ALRC Discussion Paper 69
NSWLRC Discussion Paper 47
VLRC Discussion Paper

Review of the Uniform Evidence Acts

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Appendix 5. Abbreviations

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ALRC Reference: DP 69
NSWLRC Reference: DP 47

E-mail: info@alrc.gov.au
ALRC homepage: www.alrc.gov.au

Making a submission

Any public contribution to an inquiry is called a submission and these are actively sought by law reform bodies from a broad cross-section of the community, as well as those with a special interest in the inquiry. Any submission made to this inquiry will be considered a submission to all of the law reform bodies involved in the inquiry, ie, the Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, Tasmania Law Reform Institute, Queensland Law Reform Commission, Northern Territory Law Reform Committee, and Law Reform Commission of Western Australia.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred. It will be helpful if comments address specific questions or numbered paragraphs in this Paper.

Open inquiry policy

In the interests of informed public debate, the Commissions maintain an open inquiry policy. As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. As part of the open inquiry policy, non-confidential

submissions are made available to any person or organisation upon request, and also may be published on the ALRC website.

However, the Commissions also accept submissions made in confidence. Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material). Any request for access to a confidential submission is determined in accordance with the federal *Freedom of Information Act 1982*, which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the Commissions will treat the submission as non-confidential.

Submissions to the inquiry should be sent to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
E-mail: evidence@alrc.gov.au

Submissions may also be made using the on-line form on the ALRC's homepage: <www.alrc.gov.au>.

The closing date for submissions in response to **this Discussion Paper is Friday 16 September 2005**

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Terms of Reference

AUSTRALIAN LAW REFORM COMMISSION
REVIEW OF THE EVIDENCE ACT 1995

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

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

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

1. In carrying out its review of the Act, the Commission will have particular regard to:
   (a) the following topics, which have been identified as areas of particular concern:
      (i) the examination and re-examination of witnesses, before and during proceedings;
      (ii) the hearsay rule and its exceptions;
      (iii) the opinion rule and its exceptions;
      (iv) the coincidence rule;
      (v) the credibility rule and its exceptions; and
      (vi) privileges, including client legal privilege;

   (b) the relationship between the *Evidence Act 1995* and other legislation regulating the laws of evidence, including the provisions of the *Judiciary Act 1903*, in particular in relation to the laws, practices and procedures applying in proceedings in federal jurisdiction; and whether the fact that significant areas of evidence law are dealt with in other legislation poses

any significant disadvantages to the objectives of clarity, effectiveness and uniformity;

(c) recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the *Evidence Act 1995*;

(d) the application of the rules of evidence contained in the Act to pre-trial procedures; and

(e) any other related matters.

2. In carrying out its review of the Act, the Commission, in keeping with the spirit of the uniform Evidence Act scheme, will:

(a) work in association with the New South Wales Law Reform Commission with a view to producing agreed recommendations;

(b) consult with the other members of the uniform Evidence Act scheme – the Australian Capital Territory and Tasmania;

(c) consult with other States and Territories as appropriate; and

(d) consult with other relevant stakeholders, in particular the courts, their client groups and the legal profession.

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

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

Dated: 12th July 2004

Philip Ruddock

Attorney-General

Terms of Reference

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

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

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

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

1. In carrying out its review of the *Evidence Act 1995* (NSW), the Commission, will have particular regard to:
   (a) the following topics, which have been identified as areas of particular concern:
      (i) the examination and re-examination of witnesses; before and during proceedings;
      (ii) the hearsay rule and its exceptions;
      (iii) the opinion rule and its exceptions;
      (iv) the coincidence rule;
      (v) the credibility rule and its exceptions; and
      (vi) privileges, including client legal privilege

   (b) the relationship between the *Evidence Act 1995* (NSW) and other legislation regulating the laws of evidence and whether the fact that significant areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity

(c) recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the *Evidence Act 1995* (NSW)

(d) the application of the rules of evidence contained in the *Evidence Act 1995* (NSW) to pre trial procedures

(e) any related matter.

2. In carrying out its review of the *Evidence Act 1995* (NSW), the Commission, in keeping with the spirit of the uniform Evidence Act scheme, will:

(a) work in association with the Australian Law Reform Commission, with a view to producing agreed recommendations,

(b) consult with the other members of the uniform Evidence Act scheme – the Australian Capital Territory and Tasmania,

(c) consult with other States and Territories as appropriate; and

(d) consult with other relevant stakeholders, in particular the courts, their client groups and the legal profession;

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

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

Terms of Reference

VICTORIAN LAW REFORM COMMISSION
REVIEW OF THE EVIDENCE ACT 1958

1. To review the *Evidence Act 1958* and other laws of evidence which apply in Victoria and to advise the Attorney-General on the action required to facilitate the introduction of the Uniform Evidence Act into Victoria, including any necessary modification of the existing provisions of the Uniform Evidence Act.

2. To consider whether modifications of the existing provisions of the Uniform Evidence Act are required:

- to take account of case law on the operation of the Uniform Evidence Act in jurisdictions where the Act is currently in force;
- in relation to the following topics which have been identified as areas of particular concern and are currently being considered by the Australian Law Reform Commission and the New South Wales Law Reform Commission:
  - the examination and re-examination of witnesses, before and during proceedings;
  - the hearsay rule and its exceptions;
  - the opinion rule and its exceptions;
  - the coincidence rule;
  - the credibility rule and its exceptions; and
  - privileges, including client legal privilege.

3. In conducting the review the Victorian Law Reform Commission should have regard to:

- the experience gained in other jurisdictions in which the Uniform Evidence Act has been in force for some time;
- the desirability of promoting harmonisation of the laws of evidence throughout Australia, in particular by consulting with the other members of the Uniform Evidence Act scheme;
- recommendations for changes to the law of evidence which have already been made in the Victorian Law Reform Commission's Reports on Sexual Offences and Defences to Homicide;

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

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

Participants

Australian Law Reform Commission

Division

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

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

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Bruce Alston
Miranda Biven (until September 2004)

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Imogen Goold (until September 2004)
Sarah Jahani (from February 2005 until May 2005)
Huette Lam (from April 2005)
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Judge Peter Berman SC, District Court of New South Wales
Jim Brewster, Federal Magistrate, Federal Magistrates Court of Australia

Simon Daley, Special Counsel Litigation, Australian Government Solicitor
Amanda Davis, Attorney-General's Department (from April 2005)
Dr Ian Freckelton, Victorian Bar
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
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Stephen Mason, Blake Dawson Waldron
Stephen Odgers SC, New South Wales Bar
Associate Professor Anne Rees (nee Finlay), School of Law, University of Newcastle (from November 2004)
Wayne Roser, Deputy Senior Crown Prosecutor New South Wales
Justice Tim Smith, Supreme Court of Victoria
Neil Williams SC, New South Wales Bar
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

New South Wales Law Reform Commission

Division

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

Justice Michael Adams
Judge Christopher Armitage
James Bennett SC
Acting Judge Angela Karpin
Professor Michael Tilbury

Executive Director

Peter Hennessey

Legal Officers

Catherine Gray
Robyn Johansson

Victorian Law Reform Commission

Division

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

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

Chief Executive Officer

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Angela Langan

Research and Policy Officers

Samantha Burchell
Claire Downey

Administrative Officers

Kathy Karlevski (Operations Manager)
Lorraine Pitman

List of Proposals and Questions

Chapter 2 The Uniform Evidence Acts

Proposal 2–1 The definition of 'NSW court' in the Dictionary to the *Evidence Act 1995* (NSW) should be amended to delete the parenthetical words 'including such a court exercising federal jurisdiction'.

Proposal 2–2 Section 4(1) of the Commonwealth and New South Wales Evidence Acts should be amended to delete the words 'in relation' from the phrase 'in relation to all proceedings'.

Chapter 3 Understanding the Uniform Evidence Acts

Proposal 3–1 Educational programs should be implemented by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales and by the state and territory law societies and Bar which focus on the policy underlying the uniform Evidence Acts' approach to admissibility of evidence.

Chapter 4 Competence and Compellability

Proposal 4–1 Sections 13(2), (3) and (4) should be amended or replaced to bring about the following:

- a person not competent to give sworn evidence should be competent to give unsworn evidence provided that the court informs that person of the importance of telling the truth and that person satisfies the test of general competence;
- there should be a test of general competence for both sworn and unsworn evidence. It should provide that if for any reason, including physical disability, a person is unable to understand a question about a fact or is unable to give answers to a question about a fact which can be understood, and that incapacity cannot be overcome, the person is not competent to give evidence about that fact.

Section 13(7) should be amended to make it clear that in informing itself as to the competence of a witness, the court is entitled to draw on expert opinion. The wording of s 14 should be amended to bring it in line with the proposed changes to s 13.

Proposal 4–2 The *Evidence Act 1995* (Cth) should be amended to provide that the definition of 'de facto spouse', in relation to a person, be a person with whom the person has a de facto relationship. A definition of 'de facto relationship' should be provided in the following terms:

'de facto relationship' is a relationship between two persons:

- who have a relationship as a couple; and
- who are not married to one another or related by family.

Chapter 5 Examination and Cross-Examination of Witnesses

Proposal 5–1 Section 29 of the uniform Evidence Acts should be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. A court may give directions about what evidence is to be given in narrative form and the way in which that evidence may be given.

Proposal 5–2 Section 41 of the uniform Evidence Acts should be amended to allow that the court may disallow an improper question put to a witness in cross-examination, or inform the witness that it need not be answered. An improper question should be defined as a question that is misleading or confusing, or is annoying, harassing, intimidating, offensive, humiliating, oppressive or repetitive, or is put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting), or has no basis other than a sexual, racial, cultural or ethnic stereotype.

Proposal 5–3 The uniform Evidence Acts should be amended to include a provision imposing a duty on the court to disallow any question of the kind referred to in Proposal 5–2 where the witness being cross-examined is a vulnerable witness because of their age or mental or intellectual disability.

Proposal 5–4 Educational programs should be implemented by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales and by the state and territory law societies and Bar which draw attention to s 41 and, if adopted, new provisions of the uniform Evidence Acts dealing with improper questioning.

Question 5–1 Should the uniform Evidence Acts contain provisions dealing with the form of affidavit evidence? If so, what considerations should be included in such a section?

Chapter 6 Documentary Evidence

Question 6–1 Should the uniform Evidence Acts be amended to impose a more rigorous requirement for the presumption of reliability and accuracy of computer-produced evidence? Who should have the obligation to establish reliability or unreliability?

Proposal 6–1 Section 71 of the uniform Evidence Acts should be amended to replace the words ‘a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex’ with the words ‘an electronic communication’, and to insert as s 71(2) a definition for ‘electronic communication’ identical to that in s 5 of the *Electronic Transactions Act 1999* (Cth).

Chapter 7 The Hearsay Rule and its Exceptions

Proposal 7–1 The uniform Evidence Acts should be amended to provide expressly that, for the purposes of s 59, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.

Proposal 7–2 The uniform Evidence Acts should be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

Question 7–1 If Proposal 7–2 is implemented, should the uniform Evidence Acts also be amended to provide that:

- a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence; or
- evidence of admissions that are not first-hand;

or both be excluded from the ambit of s 60? If so, how should these provisions be worded?

Proposal 7–3 Section 64(3) of the uniform Evidence Acts should be amended to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Proposal 7–4 The uniform Evidence Acts should be amended to provide that a person is taken not to be available to give evidence about a fact if a person is mentally or physically unable to give the evidence about the fact.

Proposal 7–5 Section 65(2)(d) of the uniform Evidence Acts should be amended to require that the representation be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable.

Proposal 7–6 The uniform Evidence Acts should be amended to make it clear that, for the purposes of s 66(2), whether a memory is 'fresh' is to be determined by reference to factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. These factors may include the nature of the event concerned, and the age and health of the witness.

Question 7–2 What concerns are raised by the operation of s 69(2) of the uniform Evidence Acts with respect to business records? Should these concerns be addressed through amendment of the Acts and, if so, how?

Question 7–3 Should s 69(3) of the uniform Evidence Acts be amended to provide the judge with a discretion to admit documents made in connection with an investigation relating or leading to a criminal proceeding and, if so, on what criteria?

Proposal 7–7 The uniform Evidence Acts should be amended so that the s 72 exception to the hearsay rule, which relates to certain contemporaneous statements, applies to first-hand hearsay only.

Question 7–4 Should s 67 of the uniform Evidence Acts be amended to require the prosecution to give notice of an intention to adduce evidence under s 65(9)?

Chapter 8 The Opinion Rule and its Exceptions

Question 8–1 Does the decision of the High Court in *Smith v The Queen* overly constrain the admission of police opinion evidence on identification and, if so, how should this be remedied?

Proposal 8–1 To avoid doubt, the uniform Evidence Acts should be amended to provide an exception to the opinion and credibility rules for expert opinion evidence on the development and behaviour of children.

Question 8–2 Should the uniform Evidence Acts be amended to provide for the admissibility of expert opinion evidence on the credibility or reliability of other categories of witness, such as victims of family violence or people with an intellectual disability?

Chapter 9 Admissions

Proposal 9–1 Section 85(1) of the uniform Evidence Acts should be amended to provide that the section applies only to evidence of an admission made by a defendant (a) to an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. A consequent amendment should be made s 89(1) to incorporate (a) above.

Chapter 10 Tendency and Coincidence Evidence

Proposal 10–1 Section 98(1) of the uniform Evidence Acts should be amended to provide that evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless the party adducing the evidence gives reasonable notice in writing to each other party of the party's intention to adduce the evidence; and the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, has significant probative value.

Proposal 10–2 Section 97 of the uniform Evidence Acts should be amended to replace the word 'if' in s 97(1) with 'unless', and to replace the word 'or' in s 97(1)(a) with 'and'.

Question 10–1 Should s 101 apply to any evidence led against an accused person which reveals disreputable behaviour whether or not relevant as showing a tendency or coincidence and whether or not tendered for such purposes? If so what form should the provision take?

Chapter 11 The Credibility Rule and its Exceptions

Proposal 11–1 The uniform Evidence Acts should be amended to ensure that the credibility rule applies to evidence:

- relevant only to the credibility of a witness; and
- relevant to the facts in issue, but not admissible for that purpose, which is also relevant to the credibility of a witness.

Proposal 11–2 Section 103(1) of the uniform Evidence Acts should be amended to read as follows: 'The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness'.

Proposal 11–3 Section 104(4)(a) of the uniform Evidence Acts should be deleted from s 104(4).

Proposal 11–4 Section 112 of the uniform Evidence Acts should be amended by substituting 'A defendant must not be cross-examined' for 'A defendant is not to be cross-examined'.

Proposal 11–5 Section 106 of the uniform Evidence Acts should be amended to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination.

Question 11–1 Should s 108 be extended to refer to any evidence relevant to rebuttal evidence adduced under s 106? If so, in what way should it be extended?

Proposal 11–6 The uniform Evidence Acts should be amended to include a new exception to the credibility rule which provides that, if a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge: and (b) could substantially affect the credibility of a witness; and (c) is adduced with the court's leave.

Proposal 11–7 Sections 105 and 110(4) of the *Evidence Act 1995* (Cth) should be repealed.

Chapter 12 Identification Evidence

Question 12–1 To what extent is in-court identification used in practice and is this a problem? Should Part 3.9 of the uniform Evidence Acts be amended to make it clear that, subject to the exceptions set out in s 114(3), in-court identification is inadmissible?

Chapter 13 Privilege

Proposal 13–1 The client legal privilege provisions of the uniform Evidence Acts should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Proposal 13–2 Section 117(a) of the uniform Evidence Acts should be amended to allow that a 'client' is an employer of a lawyer, which may include lawyers who employ other lawyers.

Proposal 13–3 The definition of a 'lawyer' in the Dictionary of the uniform Evidence Acts should be amended to allow that a lawyer is a person who is admitted to practice as a legal practitioner, barrister or solicitor in an Australian jurisdiction or in any other jurisdiction.

Proposal 13–4 Section 118(c) of the uniform Evidence Acts should be amended to replace the words 'the client or a lawyer' with 'the client, a lawyer or another person'.

Proposal 13–5 Section 122(2) of the uniform Evidence Acts should be amended to allow that evidence may be adduced where a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence or has otherwise acted in a manner inconsistent with the maintenance of the privilege.

Proposal 13–6 If Proposal 13–1 is adopted, s 123 of the uniform Evidence Acts should be amended to preserve the availability of client legal privilege to any legal advice—as provided for in s 118 and professional legal services as provided for in s 119—provided to the Director of Public Prosecutions and to non-DPP prosecutors.

Alternative Proposal 13–6 If Proposal 13–1 is adopted, s 123 of the uniform Evidence Acts should remain applicable only to the adducing of evidence by an accused in a criminal proceeding.

Question 13–1 Should the uniform Evidence Acts abrogate client legal privilege in relation to investigations being conducted by watchdog agencies, such as the Commonwealth Ombudsman and state and territory ombudsmen? Alternatively, should the client legal privilege sections of the Acts be amended to create an exception for information and documents relating to the accountability of government?

Proposal 13–7 Part 3.10 of the *Evidence Act 1995* (Cth) should be amended to adopt the equivalent of Division 1A of the *Evidence Act 1995* (NSW).

Proposal 13–7a Part 3.10 of the *Evidence Act 1995* (Cth) and Part 3.10, Division 1B of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault counselling privilege of a discretionary kind applicable to both civil and criminal proceedings.

Proposal 13–7b If Proposal 13–7a is accepted, Part 7 of the *Criminal Procedure Act 1986* (NSW) should be repealed.

Proposal 13–8 Both the confidential communications privilege and the sexual assault communications privilege should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Proposal 13–9 Section 128 should be re-drafted to clarify the procedure by which a witness is able to object to giving evidence, may be compelled to give evidence and may be granted privilege in respect of self-incrimination in other proceedings.

Question 13–2 On what terms should s 128 be redrafted to clarify its procedure?

Proposal 13–10 Section 128A should be inserted in the uniform Evidence Acts to apply in respect of orders made in a civil proceeding requiring an individual to disclose assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched.

Proposal 13–11 Section 128(7) of the uniform Evidence Acts should be amended to clarify that a 'proceeding' under that section does not include a retrial for the same offence or an offence arising out of the same circumstances.

Proposal 13–12 The definition of a 'NSW court' in the Dictionary of the *Evidence Act 1995* (NSW) should be amended to include 'any person or body authorised by a New South Wales law, or by consent of the parties, to hear, receive and examine evidence'.

Proposal 13–13 Section 130 of the uniform Evidence Acts should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Question 13–3 Are there any difficulties with the operation of s 131 of the uniform Evidence Acts? In particular, are there difficulties with statements made during mediation, that may not be covered by the privilege, but should be?

Chapter 14 Discretionary and Mandatory Exclusions

Proposal 14–1 The heading at Part 3.11 'Discretions to exclude evidence' should be amended to read 'Discretionary and mandatory exclusions'.

Proposal 14–2 The uniform Evidence Acts should be amended to provide the Court with the power to give advance rulings.

Chapter 15 Judicial Notice

Question 15–1 Should the provisions relating to judicial notice allow judges to take account of social facts? Are there more effective ways of dealing with this issue?

Chapter 16 Comments, Warnings and Directions to the Jury

Proposal 16–1 The *Evidence Act 1995* (Cth) should be amended to include similar provisions to ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW) dealing with warnings in respect of children's evidence.

Question 16–1 Should the recommendations proposed by the Victorian Law Reform Commission or the Tasmania Law Reform Institute in relation to *Longman* and *Crofts* warnings (or any other models) be adopted under the uniform Evidence Acts?

Question 16–2 Should the uniform Evidence Acts be amended to require that, where the parties are represented, warnings, including warnings given under s 165(5), are only required to be given on request of one of the parties? In the alternative, should the uniform Evidence Acts be amended to provide that a trial judge's obligation to give warnings at common law continues to operate unless all the parties agree that such a warning should not be given?

Question 16–3 In either case referred to in Question 16–2, should the uniform Evidence Acts be amended to provide that the court is required to inform the parties of their rights in relation to common law warnings?

Chapter 17 Aboriginal and Torres Strait Islander Traditional Laws and Customs

Proposal 17–1 The uniform Evidence Acts should be amended to provide an exception to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.

Question 17–1 Should the proposed amendment in Proposal 17–1 apply to a broader category of evidence such as evidence based on 'oral knowledge' or 'oral tradition' and, if so, how should such a term be defined?

Question 17–2 Should the uniform Evidence Acts be amended to allow courts to excuse a witness from answering a question which tends to incriminate the witness under his or her Aboriginal or Torres Strait Islander traditional laws and customs and, if so, on what basis and subject to what criteria?

Other Sections Considered

The following sections of the uniform Evidence Acts have received consideration in this Discussion Paper, but no proposal for change has been made or question raised about the need for change.

Chapter 2 The Uniform Evidence Acts

s 11(2) Powers of a court with respect to abuse of process in a proceeding

Chapter 5 Examination and Cross-Examination of Witnesses

s 38 Unfavourable witnesses

s 44 Previous representations of other persons

s 46 Leave to recall witnesses

Chapter 6 Documentary Evidence

s 155 Evidence of official records

s 156 Public documents

Chapter 7 The Hearsay Rule and its Exceptions

s 65(9) Evidence of a previous representation about a matter adduced by a defendant

s 75 Exception [to hearsay]: interlocutory proceedings

Chapter 8 The Opinion Rule and its Exceptions

s 78 Exception [to opnion]: lay opinions

s 80 Ultimate issue and common knowledge rules abolished

Chapter 9 Admissions

s 90 Discretion to exclude admissions

Chapter 11 Credibility Evidence

s 104(4)(b) and (c) of the *Evidence Act 2001* (Tas)

s 108A Admissibility of evidence of credibility of person who has made a previous representation [consequential amendments suggested due to proposals on other sections]

Chapter 12 Identification Evidence

s 115 Exclusion of evidence of identification by pictures

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

1.2 The Inquiry commenced on the eve of the tenth anniversary of the Commonwealth and New South Wales Evidence Acts. The uniform Evidence 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 differing in some respects—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'. In 1997, the New South Wales Parliament enacted the *Evidence Amendment (Confidential Communications) Act 1997*, which incorporated into Part 3.10 of the *Evidence Act 1995* (NSW) privilege in relation to professional confidential relationships and sexual assault communications. These amendments are discussed in detail in Chapter 13. Further, in 2002, the *Evidence Act 1995* (NSW) was amended to adopt a broader definition of 'de facto relationship'[8] and to insert a provision relating to warnings about children's evidence.[9] Comparable provisions were not introduced into the *Evidence Act 1995* (Cth), thus diminishing the uniformity achieved earlier.[10]

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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].

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

9 *Evidence Legislation Amendment Act 2001* (NSW). This is discussed in detail in Ch 16.

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

1.7 The Commonwealth Act applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The New South Wales Act applies in proceedings, federal or state, before New South Wales courts and some tribunals.[11]

1.8 In 2001, Tasmania passed legislation that essentially mirrors that of the Commonwealth and New South Wales Acts, although there are some differences.[12] In 2004, Norfolk Island passed legislation that essentially mirrors the *Evidence Act 1995* (NSW).[13]

1.9 No other state or territory has yet adopted similar legislation. 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'.[14] In November 2004, the Attorney-General of Victoria asked the Victorian Law Reform Commission (VLRC) to review the laws of evidence applying in Victoria. The VLRC was directed to review the *Evidence Act 1958* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the uniform Evidence Act into Victoria.

1.10 In March 2005, the Queensland Attorney-General asked the Queensland Law Reform Commission (QLRC) to undertake a review under terms of reference similar to the ALRC's inquiry, with some minor modifications in relation to Queensland specific matters. Unlike the VLRC's Terms of Reference, the QLRC's Terms of Reference do not require the QLRC to advise on the action required to facilitate the introduction of the uniform Evidence Act into Queensland. Rather, the QLRC is directed to work in association with the ALRC and the NSWLRC with a view to producing agreed recommendations for inclusion in this Discussion Paper. The QLRC is then to provide a report to the Queensland Attorney-General by 31 July 2005 on its review of the uniform Evidence Acts.

1.11 In May 2005, the ALRC was informed that the Northern Territory Attorney-General asked the Northern Territory Law Reform Committee to review the uniform Evidence Acts. The ALRC has also been advised that the Attorney-General of Western Australia has formally placed the uniform Evidence Act on the legislative agenda.

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

1.13 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—

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11 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.

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

13 *Evidence Act 2004* (NI).

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

are binding on all courts exercising federal jurisdiction in that state or territory.[15] The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the state or territory rather than the *Evidence Act 1995* (Cth), except for those provisions that have a wider reach.

1.14 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 Victorian Supreme Court would use that state's evidence law; but would use the *Evidence Act 1995* (Cth) if appearing before the Federal Court, the Federal Magistrates Court or the Family Court on a different matter the following day.

1.15 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.[16] To achieve this objective the ALRC is working with law reform bodies in New South Wales, Victoria, Tasmania and Queensland, and has conducted consultations in all non-uniform Evidence Act jurisdictions.

Inquiry with other law reform bodies

1.16 The project was conceived from the outset as a 'joint venture' between the ALRC and the NSWLRC. The scope of the project has widened since the publication of IP 28. The VLRC's Terms of Reference require the VLRC to work with the ALRC and the NSWLRC, and the three Commissions have collaborated to produce an agreed set of proposals in this Discussion Paper, with a view to producing agreed recommendations in a final Report. In addition, an ongoing consultative relationship has been established with the Tasmania Law Reform Institute (TLRI), the QLRC, the Northern Territory Law Reform Committee (NTLRC) and the Law Reform Commission of Western Australia (LRCWA).

1.17 The recommendations for legislative amendment contained in the final Report will have direct application to the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). In the interests of uniformity, it is hoped that the recommendations will be taken up where applicable by other participants in the uniform Evidence Acts regime, (Tasmania and Norfolk Island), and by those jurisdictions which subsequently enact uniform Evidence Act legislation. The involvement of the law reform bodies noted in the preceding paragraph should facilitate this outcome.

1.18 The ALRC, VLRC and NSWLRC will work together closely during the Inquiry, with involvement of commissioners and staff from all the institutions. This Discussion Paper is a joint effort of the ALRC, VLRC and NSWLRC (the 'Commissions'). The

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

16 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).

VLRC had the primary responsibility for the research and writing of chapters dealing with competence and compellability, tendency and coincidence and credibility evidence. The NSWLRC had primary responsibility for the research and writing of the judicial notice and documentary evidence chapters. The ALRC had primary responsibility for the preparation of the remaining chapters.

1.19 Where a proposal relates only to one jurisdiction, for example Proposal 2-1, the Commissions, in jointly making the proposal, rely on the requirement in the Terms of Reference of all three Commissions to promote greater harmonisation of the laws of evidence in Australia. Hence, such proposals are made by all of the Commissions, not just the Commission in the relevant jurisdiction.

The scope of the Inquiry

Terms of Reference

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

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

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

1.22 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.[17]

1.23 The VLRC is directed to review the laws of evidence applying in Victoria. In particular, the VLRC is directed to review the *Evidence Act 1958* (Vic) and other laws

17 See Chs 13, 18.

of evidence and to advise on the action required to facilitate the introduction of the uniform Evidence Act into Victoria, including any necessary modification of the existing provisions of the Act.

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

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

Definition of 'law of evidence'

1.26 For the purpose of this Inquiry, the Commissions have 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.[18]

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

- control what evidence may be received;
- 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.[19]

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

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18 Australian Law Reform Commission, *Reform of Evidence Law*, IP 3 (1980), 2.
19 Ibid, 2.

Terminology

1.29 The ALRC's Terms of Reference ask the ALRC to consider the operation of the *Evidence Act 1995* (Cth) and the NSWLRC is asked by its Terms of Reference to consider the *Evidence Act 1995* (NSW). This requires consideration of the decisions of the High Court, the Federal and Family Courts, the Federal Magistrates Court, the courts of New South Wales and the courts of the Australian Capital Territory. However, given that the Commonwealth and New South Wales Acts have counterparts in Tasmania and Norfolk Island, relevant decisions about the meaning of a particular provision may arise in a Tasmanian or Norfolk Island court in relation to evidence legislation in these jurisdictions.[20] The Commissions consider that such decisions form part of the review as they indicate how the present legislation is operating and may highlight deficiencies in it.

1.30 Accordingly, in this Discussion 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 between the statutes, this will be done expressly.

Breadth of the Inquiry

1.31 The ALRC's original evidence inquiry was lengthy and comprehensive. Although the topics identified in the Commissions' Terms of Reference for this Inquiry are broad, this has not been interpreted to mean that all aspects of the uniform Evidence Acts must be reviewed again. Rather, the Commissions are interested in identifying those parts of the uniform Evidence Acts that may benefit from some fine-tuning in the light of experience.

1.32 Based on the submissions received, and the meetings and consultations held to date, it appears that there are no major structural problems with the legislation or with the policy underpinning it. As was noted by the Law Council of Australia, 'this review is not the place for a wide-ranging review of the policies underpinning the uniform Evidence Acts', and '[t]he Council accepts the policy framework of the legislation'.[21] The Commissions agree with this view.

1.33 IP 28 identified two potential impacts of any large-scale revision of the uniform Evidence Acts. First, the commencement of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) required judicial officers and legal practitioners to master the Acts' provisions and to adapt to the modification of many common law evidentiary principles. This educative process is well advanced, and judicial officers and litigation practitioners are familiar with the operation of the legislation. Any major changes would require yet another significant educative effort.

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

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

1.34 Secondly, there are well-founded 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.

1.35 It follows that a case for change should be made before the Commissions propose a legislative amendment. In this Discussion Paper, the Commissions have attempted to reflect accurately the views expressed in submissions and consultations, and to set out clearly the view of the Commissions. Where, in the Commissions' view, a case for change has been successfully advocated, a proposal is put forward. Where no change is recommended, this has also been noted in the discussion. Both the proposals for reform and the areas where no change is recommended are summarised at the front of this Paper.

1.36 There was not a strong call in submissions and consultations for a more wide-ranging reappraisal. In fact, as outlined in Chapter 2, while areas of concern were identified, a clear message was conveyed to the Commissions that a major overhaul of the legislation is neither warranted nor desirable. Therefore, it is not the intention of this Inquiry to carry out a review as extensive as that of the original ALRC inquiry.

Organisation of this paper

1.37 IP 28 largely followed the organisation and structure of the uniform Evidence Acts, with the inclusion of some additional topics in Chapter 15. While this paper is structured in a similar way, it became clear during the course of the consultations, both with stakeholders and with participating law reform bodies, that additional areas warranted attention. In particular, it was decided that separate chapters dealing with aspects of the policy framework of the Acts, competence and compellability of witnesses, and evidence of Aboriginal and Torres Strait Islander traditional law and custom were required.

Chapters 1–3: Introduction and background

1.38 Chapter 1 contains introductory and background material to the Inquiry and the uniform Evidence Acts. Chapter 2 describes the Acts and their relationship with the 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 discusses whether the Acts should be amended to allow greater differentiation between the rules of evidence applying in jury and non-jury trials, and proposes no change in this regard. The chapter concludes with a discussion of the scope of the uniform Evidence Acts, and in particular the general obligation of the court to ensure a fair trial.

1.39 Chapter 3 discusses certain concepts in the uniform Evidence Acts which appear to have caused confusion. In particular, the approach adopted in the Acts to evidence of tendency, coincidence, credibility and character, and the concepts of probative value,

unfair prejudice and unfairness are analysed in detail. The chapter concludes with a proposal to facilitate a better understanding among judicial officers and legal practitioners of the policy underlying the Acts.

Chapters 4–6: Adducing evidence

1.40 Chapters 4, 5 and 6 are concerned with the competence and compellability of witnesses (Chapter 4), the adducing of evidence from witnesses (Chapter 5) and the use of documents in court proceedings (Chapter 6). Chapter 4 addresses the concept of competence, particularly in relation to the giving of unsworn evidence by a witness, and the definition of de facto spouse in the context of compellability of spouses in criminal proceedings.

