followed by the publication of a **Discussion Paper** in mid 2005. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the Inquiry's current thinking in the form of specific reform proposals. The ALRC will then seek further submissions and undertake a further round of national consultations in relation to these proposals. Both the Issues Paper and the Discussion Paper may be obtained free of charge in hard copy or on CD from the ALRC and

may be downloaded free of charge from the ALRC's website, <www.alrc.gov.au>.

1.47 The ALRC's **Report**, containing the final recommendations, is due to be presented to the Attorney-General of Australia by 5 December 2005. Once tabled in Parliament, the Report becomes a public document.[24] The final Report will not be a self-executing document—the ALRC provides advice and recommendations about the best way to proceed, but implementation is a matter for others.[25]

1.48 The ALRC's earlier Report on evidence contained draft legislation, which became the basis of the *Evidence Act 1995* (Cth). 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 that the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation. The ALRC has not been asked to produce draft legislation in this Inquiry, but no doubt many of the recommendations in the final Report will indicate the precise nature of the desired legislative change.

---

24 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

25 However, the ALRC has a strong record of having its advice followed. About 57% of the Commission's previous reports have been fully or substantially implemented, about 27% of reports have been partially implemented, 4% of reports are under consideration and 12% have had no implementation to date.

2. The Uniform Evidence Acts

Contents

Introduction

2.1 The law of evidence in Australia is a mixture of statute and common law together with rules of court.[26] 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 occurred. Federal courts, and courts in the Australian Capital Territory, apply the law found in the *Evidence Act 1995* (Cth)[27] and some provisions have a wider reach.[28] In addition, New South Wales, Tasmania and Norfolk Island have passed mirror legislation.[29] These statutes are substantially the same as the Commonwealth legislation but not identical.[30] In New South Wales and

---

26 Each court has its own rules covering matters of procedure including relating to evidence.

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

28 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.

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

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

Tasmania, courts exercising federal or state jurisdiction and some tribunals apply the law found in the mirror legislation.

2.2 As noted in Chapter 1, for the purposes of this Issues Paper, reference to the 'uniform Evidence Acts' means the *Evidence Act 1995* (Cth) and the mirror statutes of New South Wales, Tasmania and Norfolk Island. Where it is necessary in the context of any discussion to differentiate among them, this will be done so expressly.[31]

2.3 The uniform Evidence Acts do not codify the law of evidence.[32] They leave room—in some circumstances—for the operation of common law. The effect of s 8 in the Commonwealth Act and s 9 in the New South Wales and Tasmanian Acts is to render admissible any evidence that is not excluded by any provision of the legislation regardless of any common law rule to the contrary; and to render inadmissible any evidence not permitted under the Acts, regardless of any contrary common law rule.[33]

2.4 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.[34] 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.[35]

---

31 There is no separate discussion of the Norfolk Island legislation in this Issues Paper.

32 See discussion later in this chapter.

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

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

35 See Ch 15.

The uniform Evidence Acts

2.5 The uniform Evidence Acts extend to all proceedings in a relevant court[36], 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, relate to sentencing.[37] Other than these proceedings, the Acts do not extend to pre-trial matters. This is important in the area of privilege and is an issue for this Inquiry.[38]

2.6 In relation to sentencing, s 4(2) states that the 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.[39]

2.7 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.[40]

2.8 As discussed above, the uniform Evidence Acts are not a code. However, some parts, such as Chapter 3 on the admissibility of evidence, effectively operate as a code.[41] This is because s 56 provides that 'except as provided by this Act' all relevant evidence is admissible. Similarly, s 12 provides that all witnesses are competent and compellable 'except as provided by this Act'.

2.9 Other than these provisions, the Acts leave room for the operation of other statutes and common law. The precise scope of the operation of the common law in the face of the uniform Evidence Acts remains a matter of some contention. In *Papakosmas v The Queen*, the High Court stated that

---

36 As defined in s 4 of Uniform Evidence Acts.

37 *Evidence Act 1995* (Cth) s 4(1). However, Part 3.6 does not apply to proceedings in relation to bail or sentencing.

38 See Ch 11.

39 Uniform Evidence Acts s 4(2).

40 For more information see the ALRC's website, <www.alrc.gov.au>.

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

the 'language of the statute',[42] which is given its 'natural and ordinary meaning',[43] determines the manner in which complaint evidence is treated. McHugh J noted that 'reference to pre-existing common law concepts will often be unhelpful'.[44]

2.10 As discussed in Chapter 8, there have been differing judicial approaches to the application of common law principles in relation to the admissibility of tendency and coincidence evidence in criminal proceedings. The High Court has recently granted leave to appeal in the case of *Ellis v The Queen*.[45] This case has raised issues about the common law rules on tendency and coincidence evidence in the light of the uniform Evidence Acts. The New South Wales Court of Criminal Appeal found that:

> As finally enacted in the *Evidence* Acts of both the Commonwealth and New South Wales, there are a number of indications in the regime for tendency and coincidence evidence, found in Pt 3.6, that the Parliaments intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable.[46]

2.11 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 by the ALRC in its earlier inquiry into the laws of evidence.[47] In its Interim Report, *Evidence* (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'.[48]

2.12 Accordingly, ALRC 26 stated 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

---

42 *Papakosmas v The Queen* (1999) 196 CLR 297, 302.

43 Ibid, 318.

44 Ibid, 324.

45 *Ellis v The Queen* [2004] HCATrans 311.

46 *R v Ellis* (2003) 58 NSWLR 700, [74].

47 See further Ch 1.

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

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.[49]

2.13 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, issue estoppel, *res judicata*, and the parol evidence rule, are not found in the statute.

2.14 The Act is divided into five chapters. The organisation and structure follows the order in which evidentiary matters would generally arise in a trial. This is consistent with the recommendations of the ALRC.[50] 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; 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 or not.

2.15 Stephen Odgers notes that the Act introduces 'significant reforms' to the common law.[51] For example, the 'original document' rule is abolished in favour of a more flexible approach (Pt 2.2); 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' (Pt 3.6); the privilege against self-incrimination is modified (s 128); a court may exercise a discretion and refuse to admit evidence where the probative value is substantially outweighed by the danger that it is unfairly

---

49 Ibid, 46.

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

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

prejudicial to the accused (s 135); and the use of computer-generated evidence is facilitated (ss 146–147).

Policy framework

2.16 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 placed before courts and to reform the law to meet the demands of a contemporary society.[52]

2.17 The ALRC's final Report, *Evidence* (ALRC 38), stated that the inquiry was predicated on the continuation of the trial system.[53] In particular, it emphasised two features of that system:

- *The adversary nature of the civil and criminal trial*. ALRC 38 argued that the nature of the adversary system meant that rules were important to guide and control the proceedings; that rules allowed 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 that without a body of rules, control of trials through an appeal system and appellate review would be unpredictable. However, the Report also acknowledged that rules can be rigid in their application and concluded that the preferable approach was to draft rules as a first option but, in default, to use discretions.[54] This Issues Paper poses some questions about the use of particular discretions.[55]
- *Jury trial*. ALRC 38 noted that while questions may be asked about whether there should be separate rules for jury and non-jury trials, the preferable approach was to distinguish between civil and criminal trials. This Issues Paper is asking whether this issue needs to be revisited. (See the discussion later in this chapter.)

2.18 ALRC 38 was also predicated on the continuation of the laws of evidence in courts.[56] This is by way of contrast with many administrative and quasi-judicial tribunals that are not bound by the 'rules of evidence'. In

---

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

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

54 Ibid, [28].

55 See Ch 12.

56 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [29].

particular, ALRC 38 emphasised that even if it had been open to the ALRC under its Terms of Reference, 'it would not be appropriate simply to abolish the rules of evidence'.[57] In the case of criminal trials, ALRC 38 stated 'the trial is accusatorial and the underlying concern to minimise wrongful convictions warrants a strict approach to the admissibility of evidence'.[58] This Inquiry is not proposing to depart from this underlying assumption, nor does it consider that its Terms of Reference permit it to do so.

2.19 In relation to civil trials, ALRC 38 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'.[59] 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.[60]

2.20 ALRC 26 had argued that, while the elements of a civil trial were 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.[61]

2.21 ALRC 38 confirmed 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.

---

57 Ibid, [29].

58 Ibid, 16, fn 10.

59 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985), [33].

60 Ibid, [34].

61 Ibid, [35].

- *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 did what he is charged with the requisite mens rea.
- *Recognition of rights of individual*. Convictions are not to be obtained at any cost and accused persons have rights consistent with a recognition of their personal dignity and integrity and with the overall fairness of society.
- *Assisting adversary contest*. An accused person is entitled to be armed with some protections consistent with 'the idea of the adversary system as a genuine contest'.[62]

2.22 ALRC 38 noted that this view of the nature and purpose of the criminal trial is of long standing. It noted that there had been 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.[63]

2.23 ALRC 38 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.[64] 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'.[65]

---

62 Ibid, [35].

63 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [36].

64 Ibid, [37].

65 Ibid, [38].

2.24 The Report also discussed whether any case had been made out in favour of disturbing the traditional balance that prefers the wrongful acquittal of accused persons over wrongful conviction and concluded that no such case had been made out. The Report noted that while the ALRC agreed with criticism of technical acquittals, its recommendations would go a long way to avoiding such results.[66]

2.25 In regard to the issue of the balance between the prosecution and the defence, ALRC 38 observed that the proposals in ALRC 26 had been criticised by some as favouring the accused and by others as favouring the prosecution.[67] ALRC 38 noted that the inquiry had not started out with any preconceived notion of altering the balance but that some of the proposals advanced in ALRC 26 would have had that impact. ALRC 38 indicated that in response to submissions, amendments had been made to some of its original proposals: some that might favour the prosecution,[68] and some that might favour the accused.[69]

2.26 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'.[70]
- *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.

---

66 Ibid, [40].

67 Ibid, [41].

68 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].

69 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].

70 Ibid, [46].

- *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.[71]

Evidence, jury and non-jury trials

2.27 As discussed above, one of the central approaches to evidence recommended by 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. While generally juries are used in criminal proceedings and not used in civil proceedings, there are exceptions. Juries are used in some civil proceedings,[72] and not used in all criminal proceedings.[73]

2.28 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—as noted, the Acts do not generally distinguish between trials by judge and jury (jury trials) and trials by judge alone (non-jury trials).

2.29 One of the purposes served by the laws of evidence is to keep from juries evidence that may be misused by them.[74] In ALRC 26, the ALRC discussed in some detail the view that the laws of evidence developed from a mistrust of juries' ability to properly assess the evidence placed before them. 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 limit the operation of the rules of evidence in Commonwealth and territory courts, as juries are seldom used.[75]

---

71 Ibid, [46].

72 See, eg, defamation cases in NSW.

73 For example, proceedings in magistrates courts or proceedings where the accused chooses to dispense with a jury.

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

75 Ibid, [50].

2.30 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. Specifically, the ALRC considered whether there should be separate rules designed for jury and non-jury trials.

2.31 The argument for separate rules is, in essence, that a more flexible and less exclusionary system can be used for non-jury trials. Judges and magistrates, through training and experience are, it is said, less susceptible than jurors to misusing evidence such as hearsay or character evidence.[76]

2.32 The ALRC concluded that, on the available evidence, it should not be assumed that there is necessarily such a difference between the abilities of judges and jurors that different rules should be developed 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 distinction.[77]

2.33 The ALRC noted that, regardless of whether the trial is with a jury or not, 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 have any connection with the quality of the tribunal—were said to warrant control over unreliable and dangerous evidence.[78]

Rules of evidence in non-jury trials

2.34 The operation in non-jury trials of some exclusionary provisions of the uniform Evidence Acts has been criticised. It has been said that some provisions of the uniform Evidence Acts[79] are 'premised on the belief that the prejudicial effect of certain types of evidence is consistent throughout

---

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

77 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. Because civil proceedings rarely involve a jury, distinctions in the application of evidence law between jury and non-jury trials may come about indirectly.

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

79 For example, s 115(2), which excludes picture identification evidence where photographs examined by an identifying witness suggest that they are pictures of persons in police custody.

the criminal justice system'.[80] In fact, it is said, the prejudicial effect of evidence before a judge or magistrate sitting alone should not be equated with that which may exist before a jury. Therefore, why should exclusionary rules operate on the basis of assumed prejudice when in fact the prejudice does not operate in a particular situation?[81]

2.35 The exclusionary provisions of the uniform Evidence Acts are not directly solely to the exclusion of prejudicial evidence, but also facilitate the exclusion of evidence that might be distracting to the effective resolution of the matters at issue, including evidence that is misleading or confusing or likely to result in undue waste of time.

2.36 However, it has also been suggested that the general discretions to exclude evidence contained in the uniform Evidence Acts cannot operate with any real effect in non-jury trials. For example, s 135 provides in part that the court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party. At common law it is recognised that a trial judge has a discretion to exclude otherwise admissible evidence if its probative value is outweighed by prejudicial effect.[82] However, the common law discretion is only available in relation to prosecution evidence in criminal proceedings.[83] The rationale for the discretion is to 'prevent a jury from being exposed to evidence likely to produce incorrect verdicts by misleading it or playing upon its prejudices'.[84]

2.37 On one view, there is little point, in non-jury trials—whether civil or criminal[85]—in a judge, having heard evidence that he or she may lawfully consider, determining that the evidence should then be excluded on the

---

80 R Howie, 'Identification Evidence under the Evidence Act 1995' (1996) 3(2) *Criminal Law News* 13, 15.

81 Ibid, 15.

82 *R v Christie* [1914] AC 545.

83 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 144; *R v Driscoll* (1977) 137 CLR 517, 541.

84 A Ligertwood, *Australian Evidence* (4th ed, 2004), [2.28].

85 Ibid, [2.29].

grounds that he or she may be prejudiced by it.[86] However, in effect, this is the consequence under s 135 of the uniform Evidence Acts, which applies in both civil and criminal proceedings and to jury and non-jury trials.

A dual system of rules of evidence?

2.38 More recent inquiries have 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.

2.39 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.[87] However, 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'.[88]

Waiver of rules of evidence

2.40 It has been suggested that, rather than developing a dual system of rules of evidence, the uniform Evidence Acts might be reformed to allow rules of evidence to be waived in non-jury trials. At present, under s 190, the court may dispense with the application of certain rules of evidence,[89] but only if the parties consent.[90] 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

---

86 See Ibid, [2.29]. However, the High Court in *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 recognised that inadmissible evidence in a criminal case could affect a magistrate's decision.

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

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

89 Uniform Evidence Acts s 190(1). The following provisions may be waived, in relation to particular evidence or generally: Division 3, 4 or 5 of Part 2.1; Part 2.2 or 2.3; or Parts 3.2 to 3.8. (Part numbers differ slightly in the Tasmanian legislation.)

90 Section 190(2) contains safeguards with regard to the consent of a defendant in criminal proceedings.

(b) the application of those provisions would cause or involve unnecessary expense or delay.[91]

2.41 The Acts also provide that in deciding whether to exercise the discretion in civil proceedings, the court is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.[92]

2.42 While there may be some benefit in allowing the court a discretion to dispense with the application of rules of evidence in non-jury trials, in other situations stricter application of the rules of evidence may be desirable, justifying a departure from provisions of the Evidence Acts that permit the admission of evidence inadmissible at common law.

2.43 For example, as discussed in Chapter 5, s 60 of the uniform Evidence Acts provides that where evidence of a previous representation is relevant and admitted for a non-hearsay purpose, it may also be used for a hearsay purpose.[93] The application of this section has been contentious in a number of contexts, including in relation to evidence of prior consistent or inconsistent statements and in cases involving expert evidence (see Chapter 6). One of the justifications for its enactment was that the common law required the 'drawing of unrealistic distinctions' between different evidentiary purposes[94]—a matter likely to be particularly problematic for juries. However, there may be good reason for the operation of s 60 to be avoided in some non-jury trials.

---

91 Uniform Evidence Acts s 190(3).

92 Ibid s 190(4).

93 Subject to other provisions of the Acts, eg the court could limit the use of such evidence under the general power in s 136.

94 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685].

Question 2–1 Should the uniform Evidence Acts be amended to allow more differentiation between rules of evidence applying in jury and non-jury trials and, if so, how?

Application of the *Evidence Act 1995* (Cth)

2.44 As noted above, 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.[95] 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.[96] Provisions dealing with the full faith and credit to be given to documents properly authenticated;[97] swearing of affidavits for use in Australian courts exercising federal jurisdiction or similar jurisdiction;[98] and abolition of the privilege against self-incrimination for bodies corporate[99] also apply to proceedings in all Australian courts. This is because of reliance on Commonwealth powers under the 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).

2.45 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) (*Judiciary Act*) 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

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

96 Ibid s 5.

97 Ibid s 185.

98 Ibid s 186.

99 Ibid s 187.

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

2.46 It has been suggested that one way to achieve greater uniformity in Australian evidence laws would be to extend the operation of the *Evidence Act 1995* (Cth) to all Australian courts when exercising federal jurisdiction.

2.47 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 federal 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.[100]

2.48 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.[101]

2.49 ALRC 38 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.[102] 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).[103]

---

100 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].

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

102 Ibid, [21]. See also Ch 5 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985).

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

2.50 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 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.[104]

2.51 Such difficulties were a major factor in the ALRC's 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.[105]

Question 2–2 Should the application of the *Evidence Act 1995* (Cth) be extended to all proceedings in all Australian courts exercising federal jurisdiction?

104 See Ibid, [2.89].

105 Ibid, [2.89].

3. Examination and Cross-Examination of Witnesses

Contents

Introduction

3.1 The Terms of Reference for the Inquiry ask the ALRC to have particular regard to the examination and re-examination of witnesses, before and during proceedings. Chapter 2, Division 3 of the uniform Evidence Acts governs 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 is concerned with the giving of oral evidence by witnesses during proceedings only, and not in pre-trial proceedings or where evidence is being given by affidavit.[106] Division 4 is concerned with the

106 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 59. In *Finchill Pty Ltd v Abdel-Messih* (Unreported, Supreme Court of NSW, Levine J, 13 July 1998), Levine J held that s 26 does not empower a court to make pre-hearing directions obligating the parties to file proofs of all the evidence upon which they seek to rely in court. See also *Ramirez v Sandor's Trustee (No 1)* (Unreported, Supreme Court of NSW, Young J, 22 April 1997), where Young J found that s 29(2) only applies where evidence is given orally, not by affidavit.

examination in chief and re-examination of witnesses. The primary focus of this chapter will be the rules governing cross-examination of witnesses.

Examination of witnesses

3.2 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.[107]

3.3 Under s 37 of the uniform Evidence Acts a leading question[108] 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;[109]
- 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.

3.4 This provision reflects what the ALRC considered in its final Report *Evidence* (ALRC 38) to be existing practices in relation to leading questions.[110] The exceptions contained in the legislation are similar to those canvassed by the ALRC as instances where leading questions could be appropriate to either obtain the whole of a witness' evidence or to expedite the trial.[111]

---

107 A Ligertwood, *Australian Evidence* (4th ed, 2004), 537.

108 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, Part 1; *Evidence Act 1995* (NSW) Dictionary, Part 1; *Evidence Act 2001* (Tas) s 3(1).

109 Such as standard questions regarding name, occupation and relationship to the parties to proceedings.

110 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [114].

111 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [620].

3.5 In the Interim Report *Evidence* (ALRC 26), 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. However, research cited by the ALRC showed that allowing a witness to give a free report of events as a narrative gives a significantly more accurate version, as answering specific questions may limit and distort testimony.[112] Giving evidence in narrative form may also be more culturally appropriate for some witnesses and may assist child witnesses to give evidence.

3.6 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 Act to encourage the court to adopt the practice where appropriate.[113]

3.7 Section 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. The requirement that a party apply for a direction was not part of the ALRC's original recommendation. It has been suggested that the requirement to apply for a direction has limited the use of s 29. Stephen Odgers 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.[114]

Question 3–1 How does s 29(2) of the uniform Evidence Acts operate in practice? Is this provision sufficient to address the needs of different categories of witness? Should it be a requirement that the party calling the witness apply to the court for a direction that the witness give evidence in narrative form?

112 Ibid, [280]; [607]–[609].

113 Ibid, [607]–[609].

114 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180], fn 82.

Cross-examination of witnesses

3.8 The provisions of the uniform Evidence Acts that concern the rules for cross-examination[115] substantially mirror pre-existing practices. 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.[116]

3.9 Section 41 allows the court to disallow questions on the basis that they are harassing, misleading or annoying. 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.

3.10 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.[117] Under ss 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

3.11 Under the common law, a party cannot cross-examine its own witness unless the witness was declared hostile. In practice, the aim of

---

115 Uniform Evidence Acts ss 40–46.

116 W Harris, 'Examination of Witnesses under the Commonwealth Evidence Act 1995' (1996) 26 *Queensland Law Society Journal* 269, 271.

117 Uniform Evidence Acts s 48(1).

declaring a witness hostile is often to establish the existence of prior inconsistent statements, either through leading questions in cross-examination or by introducing a document.[118] The common law test for whether a witness could be declared hostile was whether the witness was found to be deliberately withholding or lying about material evidence.[119]

3.12 In the original evidence law inquiry, the ALRC found 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.[120]

3.13 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
>
> (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.

3.14 The term 'unfavourable' has been interpreted simply as meaning 'not favourable', rather than the more difficult test of hostile or adverse.[121] In *R v Lozano*, it was accepted that s 38(1)(a) allowed a witness to be declared unfavourable and cross-examined even when they genuinely could not remember the events in question.[122]

3.15 The effect of having a witness declared unfavourable 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.[123]

---

118 A Ligertwood, *Australian Evidence* (4th ed, 2004), 539.

119 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [39]. See *McLennan v Bowyer* (1961) 106 CLR 95.

120 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [625].

121 *R v Souleyman* (1996) 40 NSWLR 712.

122 *R v Lozano* (Unreported, NSW Court of Criminal Appeal, 10 June 1997).

123 W Harris, 'Examination of Witnesses under the Commonwealth Evidence Act 1995' (1996) 26 *Queensland Law Society Journal* 269, 270.

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.[124]

3.16 Section 38 is a discretionary section and therefore the considerations listed in s 192 must be considered in granting leave. In *R v Milat*,[125] 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. In such a case, it was found to be unjust for the Crown not to be given leave to cross-examine such a witness.

3.17 Justice Tim Smith and Paul Holdenson consider that the ALRC's view was that fundamental importance should be given to a genuine attempt to establish the facts on which the final decision is to be based.[126] Part of this process involves ensuring that all relevant witnesses are called. Hunt CJ 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.[127]

3.18 However, the s 38 discretion is not limited to cases where the witness has unexpectedly given unfavourable evidence or, as in *Milat*, where the prosecution has called a witness at the defence's request.[128]

3.19 Section 38 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. The use of s 38 in this way was considered by the High Court in *Adam v The Queen*.[129] In *Adam*, the trial judge permitted the Crown to cross-examine a witness as an unfavourable witness under s 38, in relation to prior inconsistent statements made to police by the witness. The use of the statements had two purposes.

---

124 *R v Hogan* [2001] NSWCCA 292.

125 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996).

126 T Smith and O Holdenson, 'Comparative Evidence: The Unhelpful Witness' (1998) 72 *Australian Law Journal* 720, 727.

127 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996), 7.

128 S Odgers, *Uniform Evidence Law* (5th ed, 2002), [1.2.3260], citing *R v Le* [2002] NSWCCA 186.

129 *Adam v The Queen* (2001) 207 CLR 96.

First, it would discredit the witness. Second, and importantly, once admitted for that purpose, the statements were admissible also for their hearsay purpose, which 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. [130]

3.20 In this Inquiry, the ALRC has heard two views about s 38. 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. The other view is that expressed in *Adam*—that the practice ensures all relevant evidence gets in, and that the availability of that witness for questioning by the other party overcomes any unfairness.

Question 3–2 Are concerns raised by the operation of s 38 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Constraints in cross-examination and vulnerable witnesses

3.21 Section 41 of the uniform Evidence Acts grant the court the power to disallow questions which are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Under s 41(2), the court may take into account the appropriateness of such questions on the basis of the particular witness' age, education, mental capacity or personality.

3.22 Legal professional standards are also important in regulating the limits of cross-examination and their role has to some extent kept the responsibility of setting limits with the profession. The High Court acknowledged in *Wakeley v R* that while courts should provide leeway in cross-examination, this left a significant responsibility on the profession.[131] The court quoted with approval Lord Hanworth MR in *Mechanical and General Inventions Co and Lehwess v Austin and Austin Motor Co Ltd*:

---

130 Ibid, 109. 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 9.

131 *Wakeley v The Queen* (1990) 93 ALR 79, cited in J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [41.10].

> Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness.[132]

3.23 Section 41 allows the particular sensitivities and circumstances of a witness to be taken into account. *R v TA* concerned a line of questioning in cross-examination that asked the complainant to give her opinion as to her perception of her own behaviour in relation to events recorded on videotape. On appeal, the line of questioning was ultimately rejected as inadmissible on the basis that the complainant's perceptions of the events in the video were irrelevant to any fact in issue.[133] Spigelman CJ noted that s 41 operates on the assumption that there is an element of relevance in the line of questioning, however, he also found that the trial judge was entitled to reject the line of cross-examination by applying s 41 of the Act.[134] His Honour expressed the view that in a sexual assault matter, 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.[135]

3.24 It has been suggested to the Inquiry that s 41 is not used by judges as frequently as it should be to stop the use of harassing or offensive questions. In particular, the Inquiry has been asked whether the views of Spigelman CJ in *R v TA*, regarding the role of the judge in sexual assault cases or in any case involving vulnerable witnesses, have been adopted by other members of the judiciary.

---

132 *Mechanical and General Inventions Co and Lehwess v Austin and Austin Motor Co Ltd* [1935] AC 346, 359, cited in *Wakeley v The Queen* (1990) 93 ALR 79, 86.

133 Uniform Evidence Acts s 55. Relevance is discussed further in Ch 12.

134 *R v TA* (2003) 57 NSWLR 444, 446.

135 Ibid, 446.

3.25 In 2003, the New South Wales Law Reform Commission (NSWLRC) recommended that an unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding.[136] A number of submissions indicated a belief that judicial control of offensive and intimidating cross-examination was inadequate and inconsistent.[137] Submissions also argued that judges are less strict in disallowing inappropriate questioning when the accused is unrepresented.[138] Other submittors opposed the proposal on the basis that prohibiting an unrepresented accused from cross-examining a complainant undermines the fairness of the trial as an accused must be able to present a defence and test the evidence against him or her. The view was put that the interests of complainants in sexual offence cases would be better served by further judicial education and appellate guidelines.[139]

3.26 The NSWLRC concluded that:

> Judicial control of cross-examination cannot provide systematic protection because of the inherent nature of the proceedings and the need for judges to remain neutral.[140]

3.27 The NSWLRC recommended that a legal practitioner be appointed to cross-examine the complainant in sexual offence proceedings where the accused is unrepresented.[141] Section 294A was added to the *Criminal Procedure Act 1986* (NSW) in 2004. Under that section, where the accused person is not represented by counsel, the complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be examined instead by a person appointed by the court.[142]

---

136 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), Rec 1. A similar recommendation has also recently been made by the Victorian Law Reform Commission: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 94.

137 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), [3.51].

138 Ibid, [3.54].

139 Ibid, [3.37]. See also M Hunter, 'Hard Cases Making Bad Law: Prohibiting Cross-Examination of Adult Sexual Offence Complainants by Unrepresented Accused' (2003) 27(5) *Criminal Law Journal* 272, 277.

140 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), [3.71].

141 Ibid, Rec 4.

142 Section 294A was recently found to be a valid limitation on the right to cross-examine, and was considered not in itself to create an unfair trial: *R v MSK and MAK* [2004] NSWCCA 308. Not all of the

3.28 Children are a category of witness who are particularly vulnerable in the adversarial trial system. In their inquiry into children and the legal process, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) heard significant and distressing evidence that child witnesses, particularly in child sexual assault cases, are often berated and harassed during cross-examination to the point of breakdown.[143] Concerns were raised about the role of lawyers, and also about the role of judges and magistrates as the 'referees' of the trial. 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.[144]

3.29 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).[145] 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.[146]

3.30 Part IAD of the *Crimes Act 1914* (Cth) 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:

---

recommendations of the NSWLRC were adopted in s 294A. For example, the NSWLRC recommended that a legal practitioner must cross-examine a complainant and that an unrepresented accused be warned about the potential application in the proceedings of the rule in *Browne v Dunn*: New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), Rec 4 and Rec 8.

143 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* (1997), [15.92].

144 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 110–112. See also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Ch 3.

145 Part IAD was inserted by the *Measures to Combat Serious Organised Crime Act 2001* (Cth).

146 *Crimes Act 1914* (Cth) s 15YE.

- Unrepresented defendants are not to cross-examine a child witness (other than a child complainant) without leave of the court—the request for leave must be in writing and the court must consider any trauma that could be caused by the cross-examination (s 15YG).
- Unrepresented defendants are not to cross-examine a child complainant except through a person appointed by the court for this purpose (s 15YF).
- Represented defendants must not cross-examine a child witness except through counsel (s 15YH).

3.31 Section 28 of the *Evidence (Children) Act 1997* (NSW) provides that a child witness in any criminal proceeding or civil proceeding in relation to personal assault defence cannot be examined, cross-examined or re-examined by an unrepresented defendant or accused except through a person appointed by the court.[147]

3.32 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, disability, limited intellect or lack of education. In most Australian states, 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.[148]

3.33 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.[149]

> 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 attached excessive importance to considerations of no real importance. In consequence, they

147 The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so: *Evidence (Children) Act 1997 (NSW)* s 28(4).

148 *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 M Aronson and J Hunter, *Litigation: Evidence and Procedure* (6th ed, 1998), 860.

149 *Whisprun v Dixon* (2003) 200 ALR 447, 477.

> 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.[150]

3.34 The Inquiry is interested in comments about the experience of courts and practitioners in relation to the use of s 41 and about the circumstances in which cross-examination is currently being limited, or should be limited, in relation to all types of cases.

Question 3–3 Are concerns raised by the application (or lack of application) of s 41 of the uniform Evidence Acts, particularly in regard to the types of questions being asked of vulnerable witnesses? Should any concerns be addressed through amendment to the uniform Evidence Acts or by other means?

Question 3–4 Should the uniform Evidence Acts be amended to prohibit an unrepresented accused from personally cross-examining a complainant in a sexual offence proceeding?

Use of documents in cross-examination

3.35 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 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.

3.36 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 under which the witness

150 Ibid, 477–478.

could be handed the document, asked to read it and then state whether he or she still adhered to their testimony.[151]

3.37 ALRC 26 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.[152] In relation to s 44(3), Odgers notes that it was suggested in *R v Hawes*[153](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.[154] 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.[155]

3.38 Concern has been raised with the Inquiry regarding a potential ambiguity in s 44. A person who alleges they are the victim of a sexual assault is often taken to a doctor who, as well as conducting an examination, takes and records a history of the events. When the alleged victim is later giving evidence, it is common for the witness to be cross-examined about differences between the witness' testimony and the history the doctor recorded. The question has been asked whether s 44 applies when the doctor's notes are given to the witness who is then cross-examined on them. Whether s 44 applies depends on whether the recorded notes are considered to be the witness' representation (in which case s 44 does not apply) or the doctor's. It has been suggested that this is a matter that requires clarification.

3.39 The Inquiry also understands that it is common practice in civil trials for counsel in cross-examination to present a document to a witness (that is not the witness' document) and then embark on a course of questioning

---

151 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].

152 Ibid, [636].

153 *R v Hawes* (1994) 35 NSWLR 294.

154 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4220].

155 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].

about the witness' memory of the events that are described in the document. While this is allowed under s 44, it has been put to the Inquiry that this is essentially a practice that is confusing for the court and the witness. While evidence produced in this way could be excluded under the general discretion in s 135 to exclude evidence that is misleading or confusing, the extent to which this happens in practice is not clear.

Question 3–5 Are there concerns with operation of s 44 of the uniform Evidence Acts? Does s 44 have the effect of allowing a witness to be questioned in an unfair manner on the prior representations of another person? Should these concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

The rule in Browne v Dunn

3.40 The common law rule in *Browne v Dunn*[156] 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.[157] 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 their witness' evidence will be contested and further corroboration may be required.[158]

3.41 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;[159]

156 *Browne v Dunne* (1893) 6 R 67.

157 The rule has also been held to apply to a party's failure to cross-examine their own witness pursuant to s 38: *R v McCormack (No 3)* [2003] NSWSC 645 and may operate where the evidence is in the form of a written statement, rather than testimony: *Nye v State of New South Wales* [2003] NSWSC 610. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4440].

158 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 64.

159 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.10].

- 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;[160]
- make judicial comment to the jury that the cross-examiner did not challenge the witness' evidence in cross-examination, when that could have occurred;[161] or
- make judicial 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 witness could have, but did not, put in cross-examination to the opponent's witness'.[162]

3.42 The consequences of a breach of the rule in *Browne v Dunn* may differ based on whether it is a criminal or civil matter. In *R v Birks*, Gleeson CJ noted that 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.[163]

3.43 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.

3.44 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*. ALRC 26 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

---

160 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 64.

161 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.10].

162 Ibid, [46.10].

163 *R v Birks* (1990) 19 NSWLR 677, cited in J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.15].

was argued, should only allow judicial discretion to permit parties to recall witnesses who should have been cross-examined.[164]

Question 3–6 Does s 46 of the uniform Evidence Acts adequately deal with the rule in *Browne v Dunn* for the purposes of evidence law? Should the consequences of a breach of the rule available at common law be included in the uniform Evidence Acts? Should the consequences of a breach of the rule be different depending on whether it is a civil or a criminal proceeding?

Re-examination of witnesses

3.45 Re-examination of a witness may be used to clarify uncertainties or ambiguities or supplement matters raised in cross-examination. 'Re-examination' is defined in the uniform Evidence Acts as:

> (3) … the questioning of a witness by the party who called a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party.[165]

3.46 Section 39 limits re-examination of a witness to matters arising out of cross-examination, unless the court gives leave to put other questions to the witness. The section has been held to echo the common law principles in relation to re-examination.[166] Section 108 addresses re-examination matters relevant solely to the credibility of a witness.[167]

Other issues

Question 3–7 Are there any other concerns in relation to the examination, cross-examination and re-examination of witnesses under the uniform Evidence Acts and, if so, what are these concerns and how should they be addressed?

---

164 Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Vol 1 (1985), [635].