1.41 Chapter 5 discusses a number of issues in relation to the examination and re-examination of witnesses, the primary focus being the rules governing cross-examination of witnesses. While there has not been a suggestion to the Inquiry that these sections of the Acts are fundamentally flawed or require significant amendment, the following topics have been raised as being of some interest or concern: the giving of evidence in narrative form, cross-examination of unfavourable witnesses and cross-examination of vulnerable witnesses.

1.42 The uniform Evidence Acts introduced significant changes with respect to the proof of documents. Chapter 6 examines how the provisions of the uniform Evidence Acts dealing with documentary evidence have operated in practice. It then examines two specific issues raised in IP 28: proof of electronic evidence and evidence of official records.

Chapters 7–14: Admissibility of evidence

1.43 Chapters 7–14 examine the rules pertaining to the admissibility of evidence. Chapter 7 discusses the hearsay rule, as codified in s 59 of the uniform Evidence Acts, and its exceptions. These exceptions fall into two categories. The first category applies to first-hand hearsay (where the maker has personal knowledge of the asserted fact).[22] The second category applies to more remote (or 'second-hand') hearsay.[23] The operation of s 60 and the policy underlying the provision are discussed in detail. The chapter makes a limited number of proposals for reform of the hearsay provisions.

1.44 Chapter 8 discusses the exceptions to the opinion rule. These include exceptions in relation to lay opinion[24] and opinion based on specialised knowledge[25] (expert opinion evidence). Submissions and consultations have identified the admissibility of expert opinion evidence as a significant issue in this Inquiry.

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22 Uniform Evidence Acts ss 63–66.
23 Ibid ss 69–75.
24 Ibid s 78.
25 Ibid s 79.

1.45 Chapter 9 focuses on admissions in a criminal context, primarily looking at ss 85 and 90 of the uniform Evidence Acts. A proposal is made to clarify the meaning of the term 'in the course of official questioning' as used in s 85.

1.46 Chapter 10 discusses evidence pertaining to tendency and coincidence. A number of issues have been raised concerning the operation of ss 97, 98, and 101 and the notice requirement (s 99). Particular attention is paid to whether, for criminal trials, s 101 should be replaced by a provision which relies upon 'the interests of justice' as the test for admissibility. The Commissions conclude that this is not an option that should be adopted.

1.47 Chapter 11 discusses the credibility rule and exceptions to the credibility rule. 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, including the articulation of the rule in s 102.

1.48 Chapter 12 focuses on selected aspects of the identification evidence provisions of the uniform Evidence Acts, including: the definition of identification evidence and whether it covers DNA evidence and exculpatory evidence; identification using pictures kept for the use of police officers ('picture identification evidence'); and directions to the jury regarding identification evidence.

1.49 Chapter 13 deals with privilege. Proposed amendments to the client legal privilege sections of the uniform Evidence Acts are discussed. The aim is to clarify unclear terms or, in some cases, align the Acts with developments at common law which are supported by the Commissions. The chapter also looks at the confidential communications, sexual assault communications and medical communications privileges available under the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) and discusses whether one of these models should be adopted by the *Evidence Act 1995* (Cth). Criticisms of the certification process available under the sections dealing with the privilege against self-incrimination are analysed. Finally, the chapter considers submissions received regarding the three types of evidence which may be excluded in the public interest.

1.50 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. Chapter 14 examines how these sections are operating in practice and how any concerns about their operation should be addressed, whether through amendment of the uniform Evidence Acts or otherwise.

Chapter 15–18: Other topics

1.51 Chapter 15 considers judicial notice, an area of the legislation that largely mirrors the common law, and discusses whether this concept has raised any concerns in practice. Chapter 16 discusses comments, warnings and directions to the jury, with particular emphasis on comments on the failure of the accused to give evidence,

inferences from the absence of evidence, warnings about unreliable evidence and warnings in respect of children's evidence.

1.52 Chapter 17 discusses two issues concerning the evidence of Aboriginal or Torres Strait Islander (ATSI) witnesses. The discussion focuses on whether the uniform Evidence Acts should be amended to include a provision dealing specifically with the admissibility of evidence of traditional laws and customs. The chapter also considers whether there should be a privilege with respect to evidence that, if disclosed, would render an ATSI witness liable to punishment under traditional laws and customs.

1.53 Chapter 18 considers the relationship between the uniform Evidence Acts and other legislation, and in particular examines whether there are concerns that significant areas of evidence law are dealt with in other legislation. The chapter looks at particular topics including rape shield laws, child witnesses and family law proceedings.

Process of reform

ALRC Advisory Committee

1.54 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.[26]

1.55 The Advisory Committee met for the first time on 16 September 2004, and again on 26 May 2005. It will meet again as required during the course of the Inquiry to provide general advice and assistance to the ALRC. The Committee has particular value in helping to identify the key issues for Inquiry, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee has assisted with the development of the reform proposals and questions contained in this paper, and will assist with the development of recommendations for reform contained in the final Report. However, ultimate responsibility for the proposals contained in this paper, and for the recommendations in the final Report, remains with the Commissioners of the ALRC, the NSWLRC, and the VLRC.

NSWLRC and VLRC Divisions

1.56 As noted above, this Discussion Paper is a joint effort of the ALRC, the NSWLRC and the VLRC. The Commissions held a workshop in May 2005 to discuss and finalise the proposals for reform. Representatives of the QLRC and the TLRI also participated in the workshop. The Divisions of the NSWLRC and the VLRC, part of the internal approval process of the NSW and Victorian Commissions, also had input into the development of the reform proposals and questions contained in this paper.

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

Community consultation

1.57 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.[27] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.[28] This is similarly the case with the NSWLRC and the VLRC.

1.58 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 and hence interest has been expressed mainly by legal practitioners, the judiciary and legal academics.

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

1.60 In releasing the Terms of Reference for the Inquiry, the Australian Government asked the ALRC to consult with the other members of the uniform Evidence Acts 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.

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

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

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

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

Participating in the Inquiry

1.63 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, NSWLRC or the VLRC or by applying online at <www.alrc.gov.au>.

1.64 Secondly, individuals and organisations may make written submissions to the ALRC, NSWLRC or the VLRC. 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 Commissions also receive confidential submissions. Details about making a submission may be found at the front of this Discussion Paper.

1.65 Thirdly, the Commissions maintain an active program of direct consultation with stakeholders and other interested parties. The primary responsibility for conducting consultations has been delegated by the Commissions to the ALRC, although the VLRC is also conducting consultations of particular relevance to the VLRC's Terms of Reference. The ALRC is based in Sydney, but in recognition of the national character of the ALRC, consultations have been conducted throughout Australia. Consultations on the proposals put forward in this Discussion Paper will also be conducted. Any individual or organisation with an interest in meeting with the Commissions in relation to the proposals raised in this Discussion Paper is encouraged to contact the ALRC.

Timeframe for the Inquiry

1.66 Two community consultation papers will be produced prior to issuing the final Report. The first, IP 28, was released in December 2004. The second is this Discussion Paper.

1.67 IP 28 identified the main issues relevant to the Inquiry, provided some background information, and encouraged informed public participation. An electronic copy of IP 28 is available on the ALRC website at <www.alrc.gov.au>. IP 28 made assumptions about the likely breadth of the Inquiry.[29] However, this was not meant to inhibit full and open discussion of the issue and policy choices. Issues not raised in IP 28 have arisen and are dealt with in this Discussion Paper, including certain questions relating to the unsworn testimony of children, the proposal relating to

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

evidence of ATSI traditional laws and customs and the proposal relating to the definition of 'de facto spouse'.[30]

1.68 This Discussion Paper contains a more detailed treatment of the issues and indicates the Commissions' current thinking in the form of specific reform proposals and focused questions. The proposals and questions are put forward for critical examination and to provide a focus for discussion.

1.69 The ALRC and NSWLRC are each due to present a final Report, containing final recommendations, to their respective Attorneys-General by 5 December 2005. It is planned that the ALRC, NSWLRC and VLRC will produce a joint final Report by this date. Once tabled in Parliament, the Report becomes a public document.[31] The final Report will not be a self-executing document—law reform bodies provide advice and recommendations about the best way to proceed, but implementation is a matter for others.[32]

In order to be considered for use in the **final Report**, submissions addressing the questions and proposals in this Discussion Paper must reach the Commissions by **Friday 16 September 2005**. Details about how to make a submission are set out at the front of this publication.

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

1.71 While the Commissions have not been asked to produce draft legislation in this Inquiry, some proposals in this Discussion Paper indicate the precise nature of the desired legislative change. To assist those charged with the responsibility of implementing the recommendations contained in the final Report, and to promote informed discussion, a consultant was retained to draft some specific proposals for legislative amendment. These proposals are set out for review and comment in Appendix 1 to this Discussion Paper.

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30 See Ch 4 in relation to unsworn testimony and the definition of de facto spouse, and Ch 17 in relation to evidence of ATSI traditional laws and customs.

31 The Attorney-General of Australia must table a Report received from the ALRC within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23. See also *Law Reform Commission Act 1967* (NSW) s 13; *Victorian Law Reform Commission Act 2000* (Vic) s 21.

32 However, the ALRC has a strong record of having its advice followed. About 57% of the ALRC's previous reports have been fully or substantially implemented, about 29% of reports have been partially implemented, 3% of reports are under consideration and 11% 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.[33] 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)[34] and some provisions have a wider reach.[35] In addition, New South Wales, Tasmania and Norfolk

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

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

35 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.

Island have passed mirror legislation.[36] These statutes are substantially the same as the Commonwealth legislation but not identical.[37] In New South Wales and Tasmania, state courts exercising federal or state jurisdiction and some tribunals apply the law found in the mirror legislation.

2.2 While harmonisation of the laws of evidence in Australia has not yet occurred, there are promising signs that non-uniform Evidence Act jurisdictions are moving towards entry into the uniform Evidence Act regime. The recommendations of the reports of the previous ALRC evidence inquiry[38] and the provisions of the uniform Evidence Acts have been considered by various bodies, each of which have recommended enactment.

- Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia Legislative Assembly) *Evidence Law*, 18th Report in the 34th Parliament (1996).
- Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in Western Australia Final Report, Project 92 (1999).
- The Victorian Parliament Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1958* (1996).
- The Victorian Bar Council and the Law Institute of Victoria jointly in November 2003.[39]
- The VLRC reports on defences to homicide and sexual offences.[40]

2.3 In Victoria, the VLRC has stated:

> Given our terms of reference [in relation to the Evidence Act Review], the VLRC's view is that it should not explore whether legislation based on the UEA should be introduced in Victoria. A detailed discussion of the reasons for changing the laws of evidence can be found in the original ALRC reports. … While those reports focus on

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

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

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

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

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

> federal and territory courts, similar issues arise and similar advantages would flow from the adoption of a comprehensive uniform legislative approach in Victoria.[41]

2.4 Further, while the Terms of Reference relating to this Inquiry given to the Queensland Law Reform Commission (QLRC) are not as definitive on the desirability of implementing the uniform Evidence Acts, they highlight in the preamble the 'desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia'. This, coupled with the fact that both the VLRC and the QLRC, and more recently the NTLRC and the WALRC, are involved in this Inquiry, augers well for continued movement towards uniformity.

2.5 As noted in Chapter 1, for the purposes of this Discussion 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.

Relationship with common law, equity and other statutes

2.6 The extent to which the uniform Evidence Acts operate as a code is an issue which has attracted some discussion.[42] It is uncontested that the uniform Evidence Acts in their entirety are not a code of the law of evidence. This would have required an express intention by the ALRC to develop a code and by the relevant legislatures to enact one.[43] The New South Wales Attorney General, in his second reading speech, stated: 'it should be noted that, while the bill codifies many aspects of the law of evidence, it is not intended to operate as an exhaustive code'.[44] For the uniform Evidence Acts to do so would have required a significantly different statutory scheme; one which explicitly excluded the operation of evidentiary rules and principles contained in other bodies of law.

2.7 The New South Wales, Tasmanian and Norfolk Island Evidence Acts provide that the legislation does not affect the operation of an evidentiary principle or rule of the

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41 Victorian Law Reform Commission, *Evidence Uniformity: Information Paper* (2005) Victorian Law Reform Commission, 4.

42 See *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* (1995) 62 FCR 289, 301; *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 349; *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351, 392; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 651–654; *Heeng Ung* [2000] NSWCCA 195, 353; *Workcover Authority of New South Wales v Tsougranis* [2002] NSWIRComm 282, [33]–[40]; *EI Dupont de Nemours & Co v Imperial Chemical Industries* [2002] FCA 230, [46].

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

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

common law or equity in proceedings to which the legislation applies, except in so far as the legislation provides otherwise expressly or by necessary intendment.[45] Without limiting these provisions, the New South Wales, Tasmanian and Norfolk Island Evidence Acts also provide that they do not affect the operation of a legal or evidential presumption that is consistent with the legislation.[46] While the Commonwealth Act contains a version of the latter provision,[47] it makes no provision for the operation of the rules and principles of evidence developed at common law or in equity. However, so far as the provisions of the Commonwealth Act are not applicable to particular proceedings, are not sufficient to carry them into effect, or are not appropriate to provide adequate remedies, s 80 of the *Judiciary Act 1903* (Cth) will result in the application of the common law as modified by the statute law of the state or territory in which the court is exercising jurisdiction.

2.8 The uniform Evidence Acts do, however, exclude the operation of other laws regarding the admissibility of evidence and the competence and compellability of witnesses.[48] As a consequence, there as has been some judicial discussion as to whether Chapter 3 of the uniform Evidence Acts functions as a code. Stephen Odgers SC has argued that Chapter 3 'constitutes a code for the rules relating to the admissibility of evidence, in the sense that common law rules relating to the admissibility of evidence are abrogated.'[49] Section 56 has been cited by a number of judges as the 'pivotal provision'[50] regarding the operation of the uniform Evidence Acts to admit or exclude evidence. On this basis, Branson J suggested in *Quick v Stoland Pty Ltd* that 'Chapter 3 is designed to deal exhaustively with this topic and, in a practical sense, constitutes a code relating to the admissibility of evidence in proceedings to which the Act relates.'[51] The issue has not been judicially resolved, with the discussion being limited to comments in obiter dicta.

2.9 The significance of whether the uniform Evidence Acts are a code has emerged in the context of the broader discussion regarding the relationship between the uniform Evidence Acts and the common law. If the admissibility provisions do operate as a code, this will significantly influence the way in which common law principles can be used in the application of the uniform Evidence Acts.[52] In the light of this, a consensus has emerged that the important issue is not whether Chapter 3 is or is not technically a code, but the extent to which all issues of admissibility are to be governed by the

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

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

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

48 Uniform Evidence Acts ss 12, 56(1) ('except as otherwise provided by this Act').

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

50 *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 349; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 652; *EI Dupont de Nemours & Co v Imperial Chemical Industries* [2002] FCA 230, [46].

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

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

statutory scheme.[53] There is judicial concern that statements as to whether the uniform Evidence Acts are not a code might 'be used as a means to retain aspects of the common law of evidence which are inconsistent with the operation of the Act.'[54]

2.10 An approach that abandons any technical attempt to characterise the admissibility provisions of the uniform Evidence Acts with respect to codification is preferable. The jurisprudence regarding legal codes and codification reveals a complexity not easily amenable to such an attempt.[55] Reflecting, however, on the nature of codified legislation can be useful. This is because the uniform Evidence Acts do embody some of the aspects of truly codified legislation, as implemented in common law jurisdictions.[56] When considering the codification of New Zealand's evidence law, the New Zealand Law Commission identified the essential elements of a legal code:

> A true code may be defined as a legislative enactment which is comprehensive, systematic in its structure, pre-emptive and which states the principles to be applied. It is pre-emptive in that it displaces all other law in its subject area, save only that which the code excepts. It is systematic in that all of its parts form a coherent and integrated body. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be applied in a relatively self-sufficient way. It is, however, the final element which particularly distinguishes a code from other legislative enactments: the purpose of a code, as opposed to more limited statutory enactments, is to establish a legal order based on principles.[57]

2.11 A primary purpose of the ALRC's original evidence inquiry was to review the common law and develop a principled approach to evidence law. In some areas this resulted in substantial changes to the common law; in other areas the common law remains an important reference assisting application of the uniform Evidence Acts. The approach taken by the High Court of Australia in *Papakosmas v The Queen*[58] and the New South Wales Supreme Court in *R v Ellis*[59] reflects an approach guided by the principles articulated in the uniform Evidence Acts. Stated simply, Chapter 3 of the Act governs admissibility issues. Reference to the common law can facilitate an understanding of underlying concepts and helps to identify the changes brought about by Chapter 3.

2.12 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

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53 *EI Dupont de Nemours & Co v Imperial Chemical Industries* [2002] FCA 230, [46].

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

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

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

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

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

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

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.[60] 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.[61]

The application of the uniform Evidence Acts in federal jurisdiction

2.13 Except for the few provisions that apply to proceedings in an Australian court,[62] the Commonwealth Act applies only to proceedings in an Australian Capital Territory court or a federal court,[63] except where the federal court is hearing an appeal from a state or Northern Territory court.[64] The Act does not, therefore, apply to state courts even when such courts are exercising federal jurisdiction.

2.14 However, where a state court is exercising federal jurisdiction in New South Wales or Tasmania, the provisions of the mirror legislation in those states will apply to those proceedings by reason of s 79 of the *Judiciary Act 1903* (Cth). Yet both the New South Wales and Tasmanian Evidence Acts purport to apply of their own force to proceedings in, respectively, New South Wales and Tasmanian courts when those courts are exercising federal jurisdiction.[65] To this extent, the legislation is plainly invalid. It is not within the power of a state parliament to make laws governing the exercise of federal jurisdiction, including the exercise of that jurisdiction by the courts of that state.[66] Indeed, even if it were within power, such state law would be inoperative through constitutional inconsistency with s 79 of the *Judiciary Act 1903* (Cth). The Commissions propose that the New South Wales Act should be amended to reflect this position.

Proposal 2–1 The definition of 'NSW court' in the Dictionary to the *Evidence Act 1995* (NSW) should be amended to delete the parenthetical words 'including such a court exercising federal jurisdiction'.

60 *Corporations Act 2001* (Cth) s 1316A; *Australian Securities and Investments Commission Act 2001* (Cth) s 68.
61 See Ch 18.
62 *Evidence Act 1995* (Cth) s 5.
63 Ibid s 4(1).
64 Ibid s 4(5)(a) and (b), subject to s 4(5A) which deals with appeals to the Family Court of Australia from a state or territory court of summary jurisdiction.
65 *Evidence Act 1995* (NSW) s 4(1), read with definition of 'NSW court' in the Dictionary; *Evidence Act 2001* (Tas) s 4(1), read with the definition of 'Tasmanian court' in s 3(1).
66 Consider *Commissioner of Stamp Duties v Owens (No 2)* (1953) 88 CLR 168, 169; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [59].

The uniform Evidence Acts

2.15 The uniform Evidence Acts extend to all proceedings in a relevant court,[67] 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.[68] In relation to privilege, other than religious confession privilege, the Acts do not extend to pre-trial matters. This is an important issue for this Inquiry, and is discussed in detail in Chapter 13.

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

> (a) … if the court directs that the law of evidence applies in the proceeding; and
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> (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.[69]

2.17 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.[70]

2.18 As discussed in Chapter 10, 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 case of *R v Ellis*[71] raised issues about the common law rules on tendency and coincidence evidence in the light of the uniform Evidence Acts. Spigelman CJ of 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.[72]

In rescinding special leave to appeal in *Ellis*, the High Court stated, 'we would add that we agree with the decision of Chief Justice Spigelman on the construction of the *Evidence Act 1995* (NSW)'.[73]

2.19 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

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67 The term 'proceeding', as used in s 4, is discussed in detail below.
68 Uniform Evidence Acts s 4(1). However, Pt 3.6 does not apply to proceedings in relation to bail or sentencing.
69 Ibid s 4(2).
70 For more information see the ALRC's website, <www.alrc.gov.au>.
71 *R v Ellis* (2003) 58 NSWLR 700.
72 Ibid, [74].
73 *Ellis v The Queen* [2004] HCA Trans 488.

adopted by the ALRC in its earlier inquiry into the laws of evidence.[74] In its Interim Report (ALRC 26), the ALRC stated that:

> the laws of evidence should be classified as part of adjectival law—the body of principles and rules which deal with the means by which 'people's rights and duties may be declared, vindicated or enforced, or remedies for their infraction secured'.[75]

2.20 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 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.[76]

2.21 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,[77] issue estoppel, *res judicata*, the parol evidence rule and the court's obligation to ensure a fair trial,[78] are not found in the statute.

2.22 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.[79] Accordingly, issues concerning the adducing of evidence in relation to both witnesses and documents are dealt with in Chapter 2; Chapter 3, which is the central part of the statute, deals with the admissibility of evidence; and issues of proof follow in Chapter 4. A flow chart on the admission of evidence precedes s 55 and gives guidance on whether evidence is admissible.

2.23 Odgers notes that the Act introduces 'significant reforms' to the common law.[80] For example, the 'original document' rule is abolished in favour of a more flexible

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74 See further Ch 1.
75 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [31].
76 Ibid, [46].
77 Part 4.1 of the uniform Evidence Acts does contain provisions relating to the standard of proof required in civil and criminal proceedings.
78 The court's obligation to ensure a fair trial is discussed in detail below.
79 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).
80 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.60].

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

Evidentiary provisions outside the uniform Evidence Acts

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

2.25 As discussed in Chapter 18, the uniform Evidence Acts work in conjunction with evidentiary provisions contained in a range of other Commonwealth, state and territory legislation. A central concern of the Inquiry is to consider whether, in view of the desirability of clarity, effectiveness and uniformity in evidence law, some of these other evidentiary provisions should be incorporated into the uniform Evidence Acts and, if so, in what form.

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

2.27 This policy position is based on the propositions that: (i) uniformity in evidence laws should be pursued unless there is good reason to the contrary; (ii) the uniform

Evidence Acts should be a comprehensive statement of the laws of evidence (the evidence law 'pocket bible'); and (iii) the uniform Acts should be of general application to all criminal and civil proceedings. Each of these propositions is discussed briefly below.

Uniformity in evidence laws should be pursued

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

2.29 While the passage of the *Evidence Act 1995* (Cth) had the effect of achieving uniformity of evidence law in all federal courts, in non-uniform Evidence Act jurisdictions different evidence laws operate in the state and territory courts. This is confusing and costly to litigants, and requires legal practitioners to master two different evidence regimes. Clearly this is an undesirable state of affairs.

2.30 While the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were in most respects identical when enacted they now differ from each other in significant ways. The Tasmanian and Norfolk Island Acts also have differences, both from each other and from the Commonwealth and New South Wales legislation. These differences are discussed, where relevant, throughout this Discussion Paper.

2.31 The uniform Evidence Acts are more correctly described as 'mirror' legislation rather than as uniform legislation. Mirror legislation refers to a situation in which a draft statute is enacted by separate legislation in each participating jurisdiction. This was what occurred when the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) were enacted. While this mechanism produces virtual uniformity at the outset, this often erodes over time as legislators exercise their independent political judgement and make piecemeal changes.[81]

2.32 In making proposals in relation to whether certain categories of evidentiary provision should be incorporated into the uniform Evidence Acts, the Commissions have been mindful of the desirability of maintaining uniformity. Arguably, the more non-uniform provisions that are included, the less the incentive to maintain uniformity in the existing provisions.

2.33 This consideration weighs against recommending the incorporation of categories of evidentiary provision which differ greatly from jurisdiction to jurisdiction or that are subject to political influences that make maintaining uniformity difficult. The time and resources required to develop uniform provisions is another factor dictating against the

81 B Opeskin, 'The Architecture of Public Health Reform' (2002) 22(2) *Melbourne University Law Review* 337, 349.

Inquiry recommending the incorporation of some categories of evidentiary provision in the uniform Evidence Acts.

The uniform Evidence Acts should be comprehensive

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

2.35 To some extent, this proposition is in tension with the proposition that the uniformity of the Evidence Acts should be maintained. The uniform Evidence Acts could be made more comprehensive by including all manner of evidentiary provision, even where these are not uniform across jurisdictions. Suggestions have been made that each uniform Evidence Act could include a separate part containing evidentiary provisions unique to the particular jurisdiction. Alternatively, the jurisdiction-specific provisions could be incorporated into the relevant part of the Act, maintaining its overall structure.

2.36 These suggestions found little support in submissions and consultations. In the Commissions' view the 'pocket bible' approach should not be pursued at the cost of reduced uniformity.[82]

The uniform Evidence Acts should be of general application

2.37 The uniform Acts should be of general application to all criminal and civil proceedings. The corollary is that the uniform Evidence Acts should generally *not* include provisions of application only to specific offences or categories of witness.[83]

2.38 These propositions were widely supported in submissions and consultations. The approach has the advantage of making it easier to maintain the uniformity of the uniform Evidence Acts. Further, in areas such as family law proceedings and child witnesses, evidentiary provisions are closely linked with particular types of proceedings or associated procedural provisions, and it is most convenient for these to be co-located. Provided a consistent approach is taken to the location of offence-specific evidentiary provisions, the accessibility of evidence law should not be materially affected.

2.39 However, the balance of convenience and policy principle will differ from case to case. For example, while the Commissions have rejected the idea of introducing a hearsay exception directed to children's evidence into the uniform Evidence Acts, the

82 See also P Greenwood, *Consultation*, Sydney, 11 March 2005.

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

introduction of a provision dealing with expert evidence on the credibility or reliability of children's evidence is proposed. [84]

Policy framework

General

2.40 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 contemporary society.[85]

2.41 The ALRC's final Report (ALRC 38) stated that the inquiry was predicated on the continuation of the trial system.[86] 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 noted the difficulty of establishing an appropriate level of predictability.

  > The more detailed and precise the rule, the more difficult it may be to understand it fully and the more rigid it is likely to be in its application. The more general the language used the more flexible the rule will be but the less predictable will be its application. This issue is central to the approach to be taken in reform proposals. The approach taken in the interim proposals was to attempt to draft rules as the first option. Where this was not possible, discretions were formulated.[87]

- *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 is discussed in detail later in this chapter.

2.42 ALRC 38 was also predicated on the continuation of the laws of evidence in courts.[88] This is by way of contrast with many administrative and quasi-judicial

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84 This is, in part, because the latter reform is not seen as constituting any major departure from the existing law, but as highlighting the admissibility of a particular type of expert opinion evidence in order to bring about a change in practice: see Ch 8.

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

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

87 Ibid.

88 Ibid, [29].

tribunals that are not bound by the rules of evidence. In 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'.[89] 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'.[90] This Inquiry has not departed from this underlying assumption, nor does it consider that its Terms of Reference permit it to do so.

2.43 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'.[91] 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.[92]

2.44 ALRC 26 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.[93]

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

- *Accusatorial system*. An accused is presumed innocent until proved guilty and has no obligation to assist the Crown.
- *Minimising the risk of wrongful convictions*. Traditionally this reflects the view that it is in the interest of the community to minimise the risk of conviction of the innocent even if it may result, from time to time, in the acquittal of the guilty.
- *Definition of central question*. The central question is whether the Crown has proved the guilt of the accused beyond reasonable doubt. The purpose of the

89 Ibid, [29].
90 Ibid, [29], fn 10.
91 Ibid, [33].
92 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [34].
93 Ibid, [35].

criminal trial is to be able to say with confidence if there is a guilty verdict that the accused committed the offence charged with the requisite *mens rea*.

- *Recognition of rights of individual*. Convictions are not to be obtained at any cost and accused persons have rights consistent with recognition of their personal dignity and integrity and with the overall fairness of society.
- *Assisting 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'.[94]

2.46 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.[95]

2.47 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.[96] 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'.[97]

2.48 ALRC 38 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 avoid such results.[98]

2.49 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.[99] 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

94 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [35].
95 Ibid, [36].
96 Ibid, [37].
97 Ibid, [38].
98 Ibid, [40].
99 Ibid, [41].

some of its original proposals: some that might favour the prosecution;[100] and some that might favour the accused.[101]

2.50 This debate has not been resolved. In the consultations and submissions on IP 28, concerns were expressed that the uniform Evidence Acts may have shifted the balance in favour of the prosecution in criminal cases.[102] The basis of this criticism revolved largely around the operation of ss 38[103] and 60.[104] Others suggested that, while the uniform Evidence Acts have had a significant impact on the way criminal trials are conducted—and in particular on the prosecution's duty to call relevant witnesses—this change has not shifted the balance in favour of the prosecution.[105] These issues are discussed in detail in later chapters of this Discussion Paper.

2.51 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'.[106]
- *Civil and criminal trials*. These differ in nature and purpose and this should be taken into account. In regard to the admission of evidence against an accused, a more stringent approach should be taken. The differences were also reflected in areas such as: compellability of an accused, cross-examination of an accused, and in the exercise of a court's power in matters such as the granting of leave.
- *Predictability*. The use of judicial discretions should be minimised, particularly in relation to the admission of evidence, and rules should generally be preferred over discretions.
- *Cost, time and other concerns*. Clarity and simplicity are the objectives.[107]

Evidence, jury and non-jury trials

2.52 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. This

100 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].
101 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].
102 See, eg, S Cox, *Consultation*, Darwin, 31 March 2005; Law Council of Australia, *Submission E 32*, 4 March 2005, [21].
103 Discussed in Ch 5.
104 Discussed in Ch 7.
105 T Game, *Consultation*, Sydney, 25 February 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.
106 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [46].
107 Ibid, [46].

has been discussed above. While juries are used primarily in criminal proceedings for serious indictable offences,[108] they are not the exclusive province of criminal trials. For example, juries are used in defamation cases in New South Wales, and in some civil trials in Victoria.

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

2.54 One of the purposes served by the laws of evidence is to keep from juries evidence that may be misused by them.[109] In ALRC 26, the ALRC discussed in some detail the view that the laws of evidence developed from a mistrust of juries' ability to assess properly 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 to limit severely, the operation of the rules of evidence in Commonwealth and territory courts, as juries are seldom used.[110]

2.55 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.

2.56 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.[111]

2.57 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.[112]

2.58 The ALRC noted that, regardless of whether the trial is with a jury, 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

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108 New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, LRC 48 (1986), [2.10].
109 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [49].
110 Ibid, [50].
111 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [28].
112 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.

of which have any connection with the quality of the tribunal—were said to warrant control over unreliable and dangerous evidence.[113]

Rules of evidence in non-jury trials

2.59 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[114] are 'premised on the belief that the prejudicial effect of certain types of evidence is consistent throughout the criminal justice system'.[115] In fact, it is said that 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 the prejudice does not operate in a particular situation?[116]

2.60 The exclusionary provisions of the uniform Evidence Acts are not directed 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. This is discussed in detail in Chapter 14.

2.61 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.[117] However, the common law discretion is only available in relation to prosecution evidence in criminal proceedings.[118] 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'.[119]

2.62 On one view, there is little point, in non-jury trials—whether civil or criminal[120]—in a judge, having heard evidence that he or she may lawfully consider, determining that the evidence should then be excluded on the grounds that he or she

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

114 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.

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

116 Ibid, 15.

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

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

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

120 Ibid, [2.29].

may be prejudiced by it.[121] However, in effect, this is the consequence of the application of 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?

2.63 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.

2.64 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.[122] 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'.[123]

Submissions and consultations

2.65 IP 28 asked whether the uniform Evidence Acts should be amended to allow more differentiation between the rules of evidence applying in jury and non-jury trials.