165 *Evidence Act 1995* (Cth), Dictionary, Part 2; *Evidence Act 1995* (NSW), Dictionary, Part 2; *Evidence Act 2001* (Tas), s 3(1).

166 See *Drabsch v Switzerland General Insurance Co Ltd* [1999] NSWSC 765.

167 See Ch 9.

4. Documentary Evidence

Contents

Documentary evidence

4.1 The uniform Evidence Acts introduced significant changes with respect to the proof of documents—the most significant being the abolition of the original document rule.[168] The Acts also reformed rules relating to cross-examination on documents and the refreshment of memory from documents.[169]

4.2 Part 2.2 of the *Evidence Act 1995* (Cth)[170] provides various methods to facilitate proving the content of documents and relaxes the notion of a copy of a document for the purposes of adducing documentary evidence.[171] 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'.[172]

4.3 A range of other provisions of the uniform Evidence Acts deal with documentary evidence. In the case of the *Evidence Act 1995* (Cth) these include provisions dealing with:

- inferences as to the authenticity of a document (s 58);
- the hearsay rule and its exceptions (Part 3.2);
- documents produced by processes, machines and other devices (ss 146–147);

168 Uniform Evidence Acts s 51.
169 See V Bell, 'Documentary Evidence under the Evidence Act 1995 (NSW)' (2001) 5 *The Judicial Review* 1.
170 See also *Evidence Act 1995* (NSW) Part 2.2; *Evidence Act 2001* (Tas) Part 2.
171 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 105.
172 Ibid, 105.

- evidence of official records, Commonwealth documents and public documents (ss 155–159); and
- requests to produce documents or call witnesses (ss 166–169); and
- proof of certain matters by affidavits or written statements (ss 170–173).

4.4 The ALRC is interested in evaluating the experience of courts and practitioners in relation to the operation of the documentary evidence provisions of the uniform Evidence Acts.

Question 4–1 How have the provisions of the uniform Evidence Acts dealing with documentary evidence operated in practice? Does the operation of these provisions raise concerns and, if so, how should any concerns be addressed?

Computer-produced evidence and telecommunications

4.5 The uniform Evidence Acts contain a number of provisions facilitating proof of electronic evidence. For example, s 48 permits the tendering of a copy of a document produced 'by a device that reproduces the contents of documents'. This provision allows photocopies and computer-produced copies of documents to be admitted as evidence.[173] Sections 146–147 facilitate proof of 'evidence produced by processes, machines and other devices'[174] and were intended, among other things, to facilitate the admission of computer-produced evidence.[175]

4.6 The ALRC is interested in comments on whether these or other provisions of the uniform Evidence Acts are operating satisfactorily, given the ongoing development of new forms of information technology.

4.7 For example, s 71 of the uniform Evidence Acts provides an exception to the hearsay rule applying 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'. It has been

173 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4920].
174 Uniform Evidence Acts ss 146–147.
175 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [705].

suggested that the reference to 'electronic mail' may be overly restrictive.

4.8 In fact, e-mail is only one way to transmit messages between computers. Electronic data interchange (EDI) is another form of data transmission and, technically, both e-mail and EDI are part of a broader set of electronic messaging technologies used in electronic commerce. Therefore, it may be desirable to insert a broader term into s 71.

Question 4–2 Given the development of new forms of information technology, are concerns raised by the application of the uniform Evidence Acts to computer-produced evidence?

Question 4–3 Should s 71 of the uniform Evidence Acts be amended to use a broader term than 'electronic mail', which is only one way to transmit data messages between computers? For example, would 'electronic commerce', 'electronic data transfer' or 'electronic messaging' be preferable terms?

Evidence of official records

4.9 Section 155 of the *Evidence Act 1995* (Cth) facilitates proof of Commonwealth records (or public records of a state or territory) by allowing the production of a document purporting to be such a record and signed by the relevant minister.[176]

4.10 In *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*[177] French J considered the admissibility of ministerial reasons for a decision under the *Migration Act 1958* (Cth) prepared pursuant to a statutory obligation under s 501G of the *Migration Act*, but after the date of the decision itself.[178] Counsel for the minister argued that a written statement of reasons pursuant to a statutory duty to provide such a statement is admissible as a record of the material before the decision-maker, the findings of fact made

176 The New South Wales and Tasmanian legislation refer to a 'public document' of a state or territory: *Evidence Act 1995* (NSW) s 155; *Evidence Act 2001* (Tas) s 155.

177 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 33.

178 Consequently not falling within the *res gestae* exception to the hearsay rule: Uniform Evidence Acts s 65(2)(b).

by the decision-maker and his or her reasons for making the particular decision.[179]

4.11 French J followed an earlier Federal Court case[180] in which it was held that the effect of s 155 is to facilitate proof of records which are otherwise admissible and that s 155 is not a general exception to Chapter 3 in relation to admissibility of evidence.[181] French J 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.[182] The statement of reasons would be admissible only to show that the minister stated that these are his reasons but not to establish the correctness or reliability of that statement.[183]

4.12 It has been suggested that the effect of 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.[184]

Question 4–4 Are concerns raised by the application of s 155 of the uniform Evidence Acts to official reasons for decision? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

179 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 33, [48].
180 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069.
181 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 33, [50]–[52].
182 Ibid, [53].
183 Ibid, [54].
184 R French, *Submission E 3*, 8 October 2004

5. The Hearsay Rule and its Exceptions

Contents

The hearsay rule

5.1 The purpose of the hearsay rule is to exclude statements made out of court on the basis that trial processes are unavailable to test the reliability of the evidence. It is said that the hearsay rule 'compensates for the inability of the courts to impose procedures to assist the fact-finder's assessment of such accounts … by limiting the uses the fact-finder is permitted to make of them'.[185]

5.2 The hearsay rule applies to all oral and written representations made out of court. However, while the common law and the uniform Evidence

185 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 156.

Acts each provides exceptions to ensure that reliable evidence is able to be admitted, the scope of the rule and the exceptions differ.

5.3 The common law rules of evidence exclude hearsay, subject to numerous exceptions covering, for example, contemporaneous narrative statements; statements by persons since deceased; public documents; and out-of-court admissions and confessions. In addition, many statutory provisions avoiding the results of a strict application of the hearsay rule have been enacted covering, for example, business records and computer evidence.

5.4 The common law rules of evidence were characterised by the ALRC as capable of excluding probative evidence and as overly complex, technical, artificial and replete with anomalies.[186] Further, then existing statutory provisions modifying the common law were stated to be overly complex, overlapping and unrealistic in practice.[187]

Uniform Evidence Acts

5.5 Section 59 of the uniform Evidence Acts provide 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.

5.6 The Acts then provide exceptions to this rule including those covering evidence relevant to a non-hearsay purpose;[188] 'first-hand' hearsay exceptions (where the maker has personal knowledge of the asserted fact);[189] admissions;[190] and remote (or 'second-hand') hearsay exceptions, such as those relating to business records, telecommunications and evidence of reputation.[191]

5.7 The first-hand hearsay exceptions distinguish between civil and criminal proceedings and between situations where the maker of the representation is available to give evidence and where he or she is

186 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [329–340].
187 Ibid, [341–345].
188 Uniform Evidence Acts s 60.
189 Ibid ss 63–66.
190 Ibid s 81.
191 Ibid ss 69–75.

unavailable. Reasonable notice in writing is required in some circumstances where a party intends to adduce hearsay evidence.[192]

5.8 As discussed below, it has been suggested that the hearsay provisions of the uniform Evidence Acts are unclear in certain respects and may benefit from clarification in the light of experience since enactment.

Unintended assertions

5.9 Before the enactment of the uniform Evidence Acts there were irreconcilable authorities and commentary as to whether implied representations of different kinds fell within the hearsay rule.[193] The ALRC stated that its proposed provision on the exclusion of hearsay evidence was meant to resolve the issue of whether hearsay rules should apply to implied (as well as express) representations by recommending that a distinction be drawn between intended and unintended implied assertions, with the latter outside any hearsay rule.[194]

5.10 Section 59 of the uniform Evidence Acts excludes from admissibility representations 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'.[195] Section 59 does not exclude unintended assertions, whether express or implied. It has been said that, in restricting the operation of s 59(1) to intended representations, under the uniform Evidence Acts 'fact-finders can be left to discern the meaning of highly ambiguous acts without the benefit of trial procedures such as observation or cross-examination'.[196]

5.11 The meaning of an 'intended' assertion was considered by the New South Wales Court of Criminal Appeal in *R v Hannes*.[197] Spigelman CJ stated that:

---

192 Ibid s 67.
193 See articles and texts cited in *R v Hannes* (2000) 158 FLR 359, 419.
194 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].
195 Uniform Evidence Acts s 3, definition of 'representation'.
196 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 161. See, eg, *R v Ung* (2000) 173 ALR 287 in which the statements 'Too many, hey' and 'Hey, hey, you don't know which one, hey' made to the accused by another person about a container load of canned pineapple were held to be relevant to the knowledge of the accused in relation to a heroin importation and not excluded by s 59(1).
197 *R v Hannes* (2000) 158 FLR 359.

> 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.[198]

5.12 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' would be included, because matters left to implication are generally inconsistent with 'intent'.[199] He added that nothing in the ALRC Report or the text of the *Evidence Act 1995* (NSW) 'suggests so restricted an operation for the hearsay rule under that Act'.[200]

5.13 While it was not necessary to decide the question, Spigelman CJ stated that it is arguable that the scope of the word 'intended' in s 59 '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'.[201]

5.14 Stephen Odgers has suggested that the concern expressed by Spigelman CJ as to the application of s 59 is 'somewhat misplaced' given that the burden of proof will be on the party arguing for admission of the evidence to satisfy the court that the representation was *not* intended to assert the existence of a fact.[202]

5.15 On the other hand, Dr Jeremy Gans and Andrew 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'.[203]

198 Ibid, [357].
199 Ibid, [359].
200 Ibid, [360].
201 Ibid, [361].
202 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.800].
203 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 177.

Question 5-1 Are concerns raised by the application of s 59 of the uniform Evidence Acts to previous representations containing implied assertions? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, to clarify the meaning of 'intended' in relation to implied assertions?

Question 5-2 Should the application of the uniform Evidence Acts to implied assertions be dependant upon the determination of the intention of a person who is, by definition, not before the court?

Evidence relevant to a non-hearsay purpose

5.16 At common law, even if hearsay evidence is admissible by virtue of its relevance for a non-hearsay purpose, the court is not permitted to use it for its hearsay purpose (that is, as proof of the existence of a fact asserted by it). 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.

5.17 This section applies where evidence is relevant for both a non-hearsay and a hearsay purpose. Where evidence of a previous representation is relevant and admitted for a non-hearsay purpose, it can be used also for a hearsay purpose, that is, to prove the truth of its contents.[204]

5.18 In recommending the enactment of a similar provision, the ALRC cited two areas in which the operation of the provision could arise. These were in relation to: (a) prior consistent and inconsistent statements; and (b) the factual basis of an expert's opinion.[205] Apart from simplifying the law and avoiding the need to create complex exceptions, another rationale for this provision was to avoid the need to make 'unrealistic distinctions' between permissible uses of admitted evidence,[206] and for judges to construct related directions to juries.[207]

---

204 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [60.00].

205 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144].

206 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [685].

207 See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 181.

Prior statements

5.19 In *Lee v The Queen*,[208] the High Court confirmed that s 60 was intended to work a considerable change to the common law by allowing what would otherwise be hearsay evidence to be admitted. In particular, s 60 allows evidence of prior consistent or inconsistent statements admitted for credibility purposes to be used to prove facts intentionally asserted in the statements, unless such use is limited by s 136.[209]

5.20 *Lee v The Queen* confirmed an important limitation on the operation of s 60. At trial, the Crown led a prior inconsistent statement of a witness in which he described the defendant walking up the street near the scene of a robbery and making an admission about the robbery.

5.21 The High Court held that s 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 intend to assert.[210] That is, s 60 operates only on representations that are excluded by s 59. Therefore, s 60 did not allow the witness' previous statement to be used as evidence of an admission by the defendant, a fact that the witness never intended to assert. A number of criminal law cases have followed *Lee v The Queen* in applying s 60 to prior out-of-court statements.[211]

Factual basis of expert opinion

5.22 Section 60 has also been at issue in cases involving expert opinion evidence. Under s 60, evidence of statements made to an expert or other data upon which the expert's opinion is based, may be used to prove the facts contained in the statements or data, subject again to s 136. At the same time, the operation of s 60 will often give rise to questions about whether a court should exercise the general discretion contained in s 136, to limit the use to be made of the evidence.[212]

5.23 For example, an accountant's expert report may summarise the contents of financial records not otherwise received in evidence. Such

---

208 *Lee v The Queen* (1998) 157 ALR 394.

209 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [60.15].

210 See Ibid, [60.15].

211 For example, *R v Rose* (2002) 55 NSWLR 701; *R v Glasby* (2000) 115 A Crim R 465; *R v Adam* (1999) 47 NSWLR 267; *Adam v The Queen* (2001) 207 CLR 96.

212 See, eg, *Quick v Stoland* (1998) 157 ALR 615, 625.

evidence has been held admissible on the basis that its purpose is to establish the factual basis upon which the expert held the opinions expressed in the report. As it is admissible for a non-hearsay purpose, evidence of the factual basis of the expert's opinion can also amount to evidence of the truth of that factual basis.[213] Similarly, s 60 of the Acts may operate (subject to other provisions of the Acts, including the discretions to exclude) so as to make a medical history taken by a doctor from a patient, and upon which the doctor bases his or her expert opinion, admissible to prove the facts recounted in that medical history.[214]

5.24 The application of s 60 to the admission of facts upon which expert opinions are based has been the subject of some contention. For example, in *R v Lawson*, Sperling J commented on the dangers of allowing medical histories to be used as evidence of the facts they contain. The judge stated that such an outcome would be 'so patently contrary to sound fact finding that it cannot have been intended as a matter of legislative policy'.[215] He expressed concern that unsworn and untested histories may be able to go into evidence in criminal trials as evidence of the fact, to support cases of diminished responsibility and defences of mental illness—and it may not matter who gives the history to the medical practitioner.[216]

5.25 The High Court's decision in *Lee v The Queen* may have implications for the admission of facts upon which expert opinions are based.[217] In *Lee*, the High Court held, in effect, that s 60 did not apply to second-hand or more remote hearsay evidence.[218] The decision in *Lee* can be interpreted as meaning that, for example, a medical history given to a doctor by a patient and used in the doctor's expert report is admissible under s 60 as evidence of the truth of the facts; but a similar medical history given to the doctor by the patient's guardian, or based on the reports of other medical experts, may not be admissible, as the evidence is second-hand hearsay.

5.26 However, in relation to the factual basis of expert opinion evidence it seems to be accepted, at least sometimes, that s 60 may apply to second-

213 Ibid, 621.
214 *R v Welsh* (1996) 90 A Crim R 364.
215 *R v Lawson* [2000] NSWCCA 214, [106].
216 Ibid, [106].
217 *Lee v The Queen* (1998) 157 ALR 394.
218 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.940].

hand hearsay evidence. For example, in *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland*[219] an anthropological report containing statements made to the expert over time by a number of named Kaiadilt people as to their culture, laws, practices and beliefs and their social structures and relationships was admitted, without limitation as to the operation of s 60 to the content of such statements.[220]

5.27 Further, given the emphasis in the ALRC's 1987 *Evidence* report on evidence admitted as the factual basis of expert opinion evidence performing a non-hearsay purpose, it may be difficult to argue that s 60 was not intended to apply to second-hand hearsay.[221]

5.28 Another concern is that different results may follow under s 60 depending on whether the expert gives evidence of the factual basis of a report in the form of a representation or in the form of an assumption. Section 60 does not apply to assumptions, only to representations. In *Quick v Stoland*, Branson J stated that if s 60 operates to 'give mere form significance in this way, the result cannot be regarded as entirely satisfactory'.[222] However, Justice Heydon has observed that the difference between a representation and an assumption is more than a matter of mere form and that it would be perjury for an expert to state as a representation (from a person with knowledge of the facts) what were only assumptions put to the expert, in an attempt to gain an advantage from s 60.[223]

5.29 For these reasons, it may be desirable to clarify the application of s 60 of the uniform Evidence Acts in respect of the factual basis of expert opinion evidence.

Reform of section 60

5.30 Section 60 may have the disadvantage of 'heightening the tactical benefit of having evidence of an out-of-court act admitted for a marginal

---

219 *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548.

220 See also *Daniel v Western Australia* (2000) 178 ALR 542; *Neowarra v State of Western Australia* (2003) 205 ALR 145. In relation to native title proceedings generally, s 60 may place the government party at a disadvantage in relation to anthropological expert opinion evidence because government experts will often not be in a position to challenge the factual basis of the opinions prepared for native title claimants. Other issues concerning hearsay evidence in native title proceedings are discussed below.

221 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144]–[145].

222 *Quick v Stoland* (1998) 157 ALR 615, 621.

223 J Heydon, 'Commentary on Justice Einstein's Paper' (2001) 5 *The Judicial Review* 123, 137.

non-hearsay purpose'.[224] It has been suggested that s 60 should be reformulated so that there is a presumption that evidence of a previous representation admitted as relevant for a non-hearsay purpose cannot be used as proof of the facts asserted by representation.

5.31 However, it is also said that any problems resulting from the application of s 60 should be addressed through careful application of the rules of evidence (for example, the relevance requirement) to the non-hearsay use; and, where the evidence is relevant to a non-hearsay purpose, by exercising the discretions to exclude or limit the use of evidence.

5.32 In particular, it has been suggested that s 136 should be used more often to limit the use to be made of evidence admitted for a non-hearsay purpose. However, in practice, it may be difficult to seek and obtain rulings under s 136 in civil cases where large volumes of documents are admitted into evidence, for example, as proof of the record before the decision-maker in public law cases.

5.33 Issues surrounding the application of s 60 to second-hand or more remote hearsay, especially in the context of expert opinion evidence, may also deserve more detailed consideration. For example, it may be suggested that, notwithstanding the decision of the High Court in *Lee v The Queen*, it should be made clear that s 60 allows the use of the factual basis of expert opinion evidence as evidence of the facts asserted, subject to the operation of s 136.

Question 5-3 Are concerns raised by the operation of s 60 of the uniform Evidence Acts, for example, in relation to the admissibility and use of prior inconsistent statements or the factual basis of expert opinion evidence? Is the general discretion to limit use of evidence in s 136 capable of addressing any such concerns? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

224 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 182.

Question 5-4 Should s 60 of the uniform Evidence Acts apply to second-hand hearsay evidence admitted for a non-hearsay purpose; or should its operation be limited to first-hand hearsay, as suggested by the decision of the High Court in *Lee v The Queen*? Should the operation of s 60 in this regard be clarified or modified through amendment of the uniform Evidence Acts and, if so, how?

Criminal proceedings if maker not available

Representations of complicit persons

5.34 Section 65 of the uniform Evidence Acts provides exceptions to the hearsay rule where, in a criminal proceeding, a person who made a previous representation is not available to give evidence about an asserted fact. The Acts provide that a person is taken not to be available to give evidence about a fact for reasons including that:

> (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.[225]

5.35 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
> (d) against the interests of the person who made it at the time it was made.
> ...

225 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW), Dictionary cl 4; *Evidence Act 2001* (Tas) s 3B.

5.36 In *R v Suteski*[226] 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.

5.37 The New South Wales 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 and that the finding that the witness was 'unavailable to give evidence' was correct. 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.[227]

5.38 The decision in *Suteski* has provoked concern in 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. The decision may indicate an imbalance between admissibility under ss 65 and 66 of the uniform Evidence Acts respectively.

5.39 Part of the rationale for the varying stringency of criteria for admissibility under these sections is that evidence should be more readily admitted where the witness is available for cross-examination; and where the representation is made in circumstances that make it more, rather than less, probable that the representation is reliable.[228]

5.40 The evidence held to be admissible under s 65 in *Suteski* (where the witness was not available and the representation was made in circumstances that do not particularly suggest reliability) would not have been admissible under s 66. Yet, s 66 should provide the more lenient test, given that the maker of the representation is available.

5.41 Addressing this concern might involve, for example, further restricting the circumstances in which a person may be taken as unavailable to give evidence; otherwise restricting the application of s 65; creating a more

226 *R v Suteski* (2002) 56 NSWLR 182.
227 Ibid, [38].
228 For example, because the asserted facts were 'fresh in the memory': Uniform Evidence Acts s 66, discussed below.

flexible test in s 66 circumstances; or doing nothing on the basis that judges may exclude such evidence under ss 135 and 137 of the Acts.

'Circumstances' and the reliability of evidence

5.42 Sections 65(2)(b) and (c) refer respectively to 'circumstances' that make it unlikely that the representation is a fabrication; or make it highly probable that the representation is reliable.[229]

5.43 There has been some conflicting authority interpreting the scope of the circumstances that may be taken into account in assessing these matters.[230] In *Williams v The Queen*[231] a Full Court of the Federal Court confirmed 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.[232]

5.44 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 had erred in addressing only the question of whether the evidence contained within the transcript of interview was reliable, rather than all the circumstances as to the making of the statement.

5.45 In *R v Ambrosoli*,[233] the New South Wales Court of Criminal Appeal held that relevant case law, including *R v Williams*, established that the focus in approaching s 65(2), should be on the circumstances of the making of the previous representation and on excluding evidence tending only to prove the asserted fact.[234] That is, evidence tending only to the reliability of the asserted fact should be taken into account.[235]

5.46 It has been suggested that injustice may result when only the circumstances of the making of the representation can be taken into account

---

229 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].

230 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.

231 *Williams v The Queen* (2000) 119 A Crim R 490.

232 Ibid, 503.

233 *R v Ambrosoli* (2002) 55 NSWLR 603.

234 Ibid, 616.

235 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2060].

under s 65(2), for example, when the Crown seeks to lead representations made by way of records of interview of persons who are dead. One view is that either the 'circumstances' able to be taken into account under s 65(2)(c) should be broadened to include the inherent truthfulness or otherwise of the representation or the sub-section should be repealed.[236]

Evidence of a previous representation adduced by a defendant

5.47 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; …

5.48 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.

5.49 An important question said to be raised by this provision is the scope of the term 'the matter', which may be interpreted narrowly or broadly.[237] In *R v Mankotia*,[238] the accused proposed to adduce evidence of representations by a deceased person as to aspects of their 'relationship'. 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.[239]

---

236 Confidential, *Submission E 5*, 6 September 2004.
237 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2220].
238 *R v Mankotia* [1998] NSWSC 295.
239 Ibid.

Question 5-5 Are concerns raised by the application of s 65 of the uniform Evidence Acts to previous representations made by persons who are taken to be unavailable to give evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Question 5-6 Are concerns raised by the limited scope of the 'circumstances' that may be taken into account under ss 65(2)(b) and (c) of the uniform Evidence Acts in assessing the reliability of a previous representation? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Question 5-7 Is there significant uncertainty about the scope of the term 'the matter' in s 65(9)? Should this be addressed through amendment of the uniform Evidence Acts and, if so, how?

Representations 'fresh in the memory'

5.50 Section 66 of the uniform Evidence Acts provides 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.[240] The relevant parts of s 66 read:

> (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.

5.51 In *Graham v The Queen*,[241] the High Court found that a complaint of sexual assault made six years after the sexual assualt alleged was not 'fresh in the memory' for the purpose of s 66. The Court held that:

> 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

240 Uniform Evidence Acts s 64 contains a parallel provision applicable to civil proceedings.
241 *Graham v The Queen* (1998) 195 CLR 606.

> arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.[242]

5.52 While the judgment in *Graham* noted that the quality or vividness of a recollection could be relevant in an assessment of its freshness, contemporaneity was considered the more important factor.[243] Cases in which evidence of an event relatively remote in time will be admissible under s 66 were said to be 'necessarily rare and requiring of some special circumstance or feature'.[244]

5.53 *Graham* has been applied in a large number of cases. In many of these cases, evidence of complaint has been inadmissible because the representations were not considered to be 'fresh';[245] including where complaints are made within months of the event.[246] This has led to some concern about the operation of s 66 in such cases.

5.54 Some decisions have shown a degree of flexibility in interpreting 'fresh in the memory'. In *R v Vinh Le*[247] the New South Wales 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. 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'.[248]

Criticism of the 'fresh in the memory' requirement

5.55 In recommending the enactment of the 'fresh in the memory' requirement, the ALRC recognised the importance of psychological research on loss of, and change in memory, which revealed the extent to which and rate at which memory loss occurs, and the decrease in the

---

242 Ibid, 608.
243 Ibid, 614.
244 Ibid, 608, 614.
245 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.
246 See, eg, *R v Lawson* [2000] NSWCCA 214, [98].
247 *R v Vinh Le* [2000] NSWCCA 49.
248 Ibid, [52].

accuracy of statements that result from unconscious reconstruction and interference.[249]

5.56 The concept of 'fresh in the memory' may need to be revisited in the light of more recent psychological research on memory, in particular, to consider whether aspects of the quality or vividness of certain memories should be factored into decisions about admissibility.

5.57 It has been suggested 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.[250] 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.[251]

5.58 Arguments that the quality or vividness of certain memories, such as those of sexual assault, should be considered as retaining reliability or staying 'fresh in the memory' for some longer period may be viewed as reliant on circular reasoning. 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 be spontaneous (the 'hue and cry'), and where failure to complain at the earliest possible opportunity could be used as evidence of consent.

5.59 Again, there may be a need to consider the balance between admissibility under s 66 and under s 65, particularly in the light of s 65(2)(c), which refers to representations 'made in circumstances that make it highly probable that the representation is reliable'. Arguably, it would be contrary to the overall scheme of the hearsay provisions if, because of an overly restrictive interpretation of s 66, complaint evidence were more easily admitted under s 65(2)(c) than under s 66.

---

249 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [688].

250 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.

251 Ibid. 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.

Identification and recognition

5.60 Particular issues arise with respect to the application of s 66 to previous representations concerning identification. In this context, the New South Wales Court of Criminal Appeal, in *R v Barbaro* [252] and *R v Gee*,[253] has held that evidence of identification should be distinguished from evidence of recognition, where the person recognised is someone previously known.[254]

5.61 In the case of recognition, what needs to be fresh in the memory is the person's continuing familiarity with the features of the person depicted[255] (where there is obvious contemporaneity between the act of recognition and the witnessing of this by an observer).[256] 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'.[257]

5.62 The fact that s 66 applies to identification evidence may provide 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. In addition, the complexity of the reasoning required in *Barbaro* and *Gee* in order to distinguish between identification and recognition may provide reasons to remove evidence of identification from the ambit of s 66. Such evidence would still be able to excluded as unfairly prejudicial under s 137 of the uniform Evidence Acts.

Question 5-8 Are concerns raised by the High Court's interpretation in *Graham v The Queen* of 'fresh in the memory' for the purposes of s 66 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

252 *R v Barbaro* (2000) 112 A Crim R 551.
253 *R v Gee* (2000) 113 A Crim R 376.
254 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2300].
255 *R v Gee* (2000) 113 A Crim R 376, 378.
256 *R v Barbaro* (2000) 112 A Crim R 551, 558.
257 *R v Gee* (2000) 113 A Crim R 376, 378.

Question 5-9 Does the concept of 'fresh in the memory' need to be re-examined, for example, in the light of more recent psychological research into memory loss or change or into the prevalence of delay in complaints of child or other sexual assault? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Question 5-10 Are particular concerns raised by application of s 66 of the uniform Evidence Acts to evidence of identification? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Business records

5.63 Section 69 of the uniform Evidence Acts provides exceptions to the hearsay rule relating to the admissibility of business records.[258] 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.
> …
> (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).

5.64 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', for example plans drawn up by an architect as part of a development application process or a business database compiled by a business broker.[259]

---

258 A 'document' falling within the terms of the uniform Evidence Acts s 69(1).

259 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [69.25].

5.65 An 'asserted fact' is defined to mean a fact the existence of which is intended to be asserted in the representation.[260] A statement in the form of an opinion as to the existence of a fact appears to qualify as a 'representation'.[261] However, there may still be difficulty in admitting assertions of opinion under s 69, given the requirement of personal knowledge as defined in s 69(5).[262] When a person, such as an expert, expresses an opinion regarding the existence of some fact, the person often did not 'see, hear, or otherwise perceive' that the fact existed. It has been suggested that this is an oversight in the legislation.[263]

5.66 It was held in *Ringrow Pty Ltd v BP Australia Limited*[264] that the requirement of personal knowledge of the asserted fact is satisfied in relation to opinions expressed out of court by experts 'because the asserted fact consists of opinions which they themselves had formed and expressed'.[265] However, it has been claimed that this analysis is confused because the asserted fact is not the opinion itself but the fact in respect of which the opinion is given.[266]

Question 5-11 Are concerns raised by the application of s 69 of the uniform Evidence Acts to opinion contained in business records? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Contemporaneous statements about a person's health etc

5.67 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.

260 Uniform Evidence Acts s 59(2).
261 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].
262 Ibid, [1.3.2860].
263 Ibid, [1.3.2860].
264 *Ringrow Pty Ltd v BP Australia Limited* [2003] FCA 933.
265 Ibid, [19].
266 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2860].

5.68 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 intended assertions and by the first-hand hearsay proposal.[267]

5.69 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 such representations are admissible either as original evidence or as hearsay admissible under the *res gestae* exception.[268]

5.70 The breadth of this provision has been criticised in several respects. 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 irrelevant to contemporaneous statements.[269] It has been suggested that such an interpretation should be avoided.[270] Section 72 may benefit from clarification in this regard.

5.71 It has also been suggested that s 72 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.[271] There are arguments that s 72 should be amended to remedy this position.

5.72 Finally, it is not entirely clear 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 in respect of any use of the statement.[272] That is, 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

---

267 Ibid, [1.3.3400].

268 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.00].

269 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].

270 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3400].

271 Ibid, [1.3.3400].

272 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.40].

occurrence of an event that created that state of mind, such as the making of a threat?

Question 5-12 Are concerns raised by the operation of s 72 of the uniform Evidence Acts in providing an exception to the hearsay rule applying to certain contemporaneous statements? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, by restricting the operation of s 72 to first-hand hearsay?

Hearsay in interlocutory proceedings

5.73 In interlocutory proceedings, parties often rely on affidavits, rather than on witness testimony. Such evidence is hearsay, but s 75 of the uniform Evidence Acts provides that the hearsay rule does not apply to evidence in an interlocutory proceeding 'if the party who adduces it also adduces evidence of its source'. The rules of most federal, territory and state courts include a similar provision.[273]

5.74 It has been suggested that, by the terms of s 75, the person swearing the affidavit or making a written statement should be required to swear to a belief in the information and the reasons for that belief.[274]

5.75 This is the case with other provisions of the uniform Evidence Acts, which deal with proof of certain matters by affidavit or written statements.[275] Section 172 states that, despite Chapter 3, evidence of certain matters may include evidence based on the 'knowledge and belief of the person who gives it, or on information that that person has'.[276]

Question 5-13 Should s 75 of the uniform Evidence Acts be amended to require that the evidence be based on the knowledge of the person who gives it or on information that the person has and believes?

273 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3700].
274 A Hogan, *Submission E 1*, 16 August 2004.
275 Uniform Evidence Acts s 172.
276 It has also been suggested that s 172 should be amended so that it requires either knowledge on one hand or information and belief on the other: A Hogan, *Submission E 1*, 16 August 2004.

Hearsay and evidence in native title proceedings

5.76 Claimants in native title cases under the *Native Title Act 1993* (Cth) (*Native Title Act*) face a range of particular evidentiary problems. Some of these problems were highlighted in *De Rose v South Australia*[277] (*De Rose*).

5.77 In *De Rose*, O'Loughlin J considered the admissibility of a witness statement stating that the witness was told by a deceased Aborigine, when speaking of the land subject to native claim, that 'this is your grandmother's country'. O'Loughlin J held that it would not be appropriate to receive the witness statement into evidence, under ss 62 and 63 of the uniform Evidence Acts,[278] as evidence of the fact that it was the grandmother's country.[279]

5.78 O'Loughlin J referred generally to evidentiary problems relating to the receipt into evidence of statements made by other Aboriginal people to a witness. For example, he noted that under the ordinary rules of evidence, it is not possible, in the majority of cases, to prove the place of birth of older generations by means only of oral evidence. Many Aboriginal persons, particularly those who are living in remote areas, have no such written records of their birth. Despite this absence of documentary records, there is an onus on them to establish their entitlement to native title of the area of land and waters that is the subject of their claim.[280]

5.79 In this context, the judge noted that s 73 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.

5.80 After discussing the constraints of the *Evidence Act 1995* (Cth), the judge received the evidence under s 82(1) of the *Native Title Act*, which provides that in native title cases, the Federal Court is bound by the rules of evidence 'except to the extent that the Court otherwise orders'.[281]

---

277 *De Rose v South Australia* [2002] FCA 1342.

278 Sections 62 and 63 provide for an exception to the hearsay rule for first-hand hearsay in civil proceedings if the maker is not available.

279 *De Rose v South Australia* [2002] FCA 1342, [263]. However, the statement could be received as evidence that these words were spoken and that the witness believed them.

280 Ibid, [265].

281 See the discussion of evidence in native title proceedings in Ch 15.

5.81 The ALRC is interested in comments on the operation of the hearsay provisions in proceedings under the *Native Title Act*. There may be arguments, for example, in favour of amendment of the *Evidence Act 1995* (Cth) to provide an exception for certain categories of evidence adduced in native title proceedings.

Question 5-14 Are concerns raised by the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in proceedings under the *Native Title Act 1993* (Cth)? Should any concerns be addressed through amendment of the *Evidence Act 1995* (Cth) or by other means and, if so, how?

Hearsay and children's evidence

5.82 The hearsay rule is particularly significant in cases involving child witnesses and complainants, as children are often incompetent to give sworn or unsworn evidence, or unwilling to give evidence due to the trauma involved.[282] 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.[283] The lack of evidence from child witnesses may mean that some cases are not prosecuted.[284]

5.83 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.[285] Others may be admissible for hearsay purposes (ie, proof of the truth of the contents) under s 60 if the evidence has been admitted for a non-hearsay purpose (eg, for credibility purposes).[286]

5.84 In their inquiry into children in the legal process, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) considered the hearsay exceptions provided by the uniform Evidence Acts are

---

282 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].

283 Ibid, Ch 14.

284 Ibid, [14.78].

285 Uniform Evidence Acts ss 64, 66.

286 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [60.00]. Although see *Lee v The Queen* (1998) 157 ALR 394 and the discussion above regarding the limitation on the operation of s 60.