2.66 There is general support for the approach in the uniform Evidence Acts of placing primary importance on the nature of the proceeding, rather than on whether the case was being tried before a jury.[124] The Law Council of Australia (Law Council) notes that:

> In considering evidential rules a fundamental distinction needs to be drawn between civil and criminal proceedings. Whilst civil process is ultimately concerned to provide a forum for the settlement of disputation between citizens, criminal process involves accusation by the state against citizens for the purpose of punishment. It is a foundational principle of criminal process that it should be designed to avoid the wrongful conviction of the innocent and this requires evidential rules protecting an innocent accused from this risk.[125]

2.67 The Law Council further notes that 'this foundational principle applies whether an accused is tried before a jury or before a judge sitting alone and the Council is of the view that generally the rules of evidence should be the same at both forms of trial'.[126]

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121 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.

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

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

124 Law Council of Australia, *Submission E 32,* 4 March 2005, [13]; Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005, [2-1].

125 Law Council of Australia, *Submission E 32,* 4 March 2005, [13].

126 Ibid, [14].

2.68 One senior practitioner considers that specific provisions, for example s 60 relating to the admission of hearsay evidence, and the credibility provisions, could be limited to jury trials.[127] This view has not received general support. For example, one judicial officer notes:

> I think it would be highly undesirable to distinguish between jury and non-jury trials for the purposes of the rules of evidence. One of the great benefits of the Act is that there are uniform rules which, in my submission, operate fairly and efficiently in both criminal and civil trials. It would be confusing, and possibly a source of unfairness, to make more distinctions than are absolutely necessary.[128]

2.69 It is suggested that, even in non-jury trials, the discipline imposed by provisions such as the discretionary exclusions in ss 135 and 136 has a beneficial effect on judicial decision making.[129] The Law Council notes that:

> although it may appear unnecessary for judges sitting alone to exercise discretions to exclude prejudicial evidence, the existence of such discretions serves to emphasize emphatically to the judge not to act upon such evidence …[130]

The Commissions' view

2.70 ALRC 38 noted that, on the issue of separate rules designed for jury and non-jury trials:

> The Interim Report [ALRC 26] concluded that, on the available evidence, it should not be assumed that there is necessarily such a difference between the abilities of judicial officers and jurors that different rules should be developed for jury and non-jury trials. Rather, for the purposes of the reference, the distinction between civil and criminal trials was seen as the more important distinction. … The emphasis in the Interim Report on distinguishing between civil and criminal trials rather than jury and non-jury trial, has received general support.[131]

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

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127 T Game, *Consultation*, Sydney, 25 February 2005.

128 Confidential, *Submission E 31*, 22 February 2005, 2. See also New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 3.

129 J Garbett, Sydney, 28 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005, [14].

130 Law Council of Australia, *Submission E 32*, 4 March 2005, 14.

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

Application of the *Evidence Act 1995* (Cth)

2.72 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.[132] 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.[133] Provisions dealing with the full faith and credit to be given to documents properly authenticated;[134] the swearing of affidavits for use in Australian courts exercising federal jurisdiction or similar jurisdiction;[135] and the abolition of the privilege against self-incrimination for bodies corporate[136] also apply to proceedings in all Australian courts. Reliance is placed on Commonwealth powers under the *Australian Constitution* that clearly support a wider application, for example, s 51(xxv) (recognition of state laws and judicial proceedings) and s 118 (full faith and credit).

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

2.74 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. 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.[137]

2.75 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

132 See *Evidence Act 1995* (Cth) Dictionary definition of 'Australian court'.
133 Ibid s 5.
134 Ibid s 185.
135 Ibid s 186.
136 Ibid s 187.
137 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [21].

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.[138]

2.76 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.[139] 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).[140]

2.77 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.[141]

2.78 Such difficulties were a major factor contributing to the view, expressed in ALRC 92, that there should be no general policy of extending federal law, including matters of practice and procedure, to all courts exercising federal jurisdiction.[142]

Submissions and consultations

2.79 IP 28 asks whether the application of the *Evidence Act 1995* (Cth) should be extended to all proceedings in all Australian courts exercising federal jurisdiction.[143] While not unanimous,[144] the general consensus is that such an amendment is

138 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].

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

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

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

142 Ibid, [2.89].

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

144 Australian Customs Service, *Submission E 24*, 21 February 2005, 1; Confidential, *Submission E 31*, 22 February 2005, 2.

undesirable.[145] It is suggested that such an extension may give rise to jurisdictional arguments that complicate and protract litigation,[146] result in the possibility that two evidentiary regimes might apply in cases where state and federal matters are heard together,[147] and create uncertainty as to the scope of 'federal jurisdiction', the resolution of which may result in complex collateral issues being raised in the litigation.

The Commissions' view

2.80 The best path to uniformity is through the participation of all states and territories in the uniform Evidence Acts scheme, rather than by mandating the application of the *Evidence Act 1995* (Cth) to all proceedings in all Australian courts exercising federal jurisdiction. The implementation of uniform evidence legislation throughout Australia has received widespread, although not unanimous,[148] support.[149]

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

Scope of the uniform Evidence Acts

2.82 Chapter 1 of the uniform Evidence Acts deals with a number of preliminary matters.[150] Part 1.1 deals with formal matters, including the short title (s 1), commencement (s 2), and definitions (s 3). In relation to the definition section, the *Evidence Act 2001* (Tas) defines the terms used in the Act in s 3, whereas the Commonwealth, New South Wales and Norfolk Island Acts define the terms in a Dictionary at the end of the Acts.

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145 See, eg, Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005.

146 Law Council of Australia, *Submission E 32*, 4 March 2005, [16]. The Law Council indicated that it may make a further submission on this point.

147 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005, 2.

148 P Holdenson, *Consultation*, Melbourne, 17 March 2005; Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Victoria Legal Aid, *Submission E 22*, 18 February 2005, 3; New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 3.

149 Law Council of Australia, *Submission E 32*, 4 March 2005, 50; Commercial Bar Association of the Victorian Bar, *Submission E 37*, March 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005; M Johnson, *Consultation*, Darwin, 30 March 2005; J McKechnie, *Consultation*, Perth, 9 May 2005; W Martin, *Consultation*, Perth, 9 May 2005; Law Reform Commission of Western Australia, *Consultation*, Perth, 9 May 2005; S Tilmouth, *Consultation*, Adelaide, 11 May 2005.

150 Ch 1 Pt 1 and Ch 1 Pt 2 in the *Evidence Act 2001* (Tas).

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

Section 4—Courts and proceedings to which the Acts apply

2.84 A question arises as to the meaning of the phrase 'applies in relation to all proceedings' in s 4(1) of the uniform Evidence Acts.[151] Dealing first with the meaning of the word 'proceeding', in the context of the *Evidence Act 1995* (NSW), Giles CJ Comm D (as his Honour then was) noted in *Sved v Council of the Municipality of Woollahra*:[152]

> Proceeding is not defined in the Evidence (Consequential and Other Provisions) Act, or in the [*Evidence Act 1995* (NSW)]. The word 'proceeding' may or may not, depending upon its context and purpose, refer to a step in the action … and in other contexts has been held to refer to the action as whole … and to a step in the action … Neither the report of the [Australian] Law Reform Commission (Report No 38, 1987) nor the report of the New South Wales Law Reform Commission (LRC 56, 1988) sheds light on the matter.[153]

2.85 His Honour held that 'proceedings' may consist of a step in an action.[154] The Family Court of Australia applied a similar interpretation of s 4(1) of the *Evidence Act 1995* (Cth) in *Deputy Commissioner of Taxation v McCauley*.[155]

2.86 Having established that 'proceeding' for the purpose of s 4(1) of the uniform Evidence Acts may consist of a step in the action, the question arises as to whether any step will suffice, or whether there are limitations on the types of steps that will qualify. Such a limitation was suggested in *Griffin v Pantzer*.[156] When addressing the application of s 128 of the *Evidence Act 1995* (Cth) to an examination under s 81 of the *Bankruptcy Act 1996* (Cth), Allsop J, on behalf of the Full Federal Court, stated:

> The word 'proceedings' is capable of wide and flexible application. In the Evidence Act, however, the proceedings contemplated are those conducted by a court, or by a person or by a body who or which is required to apply the laws of evidence. The whole Evidence Act is concerned with the regulation of the rules of evidence in proceedings in which there are parties, and in which there are witnesses.[157]

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

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

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

154 Ibid, 8.

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

156 *Griffin v Pantzer* (2004) 207 ALR 169.

157 Ibid, [198].

2.87 His Honour went on to note that:

> It is not easy to see how an examination under s 81 is such a proceeding. It is not between parties. It is not the resolution or agitation of a *lis* at which evidence is adduced under the rules of evidence. It does not have parties or witnesses properly so-called. It is an interrogation—a fact-finding exercise of the kind discussed by Lord Hanworth MR in *Re Paget* [[1927] 2 Ch 85].[158]

2.88 In the result, the present state of the law seems to be that 'proceedings' in s 4(1) of the uniform Evidence Acts encompasses any step in a suit or action where there is an issue between parties in dispute and the suit or action involves witnesses.

2.89 While the case law has provided guidance as to the meaning of the word 'proceeding' in s 4(1), a question arises as to whether the prepositional phrase 'in relation to' as used in s 4 of the Commonwealth, New South Wales and Norfolk Island Evidence Acts means something different to the word 'to' as used in s 4 of the *Evidence Act 2001* (Tas).[159] If the answer is 'no', then to clarify the meaning of the section and promote uniformity, the phrase 'in relation to' in s 4 of the uniform Evidence Acts should be amended.

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

> The words 'in relation to' import the existence of a connexion or association between the two proceedings; or in other words that the proceedings in question must bear an appropriate relationship to completed proceedings of the requisite kind.[160]

The Commissions' view

2.91 The evidentiary rules prescribed in the uniform Evidence Acts have been held incapable of application otherwise than in the course of a hearing of a proceeding in a court.[161] Hence, there is no 'proceeding' outside of the courts identified in s 4 to which the 'proceedings' can 'relate'. The better view would appear to be that the use of the phrase 'in relation to' in s 4(1) of the Evidence Acts of the Commonwealth, New South Wales and Norfolk Island is an example of 'verbosity in prepositions',[162] and that the Tasmanian approach should be adopted.

Proposal 2–2 Section 4(1) of the Commonwealth and New South Wales Evidence Acts should be amended to delete the words 'in relation' from the phrase 'in relation to all proceedings'.

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158 Ibid, [202].

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

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

161 *Mann v Carnell* (1999) 201 CLR 1, 9; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49, 54–55.

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

Section 11—General powers of a court

2.92 Section 11 of the uniform Evidence Acts provides:

> 11(1) The general power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
>
> (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

2.93 In *Nationwide News v District Court of New South Wales*, Meagher JA referred to s 11 as being 'almost unintelligible'.[163] While inelegantly expressed, s 11(1) assumes that the general power of a court to control the conduct of proceedings before it is found elsewhere—either in legislation or at common law. This power is preserved unless the Act provides otherwise, expressly or by necessary intendment. Section 11(2) preserves the general power of a court to control an abuse of process in a proceeding.

2.94 What is not clear is the relationship between ss 11(1) and (2). Does s 11(2) provide an absolute rule, or should the test used in s 11(1) be read by implication into s 11(2)? The latter position was accepted by the New South Wales Court of Appeal in *Van Der Lee v New South Wales*.[164] In that case, certain defendants to cross-claims in the New South Wales Supreme Court moved for the stay or dismissal of those cross-claims on the ground that they were an abuse of the Court's process. At issue was whether the primary judge was correct in holding that s 131 of the *Evidence Act 1995* (NSW) rendered inadmissible on the motion before the court evidence of settlement negotiations.

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

> I think s 11(2) does have the effect that, when evidence is tendered that could be evidence of an abuse of process, albeit evidence of without prejudice settlement negotiations, the Court may receive that evidence on the voir dire; and then, if that evidence does either by itself or in combination with other evidence establish an abuse of process, the Court may rule the evidence admissible and make appropriate orders to deal with that abuse of process. In my opinion, the powers of a court with respect to abuse of process include its powers to receive evidence, and in my opinion the authorities relied on by the claimants show that, at common law, communications evidencing abuse of process will not be protected by without prejudice privilege. *I do not think that s 131 provides otherwise, either expressly or by necessary intendment* …[165]

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

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163 *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486, 497.

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

165 Ibid, [62] (emphasis added). See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.1260].

General obligation to ensure a fair trial

2.97 IP 28 asked whether s 11(2) should be amended to include a general obligation to ensure a fair trial.[166] Divergent views have been expressed. Some practitioners consider that such an amendment is unnecessary.[167] One senior judicial officer notes that the obligation to ensure a fair trial is an obligation which operates at a higher level than the rules of evidence. For example, there is no rule of evidence that says that judges should not be biased. The judge suggested that it was better to treat the Acts as providing only detailed regulation of particular areas of evidence.[168]

2.98 In contrast, it is noted in one submission that:

> Recent legislation, both Commonwealth and State, especially relating to alleged acts of terrorism and national security, have significantly restricted or curtailed traditional rights under the common law. This makes it essential that the courts have a general duty to ensure a fair trial and … s 11(2) should be amended accordingly.[169]

The Commissions' view

2.99 The court's obligation to ensure a fair trial has been described, in the context of criminal trials, as the 'central pillar of our criminal justice system'.[170] This obligation applies equally in a civil context. An attempt to reduce such a fundamental principle of substantive law to a statutory evidentiary rule may prove to be counterproductive. For example, an argument could be made that the absence of a reference to an obligation to ensure a fair trial in other sections of the Acts relieves the court of the obligation in those contexts. This, in turn, could be taken as a point on appeal.[171] The Commissions are of the view that the obligation to ensure a fair trial is adequately enshrined in the common law and that the inclusion of such an obligation in the uniform Evidence Acts would be redundant and potentially counterproductive. Hence, the Commissions do not consider that an amendment to s 11(2) to ensure a fair trial is necessary.

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166 See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–5.

167 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

168 High Court of Australia, *Consultation*, Canberra, 9 March 2005.

169 Confidential, *Submission E 31*, 22 February 2005. The New South Wales Public Defenders Office submits that 'it would be useful to give a statutory embodiment to the undoubted common law obligation to ensure a fair trial': New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 35.

170 *Dietrich v The Queen* (1992) 177 CLR 292, 298.

171 High Court of Australia, *Consultation*, Canberra, 9 March 2005.

3. Understanding the Uniform Evidence Acts

Contents

Introduction

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

3.2 Submissions and consultations conducted following the release of IP 28[172] evidenced a significant degree of confusion around certain concepts used in the uniform Evidence Acts. It is hoped that the following analysis will help to clarify the approach adopted in the Acts in relation to: evidence of tendency, coincidence, credibility and character; and the concepts of probative value, unfair prejudice and unfairness. A proposal to facilitate a better understanding of the policy underlying the uniform Evidence Acts is then discussed.

Evidence of tendency, coincidence, credibility and character

Introduction

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

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

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

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

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

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

3.6 Parts 3.6 and 3.7 apply in both civil and criminal proceedings, yet most of the issues raised to date concern the operation of those provisions in criminal proceedings. However, the fact that the provisions operate in both civil and criminal proceedings must be borne in mind when considering the issues and possible solutions discussed in Chapters 10 and 11. In particular, where a problem is unique to criminal proceedings, it may require a solution confined to such proceedings.

Problems

3.7 The law has always been concerned with the potential to overestimate the value of, and be improperly influenced by, evidence of tendency, coincidence, credibility and character. The approach of the law is supported to a considerable extent by a substantial body of psychological research, described in some detail in the Interim Report of the original ALRC evidence enquiry (ALRC 26).[173] However, this is subject to one significant qualification, discussed below.

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

173 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [793]–[800].

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

3.10 Psychological research has demonstrated that this process of attributing actions in others to stable personality dispositions is common and carries with it the danger of overestimation of the probative value of such evidence.[174] This is exacerbated by what is known as the 'halo effect'; the phenomenon that one outstanding good or bad quality will tend to colour all judgments about that person. This, of course, may result in bias against an accused person.[175] These processes are particularly troubling because the psychological research has demonstrated that evidence of character or evidence relevant to character generally has a low probative value. The law, however, must deal with such evidence.

3.11 Psychological literature has also confirmed and explained the risk of unfair prejudice flowing from evidence indicating bad character. In addition to the 'halo effect', there operates a mechanism described as the 'regret matrix'. In most trials, absolute certainty is not possible. The responsible fact finder will be concerned about making a wrong decision. The 'regret matrix' operates in a trial context so that a fact finder will be less concerned about making a wrong decision where he or she believes that the defendant has been guilty of other misconduct justifying punishment for which he or she has not been convicted. Similarly, concern about wrongly convicting an accused will be less if it is known that the person has prior convictions. The cost of an additional conviction which may be incorrect will be seen as less than if the conviction were an accused's first.[176]

3.12 In sum, the psychological research[177] shows that:

- Behaviour tends to be highly dependent on situational factors and not, as previously postulated, on personality traits. Thus the ability to predict behaviour from past behaviour depends on the similarity of the situations. (Low cross-situational consistency of behaviour).

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

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

176 R Eggleston, *Evidence, Proof and Probability* (2nd ed, 1983), 97–98.

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

- People tend to attribute the behaviour of others to enduring personality traits and underestimate the role of situational factors in determining behaviour in any given situation. (Fundamental attribution error).
- People tend to infer, from limited knowledge of a person, general personality traits which thereafter colour their perception of that person's behaviour. (The halo and reverse halo effects).
- Jurors will be less reluctant to convict an accused if they are informed of an accused's previous misconduct and/or convictions, because they feel either that the gravity of their decision is lessened or that there is some basis for punishment even if they are not convinced the accused committed the crime charged. (The regret matrix).

3.13 In a discussion in *Pfennig v The Queen*,[178] McHugh J identified similar issues in support of the exclusion of evidence of this kind, commenting additionally that such evidence creates 'undue suspicion' and 'undermines the presumption of innocence'.[179] McHugh J also commented that:

> Common assumptions about improbability of sequences are often wrong, and when the accused is associated with a sequence of deaths, injuries or losses, the jury may too readily infer that the association 'is unlikely to be innocent'.[180]

3.14 His Honour also drew attention to the potential practical disadvantages of receiving evidence of other misconduct, in particular to its implications for the length and cost of trials.[181]

3.15 In a discussion of the potential prejudicial effects of such evidence, Professor Bob Williams referred to the problem of a jury giving undue weight to the evidence and reasoning that the accused deserves to be punished. He also commented that there are other forms of prejudice or potential unfairness, such as misdirecting the focus of the jury to the question of whether the disputed similar facts have been proved, with the attendant risk that, if the jury is so satisfied, it may precipitately reach the conclusion that the offence is proven. He also referred to the danger that, where an accused is charged with a number of counts, the evidence of which is admissible in

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

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

180 *Pfennig v The Queen* (1995) 182 CLR 461, 512.

181 Ibid, 513.

respect of the others, a jury may reason that the accused must be guilty of some of them.[182]

3.16 The prejudicial effect of evidence of previous misconduct has been confirmed in research conducted by the Law Commission of England and Wales involving magistrates and mock juries.[183] In relation to mock juries it was found, among other things, that information of a previous conviction for indecent assault on a child can be particularly prejudicial whatever the offence charged and will have a significant impact on the jurors' perception of the defendant's credibility as a witness.[184] In relation to magistrates, the study concluded that:

> In general the results indicate that information about previous conviction is likely to affect magistrates' decisions despite their awareness of the dangers and their efforts to avoid bias. These findings did not offer confidence that the rules on admitting previous convictions can be safely relaxed for magistrates anymore than for juries.[185]

3.17 A review of psychological research since the original ALRC evidence inquiry and current psychology teaching confirms and, in some instances, strengthens the basis for the analysis in the ALRC reports.

3.18 Current psychology texts[186] continue to refer to the studies used in the ALRC Reports[187] which contradicted classical trait theory, finding that the correlation between individual behaviour in different situations was in fact quite low.

3.19 However, trait theory has not been wholly discredited. Personality psychologists have argued that by aggregating behaviours across situations over time, one can discern consistent personality traits which may be used to predict an aggregate of future behaviour.[188] This research does not, however, challenge the basic proposition that the behaviour of an individual on one occasion has a very low correlation to his or her behaviour on another occasion in a different situation.

3.20 Further research has sought to quantify the difference between the actual cross-situational consistency of behaviour and the general belief as to such consistency in

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

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

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

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

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

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

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

others. Kunda and Nisbett found that participants in their study dramatically overestimated the consistency of trait related behaviour, stating:

> People are enormously more confident of the expected nature of a person's social behaviour, given knowledge of the nature of their behaviour on one occasion, than reality affords them any right to be.[189]

3.21 Wilson and Brekke have taken this research one step further, examining the process by which attribution and the halo effect occur and its implications for attempts to correct for these biases.[190] They argue that people will only be able to make a successful correction for bias where they are: aware of the bias; motivated to correct it; aware of the magnitude of the bias; and able to adjust their response. They argue that:

> it is difficult to satisfy these conditions, in part because of fundamental properties of human cognition: people are unaware of many of their cognitive processes, mental contamination often has no observable 'symptoms', and people have limited control over their cognitive processes. These facts alone are cause for considerable pessimism about people's ability to avoid unwanted judgments.[191]

3.22 Law and psychology has now become a field of research in its own right, with some authors directing their research specifically to jury scenarios and the prejudicial effect of evidence.[192] Research into the effectiveness of judicial directions to juries, particularly with regards to evidence of prior criminal history, has shown that directions to disregard evidence or to use it for only a limited permissible purpose may not always be complied with[193] and can in some instances have the opposite effect to that intended.[194] Such directions are likely to be more effective if the jurors accept the legitimacy of the direction[195] or believe it is not fair to consider the evidence.[196] This research accords with the conclusions of Wilson and Brekke that there must be recognition of biases and motivation to avoid them.

3.23 ALRC 26 stated:

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

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

191 Ibid, 122.

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

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

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

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

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

> The research confirms the need to maintain strict controls on evidence of character or conduct and for such evidence to be admitted only in exceptional circumstances. It demonstrates, however, that the emphasis of the law should be changed. For the sake of accurate fact-finding, fairness and the saving of time and cost, the law should maximise the probative value of the evidence it receives by generally limiting it to evidence of conduct occurring in circumstances similar to those in question. Only for special policy reasons should other evidence of character or conduct be received.[197]

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

Probative value, unfair prejudice and unfairness

3.25 The uniform Evidence Acts require the judge to assess the degree of probative value of particular types of evidence in order to determine the question of admissibility. These include evidence going to tendency or coincidence and evidence adduced in cross-examination as to credibility.[198] In addition, the judge will sometimes be required to balance the probative value of a piece of evidence against the danger of unfair prejudice to the defendant.[199] Other provisions require the judge to determine whether taking a particular course of action is 'unfair' or 'unfairly prejudicial' to the parties involved.[200]

3.26 The same terms appear in various sections throughout the Acts. 'Probative value' appears in ss 97, 98, 101, 103, 105 (Commonwealth Act only), 108, 135, 136, 137, 138, and 190. 'Unfair prejudice' appears in ss 53, 135, 136 and 137. The term 'prejudicial' appears in s 101. The term 'unfair' appears in ss 90 and 192.

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

Consistency of terms throughout the Acts

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

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197 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [800].
198 Uniform Evidence Acts ss 97, 98, 103, 105.
199 Ibid ss 101(2), 135, 137.
200 Ibid ss 90, 136, 189, 192; *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW) s 114.

> The meaning given to each of those phrases must logically be the same in each section—whether or not a weighing exercise is contemplated.[201]

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

> It is noteworthy that the Act provides a definition of 'probative value' … Although the definition could well have been the same as at common law, the fact that such a term was defined at all suggests an intention to ensure consistency for purposes of the Evidence Act for the words, which appear in a number of sections. This suggests that the Act, even if substantially based on the common law, was intended to operate in accordance with its own terms.[202]

3.30 It is also apparent that the factors to be taken into account in determining whether a piece of evidence has the requisite degree of probative value or results in a degree of unfair prejudice will vary depending on the type of evidence and the context in which it is sought to be adduced. Some academic commentators have described probative value as 'a floating standard'.[203] This is particularly evident with regards to evidence relating to credibility, tendency and coincidence, as evidence of these kinds tend to bolster the strength of other evidence rather than being directly associated with a fact in issue. These concepts will be dealt with in more detail in the relevant chapters of this Discussion Paper.

Measuring probative value: 'significant' and 'substantial'

3.31 Different categories of evidence require different degrees of probative value in order to be admissible. For example, tendency and coincidence evidence is required to have 'significant probative value',[204] whereas credibility evidence adduced in cross-examination must have 'substantial probative value'.[205] The uniform Evidence Acts provide no guidance as to the difference between 'significant' and 'substantial'.

3.32 There appears to be consensus that 'substantial probative value' imports a more exacting standard than 'significant probative value'. Hunt CJ at CL said in *R v Lockyer* that: '"significant" probative value must mean something more than mere relevance but something less than a "substantial" degree of relevance'.[206] His Honour felt that 'significant' in this context meant 'important' or 'of consequence'. He also felt that an assessment of the significance of the probative value of a piece of evidence would

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201 *R v BD* (1997) 94 A Crim R 131, 139.

202 *R v Ellis* (2003) 58 NSWLR 700, [78].

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

204 Uniform Evidence Acts ss 97, 98.

205 Ibid s 103(1).

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

depend on both the nature of the fact in issue to which it was relevant and its importance in establishing that fact. [207]

3.33 It was observed by Lehane J in *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* that 'more is required than mere statutory relevance' in order to satisfy the test of 'significant probative value'.[208]

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

Unfair prejudice

3.35 As with probative value, the concept of unfair prejudice is used consistently between the provisions in the uniform Evidence Acts,[209] but the factors to be taken into account in determining unfair prejudice will vary according to the factual and legal context in which the evidence is sought to be adduced. See Chapter 14 for a detailed discussion of this concept.

'Unfair' and 'unfair prejudice'

3.36 The word 'unfair', as opposed to 'unfair prejudice', appears in ss 90(b) and 192(2)(b) of the uniform Evidence Acts. Section 90(b) provides the court with the power to exclude evidence of an admission adduced by the prosecution in criminal trials where, having regard to the circumstances in which the admission was made, it would be unfair to the defendant. Section 192(2)(b) provides that when granting leave or making a direction, a court must take into account the extent to which doing so might be unfair to a party or witness.

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

> Unfairness … relates to the right of the accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted.[210]

3.38 While the High Court was dealing with the common law, the majority indicated that its articulation of the fairness discretion at common law reflected the approach

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207 *R v Lockyer* (1996) 89 A Crim R 457, 459.
208 *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171, 175–176.
209 *R v Ellis* (2003) 58 NSWLR 700, [78]; *R v BD* (1997) 94 A Crim R 131, 139.
210 *R v Swaffield* (1998) 192 CLR 159, [54].

adopted in the uniform Evidence Acts.[211] Indeed, New South Wales courts have been influenced by *Swaffield* in the application of the uniform Evidence Act provisions.[212]

3.39 The Court's comment in *Swaffield* indicates that the notion of 'unfairness', both at common law and under the uniform Evidence Acts, is broader than that of 'unfair prejudice'. As discussed in Chapter 14, the statutory concept of unfair prejudice relates primarily to the misuse of evidence by the tribunal of fact (for example, attributing more weight than it should to evidence due to an emotional reaction to it). There has been some uncertainty as to whether unfair prejudice can arise from procedural considerations (such as the inability to cross-examine on hearsay evidence). The Commissions are of the view that unfair prejudice can arise from procedural considerations only where this affects the ability of the tribunal of fact to assess rationally the weight of the evidence. By contrast, 'unfairness' may arise solely from procedural considerations. However, not surprisingly, the authorities indicate that there is some overlap in the use of the terms.

3.40 In *R v Duncan & Pierre*, Wood CJ at CL held that the issues arising in relation to ss 135 and 137 in the context of that particular case were essentially the same as those arising under s 192(2)(b).[213] In this case, the defendant argued on appeal that the overall weight and reliability of the statement of a particular witness was such that either leave should have been refused to the Crown to cross-examine its own witness (pursuant to s 38) or that the witness' statement should have been excluded pursuant to ss 135 or 137. His Honour held that there was no unfairness or unfair prejudice in this case as the jury had been given ample directions and the defence had been given the opportunity to cross-examine the witness on his prior statement.[214]

3.41 A similar situation arose in *R v Fowler*,[215] where the Crown sought to cross-examine a witness pursuant to s 38. One of the grounds of appeal was that the trial judge, who had refused to exclude the evidence under s 137, had failed to consider s 192(b) fairness when deciding whether to grant leave under s 38. On appeal, the New South Wales Court of Criminal Appeal held that, although the trial judge had not considered s 192, there was no miscarriage of justice as she could not have found the evidence unfair under s 192 where she had refused to exclude it under s 137.[216] Although their Honours gave no more detail, it is clear that the same questions arise regarding reliability and the ability of the trier of fact to assess correctly the weight of particular evidence.

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211 Ibid, [68], [70].
212 See, eg, *R v Em* [2003] NSWCCA 374; *R v Fernando* [1999] NSWCCA 66.
213 *R v Duncan & Pierre* [2004] NSWCCA 431.
214 Wood CJ at CL noted at [248] that a similar situation had arisen in *R v GAC* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, McInerney and Sully JJ, 1 April 1997).
215 *R v Fowler* [2003] NSWCCA 321.
216 Ibid, [160].

Probative value and unfair prejudice

3.42 It is clear from the conflict in the authorities that there is uncertainty as to the meanings of the terms 'probative value' and 'unfair prejudice'. It has been suggested that the difficulty lies in the fact that the concepts are insufficiently distinct.[217] This is because it is difficult to measure prejudice without reference to the degree of probative value. As McHugh J said in *Pfennig*, 'in many cases the probative value either creates or reinforces the prejudicial effect of the evidence'.[218] Hence it is apparent that the concepts are interdependent. Difficulties of interpretation arise when attempts are made to conceptualise them as completely distinct.

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

3.44 In order to understand the terms as they are used in the Acts, it is essential to recognise the important policy changes engendered by the Acts. Analysis of the case law dealing with these concepts reveals that at least some of the confusion, particularly in regard to unfair prejudice, is due to the fact that courts and practitioners have not yet come to terms with the fact that some types of evidence which would previously have been inadmissible under the common law are now admissible under the Acts. This is particularly evident in relation to hearsay evidence and the inability to cross-examine. Judges and practitioners trained under the common law may view such evidence as unfairly prejudicial due to the fact that it was previously inadmissible, and hence try to interpret the Acts' provisions in accordance with the common law notions. McHugh J said in *Papakosmas*:

> Some recent decisions suggest that the term 'unfair prejudice' may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995 … I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons. [219]

3.45 His Honour went on to note:

> Sections 135, 136 and 137 contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case. It may

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

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

219 *Papakosmas v The Queen* (1999) 196 CLR 297, [93]. Unfair prejudice is also discussed in Ch 14.

> 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.[220]

3.46 It is hoped that the commentary in this Discussion Paper will help to achieve clarity and consistency in the use of the terms probative value, unfairness and unfair prejudice. Further, as is discussed in detail below, education programs for the judiciary and the profession focusing on the policy underpinning the Acts will facilitate a more consistent approach.

Facilitating an understanding of the uniform Evidence Acts

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

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

> As under the existing law, the admissibility of a piece of evidence should be determined by first asking whether it is relevant. If the answer to that question is in the negative it should be excluded. If the answer is in the affirmative, the evidence will be admissible unless an exclusionary rule operates to exclude it or an exclusionary discretion is exercised. It will be for the party against whom it is led to direct the court's attention to the rules set out in the legislation justifying exclusion of the evidence if it wishes to have the evidence excluded.[221]

3.49 Other than directing the court's attention to statutory rules of admissibility rather than a common law evidentiary principle, the process does not differ from that which applies in non-uniform Evidence Act jurisdictions. However, the uniform Evidence Acts' relaxation of common law rules of admissibility to accord with the primary objective of enabling 'the parties to produce the probative evidence that is available to them'[222] places greater emphasis on the use of the discretionary and mandatory exclusions contained in ss 135–137.