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.[287] It was considered that the admission of a child's out-of-court statement can 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.[288]

5.85 For these reasons, the ALRC and HREOC made the following recommendation to amend the uniform Evidence Acts to allow children's hearsay statements to be admitted:

> 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.[289]

5.86 A number of jurisdictions have made provision for the admission of child witness' 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 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.[290] In New South Wales and Tasmania, in certain criminal proceedings the evidence of certain previous statements made by a child may be admitted.[291] 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.[292] In Western Australia, a statement made by a child before the proceedings were

---

287 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].

288 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Ch 8.

289 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.

290 *Family Law Act 1975* (Cth) s 100D.

291 *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). The Act applies to children under the age of 17.

292 *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.

commenced that relates to any matter in issue in the proceedings may be admitted at the discretion of the judge.[293]

5.87 Canadian courts have admitted children's hearsay statements about an issue at trial if the admission is 'necessary' and the statement is reasonably reliable.[294] It is considered to be 'necessary' where the child is incompetent to give evidence, or is unable or unavailable to give evidence, such as where they are extremely young or cannot give a coherent or comprehensive account of events, or the judge is satisfied giving evidence might be traumatic for or harm the child.

Question 5-15 Should there 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? If so, what restrictions, if any (eg, age of child, time limits), and discretions, if any, should be included? Should documents such as drawings or stories also be admissible? Must the child be available for cross-examination if the statements are admitted?

Notice where hearsay evidence is to be adduced

5.88 Section 67 makes the operation of certain of the first-hand hearsay exceptions conditional on notice being given by the party intending to adduce the evidence to each other party. 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.

5.89 Notices are to be given in accordance with any regulations or rules of court made for the purposes of s 67.[295] Section 67(4) provides that failure to give notice may be excused by the court. The section does not set out

---

293 *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 its making and 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.

294 *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 complaintant.

295 See, eg, *Evidence Regulations 1995* (Cth) r 5; *Federal Court Rules* (Cth) O 33 r 16.

criteria for the exercise of this discretion. However, the factors set out in s 192 of the Act 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.

5.90 The ALRC understands 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.

5.91 The ALRC is interested in evaluating the experience of courts and practitioners in relation to the operation of the notice provisions of the uniform Evidence Acts and in canvassing suggestions for reform. For example, it has been suggested 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.

5.92 Civil rules of court dealing with discovery and with notices to admit facts or documents allow parties to require the production of evidence, including hearsay evidence. The ALRC is interested in comments on how these rules may affect the use, or lack of use, of the procedures under s 67 of the uniform Evidence Acts.

Question 5-16 How has s 67 of the uniform Evidence Acts, requiring notice where hearsay evidence is to be adduced, operated in civil proceedings? What concerns, if any, have been raised, and how should these be addressed?

Question 5-17 How have procedures under s 67 been affected by civil rules of court in relation to discovery and notices to admit facts and documents?

Hearsay in civil proceedings

5.93 The hearsay rule and its exceptions are of much more practical importance in criminal than in civil proceedings. From initial consultations, it is apparent that the hearsay rule is often ignored in civil proceedings.

5.94 In the United Kingdom, the hearsay rule was abolished in civil proceedings by the *Civil Evidence Act 1995* (UK). Section 1 of the *Civil Evidence Act* states that

> (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.

5.95 Under the United Kingdom legislation, the party proposing to adduce hearsay evidence must provide notice of that fact to the other party.[296] The Act also contains detailed provisions setting out considerations relevant to the weighing of hearsay evidence by the court.[297]

5.96 The ALRC is interested in comments on whether the uniform Evidence Acts might be reformed to abolish the hearsay rule or to allow the hearsay rule to be waived. 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,[298] but only if the parties consent.[299] 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.[300]

Question 5-18 Should the hearsay provisions of the uniform Evidence Acts be amended to allow hearsay evidence to be admitted in civil proceedings, with or without the consent of the parties?

Other issues

Question 5-19 Are there any other concerns in relation to hearsay evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

296 *Civil Evidence Act 1995* (UK) s 2.
297 Ibid s 4.
298 Uniform Evidence Acts s 190(1). The following provisions may be waived, in relation to particular evidence or generally: Division 3, 4 or 5 of Part 2.1; Part 2.2 or 2.3; or Parts 3.2 to 3.8. (Part numbers differ slightly in the Tasmanian legislation.)
299 Section 190(2) contains safeguards with regard to the consent of a defendant in criminal proceedings.
300 Uniform Evidence Acts s 190(3).

6. The Opinion Rule and its Exceptions

Contents

The opinion rule

6.1 The common law rules of evidence generally render evidence of opinion inadmissible. Consistently, 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.

6.2 While the Act does not attempt to define the term 'opinion' it has been held that an opinion is, in substance, 'an inference drawn or to be drawn from observed and communicable data'.[301]

6.3 The distinction between evidence of an opinion and evidence of fact may be considered artificial 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'.[302] However, in its earlier inquiry into the laws of evidence, the ALRC considered that retaining the distinction

---

301 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4060]; *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73, 75.

302 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [738].

(and a rule excluding opinion evidence) was 'unavoidable' in order to exercise some control upon material at the opinion end of the continuum and for control of the admission of expert opinion evidence.[303]

6.4 The uniform Evidence Acts provide a range of exceptions to the opinion exclusionary rule.[304] These include exceptions in relation to lay opinion and opinion based on specialised knowledge[305] ('expert opinion evidence'). A number of concerns have been raised in relation to the operation of these exceptions, which are discussed below.

Lay opinion

6.5 At common law, lay opinion evidence was inadmissible unless it fitted within 'an apparently anomalous miscellany' of exceptions.[306] Section 78 of the uniform Evidence Acts was intended to reform this position. 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.

6.6 Examples of evidence that may be admitted as lay opinion evidence include evidence as to the apparent age of a person, the speed of a vehicle, the state of the weather, a road or the floor of a factory,[307] and the comparative intelligence amongst the inhabitants of a small town of a person with whom the witness has had dealings.[308]

6.7 In *R v Leung*[309] the New South Wales Court of Criminal Appeal considered the admissibility, under s 78, of an interpreter's evidence identifying recorded voices as being those of the appellants. Simpson J stated that s 78 is designed to permit evidence of opinion that would

---

303 Ibid, [738].
304 For example, in relation to: summaries of documents (s 50(3)); lay opinion (s 78); expert opinion (s 79); admissions (s 81); exceptions to the rule excluding evidence of judgments and convictions (s 92(3)); character of and expert opinion about accused persons (ss 110–111).
305 Uniform Evidence Acts s 79.
306 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [739].
307 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4180].
308 *R v Fernando* [1999] NSWCCA 66.
309 *R v Leung* (1999) 47 NSWLR 405.

facilitate the understanding of evidence otherwise relevant and admissible. That is, the section assumes that the matter or event as perceived by the witness is relevant to the proceeding and the opinion evidence is admissible as incidental to an understanding of the primary evidence.[310]

6.8 Simpson J held that, as the relevant matter was the identity of the speakers on the recordings, the interpreter's perception of that matter did not become relevant until the interpreter had formed his opinion as to identity. Accordingly, evidence of his opinion was not necessary to obtain an adequate account or understanding of his perception, and was not admissible.

6.9 It has been suggested that this restrictive approach to the application of s 78 is overly technical, and would tend to exclude evidence that s 78 is designed to admit—evidence of perceptions that cannot be communicated other than as an opinion. Simpson J's approach has also been criticised because it applies the relevance test in ss 55 and 56 to the 'matter or event' and to the person's perception of the matter or event, rather than to the evidence of the person's opinion.[311]

6.10 Another issue is that, in some circumstances, it may not be entirely clear where the dividing line lies between lay opinion evidence and expert opinion evidence. For example, a lay witness may be sufficiently familiar with another person's handwriting as to be able to give evidence of the authorship of handwriting by drawing an inference from the form of the disputed handwriting. One approach to such evidence is to seek to admit it under s 78, as the witness' perception of whether the disputed writing is that of a person with whose writing the witness is familiar. Alternatively, admission of the evidence might be sought under s 79, as so-called 'ad hoc' expert opinion evidence.[312]

6.11 It has been suggested that opinion evidence is sometimes sought to be admitted under s 78 in order to circumvent s 79 (dealing with expert opinion evidence) in situations where the witness does not have the requisite specialised knowledge based on 'training, study or experience'. In *Idoport*

---

310 Ibid, [33]–[34].

311 See J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [78.15].

312 See Ibid, [78.15].

Pty Limited v National Australia Bank Limited,[313] Einstein J considered the admissibility of the evidence of a witness who, while not qualified as an expert in terms of s 79, had had a particular involvement in the financial planning industry during a number of the years that were of relevance to the issues in the proceedings. In admitting some, but not all, of the opinion evidence of this witness, Einstein J noted the clear difference beween experts and those not qualified as experts, but who can give evidence under s 78 'of a contemporaneous nature as to their perceptions'.[314]

6.12 Einstein J observed that 'as one moves away from contemporaneous subjective opinions formed by the witness about matters or events concerning tangible factual issues and into the realm of contemporaneous subjective opinions as to the contemporaneous subjective opinions of third parties, the danger of uninformed speculation increases dramatically'. In these circumstances the discretion to exclude evidence under s 135 will come into play.[315] Further, there is far more scope for rejecting opinions apparently formed at the time when the evidence is filed for the purpose of the proceedings, rather than contemporaneously with the events in question.[316]

Question 6–1 Do concerns exist with regard to the admission of lay opinion evidence under s 78 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Opinions based on specialised knowledge

6.13 In contrast to other witnesses, expert witnesses are permitted to offer opinions to the court as to the meaning and implications of other evidence. At common law, a number of rules of evidence evolved to control the reception of expert opinion evidence. Briefly, these have been described as follows:[317]

313 *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 529.
314 Ibid, [21].
315 Ibid, [23].
316 Ibid, [27].
317 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 2. Another view is that this analysis of the current law, whether under the common law or the uniform Evidence Acts is 'highly artificial and misleading'. Rather, the 'rules' should be regarded in 'a more flexible way as aspects of either the operation of the expertise exception to the opinion rule … or the trial

- the field of expertise rule: the claimed knowledge or expertise should be recognised as credible by others capable of evaluating its theoretical and experiential foundations;[318]
- 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 proper disclosure and evidence of the factual basis of the opinion.[319]

6.14 Section 79 of the uniform Evidence Acts provides an exception to the opinion rule for expert opinion evidence:

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.

6.15 In addition, s 80 of the uniform Evidence Acts abolished the 'ultimate issue rule' and the 'common knowledge rule':

Evidence of an opinion is not inadmissible only because it is about:

(a) a fact in issue or an ultimate issue; or

(b) a matter of common knowledge.

6.16 The 'field of expertise rule' and the 'basis rule' were not specifically incorporated in the Act's expert opinion exception. The ALRC considered that these matters should not be preconditions to admissibility, but be resolved as required under the general discretion to exclude evidence pursuant to s 135.[320]

6.17 A number of issues concerning the operation of s 79 have been raised by commentators and are discussed below. The ALRC is also

---

judge's discretion to exclude prejudicial evidence': J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 243.

318 As discussed below, there is some debate about the existence and content of the field of expertise rule, both at common law and under the uniform Evidence Acts.

319 Again, as discussed below, there is debate about the existence and content of the basis rule: see also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [107]–[108].

320 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743], [750].

interested in comment on other issues concerning expert opinion evidence and the operation of the uniform Evidence Acts.

Specialised knowledge

6.18 The uniform Evidence Acts do not provide specifically for a 'field of expertise' test for admissibility of expert opinion evidence. The Acts simply require a person to have 'specialised knowledge'.[321]

6.19 The field of expertise rule (sometimes also referred to as the 'area of expertise' rule) has been a subject of contention at common law, particularly in relation to admitting evidence of new scientific techniques or theories. The criteria to be applied in determining whether opinion evidence from specific areas of expertise is admissible have arisen in reported cases in relation to fingerprinting evidence, the use of seat belts, the causes of traffic accidents, voice identification evidence, stylometry evidence, polygraph evidence, bushfire behaviour evidence, DNA profiling evidence and battered woman syndrome evidence.[322]

6.20 While some commentators accept that, under the common law, the opinion of an expert must derive from an area or field of expertise, Australian law has never clearly resolved the test.[323] Courts commonly look to see whether a field of expertise has 'general acceptance' in the relevant scientific discipline.[324] However, there are also authorities that suggest courts should themselves make an assessment of the 'reliability' of a body of knowledge; and authorities which adopt both approaches.[325] South Australian case law adopts the 'general acceptance' field of expertise test.[326] However, Victoria seems to have rejected a field of expertise rule, and the position is unclear in other jurisdictions.[327]

6.21 The High Court has considered the interpretation of 'specialised knowledge', without clearly resolving the matter. In *HG v The Queen*,

---

321 Uniform Evidence Acts s 79.

322 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 53–54.

323 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].

324 The 'general acceptance' test derives from the United States decision in *Frye v United States* 293 F 1012 (1923). See Australian cases cited in Ibid, [1.3.4260].

325 See Ibid, [1.3.4260].

326 Expertise must be 'sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience': *R v Bonython* (1984) 38 SASR 45, 47.

327 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 87.

Gaudron J (Gummow J agreeing) stated that 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'.[328]

6.22 Debate in Australia about whether courts, in considering the admissibility of expert opinion evidence, should assess the reliability of a field of knowledge or expertise has been influenced by the 1993 decision of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals* (*Daubert*).[329] *Daubert* held that, in applying Rule 702 of the Federal Rules of Evidence,[330] the court must make an assessment of whether the reasoning or methodology underlying expert opinion evidence is scientifically valid.[331]

6.23 Discussion about the possible influence of the Daubert approach on Australian evidence law has centred on whether 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,[332] others have concluded that it would be unlikely to lead to any significant improvement in the quality of scientific expert opinion evidence.[333]

---

328 *HG v The Queen* (1999) 197 CLR 414, 432. See also *Velevski v The Queen* (2002) 187 ALR 233.

329 *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.

330 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. Under Rule 702, it is also necessary that such knowledge 'will assist the trier of fact'; cf the general discretion to exclude under Uniform Evidence Acts s 135.

331 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.

332 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.

333 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.

6.24 One view is that the 'specialised knowledge' requirement of s 79 should be interpreted as imposing a standard of evidentiary reliability, so that expert opinion evidence must be derived from a reliable body of knowledge and experience.[334] At the least, aspects of the field of expertise test, including 'general acceptance' and *Daubert*-style reliability criteria may be able to be used to help determine the probative value of evidence in the exercise of the general discretion to exclude evidence.[335] On the other hand, there may be concern about the restoration of a field of expertise rule, contrary to legislative intent, through such interpretations of s 79.

6.25 The ALRC is interested in comments 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.[336]

Question 6–2 Should the uniform Evidence Acts be amended to introduce additional criterion for the admissibility of expert evidence in scientific or technical fields?

Question 6–3 Alternatively, should the uniform Evidence Acts be amended to remove threshold admissibility rules for expert opinion evidence, leaving judges to decide on the weight to be given to such evidence?

Training, study or experience

6.26 It has been held that the term 'specialised knowledge' is not restrictive and expressly encompasses specialised knowledge based on experience.[337] In *ASIC v Vines*, Austin J held that s 79 permits a professional expert such as a doctor, solicitor or accountant, to give evidence about the content of general practices of professionals in his or her field and to express an opinion about the conduct of competent and careful professionals in typical and specially defined circumstances.[338]

---

334 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].
335 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 88.
336 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.
337 See *ASIC v Vines* (2003) 48 ACSR 291, 294–295.
338 See Ibid, 297–299.

6.27 A related issue concerns the concept of an 'ad hoc' expert. An ad hoc expert is a person who, while not having formal training or qualifications, has acquired expertise based on particular experience, 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.

6.28 The concept of an ad hoc expert was recognised by the High Court in *R v Butera*.[339] Cases since the enactment of the uniform Evidence Acts have recognised that s 79 is sufficiently broad as to encompass ad hoc experts.

6.29 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 voices on the listening device tapes were those of the accused. It was held that, even if such evidence fell outside the scope of s 78, it was admissible under s 79 because the interpreter's expertise and familiarity with the voices and languages on the tapes qualified him as an ad hoc expert.[340]

6.30 It has been suggested the current approach to ad hoc experts may 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'.[341]

6.31 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.[342]

Question 6–4 Do concerns exist with regard to the admission of so-called 'ad hoc' expert opinion evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

339 *R v Butera* (1987) 164 CLR 180.
340 *R v Leung* (1999) 47 NSWLR 405. See also *Li v The Queen* (2003) 139 A Crim R 281.
341 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [78.15].
342 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 235.

The factual basis of expert opinion evidence

6.32 Under the common law, the admissibility of expert opinion evidence is said to depend on proper disclosure and evidence of the factual basis of the opinion. That is, the expert must disclose the facts upon which the opinion is based, which must be capable of proof by admissible evidence, and evidence must be admitted to prove any assumed facts upon which the opinion is based.[343]

6.33 In practice, much of the evidence given by experts is based on the opinions or statements of others—for example, reports of technicians and assistants, consultation with colleagues and reliance upon extrinsic material and information, such as books, articles, papers and statistics. This means that expert opinion evidence is often based on evidence that is technically hearsay, and which may not comply with the basis rule.

6.34 The ALRC recommended that the basis rule should not be a precondition to admissibility under the uniform Evidence Acts[344] and that such matters should be resolved under the general discretion to exclude.[345]

6.35 Under the uniform Evidence Acts, expert opinion evidence must be 'wholly or substantially based on the expert's 'specialised knowledge'.[346] In the New South Wales Court of Appeal, this requirement was interpreted by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles*[347] (*Makita*) as meaning that, in order for expert opinion evidence to be admissible:

- 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

343 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4320].
344 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [750].
345 Uniform Evidence Acts s 135.
346 Ibid s 79.
347 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

> must explain how the field of 'specialised knowledge' applies to the facts assumed or observed so as to produce the opinion propounded.[348]

6.36 Concern has been expressed that such an approach to the admissibility of expert opinion evidence may be too stringent, in effect requiring the judge to fully understand the scientific basis of an expert opinion, or to reject it as irrelevant. It may interrupt the smooth running of trials by requiring such meticulous consideration of expert evidence by trial judges.

6.37 In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,[349] Branson J stated that the approach in *Makita* should be understood as a 'counsel of perfection' and that, in the context of an actual trial, it is sufficient for admissibility that the judge be satisfied that the expert has drawn his or her opinion from known or assumed facts by reference to his or her specialised knowledge.[350] The *Makita* criteria, it was said, should commonly be regarded as going to weight rather than admissibility.[351]

6.38 It has also been stated that the suggestion in *Makita* that the factual basis of an expert report must be proven in order for expert opinion to be admissible would amount to 'restoring the basis rule'.[352] By contrast, it has been held that an 'expert's exposure of the facts upon which the opinion is based' should be sufficient to establish whether the opinion is based on the expert's specialised knowledge in terms of s 79—a matter that is not dependent on proof of the existence of those facts.[353]

6.39 On the other hand Justice Heydon has noted that the view that questions about whether the evidence supports the factual assumptions made by experts should be left to matters of weight at the end of the trial, may be difficult to reconcile with the relevance criterion for admissibility,[354] which contemplates that evidence cannot be admitted unless there is some evidence leaving it reasonably open to conclude that

---

348 Ibid, 743–744.
349 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157.
350 Ibid, [7], [16].
351 Ibid, [16], [87]. This approach was endorsed by the NSW Court of Appeal in *Adler v Australian Securities and Investment Commission* [2003] NSWCA 131, [631]–[632].
352 *Neowarra v State of Western Australia* (2003) 205 ALR 145, 154.
353 Ibid, 154.
354 Uniform Evidence Acts s 57(1).

assumptions are sound; and with the practical exigencies of conducting litigation.[355]

6.40 The ALRC understands that, in fact, there is a spectrum of approaches taken by judges on this issue. Some judges take the strict approach expressed by Heydon J in *Makita*, requiring the facts upon which an expert opinion is based to be proven. Others invariably admit such evidence, following the Branson J approach in *Red Bull*, and rule later on the weight to be given to the relevant opinions. However, on one view, this state of affairs does not differ markedly from that previously applying under the common law.

6.41 Some judicial concern has been expressed about insufficient understanding among experts and some legal practitioners about the need to demonstrate that expert opinion evidence is 'based on' the application of specialised knowledge to relevant facts or factual assumptions. In response, judges 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.[356]

6.42 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 to which the government party made at least 1,100 objections. Sackville J noted that 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.[357] He agreed with earlier comments of Lindgren J[358] that, in order to ensure that the legal tests of admissibility are addressed, lawyers should be involved in the writing of reports by experts.

---

355 D Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript.

356 C Einstein, *National Judicial Orientation Program 2002: Problems in Evidence* (2002).

357 *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [8]–[9].

358 *Harrington-Smith v State of Western Australia (No 7)* (2003) 130 FCR 424, [19]. Lindgren J observed that many of the experts' reports tendered in this case had made 'little or no attempt to address in a systematic way the requirements for the admissibility of expert opinion'.

6.43 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 Chapter 5, in relation to the operation of s 60 of the uniform Evidence Acts.

Question 6–5 Do concerns exist with regard to 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? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

Question 6–6 Is there insufficient understanding amongst 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 and, if so, how should this be remedied?

Opinion on ultimate issues or by way of submission or argument

6.44 The common law's ultimate issue rule was abolished by s 80 of the uniform Evidence Acts. Under the 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 nonsensical, and recommended that the rule be abolished.[359]

6.45 At common law, the prohibition on opinion evidence containing a legal standard has almost exclusively been applied in jury cases.[360] It has been suggested that the abolition of the ultimate evidence rule has had a significant effect on the conduct of professional negligence proceedings. In particular, there is concern that juries in such cases may be overly influenced by expert evidence on central issues—that is, on whether the defendant has been negligent. Further, it has been suggested that some lawyers fail to appreciate that s 80 is not an independent basis for the admission of expert opinion evidence on a fact in issue or an ultimate issue.

359 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743].
360 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 262.

6.46 There have been calls for the ultimate issue rule to be revived, 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'.[361]

6.47 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'.[362] The intention of the section was 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.[363] The section was 'not apt to refer to expert legal opinion which impinges upon the essential curial function of applying the law, whether domestic or foreign, to facts'.[364]

6.48 Other cases throw doubt on this view of the ambit of s 80. In *Idoport Pty Ltd v National Australia Bank*,[365] 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'.[366]

6.49 A related issue concerns the position of expert argument under the uniform Evidence Acts. The Federal Court Rules authorise the 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'.[367] This provision is said to permit 'expert argument'.[368]

---

361 In terms of the *Civil Liability Act 2002* (NSW) s 5O(1) introducing a modified *Bolam* rule: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

362 *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': *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)* (1996) 64 FCR 79, 83.

363 *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)* (1996) 64 FCR 79, 84.

364 Ibid, 83.

365 *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640.

366 Ibid, 656–657.

367 *Federal Court Rules* (Cth) O10 r 1(2)(j).

368 R French, *Submission E 3*, 8 October 2004.

6.50 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.[369]

6.51 While it may not be strictly necessary, it has been suggested that expert argument should be recognised and encouraged, for example through a saving provision to the effect that the rules governing the admissibility of opinion evidence do not prevent the reception of expert opinion as submission.[370]

> **Question 6–7** Do concerns exist with regard to the admission of expert opinion evidence about an ultimate issue or expert opinion by way of submission or argument? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

Opinion on matters of common knowledge

6.52 Section 80 of the uniform Evidence Acts abolished the common knowledge rule. It has been suggested that, as a result, unnecessary time and expense are used in dealing with evidence about such matters as motor vehicle accident reconstruction, which may have been excluded by the application of the common law rules.[371]

6.53 One consequence of s 80 has been to facilitate claims for the admission of expert opinion evidence in relation to identification (identification expert evidence). Such evidence involves opinion based on knowledge of research by psychologists into factors affecting the accuracy of eyewitness identification. Under the common law, expert opinion evidence in relation to identification is inadmissible because it concerns a matter 'within the range of human experience which must be determined by the jury'.[372]

---

369 Ibid.
370 Ibid.
371 *Clark v Ryan* (1960) 103 CLR 486; Confidential, *Submission E 5*, 6 September 2004.
372 *Smith v The Queen* (1990) 64 ALJR 588.

6.54 In *R v Smith*,[373] it was accepted that because the uniform Evidence Acts expressly abolished the common knowledge rule, identification expert evidence may be admissible under s 79 of the Act. The Crown 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'.[374] The New South Wales Court of Criminal Appeal held that the particular identification expert evidence, if tendered as fresh evidence at trial, should be excluded under s 135(c) of the Act as likely to cause or result in undue waste of time.

Question 6–8 Do concerns exist with regard to the admission of expert opinion evidence on matters of common knowledge, for example, in relation to expert identification evidence or motor vehicle accident reconstruction? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

Expert opinion regarding children's evidence

6.55 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*, concluded that changes to the law are necessary to address the traditional view that children's evidence is unreliable, based on perceptions regarding children's limited memory capacity and ability to recall events accurately.[375] There is growing psychological research demonstrating that even very young children are capable of giving reliable evidence.[376]

6.56 To help achieve this change the ALRC and HREOC recommended that the uniform Evidence Acts be clarified to ensure that expert evidence that may assist the decision maker in understanding children's disclosures, patterns of behaviour and demeanour in and out of court is admissible in

373 *R v Smith* (2000) 116 A Crim R 1.
374 Ibid, [59].
375 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.
376 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.30].

civil or criminal proceedings where the child is an alleged victim of abuse.[377]

6.57 Under s 13(7) of the uniform Evidence Acts the court can inform itself as it thinks fit in relation to questions of competence. Arguably, this gives the court the power to explore a child witness' competence to give sworn, unsworn or any evidence, including by using an expert or a person the child witness trusts and understands in questioning, or calling an expert witness to inform the court about the child witness' competence.[378]

6.58 However, it may also be appropriate to admit expert evidence that assists the jury in understanding the behaviour of child witnesses in order for the jury to give proper weight and consideration to the evidence.

6.59 At common law, Australian courts have demonstrated a reluctance to admit evidence of typical patterns of behaviour and responses of child victims of abuse as expert evidence.[379] There is a tendency to exclude expert evidence about the behaviour of child victims because it is relevant only to the complainant's credibility; is not an appropriate subject for expert evidence (ie, it is not outside the ordinary experience of the jury); or because the expert is not properly qualified to give the evidence.[380] Dr Ian Freckelton and Hugh Selby consider that Australian courts will continue to be cautious in admitting expert evidence regarding patterns of behaviour in child abuse victims.[381]

6.60 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.

> 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,

---

377 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 101.

378 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [13.45].

379 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Ch 15.

380 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.

381 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 367.

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.

6.61 This provision overcomes the traditional reluctance to accept that this kind of evidence is a subject of specialised knowledge. However, it is arguable that the provision does not override the credibility rule. Even if it can be said that the legislature intended s 79A to operate as an override in clear contradistinction to the common law, it is possible that the courts will apply a narrow interpretation and make such evidence subject to the credibility rule.

6.62 The operation of the credibility rule in s 102 and its exceptions under the uniform Evidence Acts, make it difficult for the prosecution to be able to call an expert witness solely for the purpose of bolstering the credibility of a child witness.[382] For example, there may be doubt over whether that evidence, if it is found only relevant to credibility, would be admitted to show why a child continued a relationship with the alleged offender and delayed making a complaint, or why, once a complaint had been made, the complainant gave inconsistent accounts of what had happened. If the evidence is clearly relevant beyond its credibility use, arguably there is no credibility rule problem.[383]

6.63 While the exceptions are generally more conducive to admitting evidence that discredits a witness, it may be still be difficult for defence lawyers. The High Court considered the application of the credibility rule in relation to psychological evidence about a young child's knowledge of sexual matters (which was beneficial to the defence case) in the case of *HG v The Queen*.[384] While Gaudron J (with Gummow J agreeing) accepted that such evidence would be admissible under the opinion rule, her Honour found that it was not admissible as an exception to the credibility rule.[385]

---

382 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), 301. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004) [1.3.7680].

383 This is because of the High Court's literal interpretation of s 102 in *Adam v The Queen* (2001) 207 CLR 96. See Ch 9 for discussion of this interpretation.

384 *HG v The Queen* (1999) 197 CLR 414, [71]–[74].

385 Ibid. The majority excluded the evidence under *Crimes Act 1900* (NSW) s 409B.

6.64 The exceptions in s 106, and s 106(d) in particular, may provide an avenue for defence lawyers to introduce expert evidence attacking the credibility of a child witness. The exception in s 106(d) relates to 'evidence that tends to prove that a witness is, or was, unable to be aware of matters to which his or her evidence relates', and has been interpreted broadly to include 'psychological, psychiatric or neurological considerations'.[386] The s 106 exceptions only apply where the evidence is a rebuttal of a denial in cross-examination of matters put to a witness that are relevant only to credibility.[387]

6.65 Prosecutors are generally limited to introducing evidence on credibility only in relation to re-establishing credibility. While there have been suggestions at common law that rehabilitating evidence may be provided by an expert as long as the subject matter is proper for expert opinion,[388] the exceptions in s 108 of the uniform Evidence Acts are more limited in application. Section 108(1) is restricted to the re-examination of the witness. Section 108(3) would, arguably, allow the introduction of expert evidence, but has application only where the rehabilitating evidence is of a prior consistent statement where an inconsistent statement has been admitted or there is otherwise an implied or express suggestion of fabrication or re-construction.

6.66 The ALRC and HREOC considered that the provisions of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were insufficient to ensure that appropriate evidence about a child witness' disclosures, behaviour or demeanour is admitted to explain why general assumptions about such matters may not reflect adversely on a particular child's credibility; and recommended that the rules of evidence should 'clearly indicate' that such evidence is admissible.[389] The Wood Royal Commission supported this amendment.[390]

---

386 S Odgers, *Uniform Evidence Law* (6th ed, 2004) [1.3.8200].

387 A question relating to the breadth of this requirement appears in Ch 9.

388 See, eg, *C v The Queen* [1993] SASC 4095, [14].

389 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.77].

390 Royal Commission into the New South Wales Police Service, *Final Report* (1997), [15.131].

6.67 South Australian[391] and Canadian courts[392] have allowed the admission of expert evidence concerning child witnesses. Tasmania, Queensland[393] and New Zealand[394] have enacted legislative provisions that at least partially address the issue of the admissibility of expert evidence regarding the perceived credibility or reliability of child witnesses.

Question 6–9 Should the *Evidence Act 1995* (Cth) be amended to clearly allow for the admission of expert evidence regarding the credibility or reliability of child witnesses? Does s 79A of the *Evidence Act 2001* (Tas) achieve this purpose, or is further clarification required?

Other issues

6.68 The ALRC is interested in comments on any other issues of concern in relation to opinion evidence and the uniform Evidence Acts, but leaving aside concerns that are primarily procedural in nature—for example, relating to costs or delay attributable to the adducing of expert opinion evidence; or concerns about undue partisanship or bias on the part of expert witnesses.

6.69 In this context, the ALRC's Report *Managing Justice: A Review of the Federal Civil Justice System*[395] made a number of recommendations dealing with the use of expert evidence in Federal Court, Family Court and Administrative Appeals Tribunal proceedings. The New South Wales Law

391 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'.

392 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.

393 *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] QCA 151.

394 *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.

395 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000).

Reform Commission is conducting an inquiry on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.[396]

Question 6–10 Are there any other concerns in relation to opinion evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

396 See New South Wales Law Reform Commission, *Home Page* (2002) <www.lawlink.nsw.gov.au/lrc> at 19 October 2004.

7. Admissions

Contents

Introduction

7.1 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.[397] An admission that is a representation made outside the proceedings and which is offered to prove the truth of the assertion in the previous representation is hearsay evidence. Admissions are an exception to the hearsay rule under both the common law and the uniform Evidence Acts.

7.2 The definition of an 'admission' in the uniform Evidence Acts covers admissions in both civil and criminal proceedings.[398] However, given the serious consequences of admitting evidence of admissions and confessions made by an accused in criminal proceedings, a number of specific rules of admissibility apply. This chapter will focus on admissions in a criminal context, primarily looking at ss 85 and 90 of the uniform Evidence Acts.

7.3 Under the common law there are three grounds by which otherwise admissible evidence of out of court admissions made by the accused can be

---

397 *Evidence Act 1995* (Cth) Dictionary, Part 1; *Evidence Act 1995* (NSW) Dictionary, Part 1; *Evidence Act 2001* (Tas) s 3(1).

398 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.

excluded. These are voluntariness, unfairness to the accused and where the admission was illegally or improperly obtained.[399] In order to prove unfairness, the defendant has to show that, on the basis of the particular circumstances in which the admission was made, it is unfair to the accused to allow the admission into evidence.[400]

7.4 The ALRC was critical of the notion of 'voluntariness' in the common law on the basis that it provided little guidance for resolving individual cases. The ALRC's Interim Report *Evidence* (ALRC 26) maintained that it was difficult to determine 'the extent to which an individual's capacity for choice had been impaired'.[401]

The Uniform Evidence Acts

7.5 Part 3.4 of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) deal with admissions.[402] Admissions and related representations are excepted from the hearsay and opinion rules. However, the evidence of the admission must be first-hand hearsay to be admissible.[403] Evidence of admissions against a third party is not excluded from the application of the hearsay or opinion rules unless that party consents. This is intended to ensure that one defendant's admission cannot be used against another defendant in the same proceedings without that party's consent.[404]

7.6 Sections 84 and 85 replaced the common law test of voluntariness and shifted the focus to a set of conduct or circumstances likely to render an admission unreliable.[405] Under these sections, admissions obtained or influenced by violence, threats or oppressive conduct are inadmissible. Admissions in civil proceedings need meet only the s 84 test. Sections 85 and 86 (which relate to records of oral questioning) are concerned only with criminal proceedings.

7.7 Section 85 is aimed at excluding confessions obtained in the course of official questioning unless 'the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was

---

399 P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 1.
400 *R v Lee* (1950) 82 CLR 133.
401 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [372].
402 *Evidence Act 2001* (Tas) Part 4.
403 Uniform Evidence Acts s 82.
404 Ibid s 83.
405 P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 6.

adversely affected'. It foresees the situation where a person able to influence the decision to prosecute has induced the defendant into making an admission.[406] Section 90 provides a 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.

Meaning of 'in the course of official questioning'

7.8 Section 85(2) applies where the admission was made in the course of official questioning or 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.[407]

7.9 The opportunity for police to fabricate or coerce admissions and confessions from accused persons has been a long recognised problem. Following numerous law reform reports and reports of various commissions and inquiries, all jurisdictions now have legislation that seeks to protect the rights of an accused during that period when they are being questioned or interviewed by police.[408] Section 85 of the uniform Evidence Acts is drafted along similar lines to many of those provisions.

7.10 '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 R* has considered the meaning of the words 'in the course of official questioning' in the context of s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas).[409] The decision has broader implications because of the similarity of wording used in s 85(1)(a) of the uniform Evidence Acts.

---

406 See also *Evidence Act 2001* (Tas) s 85A. Under this section, evidence of an admission in a proceeding for a serious offence made by a defendant during official questioning is not admissible unless an audio visual record of an interview is available or the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why an audio visual record was not made or the court is satisfied there are exceptional circumstances allowing the evidence of the admission to be led.

407 *Evidence Act 1995* (Cth) s 85(1).

408 See *Kelly v The Queen* (2004) 205 ALR 274, 300: citing *Crimes Act* 1914 (Cth) ss 23V and 23A(6); *Criminal Procedure Act* 1986 (NSW) s 281; *Police Powers and Responsibilities Act* 2000 (Qld) s 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, 74D; *Police Administration Act* (NT) ss 142 and 143. See also *Criminal Law (Detention and Interrogation) Act 1995* (Tas).

409 Ibid.

7.11 The majority in *Kelly* (Gleeson CJ, Hayne and Heydon JJ) took a narrow view of the section. They considered that 'in the course of official questioning' marks out a period of time running from when questioning commenced to when it ceased;[410] and that statements made before a nominated time for questioning, within a reasonable time after the conclusion of questioning, or 'as a result of questioning', are not made in the course of official questioning.[411] On the majority's view, any broader reading of the section would include the situation where, for example, a suspect confesses some time after the questioning has taken place. The majority argued that this was inconsistent with the statutory language.[412]

7.12 By contrast, McHugh and Kirby JJ considered that a broader interpretation of the term was required to fulfil the policy behind its enactment. McHugh J argued that:

> The mischief at which s 8 is aimed is clear: the attack on the integrity of the administration of justice by false or unreliable confessions or admissions allegedly made by suspects during the police investigation of a serious criminal offence. It should be interpreted, as far as possible, to overcome that mischief … the section's effect on the mischief that it was intended to overcome would be seriously undermined if 'in the course of official questioning' were defined by the clock and the officer's testimony as to the times when questioning commenced and ended.[413]

7.13 It has been argued that the majority's approach grants a wide discretion to police to nominate when 'official questioning' begins and ends.[414] As a consequence, considerable court time could be spent examining the admissibility of uncorroborated admissions or confessions obtained in this way.[415]

Question 7–1 What, if any, concerns are raised by the definition given to the term 'in course of official questioning' by the High Court in *Kelly v R*? Do these concerns require amendment of s 85 of the uniform Evidence Acts or the definition of 'official questioning'?

410 Ibid, 289.
411 Ibid, 288.
412 Ibid, 288.
413 Ibid, 302.
414 N Boyden, 'The Thin End of the Verballing Wedge' (2004) 42(6) *Law Society Journal* 62, 63.
415 Ibid, 65.

The circumstances of the admission

7.14 The ALRC considered 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 its truth adversely. As a preliminary issue the judge would determine whether, in all the circumstances, the way the admission was obtained may have impaired its reliability. The circumstances to be considered included: whether there was misconduct in the interrogation; whether procedural safeguards were adopted; and the characteristics of the person making the admission, including whether their ability to make rational decisions was impaired.[416]

7.15 Stephen Odgers argues that the language used in ALRC 26 suggests that the court should use a subjective analysis, focusing on the actual reliability of the admission. However, in the United Kingdom, s 76(2)(b) of the *Police and Criminal Evidence Act* (UK) requires the court to consider 'not whether the particular admission is reliable but whether any admission which the accused might make in consequence of what was said or done is likely to be rendered unreliable'.[417] The basis for this policy is a concern with the methods used to obtain confessions, leaving to the jury the issue of the weight given to the truth of the admission.

7.16 Odgers says it is arguable that such 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.[418]

7.17 A further issue is what 'circumstances' are relevant. Should an admission be inadmissible even where there is no suggestion of impropriety or influence on the part of the police? In *R v Rooke*, Barr J stated that 'the expression "circumstances in which the admission was made" as used in subs (2) is intended to mean the circumstances of and surrounding the making of admissions, not the general circumstances of the events said to form part of the offence to which the admissions are relevant'.[419]

---

416 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

417 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

418 Ibid, [1.3.5220].

419 *R v Rooke* (Unreported, New South Wales Court of Criminal Appeal, 2 September 1997), 14–15 cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

7.18 *Rooke* was followed in *R v Munce*.[420] In that case, the accused had psychiatric problems and there was doubt as to whether he was giving an accurate account of the events. McClellan J found that because there was nothing arising from the circumstances of the interview which would impact upon the truth of the admission, he was bound to follow *Rooke* and allow the admission. Whether the admission was considered credible was a question for the jury.[421]

7.19 However, this approach may be contrasted with that in *R v Taylor*,[422] where Higgins J in the Australian Capital Territory Supreme Court stated that:

> it is obvious from the terms of s 85(2) that the 'circumstances' are not confined to those known to the interrogator. Nor are they confined to any objective tendency in the questions or the manner in which they had been put to produce an unreliable or untruthful answer. Subsection 85(3) makes it plain that the range of such circumstances can and will include the physical and mental characteristics of the person being interviewed.[423]

7.20 Odgers suggests that a lack of clarity in s 85(2) may be the result of changes in the ALRC's views between the Interim Report and the final Report when it seemed that the objective test was favoured. However, this change of policy was not reflected in the legislation. The section may therefore require legislative amendment to address any ambiguity.[424]

Question 7–2 Does the test under s 85(2) of the uniform Evidence Acts require clarification to indicate whether it is a subjective or objective test?

Section 90 discretion

7.21 Section 90 allows 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. This provision reflects the common law.[425]

---

420 *R v Munce* [2001] NSWSC 1072.
421 Ibid, [26]–[28].
422 *R v Taylor* [1999] ACTSC 47.
423 Ibid, [29]–[30]: cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].
424 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].
425 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].

7.22 ALRC 26 criticised the fairness discretion on the basis that it was a vague concept and had not been properly defined by the courts.[426] However, the final Report concluded that it was necessary to cover situations that were unfair, but which did not meet the test of an illegally or improperly obtained confession.[427]

7.23 Odgers argues that the vagueness associated with 'fairness' under the common law remains in the legislation.[428] Nonetheless, case law provides some guidance on the factors that may constitute unfairness. In *Foster v The Queen*, the High Court found that any significant infringement of the defendant's rights would constitute unfairness.[429] Compulsion is not required to constitute unfairness.[430]

7.24 The unfairness under s 90 arises from the use of the admissions by the prosecution and not necessarily whether the police unfairly treated the accused.[431] The purpose of the discretion is to protect the right of the accused to a fair trial, which includes consideration of whether 'any forensic advantage has been obtained unfairly by the Crown from the way the accused was treated'.[432]

7.25 There is potential overlap between s 90 and the discretion in s 138 to exclude improperly or illegally obtained evidence.[433] However, the s 138 discretion involves the court balancing two public policy concerns—the desirability of admitting the evidence weighed against the undesirability of admitting the evidence. Unfairness to the particular accused is not a consideration under s 138.[434]

7.26 Section 138(3) lists a number of matters that the court may take into account in exercising its discretion. Questions have been raised about whether s 90 should similarly define the circumstances when it would be

---

426 Ibid, [967].
427 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160]. See discussion in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].
428 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].
429 *Foster v The Queen* (1993) 67 ALJR 550.
430 *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159, 127.
431 *R v Sophear Em* [2003] NSWCCA 374, [104].
432 Ibid, [104] citing *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159, 189.
433 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [90.05]. Section 138 is discussed further in Ch 12.
434 *R v Sophear Em* [2003] NSWCCA 374, [74].

unfair to admit an admission by a defendant. This approach could possibly resolve any confusion as to the considerations upon which s 90 is based.

7.27 There is no general discretion to exclude other types of evidence on the same basis as admissions under s 90. That is, there is no general discretion to exclude evidence where, having regard to the circumstances in which the evidence was obtained, it would be unfair to the defendant to use that evidence. This position has been contrasted with the common law.[435] 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.[436]

7.28 The question has therefore been asked as to whether a broader fairness discretion is required under the uniform Evidence Acts. This question is considered further in Chapter 12.

Question 7–3 Should s 90 of the uniform Evidence Acts define the circumstances in which it would be unfair to admit an admission against a defendant?

Other issues

Question 7–4 Are there any other concerns in relation to the rules regarding admissions under the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

---

435 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5860].

436 *R v Schuurs* [1999] QSC 176, [27]. See also *R v Edelsten* (1990) 51 A Crim R 397; *R v Jervis* (1998) 101 A Crim R 1. In *R v Grant* [2001] NSWCCA 486, Smart AJ did not have to resolve the issue of whether the common law fairness discretion remained alongside the uniform Evidence Acts discretions but noted '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': [85].

8. Tendency and Coincidence Evidence

Contents

Introduction

8.1 Tendency evidence may be relevant to proving that, because a person had a tendency to act or think in a particular way on an occasion, then they acted or thought in the same way on the occasion in question. Evidence may be also relevant for a coincidence purpose in that the evidence indicates the improbability of an event occurring accidentally. At common law, evidence admitted for a tendency or coincidence purpose was commonly referred to as 'propensity' and 'similar fact' evidence respectively.

8.2 It has long been accepted that people are likely to overrate the value of similar fact evidence and be influenced improperly by it.[437] The inferential reasoning for tendency or coincidence evidence is considered dangerous as it permits a person to be judged by their conduct on other occasions. The danger increases where the tendency or coincidence evidence reveals a criminal propensity of the accused. At common law, evidence that discloses a criminal propensity must satisfy the stringent 'no rational explanation' test.[438]

---

437 This view has been strongly supported over the years by psychological research; see Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [795].

438 *Pfennig v The Queen* (1995) 182 CLR 461.

8.3 Under the uniform Evidence Acts, evidence may not be led for tendency or coincidence purpose unless the court considers that the evidence has 'significant probative value' and reasonable notice of the intention to adduce such evidence has been given to the other parties to the proceedings.[439] The uniform Evidence Acts impose additional restrictions where tendency or coincidence evidence is adduced by the prosecution against a defendant in criminal proceedings, in that the probative value of the tendency evidence must substantially outweigh any prejudicial effect it may have on the defendant.[440] The uniform Evidence Acts do not provide for the 'no rational explanation' test.

8.4 The operation of the uniform Evidence Acts has involved consideration of the requirements of 'significant probative value'. In addition, the balancing test in s 101 requires a consideration of 'significant probative value' in the application of the discretion contained in s 101. Cases have considered whether the operation of s 101 imports the common law's 'no rational explanation' test. This question is to be determined by the High Court when it considers the appeal in *Ellis v The Queen*.[441]

8.5 The ALRC proposed different provisions relating to tendency and coincidence in its earlier evidence inquiry than those that appear in the uniform Evidence Acts. Therefore, there is a need for caution in relying on the ALRC's Reports to explain the operation of the tendency and coincidence rules.[442]

Tendency rule

8.6 The 'tendency rule' is set out in s 97 of the uniform Evidence Acts.[443] Section 97 provides that 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 person's tendency to act in a particular way, or to have a particular state of mind, unless:

---

439 *Evidence Act 1995* (Cth) ss 97–100. Unless the evidence is adduced responsively or in accordance with directions made by a court under s 100: *Evidence Act 1995* (Cth) ss 97(2), 98(3).

440 *Evidence Act 1995* (Cth) s 101.

441 *Ellis v The Queen* [2004] HCATrans 311. See discussion below.

442 See, eg, *R v Ellis* (2003) 58 NSWLR 700, [65]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51, 63–64.

443 Tendency evidence is defined in the Acts to mean 'evidence of a kind referred to in s 97(1) that a party seeks to have adduced for the purpose referred to in that section': Uniform Evidence Acts s 3.

- the party adducing the evidence gives reasonable notice in writing to each other party of its intention to adduce the evidence;[444] or
- the court thinks that the evidence would, either by itself or with other evidence, have significant probative value.

8.7 It seems that there have been difficulties in determining whether evidence is or is not tendency evidence. In *R v Cakovski*,[445] Hodgson JA and Hulme J held that evidence that the deceased had murdered three people on an earlier occasion was not tendency evidence, whereas Hidden J found that such evidence was tendency evidence as 'it demonstrated a propensity on the part of the deceased to retaliate in an extremely violent way against anyone who crossed him'.[446]

8.8 The tendency rule is a 'purpose rule'.[447] Evidence of 'character, reputation or conduct' (or of a person's tendency) will attract the operation of s 97 only if it is adduced for the purpose of proving the existence of a person's tendency to act or think in a particular way.

8.9 Tendency evidence adduced by the prosecution about a defendant is subject to the additional requirements set out in s 101 of the uniform Evidence Acts (unless tendered responsively). The operation of s 101 is discussed later in this chapter.

8.10 Section 95 of the uniform Evidence Acts provides that if the evidence is adduced only for a 'non-tendency' purpose, then the court must direct the jury not to use the evidence for a tendency purpose.[448]

Significant probative value

8.11 'Significant probative value' is not defined in the uniform Evidence Acts. However, 'probative value of evidence' 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'.[449] The uniform Evidence Acts do not provide any additional guidance as to when the probative value of the evidence will be 'significant'. Cases applying s 97 have held that it

444 Ibid s 99. Notice can be dispensed with: s 100.
445 *R v Cakovski* [2004] NSWCCA 280.
446 Ibid, [70].
447 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.6660].
448 Section 95 applies to coincidence evidence in the same way.
449 Uniform Evidence Acts s 3.

will require something more than mere relevance, but less than a 'substantial' degree of relevance.[450] In *R v Lockyer*, Hunt CJ at CL held that, to satisfy the test of 'significant probative value', the evidence must be 'important' or 'of consequence'.[451]

8.12 The case law also provides some guidance as to the factors that will be considered in assessing the probative value of the evidence.[452] They include: the cogency of the evidence relating to the conduct of a particular person; the strength of the inference that can be drawn from that evidence as to the tendency of the person to act or think in a particular way; and the extent to which that tendency increases the likelihood that a fact in issue did, or did not, occur.[453]

8.13 The assessment of the strength of the tendency inference will often turn on factors such as: the number of occasions of particular conduct relied on; the time periods between such occasions; the degree of similarity of the circumstances in which the conduct took place; and whether evidence is adduced to explain or contradict the tendency evidence adduced by another party.[454]

Question 8–1 Is the definition of 'tendency evidence' in the uniform Evidence Acts satisfactory and, if not, how should it be defined?

Question 8–2 Are any concerns raised by the operation of s 97 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

450 *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356, 361; *R v AH* (1997) 42 NSWLR 702, 709; *R v Fordham* (1997) 98 A Crim R 359, [15]. The ALRC expressly rejected the idea that a requirement of 'substantial probative value' should apply to the admissibility of tendency evidence: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [806].

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

452 K Downes, 'Similar Fact Evidence: A Pitted Battlefield' (2004) 78 *Australian Law Journal* 279, 287. See *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51.

453 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51.

454 See, eg, Ibid; *Townsend v Townsend* [2001] NSWCCA 136.

Coincidence rule

8.14 The 'coincidence rule' is set out in s 98 of the uniform Evidence Acts.[455] Such evidence refers to a set of circumstances where the probative force of the evidence arises from the degree of improbability that coincidence provides an innocent explanation for the evidence.[456]

8.15 Section 98 provides that evidence that two 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, unless:

- the party adducing the evidence gives reasonable notice in writing to each other party of its intention to adduce the evidence;[457] or
- the court thinks that the evidence would, either by itself or with other evidence, have significant probative value.[458]

8.16 As noted above, significant probative value is not defined in the Acts. Stephen Odgers has commented that given the definition of 'related events' in s 98, 'there does not appear any justification for a different interpretation to that adopted in relation to s 97'.[459]

Significance of 'related events'

8.17 In order for two or more events to be 'related events' as defined by the uniform Evidence Acts, the events must be 'substantially and relevantly similar' and 'the circumstances in which they occurred' must be 'substantially similar'.[460]

8.18 Section 98 does not expressly prohibit use of evidence of events that are not 'substantially and relevant similar', or which did not occur in substantially similar circumstances. The apparent effect of the approach adopted in s 98 is that such events may be admissible if the events are

---

455 'Coincidence' is not defined in the uniform Evidence Acts. The definition in the Acts indicates only that 'coincidence evidence' is 'evidence of a kind referred to in s 98(1)'.

456 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [98.20], fn 119.

457 Uniform Evidence Acts s 98(1)(a); see also s 99. Notice can be dispensed with: s 100.

458 Ibid s 98(1)(b).

459 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.6960].

460 Uniform Evidence Acts s 98(2). The relevant events may occur either before or after the event at issue in the proceedings: see *R v Fordham* (1997) 98 A Crim R 359 (relating to s 97 tendency evidence).

relevant and not subject to discretionary exclusion, even when such evidence is adduced to prove that a person did a particular act or had a particular state of mind using improbability reasoning.

8.19 For example, Miles J in *W v The Queen* considered that s 98 does not govern the admissibility of all evidence that tends to negate coincidence.[461] Miles J considered that, if evidence that does not fall within the scope of 'related events'—as defined in s 98(2)—is adduced for coincidence reasoning purposes, ss 98 and 101 do not apply. In such a case, Miles J considered that the less strict requirements of s 137 are applicable.[462] A number of commentators have questioned whether the drafters of the legislation intended this result.[463]

8.20 Justice Tim Smith, the Commissioner in charge of the ALRC's earlier evidence inquiry, has observed that the definition of 'related events' has the effect that s 98 cannot be used to exclude evidence adduced for a 'coincidence purpose' where it relies on unrelated events. Justice Smith suggests that it would be desirable to rectify this defect by simply deleting the word 'related' and the definition of 'two or more related events' so that s 98 reads as follows:

> 98(1) Evidence that two or more 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 of having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.[464]

8.21 Another option for reform is to repeal s 98. Odgers has commented:

> It may be doubted whether this attempt [in s 98 of the *Evidence Act*] to control reasoning via 'improbability' serves any useful purpose. It is arguable that it unnecessarily complicates what should be the straightforward application of logical analysis and should be removed from the Act.[465]

---

461 *W v The Queen* [2001] FCA 1648, [60].

462 Ibid, [60]. See also *R v Gibbs* [2004] ACTSC 63, [10].

463 See, eg, T Smith, 'The More Things Change the More They Stay the Same? The Evidence Acts 1995: An Overview' (1995) 18(1) *UNSW Law Journal* 1, 22; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 319–320.

464 T Smith, *Submission E 6*, 16 September 2004.

465 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.6880].

8.22 The effect of such an amendment would be that the admissibility of coincidence evidence would be governed by the general rules of relevance under s 55 of the uniform Evidence Acts, and the risk of unfair prejudice would be addressed by a trial judge's exercise of the exclusionary discretions in appropriate circumstances.

8.23 Alternatively, Odgers has suggested that if the coincidence rule in the uniform Evidence Acts is retained, s 98 may need to be amended to clarify that evidence of events will not be treated as satisfying the requirements of that section unless the conditions of similarity set out in s 98(2) are satisfied.[466]

8.24 In addition, it is unclear on the face of the legislation whether the event giving rise to the charge or cause of action is included as one of the 'two or more' events under s 98(2) of the uniform Evidence Acts. That is, is evidence of only one event in addition to the event at issue in the proceedings sufficient to attract the operation of the s 98(2), or are at least two further events are required? It has been suggested that 'not counting the subject incident may make evidence of coincidence under the Act significantly more limiting that at common law'.[467] Further, 'the probative force of improbability reasoning is reduced where evidence of a single additional event is offered' so that the 'significant probative value' requirement in s 98(1)(b) might not be satisfied.[468]

Question 8–3 What, if any, concerns are raised by the operation of s 98 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

Question 8–4 Should the tendency and coincidence rules be extended beyond the adducing of evidence revealing the tendency of the accused? Are ss 97 and 98 of assistance in other situations, where there is no need to err on the side of safety? Should the rules apply to witnesses? Should the rules apply in civil cases?

466 Ibid, [1.3.6900].
467 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [98.20].
468 Ibid, [98.20]

Tendency and coincidence evidence in criminal proceedings

8.25 Section 101 of the uniform Evidence Acts imposes additional limitations on the admissibility of tendency and coincidence evidence by the prosecution in criminal proceedings.[469] Section 101(2) provides:

> 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 it may have on the defendant.

8.26 The additional requirements do not, however, apply if the prosecution adduces tendency or coincidence evidence to explain or contradict tendency or coincidence evidence adduced by the defendant.[470]

Common law test of admissibility

8.27 At common law, the majority of the High Court in *Pfennig v The Queen* (*Pfennig*) applied *Hoch v The Queen*[471] and stated that the common law test of admissibility for similar fact evidence is:

> The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged.[472]

8.28 In the same case, McHugh J offered a different formulation of the test: namely whether the 'interests of justice require admission [of the evidence] despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced'.[473]

Meaning of 'probative value … substantially outweighs any prejudicial effect'

8.29 Differing views have been expressed as to how the requirement in s 101(2) that the 'probative value … substantially outweighs any prejudicial effect' of coincidence or tendency evidence should be interpreted. In particular, judicial interpretation of s 101(2) of the uniform Evidence Acts

---

469 'Criminal proceedings' are defined in the uniform Evidence Acts to mean a prosecution for an offence and include 'a proceeding for the committal of a person for trial or sentence for an offence; and a proceeding relating to bail'. Prescribed taxation offences under Part III of the *Taxation Administration Act 1953* (Cth) are expressly excluded.

470 Uniform Evidence Acts ss 101(3), (4).

471 *Hoch v The Queen* (1988) 165 CLR 292.

472 *Pfennig v The Queen* (1995) 182 CLR 461, 481, citing *Hoch v The Queen* (1988) 165 CLR 292, 294. This test for probative value is the same test as that which a jury must apply when dealing with circumstantial evidence.

473 *Pfennig v The Queen* (1995) 182 CLR 461, 528.

has differed in respect to the extent the approaches in *Pfennig* and *Hoch* should be relied upon.

8.30 Decisions of the Federal Court of Australia suggest that the principles expressed in *Pfennig* and *Hoch* should not be relied upon to determine the admissibility of tendency or coincidence evidence under s 101. In *W v The Queen*, Miles and Madgwick JJ indicated that the requirement in s 101 that the probative value of the evidence substantially outweighs its likely prejudicial effect, does not equate with the 'no rational view' test articulated by the majority of the High Court in *Pfennig*.[474] Further, the uniform Evidence Acts do not require that a judge must be satisfied beyond a reasonable doubt that there is no possibility of concoction where several complainants make accusations of separate offences, as is required at common law following *Hoch*.[475]

8.31 Until recently, the Federal Court's interpretation of s 101 of the *Evidence Act 1995* (Cth) differed from the interpretation of the equivalent provision in the *Evidence Act 1995* (NSW) adopted by a number of New South Wales judges.[476] A series of decisions by the New South Wales Court of Criminal Appeal interpreting s 101 have applied the common law test articulated by the High Court in *Pfennig*.[477]

8.32 However, this line of authority was rejected by the decision of the New South Wales Court of Criminal Appeal in *R v Ellis*.[478] Spigelman CJ, with whom the rest of the Court agreed,[479] held that the statutory scheme for the admissibility of tendency and coincidence evidence set out in the *Evidence Act 1995* (NSW) was intended to cover the relevant field to the exclusion of common law principles previously applicable.[480]

---

474 *W v The Queen* [2001] FCA 1648, [53], [60].

475 Ibid, [54]. Madgwick J also considered the *Hoch* test to be appropriate.

476 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7340].

477 See, eg, *R v Lock* (1997) 91 A Crim R 356, 363; *R v AH* (1997) 42 NSWLR 702, 709; *R v Fordham* (1997) 98 A Crim R 359, 370; *R v Colby* [1999] NSWCCA 261; *R v WRC* (2002) 130 A Crim R 89; *R v Joiner* [2002] NSWCCA 354, [37], [40]–[41] *R v Folbigg* [2003] NSWCCA 17, [24], [27].

478 *R v Ellis* (2003) 58 NSWLR 700. See also *R v Milton* [2004] NSWCCA 195; *R v Mason* [2004] NSWCCA 331.

479 The Court of Criminal Appeal was constituted by five judges in order to resolve differences of opinion which had been expressed in earlier Court of Criminal Appeal decisions.

480 *R v Ellis* (2003) 58 NSWLR 700, [70], [74], [83]. However, Justices Hidden and Buddin noted, in a concurring judgment, that application of the balancing test required by s 101(2) should be guided by the understanding that all propensity evidence 'is likely to be highly prejudicial' and therefore the test for

8.33 Spigelman CJ considered that the use of the word 'substantially' to indicate the extent to which the probative value of tendency and coincidence evidence must outweigh its prejudicial effect in s 101(2) is a legislative formula, not derived from prior case law.[481] Further, his Honour stated that the continued application of the common law test for admissibility of tendency and coincidence evidence in *Pfennig* is inconsistent with the terms of s 101(2), which require the court to make a judgment about whether the probative value substantially outweighs the prejudicial effect of the evidence:[482]

> The 'no rational explanation' test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.[483]

8.34 Spigelman CJ cited, with approval, the reasoning of McHugh J (in dissent) in *Pfennig*:

> If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not … This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect.[484]

8.35 However, Spigelman CJ also commented that there might be some cases where it would not be open for a court to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect unless the 'no rational explanation test' was satisfied.[485]

8.36 The Supreme Court of Tasmania and the Supreme Court of the Australian Capital Territory have recently applied the approach of Spigelman CJ in *Ellis*.[486] In August 2004, the High Court granted special

---

admissibility should be 'one of very considerable stringency: [104]. The Chief Justice expressly disagreed with these observations: [99].

481 Ibid, [84].

482 Ibid, [94], [95].

483 Ibid, [94].

484 *Pfennig v The Queen* (1995) 182 CLR 461, 516 cited in *R v Ellis* (2003) 58 NSWLR 700, [91].

485 *R v Ellis* (2003) 58 NSWLR 700, [96]. See also, *R v Gibbs* [2004] ACTSC 63, [18]. This adopts McHugh J's comments in *Pfennig*.

486 *Tasmania v S* [2004] TASSC 84; *R v Gibbs* [2004] ACTSC 63.

leave to appeal the decision in *Ellis*.[487] This appeal has not yet been heard by the High Court.

8.37 The ALRC is interested in further comments on the policy considerations underlying the admissibility of tendency and coincidence evidence by the prosecution in criminal proceedings and whether those policy considerations are sufficiently addressed by the current requirements set out in s 101 of the uniform Evidence Acts.

Question 8–5 Does the requirement in s 101 of the uniform Evidence Acts adequately protect a defendant from the potential prejudicial effect of tendency or coincidence evidence?

Question 8–6 Should s 101 of the uniform Evidence Acts be amended to:

(a) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'no rational explanation' test articulated by the majority of the High Court in *Pfennig v The Queen*; or

(b) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'interests of justice' test articulated by McHugh J in *Pfennig v The Queen*; or

(c) specify matters to which a court should have regard in determining whether the probative value of the tendency or coincidence evidence in question substantially outweighs its prejudicial effect? If so, what matters might be relevant in this regard?

Question 8–7 Does s 95 of the uniform Evidence Acts adequately limit the use of evidence that is admitted for a purpose other than tendency or coincidence, for example, character evidence?

Tendency and coincidence in child sexual assault proceedings

8.38 Many proceedings relating to sexual offences against children involve more than one incident or offence against the same child victim by the same accused, or more than one child victim by the same accused. In their inquiry into children in the legal process, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) expressed concern that the inadmissibility of children's tendency and coincidence evidence

487 *Ellis v The Queen* [2004] HCATrans 311.

results in the necessity for separate trials for each offence.[488] The consequences of this are that, firstly, the jury is left unaware of multiple allegations of abuse by the same accused, and secondly, child victims may be required to give evidence numerous times: once in their own trial and again in the trials of offences to other children about what they witnessed happening to those children.[489]

8.39 The ALRC and HREOC recommended that the rules against tendency and coincidence evidence be reviewed in light of the hardship they cause to particular child victims.[490]

8.40 The additional requirement in criminal proceedings that the probative value of the evidence substantially outweigh the prejudicial effect it may have on the defendant,[491] is a major impediment to the admission of tendency and coincidence evidence of child witnesses.[492] The prejudice that must be outweighed is the possibility that the evidence of child victims is affected by concoction: a reasonable possibility of concoction must be excluded before the evidence is admissible.[493] Often where there is more than one child victim of the same accused, the children will know each other, for example as friends or relatives. This gives rise to a reasonable possibility of concoction of their evidence, rendering the evidence of an offence against one child victim inadmissible in the trial of another.[494]

8.41 Queensland makes specific allowance for the admission of tendency and coincidence evidence despite the fact that there may be a possibility of concoction.[495] The possibility of collusion or suggestion is only relevant to the weight to be given to the evidence, which is a question for the jury.[496] This provision has been described as countering 'the dire consequences of the mere possibility of collusion, both evidentially and in the framing of

---

488 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.
489 Ibid, [14.87].
490 Ibid, Rec 103.
491 Uniform Evidence Acts s 101(2).
492 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.
493 See, eg, *R v Colby* [1999] NSWCCA 261, [107]; *R v Robertson* (1997) 91 A Crim R 388, 409; *R v OGD (No 2)* (2000) 50 NSWLRC 433, [77]; *R v WRC* (2002) 130 A Crim R 89; *R v F* (2002) 129 A Crim R 126.
494 *Hoch v The Queen* (1988) 165 CLR 292.
495 Applying the common law principles in conjunction with *Evidence Act 1977* (Qld) s 132A.
496 Ibid.

indictments' that were created by the common law 'no rational explanation' test.[497]

8.42 The Queensland Law Reform Commission (QLRC) examined whether a legislative provision should be enacted dealing specifically with the admissibility of propensity evidence in proceedings relating to offences against children, to address concerns that the common law test for admissibility was too restrictive. The QLRC recommended that no such legislative provisions be enacted[498] and concluded that s 132A of the *Evidence Act 1977* (Qld) operated adequately with the common law principles to allow the admission of propensity evidence where it is appropriate or necessary. The QLRC was of the view that the common law test for the admissibility of propensity evidence should not be any different for adults and children because the fact that an offence was allegedly committed against a child cannot make the evidence more probative, or render it less prejudicial, than if the offence was committed against an adult.[499]

8.43 Victoria has a similar provision, providing that 'propensity evidence' is admissible if the court in all the circumstances considers it just to admit it despite any prejudicial effect it might have.[500] The possibility that there is a reasonable explanation consistent with the innocence of the accused is relevant only to the weight to be given to the evidence or the credibility of the witness and not to its admissibility.[501] This section has been interpreted to allow the admission of evidence of another offence or other discreditable conduct even where there is a strong possibility that the reliability of the evidence has been affected by collusion; it is then a matter for the jury to consider what weight to give the evidence.[502] However, the evidence must have a high probative value in order for its admission to be just.[503]

---

497 *R v S* [2001] QCA 501, [32].
498 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Rec 16.1.
499 Ibid, 374.
500 *Crimes Act 1958* (Vic) s 398A.
501 Ibid.
502 *R v Best* [1998] VR 603.
503 Ibid, [619].

Question 8–8 Should s 101 of the uniform Evidence Acts be amended to provide that, where the probative value of tendency or coincidence evidence substantially outweighs any prejudicial effect it may have, it must not be ruled inadmissible merely because it may be the result of concoction, collusion or suggestion? If so, should this provision relate only to proceedings involving offences by the same accused against multiple child victims, or should it apply generally to all offences?

Question 8–9 Should there be special provisions applying to the revelation of other incidents where a series of sexual offences are alleged by child complainants, or any complainants?

9. The Credibility Rule and its Exceptions

Contents

The credibility rule

9.1 The Terms of Reference for the Inquiry direct the ALRC to have particular regard to the operation of the credibility rule and its exceptions. Evidence that affects the credibility of a witness may include character evidence of a witness, evidence of inconsistent or consistent statements and evidence that shows a witness' capacity for observation.

9.2 The rationale for the credibility rule is often explained in terms of 'case management'; that is, the need to keep the trial process within manageable confines to prevent side issues from being pursued.[504] Relevant considerations in this regard include preventing proceedings from being burdened by detailed investigation of collateral issues and, on the other

504 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [102.05].

hand, allowing a judge or jury sufficient information to assess the reliability of a witness.

9.3 The application of the credibility rule depends upon a distinction between evidence relevant to the credit of a witness and evidence that is relevant to the facts in issue in a proceeding. At times, this distinction may be difficult to determine. For example, where a person is the sole eyewitness to an event, the reliability of that person's testimony is inseparable from the person's credibility.[505] The rules relating to the admissibility of credibility evidence have, therefore, been described as being based upon pragmatism rather than logic.[506]

Uniform Evidence Acts

9.4 Part 3.7 of the uniform Evidence Acts[507] 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.

9.5 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.[508]

9.6 This exclusionary rule therefore applies to both evidence that bears on the reliability of a witness generally, and evidence that bears on the reliability of particular testimony of that witness.[509]

9.7 The credibility rule is subject to specific exceptions that apply when evidence:

- is adduced in cross-examination (s 103);
- is led in rebuttal of denials made in cross-examination (s 106);

---

505 See, eg, McHugh J (in dissent) in *Palmer v The Queen* (1998) 193 CLR 1, 31–32.
506 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 307; *Palmer v The Queen* (1998) 193 CLR 1, 31–32.
507 *Evidence Act 2001* (Tas) Part 7.
508 Uniform Evidence Acts s 3.
509 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].

- is admitted to re-establish credibility (s 108); or
- relates the character of accused persons (s 104).

9.8 There are concerns about the credibility rule and its operation. It seems that the uniform Evidence Acts have effected significant change in relation to the admissibility of complaints in sexual assault proceedings and in the cross-examination of an 'unfavourable' witness. The ALRC is interested in comments on the operation of the credibility provisions.