3.50 As discussed in Chapter 14, the submissions and consultations have suggested that judicial officers are often reluctant to take a robust approach to the use of the discretionary and mandatory exclusions contained in ss 135–137. Some judicial officers in trial courts expressed concern that reliance on the discretionary provisions to

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220 Ibid, [97].
221 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [51].
222 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [82].

exclude or limit the use of otherwise admissible evidence could result in the decision being overturned on appeal.[223] Further, it was said that, rather than identifying the precise grounds upon which evidence should be excluded, counsel often seek exclusion pursuant to ss 135, 136 or 137, adopting a 'package approach' which is of little assistance to the decision maker.[224]

3.51 Educational programs should be implemented which focus on the policy underlying the uniform Evidence Acts' approach to admissibility of evidence. For judicial officers, this could be coordinated by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales. The state and territory law societies and Bar should offer continuing legal education to their members in this regard.

Proposal 3–1 Educational programs should be implemented by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales and by the state and territory law societies and Bar which focus on the policy underlying the uniform Evidence Acts' approach to admissibility of evidence.

223 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.
224 Ibid.

4. Competence and Compellability

Contents

Introduction

4.1 A person may lawfully be called to give evidence unless a court finds they are incompetent to do so. A competent witness is also compellable if he or she may be lawfully required to give evidence. As a general rule, all witnesses who are competent are compellable, although there are some limited exceptions in criminal matters, particularly in relation to the accused, the accused's spouse, and some other immediate family members.

4.2 The rationale for the existence of tests of competence is to guard against the admission of evidence of little or no probative value. This need has to be balanced against the unnecessary exclusion of relevant evidence. These competing priorities are particularly evident in the context of the criminal law where competency requirements are necessary, on the one hand to protect an innocent defendant from wrongful conviction and on the other to ensure that relevant evidence is admissible.[225]

4.3 IP 28 does not identify any issues relating to competence and the adequacy or otherwise of the current tests of competence under the uniform Evidence Acts. However, work by other law reform bodies and some academic studies suggest that there are issues that warrant a re-examination of the provisions.

4.4 Similarly, IP 28 does not raise for consideration any aspect of the compellability provisions under the uniform Evidence Acts. However, an issue in relation to the definition of de facto spouse in the context of compellability in criminal proceedings

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

has been drawn to the attention of the Commissions. Therefore, whilst this chapter concentrates on the concept of competence, it will also make some limited proposals in relation to compellability.

Competence

Background

Position prior to the uniform Evidence Acts

4.5 The position at common law is that a person is only competent to give evidence if he or she can give 'sworn' evidence: that is, evidence on oath or affirmation. The common law test of competence to give sworn evidence is whether the person understands the nature and consequences of the oath.[226] In cases where the competence of a person is in question or where a person is presumed incompetent to give sworn evidence (for example, where the witness is a child below a certain age), the judicial officer questions the witness, often about their religious beliefs or belief in God, to decide whether they are competent to take the oath.

4.6 In most Australian jurisdictions, the common law position has been modified to change the test of competence to give sworn evidence or to allow a witness to give unsworn, as compared to sworn, evidence in certain circumstances.[227]

Discussion in ALRC 26

4.7 The interim report of the ALRC's original evidence inquiry (ALRC 26) reviewed the concept of an understanding of the nature and consequences of the oath as the basis for establishing competence. The report points out that this approach was 'far from satisfactory':

> The common law test outlined here is essentially one of moral and religious understanding. The test does not appear to meet directly the real issues of psychological competency. Factors such as memory, the ability to make inferences and the capacity to be appropriately informative and relevant are not considered. Only the criterion that the witness should have the capacity to be truthful is tested by the common law formula. The capacity to understand which information is required, extract it from other stored information and express it clearly, is not tested as it would be if the test were framed in terms of cognitive development.[228]

4.8 The ALRC produced recommendations for reform, the primary recommendation being that all witnesses should be presumed competent to give evidence. However, in circumstances where there is doubt raised, the court should be given power to decline to hear evidence from a witness who nonetheless does not meet a certain 'minimum

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226 *R v Brazier* (1799) 168 ER 202.

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

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

standard' of competence. The proposal applies to the witness' evidence generally, as well as to the particular evidence the witness is asked to give.

4.9 The ALRC's proposals moved away from reliance on religious belief to determine competence. In draft legislation, it recommended a new test of competence, requiring an understanding of an obligation to give truthful evidence,[229] to replace the common law test based on an understanding of the nature and consequences of the oath. The ALRC envisaged that this would be the 'minimum standard' that a witness would have to meet before being eligible to give evidence.[230] Hence it would no longer be necessary for the court 'to explore the religious belief and knowledge of the witness'.[231]

4.10 The draft provisions contained in ALRC 26 in relation to competence does not draw a distinction between competence to give sworn and unsworn evidence. Rather, it was generally proposed that a person was to give evidence either having sworn an oath or made an affirmation.[232]

The current law—the uniform Evidence Acts

4.11 The competence and compellability provisions of the uniform Evidence Acts are found in ss 12–20. This chapter is particularly concerned with ss 12 and 13, which are the main provisions relating to competence.

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

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

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

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229 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), 21, cl 14(1): 'A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give evidence'.

230 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [522].

231 Ibid, [522].

232 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), 24, cl 20(1): 'Except as otherwise provided by this Division, a person may not give evidence, or act as an interpreter, in a proceeding unless the person has sworn an oath or made an affirmation in accordance with the appropriate form in the Schedule or in accordance with a similar form'.

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

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

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

4.17 There is a further competence requirement applicable to both sworn and unsworn evidence contained in ss 13(3) and (4). Section 13(3) provides for the concept of 'partial' incompetence—that is, a person who is incapable of 'giving a rational reply to a question about a fact is not competent to give evidence about the fact'. He or she may nevertheless be competent to give evidence about other facts. Section 13(4) relates to physical incompetence. It provides that a person is not competent to give evidence 'about a fact' unless he or she is capable 'of hearing or understanding, or of communicating a reply to, a question about the fact'.

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

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

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

4.21 The competence provisions in ss 12 and 13 for the most part reflect the original ALRC proposals, except in two significant and related respects.

4.22 First, the provisions make a distinction between competence to give sworn and unsworn evidence. Section 13(1) adopts the test of competence recommended by the ALRC—that is, an understanding of the obligation to give truthful evidence—but confines it to a test for giving sworn evidence. Ultimately, if the witness is found to be competent to give sworn evidence, he or she will have to mark that obligation by taking an oath or an affirmation (s 21(1)).

4.23 Secondly, s 13(2) introduces a test for competence to give unsworn evidence, which is to be applied where a witness fails to meet the competence test for sworn evidence but can satisfy another set of criteria. This is a departure from the ALRC draft legislation, which does not include a separate test for competence to give unsworn evidence. A witness found competent to give unsworn evidence pursuant to s 13(2) is subject to the exception in s 21(2) and is not required to take an oath or affirmation.

4.24 It would appear that s 13(2) is intended to relax the approach recommended by the ALRC by allowing witnesses who cannot demonstrate an understanding of an obligation to give truthful evidence (for example, some children or persons with cognitive impairment) nonetheless to give unsworn evidence. However, in practice, fulfilling the requirements of the competence test for unsworn evidence is arguably as onerous as establishing competence to give evidence on oath.

4.25 Notably, under the uniform Evidence Acts, 'unsworn evidence is still evidence and is treated no differently from other evidence'[233] (although sworn evidence will presumably be afforded greater weight by the court).

VLRC's Sexual Offences Reports

4.26 Recent law reform work, particularly in Victoria, and academic consideration of the competency provisions, questions the appropriateness of the formulation of the competence tests under the uniform Evidence Acts.

4.27 In 2004, in its interim and final reports on sexual offences law and procedure, the VLRC examined the evidence laws in Victoria which determine the competence of children to give evidence. The VLRC made a series of recommendations for legislative change in Victoria.[234] Some of those recommendations are already reflected in the uniform Evidence Acts (for example, the presumption that all witnesses are competent). However, there are a number of recommendations of the VLRC which are not part of the uniform Evidence Acts. Those recommendations concern the following:

- the validity of the test for determining competence to give unsworn evidence. In particular, the VLRC recommended that people who are not competent to give

233 Stephen Odgers, *Uniform Evidence Law* (6th ed) (2004), [1.2.160].

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

sworn evidence should be able to give unsworn evidence if they can understand questions put to them as a witness and give intelligible answers to them;

- the directions that judicial officers should be required to give to witnesses, particularly children, before they give evidence; and
- the availability of expert reports to assist the court in determining competence to give evidence. The VLRC recommended that in cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert about the child's competence to give sworn or unsworn evidence.

4.28 One of the main principles underpinning the VLRC recommendations is the liberalisation of the tests of competence and the processes by which they are applied to allow children who are capable of giving evidence to do so without unnecessary or unfair hindrance. However, any amendments to the competence provisions of the uniform Evidence Acts would have broader application. The provisions would apply to children and to adults whose mental or physical condition may cause questions to be raised about their competence to give evidence.

4.29 Characteristics of witnesses which may cause vulnerability in court include old age, intellectual disability, acquired brain injury, mental illness and other forms of cognitive impairment. There is an extremely wide range of conditions of varying severity that may result in a witness' competence being challenged.

Criticisms of the current law

4.30 There are a number of criticisms which can be made about the current competency provisions under the uniform Evidence Acts. Broadly speaking, the three fundamental criticisms are:

- first, taken together, the tests of competence to give sworn and unsworn evidence are too restrictive, with the result that there is a risk that evidence of probative value will be excluded;
- secondly, the tests of competence to give sworn and unsworn evidence are too similar and pose difficulties for practical application; and
- thirdly, the use of the truth criterion as the basis of the test for competence to give unsworn evidence is questionable.

4.31 Achieving acceptable competency laws requires 'a delicate balancing of the interests and needs of individuals [including defendants, victims and witnesses], society, investigating authorities and the courts'.[235] No matter what form the law

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

takes, it is to be expected that there will be differences of opinion about whether it is too stringent or too liberal. It is apparent, however, that the evolution of competency laws in recent years favours an approach that is less exclusionary and promotes greater admissibility of evidence.[236] Decisions about the weight to be given to the evidence are then left to the court. This policy of inclusion is reflected in the structure of s 13, which makes provision for tests of both sworn and unsworn evidence and also allows for a witness to be competent to give evidence in relation to some matters but not others.

4.32 However, the content and complexity of the tests in s 13 may in fact defeat this objective of greater inclusion of evidence. In their current form, the uniform Evidence Acts require a witness whose competence is in doubt to meet certain standards. The level of intellectual capacity required to fulfil those standards may exclude some persons from giving evidence who may nonetheless be able to communicate satisfactorily valuable information that may be central to a case. For instance, appropriately questioned, a person with an intellectual disability may be able to understand a question and provide an answer about some straightforward concrete matters, but may not otherwise be able to respond to questioning about more abstract concepts. Under the existing competence regime, such a witness may not be competent and evidence of probative value will be excluded.

4.33 The competence tests for sworn evidence (s 13(1)) and unsworn evidence (s 13(2)) bear a striking similarity. Each is founded on the complex notion of truth. Beyond this common attribute, the tests are distinguishable but not significantly different.

4.34 The most important distinction is that the competence test for sworn evidence requires a witness to understand that he or she is under an 'obligation' to tell the truth when giving evidence. This entails a certain level of sophisticated and conceptual thought. The obligation is something more than a promise or statement of an intention to tell the truth. It equates to an appreciation of the nature of the duty. On the other hand, the competence test for unsworn evidence also requires conceptual thought for a witness to satisfy the court that he or she understands the difference between the truth and a lie (s 13(2)(a)). Similar to the test for competence to give sworn evidence, the test involves a grasp of the meaning of the abstract concepts of truth and dishonesty.

4.35 These subtle distinctions between the tests are potentially problematic. The value and effectiveness of having two separate tests are diluted if the content of the tests are too similar. This is so from the perspectives of both the court applying the tests and witnesses subjected to them.

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

4.36 In the application of the competence tests for sworn and unsworn evidence, s 13 requires a judicial officer to conduct a staged inquiry. Ideally he or she should ask questions which are developmentally sensitive and not too difficult or abstract, particularly when questioning children.[237] The questioning must also be capable of eliciting the witness' capacity for subtle distinctions in conceptual thinking to establish whether the witness understands the obligation to tell the truth and, if not, whether the witness nonetheless understands the difference between the truth and a lie. However, because the elements of the two tests are not sufficiently different, witnesses who do not meet the requirements of the first test may also fail to meet the requirements of the second test.

4.37 Currently, the legislation gives little guidance about the questions that should be asked to assist judicial officers in establishing competence. This may result in inconsistent judicial decision making[238] or the increased likelihood of judicial error. Further, because of the similarities between the two tests, in practice there is the potential for judicial officers to ask substantially the same questions, or to blend or fuse the questioning for each test. In other contexts where it has been considered that the distinction between the competence tests for sworn and unsworn evidence is unclear, it has been observed that some judicial officers administer a 'dual-purpose' competence test for both evidence types.[239] This involves asking the same or substantially the same questions for each evidence type, reflecting the view that one inquiry will usually serve for a judicial officer's determination on both issues of sworn and unsworn evidence.[240]

4.38 As there are few reported cases which show a difficulty in applying s 13, some of these concerns may be theoretical. Nonetheless, there have been cases which illustrate the potential for confusion or judicial error. For example, in *R v Brooks*, a new trial was ordered by the New South Wales Court of Criminal Appeal where the trial judge allowed a child of 10 to give unsworn evidence without first fulfilling all of the requirements of ss 13(1) and (2).[241] In that case, the trial judge had erroneously assumed that the witness' age precluded her from being sworn. He then embarked on a line of questioning that purported to follow the requirements of s 13(2) without first establishing that she did not understand the obligation to tell the truth. *R v Brooks* has been followed in at least one instance.[242]

4.39 *R v Brooks* also highlights judicial debate about the exact nature of the requirement under s 13(2)(b) for the court to tell the person that it is important to tell

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237 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [6.92].
238 Ibid, [6.92].
239 K Schultz, 'The Content of Competence Tests: Queensland Judicial Perspectives on Non-Accused Child Witnesses in Criminal Proceedings, Part 2' (2004) 23 *University of Queensland Law Journal* 134, 138.
240 Ibid, 138, referring to *Lau v The Queen* (1991) 6 WAR 30, 59.
241 *R v Brooks* (1998) 44 NSWLR 121.
242 *R v JTB* [2003] NSWCCA 295.

the truth. For instance, the provision may be interpreted as requiring some form of judicial 'instruction'. Thus, one of the judges in the New South Wales Court of Criminal Appeal in *R v Brooks* said that the policy he discerns behind the provision is that 'the authority of the court is to be brought to bear on the witness by means of an instruction'.[243] It is therefore not surprising that the delivery of the judicial officer's statement may have the potential to sound like a 'formal or intimidating' warning.[244]

4.40 The contrary view about the usefulness of this provision is held by some researchers on children's competence, who suggest that there may be some benefit in asking a child to tell the truth.[245] Indeed, aside from the provision that currently exists in s 13(2)(b), a like requirement exists in Queensland and has been recommended in Victoria.[246]

4.41 The appropriateness of using an understanding of the concept of truth as a criterion in the tests of competence is also questionable. Truth is an abstract, morally based concept. As has been noted, 'truth is not an unitary concept even for adults. "Truthfulness" is a concept of little or no meaning for very young children'.[247]

4.42 Typically, challenges to competence will occur in relation to child witnesses or witnesses with cognitive impairment. Arguably, these witnesses should not be subjected to testing founded on complex and abstract concepts. A grasp of a concept such as truth depends upon intellectual ability or cognitive development. For example, in the case of many young children, an understanding of the truth or the nature of a lie will be influenced by developmental factors and, possibly, cultural background and moral and religious influences.

4.43 The use of truth and related concepts in the criteria for the tests of both sworn and unsworn evidence potentially makes the test of giving unsworn evidence as rigorous as the test for giving sworn evidence. A witness who cannot satisfy the court that he or she understands the concept of truth may be incompetent to give either sworn or unsworn evidence, even though he or she may otherwise have general competence to give relevant probative evidence—that is, he or she may possess basic comprehension and communication skills.

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243 *R v Brooks* (1998) 44 NSWLR 121, 127 per Sperling J.

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

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

246 *Evidence Act 1977* (Qld) s 9B(2)(b); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 296 Rec 136.

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

The Commissions' view

4.44 The Commissions propose that the existing competency regime be made less stringent to guard against the possibility of evidence of probative value being excluded from court proceedings. In particular, the Commissions propose reducing the barriers to giving unsworn evidence and addressing many of the above criticisms by reformulating s 13, so that the standard for determining competence of a witness to give unsworn evidence is substantially different from that for competence to give sworn evidence. This could be achieved if an ability to demonstrate understanding of the concept of truth does not form part of a test for competence to give unsworn evidence. It will be up to the court to determine the weight that should be given to unsworn evidence.

4.45 In particular, the test of competence to give sworn evidence in s 13(1) should continue to be that the person understands the obligation to give truthful evidence. It should also be made clear that a person who satisfies the test must also satisfy a test of general competence founded on basic comprehension and communication skills (to be located elsewhere in s 13). A person who does not possess the requisite standard of comprehension and communication to give sworn evidence in relation to some matters will be incapable of giving evidence about those matters or facts, but not necessarily others.

4.46 In relation to unsworn evidence, it is proposed that a person may give unsworn evidence about a fact if they satisfy a test of general competence. A person who does not possess the requisite comprehension and communication skills in relation to some matters will be incapable of giving unsworn evidence about these matters or facts, but not necessarily others. Therefore the Commissions propose that, subject to retaining (in general terms) the requirement that the court informs the person of the importance of telling the truth, the current test of competence to give unsworn evidence in s 13(2) be deleted.

4.47 As to the common test of general competence, such a test is not novel. A similar test formulated in the nineteenth century by Sir James Fitzjames Stephen, and as applied in Christmas Island and the Cocos (Keeling) Islands, is favourably considered in ALRC 26.[248] A like test applies in:

248 Ibid, [237], referring to J Stephen, *A Digest of the Law of Evidence* (1876), arts 106–107: All persons shall be considered competent unless they are 'prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'.

- the United Kingdom under the *Youth Justice and Criminal Evidence Act 1999* (UK);[249] and
- Queensland under the *Evidence Act 1977* (Qld).[250]

4.48 There are a number of possible alternative formulations of a test for general competence to give sworn or unsworn evidence founded on basic comprehension and communication skills. The main variation is in the description of the witness' response to questions. The options the Commissions have considered are as follows:

- First, the test could provide that a person is competent to give unsworn evidence if he or she can understand questions put to him or her as a witness and give *intelligible* answers to them. This is the formulation of the test recommended by the VLRC in relation to unsworn evidence in its final report on sexual offences.[251] However, the Commissions note that the concept of 'intelligibility' is open to interpretation.
- Secondly, the test for unsworn evidence could require that the person understand the questions put and give *rational* answers to them. The word 'rational' also appears in s 13(3) which deals with a witness' capacity to give evidence about some facts and not others. This term is potentially quite restrictive and also open to interpretation. For instance, in the context of the analysis of Stephen's test in ALRC 26, the test of a 'rational answer' is said to recognise 'the requirement that a witness have an adequate memory, the ability to give responses which are clear and to give relevant information'.[252] In other situations, memory or 'recall' has been said not to be 'something which affects the rationality of the reply'.[253] Since it is open to complex and diverse interpretation, the Commissions are not in favour of the use of the word 'rational' in the test for competence to give sworn or unsworn evidence or, indeed, in s 13 generally.
- The third option considered is that a person be required to understand the questions put and give *answers which can be understood*. This is the English test of general competence in the *Youth Justice and Criminal Evidence Act 1999* (UK).[254] That provision is seen to leave less room for interpretation than an intelligibility test[255] or a test requiring rationality.

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249 *Youth Justice and Criminal Evidence Act 1999* c 23 (UK) s 53(3): a person will lack competence to give evidence in a criminal proceeding if it appears to the court that they are 'not a person who is able to (a) understand questions put to him as a witness, and (b) to give answers to them which can be understood'.

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

251 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 296, Rec 134.

252 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [240].

253 *R v Tran* [2003] ACTSC 53, [28].

254 *Youth Justice and Criminal Evidence Act 1999* c 23 (UK) s 53(3).

255 D Birch, 'A Better Deal for Vulnerable Witnesses' (2000) *Criminal Law Review* 223, 228.

4.49 The Commissions prefer the third option because of its clarity and lack of ambiguity. Accordingly, the proposed standard for general competence to give sworn or unsworn evidence is that the person can understand a question about a fact and can give an answer which can be understood to a question about that fact.

4.50 The Commissions also propose that the uniform Evidence Acts be amended to provide that if for any reason, including physical disability, a person is incapable of meeting the requisite standard of comprehension and communication and that incapacity cannot be overcome, the person is not competent to give evidence (sworn or unsworn). Otherwise, the current provisions in relation to partial competence and physical competence in s 13(3) and (4) should be deleted.

4.51 The issues concerning competence have only arisen during consultation on IP 28. A matter of obvious importance will be the way the proposal for a requirement of general competence is likely to operate in practice. A number of matters may need to be considered. For example, does requiring the witness to have the capacity to give an understandable answer unduly shift the focus from the witness to the listener? Is the witness' ability to give a response to a question which can be understood an appropriate element of the test, bearing in mind that a witness may give an understandable but obviously illogical response? In practice, will the focus on questions about 'a fact' cause practical difficulties? Are these concerns more theoretical than real?

4.52 The Commissions have also considered the recommendation in the VLRC sexual offences reports that, in cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert about a child's competence to give sworn or unsworn evidence. As the VLRC noted, courts generally

> do not hear expert evidence on the capacity of a particular child to give evidence, even though a person with expertise in the development patterns of children may be able to provide important information about the child's capacity to give evidence.[256]

4.53 The VLRC's recommendation should not be confined to child witnesses or to sexual assault matters. It is reasonably foreseeable that a court may benefit from the availability of expert reports in relation to other witnesses, such as those with some form of cognitive impairment. The insights of an appropriately qualified expert skilled in determining intellectual functioning may assist the court in determining issues of capacity, which would otherwise be determined by judicial questioning and impressions ascertained in the artificial environs of the courtroom.

4.54 Therefore, it is proposed that the current provision s 13(7), which provides that in determining questions under s 13 the court may 'inform itself as it sees fit', should

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

be amended to make it clear that a court is entitled to draw on expert opinion to assist in determining such questions.

4.55 Finally, the wording of s 14 should be amended to bring it in line with the proposed changes to s 13.

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

- a person not competent to give sworn evidence should be competent to give unsworn evidence provided that the court informs that person of the importance of telling the truth and that person satisfies the test of general competence;
- there should be a test of general competence for both sworn and unsworn evidence. It should provide that if for any reason, including physical disability, a person is unable to understand a question about a fact or is unable to give answers to a question about a fact which can be understood, and that incapacity cannot be overcome, the person is not competent to give evidence about that fact.

Section 13(7) should be amended to make it clear that in informing itself as to the competence of a witness, the court is entitled to draw on expert opinion. The wording of s 14 should be amended to bring it in line with the proposed changes to s 13.

Compellability

Compellability of de facto spouses in criminal proceedings

4.56 The common law provides that spouses are not compellable unless the law provides that they are.[257] The approach taken under the uniform Evidence Acts is to make a spouse (as well as a de facto spouse, parent or child) of the accused compellable to give evidence for the prosecution in a criminal trial, but to give him or her the right to object.[258] The uniform Evidence Acts provide that the judicial officer then has the discretion to excuse the witness from testifying by balancing the risk of harm to the witness or to their relationship with the accused, on the one hand, against the importance of the evidence, on the other hand.[259] The Acts also set out a non-exhaustive list of factors that must be taken into account in the exercise of the discretion, including the nature and gravity of the offence, the importance of the evidence, the availability of other evidence, the nature of the relationship between the

257 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474.
258 Uniform Evidence Acts ss 12(b), 18(2).
259 Ibid s 18(6).

witness and the accused, and any breach of confidence involved.[260] This general approach is subject to exceptions for proceedings for certain criminal offences (which differ for each of the uniform Evidence Act jurisdictions). The exceptions are set out in s 19 of the uniform Evidence Acts. In proceedings relating to the excepted offences, the witness is compellable.

4.57 The discretionary approach to compellability in the uniform Evidence Acts reflects the underlying rationale and competing policy considerations:

> on the one hand, the desirability, in the public interest, of having all relevant evidence available to the courts and on the other the undesirability in the public interest that
>
> - the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require, and
> - the community should make unduly harsh demands on its members by compelling them, where the general interest does not require it, to give evidence that will bring punishment upon those they love, betray their confidences, or entail economic and social hardships.[261]

4.58 Under the uniform Evidence Acts, the right to object to giving evidence applies not only to the accused's spouse, but also to a de facto spouse (as well as a parent or child) of the accused. This acknowledges that the rationale for the discretion to excuse a spouse applies equally to a de facto spouse. It also takes account of contemporary social attitudes and practices.

4.59 The definition of 'de facto spouse' contained in the *Evidence Act 1995* (Cth) provides that a de facto spouse:

> (a) of a man, means a woman who is living with the man as his wife on a genuine domestic basis although not married to him; and
>
> (b) of a woman, means a man who is living with the woman as her husband on a genuine domestic basis although not married to her.[262]

4.60 Among other things, this definition requires co-habitation between a man and a woman. It does not extend to same sex couples. In this respect, it is inconsistent with the position in the majority of the other uniform Evidence Act jurisdictions—namely, New South Wales and Tasmania, which recognise same sex couples who come within definitions in other legislation.[263]

4.61 The issue raised in this review is whether the definition of 'de facto spouse' in the *Evidence Act 1995* (Cth) should be extended to cover a de facto spouse in a same sex relationship, as is the case in New South Wales and Tasmania. In 2002,

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260 Ibid s 18(7).
261 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [80].
262 *Evidence Act 1995* (Cth) Dictionary Pt 1.
263 The *Evidence Act 2004* (NI) Dictionary Pt 1 includes the same definition as the Commonwealth Act.

amendments were made to the *Evidence Act 1995* (NSW) with the passing of the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW). This Act extended the definition of 'de facto relationship' contained in the *Property (Relationships) Act 1984* (NSW) to a range of statutes, including the *Evidence Act 1995* (NSW). The effect of the amendment was to broaden the definition of 'de facto spouse' in the *Evidence Act 1995* (NSW) by making it non-gender specific. A 'de facto spouse' for the purposes of the *Evidence Act 1995* (NSW) is now a person with whom the person has a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW), that is:

> a relationship between two adult persons:
>
> (a) who live together as a couple, and
>
> (b) who are not married to one another or related by family.[264]

4.62 In determining whether two persons are in a de facto relationship, the court is to take into account all the circumstances of the relationship, including:

> (a) the duration of the relationship,
>
> (b) the nature and extent of common residence,
>
> (c) whether or not a sexual relationship exists,
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
>
> (e) the ownership, use and acquisition of property,
>
> (f) the degree of mutual commitment to a shared life,
>
> (g) the care and support of children,
>
> (h) the performance of household duties,
>
> (i) the reputation and public aspects of the relationship.[265]

4.63 Section 4(3) provides that no finding in respect of any of the above matters, or any combination of them, is

> to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

4.64 Although not explicitly stated, this provision has the effect, in New South Wales, of extending the potential exemption to compellability of a de facto spouse to a person in a same sex relationship.

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264 *Evidence Act 1995* (NSW) Dictionary Pt 1; *Property (Relationships) Act 1984* (NSW) s 4(1).
265 Ibid s 4(2).

4.65 In Tasmania, persons in a same sex relationship are recognised in a similar way. However, the position is less prescriptive than in New South Wales. The term 'spouse' in s 18 of the *Evidence Act 2001* (Tas) includes a person who is in a 'significant relationship' within the meaning of the *Relationships Act 2003* (Tas).[266] For the purposes of the *Relationships Act 2003* (Tas), the definition of a 'significant relationship' differs from the definition of a 'de facto relationship' contained in the *Property (Relationships) Act 1984* (NSW) in a notable respect. A 'significant relationship' is defined in s 4(1) of the *Relationships Act 2003* (Tas) as:

> a relationship between two adult persons:
>
> (a) who have a relationship as a couple; and
>
> (b) who are not married to one another or related by family.

4.66 It follows that in Tasmania it is not necessary for a couple to live together to establish the requisite relationship (as is the case in New South Wales). Otherwise, s 4(2) provides that in determining whether two persons are in a 'significant relationship', the court is to take into account a range of matters that point to the nature and quality of the relationship. These are the same matters that are also contained in the *Property (Relationships) Act 1984* (NSW). The list includes 'the nature and extent of common residence'[267] as one of the matters that may be taken into account, if relevant.

4.67 Given the differing definitions of 'spouse' and 'de facto spouse' in the Commonwealth, New South Wales and Tasmania, there is currently disconformity in the laws relating to compellability of a de facto spouse between uniform Evidence Act jurisdictions.

Submissions and consultations

4.68 Although not canvassed in IP 28, the Inquiry received a submission in relation to this matter from Rights Australia.[268] Rights Australia submits that the *Evidence Act 1995* (Cth) should be amended to give same sex de facto relationships recognition within the definition of 'de facto spouse' under that Act.

4.69 In addition to acknowledging the desirability of consistency in evidence laws, the submission encourages amendment to ensure equal protection in relation to compellability for a same sex partner of an accused in a criminal matter.

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266 *Evidence Act 2001* (Tas) s 3.
267 Ibid s 4(3)(b).
268 Rights Australia Inc, *Submission E 45*, 24 March 2005.

The Commissions' view

4.70 The Commissions propose that the *Evidence Act 1995* (Cth) be amended to allow a de facto spouse in a same sex relationship with the accused the right to object to giving evidence for the prosecution in criminal matters. This can be achieved by amending the current definition of 'de facto spouse' in that Act.

4.71 This change would ensure equality and avoid discrimination by according the same legal privileges in relation to compellability provisions to all those who are couples irrespective of the gender of the parties involved. It would also reflect developments in social attitudes and result in greater uniformity between the uniform Evidence Acts jurisdictions.

4.72 The Commissions are of the view that the definition of 'de facto relationship' that applies under the Tasmanian legislation is the preferred approach, as it is less prescriptive and does not require that the parties to a relationship live together. It caters for a range of situations in which a couple may not cohabit but may nonetheless have a relationship with many of the other characteristics indicative of a de facto relationship. For example, circumstances can be envisaged where parties in a relationship maintain separate residences or live apart whilst one party is in long term care outside the home. In such cases, the circumstances of any cohabitation (or lack of it) are just one factor to be taken into account in determining whether a de facto relationship exists.

4.73 Further, the Commissions propose that it should not be a requirement that the relationship is between two 'adult' persons. It is quite foreseeable that one or both of the persons in a de facto relationship may be less than 18 years old and should be entitled to object to giving evidence in the same way as an older de facto spouse.

4.74 It should be noted that whatever definition of 'de facto spouse' applies, it is still up to the court to assess whether or not the relationship exists and whether, taking into account various factors, the discretion should be exercised to excuse the witness.

4.75 Once again, the Commissions note that the above issue in relation to compellability arose during consultation on IP 28 and there has not been an opportunity for consultation on this matter. Future consultation will be directed to the issue.

Proposal 4–2 The *Evidence Act 1995* (Cth) should be amended to provide that the definition of 'de facto spouse', in relation to a person, be a person with whom the person has a de facto relationship. A definition of 'de facto relationship' should be provided in the following terms:

'de facto relationship' is a relationship between two persons:

- who have a relationship as a couple; and

- who are not married to one another or related by family.