Interpretation of the credibility rule

9.9 In *Adam v The Queen*[510] (*Adam*), the Crown called a witness to give evidence. The witness had previously given a statement to the police that implicated the accused in a fatal stabbing of a police officer. At the trial, the witness gave evidence that was harmful to the Crown case. The Crown was granted leave, under s 38, to cross-examine the witness about the statement that he made to the police that was inconsistent with his evidence given at the trial.[511] The majority of the High Court held that the statement was admissible to attack the witness' credibility and, although it was hearsay, s 60 of the Act meant that it could also be used to prove the truth of the facts asserted in the statement.[512]

9.10 In *Adam*, a majority of the High Court held that s 102 should be interpreted literally, meaning that evidence that is relevant solely to a witness' credibility will be excluded by s 102. This means that s 102 will not apply if the evidence is also relevant in some other way, even if the evidence is inadmissible under the Act for that purpose. Section 60 then operates to permit the evidence to be used for a hearsay use, subject to s 136. The majority in *Adam* expressly rejected the argument that s 102 should be interpreted as applying to evidence which is not *admissible* on any basis other than relevance to the credibility of a witness.[513] This decision implicitly overrules aspects of the decision in *Graham v The Queen*,[514] which indicated that s 108 would apply to evidence of complaint that is relevant for a hearsay purpose in addition to any credibility purpose.

---

510 *Adam v The Queen* (2001) 207 CLR 96.
511 Section 38 of the uniform Evidence Acts is discussed in Ch 3.
512 Section 60 of the uniform Evidence Acts is discussed in Ch 5.
513 *Adam v The Queen* (2001) 207 CLR 96, [34]–[35].
514 *Graham v The Queen* (1998) 195 CLR 606.

9.11 It has been said that the High Court's interpretation of the operation of s 102 has produced a difference between the approach to credibility evidence under the uniform Evidence Acts and the common law rules.[515] In general, the common law approach to evidence that is relevant for more than one purpose is to consider the admissibility of the evidence for each purpose separately.[516] For example, the admissibility of a prior statement for a credibility use is determined by the operation of the credibility rules; while the admissibility of the statement for its truth would depend on the independent operation of the hearsay rules.

9.12 It has been suggested that the operation of s 102 has been complicated by the way in which the High Court has interpreted the provision.[517] Stephen Odgers states that, contrary to the intention of the statute, evidence may be admissible for a credibility use, without needing to satisfy the requirements of s 102, unless it is subject to discretionary exclusion. Odgers has suggested that reliance on judicial discretions in this area is unsatisfactory and may lead to greater uncertainty in the preparation of cases and the conduct of trials.[518] Odgers suggests that s 102 should be amended to overcome the potential difficulties created by the decision in *Adam*.[519]

9.13 Justice Tim Smith, the Commissioner in charge of the ALRC's earlier evidence inquiry, submitted:

> The original intention of the legislation was that the detailed rules dealing with evidence relevant to credibility had to be satisfied where evidence was relevant only to a witness' credibility or where it was relevant to credibility and to other issues but excluded by the other rules of exclusion so far as it was relevant for other reasons; eg, prior statements of relevant facts. Again admissibility can be dealt with under the Act by use of the relevance provisions and the discretions to exclude but the interpretation now adopted effectively denies the credibility rules operation in a large number of cases—in particulars complaints and prior statements. It could be amended as follows:
>
> > Evidence is not admissible that is
> >
> > (a) relevant only to credibility; or

515 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 310.
516 Ibid, 310.
517 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7660].
518 Ibid, [1.3.7660].
519 Ibid, [1.3.7660].

(b) relevant to credibility but otherwise inadmissible under the Act.[520]

9.14 It has been suggested that the practical effect of the High Court's interpretation of s 102 is to render the credibility provisions inoperable. The ALRC is interested in whether there should be reform of the section to address any concerns.

Question 9–1 Do any concerns arise as a result of the High Court's interpretation of s 102 of the uniform Evidence Acts in *Adam v The Queen*? Should s 102 be amended to address any concerns and, if so, how?

Exceptions to the credibility rule

Cross-examination as to credibility

9.15 Section 103 of the uniform Evidence Acts is based on the ALRC's recommendations.[521] The ALRC's recommendations were influenced by psychological research findings that 'the existence of character influencing behaviour is only likely to produce consistent behaviour where the situational factors are consistent'.[522] The ALRC, therefore, considered that cross-examination as to the credibility of a witness should be focused on:

> evidence of conduct which is similar to testifying untruthfully (ie involves false statements) and which took place in circumstances similar to those of testifying (ie the witness was under a substantial obligation to tell the truth at the time).[523]

9.16 Section 103 provides that the credibility rule does not apply to evidence relevant only to a witness' credibility adduced in cross-examination of a witness if 'the evidence has substantial probative value'.[524]

9.17 'Substantial probative value' is not defined in the uniform Evidence Acts and it has been suggested that the meaning of the term should be clarified. Section 103(2) provides that the court may have regard to the following matters to decide whether the evidence has substantial probative value:

---

520 T Smith, *Submission E 6*, 16 September 2004.
521 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App A, cl 96.
522 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [797].
523 Ibid, [819].
524 Uniform Evidence Acts s 103(1). The terms 'probative value of evidence' and 'cross-examination' are defined in the Acts.

> (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.

9.18 Two principal issues have been raised regarding the assessment of 'substantial probative value'. First, while the term 'substantial probative value' is not defined, a definition of 'probative value' is included in the uniform Evidence Acts. 'Probative value' means 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.[525] In *R v RPS*, Hunt CJ at CL suggested that the definition of 'probative value' does not, however, apply in the context of s 103:

> [B]oth the context in which [the] phrase ['substantial probative value'] 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 the witness.[526]

9.19 Some academic commentary on the relationship between the definition of probative value and the substantial probative value standard has questioned this approach.[527]

9.20 Second, the standard of 'substantial probative value' needs to be distinguished from that of 'significant probative value'—which applies, for example, in the context of tendency and coincidence evidence under ss 97 and 98 of the uniform Evidence Acts.[528] In *R v Lockyer*, Hunt CJ at CL indicated that 'substantial probative value' seems to impose a higher standard of relevance than 'significant probative value', which requires the evidence in question to be 'important' or 'of consequence'.[529]

9.21 It has been suggested that examples of evidence that have substantial probative value in determining the credibility of a witness are, however,

---

525 Ibid s 3.

526 *R v RPS* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL and Hidden J, 13 August 1997).

527 See, eg, S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 345. However, academic support for Hunt CJ at CL's interpretation also exists: see G Roberts, *Evidence: Proof and Practice* (1998), 283, 354.

528 The term 'significant probative value' is discussed further in Ch 8.

529 *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.

more numerous than those listed in s 103(2). For example, they might include evidence relating to a witness' opportunity for observation, reasons for recollection or special circumstances affecting competency.[530]

9.22 The ALRC is interested in comments as to whether it would be useful to define the term 'substantial probative value'.

Question 9–2 Are there concerns with the interpretation of 'substantial probative value' in s 103 of the uniform Evidence Acts and, if so, how should any concerns be addressed?

Cross-examination of an accused

9.23 Section 104 of the uniform Evidence Acts imposes additional limitations on the admissibility of credibility evidence adduced in cross-examination of a defendant in criminal proceedings in respect of matters that are relevant only to the defendant's credibility as a witness.

9.24 Cross-examination relevant only to the defendant's credibility is further limited under s 104 in the following manner:

- Leave to cross-examine the defendant must be sought and obtained, unless the subject of cross-examination falls within s 104(3), namely the evidence relates to the defendant's bias, or ability to be aware of or to recall matters, or to the making of a prior inconsistent statement.[531]
- If leave is required, it may not granted for cross-examination by the prosecutor unless the subject of the cross-examination relates to: (i) evidence adduced by the defendant that tends to show he or she is either generally, or in a particular respect, a person of good character; or (ii) defence evidence that has been admitted to prove a prosecution witness has a tendency to be untruthful.[532]
- If leave is required, it may not be granted for cross-examination by another defendant unless evidence given by the defendant to be cross-examined includes

530 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7760].

531 *Evidence Act 1995* (Cth) ss 104(2), 104(3), 192. In addition, ss 43 and 45 of the *Evidence Act* impose procedural requirements if the cross-examination relates to prior inconsistent statements made by the defendant.

532 Ibid ss 104(4), 192. See below for discussion of the interaction between s 104 and s 110 of the uniform Evidence Acts.

evidence adverse to the defendant seeking leave and that evidence has been admitted.[533]

9.25 Section 192 applies generally to the grant of leave by a court under the Act and sets out factors that a court may take into account in deciding whether such leave should be granted. Those factors include: the nature of the proceedings; fairness to a party or a witness; the importance of the evidence; and the power of the court to adjourn the proceedings, or to make another order or give a direction in relation to the evidence.[534] The requirement in s 104 that a court grant leave to the prosecution (or a co-defendant) before cross-examination on matters relevant only to a defendant's credibility brings s 192 into operation.

9.26 It seems that the High Court's interpretation of s 102 in *Adam* may be applicable in relation to s 104(2), which uses substantially similar terminology.[535] This would mean that s 104 does not apply in circumstances when the cross-examination of a defendant may be relevant for a purpose other than a defendant's credibility, even if the evidence is inadmissible for that other purpose. Odgers observes that such an interpretation would produce the bizarre result that evidence of a defendant's prior convictions for offences similar to that with which he or she is charged would not be caught by s 104(2) as such evidence is relevant for a tendency purpose, although it may be inadmissible for that purpose pursuant to ss 97 and 101. Odgers suggests that s 104 should be amended to overcome the effect of the decision in *Adam*.[536]

Character evidence about a defendant

9.27 Section 104(4)(a) of the uniform Evidence Acts permits a court to consider granting leave for the prosecution to cross-examine a defendant about the defendant's credibility when evidence has been adduced that tends to prove that the defendant is a person of good character. Section 110 of the Acts is also relevant in this context because it addresses the admissibility of character evidence of the accused.

---

533 Ibid ss 104(6), 192. Under s 111 of the uniform Evidence Acts, the hearsay and tendency rules do not apply to evidence of an expert's opinion about a defendant adduced by another defendant.

534 Ibid s 192(2). The list of factors is not exhaustive.

535 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7840]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.20].

536 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7840].

9.28 Section 110 excludes the operation of the credibility, hearsay, opinion and tendency rules with respect to 'evidence adduced by a defendant to prove (either directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character'.[537] Sections 110(2)–(3) exclude the operation of credibility, hearsay, opinion and tendency rules with respect to rebuttal evidence and cross-examination that seeks to rebut evidence of a defendant's good character. The effect of ss 110(2)–(3) is to limit the prosecution's rebuttal evidence to the same features as were adduced in evidence for the defendant.

9.29 However, there appears to be differences between the conditions imposed by s 104(4)(a) with respect to cross-examination of a defendant about matters relating to the defendant's credibility and those imposed under s 110 on the admissibility of evidence to rebut good character evidence adduced by a defendant. These differences include the following:

- Under s 110, the prosecution may adduce rebuttal evidence only if evidence has been adduced by the defendant with the intention of proving that he or she is a person of good character.[538] Section 104(4)(a) does not appear to contain this limitation. That is, s 104(4)(a) does not appear to require an inquiry into the intention of a defendant in adducing evidence of good character.[539]
- Cross-examination of a defendant (or rebuttal evidence adduced) under s 110 must respond in 'mirror image' to the good character evidence adduced by the defendant.[540] Section 104(4)(a) does not contain a similar requirement.
- A grant of leave to cross-examine a defendant about his or her good character under s 112 does not require the cross-examination to be of 'substantial probative value'. Such a requirement exists if the leave to cross-examine is sought under s 104 (because the 'substantial probative value' requirement in s 103 must be satisfied).[541]

---

537 Uniform Evidence Acts s 110(1).

538 See, eg, *Gabriel v The Queen* (1997) 76 FCR 279.

539 However, Odgers has commented that court may effectively incorporate an intention requirement when considering whether to grant leave under s 104(2) of the Act: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7920].

540 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.50].

541 *Evidence Act 1995* (Cth) s 104(1). See further: S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 357.

9.30 It has been suggested that the overlap between ss 104 and 110 is problematic.[542] The ALRC is interested in comments on the interaction between s 104 and s 110 and whether any concerns arise as a result of the different conditions imposed on cross-examination of a defendant.

Differences in the uniform Evidence Acts

9.31 There is a difference between s 104 of the Tasmanian legislation and the other uniform Evidence Acts. The Tasmanian legislation provides leave to cross-examine the defendant on credibility if:

> the nature or conduct of the defence involves imputations on the character of the prosecutor or any witness for the prosecution.

9.32 This is contrasted with s 104(4)(b) of the *Evidence Act* (Cth) and (NSW), which provides that leave may be granted if:

> 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.

9.33 Further, s 104(5) of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) provides:

> 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.

9.34 In 1996, the Law Reform Commissioner of Tasmania recommended that Tasmania should adopt the uniform evidence legislation.[543] The report included an analysis of the principal differences between the *Evidence Act 1910* (Tas) and the uniform evidence legislation. Relevantly, the Law Reform Commissioner considered that the uniform evidence legislation provided greater restrictions on the circumstances in which a defendant's character may be put in issue than the restrictions set out in the *Evidence Act 1910* (Tas).[544]

---

542 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7920]; S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 357.

543 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996).

544 Ibid, 24.

9.35 As discussed above, the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) require that evidence of a defendant's good character or of a prosecution witness's tendency to be untruthful must actually be adduced and admitted before the defendant's character will be put in issue. However, under Tasmanian law prior to the enactment of the *Evidence Act 2001* (Tas):

> it [was] sufficient that the nature or conduct of the defence [was] such as to involve imputations on the character of the Crown or Crown witness, or that the accused *questions* Crown witnesses in order to establish his or her own good character.[545]

9.36 The Law Reform Commissioner of Tasmania explained the significance of the differences between the Tasmanian provisions and those included in ss 104(4)(b) and 104(5) of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) as being that:

> under the [uniform Evidence Act], the accused can cross-examine Crown witnesses up hill 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 evidence is actually adduced.[546]

9.37 The ALRC is interested in comments on the differences between s 104 of the Commonwealth and New South Wales legislation and s 104 of the Tasmanian Act and, in particular, whether s 104(4) of the *Evidence Act 2001* (Tas) is to be preferred.

Question 9–3 What concerns, if any, arise from the interaction between ss 104 and 110 of the uniform Evidence Acts? How should any concerns be addressed?

Question 9–4 Should s 104 of the *Evidence Act 1995* (Cth) be amended to mirror s 104 of the *Evidence Act 2001* (Tas)? What benefits, if any, might be achieved by adopting the formulation of s 104 set out in the *Evidence Act 2001* (Tas)?

---

545 Ibid, 24, fn 35. (Emphasis in original.)

546 Ibid, 24, fn 35. Despite these observations, the Commissioner did not appear to consider it necessary for the relevant provisions of the *Evidence Act 1910* (Tas) to be retained: see Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), App B, 63.

Rebutting denials by other evidence

9.38 Section 106 replaces the 'collateral facts rule'—or 'finality rule'—that exists under the common law. The collateral facts rule provides that, subject to certain exceptions, an answer given by a witness to a question in cross-examination relating to a collateral issue (such as credit) is final, and may not be contradicted by other evidence.

9.39 Explaining the proposal on which s 106 of uniform Evidence Acts was based, the ALRC considered that the collateral facts rule should not be retained in the uniform Evidence Acts in the same form that existed at common law. The ALRC considered that the common law 'finality rule' was 'an artificial and inflexible limitation which may result in the court being misled'.[547] The ALRC commented that:

> Such a strict rule, although it is subject to exceptions, does not reflect the general concern to admit relevant evidence and is incompatible with a flexible approach on matters of credibility.[548]

9.40 Whether s 106 provides greater scope than the common law for evidence to be admitted to rebut denials of matters in cross-examination of a witness is a matter of debate.[549] As discussed below, certain of the exceptions provided in s 106 may be broader in scope than equivalent exceptions to the collateral facts rule at common law. However, s 106 may be more restrictive than the common law in the extent to which a judge may permit contradiction of collateral matters by other evidence.[550]

9.41 Section 106 provides that the credibility rule does not apply to evidence that tends to rebut denials in cross-examination of matters put to a witness that are relevant only to credibility.

9.42 If a witness has previously denied the substance of certain evidence, s 106 allows evidence in relation to the following matters to be adduced otherwise than from the witness:

---

547 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [226].

548 Ibid, [226].

549 Dr Jeremy Gans and Andrew Palmer have commented that s 106 both adds to and reduces the exceptions to the collateral issues rule at common law: J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 317.

550 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.

- the witness' bias or ability to be aware of matters to which his or her evidence relates;[551]
- the making of a prior inconsistent statement by the witness;[552]
- the witness' conviction of an offence, under Australian law or the law of another country; or
- a knowing or reckless false representation made by the witness while under an obligation (imposed under Australian law or the law of another country) to tell the truth.[553]

9.43 Odgers has commented that the requirement that a witness must deny the substance of the evidence in order for s 106 to apply is 'excessive'.[554] It has been suggested that s 106 should also cover situations in which a witness has 'not admitted' the substance of the evidence.[555] This would allow s 106 to apply if a witness neither admits nor denies the substance of evidence put to him or her; for example, if a witness claims to have forgotten the matter or statement at issue.[556] It has been observed that the case law interpreting this section, while not extensive, indicates that the courts are likely to adopt a liberal interpretation of the term 'denial'.[557]

Need for a general discretion?

9.44 The list of exceptions in s 106 appears to be exhaustive. In contrast, 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

---

551 Compare s 104(3)(b) which also includes an express reference to the inability to 'recall' maters 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].

552 Sections 43 and 45 of the *Evidence Act 1995* (Cth) impose procedural requirements in relation to cross-examination on a witness' prior inconsistent statement. If the statement is relevant to a fact in issue, the statement will not be caught by s 102 (see above) so s 106 will not apply.

553 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.

554 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8120].

555 Ibid, [1.3.8120]; S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 350.

556 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8120].

557 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.40]–[106.45] citing *R v Souleyman* (Unreported, New South Wales Supreme Court, Levine J, 5 September 1996).

should be adopted.[558] In *R v Milat*, Hunt CJ at CL suggested that the Act may have 'fallen behind the developments achieved at common law' in this area.[559]

9.45 It has been suggested that s 106 could be amended to 'include a general discretion to allow proof of collateral matters where the probative value outweighs the disadvantages of time, cost and inefficiency'.[560] Associate Professor Sue McNicol has argued that such an amendment would be consistent with the general tenor of the uniform Evidence Acts.[561]

Inability to be aware of matters to which the evidence relates

9.46 The exceptions to the credibility rule set out in s 106 may, however, expand the equivalent common law exceptions to the collateral facts rule in certain respects.

9.47 Section 106(d) permits rebuttal evidence to be adduced relating to whether a witness 'is or was able to be aware of matters to which his or her evidence relates'. This may be broader than the equivalent common law exception.[562] At common law, the exception is limited to proving that a witness' credibility is affected by a mental or medical condition.[563] However, the application of s 106(d) by the courts suggests that the exception will extend beyond cases where a witness' condition affects their *capacity* to give evidence, to cases where it impacts on the reliability of a witness' testimony.[564] Further, s 106(d) seems to allow proof of the fact that

---

558 See, eg, *Natta v Canham* (1991) 104 ALR 143, 161; *Goldsmith v Sandiland* (2002) 190 ALR 370, 379–380, 399; *Palmer v The Queen* (1998) 193 CLR 1, 23. See also: S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8120]; J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 316–318.

559 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996), [6].

560 S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 351.

561 Ibid, 351.

562 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.30]. The alternative view has, however, also been advanced: S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 351.

563 *R v Toohey* [1965] AC 595, 609.

564 See, eg, *R v Souleyman* (Unreported, New South Wales Supreme Court, Levine J, 5 September 1996) (evidence of a psychiatric report to show that a witness was a dependent personality, histrionic and prone to lying admitted as tending to prove that the witness would neither know or want to know the truth); *R v Rivkin* [2004] NSWCCA 7. See also: J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.30].

a witness lacked the opportunity for observation of matters included in their testimony, which would not be permitted at common law.[565]

Making of a false representation while under a legal obligation to tell the truth

9.48 Section 106(e) permits rebuttal evidence to be adduced relating to whether a 'witness has knowingly or recklessly made a false representation while under an obligation … to tell the truth'. One interpretation suggests that this provision operates as a broad exception to the collateral facts rule. On this view, s 106(e) applies whenever a witness denies a matter in cross-examination and the other party has evidence tending to prove that such a denial is a lie.[566] However, an alternative view is that such an interpretation of s 106(e) permits rebuttal in all circumstances and would render the other exceptions in s 106 redundant.[567]

9.49 The ALRC is interested in comments about whether s 106 provides adequate scope for evidence to be admitted to rebut denials in cross-examination of matters put to a witness where the interests of justice require the admission of such evidence.

Question 9–5 Should s 106 of the uniform Evidence Acts be amended to allow rebuttal evidence in respect of the credibility of a witness to be adduced if the witness has 'not admitted', rather than denied, the substance of particular evidence put to the witness on cross-examination?

Question 9–6 Should s 106 of the uniform Evidence Acts be amended to expand the categories of rebuttal evidence relevant to a witness' credibility that are admissible and, if so, could this be achieved by amending s 106 of the Acts to: (i) indicate that the existing list of categories is not intended to be exhaustive; or (ii) expressly allow other types of rebuttal evidence relevant to a witness' credibility to be admitted where a court is satisfied that it is in the interests of justice for it to be admissible?

565 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 318; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8200].

566 C Maxwell, 'Credibility, Collateral Facts and the Evidence Act' (1996) 8(7) *Judicial Officers Bulletin* 51, 52. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.05].

567 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8220]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.35].

Re-establishing credibility

9.50 In general, a party calling a witness may not adduce evidence relevant solely to support the credibility of the witness. However, if the credibility of a witness is impeached in cross-examination, s 108 allows credit evidence to rebut such an attack to be admitted by the party calling the witness, subject to certain requirements.

9.51 Section 108 provides that the credibility rule does not apply to evidence adduced in re-examination of a witness.[568] Further, the credibility rule does not apply to evidence of a prior consistent statement if evidence of a prior inconsistent statement has been admitted, or it is or will be suggested that evidence given by the witness has been fabricated or reconstructed, or is the result of a suggestion.[569] A court must give leave before evidence of a prior consistent statement may be adduced.[570]

9.52 In *Graham v The Queen*,[571] the High Court clarified the circumstances where leave should be granted to permit the adducing of a prior consistent statement under s 108(3)(b).[572] The majority held that even though the appellant's denial of the charges and the course of cross-examination of the complainant may have amounted to a suggestion to the complainant that she had fabricated her evidence, this did not mean that 'leave' would automatically be granted to adduce evidence of her prior consistent statement.[573] In determining whether leave should be granted the majority (Gaudron, Gummow and Hayne JJ) held:

> In exercising the discretion under s 108(3) to permit the adducing of a prior consistent statement, it is important to identify how the evidence relates to the statutory premise

568 Section 39 of the uniform Evidence Acts limits re-examination to 'matters arising out of the evidence given by the witness in cross-examination', or in relation to which a court grants leave.

569 *Evidence Act 1995* (Cth) s 108(3).

570 Section 192 of the uniform Evidence Acts addresses the grant of leave by a court generally. For considerations relevant to the grant of leave under s 108(3) of the Act: see *Graham v The Queen* (1998) 195 CLR 606.

571 Ibid.

572 *Evidence Act 1995* (Cth) s 108(3)(b) provides for the adducing of a prior consistent statement if 'it is or will be suggested (either expressly or by implication) that the evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion'.

573 In addition, leave must be sought by the Crown Prosecutor before evidence can be adduced pursuant to s 108: see *R v Dwyer* [1999] NSWCCA 47, [28]. This is clearly stated in *Graham* by Callinan J who stated; 'The position here is that leave was neither sought nor given and accordingly the judge's discretion as to admissibility pursuant to s 108 was never enlivened or exercised': *Graham v The Queen* (1998) 195 CLR 606, 614.

> for its admission. Whether, if admissible, the complaint becomes evidence of the truth of what is asserted is not relevant to the exercise of the discretion to give leave under s 108. The exercise of the discretion under s 108 depends upon the effect of the evidence on the witness's credibility: here, the suggestion of fabrication.
>
> How does the making of a complaint six years after the events bear upon that question? Unless the making of the complaint can be said to assist the resolution of that question, the evidence of complaint is not important (cf s 192(2)(c)) and would do nothing except add to the length of the hearing (cf s 192(2)(a)). And in this case, it is by no means clear that the making of a complaint six years after the event does assist in deciding whether the complainant had fabricated her evidence. Although trial counsel for the appellant suggested to the complainant, by his last question in cross-examination, that she was 'making it all up' the allegation of fabrication of evidence did not loom large in the trial. No question was put, and no answer was given, from which the time of alleged fabrication could be identified. The complaint having been made in 1994, and it having led at once to the start of police investigations, it may be doubted that a jury could gain assistance from its making in deciding whether the complainant had fabricated her story.[574]

9.53 The New South Wales Court of Criminal Appeal has held that leave will be granted under s 108(3)(b) unless the accused's representatives state that no suggestion will be made that the complainant's evidence has been the result of fabrication, reconstruction or suggestion.[575] It has also been held that a mere denial by the accused of the alleged sexual offence will not automatically mean that leave can be sought by the Crown or should be granted by the court.[576]

9.54 The ALRC is interested in comments regarding the operation of s 108 and whether it adequately addresses admitting evidence relevant to re-establishing credibility.

Question 9–7 Is the formulation of s 108(2) of the uniform Evidence Acts satisfactory? Does s 108 cover all situations of fabrication and reconstruction and, if not, how should this matter be addressed?

---

574 Ibid, 609–610.

575 See Hunt CJ at CL's analysis of s 108 in *R v BD* (1997) 94 A Crim R 131. This approach was approved by the High Court in *Papakosmas v The Queen* (1999) 196 CLR 297. For other examples of where leave is granted under s 108(3)(b) see: *R v Lemura* [1998] NSWSC 699; *R v Rawlings* (Unreported, New South Wales Court of Criminal Appeal, Grove, Devine and Dowd JJ, 18 December 1998); *Foley v The Queen* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Stein JA and Bruce J, 5 June 1997); *R v Gillard* (1999) 105 A Crim R 479; *R v DJT* [1999] NSWCCA 22. Cross-examining counsel may not offend s 108(3)(b) by putting to the witness that their story is incorrect, rather than a lie.

576 *R v Whitmore* [1999] NSWCCA 247.

Credibility of previous representations

9.55 As discussed in Chapter 5, the uniform Evidence Acts adopt a more flexible approach to the admissibility of hearsay evidence than the common law. However, concerns may arise in relation to the reliability of hearsay evidence admitted in proceedings. Section 108A of the uniform Evidence Acts is directed to this issue.[577] Section 108A permits a party against whom hearsay evidence has been admitted, without the maker of the previous representation being called as a witness, to have admitted evidence relevant to the credibility of the person who made that representation.[578]

9.56 The requirements imposed by s 108A are equivalent to those that apply to credibility evidence adduced in cross-examination of a witness under s 103. Credibility evidence relating to the maker of a representation who is not a witness must have 'substantial probative value'. Section 108A(2) sets out a non-exhaustive list of matters to which a court may have regard in determining whether the evidence has substantial probative value.[579] These factors are similar to those specified in s 103(2).

9.57 Odgers has suggested that when s 108A was incorporated into the uniform Evidence Acts, corresponding amendments should have been made to s 108 to permit the admission of evidence to explain or contradict evidence admitted under s 108A.[580] In the absence of such amendment, evidence may not be admissible to explain or contradict evidence relevant only to the credibility of a person who made a representation, which is admitted without the person being called as a witness. Such evidence may, however, be admissible on another basis.

---

577 This provision replaced s 107 of the *Evidence Act 1995* (Cth) and Evidence Act 1995 (NSW), which were repealed. In Tasmania, the equivalent provision is *Evidence Act 2001* (Tas) s 107.

578 The term 'credibility of a person who has made a representation' that has been admitted in evidence is defined in the uniform Evidence Acts. The definition is similar to that of the 'credibility of a witness' under the Acts.

579 The factors listed are the same as those specified in s 103(2).

580 S Odgers, *Uniform Evidence Law* (6th ed, 2004) [1.3.8580].

Question 9–8 Should s 108 of the uniform Evidence Acts be amended to allow the admission of evidence to explain or contradict evidence admitted under s 108A relevant to the credibility of a person whose hearsay representation has been admitted into evidence and, if so, what changes to s 108 would be required to achieve this result?

Credibility issues in sexual offence cases

9.58 The common law has developed rules of evidence that operate specifically in respect of the credibility of complainants in sexual offence proceedings. These include rules in respect of the admissibility of a complainant's sexual history and the doctrine of recent complaint to support the credibility of the complainant.[581]

9.59 Legislation exists in all states and territories to regulate the admissibility of the sexual history of a complainant in sexual offence proceedings.[582] Such legislation determines the admissibility of cross-examination of a complainant on his or her sexual history. Evidence of a complainant's past sexual history may be relevant to either credit or to proving the facts in issue in the proceedings. Therefore, such provisions operate in addition to the credibility provisions in the uniform Evidence Acts.[583] The ALRC is interested in whether the 'rape shield' provisions should be included in the uniform Evidence Acts.[584]

9.60 At common law, evidence of complaint is only admissible to support the credibility of a complainant.[585] Under the uniform Evidence Acts, complaint evidence is admissible for either a hearsay or credibility purpose. The High Court has firmly stated that the admissibility of complaint evidence must be determined with sole reference to the uniform Evidence Acts and tests of admissibility under the common law are irrelevant to such a determination.[586]

---

581 *Kilby v The Queen* (1973) 129 CLR 460.
582 See Ch 15.
583 The provisions also operate in addition to the tendency and coincidence provisions if such evidence is being adduced for a tendency or coincidence purpose.
584 See Ch 15.
585 *Kilby v The Queen* (1973) 129 CLR 460.
586 *Papakosmas v The Queen* (1999) 196 CLR 297**,** [10], [88].

9.61 The ALRC is interested in whether complaint evidence is being admitted for a hearsay or credit purpose. The ALRC is also interested in comment on whether s 136 may be used to limit the use of complaint evidence to its common law use. The operation of s 136 in such a way has been the subject of criticism by McHugh J as it is subverting the intention of the legislation.[587]

9.62 The absence of complaint can be used to discredit a complainant. In legislation in New South Wales, South Australia, Tasmania, Victoria and Western Australia, the jury is required to be warned that failure or delay in complaining should not automatically be regarded as capable of discrediting the witness and other good reasons may exist for such failure or delay. The ALRC is interested in whether such a direction should be provided for in the uniform Evidence Acts.[588]

Other issues

Question 9–9 Are there any other concerns raised in relation to the operation of the credibility rule and its exceptions under the uniform Evidence Act and, if so, what are those concerns and how should they be addressed?

587 Ibid, [96].
588 See Ch 15.

10. Identification Evidence

Contents

Identification evidence

10.1 The uniform Evidence Acts address issues concerning prosecution evidence identifying a defendant as being present at or near a place where an offence for which the defendant is being prosecuted was committed.

10.2 The *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) require visual identification of an accused to take place in an identification parade, subject to certain exceptions.[589] Picture identification is permitted in limited circumstances only and is subject to limitations that seek to minimise the prejudicial effect to the accused.[590] The *Evidence Act 2001* (Tas) does not contain equivalent provisions.

10.3 Tasmania has, however, enacted s 116 of the *Evidence Act 2001* (Tas), dealing with directions to the jury and the associated definition of 'identification evidence'.[591] Section 116 requires directions be given to juries if identification evidence has been admitted, informing them about the special need for caution before accepting such evidence.

Definition of identification evidence

10.4 The definition of 'identification evidence' in the uniform Evidence Acts constrains the field of operation of the identification evidence provisions:

> ***identification evidence*** means evidence that is:

589 *Evidence Act 1995* (Cth) s 114; *Evidence Act 1995* (NSW) s 114.
590 *Evidence Act 1995* (Cth) s 115; *Evidence Act 1995* (NSW) s 115.
591 *Evidence Act 2001* (Tas) ss 3, 116.

> (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.

Identification and DNA evidence

10.5 It has been said that the words 'or otherwise' may be intended to cover 'such unusual cases as identification by touch or identification by the sound of a person's particular gait'.[592]

10.6 It has been suggested that the breadth of the definition of identification evidence—in referring to resemblance 'visually, aurally or otherwise'—means it may inadvertently encompass DNA evidence and fingerprint evidence. If so, admission of these forms of evidence in a jury trial would require directions to be given to the jury under s 116.

10.7 On the other hand, identification evidence is limited to identification 'by a person', which has been said to exclude 'evidence arising from an identification made by a tracker dog or a machine-based identification'.[593] This requirement may exclude DNA evidence—which requires the use of machinery such as thermal cyclers and chemical primers and reagents to produce a DNA profile.[594] It may not be as easy to exclude fingerprints from the definition of identification evidence.

10.8 The ALRC concluded in its 2003 Report *Essentially Yours: The Protection of Human Genetic Information* that, unless the trial judge considers it would be unreasonable in the circumstances of the case to do so, the judge should provide a direction to the jury in all criminal proceedings in which DNA evidence is admitted. The ALRC recommended that, in order

---

592 *R v Adler* (2000) 52 NSWLR 451, [36].

593 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [114.15].

594 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), [39.5].

to provide better guidance for judges and juries, the judiciary should develop a model jury direction for such cases.[595]

Exculpatory identification evidence

10.9 In *R v Rose*,[596] the New South Wales Court of Criminal Appeal confirmed that, where visual identification evidence is exculpatory of the accused, such evidence does not come within the definition of 'identification evidence' in the Dictionary to the *Evidence Act 1995* (NSW). Therefore, s 116, which requires directions to be given to a jury where identification evidence has been admitted, did not apply.

10.10 Section 165 of the uniform Evidence Acts deals with warnings to juries about evidence of a kind that may be unreliable, including 'identification evidence', which is specified in s 165(1)(b) as a kind of unreliable evidence.[597] In *R v Rose*, Wood CJ and Howie J found that it was appropriate for the judge to give an unreliable evidence warning under s 165, notwithstanding that exculpatory evidence was not covered by the term 'identification evidence'.

10.11 The judges noted that visual identification evidence of a particular person is no more reliable because the person being identified is not the accused and rejected the conclusion of Smart A-J that, because of the specific reference 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.[598]

Question 10–1 Does the definition of identification evidence in the uniform Evidence Acts inadvertently encompass DNA and fingerprint evidence? If so, is this a problem and how should it be remedied?

Question 10–2 Are concerns raised by the application of the uniform Evidence Acts to identification evidence that is exculpatory of the accused and, if so, how should any concerns be addressed?

595 Ibid, Rec 44–2.
596 *R v Rose* (2002) 55 NSWLR 701.
597 See also Ch 5, in relation to hearsay evidence of identification.
598 *R v Rose* (2002) 55 NSWLR 701, 712–713.

Picture identification

10.12 Section 115 of the Commonwealth and New South Wales legislation place limitations on the admissibility of picture identification evidence. Picture identification evidence means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.[599]

10.13 Section 115 seeks, among other things, to address the possible unfairness to a defendant accused where a photograph received in evidence appears to be a police 'mug-shot', implying that the accused has a criminal record.[600] It provides, subject to a number of exceptions, that picture identification evidence is not admissible where the defendant was in police custody when the pictures were examined.

10.14 The term 'police custody' is not defined but has been interpreted as meaning 'under physical restraint'.[601] It has been stated that, in consequence, the police may be able to avoid the operation of this provision by defining a person as voluntarily co-operating or by releasing an arrested person on bail before attempting picture identification.[602]

Question 10–3 Should the *Evidence Act 1995* (Cth) be amended to ensure that the provisions relating to the admission of picture identification evidence where defendants are in 'police custody' are not able to avoided by police and, if so, how?

Directions to the jury

10.15 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.

---

599 *Evidence Act 1995* (Cth) s 115(1); *Evidence Act 1995* (NSW) s 115(1).
600 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [189].
601 *R v McKellar* [2000] NSWCCA 523.
602 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800].

10.16 In *Dhanhoa v The Queen*, in the High Court, it was 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.[603]

10.17 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'.[604] So understood, the provision means that directions must be given only where the reliability of the identification evidence is disputed.[605]

10.18 In his judgment, Callinan J observed that s 116 'is inappropriately prescriptive, just as some other provisions of the Act and its Commonwealth analogue inappropriately confer discretions in place of earlier, reasonably clear rules which proved generally satisfactory in practice'.[606]

Question 10–4 Should s 116 of the uniform Evidence Acts be amended to clarify that directions to the jury in relation to identification evidence are not mandatory and, if so, how?

Question 10–5 Are there any other concerns in relation to identification evidence and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

603 *Dhanhoa v R* (2003) 199 ALR 547, 551.
604 Ibid, 552.
605 Ibid, 552.
606 Ibid, 564.

11. Privilege

Contents

Introduction

11.1 A privilege is essentially a right to resist disclosing information that would otherwise be ordered to be disclosed.[607] 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 the right legal advice. Privileges are not only available as part of the rules of evidence, but apply outside court as a substantive doctrine wherever information may be compulsorily acquired, including by administrative agencies.[608] Privilege may, therefore, be claimed in the production of documents before a trial (including in 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.

11.2 Under the *Evidence Act 1995* (Cth), the following privileges are available:

- client legal privilege;[609]
- privilege in respect of religious confessions;[610] and
- privilege in respect of self-incrimination in other proceedings.[611]

11.3 In addition, there are three types of evidence which may be excluded in the public interest:

- evidence of reasons for judicial decisions;[612]
- evidence of matters of state (public interest immunity);[613] and
- evidence of settlement negotiations.[614]

---

607 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

608 *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.

609 *Evidence Act 1995* (Cth) Part 3.10, Division 1.

610 Ibid s 127.

611 Ibid s 128.

612 Ibid s 129.

613 Ibid s 130.

614 Ibid s 131.

11.4 The *Evidence Act 1995* (NSW) contains these and two additional privileges; a professional confidential relationship privilege and a sexual assault communications privilege.[615]

Application to pre-trial proceedings

11.5 It has been suggested that the major area for potential reform of the operation of the privilege provisions of the uniform Evidence Acts is in their application only to proceedings in a relevant court.[616] In its original evidence law inquiry, the ALRC confined its consideration of privileges to the trial phase on the basis that the Terms of Reference limited it to considering 'the laws of evidence applicable in proceedings in federal courts and the courts of the territories'.[617]

11.6 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. In the final Report *Evidence* (ALRC 38), the ALRC acknowledged the limitations imposed by the Terms of Reference. However, the ALRC suggested that it was not necessarily unreasonable that, for example, access could be granted to documents under the common law at the investigation stage that were then protected in the courtroom by the Act.[618]

11.7 There has been criticism of the uniform Evidence Acts in this regard:

> 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.[619]

---

615 Ibid Part 3.10, Division 1A and Division 1B (applying to civil matters only). The sexual assault communications privilege available in criminal proceedings is in Part 7 of the *Criminal Procedure Act 1986* (NSW). The *Evidence Act 2001* (Tas), has the same privileges as the federal Act and also ss 127A and 127B which cover medical communications and communications to a counsellor respectively. Section 127A operates only in civil proceedings and s 127B operates only in criminal proceedings.

616 See Ch 2.

617 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [108].

618 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [199].

619 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 416.

11.8 From 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.[620] However, in *Mann v Carnell*[621] and *Esso v Commissioner of Taxation*,[622] the High Court rejected this approach and found that the uniform Evidence Acts applied to the adducing of evidence only in relevant proceedings. The High Court in *Esso* took particular notice of 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.[623]

11.9 The Supreme Court of New South Wales and the District Court of New South Wales have amended their rules to provide specifically that the *Evidence Act 1995* (NSW) applies pre-trial.[624] However, inconsistencies also operate in this regard as the rules apply the Act only to civil proceedings and not, for example, to subpoenas in criminal matters. In the Australian Capital Territory, the Supreme Court amended its rules in line with the Supreme Court of New South Wales. However, following the decision in *Mann v Carnell* the rule was repealed.[625]

11.10 It has been strongly suggested to this Inquiry that it is unsatisfactory to have two sets of laws applying concurrently to privileges and that the uniform Evidence Acts require urgent reform in this regard.

11.11 In the case of client legal privilege, Jill Anderson, Associate Professor Jill Hunter and Neil Williams note that in all but a small proportion of cases, all of the privilege issues will arise in relation to pre-

---

620 See *Telstra Corporation v Australis Media Holdings (No 1)* (1997) 41 NSWLR 277; *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360;*Atkins v Abigroup* (1998) 43 NSWLR 539: S Odgers, *Uniform Evidence Law* (6th ed, 2004), 451.

621 *Mann v Carnell* (1999) 201 CLR 1.

622 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49.

623 Ibid, 62.

624 These rules apply Part 3.10 of the *Evidence Act 1995* (NSW) to discovery, interrogatories, subpoenas, notices to produce and oral examinations: *Supreme Court Rules* Pt 23, 24, 36 and 75; *District Court Rules* Pt 22, 22A and 29. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10360]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 417.

625 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 418.

trial procedures.[626] It is the area identified to this Inquiry as being most significantly affected by the operation of the two regimes. As noted below, there are significant differences between the rules of legal professional privilege under the common law and the client legal privilege sections of the uniform Evidence Acts. Other privileges available under the uniform Evidence Acts have attracted less comment in this regard as either they do not arise as frequently in a pre-trial context or the privilege at common law has been reflected in the Act.

11.12 If the goal in amending the client legal privilege sections is greater uniformity, it would appear to be counterproductive to have the provisions in relation to one of the privileges apply pre-trial and not others. The privileges available under the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas), such as the sexual assault communications privilege, have no common law equivalents and are therefore not currently available in any form at the pre-trial stages, except where provided for in other legislation.[627]

11.13 In relation to the application of the uniform Evidence Acts to non-curial contexts, the policy basis for each of the privileges may quite properly limit their application to certain types of processes. In *Daniels v ACCC*, the majority of the High Court noted in relation to the privilege against self-exposure to a penalty:

> Today the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly, no decision of this Court says it should be so recognised, much less that it is a substantive rule of law.[628]

11.14 The Inquiry is interested in opinions on whether the Act should apply to pre-trial processes only in relation to client legal privilege sections or whether it should extend to all the privileges.

11.15 Should the Inquiry find that reform is required, there are two approaches which could be taken. Firstly, the uniform Evidence Acts could be amended so that Part 3.10[629] applies to pre-trial contexts such as

---

626 Ibid, 416.

627 For example, Part 7 of the *Criminal Procedure Act 1986* (NSW). These privileges are discussed further below.

628 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559.

629 *Evidence Act 2001* (Tas), Part 10.

discovery and production of documents in response to a subpoena. In the alternative, a decision could be made to excise the provisions of the Act relating to privileges and return to the application of the common law. As noted in Chapter 1, the ALRC does not see its task in this Inquiry as undertaking a complete revision of the policy behind the uniform Evidence Acts. In the absence of strong submissions to the contrary, it is the ALRC's present belief that excising the privilege sections of the uniform Evidence Acts would lead to significant uncertainty and perhaps even greater confusion than at present.

Question 11–1 Should the uniform Evidence Acts make express provision for client legal privilege to apply in contexts such as pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and s 264 notices under the *Income Tax Assessment Act 1936* (Cth)?

Question 11–2 Should the uniform Evidence Acts make express provision for other privileges to apply in contexts such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts?

Client legal privilege

11.16 Historically, 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.

11.17 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.[630] On balance, this freedom is considered to outweigh the alternative benefit of having all information available to facilitate the trial process. In *Baker v Campbell*, Deane J described legal professional privilege as 'a fundamental and general principle of the common law'.[631] The protection only applies where it is intended for a proper purpose—communications made in furtherance of an

630 *Baker v Campbell* (1983) 153 CLR 52.
631 Ibid.

offence or an action that would render a person liable for a civil penalty are not protected.[632]

11.18 At common law, the doctrine has been subject to a number of key modifications over time 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).[633] Some legislation that gives administrative agencies investigative powers, such as those exercised by the Australian Competition and Consumer Commission (ACCC) and the Australian Tax Office (ATO), has sought to abrogate the privilege in an attempt to stop its use to avoid giving information. In *Daniels v ACCC*, the High Court held that s 155 of the *Trade Practices Act 1974* (Cth)[634] did not abrogate legal professional privilege, because the privilege was an important common law right that could only be abrogated with express words to that effect.[635]

The test

11.19 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*.[636] In 1999, the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation*[637] overruled *Grant v Downs*, holding that the common law test for legal professional privilege was the dominant purpose test. This was in line with the ALRC's recommendation and with the uniform Evidence Acts.[638]

---

632 See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Evidence Act 1995* (Cth), s 125.

633 *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.

634 Section 155 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.*

635 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

636 *Grant v Downs* (1976) 135 CLR 674.

637 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49.

638 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [881].

11.20 The ALRC recommended that under the uniform Evidence Acts, the 'sole purpose' test be replaced with a 'dominant purpose' test, reflecting the formulation proposed by Barwick CJ (in the minority) in *Grant v Downs.*[639]

11.21 Section 118 operates in the context of protecting legal advice and provides that evidence is not to be adduced if, on objection of 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;
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

11.22 Section 119 allows 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.

11.23 Under the common law, legal professional privilege also encompasses a communication privilege and a litigation privilege.[640] Although there is alignment of the common law with the uniform Evidence Acts in relation to the dominant purpose test, there remain some differences between the two approaches. For example:

- Under the common law, the client must be genuinely seeking legal advice for the privilege to attach, and the privilege does not attach when a communication is made for an illegal or improper purpose.[641] The uniform Evidence Acts contain two formal exceptions to the privilege: s 125(1)(a) which excepts communications made in furtherance of a crime or fraud or an act for which there is a civil penalty; and s 125(1)(b), which applies to communications made knowingly or negligently in furtherance of a deliberate abuse of power.[642]

---

639 *Grant v Downs* (1976) 135 CLR 674, 678. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), 457.
640 A Ligertwood, *Australian Evidence* (4th ed, 2004), 276.
641 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
642 A Ligertwood, *Australian Evidence* (4th ed, 2004), 281.

- The uniform Evidence Acts do not make provision for 'severance', whereby matters in a document extraneous to the privileged matters might still be disclosed. The possibility of severance under the common law was recognised by the High Court in *Waterford v Commonwealth*.[643]
- The litigation privilege under s 119 extends to any confidential document made for the dominant purpose of the client receiving legal services in respect of a proceeding or anticipated proceeding. It has been argued that as the Acts do not limit who the author of the document has to be, a literal interpretation of the section makes it wider than the litigation privilege at common law.[644]
- Under s 119 the client must be, or potentially be, a 'party' to the litigation. At common law, the client must only be 'involved' in the litigation.[645]
- In relation to waiver of the privilege, s 122 applies if the client or party knowingly and voluntarily disclosed the substance of the evidence. The common law, in contrast, imposes a 'fairness' test, whereby the privilege will be lost where the disclosure is incompatible with the retention of confidentiality.[646]

Definitions

11.24 Commentators have suggested there are a number of drafting difficulties with the client legal privilege provisions of the uniform Evidence Acts.[647] Section 117 contains a number of definitions of terms used within the division dealing with client legal privilege. 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
>
> (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

643 *Waterford v Commonwealth* (1987) 163 CLR 54. See A Ligertwood, *Australian Evidence* (4th ed, 2004), 288.

644 A Ligertwood, *Australian Evidence* (4th ed, 2004), 289 citing Nicholson J in *Hardie Finance Corp Pty Ltd v CCD Australia Pty Ltd* (1995) 67 FCR 594.

645 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 198.

646 Ibid, 204.

647 See Ibid; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 417.

> 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.

11.25 It has been suggested that it is unclear why the private employer of a lawyer may not be a lawyer themselves in order to qualify as a 'client', whereas the government employer is not restricted.[648] Stephen Odgers notes that different approaches have been taken to the breadth of the term 'client', in particular whether a client could be considered a person to whom the lawyer owes an obligation of confidentiality in terms of the preparation or giving of legal advice.[649]

11.26 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.[650] At common law, it appears that a lawyer for the purpose of the privilege must be a *practising* barrister or solicitor.[651] This position was recently confirmed in *Vance v McCormack*, where Crispin J in the Australian Capital Territory Supreme Court found that privilege did not attach where the lawyer concerned did not hold a current practising certificate or have a statutory right to practice.[652] Crispin J based this finding on the rationale for legal professional privilege being the public interest in proper representation of clients. Where a legal advisor has no right to represent a client, no privilege should attach.[653]

11.27 Under s 117(1), a party includes the following:

> (a) an employee or agent of a party;
>
> (b) 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 party—a manager, committee or person so acting;

---

648 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 192.

649 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10260].

650 Uniform Evidence Acts s 3.

651 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189.

652 *Vance v McCormack* [2004] ACTSC 78. This case concerned advice given by legal and military officers employed by the Department of Defence.

653 Ibid, [38]–[40].

(c) if a party has died—a personal representative of the party;

(d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

11.28 It has been suggested that confusion arises under the Act because the word 'party' is given an inclusionary definition, rather than indicating who a party actually is.[654]

Question 11–3 Do the definitions of 'client', 'lawyer' and 'party' in s 117 of the uniform Evidence Acts require reconsideration or redrafting?

Copies of documents

11.29 At common law, the extent to which copies of documents are afforded the privilege has been a question of some contention.[655] It is clear that when a copy is made of an original that attracts the privilege (ie, for the purpose of record keeping or administration) the copy is also privileged. The position is more difficult where the original is not privileged but a copy of that document, which is communicated for the purpose of seeking or giving advice or in preparation for litigation, may be.[656]

11.30 The majority of the High Court in *Australian Federal Police v Propend Finance*[657] found that privilege could exist in copies of documents made for the purpose of seeking legal advice or pending litigation.[658] Where it is made for this purpose the copy becomes a separate communication to which the dominant purpose test is applied.[659] As Andrew Ligertwood has noted 'the practical effect of *Propend* is to protect copies of unprivileged documents that find their way into a lawyer's brief for litigation'.[660] Ligertwood further notes that the position under the uniform Evidence Acts in relation to copies is likely to be similar to that under the common law.[661]

---

654 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 193.
655 A Ligertwood, *Australian Evidence* (4th ed, 2004), 293.
656 Ibid, 291.
657 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501.
658 Ibid, 509.
659 A Ligertwood, *Australian Evidence* (4th ed, 2004), citing Uniform Evidence Acts, 96.
660 A Ligertwood, *Australian Evidence* (4th ed, 2004), 291.
661 Ibid, 293.

11.31 The decision in *Propend* was based on the then existing common law sole purpose test.

> If privilege were denied to a copy of an unprivileged document when the copy is produced solely for the purpose of seeking advice from a solicitor or counsel or for he purpose of use in pending, intended or reasonably apprehended litigation there would be a risk that the confidentiality of solicitor–client communications would be breached. The way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors' files and counsels' briefs. That would undermine the adversary system under which most litigation is conducted.[662]

11.32 In *Propend* a significant part of the argument rested on the fact that the copy would have to have been made solely for the purpose of providing advice or in the course of litigation. As noted above, the common law test is now the dominant purpose test, as in the uniform Evidence Acts. It has been suggested that an application of the dominant purpose test to copied documents may produce an undesirable broadening of the privilege.

Question 11–4 Is there a need to amend the uniform Evidence Acts to address the issue of whether a copy of a document can be privileged where the original document is not privileged?

Legal advice

11.33 As outlined above, s 118 creates a privilege for legal advice. In the Interim Report *Evidence* (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 the lawyer.[663]

11.34 It has been argued that the wording of s 118, where the advice must be prepared 'for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client' is not consistent with the

662 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.

663 *Baker v Campbell* (1983) 153 CLR 52, 408, cited in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [438].

nature of the privilege.[664] The wording is also inconsistent with s 119, which uses the term 'for the dominant purpose of the client being provided with legal services'.

Question 11–5 Should s 118 of the uniform Evidence Acts be amended to read 'for the dominant purpose of the client seeking or obtaining legal advice from the lawyer' rather than the current wording referring to the 'lawyer providing legal advice'?

Litigation

11.35 Section 119 creates a privilege for confidential communications made between the client and another person or the lawyer and another person, and confidential documents prepared for the dominant purpose of the lawyer providing legal services in the context of litigation. 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.[665]

11.36 However, the term 'another person' is not defined in the uniform Evidence Acts. Odgers states that 'another person' is not only a third party, it may also refer to the client and lawyer or two or more lawyers acting for the client.[666] In contrast, Associate Professor Sue McNicol has argued that 'the intended meaning of another person is surely a third party in the sense this is used at common law'.[667]

---

664 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 195.

665 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

666 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10740].

667 Meaning a person outside the lawyer/client relationship: S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 197. In relation to the common law, the Full Federal Court has recently held that a third parties' communication with a client, even where there is no litigation pending, could potentially be protected by legal professional privilege. 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: *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

Question 11–6 Does the term 'another person' as used in s 119 of the uniform Evidence Acts require definition in s 117? If so, how should it be defined?

Loss of privilege

General

11.37 Section 121 deals with a general loss of client legal privilege.

> (1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.
>
> (2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.
>
> (3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

11.38 Section 121(3) has been criticised because of its potential to be read broadly. Odgers notes that the section should be read narrowly, applying to communications only that affect rights directly, and not 'merely by way of being evidentiary as to rights created or affected otherwise'.[668]

11.39 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. This approach is different to that of the common law, where waiver may be imputed where the circumstances are such that it is unfair for the client to say that the privilege has not been waived.[669] What is unfair in the circumstances is determined by the conduct of the client.

> 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

668 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10920].
669 A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

> and the maintenance of confidentiality; not some overriding principle of fairness operating at large.[670]

11.40 The courts have interpreted s 122 inconsistently. In some cases, the courts have attempted to import the common law notion of fairness into the section.[671] However, 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'.[672]

11.41 The prescriptive approach to s 122 has been criticised as failing to allow sufficient room for flexibility. One suggested advantage of the fairness 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'.[673]

Question 11–7 Are concerns raised by the operation of s 122 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

Misconduct

11.42 Under s 125 of the uniform Evidence Acts, privilege does not apply when a communication is made or document created in furtherance of the commission of a fraud, an offence, an abuse of power or an act that renders a person liable for a civil penalty. The term 'fraud' is not limited to the criminal offence of fraud, but also includes a wider sense of dishonesty or deception.[674] The onus of proof rests with the party alleging that the privilege has been lost. Section 125(2) states there must be 'reasonable grounds' for the court to find that the fraud, offence or abuse of power was committed and that the communication was made in furtherance of it.

11.43 In *Kang v Kwan*, Santow J stated:

---

670 *Mann v Carnell* (1999) 201 CLR 1, [29] cited in A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.
671 *Telstra Corporation v BT Australasia* (1998) 85 FCR 152.
672 *Carnell v Mann* (1998) 89 FCR 247, 257.
673 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 202.
674 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11620].

> [t]he standards for establishing reasonable grounds will depend on the circumstances, though must still be sufficient to 'give colour to the charge', that is at a prima facie level. Thus if a person challenging privilege is clearly not in a position to lead very much evidence concerning purpose, as where the other party has exclusive access to that evidence, the Court may be satisfied with relatively less evidence. In contrast, much more evidence may be required where the party challenging improperly obtained access to that evidence.[675]

11.44 Further, it has been held that 'a submission that client legal privilege has been lost by reason of misconduct pursuant to s 125 must be viewed seriously and should not be made lightly'.[676] In accordance with s 133, the court may inspect the document in question for the purpose of establishing whether reasonable grounds have been established.

11.45 The onus of proof under s 125 is therefore a high one. The ALRC is interested in comments on the operation of s 125 and, in particular, in relation to any difficulties in attempts to prove misconduct as required under the section.

Question 11–8 Are concerns raised by the operation of s 125, in particular the proof of misconduct? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

Confidential communications privilege

11.46 In ALRC 26, the ALRC proposed the creation of a further discretionary privilege that would cover confidential 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. These relationships could include doctor and patient, psychotherapist and patient, social worker and client or journalist and source.[677] The Report noted that, for example, there are circumstances in which confidentiality is crucial to the furtherance of an accountant and client relationship.[678] Given the controversial nature of the some of these

675 *Kang v Kwan* [2001] NSWSC 698, [7].
676 *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 428, [38].
677 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 116.
678 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [955].

categories, the ALRC proposed that such a privilege be granted at the discretion of the court, rather than as a privilege in all cases.[679]

11.47 This proposal was not taken up as part of the *Evidence Act 1995* (Cth). A confidential relationships privilege does, however, now exist under Division 1A of the *Evidence Act 1995* (NSW).[680] Under s 126A of the New South Wales Act, 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 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.

11.48 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*.[681] 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.[682]

11.49 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.[683] 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, the likelihood of harm to the

---

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

680 The *Evidence Amendment (Confidential Communications) Act* (NSW) which enacted this division was passed in 1997. 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 or act for the patient unless the sanity of the patient is the matter in dispute.

681 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].

682 NSW Legislative Council Debates (22 October 1997), 1120: see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

683 *Evidence Act 1995* (NSW) s 126B, see also *Wilson v New South Wales* [2003] NSWSC 805, [18].

protected confider in adducing the evidence and then decide if it is appropriate to give a direction under the section.

11.50 Odgers notes that there has been criticism of the section because it is not clear how the court should exercise the discretion.[684] The New South Wales Bar Association has argued that there appear to be two discretions within the section. That is, even if the court is not satisfied that the harm which may be caused if the evidence is adduced outweighs the desirability of the evidence being given, there is still a discretion to direct that the evidence not be adduced.[685]

11.51 The ALRC is interested in hearing views on the operation of the professional confidential relationships privilege in New South Wales, and whether such a provision should be adopted in the federal Act. If this provision was to be adopted, what criticisms of it should be taken into account in its drafting?

11.52 The rationale for the protection of confidential relationships may also be extended to other professional relationships where full and frank disclosure provides a wider policy benefit to the community. As one example, the New Zealand government will shortly introduce legislation establishing a new privilege for opinions on tax law by registered tax practitioners. The statutory privilege will be available to cover communications made for the dominant purpose of giving or receiving tax advice on tax laws. The policy basis for the privilege is to allow candid and open communications between tax advisors and their clients.[686]

Question 11–9 Should the *Evidence Act 1995* (Cth) adopt the provisions of Division 1A of the *Evidence Act 1995* (NSW) in relation to professional confidential relationships?

---

684 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

685 Ibid, [1.3.11940].

686 M Cullen (Minister of Finance New Zealand Government), 'Statutory Privilege for Legal Advice Extended', 14 September 2004. The legislation is expected to be introduced in November 2004. The ATO has indicated that they are looking at the New Zealand approach: Follow NZ Lead Say Accountants', *Australian Financial Review* (Sydney), 17 September 2004, 3.

Sexual assault communications privilege

11.53 A privilege for sexual assault communications is available under Division 1B of the *Evidence Act 1995* (NSW) and Part 7 of the *Criminal Procedure Act 1986* (NSW).[687] Division 1B was first inserted into the *Evidence Act 1995* (NSW) by the *Evidence Amendment (Confidential Communications) Act 1997* (NSW). In 1999 part of Division 1B became Part 7 of the *Criminal Procedure Act 1986* (NSW).[688] The chief reason for re-enacting the provisions the *Criminal Procedure Act* was the decision in *R v Young*[689] that Division 1B applied only to the adducing of evidence and could not protect sexual assault communications in relation to discovery and production of documents. Division 1B now applies only to civil proceedings 'in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding'.[690] If the evidence is found to be privileged under Part 7 of the *Criminal Procedure Act*, the evidence may not be adduced in civil proceedings to which Division 1B applies.[691]

11.54 At the time of enacting the confidential communications privilege, the New South Wales government argued that the records of the relationship between a sexual assault victim and a counsellor required a particular privilege.[692] Part 7 the *Criminal Procedure Act* renders counselling records inadmissible unless the defence can show the evidence has substantial probative value and that the public interest in protecting the confidentiality of document is outweighed by the public interest in allowing its inspection.

11.55 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* (NSW) as it is an absolute protection of the communications, unless the complainant consents to their production. Section 127B applies only to criminal proceedings.

---

687 A similar privilege is available under s 127B of the *Evidence Act 2001* (Tas).
688 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 444.
689 *R v Young* (1999) 46 NSWLR 681.
690 *Evidence Act 1995* (Cth) s 126H(1).
691 Ibid s 126H(2),
692 NSW Legislative Council Debates (22 October 1997), 1121.

Question 11–10 Should the sexual assault communications privilege available under Part 7 of the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) be included in the *Evidence Act 1995* (Cth)?

Question 11–11 Should the sexual assault communications privilege available under s 127B of the *Evidence Act 2001* (Tas) be included in the *Evidence Act 1995* (Cth)?

Privilege in respect of self-incrimination in other proceedings

11.56 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.[693] 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 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).

11.57 Section 128 of the uniform Evidence Acts applies where a witness objects to giving 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.[694] Under s 128, a witness claiming the privilege on 'reasonable grounds' is not required to give evidence unless the court finds that the 'interests of justice' so require. In this regard, the Acts are different from the common law, which grants an absolute right to claim the privilege.[695] Under the Acts, if the witness does give evidence, the court must give the witness a

693 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

694 Clause 3 of Part 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.

695 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.05].

certificate which grants that person use and derivative use immunity in relation to the evidence (except in criminal proceedings in respect of the falsity of the evidence).[696] Where the court has denied a claim for privilege and if, 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. 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.

11.58 Section 128 differs from the ALRC's original proposal, which was only for an optional certificate, and did not allow a court to compel a witness to give the evidence.[697]

Question 11–12 Are any general concerns raised by the issuing of certificates under s 128 of the uniform Evidence Acts?

Application to ancillary proceedings

11.59 Anderson, Hunter and Williams note that there are circumstances in which s 128 has been held to apply to ancillary proceedings, in the context of orders made ancillary to asset preservation orders requiring an affidavit of assets.[698] 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. One issue in these cases is whether s 128 is applicable in the context of affidavit evidence only where a witness or deponent is in court and can give oral evidence of the contents of the affidavit.

---

696 Under the *Evidence Act 1995* (NSW) the protection afforded under the certificate only extends to any proceeding in a NSW court. However, under ss 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). This issue is also discussed in Ch 2.

697 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [215].

698 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.10].

11.60 It has been held in a number of cases that a 'witness' for the purpose of s 128 includes a person who gives evidence by affidavit.[699] In *Bax Global (Australia) Pty Ltd v Evans*, Austin J described the practice of the Equity Division in relation to deciding whether or not the court will protect an affidavit of assets by the granting of 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.[700]

11.61 A recent case in the Supreme Court of New South Wales, *Pathways Employment Services v West*,[701] has considered this 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.[702]

> 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.[703]

11.62 Campbell J considered in that case (noting that the remarks were divorced from the factual context of the case) that:

---

699 Ibid, [128.10], citing, eg, *In the Marriage of Atkinson* (1997) 136 FLR 347and *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538.

700 *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538, [41]–[46].

701 *Pathways Employment Services v West* [2004] NSWSC 903.

702 Ibid, [40].

703 Ibid, [40].

> The interaction between the law concerning privilege against self-incrimination and the law concerning compulsory disclosure of information for the purpose of civil proceedings is not at present coherent.[704]

11.63 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, originally equitable, of discovery and interrogatories'.[705] 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.[706]

11.64 Campbell J argued that the ALRC and NSWLRC's present Inquiry may be the 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.[707]

Question 11–13 Are there concerns raised by the application of s 128 to ancillary proceedings for the compulsory disclosure of information in civil matters? Should these concerns be addressed through amendment of the uniform Evidence Acts or by other means?

Definitions

Use in any proceeding in an Australian court

11.65 Section 128(7) of the uniform Evidence Acts 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;

704 Ibid, [46].
705 Ibid, [12].
706 Ibid, [13].
707 Ibid, [49].

> cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.[708]

11.66 The term 'proceeding' is not defined, although 'Australian court' is given a wide definition.[709] Odgers argues that both concepts should be given a liberal interpretation based on the underlying protective purpose of granting the privilege.[710]

11.67 One issue raised by the term, 'any proceeding', is the status of a retrial. In *R v Cornwell*,[711] 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 J in the District Court of New South Wales. Blackmore J determined that the trial before him was a different proceeding for the purposes of s 128(7) and 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. An issue, therefore, was whether a retrial could be considered a 'proceeding' for the purpose of a s 128 certificate, or whether it is part of the original proceedings.[712]

11.68 Following Blackmore J'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. 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'.[713] The process set out by s 128 is mandatory not discretionary once the requirements of the section are met.

---

708 *Evidence Act 1995* (NSW) s 128(7) refers to a NSW Court instead of an Australian Court.
709 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13100].
710 Ibid, [1.3.13100].
711 *R v Cornwell* [2004] NSWSC 45.
712 Ibid.
713 Ibid, [12].

11.69 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 or it could not be used against him in any subsequent proceedings for the same offence'.[714] 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.[715]

Question 11–14 Are there any concerns about the definition of 'any proceeding in an Australian court' under s 128 of the uniform Evidence Acts?

Fact in issue

11.70 A certificate under s 128 is not available for evidence given by a defendant which is evidence that the defendant did an act the doing of which is a fact in issue or had a state of mind the existence of which is a fact in issue.[716] In *R v Cornwell*,[717] Howie J considered the meaning of the term 'fact in issue', noting that it is also used in relation to s 55 (dealing with relevance) and s 94 (tendency and coincidence). Howie J stated that a fact in issue in a criminal trial is 'any matter that must be ultimately determined by the jury in order to decide whether or not an accused person is guilty of the offence charged'.[718] This is to be distinguished from any fact in dispute in the proceedings or 'those factual disputes the resolution of which may merely assist the jury in determining whether the accused has committed the offence charged'.[719] In this sense a fact *relevant* to a fact in issue may be distinguished from a fact in issue. How probative or significant the evidence is is also irrelevant to whether it went to a fact in issue.[720] Howie J drew a comparison with s 94 where, under the tendency and coincidence rules, the character, reputation, conduct or tendency of a person is a fact in issue only

714 Ibid, [11].
715 Ibid, [18].
716 *Evidence Act 1995* (Cth) s 128(8).
717 *R v Cornwell* [2003] NSWSC 660.
718 Ibid, [8].
719 Ibid, [9].
720 Ibid, [9].

where any of these matters have to be determined to resolve the proceedings before the court.[721]

11.71 There is a dearth of case law considering the definition of a 'fact in issue'. The ALRC is interested in comments on any concerns raised by the definition of a 'fact in issue' for the purposes of s 128(8).

Question 11–15 Are there any concerns about the definition of a 'fact in issue' under s 128(8) of the uniform Evidence Acts?

Application of the privilege to documents

11.72 Section 128 protects a witness from having to give self-incriminatory information through their evidence. There is no distinction under the uniform Evidence Acts between oral testimony and the production of documentary evidence.[722] In relation to documents, it is not only the content of the documents which may be incriminatory, but the fact of their existence. As noted above, there has been some disagreement as to whether s 128 is applicable to affidavit evidence or only where the witness is in court. Odgers has argued that the latter approach is unduly narrow, as the section does not prescribe any particular mode for giving evidence.[723]

11.73 A distinction is drawn between a witness' testimony and where the court has ordered the production of documents. In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (*Caltex*) Mason CJ and Toohey J explained the distinction as being:

> 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.[724]

11.74 McHugh J in *Caltex* cited Lord Templeman in *Istel v Tully*[725] that 'it was difficult to see why in civil proceedings the privilege against self-

---

721 Ibid, [11]; citing also Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [786]. See Ch 8.
722 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.12980].
723 Ibid, [1.3.12980].
724 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.
725 *Istel v Tully* [1993] AC 45, [53].

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'.[726] In *Istel*, Lord Templeman considered that the privilege against self-incrimination could only be justified on the basis that it discouraged the ill treatment of a suspect and the production of dubious confessions.

> I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.[727]

Question 11–16 Is there a need to revisit the application of s 128 of the uniform Evidence Acts to documents as well as testimony?

Availability of the privilege for bodies corporate

11.75 Under s 187 of the uniform Evidence Acts, the privilege against self-incrimination is not available to corporations:

> (1) This section applies if, under a law of the Commonwealth or the Australian Capital Territory or in a proceeding in a federal court or an ACT court, a body corporate is required to:
>
> (a) answer a question or give information; or
>
> (b) produce a document or any other thing; or
>
> (c) do any other act whatever.
>
> (2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.[728]

11.76 The common law decisions in *Caltex*[729] and *Trade Practices Commission v Abbco Iceworks Pty Ltd* (*Abbco*),[730] also found that the privilege against self-incrimination and the privilege against self-exposure

---

726 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 555.

727 *Istel v Tully* [1993] AC 45, [53].