5. Examination and Cross-Examination of Witnesses

Contents

Introduction

5.1 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.[269] Division 4 is concerned with the examination in chief and re-examination of witnesses.

5.2 The focus of this chapter will be the rules governing cross-examination of witnesses. Generally, it has not been suggested that these sections of the Acts are fundamentally flawed or require significant amendment. However, the following topics have been raised as being of some interest or concern and will be considered as part of this chapter: giving evidence in narrative form, cross-examination of unfavourable witnesses and cross-examination of vulnerable witnesses.

269 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 59.

Examination of witnesses

5.3 It is a general principle of the common law that a witness must testify in his or her own words. In order to protect the integrity of the evidence, a party who calls a witness is prevented from asking leading questions—questions that suggest a desired answer or a set of assumptions.[270]

5.4 Under s 37 of the uniform Evidence Acts, a leading question[271] 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;[272]
- no objection is made to the question (where the other party is represented by a lawyer);
- the question relates to a matter not in dispute; or
- the witness is an expert and the question seeks the witness' opinion on a hypothetical statement of facts related to the evidence being adduced.

5.5 This provision reflects what the ALRC considered in its final Report of the original evidence inquiry (ALRC 38) to be existing practices in relation to leading questions.[273] The exceptions contained in the legislation are similar to those canvassed by the ALRC as instances where leading questions could be appropriate either to obtain the whole of a witness' evidence or to expedite the trial.[274]

Giving evidence in narrative form

5.6 In a trial, witnesses generally give their evidence in response to specific questions from counsel. The uniform Evidence Acts maintain the question and answer format as the primary way in which witnesses are examined. However, s 29(2) of the Act also allows a witness to give evidence wholly or partially in narrative form, where the party applies to the court for a direction allowing the witness to do so. 'Narrative form' refers to the witness giving evidence as a continuous story in their own words, uninterrupted by questions from counsel.

5.7 In the Interim Report of the original evidence inquiry (ALRC 26), the ALRC noted that there was a general reluctance by lawyers to allow witnesses to tell their

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

271 Defined in the uniform Evidence Acts as a question which directly or indirectly suggests a particular answer to a question or assumes the existence of a fact which is in dispute: *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3(1); *Evidence Act 2004* (NI) Dictionary, Pt 1.

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

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

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

story freely, with oral evidence being limited to the answering of specific questions. However, research cited by the ALRC shows that allowing a witness to give a free report of events as a narrative may give a significantly more accurate version, as answering specific questions may limit and distort testimony.[275] Giving evidence in narrative form may also be more culturally appropriate for some witnesses and may assist child witnesses to give evidence.

5.8 ALRC 26 discussed criticisms of 'free report' or narrative evidence. It is argued that the method leads to witnesses taking charge of proceedings, resulting in wasted court time. Witnesses may also give irrelevant or inadmissible evidence, including hearsay evidence. Nonetheless, although the ALRC acknowledged that the benefit may be marginal in a number of cases, it was suggested that narrative evidence should be encouraged, to avoid the 'filtering and distorting' process of giving evidence by question and answer.[276]

> Psychological research lends support to the claim advanced at times by witnesses that being tied to answering designated questions tends to result in the distortion of their testimony. Similarly, the claim that a free report would give a more accurate version of the events in dispute is supported. On the other hand, psychological research also confirms the experience of many legal practitioners: a free report by a witness is usually found to be sketchy or incomplete … Obviously, both these techniques have positive and negative attributes and there would be considerable merit in the courts generally adopting a procedure which incorporated the use of each method to its greatest advantage.[277]

5.9 The ALRC suggested that while it would not always be desirable, the opportunity for evidence to be given in free narrative should be available under the Acts to encourage the court to adopt the practice where appropriate.[278]

5.10 As noted above, s 29(2) of the uniform Evidence Acts allows a witness to give evidence in narrative form if the party calling the witness applies to the court for a direction that the witness give evidence in that form. As with making any directions under the uniform Evidence Acts, the court must take into account s 192(2) factors when considering whether to make any directions regarding how the witness is to give their evidence.[279] Where the court gives no direction under s 29, the witness must give their evidence by the question and answer method; and if an answer is unresponsive to the question asked, it may be struck out.[280] Section 29 applies only where the evidence is given orally by the witness, and does not apply to affidavit evidence.[281]

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275 Ibid, [280]; [607]–[609].
276 Ibid, [608]–[609].
277 Ibid, [607]–[609].
278 Ibid, [607]–[609].
279 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180]. See Ch 16.
280 *R v Parkes* [2003] NSWCCA 12. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.2180].
281 *Ramirez v Sandor's Trustee (No 1)* (Unreported, New South Wales Supreme Court, Young J, 22 April 1997). The issue of affidavit evidence is discussed further below.

5.11 The requirement that a party apply for a direction was not part of the ALRC's original recommendation.[282] It has been suggested that the requirement to apply for a direction has limited the use of s 29. Stephen Odgers SC points out that a lawyer would rarely seek to have their own witness give evidence in narrative form, as it potentially allows the witness to take charge of the proceedings.[283] Similarly, Andrew Ligertwood states that, as directions under s 29 can only be made on application of the party calling the witness, the section is unlikely to be used.[284] Odgers notes that the section is most likely to be used in relation to expert witnesses, because they are familiar with the rules of evidence and can observe warnings regarding what evidence is or is not admissible.[285]

5.12 Section 29(2) reflects the common law position. The general rule is that evidence is given by question and answer, but an exception may be made where it would aid in the giving of more effective evidence.[286] Victoria and Western Australia have similar provisions to s 29.[287]

Submissions and consultations

5.13 IP 28 asked how s 29(2) of the uniform Evidence Acts operated in practice and whether this provision was sufficient to address the needs of different categories of witnesses. 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?[288]

5.14 The Commissions received differing views on the desirability of encouraging the use of narrative evidence. A common view expressed is that narrative evidence will allow a witness to give inadmissible evidence.[289] Victoria Legal Aid indicates that it does not support the giving of evidence in narrative form, on the basis that witnesses may include inadmissible evidence that may prejudice the jury and the jury is left to disentangle fact from opinion and relevant evidence from irrelevant evidence.[290]

5.15 The New South Wales Public Defenders Office (NSW PDO) says that, in practice, s 29(2) is rarely relied upon in criminal trials. In their view, criminal advocates recognise the importance of guiding the witness through the relevant parts of the witness' evidence, and of avoiding irrelevant and prejudicial material. Inviting a witness to give a narrative account is generally poor advocacy and increases the risk of

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282 There is no comment in the second reading speeches or the explanatory memorandum as to why an application is required before a direction can be given.

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

284 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.119].

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

286 In *R v Butera* (1987) 164 CLR 180, referring to evidence given by charts or explanatory materials, the High Court stated that in waiving the general rules regarding the giving of evidence, the court must consider whether there is a risk that an altered form of giving evidence might give it undue weight.

287 *Evidence Act 1958* (Vic), ss 42A, 42B; *Evidence Act 1906* (WA), ss 27A, 27B.

288 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3–1.

289 For example, B Donovan, *Consultation*, Sydney, 21 February 2005.

290 Victoria Legal Aid, *Submission E 22*, 18 February 2005.

derailing the trial by the accidental adducing of prejudicial evidence. On that basis, the NSW PDO's view is that s 29(2) should be repealed.[291]

5.16 A senior member of the New South Wales Bar suggests that there are good reasons why narrative evidence is not used, and that legislation need not be changed to make up for what may be a problem with inadequate counsel.[292]

5.17 One District Court judge agrees that he has rarely seen s 29(2) invoked, except to allow children to give evidence. His view is, however, not that it should be repealed but rather that it is adequate for present needs.[293] One magistrate indicates that she has used the section to good effect.[294]

5.18 However, the contrary view has been put by the New South Wales Director of Public Prosecutions (DPP NSW) which submits that narrative evidence may be a more efficient method of adducing evidence from some witnesses (for example, child witnesses or witnesses with a cognitive impairment) and may be more culturally appropriate for some witnesses. The DPP NSW suggests that the legislation be amended so that a court of its own volition is able to direct that a witness give evidence in narrative form, in the absence of a request for leave from the party calling the witness.[295]

5.19 The Law Council of Australia (Law Council) argues that, as long as it remains the adversarial responsibility of parties to collect and present evidence at trial, parties should be entitled to retain control over the presentation of oral testimony through the process of examination in chief. Allowing witnesses to testify in narrative form would undermine this adversarial process. The Law Council submits that whilst there may be arguments in favour of changing the procedural system to give the court responsibility for the presentation of evidence, changes to the current process should not be made without a serious inquiry into whether such a change in process is warranted in Australia.[296]

5.20 As it is the duty of the prosecutor to present evidence fairly to the court, the Law Council has considered whether it is arguable that prosecution witnesses should in all cases present their argument in narrative form. However, it believes that prosecution witnesses should only be allowed to testify in narrative form if there are limits upon the prosecution's right to cross-examine its own witnesses and tender their prior statements.[297]

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291 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
292 P Greenwood, *Submission E 47*, 11 March 2005.
293 Confidential, *Submission E 31*, 22 February 2005.
294 J Orchiston, *Submission E 48*, 12 April 2005.
295 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
296 Law Council of Australia, *Submission E 32*, 4 March 2005.
297 Ibid.

5.21 Support was received for the view that the ability to give evidence in narrative form was important for Aboriginal and Torres Strait Islander witnesses.[298] It was submitted that s 29 was under utilised in affording protection for Aboriginal witnesses in native title proceedings.

> The communication barriers faced by Aboriginal witnesses are well-known in the criminal and investigatory context (such as through the application of the Anungu rules) and have been well documented in the writings of Diana Eades, amongst others. Matters such as the tendency of Aboriginal witnesses to agree to leading questions in cross-examination, or to remain silent when embarrassed or shamed by a particular line of questioning, provide as much a barrier to eliciting the truth of a matter in native title proceedings as they do in the criminal context.[299]

5.22 The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation notes that the giving of evidence in narrative form is generally restricted to examination-in-chief. It argues that it is questionable whether other evidentiary procedures (ie, cross-examination) result in the extraction of the 'best evidence'.[300]

5.23 Some argue that the court already has the power to allow a witness to give evidence in this way. One Northern Territory practitioner notes that a provision like s 29 is somewhat artificial because, in his experience, Northern Territory courts frequently allow witnesses to give evidence in narrative form where it is appropriate.[301]

Aboriginal and Torres Strait Islander witnesses[302]

5.24 The question and answer method for eliciting evidence may be particularly inappropriate for Aboriginal and Torres Strait Islander witnesses who are not accustomed to this method of communication or to approaching a story in a direct way in response to specific questions.[303] It has been argued that a question and answer method of eliciting information can be socially distressing for Aboriginal witnesses, because it is antithetical to their culture and style of communication, which emphasises narrative and indirect means of eliciting information.[304] Studies have shown that indirectness is a definitive characteristic of Aboriginal communicative styles.[305]

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298 See, eg, Aboriginal Interpreter Service, *Consultation*, Darwin, 1 April 2005; S Cox, *Consultation*, Darwin, 31 March 2005.

299 Confidential, *Submission E 49*, 27 April 2005.

300 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

301 M Johnson, *Consultation*, Darwin, 30 March 2005. This view was confirmed by NT Department of Justice: Department of Justice (Northern Territory), *Consultation*, Darwin, 31 March 2005.

302 Other issues concerning the evidence of Aboriginal and Torres Strait Islander witnesses are discussed in Ch 17.

303 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Ch 4.

304 J Byrne, *Indigenous Witnesses and the Native Title Act 1993 (Cth)—Occasional Paper Series No 2/2003* (2003) National Native Title Tribunal.

305 Ibid, citing D Eades 'Commicative Strategies in Aboriginal English', S Romaine (ed) *Language in Australia* (1991), 84.

5.25 The NSWLRC has identified a number of areas where communication difficulties may occur between Aboriginal and non-Aboriginal people in a courtroom setting:

- Aboriginal society values the use of silence in conversation more than non-Aboriginal society, which can lead to misunderstanding in court and be incorrectly seen as guilt, ignorance or reflection of a communication breakdown.
- Aboriginal witnesses may agree gratuitously with whatever the questioner has put to him or her. This occurs particularly where many 'yes-no' questions are being asked by someone in a position of authority.
- Aboriginal people frequently do not use numbers or other quantitative means of describing events, such as days of the week, dates or time. Consequently, if specific answers are sought to questions like 'how' or 'when', Aboriginal witnesses are frequently seen as vague.[306]

5.26 Australian courts have to a certain extent recognised that the question and answer method is not always the most effective way of eliciting information from Aboriginal witnesses. For example, Blackburn J has stated that experience has taught him not to rely too heavily on the cross-examination of Aboriginal witnesses.[307] O'Loughlin J in *De Rose v South Australia* considered that the interests of justice would be best served by a witness giving their evidence in the most convenient and comfortable way for that witness.[308]

5.27 The Queensland Criminal Justice Commission recommended that the *Evidence Act 1977* (Qld) be amended to allow the court to direct a witness to give evidence wholly or partly in narrative form.[309] This recommendation has not been implemented. Instead the Queensland Government has developed a system to assist the courts in their communications with Aboriginal witnesses whereby judges, magistrates, legal practitioners and court facilitators are given guidance regarding the appropriate ways of asking questions to elicit the desired information accurately and effectively, including guidance on vocabulary, grammar and body language.[310]

5.28 The NSWLRC recommended that interpreters and court facilitators be used to overcome the difficulties experienced by Aboriginal offenders in giving evidence. The facilitators would assist the offenders in giving their evidence and understanding the proceedings, and would assist the court in understanding Aboriginal offenders'

306 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [7.5].
307 *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 171.
308 *De Rose v South Australia* [2002] FCA 1342, [252].
309 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Ch 4, Rec 4.1.
310 Queensland Department of Justice, *Aboriginal English in the Court—A Handbook* (2000).

demeanour and behaviour in court.[311] The NSWLRC also recommended that the court should be able to exercise a discretion, wherever possible, to allow Aboriginal offenders to give their evidence in narrative form.[312]

Child witnesses[313]

5.29 The question and answer method of giving evidence may be particularly difficult for witnesses who are children, due to such factors as the formality of the court, legal language and procedures, and the limitations of children's understanding, experience and language.[314]

5.30 In the Report of the inquiry into children and the legal process, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84), the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) looked extensively at research into children's memory and the sociology and psychology of disclosing remembered events.[315] ALRC 84 noted that the presumed gulf between the reliability of evidence from children and from adults appeared to be exaggerated. Studies demonstrated that the ability to remember and describe an event accurately, both at the time of questioning and at later dates, can be dependent on the interviewing method.[316] Using misleading or suggestive questioning techniques adversely affects young children's ability to recall an event accurately, and repetition of questions can also lead to young children changing their answers, as they may interpret the repetition of the question as a sign that their first answer was wrong. When children were asked to recount, in a free recall narrative, everything they remember, they typically remember less detail than older children or adults, although the information they do recall is equally accurate.[317]

5.31 ALRC 84 considered that allowing children to give their evidence in narrative form would be helpful in overcoming the problems children face in giving evidence in court, although it would not address the problems associated with cross-examination.[318]

5.32 Recommendations regarding the giving of evidence by children tend to focus on ways to keep children out of the courtroom, rather than the manner in which they give evidence. Most jurisdictions now allow for alternative arrangements to be made, such as for children's evidence in certain proceedings to be given via video links, CCTV, or a recording of a previous statement.[319]

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311 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), Ch 7.

312 Ibid, [7.41].

313 ***Other issues concerning the evidence of child witnesses are discussed in Ch 18.***

314 P Byrne, 'Children as Witnesses: Legal Aspects' in J Vernon (ed) *Children as Witnesses: Proceedings of a Conference* (1991) .

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

316 Ibid, [14.20].

317 Ibid, [14.21].

318 Ibid, [14.114].

319 *Evidence (Children) Act 1997* (NSW); *Evidence (Children and Special Witnesses) Act 2001* (Tas); *Evidence Reform (Children and Sexual Offences) Act 2004* (NT); *Evidence Act 1977* (Qld), ss 21AA–

The Commissions' view

5.33 The criticisms of narrative evidence raised in submissions and consultations are essentially the same as those considered in ALRC 26. The Commissions do not accept that the giving of evidence in free narrative by some witnesses will necessarily result in inadmissible evidence being heard by the court, or long delays in court time.

5.34 The Commissions endorse the view expressed in ALRC 26 that there is a place for narrative evidence in courtrooms and that its use should be encouraged. In particular, narrative evidence may be a more culturally appropriate form of testifying for some Aboriginal or Torres Strait Islander witnesses. It may also ameliorate some of the difficulties of giving evidence for child witnesses. This position is supported by the considerable body of research identified above.

5.35 Two reasons have been proposed for the section's lack of use. First, that adducing evidence in narrative form is not an effective method of advocacy, and second, the requirement that a party must apply for a direction has left the discretion in the hands of advocates rather than the court.

5.36 The Commissions believe that more effective use may be made of s 29(2) if the requirement for a party to apply for a direction is removed and a provision closer to the ALRC's original proposal enacted.[320] This would mean that the uniform Evidence Acts would provide that the evidence may be given in narrative form. Rather than specify that the evidence may be given wholly or partly in narrative form, the court should be able to use its general powers to give directions about which evidence is to be given in narrative form and the way in which that evidence may be given. A draft provision is set out in Appendix 1.

5.37 A court should only invoke s 29(2) where it considers that giving evidence in narrative form is appropriate. Relevant considerations in this regard will be a witness' age or cultural background, or, for example, the witness' ability to observe warnings about what evidence is admissible. Whilst such a change may not impact on the practice of advocates, it signals a clear legislative intention that the section should be used where it is in the interests of the proceedings to do so.

5.38 As noted recently by the VLRC, judicial officers play a key role in controlling the courtroom process and the manner and type of questions that are put to witnesses.[321] ALRC 84 noted that most lawyers, magistrates and judges are not trained in talking to children and lack the necessary language, sensitivity and skills to elicit a

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21AW; *Evidence Act 1929* (SA), ss 12, 13; *Evidence Act 1958* (Vic), ss 37B, 37C, 42F; *Evidence Act 1906* (WA), ss 106H–106P.

320 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 156.

321 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.154].

coherent account from a child in courtroom interrogations.[322] ALRC 84 recommended that guidelines and training programs be developed to assist judges and magistrates in dealing with child witnesses.[323]

5.39 Without an understanding of the reasons why giving evidence in narrative form may be more appropriate for some witnesses, it is likely that judges will fall back on their own experience as advocates and view this practice with suspicion. Judicial colleges must therefore include in their programs training on the way in which different types of witnesses may respond to traditional methods of examination in chief and cross-examination. A significant amount of work is already being undertaken in this area. For example, the Australian Institute of Judicial Administration has prepared an *Aboriginal Cultural Awareness Benchbook for Western Australian Courts*, which includes information on cross-cultural issues that may arise in the conduct of trials involving Aboriginal people.[324]

Proposal 5-1 Section 29 of the uniform Evidence Acts should be amended to remove the requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. A court may give directions about what evidence is to be given in narrative form and the way in which that evidence may be given.

Cross-examination of witnesses

5.40 The provisions of the uniform Evidence Acts that concern the rules for cross-examination[325] substantially mirror practices under the common law. For example, s 40 adopts the rule that where a witness has been called in error and is not questioned, that witness is not then available to the other party for cross-examination.[326]

5.41 Section 41 provides that the court may disallow questions on the basis that they are misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Section 42 establishes that leading questions may be asked in cross-examination. However, the court may disallow the question or direct the witness not to answer it, taking into account a number of factors. Section 42(2) states:

322 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.112].

323 Ibid, Rec 110.

324 See Australian Institute of Judicial Administration, *Aboriginal Cultural Awareness Benchbook for Western Australian Courts* (2004) Australian Institute of Judicial Administration <www.aija.org.au/online/ICABenchbook.htm> at 10 May 2005; see also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.155].

325 Uniform Evidence Acts ss 40–46.

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

> Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
>
> (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
>
> (b) the witness has an interest consistent with an interest of the cross-examiner; and
>
> (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
>
> (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

5.42 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.[327] 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

5.43 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.

5.44 Under the common law, a party cannot cross-examine its own witness unless the witness is declared hostile. To be declared hostile, the court must find that the witness is deliberately withholding or lying about material evidence.[328]

5.45 In the original evidence inquiry, the hostile witness rule was criticised as irrational and anachronistic.[329] The ALRC found that there was no satisfactory rationale for such a stringent test and proposed that a party be permitted to cross-

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327 Uniform Evidence Acts s 43(1).

328 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [39]. See *McLennan v Bowyer* (1961) 106 CLR 95.

329 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [623].

examine its own witness where the evidence being given is unfavourable to that party.[330]

5.46 Justice Tim Smith and Paul Holdenson QC have discussed the limitations of the common law in dealing with unhelpful witnesses.

> Trial counsel have all found themselves in the unenviable position of having called a witness only to find that the witness gives evidence which is either damaging to the client's case or assists in the case of the other party. Other situations arise. It may be that there are witnesses, for example, that the Crown would rather not call because they do not assist the Crown to advance its case against the accused. It may be that witnesses are called who gave detailed statements about the events in question but at the trial claim to have no recollection.[331]

5.47 As Smith and Holdenson point out, apart from a limited procedure of putting facts set out in the statement of the witness to the witness in the form of leading questions with the court's leave,[332] at common law there is no remedy for this problem other than calling further witnesses to contradict that witness or convincing the court that the witness is hostile.

5.48 The effect of having a witness declared unfavourable under s 38 is significant. With the leave of the court, an unfavourable witness may be questioned as if being cross-examined. That is, they can be asked leading questions, given proof of prior inconsistent statements, and asked questions as to credit.[333] 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.[334] Leave can be granted to cross-examine a witness on only part of his or her evidence, even though the rest of the witness' evidence is favourable to the party that called him or her.[335] Section 38 is a discretionary section and the factors listed in s 192 must be considered in granting leave.[336]

5.49 The term 'unfavourable' has been interpreted simply as meaning 'not favourable', rather than the more difficult test of hostile or adverse.[337] In *R v Lozano*, it

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330 Ibid, [625].

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

332 *R v Thynne* [1977] VR 98.

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

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

335 *R v Pantoja* (Unreported, NSW Court of Criminal Appeal, James J, 5 November 1997).

336 These being (non-exhaustively): the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; the extent to which to do so would be unfair to a party or to a witness; the importance of the evidence in relation to which the leave, permission or direction is sought; the nature of the proceeding; and the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

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

was accepted that s 38(1)(a) allows a witness to be declared unfavourable and cross-examined even when they genuinely cannot remember the events in question.[338]

5.50 There are a number of examples of the application of s 38. In *R v Milat*,[339] 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. 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.[340]

5.51 In *Randall v The Queen*[341] the complainant alleged that she was sexually assaulted by the accused in a room with ten to twelve men present. The Crown's case was that the complainant had been given drugs by the accused and was, in effect, comatose at the time of the offence and incapable of consenting to sexual intercourse. A number of the men present gave evidence consistent with the view that the complainant appeared comatose. Two witnesses gave evidence that suggested the complainant was alert and consented. As witnesses to the alleged offence, the Crown was obliged to call them. Without the ability to have the witnesses declared unfavourable under s 38, the Crown could not have cross-examined them, nor would they have been cross-examined by the defence, as their evidence was favourable to the accused.[342]

5.52 A prosecutor is under a duty to call any witnesses whose evidence may assist in determining the truth of the matter at issue. Dawson J said in *Whitehall v the Queen*:

> All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye witness, whose evidence he considers to be unreliable, untrustworthy or otherwise incapable of belief.[343]

5.53 As noted above, s 38 is not limited to the situation where a witness unexpectedly gives hostile evidence, or unexpectedly appears not to be making a genuine attempt to give evidence. Therefore the section allows a party (in practice, most likely to be the prosecution) to call a witness they know to be unfavourable for the sole purpose of having them available for cross-examination and getting an inconsistent out-of-court

338 *R v Lozano* (Unreported, New South Wales Court of Criminal Appeal, 10 June 1997).
339 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996).
340 Ibid, 7.
341 *Randall v the Queen* (2004) 146 A Crim R 197.
342 Ibid, 205.
343 *Whitehall v The Queen* (1983) 152 CLR 657, 674.

statement admitted into evidence under s 38(1)(c). The prior inconsistent statement is only admissible if it satisfies the requirements of Part 3 of the Act.[344]

5.54 The use of s 38 in this way was considered by the High Court in *Adam v The Queen.*[345] In *Adam*, the trial judge permitted the Crown to cross-examine a witness as an unfavourable witness under s 38(1)(c), in relation to prior inconsistent statements made to police by the witness. The use of the statements had two purposes. First, it related to the credibility of the witness. Second, and importantly, once admitted for that purpose, the statements were admissible also for their hearsay purpose under s 60,[346] 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.[347]

5.55 The discretions under ss 135, 136 and 137 may be employed to prevent questioning under s 38. In *R v GAC*, it was argued that leave should not be given to cross-examine the witness on the ground that it was unfairly prejudicial to the accused to allow the witness' prior statement into evidence because his professed lack of memory meant that the defence could not cross-examine him on his earlier version of events given to the police. However, after finding that the witness' memory loss was founded on a desire to help the accused, the New South Wales Court of Criminal Appeal stated:

> having regard to the circumstances of the interview, including its proximity to the critical events, what C said to the police was likely to be a good deal more reliable than what he said in court. For my part, I would not regard the probative value of the interview as being outweighed by unfair prejudice to the appellant; nor do I consider that there was substantial unfairness of the kind relied upon by the appellant.[348]

Submissions and consultations

5.56 Throughout this Inquiry, the Commissions have 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.

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344 P Zahra, *Advocacy: Cross-Examination: Understanding the Parameters Set by the Evidence Act 1995* (2003) College of Law, 102.

345 *Adam v The Queen* (2001) 207 CLR 96. Adam is also discussed in Ch 11.

346 Section 60 allows evidence of a previous representation that is relevant and admitted for a non-hearsay purpose, to be used also for a hearsay purpose, that is, to prove the truth of its contents. See Ch 7.

347 *Adam v The Queen* (2001) 207 CLR 96, 107. However, the propriety of this practice was based on the prior statement being admissible as evidence of the truth of what was said. See discussion of this aspect of *Adam* in Ch 11.

348 *R v GAC* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, McInerney and Sully JJ, 1 April 1997), 18.

5.57 Views from the uniform Evidence Act jurisdictions were split. The DPP NSW submits that the provisions of ss 38 and 192 are appropriate. The DPP NSW strongly agrees with the majority in *Adam*—that the terms of the Acts give effect to the original intention of the ALRC and do not produce unfairness to the accused. The DPP NSW's view is that s 38 enhances the prospect that the tribunal of fact will have access to all relevant evidence in determining the issues before it. Further, the availability of the 'unfavourable' witness for cross-examination by both parties ensures that the witness' evidence is properly tested and that the proceedings are fair to both parties.[349]

5.58 In contrast, the NSW PDO argues that the section does not apply fairly to both sides. The NSW PDO submits that:

> There has been an increasing tendency for Crown Prosecutors to rely on s 38 on every occasion when a witness called for the Crown gives evidence which does not fit in with the Crown theory of the case, even if the witness patently is attempting to give truthful accurate evidence.

5.59 In the NSW PDO's view, the problem is magnified by the operation of s 60, which will admit the witness' prior statement as evidence of the fact. It submits that paragraph (a) should be deleted from s 38(1). This would confine the section to permitting applications to be made to cross-examine only those witnesses who do not appear to be making a genuine attempt to give evidence, or who have made a prior inconsistent statement.[350]

5.60 The Law Council is supportive of some of the features of s 38:

> The first exception seeks to preserve adversarial balance by ensuring that all testimony is tested by cross-examination and it would seem that defence counsel cannot complain where the prosecution is permitted to cross-examine its witness about testimony unfavourable to its case, as the defence will certainly not do so.[351]

5.61 However, the Law Council argues the effect of s 38(1)(c)

> is to encourage the prosecution to call every witness who has made a prior favourable statement in the knowledge that this may be led to the court and once before the court will be admitted as hearsay … Where the prior statement is otherwise admissible as hearsay within other provisions of the Acts the Council has no objection to the practice, which permits the witness to be cross-examined on the hearsay evidence. However where the statement would otherwise be inadmissible under the Act the Council is of the view that the prosecution should not be given permission to call a witness it knows will be unfavourable simply for the purpose of leading a prior statement. To do so simply undermines the other hearsay provisions in the Act.[352]

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349 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
350 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
351 Law Council of Australia, *Submission E 32*, 4 March 2005.
352 Ibid. The view that deliberate forensic use of s 38(1)(c) was undesirable was shared by others: P Greenwood, *Submission E 47*, 11 March 2005.

5.62 The alternative view was also put—that prior inconsistent statements should be allowed into evidence through s 38, as they are contemporaneous and have strong probative value.[353] However, even amongst those who generally support s 38, it is noted that s 38(1)(c) means that the way in which statements are provided to police or other officials is of importance, as they can be used against a witness who later changes his or her story.[354] It is observed that, if the statement was obtained in an unfair manner, the discretions under ss 135, 136 and 137 of the uniform Evidence Acts can operate to exclude its admission.[355]

5.63 A number of New South Wales Supreme Court judges submit that they prefer the common law test to the test under s 38. This is on the basis that the ability to cross-examine a party's own witness should be limited to situations where the witness is deemed by the judge to be unwilling to tell the truth. Some of the judges consider that the breadth of the term 'unfavourable' is still not clear.[356] One District Court judge also believes the common law is preferable, as 'unfavourable' is unduly ambiguous.[357]

5.64 Some New South Wales District Court judges suggest that the section be amended to require that leave for cross-examination will only be given where the unfavourable evidence is unexpected. This will remove the opportunity for the prosecution to have any tactical advantage. The only other time cross-examination of a party's own witness will be allowed will be where a party has been directed to call that witness by the other party.[358]

5.65 However, other New South Wales District Court judges support s 38. They acknowledge that 'the defence sees it as a free kick' for the prosecution, but believe that it is appropriate to put into evidence prior inconsistent statements. In their view, the section is unproblematic, but has effected a significant change to court practice.[359]

5.66 The views from non-uniform Evidence Act jurisdictions were equally split. The Commercial Bar Association of the Victorian Bar states that 'the availability of these provisions under the Act ensure that a litigant aggrieved by unreliable and incorrect evidence from their own witness is not left to the very rare case at common law where a judge can be persuaded to declare a witness "hostile"'.[360] It maintains that the discretions granted to the trial judge under ss 135, 136 and 137 of the Acts ensure that there will be no abuse of s 38.[361]

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353 Office of the Director of Public Prosecutions Tasmania, *Consultation*, Hobart, 15 March 2005.
354 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005; T Game, *Consultation*, Sydney, 25 February 2005.
355 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.
356 Judicial Officers of the Supreme Court of New South Wales, *Consultation*, Sydney, 18 March 2005.
357 Confidential, *Submission E 31*, 22 February 2005.
358 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.
359 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.
360 Commercial Bar Association of the Victorian Bar, *Submission E 37*, March 2005.
361 These discretions are discussed in Ch 14.

5.67 The Criminal Law Committee of the Law Society of South Australia (Law Society of SA) does not support s 38.

> From the point of the criminal law, there is a potential for grave prejudice to an accused if a lower threshold is adopted in relation to whether the Prosecution is entitled to cross-examine a witness it calls as part of its case. In particular, the Prosecution might call a witness primarily for the purpose of placing before the jury by cross-examination alleged statements to the police by the witness which were highly damning of the accused but which statements were never adopted by the witness.[362]

5.68 Victoria Legal Aid shares the NSW PDO's view that s 38 operates unfairly in criminal cases to permit a party to call a witness solely to admit a prior inconsistent statement.