728 Section 187 did not form part of the ALRC's original recommendations. ALRC 26 notes that the ALRC's view was that the rationale for the privilege did not warrant its extension to corporations, however, no specific recommendation was made in that regard: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [862].

729 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

730 *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96.

to a penalty are not available to corporations. In *Caltex*, Mason CJ and Toohey J stated that 'the historical reasons for the creation and recognition of the privilege do not support its extension to corporations'.[731] The modern rationale for the privilege is equally inapplicable: 'modern international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument that corporations should enjoy the privilege'.[732] According to Burchett J in *Abbco*, the argument that denying privilege to corporations denies protection to individual company officers is not correct. The privilege 'has never been, nor should it be, a shield against the use of incriminating evidence—only a right to decline to be themselves the author of their destruction by producing the evidence'.[733]

11.77 The key policy issue regarding the application of the privilege to corporations involves weighing up effective corporate regulation against damage to the adversarial principle.[734] On one hand, the nature of corporations, the complexity of corporate structures, and the centrality of documentary records to business activity would make effective regulation (particularly detection of unlawful behaviour) difficult if corporations were protected by the privilege.[735] On the other hand, the adversarial system of justice requires that a party must be found guilty on the evidence and not forced to do the work of the accuser.[736]

Question 11–17 Are there any concerns raised by s 187 of the uniform Evidence Acts and, if so, how should such concerns be addressed?

Religious confessions

11.78 A specific privilege in respect of religious confessions was not recommended by the ALRC, because it was considered that confessions fall under the confidential communications privilege.[737] The religious

731 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.
732 Ibid, 500.
733 *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 116.
734 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 535.
735 Ibid, 502.
736 *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465.
737 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), proposed s 109.

confessions privilege applies in pre-trial matters, as it not only relates to the adducing of evidence but also allows a member of clergy (of any religious denomination) to refuse to divulge that a religious confession was made or the contents of the confession.[738]

Evidence excluded in the public interest

11.79 Public interest immunity is available both under the common law and s 130 of the uniform Evidence Acts. Public interest immunity can be distinguished from privilege. In the case of privileges, only the party holding the information is able to invoke it, whereas 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.

11.80 Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to governments, communications or negotiations between governments, national security, police investigation methods, or in relation to the activities of ASIO officers, police informers, and other types of informers or covert operatives.[739]

11.81 In its earlier evidence inquiry, the ALRC found no serious inadequacies in the common law approach to public interest immunity, and recommended as little interference with the supervisory role of the courts as possible.[740] However, the ALRC did recommend a change from the accepted common law formula that required the judge, when determining whether to grant public interest immunity, to balance the competing interests at a general level.[741] 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'.[742]

11.82 Section 130(1) substantially reflects the ALRC's recommendations. It provides:

---

738 *Evidence Act 1995* (Cth) s 127.
739 M Aronson and J Hunter, *Litigation: Evidence and Procedure* (6th ed, 1998), 597.
740 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [864].
741 See *Sankey v Whitlam* (1978) 142 CLR 1.
742 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [866], citing, *Alister v The Queen* (1983) 50 ALR 41, 44–45.

> (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.

11.83 In *State of NSW v Ryan*, the 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*,[743] and the provisions of s 130.[744]

11.84 The ALRC has recently examined the operation of s 130 in the context of 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.[745] The ALRC also found that the public interest immunity procedure worked effectively, although the procedures for invoking its use were thought by some submittors to require clarification.[746]

11.85 ALRC 26 had noted that one issue in relation to public interest immunity was whether some procedural provisions should be included in the uniform Evidence Acts to enable a judge's ruling to be obtained in advance of the trial, and to allow time for an appeal from that ruling.[747] At the time of that Report, the ALRC considered that the 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.[748]

11.86 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).[749]

---

743 *Sankey v Whitlam* (1978) 142 CLR 1.

744 *New South Wales v Ryan* (1998) 101 LGERA 246, cited in J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [130.40].

745 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.192].

746 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [8.192]–[8.205].

747 Ibid, [8.68].

748 Ibid, [8.68].

749 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.208]–[8.211].

Question 11–18 Are concerns raised by the operation of s 130 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

Other issues

Question 11–19 Are there any other concerns in relation to privileges and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

12. Discretions to Exclude Evidence

Contents

Introduction

12.1 The uniform Evidence Acts contain a number of provisions that give courts the discretion to exclude otherwise admissible evidence in both civil and criminal proceedings.

12.2 Section 135 provides a discretion to exclude otherwise admissible evidence where the probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party; misleading or confusing; or cause or result in undue waste of time. Section 137 provides that, in criminal proceedings, the trial judge must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to a defendant. Section 138 allows evidence that has been illegally or improperly obtained to be excluded.

12.3 In addition, s 136 provides a discretion that allows the trial judge to limit the use that can be made of evidence that has multiple relevance. Finally, s 192(2) specifies factors that a court may take into account in determining whether to give leave, permission or directions under other provisions of the uniform Evidence Acts.

12.4 Sections 135, 136 and 138 require the judge to make an evaluative judgment in exercising the discretions, whereas, the use of the word 'must' in s 137 means that the judge has no discretion if there is a danger that the probative value of evidence is outweighed by unfair prejudice.

12.5 This chapter examines each of these provisions and asks questions about how they are operating in practice and how any concerns about their operation should be addressed, whether through amendment of the uniform Evidence Acts or otherwise.

General discretion to exclude evidence

12.6 In relation to both civil and criminal proceedings, s 135 of the uniform Evidence Acts provides that:

> 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.

12.7 Stephen Odgers has observed that the origin of s 135 is the common law concept of 'sufficient relevance'.[750] The onus is on the party seeking exclusion of the evidence to demonstrate that the probative value is outweighed on one of the grounds set out in s 135. This discretion does not operate at common law in civil proceedings.

Relevance and the discretion to exclude

12.8 In its Interim Report *Evidence* (ALRC 26), the ALRC proposed a broad definition of 'relevance'. The rationale for this was that the discretions in Part 3.11[751] of the uniform Evidence Acts would be used to exclude evidence. Under the common law rule, evidence that was irrelevant was not admissible; and evidence that was relevant was admissible (subject to exclusionary rules). ALRC 26 indicated that its proposal—subsequently enacted as ss 55 and 135–137—addressed criticisms of the common law:

---

750 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14540].

751 Uniform Evidence Actsss 135, 137 and 138. The equivalent provisions are contained in *Evidence Act 2001* (Tas) Part 11.

> It 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.[752]

12.9 Section 55 defines relevant evidence as 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceedings'. If evidence is 'relevant', then it is prima facie admissible under s 56 of the uniform Evidence Acts.

12.10 The High Court has observed that a determination of relevance under s 55 does not require consideration of factors such as prejudice or reliability.[753] The majority of the High Court has held that a determination of relevance assumes that the tribunal of fact accepts the evidence.[754] McHugh J has stated that the words 'if it were accepted' in s 55 indicate that relevance is determined on the assumption that the evidence is reliable.[755]

12.11 This definition may be contrasted with the definition of 'probative value', which involves assessing reliability. 'Probative value' is defined in the uniform Evidence Acts as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.[756] McHugh J concluded that:

> Notions of reliability and procedural fairness play no part in testing the relevance of evidence for the purpose of s 55 of the Act.[757]

The grounds for exclusion

12.12 Section 135 provides three grounds for the exclusion of evidence. The first is where the probative value of evidence is outweighed by the 'unfair prejudice' to a party.[758] This ground is based on the common law

---

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

753 *Smith v The Queen* (2001) 206 CLR 650, [6], [81].

754 *Adam v The Queen* (2001) 207 CLR 96, [22].

755 *Papakosmas v The Queen* (1999) 196 CLR 297, [81].

756 *Evidence Act 1995* (Cth), *Evidence Act 1995* (Cth) Dictionary; *Evidence Act 2001* (Tas) s 3.

757 *Papakosmas v The Queen* (1999) 196 CLR 297, 323. This approach has been applied in *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1120, [20].

758 Uniform Evidence Acts s 135(a).

discretion to exclude prosecution evidence in criminal trials, and is discussed in more detail below. The other grounds are where there is a danger the evidence might be misleading or confusing;[759] or cause or result in undue waste of time.[760]

12.13 The discretion in s 135 operates only where there is a 'substantial' discrepancy between the probative weight and the 'danger of unfair prejudice' and it arises where that danger 'might' exist.

12.14 The discretion to exclude evidence that is 'misleading or confusing' has been used to exclude evidence where there is a danger that the jury would focus unduly on evidence and give it more significance than it deserved.[761] The discretion to exclude evidence if the probative value is substantially outweighed by the danger that the evidence may 'cause or result in undue waste of time' may be used to exclude needless duplication of evidence. A factor that may be significant to the exercise of the discretion is whether admission of other evidence is required in order to evaluate the evidence subject to the discretionary exclusion.[762]

12.15 In formulating s 135, the ALRC had regard to Rule 403 of the United States Federal Rules of Evidence.[763] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

12.16 There are a number of differences between Rule 403 and s 135. The most significant of these is that, under Rule 403, assessment of the danger that the evidence is misleading is limited to its effect on a jury. It is noted that juries are generally used in the United States, whereas they are seldom used in Australian civil cases.

---

759 Ibid s 135(b).

760 Ibid s 135(c).

761 *Reading v ABC* [2003] NSWSC 716, [32]–[33].

762 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14600].

763 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985), [642].

Unfair prejudice

12.17 One of the grounds to exclude evidence under s 135 is if the probative value is substantially outweighed by 'unfair prejudice'. ALRC 26 stated that what is meant by 'unfair prejudice' is a

> 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 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 decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.[764]

12.18 There are two views on whether unfair prejudice can arise from procedural considerations. One view is that the application of s 135 is not limited to misuse of the evidence by the tribunal of fact, but may arise from procedural considerations—for example, a party may be significantly prejudiced by hearsay evidence if unable to cross-examine on a crucial issue.[765] The other view is that s 135(a) is limited to excluding evidence that is unfairly prejudicial 'if there is a real risk that evidence will be misused by the jury in some unfair way'.[766]

12.19 In *Papakosmas v The Queen* McHugh J indicated his support for the more restrictive view of the meaning of 'unfair prejudice', observing that:

> [s]ome 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 … It is unnecessary to express a concluded opinion on the correctness of these decisions, although 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.[767]

12.20 Justice McHugh suggested that appellate court guidelines on the exercise of discretions to exclude evidence may be desirable:

---

764 Ibid, [644].

765 *Ordukaya v Hicks* [2000] NSWCA 180 (Mason P, dissenting).

766 *R v BD* (1997) 94 A Crim R 131, 139.

767 *Papakosmas v The Queen* (1999) 196 CLR 297, [93].

> 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.[768]

12.21 The ALRC is interested in comment on whether the basis for excluding evidence under s 135 should be clarified. For example, does 'unfair prejudice' need to be defined and should it include procedural unfairness? Would a guided discretion improve the operation of the provision, or would such an amendment increase its complexity?

Question 12–1 How has s 135 of the uniform Evidence Acts operated in practice? Does the operation of s 135 raise any concerns and, if so, how should any concerns be addressed?

Question 12–2 Should s 135 be made mandatory, so that the court 'must refuse to admit evidence' if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time?

Question 12–3 Does s 135 require amendment to define the circumstances in which evidence is 'unfairly prejudicial', 'misleading or confusing' or will 'cause or result in undue waste of time'?

Exclusion of prejudicial evidence in criminal proceedings

12.22 Section 137 provides that, in criminal proceedings, the trial judge must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to a defendant. There is a clear distinction between the terms of s 135 and s 137. Section 137 is more in the nature of an exclusionary rule.

12.23 The ALRC explained the operation of this discretion as follows:

> There is some uncertainty over the meaning of 'prejudice'. But, clearly, it does not mean simply damage to the accused's case. It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving

768 Ibid, [97].

> evidence more weight than it should have. It is proposed to retain this judicial discretion in its conventional form.[769]

12.24 In determining what constitutes 'prejudice', McHugh J has observed that:

> Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted.[770]

12.25 The ALRC is interested in comments on whether a guided discretion is required to better determine whether evidence is unfairly prejudicial.

Exclusion and unfairness

12.26 Since the ALRC completed its earlier inquiry on evidence,[771] the issue of the general obligation on and power of the court to ensure a fair trial has received considerable attention.[772] The obligation to ensure a fair trial goes beyond, but obviously affects, the admissibility of evidence. There are two possible approaches to a general unfairness discretion.

12.27 One is that s 11 of the uniform Evidence Acts be used as a basis for a general discretion to ensure a fair trial and that, rather than create a further discretion, simply make reference to the obligation to ensure a fair trial, by amending s 11(2). The ALRC is interested in comment as to whether s 11 should be amended to include a general obligation to ensure a fair trial.

12.28 Secondly, it has been suggested that the uniform Evidence Acts should be amended to include a general unfairness discretion to deal, for example, with aspects of identification evidence[773] and evidence adduced by a co-accused.

12.29 Under s 137 the court must refuse to admit evidence adduced by a prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. However, this does not apply where a co-

---

769 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985), [957].

770 *Papakosmas v The Queen* (1999) 196 CLR 297, [91].

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

772 See *Dietrich v The Queen* (1992) 177 CLR 292.

773 Identification evidence is discussed in Ch 10. Under s 116 of the uniform Evidence Acts, a judge is required to inform the jury that there is a special need for caution before accepting identification evidence.

defendant is adducing the evidence. It has been suggested that, because this type of evidence is likely to cause difficulties in balancing one accused's right to present evidence in his or her own defence with another accused's right to a fair trial, a more general discretion to exclude on the basis of unfairness is required under the uniform Evidence Acts.

Question 12–4 Are concerns raised by the operation of s 137 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the Acts and, if so, how?

Question 12–5 Should s 11(2) of the uniform Evidence Acts be amended to include a general obligation to ensure a fair trial?

Question 12–6 Should a general discretion to exclude evidence to ensure a fair trial, such as appears in s 90, apply to all evidence adduced by the prosecution?

Exclusion of improperly or illegally obtained evidence

12.30 Section 138 operates in civil and criminal proceedings to exclude evidence that has been illegally or improperly obtained. The discretion is based on the discretion provided at common law by *Bunning v Cross*.[774] However, the uniform Evidence Acts alter the common law position in a number of ways, namely:

- the onus of proof is changed so that under s 138(1) the party adducing the evidence must establish that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence;
- it applies to derivative evidence (s 138(1)(b));
- it includes confessional evidence (s 138(2));
- it lists certain matters which must be taken into account in the exercise of the discretion (s 138(3)); and
- it applies both to civil and criminal proceedings (s 138(1)).[775]

774 *Bunning v Cross* (1978) 141 CLR 54.

775 *Nicholas v The Queen* (1998) 193 CLR 173, [197].

12.31 The discretion involves the court balancing the desirability of admitting the evidence with the undesirability of admitting the evidence. Section 138(1) provides:

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

12.32 Section 138 does not define 'improperly' obtained evidence. Section 138(2) specifically provides that an admission is taken to have been improperly obtained if it is obtained through questioning and the person who conducted the questioning either:

> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
>
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

12.33 Further, s 139(1) provides that the absence of a caution to an arrested person renders the evidence obtained through any questioning to have been 'improperly obtained'.

12.34 Section 138(3) lists 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; 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.

12.35 There has been recent dissent in the New South Wales Court of Criminal Appeal in respect of the interpretation of s 138(3)(c) in the balancing exercise undertaken under s 138(1). In *R v Dalley*,[776] Spigelman CJ, with whom Blanch AJ agreed, held that the 'public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the cases of crimes of greater gravity'.[777] The majority held that the more serious the offence, the more likely it is that the public interest requires the admission of the evidence. Simpson J took an opposite view, stating that the 'more serious the charge faced, the more rigorous should be the insistence on adherence to statutory provisions enacted to protect the rights of individuals'.[778]

Question 12–7 How has s 138 of the uniform Evidence Acts operated in practice? Does the operation of s 138 raise any concerns and, if so, how should such concerns be addressed?

Question 12–8 Are the factors that a court may take into account in s 138(3) sufficient? Should there be any amendment to the factors and, if so, how?

Question 12–9 Do any of the factors in s 138(3) require clarification, for example s 138(3)(c) in relation to the influence of the nature of the relevant offence?

General discretion to limit the use of evidence

12.36 Section 136 provides a trial judge with a discretion to limit the use that can be made of evidence that has multiple relevance—for example,

776 *R v Dalley* [2002] NSWCCA 284.

777 Ibid, [7].

778 Ibid, [95].

evidence that is relevant for a hearsay and credit purpose may be limited to a particular use if there is a danger that the evidence might be unfairly prejudicial or misleading or confusing. The operation of the discretion may arise in the context of ss 60 or 77.

12.37 The discretion to limit the use of evidence is not guided. Odgers suggests that the primary question to be asked is whether the probative value and importance of the evidence, when used for that purpose, outweighs the particular danger or dangers. The court should consider the extent to which the dangers associated with a particular use of the evidence may be reduced by some other action, such as by directions to the jury. The nature of the application of the proceedings will have an effect on the application of the discretion.[779] Odgers has observed that this discretion is more likely to be utilised in jury trials. Further, he asks whether s 136 might be utilised to prevent evidence from being taken into the jury room.[780]

12.38 In *Papakosmas* v *The Queen*,[781] the High Court rejected the argument that s 136 could be used to limit the use of evidence to its common law use. The appellant submitted that as a general rule, even if complaint evidence is admissible under s 66, trial judges should exercise their s 136 discretion to direct juries with the standard common law direction in relation to the use of complaint evidence; that is, it could only be used to support the credit of the complainant to prove consistency of conduct. Gleeson CJ and Hayne J rejected this argument and held:

> The submissions must be rejected. They amount 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.[782]

12.39 However, their Honours added:

> There may well arise circumstances in which a court, in the exercise of a discretion enlivened by the requirements of justice in the facts and circumstances of the particular case, will see fit to limit the use of complaint evidence, and, in some instances, it may be appropriate to effect that limitation in a manner which corresponds to the previous common law. To assert a general principle of the kind for

779 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14640].

780 Ibid, [1.3.14640].

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

782 Ibid, [39]

> which the appellant contends, however, would be to subvert the policy of the legislation.[783]

12.40 However, McHugh J found that it is 'artificial and wrong' to admit evidence under s 66 and then limit its purpose to a credit purpose. McHugh J held that a warning under s 165 should cure any perceived dangers due to its hearsay nature and that if a warning does not cure any danger then s 136 should be used.[784] McHugh J commented that in such circumstances directions under s 136 should be made 'as a matter of course'.[785]

12.41 One question which appears to have been left undecided is in what circumstances may evidence which has been admitted pursuant to s 108 be used, pursuant to s 60, to prove the facts asserted in the prior consistent statement.[786] The ALRC is interested in comments regarding the operation of s 136, and about the extent to which it is being utilised in jury and non-jury trials.

Question 12–10 Has s 136 of the uniform Evidence Acts operated to limit the use of evidence that has multiple relevance? Does the operation of s 136 raise any concerns and, if so, how should any concerns be addressed?

Question 12–11 Is s 136 being used to limit the operation of s 60? If so, in what circumstances are trial judges limiting the use of hearsay evidence admitted for a non-hearsay purpose? What concerns, if any, have been raised? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Discretion to give leave

12.42 A further discretion operates by virtue of s 192. Section 192(2) lists the factors that a court may take into account in determining whether it will

---

783 Ibid, [40]

784 Ibid, [94]. McHugh J adopted comments made by Hunt CJ at CL and Bruce J in *R v BD* (1997) 94 A Crim R 131, 140, 151.

785 *Papakosmas v The Queen* (1999) 196 CLR 297, [94].

786 However, applying the High Court's reasoning in *Adam v The Queen* (2001) 207 CLR 96 (see Ch 5) would mean that ss 102 and 108 have no application as complaint evidence is relevant for a hearsay and non-hearsay purpose.

grant leave under the uniform Evidence Acts, for example, in granting leave to a witness to revive their memory under s 32; permitting cross-examination of an unfavourable witness pursuant to s 38; admitting evidence relevant to an accused's character pursuant to s 112; or admitting evidence pursuant to s 108(3)(b).

12.43 Section 192(2) 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.

12.44 The majority of the High Court has held that when a court is considering granting leave, permission or making a direction under the uniform Evidence Acts, 'in all cases the court must take into account the matters prescribed by s 192(2)', as well as 'matters which may be relevant in a particular case'.[787]

12.45 However, the New South Wales Court of Criminal Appeal has held that 'unless the contrary may be inferred from the circumstances or from what a judge does say, it should be assumed that a judge hearing a case will continually have regard during the course of a hearing to the matters referred to in s 192(2)'.[788]

12.46 In *TKWJ v The Queen*,[789] Gaudron J, with whom Gummow and Hayne JJ agreed, held that it may be appropriate in certain cases for a court to give an 'advance ruling' as to a grant of leave under s 192. Gaudron J stated:

---

787 *Stanoevski v The Queen* (2001) 202 CLR 115, [41].

788 *R v Reardon, Michaels and Taylor* [2002] NSWCCA 203, [30]. See also cases referred to in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.5.780].

789 *TKWJ v The Queen* (2002) 212 CLR 124.

> The provisions of the *Evidence Act* requiring the giving of leave, permission or direction require a ruling to be made and, unless the particular provision in question directs otherwise, there is no reason why they should be read as precluding an 'advance ruling' if that course is appropriate. It may, for example, be appropriate to give an 'advance ruling' if all matters relevant to the issue have been or can then be ascertained and if it is clear that a ruling will inevitably be required.
>
> 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 by a provision of the *Evidence Act* requiring leave or permission, 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.[790]

12.47 The ALRC is interested on comment regarding the operation of s 192 and whether it should be amended to specifically provide for 'advance rulings'.

Question 12–12 How has s 192 of the uniform Evidence Acts operated in practice? Does the operation of s 192 raise any concerns and, if so, how should such concerns be addressed?

790 Ibid, [42]–[43].

13. Judicial Notice

Contents

Introduction

13.1 In general, all facts in issue or relevant to the issue in a particular proceeding must be proved by evidence. The two principal exceptions to this rule are facts that are formally admitted or agreed to by the parties, and facts of which judicial notice may be taken.

13.2 The doctrine of judicial notice is a common law doctrine that relieves a party from leading evidence to prove certain well-known or indisputable facts. Part 4.2 of the uniform Evidence Acts[791] restates the common law doctrine of judicial notice and sets out four principal categories of fact that do not require proof.[792] Those categories are:

- matters of Australian law;
- facts forming part of the common knowledge;
- facts which can be verified by reference to an authoritative document; and
- matters of State.

Australian law

13.3 Section 143 of the uniform Evidence Acts provides that the terms and the process by which legislation comes into operation in an Australian

---

791 *Evidence Act 2001* (Tas) Part 2, Ch 4.

792 The term 'judicial notice' is used only as a heading for Part 4.2 of the *Evidence Act 1995* (Cth). The ALRC considered that the terminology was confusing because it was used to describe a number of different principles and failed to acknowledge a jury's use of general knowledge: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [476]–[477].

jurisdiction do not require proof. The section applies to statutes, subordinate legislation, proclamations and instruments of a legislative character published, or about which notice is given, in a government or official gazette. Section 143(2) permits a judge to 'inform himself or herself about those matters in any way that the judge thinks fit'.[793]

13.4 Section 5 of the *Evidence Act 1995* (Cth) purports to extend the operation of s 143 to all proceedings in an Australian court. 'Australian court' is defined to include courts in jurisdictions that have not adopted the uniform evidence legislation, and also persons or bodies that take evidence or that are required to apply the laws of evidence.[794] Dr Jeremy Gans and Andrew Palmer have commented that the effect of s 5 appears to be that s 143 has 'entirely replaced the common law in relation to judicial notice of Australian law'.[795]

13.5 However, the constitutional validity of s 5 may be an issue.[796] Stephen Odgers has suggested that s 5 may need to be read down for constitutional reasons and will not apply to 'proceedings in a State court exercising State jurisdiction with respect to State legislation'.[797]

Matters of common knowledge

13.6 Proof of certain matters that are common knowledge are not required under s 144 of the uniform Evidence Acts. Section 144(1) provides that no proof is required for 'knowledge that is not reasonably open to question' and is either:

> (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.[798]

13.7 Examples of facts that are general common knowledge include the nature of the Internet and the World Wide Web,[799] or that 'reliable clocks

---

793 For example, by reference to the Government Gazette: J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [143.05].
794 *Evidence Act 1995* (Cth) Dictionary.
795 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 39.
796 Ibid, 39.
797 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.540].
798 *Evidence Act 1995* (Cth) s 144(1).

and timing devices may show slightly different times'.[800] Odgers has suggested that an example of local common knowledge would be, in a proceeding in a court in Sydney, the location of the Harbour Bridge.[801]

13.8 Examples of documents the authority of which is not reasonably open to question include meteorological almanacs or tide charts that could be used to determine the time at which the sun rose or high tide was reached on a particular day. Street directories, encyclopaedias and authoritative texts may also be authoritative documents for the purposes of s 144(1)(b).[802]

13.9 The primary difference between facts that are general or local common knowledge under s 144(1)(a), and those facts within the scope of s 144(1)(b), is that the latter category may require reference to an authoritative document to discover or confirm a fact of which judicial notice is taken, whereas no such inquiry is needed for facts that form part of common knowledge.[803]

13.10 Section 144 permits a judge to acquire knowledge of the kind of facts falling within s 144(1) 'in any way the judge thinks fit'. Further, the court (including a jury if there is one) is required to take such knowledge into account.[804] However, the uniform Evidence Acts do not prevent parties from leading formal evidence of matters of common knowledge.

13.11 The uniform Evidence Acts also impose certain procedural requirements where a judge intends to take judicial notice of matters of common knowledge or knowledge contained in authoritative documentary sources. Section 144(4) provides that a judge must give a party an opportunity to make submissions and refer to relevant information about the acquiring or taking into account of matters of common knowledge as may be necessary to 'ensure that the party is not unfairly prejudiced'.

13.12 The scope and application of s 144(4) may be unclear. In *Prentice v Cummins (No 5)* (*Prentice*), Sackville J concluded that s 144(4) authorises a

---

799 *Jones v Toben* (2002) 71 ALD 629, 644. Judicial notice was not raised on appeal: see *Toben v Jones* (2003) 129 FCR 515.

800 *R v Magoulias* [2003] NSWCCA 143, [41].

801 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.600].

802 Ibid, [1.4.600].

803 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 40.

804 Section 144 was not, however, intended to authorise juries to undertake their own inquiries: see Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [977].

court to decline to take into account matters of common knowledge or knowledge contained in authoritative documentary sources if it is impossible to do so without unfairly prejudicing one of the parties.[805] However, it is unclear whether s 144(4) permits a judge to conclude that a party would be unfairly prejudiced in the absence of the party being given the opportunity to make submissions on this issue.[806]

13.13 Further, Justice Dyson Heydon has questioned whether the procedural protections in s 144(4) will apply to matters of 'general experience' upon which a judge (or jury) relies to interpret evidence presented in a proceeding.[807] Matters within 'general experience'—for example, the behaviour of people in motor vehicles—may be different from those that will be regarded as 'common knowledge' and therefore within the scope of s 144 of the uniform Evidence Acts. Justice Heydon has suggested that an alternative interpretation would result in 'great cumbersomeness' as notice would need to be 'given about what matters the judge (or jury) was considering in a manner which was not necessary at common law'.[808]

Relationship to the common law doctrine of judicial notice

13.14 Section 144 of the uniform Evidence Acts restates the common law doctrine of judicial notice.[809] In *Gattellaro v Westpac Banking Corporation* (*Gattellaro*),[810] the High Court commented on the scope of the provision:

> 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.[811]

13.15 However, prior to the High Court's decision in *Gattellaro*, some judicial consideration of s 144 seemed to suggest that the common law doctrine of judicial notice and s 144 operated in parallel. For example,

---

805 *Prentice v Cummins (No 5)* (2002) 124 FCR 67, 87.

806 The ALRC considered that the provision on which s 144(4) of the *Evidence Act* is based 'required the judge to inform the parties if there was a risk that making his or her own inquiries to acquire knowledge might cause unfair prejudice': Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [227].

807 D Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript, 6–7.

808 Ibid, 44.

809 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.40]. See *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 for a recent discussion by McHugh and Callinan JJ of the common law doctrine of judicial notice.

810 *Gattellaro v Wetspac Banking Corporation* (2004) 204 ALR 258.

811 Ibid, 262.

Sackville J in *Prentice* considered whether certain litigation and particular circumstances surrounding the calling of the general federal election in 1987 could be 'judicially noticed' under *either* common law principles *or* s 144.[812]

Matters of State

13.16 The common law rules relating to judicial notice of matters of State are preserved by s 145 of the uniform Evidence Acts. It provides:

> 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 by or on behalf of the Crown with respect to a matter of international affairs.

13.17 Facts falling within s 145 include whether a particular country is a sovereign State or whether a particular body that purports to be the government of a State should be recognised as such.[813]

13.18 The ALRC did not review the common law principles relating to judicial notice of matters of State in its earlier review of the rules of evidence.[814] The ALRC indicated that, in its view, it was inappropriate to consider reform of this area because it raised issues of 'the extent of the powers of the courts, and in particular the High Court, to review legislation and executive actions, and the relationship between the High Court and the executive'.[815] The ALRC indicated that such matters would be more appropriately addressed in the context of a reference on international or constitutional law, rather than an inquiry into the rules of evidence.

Question 13–1 Are there any concerns about the operation of the judicial notice provisions in Part 4.2 of the uniform Evidence Acts and, if so, how should such concerns be addressed?

812 *Prentice v Cummins (No 5)* (2002) 124 FCR 67, 85–88.
813 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 41.
814 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).
815 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [977].

Question 13–2 Are there any concerns about the operation of the procedural requirements in s 144(4) of the uniform Evidence Acts, which provide for a judge to give a party the opportunity to make submissions relating to the acquiring or taking into account of common knowledge? If so, how might those concerns be addressed?

14. Directions to the Jury

Contents

Introduction

14.1 Generally, the role of the judge in a trial is to decide questions of law and the role of the jury is to decide questions of fact. The judge is required to direct the jury about the legal rules that they must apply to the facts in determining what verdict to bring in. The judge can also direct the jury about the manner in which the legal rules should be applied to the facts, and may express opinions about the evidence. It has been observed that it is difficult to estimate the amount of control that a judge exercises over a jury by means of the summing up.[816]

14.2 It is not possible to foresee all of the ways that a judge may be required to direct the jury during the course of a trial. However, the common law has developed certain warnings to the jury in respect of certain types of evidence and the inferences that can be drawn from the absence of evidence. The uniform Evidence Acts do not have a specific part that deals exclusively with a trial judge's directions to the jury.

14.3 The uniform Evidence Acts do cover the following directions to the jury:

- the comment that may be made when a defendant in a criminal case does not give evidence (s 20);

816 Butterworths, *Cross on Evidence: Australian Edition*, vol 1, [11135].

- the limitation on use of evidence by the trial judge's exercise of discretion pursuant to s 136;
- warnings about 'unreliable' evidence (s 165); and
- directions in respect of identification evidence (s 116).

14.4 The uniform Evidence Acts have abolished the requirement for corroboration warnings. Further, it is notable that the uniform Evidence Acts do not cover the common law doctrine in relation to the inferences that can be drawn from absent evidence, nor do they cover the directions for circumstantial evidence in a criminal trial.

Comment on the failure of the accused to give evidence

14.5 A defendant's right to silence in a criminal trial is a well-established principle of the common law. There are, however, differing rules across jurisdictions as to whether any comment can be made during the trial about the fact that the defendant did not give evidence.

14.6 Section 20 of the uniform Evidence Acts applies in a criminal proceeding for an indictable offence. Under this section:

> (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
>
> (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:
>
> (a) the defendant's spouse or de facto spouse; or
>
> (b) a parent or child of the defendant.[817]

14.7 A distinction is drawn between a comment and a direction. A direction is an explanation to the jury regarding the necessary law that guides their decision making function, and ensures that they do not follow

---

817 However, unless the comment is made by another defendant in the proceeding, a comment made by a judge or party must not suggest that the spouse, de facto spouse, parent or child failed to give evidence because the defendant was guilty of the offence or because the spouse, de facto spouse, parent or child believed that the defendant was guilty: Uniform Evidence Acts s 20(4).

impermissible paths of reasoning. A judicial comment is made to guide the jury as to how they might determine guilt, and can be ignored.[818]

14.8 It is common for a judge to give a direction to the jury that it is the prosecution's burden to prove the case beyond reasonable doubt and that no inferences should be drawn from the defendant's failure to give evidence. The ability of a judge to make an adverse comment regarding the defendant's failure to give evidence has been considered by the High Court in a number of cases.

14.9 In *Weissensteiner v The Queen*, the High Court upheld the trial judge's comment that an inference of guilt could be drawn by a jury where a defendant elected not to give evidence about facts that must be within the accused's knowledge.[819] However, later decisions of the High Court have distinguished *Weissensteiner* on its facts. In *Weissensteiner*, the prosecution case was entirely circumstantial and only the accused would have been able to explain how certain events had taken place. The High Court stated that:

> It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it in account and they may take it into account only for the purpose of evaluating that evidence.[820]

14.10 In *RPS v The Queen*, the High Court said that the prohibition contained in s 20(2) must be given full operation. Where the prosecution case depended on direct evidence, the question was whether that evidence proved the case beyond reasonable doubt and no increased likelihood of guilt should arise from the defendant's silence.[821]

14.11 In *Azzopardi v The Queen*, the fact situation in *Weissensteiner* was considered to be a rare and exceptional case:

> It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused … it cannot fill any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt.[822]

---

818 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [20.15], [20.30], fn 70.
819 *Weissensteiner v The Queen* (1993) 178 CLR 217.
820 Ibid, 229.
821 *RPS v The Queen* (2000) 199 CLR 620, [27]–[34].
822 *Azzopardi v The Queen* (2001) 205 CLR 50, [34].

14.12 Dr Jeremy Gans and Andrew Palmer note that the effect of these decisions is that the *Weissensteiner* principle does not apply where offences are committed against or in the presence of a surviving and capable person.[823]

14.13 The case law in relation to the circumstances when a *Weissensteiner* comment is permissible and its relationship to s 20 is complex.[824] The ALRC is interested in comment on whether the application of s 20 should be clarified. For example, should the content of permissible judicial comment be defined and, if so, in what terms?