> The combined effect of sections 38 and 60 is to allow the prosecution to use any out of court statement as evidence of the truth of that statement, even if the witness now denies the truth of the statement or is not available to give evidence. *Lee* and *Adam* are examples of cases where the residual fairness discretion in the Act did not operate to exclude statements which were unsworn and which were made in circumstances where the makers had strong motives to exculpate themselves.[363]

The Commissions' view

5.69 The Commissions acknowledge, as recognised in the original ALRC evidence inquiry, that there are differing views about the value of the change made by s 38.

5.70 Smith and Holdenson have noted that:

> Much depends on the view that is taken about the importance for the credibility of trials, be they civil or criminal, that there be a genuine attempt to establish the facts on which the final decision will be based. The ALRC view was that that attempt was of fundamental importance.[364]

5.71 ALRC 26 considered whether to limit the operation of s 38 by requiring that the unfavourable evidence was unexpected. The ALRC rejected this approach on the basis that it would enable criminals to defeat prosecutions by suborning key witnesses. The ALRC also noted the argument that the prosecution receives a tactical advantage because, where a prior statement is used, it will go into evidence. ALRC 26 considered that the prosecution in that case has already suffered the tactical disadvantage of having to call a witness to prove its case and that witness has supported the defence.[365]

5.72 The Commissions believe that the guiding principle under which s 38 was first recommended—improvement in fact-finding by enabling a party who calls a witness to

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362 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.
363 Victoria Legal Aid, *Submission E 22*, 18 February 2005.
364 T Smith and O Holdenson, 'Comparative Evidence: The Unhelpful Witness' (1998) 72 *Australian Law Journal* 720, 727.
365 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [626].

challenge unfavourable evidence by cross-examining that witness—has been upheld by the operation of the section over the last ten years. While there has been some criticism of the section, there has also been strong judicial support, as in the *Adam* and *Milat* judgments noted above.

5.73 Furthermore, if the operation of s 38 means that evidence could be admitted which is unfairly prejudicial within the meaning of ss 135, 136 and 137, that evidence can be excluded or its use limited by the exercise of those discretions.

5.74 The Commissions therefore remain supportive of the reasoning behind the enactment of s 38 and its practical application. On this basis, no change is proposed.

Constraints in the cross-examination of vulnerable witnesses

5.75 Cross-examination is a feature of the adversarial process and designed to let a party confront and undermine the other party's case by exposing deficiencies in a witness' testimony. Under both common law and statute, limitations have been placed on inappropriate and offensive questioning under cross-examination. However, it has been argued that the effect of these provisions in practice has not provided a sufficient degree of protection for vulnerable witnesses.[366]

5.76 Section 41 of the uniform Evidence Acts grants the court the power to disallow improper questions asked in cross-examination.

> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading; or
>
> (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness, including age, personality and education; and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

5.77 The ALRC intended this section to bring together and clarify common law and legislative provisions which set limits on cross-examination.

> The proposals provide for the judge to disallow the question, or to inform the witness that he need not answer but may if he wants to do so. In this way the judge can prevent a slanging match developing, or let the witness answer the question nonetheless.[367]

366 T Drabsch, *Cross-Examination and Sexual Offence Complainants* (2003) NSW Parliament, 8.
367 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [631].

Child witnesses

5.78 Children are a category of witness who are particularly vulnerable in the adversarial trial system.[368] In their inquiry into children and the legal process, the ALRC and HREOC heard significant and distressing evidence that child witnesses, particularly in child sexual assault cases, are often berated and harassed to the point of breakdown during cross-examination.[369] Concerns were raised about the role of lawyers, and also about the role of judges and magistrates as the 'referees' of the trial. ALRC 84 made recommendations for the development of guidelines and training programs to assist judges, magistrates and lawyers in dealing with child witnesses.[370]

5.79 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).[371] 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.[372]

5.80 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.

- 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).

5.81 Section 28 of the *Evidence (Children) Act 1997* (NSW) provides that a child witness in any criminal proceeding or civil proceeding arising from a personal assault

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368 Issues involving child witnesses and children's evidence are also discussed in Chs 7 and 18.

369 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.111]. The Wood Royal Commission heard a number of similar complaints in relation to treatment of child witnesses: Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.92].

370 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Recs 110–112. See also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Ch 3.

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

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

offence cannot be examined, cross-examined or re-examined by an unrepresented defendant or accused except through a person appointed by the court.[373]

5.82 In its report on sexual offences, the VLRC concluded that general provisions regulating cross-examination, such as s 41 of the uniform Evidence Acts, were insufficient to ensure that child witnesses are protected against inappropriate questions.[374] The VLRC supported a recommendation of the Queensland Law Reform Commission that included, as well as the considerations in s 41, consideration of the content, manner and language of questioning, and the culture and level of understanding of the child.[375] The VLRC recommended that there be a duty on the court to ensure that, in the case of questions asked of children under 18 years of age:

- Neither the content of a question, nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
- The questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
- In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding and any mental, intellectual or physical disability of the witness.[376]

Complainants in sexual assault matters

5.83 Complainants in a sexual assault matter are in a particularly vulnerable and distressing position in a courtroom. The NSWLRC recognised that there are at least three factors that make sexual offence trials particularly distressing for complainants: the nature of the crime; the role of consent with its focus on the credibility of the complainant; and the likelihood that the complainant and the accused knew each other before the alleged assault took place.[377] The NSWLRC found that the treatment of such matters in cross-examination was a particular concern, with complainants likely to be cross-examined for a longer period of time than victims of other types of assaults. Complainants have appealed for greater control of cross-examination to make the process less stressful.[378]

5.84 In all Australian states and territories, recognition of the nature of sexual offences has led to the enactment of specific evidentiary limitations, such as making

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373 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).

374 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.146].

375 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children, Summary of Recommendations*, Report No 55: Part 2A (2000), Rec 13.1.

376 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 143, 144.

377 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), [2.2].

378 Ibid, [2.7].

evidence of a complainant's sexual experience inadmissible.[379] These specific provisions are discussed further in Chapter 18. Use of s 41 is another way in which improper cross-examination may be limited in sexual assault proceedings.

5.85 *R v TA* concerns 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.[380] Spigelman CJ noted that s 41 operates on the assumption that there is an element of relevance in the line of questioning. However, his Honour also found that the trial judge was entitled to reject the line of cross-examination by applying s 41 of the *Evidence Act 1995* (NSW).[381] 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.[382]

5.86 Justice Wood, in his February 2003 paper *Sexual Assault and the Admission of Evidence*, expressed the view that:

> Perhaps regrettably, this is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a 'fair run'. In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.[383]

5.87 In November 2004, the New South Wales Adult Sexual Assault Interagency Committee released its advice to the New South Wales Government on evidential and procedural issues regarding criminal law sexual offences.[384] That report also found that

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379 See, eg, *Criminal Procedure Act 1986* (NSW) s 293.

380 Uniform Evidence Acts s 55. Relevance is discussed further in Ch 14.

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

382 Ibid, 446.

383 J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), 30–31. See also Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

384 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004). This report was also given to this Inquiry as a submission: Women's Legal Services (NSW), *Submission E 40*, 24 March 2005. See also NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

provisions in place to address improper questioning are under utilised.[385] The report further notes that members of Aboriginal communities may face significant barriers in cross-examination. In the case of sexual assault, the high importance placed on the privacy of the female body by some Aboriginal cultures may make women feel extremely vulnerable and exposed. The Committee's report has recommended three reforms to s 41:

- Introduction of practice directions to assist judges in utilising section 41 of the *Evidence Act 1995 (NSW)* to regulate the conduct of cross-examination of the complainant;
- Amendment of section 41 of the *Evidence Act 1995 (NSW)* to place greater restrictions on tone and manner of questions that may be put to the complainant in cross-examination (in addition to the content of questions);
- Amendment of section 41 to model section 21 of the *Evidence Act 1977 (Qld)* to further allow the Court to consider whether a question is improper having regard to the level of understanding of the witness, cultural background or relationship to any party to the proceeding.[386]

5.88 The *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) was assented to on 31 May 2005.[387] The *Criminal Procedure Act 1986* (NSW) will be amended to impose a duty on a court hearing any criminal proceeding to disallow improper questions that are put to witnesses in cross-examination.[388] Whilst the amendments impose the duty for any witness, they form part of the New South Wales Government's ongoing program of legislative reform in sexual assault prosecutions.[389]

5.89 As a result of the amendments, s 41 of the *Evidence Act 1995* (NSW) will no longer apply to the cross-examination of witnesses in criminal proceedings, but will continue to apply to civil proceedings. The new s 275A(7) of the *Criminal Procedure Act 1986* (NSW) will state that s 41 of the *Evidence Act 1995* (NSW) does not apply to the criminal proceedings to which this section applies.[390]

5.90 The model adopted in New South Wales is similar to the model recommended by the VLRC in relation to child witnesses discussed above. Under the amendments, a

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385 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 3.

386 Ibid, 4. *Evidence Act 1977* (Qld) s 21(2) states that in deciding whether a question is an improper question, the court must take into account: (a) any mental, intellectual or physical impairment the witness has or appears to have; and (b) any other matter about the witness the court considers relevant, including, for example, age, education, level of understanding, cultural background or relationship to any party to the proceeding.

387 The commencement date of the provisions of the Act has not yet been proclaimed.

388 Criminal Procedure Further Amendment (Evidence) Bill 2005 (NSW), Sch 1.

389 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005, 14899 (B Debus—Attorney General), 14899.

390 Criminal Procedure Further Amendment (Evidence) Bill 2005 (NSW). For the purposes of the section, 'criminal proceedings' means proceedings against a person for an offence (summary or indictable), including committal proceedings, bail proceedings, sentencing and appeals: s 275A(9).

court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question:

(a) is misleading or confusing, or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
(d) has no basis other than a sexist, racial, cultural or ethnic stereotype.

5.91 The factors which may be taken into account by the court in determining whether a question should be disallowed are extended to include the ethnic and cultural background of the witness, the language background and skills of the witness, and the level of maturity and understanding of the witness.

5.92 The New South Wales legislation differs from s 41 as it imposes a duty on the court to disallow an improper question rather than a discretion. In the second reading speech, the New South Wales Attorney General stated that the amendment

> sets a new standard for the cross-examination of witnesses in criminal proceedings, including by referring, for the first time, to the manner and tone in which the question is asked … This amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear.[391]

Vulnerable witnesses

5.93 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,[392] 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.[393]

5.94 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

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391 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005, 14899 (B Debus—Attorney General), 14899.

392 For example, a spouse, parent or child of the accused. The compellability of certain witnesses is considered in detail in Ch 4.

393 *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1939* (NT) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1958* (Vic) s 37C. See J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005), [23.80].

parties, where a witness' credibility is challenged, even on peripheral or irrelevant matters.[394]

> 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 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.[395]

Submissions and consultations

5.95 IP 28 asked for 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.[396]

5.96 The Inquiry asked a number of judicial officers and senior advocates whether s 41 was used often to limit inappropriate or offensive cross-examination. Some New South Wales District Court judges indicate they are more likely to use the court's general powers to control proceedings rather than specifically make reference to s 41.[397] A number of judges of the Australian Capital Territory Supreme Court agree that advocates can often be dissuaded from a line of questioning without the formality of mentioning s 41. However, the judges consider that the section is important where an unrepresented litigant is conducting the cross-examination. Most often it is repetitive questioning that is censured.[398]

5.97 A number of senior practitioners make the point that, in their experience, the section is not often invoked by judges.[399] In the Australian Capital Territory, the provision has been used occasionally in cases involving family violence.[400]

5.98 The Law Council notes that s 41 gives no indication as to how the discretion to disallow questions is to be exercised—'there is no discernible judicial policy in respect

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394 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, 477.
395 Ibid, 477–478.
396 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3–3.
397 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.
398 Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005. One magistrate said she had successfully invoked the section: New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.
399 B Donovan, *Consultation*, Sydney, 21 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; Crown Prosecutors, *Consultation*, Sydney, 11 February 2005; Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.
400 Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

of the discretion and its exercise is left to all the facts and circumstances of the individual case'.[401]

5.99 The DPP NSW submits that judicial use of s 41 is inconsistent and depends upon the particular judicial officer and prosecutor.

> On some occasions judges do not use section 41 to stop the use of harassing or offensive questions, particularly in the context of sexual assault matters; but as this material is anecdotal, we are not able to quantify the degree to which this is a problem.[402]

5.100 The DPP NSW argue that, while it is acknowledged that defence counsel must test the consistency and veracity of the complainant's evidence, the potential for improper questioning by defence counsel remains of concern for complainants when they are considering whether or not to pursue a complaint.[403]

5.101 Victoria Legal Aid submit that in its experience most Victorian counsel refrain from harassing and offensive questioning in criminal trials as such tactics generally alienate the jury. Victoria Legal Aid express concern about unnecessary restrictions on cross-examination because in some criminal cases there may be few other methods of negating untruthful evidence—particularly in cases where sexual abuse in the distant past is alleged. Its view is that the current restrictions which operate under Victorian law (on access by the defence to potentially relevant information and on cross-examination about various subjects) already tip the balance between the protection of genuine victims and the avoidance of wrongful convictions towards the former.[404]

5.102 There is a significant similarity in the submissions that suggest ways in which s 41 should be amended. In particular, a number of submissions indicate that the relevant considerations under s 41(2) should be expanded, and that it is important that the tone of questioning is a relevant consideration.[405]

5.103 As noted earlier in this chapter, one Aboriginal Land Council submits that s 41 is under utilised in protecting Aboriginal witnesses in native title proceedings. An amendment to s 41 is proposed to make express reference to the vulnerable position of Aboriginal and Torres Strait Islander witnesses through the addition of a further subsection 41(2)(c) which would allow the court to take into account any cultural or customary matters arising under Aboriginal or Torres Strait Islander tradition.[406]

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401 Law Council of Australia, *Submission E 32*, 4 March 2005.
402 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
403 Ibid.
404 Victoria Legal Aid, *Submission E 22*, 18 February 2005.
405 Women's Legal Services (NSW), *Submission E 40*, 24 March 2005; NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005; Confidential, *Submission E 49*, 27 April 2005; Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.
406 Confidential, *Submission E 49*, 27 April 2005.

5.104 The Law Society of SA raises for consideration whether the subject of improper questions should be expanded to include 'cultural background' and 'sexual preference'.[407]

5.105 The DPP NSW submits that s 41 should be amended to impose a positive duty on the court to disallow improper questions and improper tones of address in cross-examination of all witnesses in all criminal matters. It agrees that judicial education and further appellate guidance are desirable, particularly in relation to child witnesses.[408]

5.106 The NSW PDO does not agree that it would be worthwhile to expand the considerations under s 41.

> Adding further synonyms of the word 'offensive' to s 41 will not lead to greater use of the provision. It is submitted that if s 41 is under-utilised, the solution is improved education of judicial officers, rather than amendments to s 41.[409]

The Commissions' view

5.107 The Commissions endorse the view of the NSW Adult Sexual Assault Interagency Committee that 'curbing the use of improper questions does not impede the cross-examination process, it simply respects the rights of the complainant witnesses and ensures the best evidence is received by the courts'.[410]

5.108 The use of s 41 to control improper questions during cross-examination is patchy and inconsistent. The Commissions support the view of the VLRC and others that the approach in s 41 is too limited to provide sufficient protection to vulnerable witnesses in some types of matters.

5.109 On that basis, the Commissions support the approach of the *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) to the extent that it sets out a more comprehensive and detailed list of questions that are inappropriate. Whilst it is true that these types of questions could (and should) already be disallowed under s 41 as it stands, explicit reference to these types of questions may serve to bring them to judicial attention and provide greater guidance as to how the discretion to limit cross-examination should be exercised.

5.110 However, the Commissions propose a different approach from that Act in two regards. First, the protections offered to witnesses in criminal matters should be no more comprehensive than in civil matters. A witness in a negligence or a civil assault matter may be equally vulnerable to attack in cross-examination as a victim of a crime. Any amendment to s 41 should apply equally to civil and criminal matters.

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407 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005. See also Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005.

408 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

409 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

410 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004), 4.

5.111 Secondly, the Commissions do not support imposing a general duty on the court to disallow improper questions. It must be recognised that examination of witnesses occurs in the context of an adversarial system. At times, counsel may seek to gain forensic advantage by allowing the other party to question witnesses in a certain manner. In the case of an ordinary witness, the objections of counsel and a discretionary power under s 41 will be sufficient to ensure that appropriate questions are asked of witnesses.

5.112 However, in relation to vulnerable witnesses, such as child witnesses and witnesses with a cognitive impairment, additional protection must be offered. Courts have a duty to protect vulnerable witnesses and it must be mandatory for judicial officers to disallow improper questions in these circumstances. Questioning which must be disallowed includes confusing or repetitive questions and questions structured in a misleading or confusing way. The draft provision is set out in Appendix 1.

5.113 The VLRC noted in it sexual offences report that:

> In order to maximise the effectiveness of tighter legislative controls on the types of questions asked of child witnesses, prosecutors, defence counsel and judicial officers need to be aware of the rationale for those changes. Previous experience has shown that legislative change in isolation from attitudinal change is not effective.[411]

5.114 The Commissions endorse the VLRC's recommendations regarding judicial and practitioner education on the needs of vulnerable witnesses in the context of this Inquiry.

Proposal 5-2 Section 41 of the uniform Evidence Acts should be amended to allow that the court may disallow an improper question put to a witness in cross-examination, or inform the witness that it need not be answered. An improper question should be defined as a question that is misleading or confusing, or is annoying, harassing, intimidating, offensive, humiliating, oppressive or repetitive, or is put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting), or has no basis other than a sexual, racial, cultural or ethnic stereotype.

Proposal 5-3 The uniform Evidence Acts should be amended to include a provision imposing a duty on the court to disallow any question of the kind referred to in Proposal 5–2 where the witness being cross-examined is a vulnerable witness because of their age or mental or intellectual disability.

411 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.152].

Proposal 5-4 Educational programs should be implemented by the National Judicial College, the Judicial College of Victoria and the Judicial Commission of New South Wales and by the state and territory law societies and Bar which draw attention to s 41 and, if adopted, new provisions of the uniform Evidence Acts dealing with improper questioning.

Questioning of a complainant by an unrepresented accused

5.115 In 2003, the NSWLRC recommended that an unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding.[412] In that inquiry, a number of submissions stated that judicial control of offensive and intimidating cross-examination was inadequate and inconsistent.[413] Submissions also argued that judges are less strict in disallowing inappropriate questioning when the accused is unrepresented.[414] Other submittors opposed the NSWLRC's recommendations 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.[415]

5.116 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.[416]

5.117 The NSWLRC recommended that a legal practitioner be appointed to cross-examine the complainant in sexual offence proceedings where the accused is unrepresented.[417] 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. Section 294A was recently found to be a valid limitation on the right to cross-examine, and not in itself to create an unfair trial.[418]

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412 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 VLRC: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 94.

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

414 Ibid, [3.54].

415 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.

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

417 Ibid, Rec 4.

418 *R v MSK and MAK* [2004] NSWCCA 308.

5.118 However, not all of the 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.*[419]

5.119 In its sexual offences report, the VLRC recommended that in any proceeding for a sexual offence, the accused may not cross-examine the complainant or a protected witness personally.[420] The VLRC made recommendations similar to those of the NSWLRC that the person able to conduct the cross-examination must be a legal practitioner, and that a warning regarding the rule in *Browne v Dunn* must be given.

5.120 IP 28 asked whether the uniform Evidence Acts should be amended to prohibit an unrepresented accused from personally cross-examining a complainant in a sexual offence proceeding.[421]

Submissions and consultations

5.121 The NSW PDO submits that it is fundamental that an accused has the right to be unrepresented and, if unrepresented, has the right to cross-examine witnesses called by the Crown. In the NSW PDO's view, s 294A derogates from these rights, is cumbersome, and reduces cross-examination to a reading from a list of prepared questions. It maintains no similar provision should be inserted into the uniform Evidence Acts.[422]

5.122 The NSW PDO cites the judgement of Sully J in *R v MSK* in regards to the requirement that 'a person' be appointed to cross-examine on behalf of the accused.

> I note that the section gives not the very slightest guidance or assistance as to where such a person is actually to be found; as to what qualifications, training, experience or other characteristics it is envisaged that the appointed 'person' should have; or as to the provision of any funding that might be required in order to secure the willing cooperation and assistance of a suitable 'person'.[423]

5.123 In contrast, the DPP NSW supports the inclusion of such a provision in the uniform Evidence Acts.[424]

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419 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), Recs 4, 8. The rule in *Browne v Dunn* is discussed below.

420 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 94.

421 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3–4.

422 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

423 *R v MSK* [2003] NSWSC 849, [25]. Note, however, as outlined above, on appeal the section was found to be a valid limitation on the right to cross-examine: *R v MSK and MAK* [2004] NSWCCA 308. Leave to appeal to the High Court has been denied in this case.

424 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

The Commissions' view

5.124 Chapter 18 looks at the 'rape shield' provisions of the various Australian jurisdictions and considers whether, in the interest of uniformity and consistency between Australian jurisdictions, there may be good reasons to recommend including provisions dealing specifically with the admission of evidence of sexual reputation or experience in the uniform Evidence Acts. However, the chapter notes that, 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.

5.125 Provisions which govern the ability of an unrepresented accused to question a complainant in a sexual assault matter are, like rape shield provisions, confined expressly to sexual offences. These types of provisions vary from jurisdiction to jurisdiction, and to specific types of evidence. In relation to rape shield provisions, Chapter 18 concludes that it is consistent with the Commissions' policy position and with the structure of the uniform Evidence Acts (and their intended application) for specific evidentiary provisions relating to sexual offence cases to remain outside the Acts.[425]

5.126 For similar reasons, the Commissions do not propose that 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

5.127 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.

5.128 ALRC 26 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 could be handed the document, asked to read it and then state whether he or she still adheres to his or her testimony.[426]

5.129 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

425 The policy framework, and structure of the uniform Evidence Acts is discussed in Ch 2.
426 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].

her so that an inference may be drawn on its contents.[427] In relation to s 44(3), Odgers notes that it was suggested in *R v Hawes*[428] (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.[429] 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.[430]

5.130 IP 28 asked whether there were concerns with the operation of s 44 of the uniform Evidence Acts.[431] Issues concerning s 44 were not extensively raised with the Inquiry. The NSW PDO submits that cross-examination under s 44 is an important tool available to the cross-examiner, and has been available under the common law, in limited circumstances, for over 100 years. On this basis, the NSW PDO suggests that no change to s 44 is desirable.[432]

The Commissions' view

5.131 At this stage of the Inquiry, the Commissions have not identified any significant concerns with s 44(2) where the evidence has or will be admitted into evidence and proposes no change in that regard. However, the Commissions note both the issue raised by Odgers and concerns raised in the previous ALRC evidence inquiry regarding the practice under s 44(3) where the document is not admissible. Whilst the Acts are a reflection of the common law in this regard,[433] the Commissions agree that the judge or jury may be susceptible to the impression (that cannot be refuted elsewhere) that the document asserted something contrary to the witness' testimony.

5.132 In 1978, the NSWLRC noted:

> It seems undesirable to have a system where documents are handed around the courtroom without the jury hearing of their contents directly because of a rule of admissibility, but with the possibility open of their drawing inferences as to their contents, particularly where counsel has hinted at or summarised their contents.[434]

5.133 While this matter has not been raised as an issue of concern during this Inquiry, the Commissions question whether there is sufficient safeguard against unfairness. Such cross-examination may be oppressive and unfair to a witness and confusing for

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427 Ibid, [636].
428 *R v Hawes* (1994) 35 NSWLR 294.
429 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4220].
430 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [636].
431 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3–5.
432 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
433 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [307].
434 New South Wales Law Reform Commission, *The Course of the Trial: Working Paper* (1978), [9.14].

the judge and jury. Further, the procedure offers little towards the ultimate aim of gathering the best evidence possible on which to decide the case. The guiding principles for the sections of the uniform Evidence Acts governing the presentation of evidence were improvement of fact finding, fairness and rendering the law more rational and easier to operate.[435] Permitting cross-examination of a witness on an inadmissible document is not consistent with any of these principles. However, repeal of s 44(3) and (4) of the uniform Evidence Acts would mean that the common law would apply in this area. As these sections were essentially a restatement of the common law, the concerns raised above would not be alleviated by repealing them.

5.134 It may be that judges could exercise greater control over this type of questioning under the existing provisions. Where a judge is concerned that counsel is confusing or misleading the court or jury by questioning a witness on a previous representation of another person that is inadmissible, he or she may call for the document to be produced under s 45(1)(b) and give directions as to its use.[436] A judge could also presumably make orders to control such cross-examination under the general power in s 26 to control the questioning of witnesses. On this basis, no change to s 44 is proposed at this time.

The rule in *Browne v Dunn*

5.135 The common law rule in *Browne v Dunn*[437] 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.[438] It is essentially a rule of fairness—that a witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness' evidence will be contested and further corroboration may be required.[439]

5.136 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;[440]

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435 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [598].

436 Note that under s 45(5), the mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

437 *Browne v Dunn* (1893) 6 R 67.

438 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 New South Wales* [2003] NSWSC 610. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4440].

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

440 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;[441]
- make judicial comment to the jury that the cross-examiner did not challenge the witness' evidence in cross-examination, when that could have occurred;[442] 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'.[443]

5.137 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.[444]

5.138 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.

5.139 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 was argued, should only allow judicial discretion to permit parties to recall witnesses who should have been cross-examined.[445]

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

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

443 Ibid, [46.10].

444 *R v Birks* (1990) 19 NSWLR 677, 685. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [46.15]. In *R v Lisiritis* [2004] NSWCCA 287, whilst not deciding the point, the New South Wales Court of Criminal Appeal said there was 'much to commend' the view that the High Court has implied in decisions such as *Azzopardi v The Queen* (2001) 205 CLR 50 and *Dyers v The Queen* (2002) 210 CLR 285 that the rule does not apply to an accused in a criminal trial. However, both these cases concerned the right of the accused not to give evidence, rather than the rule in *Browne v Dunn* in a strict sense.

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

5.140 IP 28 asked whether s 46 of the uniform Evidence Acts dealt adequately with the rule in *Browne v Dunn* and whether the consequences of a breach of the rule available at common law should be included in the Acts.[446]

5.141 The Inquiry did not receive many submissions addressing this issue. One senior practitioner argues that s 46 is unnecessary and should be repealed, leaving the common law to apply. His view is that the remedy available under s 46 is too simple and could operate unfairly.[447]

5.142 The DPP NSW submits that s 46 does not require amendment and that the consequences of a breach of the rule in *Browne v Dunn* at common law are not needed under the Acts.[448] The NSW PDO also does not support a statutory formulation of the consequences of a breach. It notes that recent doubt as to whether the rule applied in criminal proceedings means that it would be unfortunate for the Acts to include the entirety of the rule.[449]

5.143 Given the flexibility required to deal with the circumstances of each case, it was never intended that s 46 operate as a code to the exclusion of the common law remedies for a breach of the rule in *Browne v Dunn*. The Commissions have not found any significant difficulties with this approach and therefore propose no change to s 46.

Other issues

5.144 A further issue was raised regarding the form of evidence presented in affidavits in proceedings in New South Wales. In civil proceedings other than a trial, such as interlocutory applications, evidence is given solely by affidavit, unless the court agrees to accept oral evidence.[450] In some jurisdictions, certain evidence in a trial may be given solely by affidavit on the direction of the court.[451]

5.145 Affidavits are required to be prepared in a strict manner. The Rules of the Supreme Court of New South Wales currently require that affidavits be made in the first person and in direct speech.[452] Deponents of affidavits must use their own words and manner and, as a general rule, are not allowed to draw conclusion from facts. That is, a deponent is not allowed to say 'I had an agreement with Mr Smith'. A new Civil Procedure Bill and Uniform Civil Procedure Rules will shortly be introduced in New South Wales with the aim of rationalising and simplifying the state's civil court

446 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 3-6.
447 P Greenwood, *Submission E 47*, 11 March 2005.
448 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
449 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, citing the decision in *R v Lisiritis* [2004] NSWCCA 287, fn 175.
450 B Cairns, *Australian Civil Procedure* (5th ed, 2002), 447.
451 Ibid, 447.
452 *Supreme Court Rules 1970* (NSW), Pt 38, r 2.

rules.[453] The new rules largely follow the current rules, but do not have an express requirement of direct speech.

5.146 Schedule 2 of the Supreme Court of Victoria standard order for setting down proceedings in the Commercial List states that, where a witness statement contains conversations, they should, if recollection permits, be expressed in direct speech.[454] Other Victorian court rules, such as the *Supreme Court (Criminal Procedure) Rules 1998*, state that an affidavit must be in the first person, but do not require direct speech.[455]

5.147 A senior practitioner notes that 40–50 per cent of objections to evidence in civil matters are about affidavits not being expressed in direct speech and containing a conclusion.[456] He considered that the requirement of direct speech is akin to creating a fiction. Affidavits are often prepared years after the events in question. To believe that a person has remembered a conversation in the form of direct speech is a nonsense, even where the affidavit is framed in terms of 'to the best of my recollection'. It was suggested that what people remember is the outcome of conversations, and this should be the matter that they are testifying to. There should be no requirement that these recollections be expressed in direct speech.[457]

5.148 As noted above, many of the conventions regarding affidavit evidence differ between courts and may or may not be struck out by the court at its discretion. Practice also differs between states.

5.149 The adducing of evidence by affidavit was not dealt with specifically in the ALRC's earlier evidence inquiry. It was submitted to this Inquiry that the uniform Evidence Acts should contain provisions governing the form and content of affidavits on the basis that the Acts are concerned with the presentation of evidence generally.[458]

5.150 The Commissions' view at this stage is that these matters are best dealt with by the rules of the relevant courts. However, the Commissions would be interested to receive further views on this matter.

Question 5-1 Should the uniform Evidence Acts contain provisions dealing with the form of affidavit evidence? If so, what considerations should be included in such a section?

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453 At the time of writing, the Civil Procedure Bill 2005 was under consideration by the Legislative Assembly.

454 Supreme Court of Victoria, *Supreme Court of Victoria, Practice Note No 4 of 2004* (2004) Supreme Court of Victoria <www.supremecourt.vic.gov.au> at 19 May 2005.

455 *Supreme Court (Criminal Procedure) Rules 1998* (Vic) Ch VI.

456 S Finch, *Consultation*, Sydney, 3 March 2005.

457 Ibid.

458 Ibid.

6. Documentary Evidence

Contents

Background

6.1 The uniform Evidence Acts introduced sweeping reforms to the rules governing the admissibility of documentary evidence. The most significant of these is the abolition of the original document rule.[459] Under the common law, the contents of a document can only be proved by tendering the original document. There are several exceptions to this rule for situations where the original is unavailable, but, generally, secondary evidence of the contents of the document is not admissible. Section 51 of the uniform Evidence Acts provides that 'the principles and rules of the common law that relate to the means of proving the contents of a document are abolished'.

6.2 The uniform Evidence Acts also greatly widened the definition of 'document'. At common law, 'a document is essentially an object upon which is visibly inscribed intelligible writing or figures'.[460] The uniform Evidence Acts define 'document' to be any record of information, including:

(a) anything on which there is writing; or

459 Uniform Evidence Acts s 51.
460 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 72.

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.[461]

6.3 The wide definition of the term 'document' and the allowable means of proof are said to 'greatly increase the flexibility of the law to admit the contents of documents into evidence'.[462]

6.4 Other reforms introduced by the uniform Evidence Acts relate to the rules on cross-examination on documents,[463] the refreshment of memory from documents[464] and proving attested documents.[465]

6.5 This chapter examines how the provisions of the uniform Evidence Acts dealing with documentary evidence have operated in practice. It then examines two specific issues raised in IP 28:[466] proof of electronic evidence; and evidence of official records.

Operation of the documentary evidence provisions

6.6 Part 2.2 of the uniform Evidence Acts[467] contains the principal provisions dealing with documentary evidence. These are ss 47–51.

6.7 Section 48 sets out the ways in which the contents of a document can be proved. In addition to tendering the document itself, these include:

- by admissions by a party to the proceedings as to its contents;[468]
- by tendering a copy of the document;[469]

461 Uniform Evidence Acts Dictionary, Pt 1. 'This definition needs to be coupled with that contained in s 47(1) … which sets the scope for the rules contained in Part 2.2': J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 73.

462 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 105.

463 Uniform Evidence Acts s 45.

464 See V Bell, 'Documentary Evidence under the Evidence Act 1995 (NSW)' (2001) 5 *The Judicial Review* 1.

465 Uniform Evidence Acts s 149. Where the validity of a document depends on it having been properly attested, at common law it is necessary to prove this fact by calling one of the attesting witnesses to testify, unless the witnesses are unavailable or a presumption of validity applied. Section 149 does away with this requirement.

466 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 4–2, 4–3, 4–4.

467 Pt 2 in the *Evidence Act 2001 (Tas)*.

468 Uniform Evidence Acts s 48(1)(a). The admission can only be used against the party who made the admission, or who adduced evidence of it: s 48(3).

469 Ibid s 48(1)(b). It need not be an exact copy as long as it is 'identical in all relevant respects': s 48(2).

- if the document is an article or thing that records sounds, or in which words are recorded as code (such as shorthand writing), by tendering a transcript of the recording or decoded words;[470]
- by tendering a document produced by use of a device to retrieve stored information;[471]
- by tendering a copy or summary of, or extract from, a business record;[472]
- by tendering a copy of a public document;[473] and
- if the document is 'unavailable',[474] or if the existence and contents of the document are not in issue, by tendering a copy, summary or extract of the document, or by adducing oral evidence of its contents.[475]

6.8 Other provisions of the uniform Evidence Acts dealing with documentary evidence include:

- inferences as to the authenticity of a document;[476]
- the hearsay rule and its exceptions;[477]
- documents produced by processes, machines and other devices;[478]
- evidence of official records, Commonwealth documents and public documents;[479]
- requests to produce documents or call witnesses;[480] and

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470 Ibid s 48(1)(c). See *R v Butera* (1987) 164 CLR 180 and *R v Cassar* [1999] NSWSC 436 on the admissibility of tape recordings. The latter case considers the combined effect of the common law and s 48(1) of the *Evidence Act 1995* (Cth).

471 Uniform Evidence Acts s 48(1)(d).

472 Ibid s 48(1)(e).

473 Ibid s 48(1)(f). Providing that it is, or purports to have been, printed: by the Government Printer or the state equivalent; by authority of the government or administration of the Commonwealth, a state or territory or a foreign country; or by authority of Parliament: Uniform Evidence Acts s 48(1)(f). A 'public document' is defined to mean a document that forms part of the records of, or is being kept by or on behalf of: the Crown; a foreign government; or a person or body holding office or exercising a function under the Constitution, an Australian law or a foreign law: Uniform Evidence Acts Dictionary, Pt 1.

474 A document is defined 'not to be available' if and only if: it cannot be found after reasonable inquiry and search; it was destroyed (not in bad faith if destroyed by or on behalf of the party); it would be impracticable to produce it; its production could lead to a conviction; it is not in the party's possession or control: Uniform Evidence Acts Dictionary, Pt 2, cl 5.

475 Ibid s 48(4).

476 Ibid s 58. Section 58(1) provides: 'If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity'.

477 *Evidence Act 1995* (Cth) Ch 3 Pt 3.2; *Evidence Act 1995* (NSW) Ch 3 Pt 3.2; *Evidence Act 2001* (Tas) Ch 3 Pt 2; *Evidence Act 2004* (NI) Ch 3 Pt 3.2.

478 Uniform Evidence Acts ss 146–147.

479 Ibid ss 155–159; except s 155A of the *Evidence Act 1995* (Cth) which has no equivalent in the New South Wales and Tasmanian legislation.

- proof of certain matters by affidavits or written statements.[481]

6.9 IP 28 questions how the provisions of the uniform Evidence Acts dealing with documentary evidence have operated in practice and whether any concerns have emerged.[482]

Submissions and consultations

6.10 The NSW Young Lawyers Civil Litigation Committee expresses the view that the uniform Evidence Acts, and the level of discretion afforded the judiciary, have worked very well.[483] It comments that the legislation has been successful in balancing the interests of the parties against reducing the previous level of difficulty in having copies and computer-stored documents admitted into evidence. As an example of an effective provision, it points to s 58, which allows a court to draw inferences as to the authenticity of documents. It submits that the wide drafting of the provision protects 'against the abuse of such presumptions'.[484] It also notes that parties are free to raise evidence challenging the authenticity of documents, such as pursuant to s 155(2). Finally, the Committee highlights provisions in respect of persons having responsibility for the making or keeping of the relevant documents (or in some cases 'authorised' persons as defined in s 171(3)) as providing useful checks and balances.

6.11 The Legal Services Commission of South Australia raises the use of the expression 'summary document' in s 156 of the uniform Evidence Acts. It submits that 'the interpretation of that expression and the potential for personal opinions and interpretation to be included in any "summary" is a matter for concern'.[485]

6.12 The only other matter raised for consideration in submissions and consultations is in relation to s 146 of the uniform Evidence Acts and the issue of ensuring that a device producing a document is in itself not prone to error. This issue is considered later in this chapter.

The Commissions' view

6.13 Section 156 deals with public documents.[486] It provides a rebuttable presumption that a document that purports to be a copy of, or an extract from or summary of, a public document, and is either sealed or certified as such, is what it purports to be. Section 48(1)(e)(ii) and s 48(4)(a) contain similar wording. Section 50 allows proof of the contents of voluminous or complex documents by tendering a

480 Uniform Evidence Acts ss 166–169.
481 Ibid ss 170–173 (except that the definition of 'authorised person' differs between the Acts).
482 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4–1.
483 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, 2.
484 Ibid, 2.
485 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 2.
486 Section 182 gives this section a wider application in relation to Commonwealth records.

summary. There are also numerous other pieces of legislation that contain references to a 'summary of a document'.

6.14 Perhaps surprisingly, the word 'summary' is not defined in any of the legislation in which it appears, nor has its legislative meaning been judicially considered in Australia. This absence of judicial consideration in itself indicates that the inclusion of 'summary' in legislation appears not to have caused difficulties. A Canadian decision of the Alberta Court of Queen's Bench considered its meaning and held that a summary of a document must 'fairly represent its contents, including any qualifications to the statements chosen'.[487]

6.15 The Commissions are not presently persuaded that the provision in s 156 for admitting a summary of a public document is a matter for concern. First, the presumption that the document is what it purports to be is rebuttable. Secondly, requiring the summary to be sealed or certified as such provides a safeguard in so far as the document has been checked by a person in a position of some authority. Thirdly, it is debatable that the word 'summary' can be interpreted widely and allows, at least to any significant degree, for personal opinions. As a matter of commonsense, a summary is a reduced representation, or abridgment, of the original, which 'fairly represent[s] its contents'.[488]

6.16 At any rate, the Commissions' consultations indicate that the ability to tender a summary of a document is valued by the legal profession, as well as appreciated by the bench. Section 50, which allows proof of the contents of voluminous or complex documents by tendering a summary, has been singled out as a particularly useful provision. The wide use of interlocutory procedures, such as discovery, in present-day litigation has enabled many evidence issues to be resolved prior to the start of a hearing or trial. In this context, the provision to the other party of summaries of documents has been a useful tool in settling the issues early on and reducing hearing time. Objections to summaries can be, and are, made and resolved at these pre-trial stages. The Commissions do not propose to make any amendment to s 156 of the uniform Evidence Acts.

Reliability and accuracy of computer-produced evidence

6.17 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'.[489] This provision allows photocopies and computer-produced copies of documents to be admitted as evidence.[490] Sections 146–147 facilitate proof of 'evidence produced by processes,

487 *Opron Construction Co v Alberta* (1994) 151 AR 241, [507].
488 Ibid, [507].
489 Uniform Evidence Acts s 48(1)(b)(ii).
490 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4920].

machines and other devices'[491] and are intended, among other things, to facilitate the admission of computer-produced evidence.[492]

6.18 Section 146 of the uniform Evidence Acts creates a rebuttable presumption that, where a party tenders a document or thing that has been produced by a process or device, if the device or process is one that, if properly used, ordinarily produces a particular outcome, then in producing the document or thing on this occasion, the device or process has produced that outcome. For example, it would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy the relevant document. Section 147 provides a similar rebuttable presumption in relation to documents produced by processes, machines and other devices in the course of business.

6.19 IP 28 asks whether the application of the uniform Evidence Acts to computer-produced evidence raises any concerns.[493]

Submissions and consultations

6.20 The NSW Young Lawyers Civil Litigation Committee does not raise any concerns relating to the application of the uniform Evidence Acts to computer-produced evidence.[494] It notes that the methodology used to present such evidence is still evolving, as is the handling of the evidence by the courts. It submits that the legislation makes adequate provision for judicial discretion to operate in the handling of computer-produced evidence, and that court rules are flexible enough to allow the process of evolution to occur.

6.21 Clayton Utz submits that the wide definition of 'document' in the uniform Evidence Acts, and the broad interpretation of that definition in the case law,[495] can adequately accommodate the receipt of electronic information as admissibile evidence, in particular under ss 47–51, ss 59–75 (other than s 71, which is discussed below) and ss 146–152.[496]

6.22 The Criminal Law Committee of the Law Society of South Australia and the Legal Services Commission of South Australia make a comparison between the provisions of South Australia's evidence legislation and that of the uniform Evidence Acts dealing with evidence produced by processes, machines and other devices.[497] Both commented that s 45C of the *Evidence Act 1929* (SA) seems to be more

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491 Uniform Evidence Acts ss 146–147.
492 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [705].
493 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4–2.
494 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, 2.
495 See, eg, *Sony Music Entertainment (Aust) v University of Tasmania (No 1)* (2003) 129 FCR 472.
496 Clayton Utz, *Submission E 20*, 17 February 2005, 7–8.
497 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 2; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 2.

comprehensive than s 146 of the uniform Evidence Acts 'in ensuring that a device producing a document is in itself not prone to error'.[498]

6.23 Both these submissions also point out that the uniform Evidence Acts have no direct equivalent of s 59B of the *Evidence Act 1929* (SA), which requires a court to be satisfied that there have been no alterations made to the machine, such as tampering with the hard drive of the computer.[499]

6.24 These South Australian submissions suggest that the uniform Evidence Acts may require a more rigorous process for ensuring the reliability and accuracy of computer-produced evidence.[500] There is empirical evidence signalling that presumptions of accuracy of computer-produced material are often incorrect, yet errors are not detected by physical inspection.[501] Based on submissions and further research, the Commissions have considered two approaches.

The South Australian approach

6.25 Section 45C of the *Evidence Act 1929* (SA) applies to reproductions made by 'an instantaneous process' or produced from a record made by a process in which the contents of a document are recorded by photographic, electronic or other means.[502] Section 45C(2) provides that, in determining whether the document sought to be tendered is an accurate reproduction, a court is not bound by the rules of evidence and, in particular, the court may:

- rely on its own knowledge of the nature and reliability of the processes by which the reproduction was made;
- make findings based on the certificate of a person with knowledge and experience of the processes by which the reproduction was made, or who has compared the contents of both documents and found them to be identical; or
- act on any other basis it considers appropriate in the circumstances.

6.26 Section 45C(4) creates a rebuttable presumption that a reproduction made by 'an approved process'[503] accurately reproduces the contents of the document purportedly reproduced.

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498 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 2.

499 Ibid, 2; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 2.

500 See also L Crowley-Smith, 'The Evidence Act 1995 (Cth): Should Computer Data be Presumed Accurate?' (1996) 22(1) *Monash University Law Review* 166, 173.

501 C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, 130–131: 'A software failure can result in the production of material that appears regular on its face, but which contains information that is inaccurate in some respect. It is precisely this case of latent inaccuracy that presents the greatest challenge to legal fact finding. The absence of obvious irregularity on the face of given material means that scrutiny of that material alone cannot be an effective means of determining the accuracy of the information that it contains'.

502 *Evidence Act 1929* (SA) s 45C(3).

503 As defined by regulations: Ibid s 45C(5).

6.27 The *Evidence Act 1929* (SA) also has a number of provisions applying specifically to computer evidence. Section 59B makes 'computer output'[504] admissible subject to the court being satisfied that:

- the computer is correctly programmed and regularly used to produce the same kind of output;
- the data from which the output is produced is prepared on the basis of information that would normally be admissible as evidence of the statements or representations contained in the output;
- there is no reason to suspect any departure from the system, or any error in the preparation of the data;
- the computer has not malfunctioned so as to affect the accuracy of the output;
- there have been no alterations to the computer that might affect the accuracy of the output;
- records have been kept of alterations to the computer; and
- there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

6.28 These sections provide alternative approaches to the admissibility of computer-produced evidence.

The redundancy test approach

6.29 Another possible approach, developed in the course of the empirical research referred to above, has been termed a 'redundancy test' approach.[505] In this research, Dr Cameron Spenceley tested the assumption of reliability of computers and found that it cannot be assumed that the risk of inaccuracy in computer output due to failure is low.[506] He explains that it is impossible to test for either the inaccuracy or accuracy of computer operations, and impossible to give a statistical rate of failure, and that there is therefore no rational basis for assuming a high rate of reliability.[507] He concludes that

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504 Ibid s 59A includes definitions for 'computer', 'computer output' and 'data'.

505 C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003.

506 Ibid, Ch 4 and Ch 6, 251. The impetus for Spenceley's thesis was his unease at an assertion made in C Tapper, *Cross and Tapper on Evidence* (9th ed, 1999) that, generally speaking, computers are reliable, and a general acceptance of this assumption in legislation and in judicial decisions.

507 Leaving aside the accuracy of data input, a computer is only as reliable as its least reliable component. This is more likely to be the software than the hardware. It is not feasible to carry out an empirical study of software reliability, as it is not possible to get a representative sample of how the software will be used. A software program may contain a fault—and it is anecdotally acknowledged by software designers that, although programs are tested before release to minimise faults, no software program is ever going to be fault-free—but whether this fault results in a failure of the program depends on the individual's use of the

'all that can be demonstrated is that there is genuine uncertainty about reliability which is operative on both a general and a specific level'.[508]

6.30 Spenceley acknowledges that 'computers are unique in terms of the manner in which they operate and the ubiquity of their use'[509] but warns against a preferential evidentiary treatment of their output that is not necessarily justified. He argues that 'there is a need to have a rational foundation for asserting that a source of information will be able to aid the identification of truth',[510] but that it is 'very difficult to quantify or qualify the reliability of computers in a way that would furnish the foundations about probative capacity that are required for the purposes of evidentiary treatment'.[511] Furthermore:

> the argument that evidentiary treatment of computer-produced material should be undertaken according to different standards does not make clear if there are to be any boundaries beyond which those different standards should not be applied. … there is a range of complex material in respect of which various dispensations of proof might be superficially attractive. If the requirements of rationality are to be relaxed or discarded for computer-produced material, why should they not be relaxed or discarded for a range of other material.[512]

6.31 Spenceley builds a case for adopting an approach that relies on implementing a 'redundant mechanism' in the environment in which the computer is used to address the problem of reliability of computer output.[513] A 'redundant mechanism' does not increase the functional capacity of the computer system itself, but operates to prevent or mitigate unreliability in that system.[514] That is, it operates to provide some level of verification that a failure in the computer has not occurred. There is very little that can alert a user to the fact that a failure has occurred, but there may be at least some tell-tale signs revealed by a redundant mechanism. Spenceley argues that if the legal system does not at least attempt to filter evidence by asking the question 'how would one know if something has gone wrong?' it is doing no better than guessing at the reliability of the computer output.[515] In many cases, the cost of admitting and relying on unreliable evidence is too great for assumptions of reliabilty to be acceptable. For

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computer. Particular inputs will trigger particular faults and lead to failures in data processing; whereas other information inputs may not trigger faults and may result in reliable processing: see C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, Ch 4, especially 131–132 and Figure 4–1. There are too many degrees of freedom to carry out empirical testing. In addition, software can change over time. The only constant that can be assessed is the number of faults in a computer, but this information is not enough, as it gives no indication of the percentage rate of failure triggered by the faults.

508 Ibid, 251.

509 Ibid, 252.

510 Ibid, 248.

511 Ibid, 248.

512 Ibid, 252.

513 Ibid, 254–263.

514 Ibid, 255. 'System A' is the system that arrives at the result for which the computer is being used. 'System B' is a parallel system that verifies the result, but is redundant in so far as it is actually needed to arrive at the result.

515 C Spenceley, *Consultation*, 20 May 2005.

example, in some criminal cases carrying serious penalties, such as corporate fraud, child pornography or carrying out terrorist activities, the prosecution can rest almost entirely, if not entirely, on computer-produced evidence.[516]

6.32 'Redundant mechanisms' can involve hardware solutions, software solutions, human solutions, or any combination of the three. Examples of 'redundant mechanisms' are: manual verification of output by a person with knowledge of, or at least familiarity with, the expected output; or comparison of the output of interest with the output from a parallel computer system.[517] A 'redundant mechanism' can be as simple as a customer phoning his or her bank to query a suspect entry on a bank statement to something as involved as processing data through five separate computer systems that perform the same task, as was done on the American space shuttle program. If the same input data is processed by two systems that are similar but not identical and each produces the same outcome, there is a high probability it is reliable.[518] However, a 'redundant mechanism' may simply highlight that something could be wrong, not necessarily that something is wrong.

6.33 The test of admissibility for computer-produced output that Spenceley proposes is as follows:

> It should be demonstrated that:
>
> (a) some mechanism(s) of redundancy (however formulated and implemented) was or were utilised in connection with the production of particular material in the setting in which it was produced; and that
>
> (b) it is reasonably likely that any error(s) in the operation of that computer that affected the accuracy of information contained in that material would have been detected by such mechanism(s).[519]

6.34 Spenceley stresses that the problem of balancing the benefits of facilitating the admission of computer-produced evidence with the need to ensure its reliability is not

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516 An example of how a failure in computer processing might manifest in such a case is if there is a fault in a software program that monitors and records IP (Internet Protocol) addresses. An IP address is an identifier for a computer or device on a TCP/IP network. Networks using the TCP/IP protocol route messages based on the IP address of the destination. The numbers in an IP address are used in different ways to identify a particular network and a host on that network. If a mistake occurs in the program, the data may indicate that a particular number connects to a particular site, indicating that a particular user has accessed a particular website. In cyber crime, where the tracing of activity on the Internet may be the cornerstone of the prosecution, the program failure could wrongly implicate someone in illegal activity. Similarly, in Internet banking, the bank keeps a record of users logging onto the bank's website. A failure in this software could give rise to unreliable evidence.

517 C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, 255.

518 The 'parallel approach'.

519 Spenceley argues that computer input should be treated exactly the same way as it would be treated if offered directly as evidence: C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, 263–265.

an easy one and that what he proposes is not a 'quick fix'.[520] He argues, however, that a 'redundancy test' is the most rationally-based test of reliability. What results from his proposed test

> is not a guarantee of accuracy, but a basis for inferring that computer-produced material that is admitted for use in a given instance of legal fact finding will be more likely than not to aid the identification of truth. Of greater importance still, the basis of inference is one that has a rational foundation.[521]

The Commissions' view

6.35 In light of Spenceley's research, the presumptions of reliability in ss 146 and 147 of the uniform Evidence Acts may need to be questioned and a higher threshold for the admission of computer-produced output into evidence established.

6.36 Section 45C of the *Evidence Act 1929* (SA) has the outward appeal of being broad and investing the court with wide judicial discretion to admit into evidence photographic, electronic and other reproductions. However, the presumption in s 45C, that 'an approved process' has accurately reproduced the tendered document, has the same shortcoming as that which arises from the presumptions in ss 146 and 147 of the uniform Evidence Acts. As long as an 'approved process' is used, concerns about reliability without further investigation arise.

6.37 On the other hand, a 'redundancy test' appears to offer a more rigorous requirement for admissibility of computer-produced material that balances the need to ensure reliability of evidence with the need for an efficient practice for use in litigation. Relatively simple and cheap verifying measures can be built into the computer environment that can at least mitigate the risks of computer unreliability.

6.38 The advantage of a test that requires a mechanism that verifies the correct operation of the computer is that all that is required 'is to describe the measures that have been put in place in a particular setting'.[522] The problem of reliability is confronted not by seeking to assess reliability directly, but rather by attempting to qualify the risk that uncertainty presents.[523]

6.39 Although s 59B of the *Evidence Act 1929* (SA) goes some way to requiring proof of a 'redundant mechanism',[524] it falls short of providing a basis on which the reliability of the evidence can be inferred. On the one hand, the merit of the section lies in its 'specific computer' approach, focusing on the reliability of the computer that produced the document rather than the reliability of computers generally. The approach 'recognises in a direct way the need to address the issue of whether a computer has

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520 C Spenceley, *Consultation*, 20 May 2005.

521 C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, 262.

522 Ibid, 263.

523 Ibid, 265.

524 The court must be satisfied that there is no reason to suspect any departure from the system, or any error in the preparation of the data.

operated correctly in producing material that is to be admitted'.[525] However, it is based on the *Civil Evidence Act 1968* (UK), which was criticised by the Law Commission of England and Wales in a 1993 review of that Act. The Law Commission observes:

> there is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. It is at least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned.[526]

6.40 Section 59B similarly relies on 'normal use' criteria. In addition, one of the matters in s 59B of which the court must be satisifed is that the computer has not malfunctioned. No indication of the relevant time-frame is given. If this refers to a malfunction while the data was being produced, then it will be obvious that the output may be unreliable. If it refers to a malfunction-free period of time, this proves nothing. It is inconsistent with the fact that errors are produced on a random basis. Other matters of which the court must be satisfied under s 59B either do not go to the question of the relaibility of the computer, or do not effectively advance the issue.

6.41 An alternative viewpoint argues that there are significant benefits to be derived from the presumption of accuracy of computer output, because this facilitates the admissibilty of the numerous documents and business records generated from computer stored information.[527] It is suggested that s 59B has not made it easy to have computer-produced documents admitted into evidence.[528] In the few cases in which the section has been considered, the South Australian courts have held that the conditions of s 59B were not complied with in at least three cases, and admissibility was required to be based on other grounds.[529] Emmanuel Laryea argues that ss 146 and 147 of the uniform Evidence Acts, which presume proper operation of devices and processes, is an improvement on s 59B, which requires proof of the proper operation of computers producing pieces of evidence.[530] He argues that ss 146 and 147 eliminate the problems that arise under s 59B of computer evidence being rejected for no apparent system malfunctions.[531] In spite of this, the author concludes by arguing that:

> It must be ensured … that adequate safeguards for testing computer evidence are put in place. Courts should be given, and use, wide powers to ensure that computer

525 C Spenceley, 'Evidentiary Treatment of Computer-Produced Material: A Reliability Based Evaluation', *Thesis*, University of Sydney, 2003, 233.

526 Law Commission, *The Hearsay Rule in Civil Proceedings*, Report 216 (1993), [3.15].

527 L Crowley-Smith, 'The Evidence Act 1995 (Cth): Should Computer Data be Presumed Accurate?' (1996) 22(1) *Monash University Law Review* 166, 173.

528 E Laryea, 'The Evidential Status of Electronic Data' (1999) 3 *National Law Review* 1, [27].

529 Ibid, [27]. The evidence was admitted on other grounds in *Mehesz v Redman* (1979) 21 SASR 569 and *R v Weatherall* (1981) 27 SASR 238. The evidence was found inadmissible under s 59B and at common law in *Steiner v Modbury Towing Pty Ltd* (Unreported, Supreme Court of South Australia, Matheson J, 5 August 1998).

530 E Laryea, 'The Evidential Status of Electronic Data' (1999) 3 *National Law Review* 1, [37].

531 Ibid, [37].

> systems and electronic data are sufficiently tested for integrity and reliability when necessary.[532]

6.42 A review of the case law in which ss 146 and 147 of the uniform Evidence Acts received judicial consideration, or were relevant in some way, does not reveal any problems with the operation of the section. While this could merely mean that the possibility of inaccuracy has not been realised, or has not been realised in a case where it may be significant, it needs to be questioned whether the sections should be amended. Evidence of there being 'redundant mechanisms' or 'error prevention techniques' in place, such as proper maintenance, the use of fault tolerant systems and records, and the storage of documents and business records on CD-Rom (to guard against corruption of documents) would ease doubt about the accuracy of the computer output.[533] The Commissions would welcome feedback on this issue, in particular, feedback on the advantages or disadvantages of ss 45C and 59B of the *Evidence Act 1929* (SA) in relation to computer-produced evidence, and Spenceley's proposed 'redundancy test'.

Question 6–1 Should the uniform Evidence Acts be amended to impose a more rigorous requirement for the presumption of reliability and accuracy of computer-produced evidence? Who should have the obligation to establish reliability or unreliability?

6.43 An issue related to the reliability of computer output that the Commissions would like to draw attention to is the security of electronic data. The integrity of a document produced by a computer cannot be assumed and its probative value may have to be questioned. For example, electronic data and images can be manipulated without easy detection; computers can be hacked into and the hacker's authorship of communications passed off as another's; or a stealth computer program can secretly log passwords, keystrokes and user names on another computer and use the information to personalise false communications. The Commissions are not intending to take this issue further in this review, but signal it as a possible matter of concern.

Electronic communications

6.44 Section 71 of the uniform Evidence Acts provides that:[534]

> The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:

532 Ibid, [92].

533 L Crowley-Smith, 'The Evidence Act 1995 (Cth): Should Computer Data be Presumed Accurate?' (1996) 22(1) *Monash University Law Review* 166, 173.

534 *Evidence Act 1995* (Cth) s 182 gives s 71 a wider application in relation to Commonwealth records.

(a) the identity of the person from whom or on whose behalf the message was sent; or

(b) the date on which or the time on which the message was sent; or

(c) the message's destination or the identity of the person to whom the message was addressed.

6.45 IP 28 asks whether s 71 of the uniform Evidence Acts should be amended to use a term broader than 'electronic mail', such as 'electronic commerce', 'electronic data transfer' or 'electronic messaging'.[535]

Submissions and consultations

6.46 All submissions and consultations addressing the defintion of 'electronic mail' are of the view that the expression is too restrictive in the context of the application of s 71.[536]

6.47 Dr Alan Davidson suggests that s 71 should include communications such as SMS messages as well as possible future technologies.[537] He pointed out that the issue of appropriate terminology has been addressed in the nine Electronic Transactions Acts passed by federal, state and territory parliaments. The term used in these Acts is 'electronic communication'. Each of these Acts defines 'electronic communication' in terms similar to the definition contained in s 5 of the *Electronic Transactions Act 1999* (Cth), which is as follows:

electronic communication means:

(a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or

(b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

6.48 Clayton Utz also suggests amendment of s 71 in line with the definition contained in the *Electronic Transactions Act 1999* (Cth).[538] It argues that the uniform Evidence Acts should, in line with the principles of the *Electronic Transactions Act 1999* (Cth), not discriminate against or between different types of electronic

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535 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4–3.

536 A Davidson, *Submission E 7*, 20 December 2004; Clayton Utz, *Submission E 20*, 17 February 2005, 10; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 7; Australian Customs Service, *Submission E 24*, 21 February 2005, 2; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005; Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005, 2; NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, 3; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 2; Victorian Supreme Court Litigation Committee, *Consultation*, 18 March 2005.

537 A Davidson, *Submission E 7*, 20 December 2004.

538 Clayton Utz, *Submission E 20*, 17 February 2005, 10.

communications and data.[539] A definition that is too limited may fail to cover some electronic communiations, thus discriminating against them. Clayton Utz submits that terms such as 'electronic commerce', 'electronic data transfer' or 'electronic messaging' are too vague.[540]

6.49 The NSW Young Lawyers Civil Litigation Committee favours use of the term 'data message' from the 1996 UNCITRAL Model Law on Electronic Commerce, although it does not hold a conclusive view.[541] 'Data message' is defined in the Model Law as 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'.

6.50 The Australian Securities and Investments Commission submits that the term used needs to be carefully defined so as to be broad enough to encompass other existing methods of transmitting data and to allow for methods that may be developed in the future.[542]

The technology

6.51 Email is not the only way to transmit messages between computers. Although largely superseded by the Internet, both traditional electronic data interchange (EDI)[543] and application-centric EDI[544] are other forms of data transmission via computer. In addition, communications between computers can be by way of Internet Relay Chats (IRCs) ('chat room' correspondence) and instant messaging.[545] While IRCs and instant messaging communications are generally not logged or stored, it is conceivable that a screen shot of conversations could be taken and kept. As well, applications are now being developed that can record and log instant messaging.[546]

6.52 Nor is messaging between computers the only method of electronic communication. Increasingly, common electronic communication is by means of

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539 Ibid, 7.

540 Ibid, 10.

541 NSW Young Lawyers Civil Litigation Committee, *Submission E 34,* 7 March 2005, 3.

542 Australian Securities & Investments Commission, *Submission E 33,* 7 March 2005, 3.

543 EDI emerged in the early 1980s and gained some popularity in the late 1980s as a form of electronic commerce. EDI is the exchange of standardised document forms between computer systems for business use. Companies who had set up similar applications could exchange information, such as trade orders, between their computers. EDI, as well as a Customs Interactive facility, available directly through the internet can be used to access the Australian Customs Service's Integrated Cargo System, a new integrated IT system that will replace existing reporting and processing procedures: Australian Customs Service, *Submission E 24,* 21 February 2005, 2.

544 Application-centric EDI is an update to traditional EDI that uses secure transmission methods to facilitate the exchange of information between secure applications, typically residing at different companies (for example, vendor and customer). Deployment of such secured applications over their intranets and Internets is faster, less costly, and more effective than traditional EDI.

545 Instant messaging, using software programs such as ICQ, is gaining in popularity. It is a technology that combines features of email with chat.

546 C Heunemann, *Consultation,* 1 April 2005; C Heunemann, *Consultation,* 6 April 2005.

mobile phones, especially text messaging, or SMS. A PDA device[547] can copy an SMS into an email or word processing program document. It is also possible, though not quite so easily done, to use a mobile phone to forward an SMS to a computer, where it can be printed out. At any rate, all devices that can receive an SMS can forward the message to another device. Electronic communication can also be by way of photos taken with a mobile phone camera, a device becoming increasingly popular.[548]

6.53 Whether computer or phone communications are via wire, cable or wireless connection, they can all be classified as electronic communications. It is important to be satisified of this as any reform of s 71 that centres on a definition of 'electronic communication' must include all these technologies. In particular, modern society's demand for mobility is fuelling a rapid growth in the use of wireless networking devices, including mobile phones, wireless modems and wireless local area networks (LANs). An understanding of messaging technologies is required before a view can be formed about the suitability of the technical language used. The following paragraphs give a brief outline of the technical aspects of ethernet and telecommunications technology.

6.54 When data is sent across a network, it is converted into electrical signals. These signals are generated as electromagnetic waves (analog signaling) or as a sequence of voltage pulses (digital signaling). To be sent from one location to another, a signal must travel along a physical path. The physical path that is used to carry a signal between a signal transmitter and a signal receiver is called the transmission medium. There are two types of transmission media: guided and unguided.

6.55 The three most commonly used types of guided media are: twisted-pair wiring, similar to common telephone wiring; coaxial cable, similar to that used for cable television; and optical fibre cable.[549]

6.56 Unguided media are natural parts of the Earth's environment that can be used as physical paths to carry electrical signals. The atmosphere and outer space are examples of unguided media that are commonly used to carry signals. These media can carry such electromagnetic signals as microwave, infrared light waves, and radio waves.[550]

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547 First introduced by Apple Computer in 1993 as the Newton MessagePad, the PDA is short for personal digital assistant. It is a handheld device that combines computing, mobile phone, fax, Internet, networking and personal organiser features. Unlike portable computers, most PDAs began as pen-based, using a stylus rather than a keyboard for input. This means that they also incorporated handwriting recognition features. Some PDAs can also react to voice input by using voice recognition technologies. PDAs are also called palmtops, hand-held computers and pocket computers.