Prosecutor's comment

14.14 The New South Wales Law Reform Commission (NSWLRC) examined the operation of s 20 in 2000,[825] and recommended that, in general, the present law concerning the right to silence at trial should not change.[826] However, the NSWLRC considered allowing a prosecutor, as well as the trial judge, to comment to the jury on the inferences that could be drawn from a defendant's failure to give evidence. The arguments in favour of such a change were that the jury could interpret a judicial comment as an indication the judge has an opinion adverse to the defendant and give the issue undue significance. It was also considered unfair that the prosecution was not permitted to comment on matters that the defence may itself raise with the jury, in anticipation of comments from the judge.[827]

14.15 On the basis of these arguments, the NSWLRC recommended that the prosecutor should be permitted to make appropriate comments to the jury. This could be done by the prosecution making an application, in the absence of the jury, for leave to comment. Leave could then be granted subject to conditions on the content of the proposed comment, which would not be permitted to go beyond that allowed for under s 20.[828]

---

823 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 461.
824 See *Azzopardi v The Queen* (2001) 205 CLR 50, *RPS v The Queen* (2000) 199 CLR 620.
825 New South Wales Law Reform Commission, *The Right to Silence*, Report 95 (2000).
826 Ibid, Rec 14.
827 Ibid, 180–181.
828 Ibid, 181, Rec 15.

Question 14–1 Are any concerns raised by the operation of s 20 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how? For example, should 'comment' be defined? Should the content of the judicial comment be defined?

Question 14–2 Are any concerns raised by judicial comment on the failure of a spouse, de facto spouse, parent or child of a defendant to give evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Question 14–3 Should the prohibition on prosecution comment in s 20(2) of the uniform Evidence Acts be removed? Should such removal be subject to a requirement that the prosecution apply for leave before commenting?

Inferences from the absence of evidence

14.16 The uniform Evidence Acts are silent about the common law rule in *Jones v Dunkel*.[829] This rule permits the judge to direct the jury about the inferences that can be drawn from a party's failure to call evidence. The inference that can be drawn is that the reason why the evidence was not adduced is that it would not have assisted the party's case.[830]

14.17 The rule in *Jones v Dunkel* has generally been held not to apply in criminal matters.[831] A judge may give a warning to the jury that they may not speculate as to why a criminal defendant's spouse, parent or child has not given evidence. By analogy with the situation of a defendant who does not testify, the High Court has held that only in 'the most unusual circumstances' should the judge comment on the failure of the defence to call a witness.[832]

14.18 The ALRC is interested in whether there is a need for the uniform Evidence Acts to provide specifically for the rule in *Jones v Dunkel*.

---

829 *Jones v Dunkel* (1959) 101 CLR 289.

830 Section 9 of the uniform Evidence Acts has the effect that the rule in *Jones v Dunkel* has application in uniform Evidence Act jurisdictions.

831 *Dyers v The Queen* (2002) 210 CLR 285, [9]–[10].

832 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.1080], citing *Dyers v The Queen* (2002) 210 CLR 285, [15].

Question 14–4 Should the uniform Evidence Acts be amended to provide for comment on the adverse inferences that may be drawn from the failure to call evidence and, if so, how? Should such comment be limited to civil proceedings?

Warnings about unreliable evidence

14.19 Section 164 of the uniform Evidence Acts abolishes the common law requirement for warnings in respect of corroboration of certain categories of evidence—with the sole exception of perjury. At common law, the absence of corroboration of certain categories of evidence necessitated a mandatory warning. Under the common law, some of these categories or classes of evidence in respect of which a warning may be required include:

- evidence of complainants in sexual assault cases;[833]
- accomplices;[834]
- children giving sworn evidence;[835] and
- prison informers' evidence.[836]

14.20 The uniform Evidence Acts replace the common law requirements in respect of corroboration with the warning requirements in s 165. However, s 164 does not prohibit the trial judge from warning that it would be dangerous to convict on uncorroborated evidence.[837]

14.21 ALRC 26 described the common law in this area as 'too rigid and technical' and argued that it did not 'adequately serve the rationale of minimising the risk of wrongful convictions'.[838] In particular, the ALRC expressed concern that warnings were distracting attention from the issue of reliability and that the directions to be given were so complex that they were likely to be ignored. It argued that the existing system was focused on technicalities and that what was required was 'a simpler regime, under

833 *Kelleher v The Queen* (1974) 131 CLR 534.
834 *Davies v Director of Public Prosecutions* [1954] AC 378.
835 *Hargan v The King* (1919) 27 CLR 13.
836 *Pollitt v The Queen* (1992) 174 CLR 558.
837 *Conway v The Queen* (2002) 209 CLR 203, [53].
838 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985), [1015].

which the trial judge must consider whether a direction appropriate to the circumstances should be given'.[839]

14.22 In *R v Stewart,* Chief Justice Spigelman observed that ss 164 and 165 'constitute reform of the law of a fundamental kind'[840] and that a 'significant change in the law was intended'.[841] The Chief Justice agreed with the characterisation of these provisions in *Cross on Evidence* which states:

> Sections 164 and 165, though they have statutory and common law precursors, constitute an attempt at a fresh start.[842]

14.23 The Chief Justice's remarks emphasise that great caution must be exercised in taking into account the comparable common law (ie, the requirements for corroboration and corroboration warnings) in the interpretation of s 165.[843]

14.24 Section 165 defines certain categories of evidence as 'unreliable'. 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;
>
> (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;

---

839 Ibid, [1015].

840 *R v Stewart* (2001) 52 NSWLR 301, [6].

841 Ibid, [8].

842 Butterworths, *Cross on Evidence: Australian Edition*, vol 1, [15260].

843 *R v Stewart* (2001) 52 NSWLR 301, [2]–[15], applying *Papakosmas v The Queen* (1999) 196 CLR 297; see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.2860].

> (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.

14.25 The draft legislation in ALRC 38[844] limited the categories of evidence covered by the provision that became s 165(1) of the uniform Evidence Acts. By contrast, the list of categories in s 165(1) is not exhaustive. The required contents of the warning are set out in s 165(2). Section 165(2) provides:

> (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.
>
> (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

14.26 Stephen Odgers has identified three main situations where s 165 may be used. These are:

- An item of evidence falls within the categories listed in s 165(1), and if a party requests, the judge is to warn the jury as required in s 165(2), unless the judge decides 'there are good reasons for not doing so'.
- An item of evidence does not fall within one of the listed categories but the trial judge finds it is 'evidence of a kind that may be unreliable', and if a party requests, the judge is to warn the jury as required in s 165(2), unless the judge decides 'there are good reasons for not doing so'.
- The judge's general powers and obligations to give appropriate warnings and directions apply (see s 165(5)).[845]

14.27 The uniform Evidence Acts do not define what constitute 'good reasons' for not giving a warning.

---

844 The draft legislation in ALRC 38 also provided a residual discretion, as appears in s 165(5): Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 197.

845 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.2860].

14.28 Section 165 is silent on the timing of the warning. Howie J has observed that it is 'highly preferable' that a trial judge gives warnings immediately before or after the giving of the evidence that is the subject of the warning.[846] The ALRC is interested in whether there is need for any redrafting of s 165.

Question 14–5 How has s 165 of the uniform Evidence Acts operated in practice? What, if any, concerns are raised by the operation of s 165? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Question 14–6 Should further categories of evidence be included in s 165(1)?

Question 14–7 Should the required content of warnings to the jury under s 165(2) be amended and, if so, how?

Warnings in respect of children's evidence

14.29 At common law, children were traditionally seen as unreliable witnesses, and there were requirements in all Australian jurisdictions that judges warn juries that it was dangerous to convict on the uncorroborated evidence of a child. As a result of research and a better understanding of children's cognitive and recall skills, all Australian jurisdictions have removed the common law requirement that corroboration warnings be given.[847] However, there are differences in the scope of the provisions that allow judges to give warnings about the reliability of children's evidence.

14.30 The *Evidence Act 1995* (Cth) contains no specific provision regarding warnings on the evidence of child witnesses. As noted above, s 165 allows, at the request of a party, the judge (in his or her discretion) to give a warning to the jury that certain evidence may be unreliable. Section 165(1)(c) specifically includes 'age' as one of the reasons why the reliability of evidence might be affected.

14.31 In the Report of the inquiry into children and the legal process, the ALRC and the Human Rights and Equal Opportunity Commission

846 *R v DGB* (2002) 133 A Crim R 227, [23].

847 Section 164 of the uniform Evidence Acts abolishes corroboration requirements for all types of evidence.

(HREOC) found that, despite changes to the law removing corroboration requirements, it remained standard practice in many jurisdictions for judges to give warnings to juries concerning the evidence of children.[848] The concerns raised in submissions to that inquiry were that these judicial warnings were often based on individual judges' assumptions and prejudices rather than modern research findings, effectively discriminating against child witnesses.[849] The ALRC and HREOC made a recommendation 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 on request of a party where that party can show that there are exceptional circumstances warranting the warning.[850]

14.32 In 2001, the *Evidence Act 1995* (NSW) was amended to insert a number of specific provisions relating to warnings to be given by judges in jury trials involving the evidence of child witnesses.[851] Sections 165(6) and 165A prohibit the giving of general warnings:

- about the reliability of a child's evidence due to age;
- that children as a class are unreliable witnesses; or
- that there is a danger of convicting on the uncorroborated evidence of any child witness.

14.33 Section 165B provides that a judge may give warnings in relation to a particular child's evidence where this has been requested by a party, and the party has satisfied the court that there are circumstances particular to the child affecting the reliability of the child's evidence.

14.34 The New South Wales provisions were inserted in the New South Wales Act upon the recommendation of the Wood Royal Commission into the New South Wales Police Service,[852] based in turn upon the recommendations of the ALRC and HREOC in their inquiry into children

---

848 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].

849 Ibid, [14.71].

850 Ibid, Rec 100.

851 See, *Evidence Legislation Amendment Act 2001* (NSW).

852 Royal Commission into the New South Wales Police Service, *Final Report* (1997), Rec 90.

and the legal process.[853] The New South Wales Evidence Act Monitoring Committee[854] recommended the implementation of the Wood Royal Commission's recommendation on child witnesses.[855]

14.35 Section 164(4) of the *Evidence Act 2001* (Tas) contains a similar provision to s 165A(2) of the New South Wales Act prohibiting warnings on the danger of convicting on the uncorroborated evidence of any child witness, but does not contain any of the other restrictions on warnings relating to the reliability of the evidence of child witnesses.

14.36 The *Crimes Act 1914* (Cth) contains, in relation to sexual offences (including child sex tourism and sexual servitude offences), a prohibition on warnings to the jury regarding children as an unreliable class of witnesses.[856] While child sexual assault cases—where the evidence of the child is often the crucial piece of evidence in a trial—are the type of cases where the mischief of unwarranted judicial warnings is most likely to arise, there is a question as to whether the approach to warnings to juries on the evidence of children should be applied uniformly across all jury trials under Commonwealth law.

Question 14–8 How have ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW) operated in practice? Should the *Evidence Act 1995* (Cth) be amended to include more specific provisions on warnings to juries regarding the evidence of children, similar to those that appear in the *Evidence Act 1995* (NSW)?

Other common law warnings

14.37 The common law requires a warning to be given to the jury (known as the *Longman* direction) 'whenever a warning is necessary to avoid a

---

853 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 the ALRC and HREOC final Report was in similar terms to the draft recommendation.

854 This was a committee established within the NSW courts to monitor operation of the uniform Evidence Acts.

855 Parliament of Australia, *Parliamentary Debates*, Senate, 4 April 2001 (I Campbell—Parliamentary Secretary to the Minister for Communications Information Technology and the Arts).

856 *Crimes Act 1914* (Cth) s 15YQ. The types of offences to which this section applies are set out at s 15Y. Part IAD was inserted by the *Measures to Combat Serious Organised Crime Act 2001* (Cth).

perceptible risk of miscarriage of justice arising from the circumstances of the case'.[857] Such a direction is required even when statute has abolished the requirement of corroboration.[858]

14.38 Some examples of where a *Longman* warning has been held to apply are where there has been a long delay in the reporting of an offence,[859] and in respect of the evidence of prison informers who give evidence of a disputed confession.[860]

14.39 The uniform Evidence Acts are silent in respect of the directions that are given in respect of circumstantial evidence.[861] The ALRC is interested in comments about whether the uniform Evidence Acts should be amended to include the *Longman* direction and any other common law directions.[862]

Question 14–9 Should the uniform Evidence Acts be amended to provide for other common law warnings such as the *Longman* direction and, if so, how?

Question 14–10 Has s 164 been effective in abolishing warnings in relation to corroboration?

Question 14–11 What other concerns are raised by judges' directions to the jury? What other, if any, directions should be included in the uniform Evidence Acts?

857 *Longman v The Queen* (1989) 168 CLR 79, [16].
858 *Robinson v The Queen* (1997) 197 CLR 162.
859 *Jones v The Queen* (1997) 191 CLR 439; *Fleming v The Queen* (1998) 197 CLR 250.
860 *Pollitt v The Queen* (1992) 174 CLR 558.
861 *Shepherd v The Queen* (1990) 170 CLR 573.
862 For a list of the situations in which a comment or warning may be required at common law see generally S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.3060].

15. Matters Outside the Uniform Evidence Acts

Contents

Introduction

15.1 The Terms of Reference direct the ALRC to examine the relationship between the *Evidence Act 1995* (Cth) and other legislation regulating the law of evidence. In particular, the ALRC is to have regard to the laws, practices and procedures applying in proceedings in the 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.

15.2 In the uniform Evidence Act jurisdictions, the Acts work in conjunction with evidentiary provisions contained in a range of other Commonwealth, state and territory legislation. These evidentiary provisions include those dealing with, for example, the privilege against self-incrimination in the context of regulatory proceedings;[863] warnings to be

863 See Ch 11.

given to juries in relation to lack of complaint in sexual offence proceedings;[864] protection of complainants in sexual offence proceedings ('rape shield' provisions); protection of child witnesses; and evidence in family law proceedings.

15.3 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.

15.4 It is beyond the practical scope of the Inquiry to examine in detail all evidentiary provisions and their relationship with the uniform Evidence Acts. Rather, this chapter focuses on areas that have been highlighted in initial consultations as being of particular significance—in particular, the 'rape shield' provisions contained in state and territory criminal procedures legislation; and provisions dealing with child witnesses.

15.5 Other issues concerning the relationship between the uniform Evidence Acts and other legislation relate to the operation of provisions that allow the rules of evidence to be modified in certain proceedings. This chapter discusses aspects of the application of rules of evidence in native title proceedings and in family law proceedings.

Evidence Act and other legislation

15.6 Section 8 of the *Evidence Act 1995* (Cth) deals with the operation of other Acts. Section 8(1) states:

> (1) 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*.

15.7 It has been held that the legislative intention of s 8(1)[865] is that, where a court is not required to observe the rules of evidence, the *Evidence Act 1995* (Cth) will not operate so as to impose that obligation.[866]

15.8 The effect of the reference to the *Judiciary Act 1903* (Cth) is said to be that those provisions which had allowed courts exercising federal

---

864 See Ch 9.

865 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'.

866 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397, 409.

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:

- federal courts and Australian Capital Territory 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.[867]

15.9 The *Evidence Act 1995* (NSW) provides simply: 'This Act does not affect the operation of the provisions of any other Act'.[868] This means, for example, that evidentiary provisions contained in the *Criminal Procedure Act 1986* (NSW) are not affected by the New South Wales Act.

Rape shield laws

15.10 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.[869] The development of rape shield laws and the nature of existing provisions of Commonwealth, state and territory legislation are discussed below.

The development of rape shield provisions

15.11 Historically, the law of evidence in sexual offence cases reflected the assumption that a woman's sexual experience and reputation had a bearing on her credibility as a witness. Evidence of a woman's sexual relations with a person other than the accused relevant to credibility could be admitted in cross-examination. However, evidence from other witnesses could not be called to contradict her denials.[870]

15.12 Evidence of a complainant's reputation and sexual history with the accused were regularly admitted as relevant to both credibility and as to

---

867 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.900].

868 *Evidence Act 1995* (NSW) s 8.

869 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.

870 *R v Riley* (1887) 18 QBD 481, 483.

whether the complainant had consented to sexual intercourse with the accused. The defence could cross-examine the complainant on her reputation and history with the accused and lead evidence from other witnesses to disprove her answers.[871] Complainants in sexual offence cases were consequently subjected to detailed, and often traumatic questioning about their sexual experiences,[872] despite the fact that such evidence was 'invariably based on unreliable hearsay, gossip and prurient speculation'.[873]

15.13 The common law approach to the admission of prior sexual history has been described as being based on a view that a woman's sexual lifestyle can provide a substantial indication about whether she consented to sexual activity with an accused; and on a supposed link between sexual experience and untruthfulness.[874]

15.14 The former view is problematic for many reasons, including because it is based on stereotypes of women's sexuality and suggests that consent to sexual activity is determined by the 'type' of woman the complainant is considered to be, rather than by what she actually said and did.[875] The latter view has been characterised as being based on anachronistic assumptions about women being prone to fantasy and malicious prosecution.[876]

15.15 Heavy criticism of these views and the common law approach to sexual history and reputation evidence emerged in England and Australia in the 1970s and 1980s. In particular, objections to the admission of sexual history evidence highlighted the traumatic impact the admission of such evidence has on complainants in sexual offence cases. During this period all Australian states and territories enacted legislation placing limits on cross-examination of complainants in sexual offence cases and on the admission of evidence of a complainant's prior sexual history.

---

871 See T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998), 76, 77–78.

872 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.36].

873 T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998), 76, 78.

874 Ibid, 79–80.

875 Ibid, 79.

876 Ibid, 80.

Australian rape shield laws

15.16 It is said that rape shield laws 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 woman who is more likely to consent to sexual activity; and
- exclude the use of a complainant's sexual history as an indicator of her truthfulness.[877]

15.17 All Australian rape shield laws take the form of an exclusionary rule and share a similar procedural scope.[878] However, there are a number of differences between Commonwealth, state and territory rape shield laws.[879] 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.[880] All existing rape shield laws regulate the cross-examination of witnesses and the adducing and admission of evidence of witnesses' sexual history by any party, except in Western Australia where the law only applies to defence evidence.[881]

15.18 All states and the Australian Capital Territory have provisions which make evidence relating to the sexual reputation of a complainant inadmissible.[882] 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'.[883]

---

877 Ibid, 82.
878 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.
879 These differences were highlighted by the High Court in *Bull v The Queen* (2000) 201 CLR 443.
880 *Crimes Act 1914* (Cth) ss 15YB–15YC.
881 *Evidence Act 1906* (WA) ss 36A–36BC. See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.
882 *Criminal Procedure Act 1986* (NSW) 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.
883 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.

15.19 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.[884] Similarly, the Commonwealth 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.[885]

15.20 Australian jurisdictions have adopted different approaches in relation to evidence of the 'sexual activities',[886] 'sexual experience'[887] or 'sexual experiences'[888] of the complainant.

15.21 The most important distinction is between New South Wales, where the admissibility of such evidence depends on whether it falls within specific statutory exceptions,[889] and the other jurisdictions, where the evidence is inadmissible unless the leave of the judge 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.[890]

15.22 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.[891]

---

884 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).

885 *Crimes Act 1914* (Cth) s 15YB.

886 *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).

887 *Criminal Procedure Act 1986* (NSW) s 293(3); *Evidence Act 2001* (Tas) s 194M(1)(b).

888 *Evidence Act 1906* (WA) s 36BC.

889 *Criminal Procedure Act 1986* (NSW) s 293(4).

890 *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) 34I(2)–(3); *Evidence Act 2001* (Tas) s 194M(2); *Evidence Act 1958* (Vic) s 37A(3); *Evidence Act 1906* (WA)s 36BC(2).

891 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*

Concerns about the rape shield laws

15.23 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.[892] These reports have canvassed concerns about whether:

- a mandatory or discretionary model is preferable for dealing with the admission of evidence of a complainant's sexual experience;[893]
- the New South Wales legislation[894] is too restrictive, so that it excludes not only irrelevant but also relevant material concerning the complainant's sexual experience;[895]
- the restrictions on cross-examination contained in the Victorian legislation work in practice, particularly in relation to prior non-consensual and consensual sexual activity.[896]

15.24 The MCCOC report considered the relative merits of the mandatory and discretionary approaches in some detail.[897] 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'.[898] MCCOC therefore recommended that the Model Criminal Code should contain a provision that

---

(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').

892 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).

893 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.

894 *Crimes Act 1900* (NSW) s 409B. These provisions were re-enacted without significant change in *Criminal Procedure Act 1986* (NSW) s 293.

895 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [1.8].

896 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 201–204.

897 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.

898 Ibid, 243. MCCOC also stated that it favoured 'the variant that extends the discretionary regime to all incidents of sexual contact between the complainant and the accused'.

prohibits questioning of a complainant in the trial of a sexual offence as to prior sexual experience unless leave of the judge is obtained.[899]

15.25 A review of the effectiveness of the rape shield provisions is outside the terms of reference of the Inquiry and would constitute an unnecessary duplication of effort, given recent reports by other bodies. However, the ALRC is interested in comment on whether rape shield provisions should be included in the uniform Evidence Acts. The relationship between rape shield laws and uniform Evidence Acts is discussed below.

Relationship with the uniform Evidence Acts

15.26 The uniform Evidence Acts do not affect the operation of Commonwealth, state or territory rape shield laws.[900] 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.

15.27 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 to another purpose or falls within one of the exceptions to the credibility rule. The operation of credibility rule, including in relation to evidence of sexual reputation or experience is discussed in Chapter 9.

15.28 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).

---

899 Ibid, 245.
900 Uniform Evidence Acts s 8.

15.29 In some circumstances, evidence of a complainant's sexual reputation or experience may be subject to the tendency rule. As discussed in Chapter 8, 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.

15.30 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 constitute 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

15.31 In some states and territories, rape shield provisions are contained in legislation dealing with criminal procedure[901] or with evidence and procedure in sexual offence cases specifically.[902] Some non-uniform Evidence Act jurisdictions have rape shield provisions in general evidence legislation.[903]

15.32 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 a uniform Evidence Act were adopted in Tasmania, 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*

---

901 *Criminal Procedure Act 1986* (NSW).

902 *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.

903 *Evidence Act 1929* (SA); *Evidence Act 1958* (Vic); *Evidence Act 1906* (WA).

(Tas).[904] However, the provisions were instead re-enacted in Tasmania's uniform evidence legislation.[905]

15.33 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.

15.34 However, as each jurisdiction which is part of the uniform Evidence Acts scheme has enacted different rape shield provisions, uniform rape shield provisions would need to be developed. This would, in particular, necessitate a choice between the discretionary model adopted in Tasmania, and the mandatory New South Wales provisions.

Question 15–1 Are there any concerns about the relationship between the uniform Evidence Acts and the rape shield provisions in state and territory legislation?

Question 15–2 Should the uniform Evidence Acts be amended specifically to include provisions dealing with the admission of evidence of sexual reputation or experience? If so, what form should these provisions take?

Evidence and child witnesses

15.35 The treatment of child witnesses is another area in relation to which concerns about the effects of evidentiary and procedural rules on a particular category of witness have led to the enactment of new evidentiary provisions since the uniform Evidence Acts.

15.36 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 of the Rights of the Child* in 1990); expanded research into the psychological development of children; and greater

904 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996) rec 5, [6.1.3].

905 *Evidence Act 2001* (Tas) s 194M.

experience of child witness testimony primarily derived from the increased numbers of prosecutions of child sex offences.[906]

15.37 This Issues Paper raises a number of concerns relating to the evidence of child witnesses and asks whether there is a need for new rules of evidence to better facilitate the giving of evidence by child witnesses.[907]

15.38 Most Australian jurisdictions have enacted procedural provisions intended to assist children to give evidence in a manner that reduces stress and trauma and thereby 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, 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.[908]

15.39 Even if there is a need for specific rules of evidence applying to child witnesses, it can be argued that it would not be 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. 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).

15.40 Another issue is whether evidentiary provisions relating specifically to child witnesses should be separated from procedural rules.[909] While it

---

906 See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.4].

907 See discussion in relation to: constraints on cross-examination of child witnesses (Ch 3); an exception to the hearsay rule for evidence of child witnesses (Ch 5); admission of expert evidence as to the credibility or reliability of a child witness (Ch 9); and specific prohibitions on warnings to the jury about the reliability of the evidence of children (Ch 14).

908 See also *Evidence (Children and Special Witnesses) Act 2001* (Tas) which applies to children under the age of 17.

909 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: Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), Ch 2.

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.

15.41 The *Evidence (Children) Act 1997* (NSW) was established as a comprehensive regime for children giving evidence in criminal proceedings. Its provisions combined 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.[910] 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). The majority of the provisions are procedural in nature.

15.42 While it would have been possible to include 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.

15.43 The ALRC is interested in comment on whether it would be appropriate to enact a Commonwealth *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.

15.44 In relation to evidentiary provisions, issues to be considered would include the scope of proceedings to which specific evidentiary rules relating to the evidence of children should apply (ie, should the application of the rules be restricted to certain offences, to criminal trials in general or apply more broadly); and whether such evidentiary rules would be better placed in a Commonwealth *Evidence (Children) Act*; in the *Evidence Act 1995* (Cth); or in legislation relating to particular criminal offences.

---

910 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* (1997).

Question 15–3 Is there a need for a Commonwealth *Evidence (Children) Act* that incorporates relevant evidentiary and procedural laws that should apply to child witnesses?

Question 15–4 Are there particular evidentiary rules relating to child witnesses that should instead be incorporated into the *Evidence Act Act 1995* (Cth)?

Other evidentiary provisions

15.45 There are other evidentiary provisions contained in state and territory criminal procedures or evidence legislation which might be included in the uniform Evidence Acts.

15.46 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.[911]

15.47 The *Criminal Procedure Act* contains detailed provisions dealing with the compellability of spouses to give evidence in certain proceedings;[912] evidentiary aspects of certain depositions and written statements;[913] sexual assault communications privilege;[914] and warnings to be given to juries in relation to lack of complaint in sexual offence proceedings.[915]

15.48 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

911 For example, *Crimes Act 1914* (Cth) s 23V; *Crimes Act 1958* (Vic) s 464H.
912 *Criminal Procedure Act 1986* (NSW) s 279.
913 Ibid ss 284–289.
914 See Ch 11.
915 See Ch 9.

found elsewhere in those jurisdictions' statute books. The additional Tasmanian provisions include those dealing with:

- procedures for proving certain matters, which are not provided for in the other uniform Evidence Acts;[916]
- the admissibility of depositions on one charge in the trial of another;[917]
- the production and use in evidence of certain depositions;[918] and
- the powers of a court or judge to order examination of witnesses on interrogatories or otherwise.[919]

15.49 The evidence legislation of other states or territories also contain kinds of evidentiary provisions that might be incorporated in the uniform Evidence Acts. For example, Queensland, Western Australia and the Northern Territory evidence legislation provides, in similar terms, for evidentiary certificates with respect to DNA evidence used in criminal proceedings.[920]

15.50 The ALRC is interested in comments on whether the kinds of evidentiary provisions discussed above, or other kinds of evidentiary provisions, should be incorporated in the uniform Evidence Acts.

Question 15–5 Are there categories of evidentiary provisions, for example those contained in state or territory criminal procedures or evidence legislation or in the *Evidence Act 2001* (Tas), which should be incorporated in the uniform Evidence Acts?

Native title proceedings

15.51 Determination of native title under the *Native Title Act 1993* (Cth) (*Native Title Act*) requires applicants to establish rights and interests in relation to land or waters possessed under traditional laws and customs, by which they have a continuing connection with the land or waters.[921] The

916 *Evidence Act 2001* (Tas) ss 177A–177D.
917 Ibid s 181A.
918 Ibid ss 194A–194B.
919 Ibid ss 194C–194I.
920 *Evidence Act 1977* (Qld) s 95A; *Evidence Act 1906* (WA) s 50B; *Evidence Act 1939* (NT) s 24.
921 See *Native Title Act 1993* (Cth) s 223; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655.

primary issue in establishing traditional laws and customs is whether the law or custom has, in substance, been handed down from generation to generation: that is, whether it can be shown to have its root in the tradition of the relevant community.[922]

15.52 It has been observed that, in native title proceedings, 'some of the most important issues before the Court can only be resolved upon evidence which in other circumstances may be regarded as hearsay'.[923] The need to make findings about traditional laws and customs practiced more than 150 years ago must necessarily rely upon evidence other than that of the personal observations of witnesses. Similarly, genealogical connections to ancestors living at or prior to European settlement cannot be proved by reference to official records.[924]

15.53 When first enacted, the *Native Title Act* provided that the Federal Court, in conducting native title proceedings was 'not bound by technicalities, legal forms or rules of evidence'. In 1998, s 82 of the *Native Title Act* was amended to provide:

> *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.

15.54 Section 82 operates in conjunction with the Federal Court Rules, which provide that the Court may 'make any order it considers appropriate relating to evidentiary matters' including 'relating to the presentation of evidence about a cultural or customary subject'.[925]

15.55 However, the Act provides no guidance on the factors which may justify an order setting aside rules of evidence. In *Daniel v Western Australia*,[926] Nicholson J held that, by enacting s 82(1) of the *Native Title Act* in 1998 and abandoning the prior provision, Parliament 'evinced an

---

922 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655, 688–689.
923 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 544.
924 Ibid, 544.
925 *Federal Court Rules* O 78 r 31(3)(f).
926 *Daniel v Western Australia* (2000) 178 ALR 542.

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'.[927]

15.56 Similarly, in *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland & Ors*[928] the Court interpreted s 82(1) 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'.[929]

15.57 In *De Rose v South Australia*, O'Loughlin J highlighted the practical evidentiary issues facing native title applicants. He stated that, given much of the evidence in native title cases is dependent upon 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'.[930]

15.58 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'.[931]

15.59 However, 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'.[932]

---

927 Ibid, 552.
928 *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548.
929 Ibid, [7].
930 *De Rose v South Australia* [2002] FCA 1342, [270].
931 Ibid, [370].
932 *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483, 499.

15.60 The ALRC is interested in comments on whether, in practice, s 82 of the *Native Title Act* operates to address satisfactorily the evidentiary difficulties faced by applicants in native title proceedings.

15.61 If it does not, solutions may lie in amendment to the *Native Title*, the *Evidence Act* or to both. For example, it may be suggested that the circumstances in which the *Native Title Act* allows the court to set aside the operation of the rules of evidence in native title proceedings should be clarified.

Question 15–6 Does s 82 of the *Native Title Act 1993* (Cth) operate to address satisfactorily the evidentiary difficulties faced by applicants in native title proceedings?

Question 15–7 Is there a need to clarify the circumstances in which s 82(1) of the *Native Title Act* allows the court to set aside the operation of the rules of evidence in native title proceedings and, if so, how?

Question 15–8 Are there any other concerns in relation to native title proceedings and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

Family law proceedings

15.62 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 are governed by both the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth) (*Family Law Act*).

15.63 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 Act also contains evidentiary provisions dealing with, among other things:

- the admissibility in evidence of admissions made at a meeting or conference conducted by a family and child counsellor or court mediator;[933]
- the admissibility in evidence of admissions made by a person attending a post-separation parenting program;[934]
- the court's power requiring any person to give evidence material to the parentage of a child;[935]
- the competence and compellability of husbands and wives in proceedings under the Act; [936]
- children swearing affidavits, being called as witnesses or being present in court;[937]
- protecting witnesses from offensive or oppressive questioning;[938]
- means of proving birth, parentage, death or marriage;[939]
- restrictions on the examination of children.[940]

15.64 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.

15.65 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 the light of the 'paramountcy principle', which requires that the court treat the best interests of the child as the paramount consideration in deciding children's issues.[941]

---

933 *Family Law Act 1975* (Cth) s 19N.
934 Ibid s 70NI.
935 Ibid s 69V.
936 Ibid s 100.
937 Ibid s 100B.
938 Ibid s 101.
939 Ibid s 102.
940 Ibid s 102A.
941 See G Watts, 'Is the Family Court Bound by the Rules of Evidence in Children Matters?' (1999) 13(4) *Australian Family Lawyer* 8.

15.66 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.[942] Some decisions limited this principle, noting that statutory provisions relating to evidence could not be overridden by concerns for the welfare of the child.[943]

15.67 Since these decisions, the enactment of comprehensive rules of evidence in the *Evidence Act 1995* (Cth) and amendments to the paramountcy provisions made by the *Family Law Reform Act 1995* (Cth) have changed the law and, arguably, left little room for the paramountcy principle to operate.[944] The *Family Law Reform Act 1995* has been said to have restricted the scope of the paramountcy 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.[945]

15.68 The High Court, in *Northern Territory v GPAO*,[946] interpreted this restriction to mean that the paramountcy 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. McHugh J and Callinan J stated that the paramountcy 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'.[947] 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.

15.69 In this context it is relevant to note that in March 2004 the Family Court commenced a pilot for a new children's cases program, which has moved towards a more permissive application of the rules of evidence.[948] Practice Directions state, for example, that all evidence is to be

---

942 See, eg, *Hutchings v Clarke* (1993) 16 Fam LR 452.

943 See, eg, *Wakely v Hanns* (1993) 17 Fam LR 215.

944 R Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87, 96.

945 See Ibid, 109–110.

946 *Northern Territory v GPAO* (1999) 196 CLR 553.

947 Ibid, 629.

948 The pilot is being run in the Sydney and Parramatta registries of the Family Court of Australia. It involves represented and unrepresented parties who give consent to having their cases heard in this way.

conditionally admitted and that the judge will determine the weight to be given to the evidence.[949] 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 matter.[950] The pilot program will be evaluated to determine if the approach should be adopted more widely in children's cases.

Question 15–9 Should the *Family Law Act 1975* (Cth) or the *Evidence Act 1995* (Cth) be amended to ensure that, in proceedings under Part VII of the *Family Law Act*, rules of evidence may be dispensed with where this is in the best interests of the child?

Question 15–10 Are there any other concerns in relation to family law proceedings and the uniform Evidence Acts and, if so, what are those concerns and how should they be addressed?

949 *Practice Direction No 2 of 2004: The Children's Cases Program* (Cth), [5.7].
950 Ibid, [5.9].

Appendix 1. List of Submissions

Name	Submission	Date
Confidential	E 4	3 September 2004
Confidential	E 5	6 September 2004
Justice Robert French	E 3	8 October 2004
Mr Alan Hogan	E 1	16 August 2004
Dr Carol O'Donnell	E 2	2 September 2004
Justice Tim Smith	E 6	16 September 2004