548 C Heunemann, *Consultation*, 1 April 2005; C Heunemann, *Consultation*, 6 April 2005.

549 The Explanatory Memorandum to the Electronic Transactions Bill 1999 (Cth) clarifies that 'communications by means of guided electromagnetic energy is intended to include the use of cables and wires, for example optic fibre cables and telephone lines': Explanatory Memorandum, Electronic Transactions Bill 1999 (Cth).

550 The Explanatory Memorandum to the Electronic Transactions Bill 1999 (Cth) also clarifies that 'communications by means of unguided electromagnetic energy is intended to include the use of radio

6.57 Network signals are transmitted through all transmission media as a type of waveform. When transmitted through wire and cable, the signal is an electrical waveform. When transmitted through fibre-optic cable, the signal is a light wave: either visible or infrared light. When transmitted through Earth's atmosphere or outer space, the signal can take the form of waves in the radio spectrum, including VHF and microwaves, or it can be light waves, including infrared or visible light (for example, lasers).

6.58 Once a transmission medium has been selected, devices are needed that can propagate signals across the medium and receive the signals when they reach the other end of the medium. Such devices are designed to propagate a particular type of signal across a particular type of transmission medium. Transmitting and receiving devices used in computer networks include network adapters, repeaters, wiring concentrators, hubs, switches, and infrared, microwave, and other radio-band transmitters and receivers.

6.59 Microwave transmitters and receivers, especially satellite systems, are commonly used to transmit network signals over great distances. A microwave transmitter uses the atmosphere or outer space as the transmission medium to send the signal to a microwave receiver. The microwave receiver then either relays the signal to another microwave transmitter or translates the signal to some other form, such as digital impulses, and relays it on another suitable medium to its destination.

6.60 Infrared and laser transmitters are similar to microwave systems: they use the atmosphere and outer space as transmission media. However, because they transmit light waves rather than radio waves, they require a line-of-sight transmission path.

6.61 It is clear, then, that whatever the transmission media, the receiver of the electromagnetic signals converts the signals to some form of electric signal that the device can understand. That being so, the technologies described above can all be defined as 'electronic communication'.

6.62 By way of an insight into the possibility of unforeseen advancements in electronic communication and a reminder of the need for legislative definitions to accommodate such future developments, the Commissions note that, currently, technology is being developed to use the human body as a 'wet-wire' transmitter. The personal area network (PAN)[551] takes advantage of the conductive powers of living tissue to transmit signals. The PAN device, which can be worn on a belt, in a pocket, or as a watch, transmits extremely low-power signals (less than 1 MHz) through the body. With a handshake, users could, for example, exchange business cards.

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waves, visible light, microwaves, infrared signals and other energy in the electromagnetic spectrum': Ibid.

551 The term PAN is also used to describe ad hoc, peer-to-peer networks.

The Commissions' view

6.63 The Commissions agree that the reference in s 71 to 'electronic mail' is too restrictive. As demonstrated above, it has been overtaken by considerable developments in electronic technology. However, a device-specific or method-specific response to modern and developing technology may turn out to be too restrictive in itself and a short-lived solution. Ways of communicating electronically are expanding and changing rapidly. A broad and flexible approach to this technology is needed.

6.64 The Commissions consider that none of the terms 'electronic commerce', 'electronic data transfer' or 'electronic messaging' sufficiently cover the possible means of communicating electronically. 'Electronic commerce' refers to electronic communications and transactions in a commerce or business context. Internet banking, Internet shopping and electronic inventory control, invoicing and account management are examples of electronic commerce. 'Electronic data transfer' simply means the transfer of data by electronic means from one location to another, but gives rise to ambiguity as to whether it includes text or images. 'Electronic messaging' likewise has a particular, and limited, meaning, restricted to software that allows messages to be exchanged with other computer users (or groups of users) via a communications network in electronic form.[552]

6.65 Nor are the Commissions convinced that the term 'data message', as defined in the UNCITRAL Model Law on Electronic Commerce, is sufficiently broad and able to encompass future technologies. Drafted as it was in 1996, it has been overtaken by developments since then.

6.66 The Commissions propose amending s 71 so as to replace the references to electronic mail, fax, telegram, lettergram and telex with 'electronic communications', defined in accordance with the definition in the *Electronic Transactions Act 1999* (Cth). This would embrace all modern electronic technologies, including telecommunications, as well as the more outmoded fax, telegram, lettergram and telex methods of communication. A redraft of s 71 is included in Appendix 1.

6.67 It may be useful to produce as part of any amendment to s 71 an Explanatory Memorandum similar to that which accompanied the Electronic Transactions Bill 1999 (Cth).[553] For example, the Explanatory Memorandum notes that 'electronic communication', 'communication' and 'information' should all be interpreted broadly. It also explains that:

> The use of the term 'unguided' is not intended to refer to the broadcasting of information, but instead means that the electronic magnetic energy is not restricted to a physical conduit, such as a cable or wire. … Information that is recorded, stored or

552 It is also called: MTA Servers, Messaging Servers, Electronic Messaging, Message Transfer Agent Servers, and Messaging Software.

553 Explanatory Memorandum, Electronic Transactions Bill 1999 (Cth).

> retained in an electronic form but is not transmitted immediately after being created is intended to fall within the scope of an 'electronic communication'.
>
> This definition should be read in conjunction with the definition of 'information', which is defined to mean data, text, images or speech. However, as a limitation is applied on the use of speech the definition of electronic communication is in two parts. Paragraph (a) states that, in relation to information in the form of data, text or images, the information can be communicated by means of guided and/or unguided electromagnetic energy. Paragraph (b) provides that information in the form of speech must be communicated by means of guided and/or unguided electromagnetic energy and must be processed at its destination by an automated voice recognition system. This is intended to allow information in the form of speech to be included in the scope of the Bill only where the information is provided by a person in a form that is analogous to writing. 'Automated voice recognition system' is intended to include information systems that capture information provided by voice in a way that enables it to be recorded or reproduced in written form, whether by demonstrating that the operation of the computer program occurred as a result of a person's voice activation of that program or in any other way. This provision is intended to maintain the existing distinction commonly made between oral communications and written communications. The intention is to prevent an electronic communication in the form of speech from satisfying a legal requirement for writing or production of information. For example, it is not intended to have the effect that a writing requirement can be satisfied by a mere telephone call, message left on an answering machine or message left on voicemail.
>
> 'Information' is defined to mean information that is in the form of data, text, images or speech. … These terms are not intended to be mutually exclusive and it is possible that information may be in more than one form. For example, information may be in the form of text in a paper document but is then transferred in to the form of data in an electronic document.

Proposal 6–1 Section 71 of the uniform Evidence Acts should be amended to replace the words 'a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex' with the words 'an electronic communication', and to insert as s 71(2) a definition for 'electronic communication' identical to that in s 5 of the *Electronic Transactions Act 1999* (Cth).

Evidence of official records

6.68 Section 155 of the *Evidence Act 1995* (Cth) facilitates proof of official records. The section provides that evidence of Commonwealth records, or public records of a state or territory, may be adduced by producing a document purporting to be such a

record, or a certified copy or extract from the record, and signed by the relevant minister, or the person who has custody of the record.[554]

6.69 Section 155(1) of the *Evidence Act 1995* (NSW) differs from s 155(1) of the Commonwealth Act in that the former refers to evidence of a 'public document' of a state or territory whereas the latter refers to evidence of a 'public record' of a state or territory. In all other respects, the sections are the same. 'Public record' in the Commonwealth provision is not defined in the Dictionary and 'is intended to be interpreted broadly'.[555]

6.70 In *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*,[556] 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 that Act, but after the date of the decision itself.[557] The Minister sought to place before the court reasons for a decision made some months earlier. At the time the applicant had originally been notified of the Minister's decision, the applicant was given somewhat ambiguous material on the basis of which it was said the decision had been made. The decision was subsequently challenged.

6.71 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 by the decision maker and his or her reasons for making the particular decision. Counsel argued that the Minister's statement of reasons constitutes a Commonwealth record for the purposes of s 155 and could therefore be admitted under that section, and not excluded as hearsay by virtue of s 59.[558]

6.72 Similar arguments were relied on in an earlier Federal Court case, *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs*.[559] In that case, Hely J held that the effect of s 155 of the *Evidence Act 1995* (Cth) is to facilitate proof

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554 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.

555 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.1680]. The explanation for the differing terminology 'public record' and 'public document' in s 155 of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) relates to constitutional considerations. Section 51(xxv) of the *Australian Constitution* gives Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states. 'Public record' in s 155 of the Commonwealth Act needs to have the same meaning as in s 51(xxv) of the *Australian Constitution*. There are no such restrictions on the drafting of s 155 of the New South Wales Act. The provision could include the broadly defined 'document'.

556 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33.

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

558 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33, [48].

559 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069.

of records that are otherwise admissible and that s 155 is not a general exception to Chapter 3 in relation to admissibility of evidence.[560] His Honour stated that 'not every Commonwealth record is admissible in all proceedings'.[561] French J, following the decision in *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs*, 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.[562] The statement of reasons signed by the Minister would be admissible only to show that the Minister states that these are his or her reasons, but not to establish the correctness or reliability of that statement.[563] Given that it was for the latter purpose that the statement of reasons was tendered, it was held not to be admissible by virtue of s 155 having regard to the operation of the hearsay rule.[564]

6.73 IP 28 draws attention to a submission made to the ALRC by Justice Robert French 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.[565]

6.74 IP 28 asks whether the application of s 155 of the uniform Evidence Acts to official reasons for decision raises any problems, and, if so, whether these should be addressed through amendment of the uniform Evidence Acts.[566]

Submissions and consultations

6.75 The NSW Young Lawyers Civil Litigation Committee submits that s 155 creates a presumption that would ultimately be very difficult for the other party to resist, particularly as it is unlikely that the other party would have access to all of the background information.[567] However, it concedes that it would be unduly onerous for the test to be applied to every document where it is not in issue. The Committee submits that the section should be clarified in line with the submission of Justice French. That is, the section should be amended to prevent the admission of evidence of official reasons for decisions other than on a consensual basis, unless the decision maker is put to proof as to the authenticity of the reasons contained in the document.[568]

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560 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069, [64]. An appeal by Mr Tuncok to the Full Court of the Federal Court on grounds not related to the evidence point was dismissed: *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FACFC 172.

561 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069, [64].

562 *Nezovic v Minister of Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 203 ALR 33, [53].

563 Ibid, [54].

564 Ibid, [54].

565 R French, *Submission E 3*, 8 October 2004. See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [4.12].

566 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 4–4.

567 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, 4.

568 Ibid, 4.

The Commissions' view

6.76 The Commissions' analysis of *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* is that French J held that s 155 did no more than facilitate proof of the record of reasons the Minister sought to tender but did not address the question of admissibility of them as the Minister's reasons. The evidence before French J was an affidavit sworn by the solicitor exhibiting the alleged reasons. As there was an issue as to whether these were the true reasons for the original decision, French J, correctly in the Commissions' view, approached the tender of the record as a question of admissibility and ruled that the hearsay rule applied and it was not admissible. The solution was for the Minister to swear the requisite affidavit. In that event, there does not appear to be any need for amendment of the uniform Evidence Acts.

6.77 The Commissions are also of the view that the structure of the Act and the purposes of the provisions in Chapters 3 and 4 are clear. If there is any uncertainty, the Commissions believe that the decision in *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* has clarified the matter and that there is no need for further statutory clarification.

7. The Hearsay Rule and its Exceptions

Contents

Introduction

7.1 This chapter discusses the hearsay rule, as codified in s 59 of the uniform Evidence Acts, and its exceptions. These exceptions fall into two categories. The first category of exception applies to first-hand hearsay (where the maker has personal knowledge of the asserted fact).[569] The second category applies to more remote (or 'second-hand') hearsay.[570]

7.2 This chapter makes a limited number of proposals for reform of the hearsay provisions. As discussed below, the hearsay provisions are unclear in certain respects and may benefit from clarification in the light of experience since enactment, and decisions of the courts. In some cases, existing provisions of the uniform Evidence Acts, as interpreted by the courts, may not adequately reflect the intention of the legislation; in others, the Commissions propose changes to the policy of the Acts to reflect more recent understanding of evidentiary issues.

7.3 Aspects of the hearsay rule in specific contexts are discussed elsewhere, including in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs (Chapter 17); evidence in sexual offence cases, from child witnesses and in family law proceedings (Chapter 18).

The hearsay rule

7.4 The hearsay rule applies to all oral and written representations made out of court. However, while the common law and the uniform Evidence Acts each provide exceptions to ensure that the best available evidence is able to be admitted, the scope of the rule and the exceptions differ.

7.5 The common law rules of evidence exclude hearsay, subject to numerous exceptions covering, for example, contemporaneous narrative statements; statements by persons who have died; 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.

7.6 The common law rules of evidence were characterised by the ALRC in its previous evidence inquiry as capable of excluding probative evidence and as overly

569 Uniform Evidence Acts ss 63–66.
570 Ibid ss 69–75.

complex, technical, artificial and replete with anomalies.[571] In addition, statutory provisions modifying the common law at the time were stated to be overly complex, overlapping and unrealistic in practice.[572]

Uniform Evidence Acts

The policy of the Acts

7.7 The ALRC stated that the continuation of an exclusionary rule for hearsay evidence was justified on the following grounds:

- out of court statements are usually not on oath;
- there is usually an absence of testing by cross-examination;
- the evidence might not be the best evidence;
- there are dangers of inaccuracy in repetition;
- there is a risk of fabrication;
- to admit hearsay evidence can add to the time and cost of litigation; and
- to admit hearsay evidence can unfairly catch the opposing party by surprise.[573]

7.8 The policy framework for the ALRC's hearsay evidence proposals was set out in ALRC 26 and ALRC 38.[574] The starting point was the proposition that the 'best evidence available' to a party should be received. The view was taken that this would assist parties to present all relevant evidence and give the courts the competing versions of the facts. In so doing, the appearance and reality of the fact-finding exercise would, on balance, be enhanced and so, in that respect, would the fairness of the trial process.

7.9 The concept of 'best available evidence' was said to involve two elements—the quality of the evidence and its availability.[575]

7.10 Quality of evidence factors led to the distinction drawn between first-hand and more remote hearsay. The view was taken that more remote hearsay is generally so unreliable that it should be inadmissible except where there were some guarantees of reliability. It was considered that remote hearsay would usually be of no value to the party seeking to call it and would only add to the time and cost of proceedings and difficulties in assessing its weight. Quality of evidence factors also led to the

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571 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [329]–[340].
572 Ibid, [341]–[345].
573 See Ibid, [661]–[675]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [126].
574 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [676]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [139].
575 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678].

distinction being drawn between statements made while relevant events were 'fresh in the memory' and later statements.[576]

7.11 The issue of availability raises at least two issues—the physical availability of a witness or evidence; and the difficulty of producing a witness or evidence to the court, if available. It was observed that what is the best evidence may depend upon balancing the importance and quality of evidence against the difficulty of producing it.[577]

7.12 This general policy approach was subject to a major qualification for criminal trials. The concern to minimise wrongful convictions requires a more cautious approach to the admission of hearsay evidence against an accused. It was considered important that the accused be able to confront those who accuse him or her. Where the maker of the representation is unavailable, it was thought that some guarantees of trustworthiness should be required. On the other hand, the concern to protect people from wrongful conviction was thought to justify fewer limits on the admissibility of evidence led by an accused person.[578]

7.13 The ALRC considered that, where relaxation of the hearsay rule leads to an increase in the hearsay evidence admissible, safeguards should be employed to minimise surprise and the probability of fabrication, and to enable the party against whom the evidence is led to investigate, meet and test the evidence, whether by cross-examination or other means.[579]

7.14 A final policy concern was the impact on costs. It was noted that while relaxation of the hearsay rule can save costs, it can also result in more evidence being led and collateral issues being raised. For this reason, and the other concerns mentioned above, the view was taken that a cautious approach to relaxation of the hearsay rule was warranted.[580]

The hearsay provisions

7.15 Section 59 of the uniform Evidence Acts provides a general exclusionary hearsay rule:

> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

7.16 The Acts then provide exceptions to this rule including those covering evidence relevant to a non-hearsay purpose;[581] 'first-hand' hearsay exceptions (where the maker

576 Ibid, [678]. See discussion of Uniform Evidence Acts s 66 below.
577 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [678].
578 Ibid, [679].
579 Ibid, [680].
580 Ibid, [681].
581 Uniform Evidence Acts s 60.

has personal knowledge of the asserted fact);[582] admissions;[583] and 'second-hand' hearsay exceptions, such as those relating to business records, telecommunications and evidence of reputation.[584]

7.17 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 unavailable. Reasonable notice in writing is required in some circumstances where a party intends to adduce hearsay evidence.[585]

7.18 This chapter discusses selected aspects of the hearsay provisions of the uniform Evidence Acts, including:

- the exclusion of unintended assertions from the hearsay rule;
- the admission of evidence relevant to a non-hearsay purpose under s 60;
- the exception applying in civil proceedings if the maker of the representations is available;
- the exception applying in civil and criminal proceedings if the maker of the representation is not available;
- the exception applying in criminal proceedings to representations made when relevant events were 'fresh in the memory' of the maker;
- the business records exception; and
- the exception applying to contemporaneous statements.

Unintended assertions

7.19 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.[586] 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 assertions, with the latter outside any hearsay rule.[587]

7.20 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

582 Ibid ss 63–66.
583 Ibid s 81.
584 Ibid ss 69–75.
585 Ibid s 67.
586 See articles and texts cited in *R v Hannes* (2000) 158 FLR 359, 419.
587 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684].

representation'.[588] Section 59 does not exclude unintended assertions, whether express or implied. For example, evidence that a child answered the telephone 'Hello Daddy' would arguably not be hearsay when used to prove the identity of the caller, because the child would not have intended to assert this fact. By contrast, at common law, the child's statement was held to be inadmissible hearsay by the High Court in *Walton v The Queen*.[589]

7.21 It has been said that, in restricting the operation of s 59(1) to intended representations, the uniform Evidence Acts narrows the rationale of the hearsay rule to ensuring that fact-finders are assisted in detecting intentional deception. Dr Jeremy Gans and Andrew Palmer state that this contrasts with the common law, which is equally committed to 'ensuring the availability of trial processes to resolve the possibility of ambiguity or mistake'.[590] Gans and Palmer express concern that, 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'.[591]

7.22 The meaning of an 'intended' assertion was considered by the New South Wales Court of Criminal Appeal in *R v Hannes*.[592] In *Hannes*, the Court considered the application of s 59 to a written impression on the appellant's notebook, which stated: 'Am confident I have full story after my conversations with Mark in London; But must take Mark with me to ASC otherwise will not be believed'. The appellant submitted, among other things, that the note should be admitted as an implied assertion that a person called Mark Booth existed and that the appellant had met him in connection with the relevant events. The prosecution's case was that Hannes had done acts in the name of the fictitious Mark Booth.

7.23 In relation to whether such assertions should be considered as 'intended' for the purposes of s 59, Spigelman CJ stated that:

> 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.[593]

7.24 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'

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588 Uniform Evidence Acts s 3, definition of 'representation'.

589 *Walton v The Queen* (1989) 166 CLR 283.

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

591 Ibid, 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).

592 *R v Hannes* (2000) 158 FLR 359.

593 Ibid, [357].

would be included, because matters left to implication are generally inconsistent with 'intent'.[594] 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'.[595]

7.25 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 'it may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to'.[596] While it was not necessary to decide the question, the implication of this reasoning appears to be that the previous representation in *Hannes* would be hearsay, if offered to assert the existence of a person called Mark.

7.26 Stephen Odgers SC considers that the approach suggested by Spigelman CJ should not be adopted. He states that the concern expressed by Spigelman CJ (about an overly restrictive interpretation of an 'intended' assertion) is 'somewhat misplaced' given that, in these circumstances, the party arguing for admission of the evidence would have to satisfy the court that the representation was *not* intended to assert the existence of a fact.[597]

7.27 On the other hand, Gans and Palmer state that the wider meaning of the word 'intended' adopted by Spigelman CJ is 'a desirable way of achieving s 59(1)'s continuing rationale of ensuring that the fact-finder is not exposed to the risk of deliberate deception without the assistance of the trial's processes for assessing witnesses'.[598]

The United States approach

7.28 The distinction between intended and unintended assertions also arises in the United States. The framing of s 59 was influenced by the approach taken in the United States *Federal Rules of Evidence*.[599] Rule 801 of the *Federal Rules of Evidence* defines hearsay as:

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

7.29 A 'statement' is defined as an oral or written assertion or nonverbal conduct of a person, 'if it is intended by the person as an assertion'.[600] The effect of the definition of 'statement' is said to be to exclude from the operation of the hearsay rule all evidence

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594 Ibid, [359].
595 Ibid, [360].
596 Ibid, [361].
597 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.800]. See *R v Hannes* (2000) 158 FLR 359, [477]: 'Absent evidence to the contrary, it could not be inferred that the appellant did not intend to assert by what he wrote the very matters which the appellant contends emerged from a reading of the document' (Studdert J).
598 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 177.
599 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [684]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.800], fn 77.
600 *Federal Rules of Evidence* (US), r 801.

of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.[601]

7.30 The commentary by the Advisory Committee on Rules[602] states, with respect to nonverbal conduct 'offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred', that:

> while evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.[603]

7.31 Similar considerations are said to govern non-assertive verbal conduct,[604] and verbal conduct which is assertive, but offered as a basis for inferring something other than the matter asserted.[605] Such evidence is also excluded from the definition of hearsay. Rule 801 is said to place the burden upon the party claiming that the intention existed, with ambiguous and doubtful cases to be resolved in favour of admissibility.[606]

7.32 The distinction made by the *Federal Rules of Evidence* between intended and unintended assertions has been criticised on the grounds that the distinction results in the admission of unreliable communications; requiring intent to be shown unnecessarily complicates the hearsay rule; and because the distinction between intended and unintended communications has led to inconsistencies in its application to unintended implications of speech.[607]

7.33 On the other hand, those who favour an intent-based approach to implied assertions consider that hearsay risks are reduced greatly where statements

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601 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <www.law.cornell.edu/rules/fre/ACRule801.htm> at 2 February 2005.

602 The Advisory Committee on Rules is a committee of the United States Judicial Conference's Committee on Rules of Practice and Procedure. The Judicial Conference approves rules of practice, procedure, and evidence for the federal courts, which are then prescribed by the Supreme Court and subject to Congressional review: L Mecham, *The Rulemaking Process: A Summary for the Bench and Bar* (2004) UC Courts <http://www.uscourts.gov/rules/proceduresum.htm> at 2 February 2005.

603 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <www.law.cornell.edu/rules/fre/ACRule801.htm> at 2 February 2005.

604 See, eg, the use of nicknames in *United States v Weeks* 919 F2d 248 (5th Circuit, 1990), discussed below.

605 Advisory Committee on Rules, *Notes to Rule 801 of the Federal Rules of Evidence* (2004) Legal Information Institute <www.law.cornell.edu/rules/fre/ACRule801.htm> at 2 February 2005.

606 Ibid. Another view is that the Advisory Committee's assertion is not supported by the wording of Rule 801 and that the party arguing for admission should have to show that the statement is not hearsay as the witness did not intend the statement to substitute for an assertion. This latter position appears to be the case under the *California Evidence Code*: see M Mendez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and its Exceptions* (2002) California Law Revision Commission <www.clrc.ca.gov/pub/2002/MM02-41.pdf> at 2 February 2005.

607 See, eg, P Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence American University* (2005) American University <www.wcl.american.edu/pub/journals/evidence> at 4 February 2005.

intentionally asserting one thing are being used to prove something else that the person was not trying to say. That is, the person is unlikely to have intended to mislead on matters that the person had no intention to communicate. An intent-based test also allows the hearsay rule to exclude statements that are exaggerations, metaphor or sarcasm where these are offered to prove the truth of the implied and intended meaning.[608]

7.34 Most United States commentators are said to favour an 'intent-based' approach toward implied assertions.[609] The authors of the *Federal Rules of Evidence Manual* observe that an intent-based approach to implied assertions is not free from difficulty:

> There is some indeterminacy in the application of any intent-based test … But any problem, we think, can be adequately handled by an objective, rather than subjective, test of intent. The question should be whether a reasonable person making a statement such as the declarant made would have intended to communicate the implied assertion that the proponent is offering for its truth. As with conduct, the burden should be placed on the nonoffering party to show that the declarant had the intent to communicate the implied assertion.[610]

7.35 There is much United States case law involving the distinction between intended and unintended assertions, including in situations not dissimilar from that considered in *Hannes*. For example, the *Federal Rules of Evidence Manual* contrasts the outcomes in *United States v Weeks*[611] and *United States v Berrios*.[612]

7.36 In *United States v Weeks*, Weeks was charged with kidnapping. The victims testified that their abductors used the names 'Jimmy' and 'Gato' in addressing each other. To establish that Weeks was 'Gato', the prosecution called a witness who testified that he had heard others refer to Weeks as 'Gato' when they addressed him. The United States Court of Appeals for the Fifth Circuit held that evidence of these out of court statements was properly admitted. It was not shown that these persons were intending to communicate an implied assertion that Weeks was nicknamed 'Gato'. It was more likely that they were trying to communicate other ideas, and were simply using 'Gato' as they would any other name, that is, as a means of introduction or reference. Therefore, the statements were not hearsay.

7.37 In contrast, in *United States v Berrios*, the prosecution had proof that a man named 'Pablo' was a drug dealer, and sought to prove that the defendant went by that nickname. The defendant called a witness who would have testified that she was present at a drug deal with her husband, and her husband introduced her to the seller,

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608 S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

609 Ibid, [801.02], fn 20. See also G Weissenberger, 'Unintended Implications of Speech and the Definition of Hearsay' (1992) 65 *Temple Law Review* 857.

610 S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

611 *United States v Weeks* 919 F2d 248 (5th Circuit, 1990) as discussed in S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

612 *United States v Berrios* 132 F3d 834 (1st Circuit, 1998) as discussed in S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02].

saying 'This is Pablo'. The witness would have testified that the person introduced as 'Pablo' was not the defendant. The United States Court of Appeals for the First Circuit held that the out of court statement of the witness' husband, 'This is Pablo', was properly excluded as hearsay. The *Federal Rules of Evidence Manual* states that this is the correct result because the intent of the husband was to assert to his wife that the person went by the name 'Pablo'.[613]

7.38 In the United States, the distinction between intended and unintended assertions has been codified in the *Federal Evidence Code* since 1975, and built on similar provisions in the *California Evidence Code* enacted in 1965. While the matter has not been free of controversy, the Commissions' survey of the American case law and commentary tends to suggest that the United States provisions have operated satisfactorily and courts have been able to provide reasonably consistent guidance on their interpretation.

7.39 The Commissions note that it seems more consistent with the reasoning in these United States cases to conclude that, under an objective test, the notes in *Hannes* did *not* contain an intended implied assertion that 'Mark' existed and was involved in the events of interest in the case. The notes would not be hearsay if offered as proof of these facts. However, the prosecution could then raise the possibility of fabrication to support a contrary inference.

Submissions and consultations

7.40 IP 28 asks whether concerns are raised by the application of s 59 of the uniform Evidence Acts to previous representations containing implied assertions and whether any such concerns should be addressed through amendment of the uniform Evidence Acts, for example, to clarify the meaning of 'intended' in relation to implied assertions.[614]

7.41 Some favour amending the uniform Evidence Acts to cover all express or implied assertions[615] or to codify the extended meaning given to the word 'intended' by Spigelman CJ in *Hannes*.[616] The Law Council of Australia (Law Council) expresses concern that the existing uniform Evidence Acts definition of hearsay means that:

> ambiguous words and conduct containing unintended assertions of fact may fall outside the prohibition and be admissible as relevant evidence despite an accused being denied an opportunity to cross-examine the maker of the representation in an attempt to gauge what was meant by it. If such evidence is to be excluded an accused

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613 S Saltzburg, M Martin and D Capra, *Federal Rules of Evidence Manual* (2004), [801.02]. However, if the husband had said to his wife privately 'watch out for Pablo, he is dangerous', this would not be an intentional assertion that the person identified went by the name Pablo—as the intent would be to warn the wife to stay away from the identified person.

614 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–1.

615 Law Council of Australia, *Submission E 32*, 4 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

616 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

> must persuade the court to exercise its exclusionary discretion. In the Council's view this is inappropriate and the hearsay prohibition should be drafted to cover all out of court assertions, express or implied.[617]

7.42 The Law Council states that, while a better position can be reached by defining 'intended' to cover all facts necessarily assumed in an intended express assertion, in criminal proceedings, hearsay evidence should be defined to encompass all out of court assertions, express or implied, intended or unintended, and whether made by words or conduct. Where this appears to exclude probative evidence it should be admitted through an exception to the prohibition.[618] Others do not consider that the existing provision can be improved in this regard.[619]

The Commissions' view

7.43 While s 59 does not apply to an unintended assertion so that evidence of the representation may be received even though the maker of the representation is not before the court, this is not inevitable because the discretions contained in the uniform Evidence Acts can still be used to exclude the evidence.

7.44 In particular, if the judge takes the view that the assertion was not intended and so is not excluded by the hearsay rule, the opposing party can seek to invoke s 135 to exclude the evidence where its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, misleading or confusing, or will cause or result in undue waste of time.

7.45 The uncertainty of the common law had to be addressed by a definition. The Acts' definition may be the best that can be provided. While the definition raises its own issues, it is infinitely better than the present common law uncertainty. Its interpretation can be left to the courts and, in the Commissions' view, does not need further refinement.

7.46 As to the argument that the definition should apply to all express and implied assertions, the ALRC put forward that proposal early in its original reference. It was demonstrated, however, that such an approach is too broad. In ALRC 26, the problem was explained as follows:

> Every piece of human conduct is an assertion of something, even if it is only an assertion by the actor that he intends to perform the action that he is engaged in. In many cases, evidence of intention or state of mind is not direct. The intent or state of mind is inferred or implied from the conduct engaged in by a person. From that conduct the inference is drawn that the person intended to do the act complained of. The result of including unintended implied assertions in the definition may, therefore, be that the hearsay proposal would embrace evidence of relevant acts, however detailed and complicated they may be, because it is sought to tender such evidence to

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617 Law Council of Australia, *Submission E 32*, 4 March 2005.
618 Ibid.
619 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

> prove, inter alia, the intent or state of mind of a relevant person … [T]rials could be seriously disrupted and much evidence excluded.

7.47 Similarly, there is a danger that the expansive interpretation proposed by Spigelman CJ—that is, to encompass any fact which is a 'necessary assumption underlying the fact that the assertor does subjectively advert to'—would give rise to considerable practical difficulties. There are many such necessary assumptions implicit in any representation, whether oral, written or inferred from conduct.

7.48 The importance of grounding the concept of hearsay on a person's intention (purpose) in making a representation has been recognised in recent United Kingdom evidence legislation. Section 115(3) of the *Criminal Justice Act 2003* (UK) provides that the hearsay rule applies only to a 'matter stated' by a person, if the purpose was to cause another person to believe the matter or act on the basis that the matter is as stated. This reform was considered necessary, in part, because of continuing difficulties, at common law, in distinguishing between inadmissible implied assertions and admissible 'circumstantial evidence'.[620]

7.49 From one perspective, it is always possible to identify one or more unintended assertions behind any express representation and the evidentiary relevance of such assertions may be difficult to discern.[621] However, while there will inevitably be occasions where it is uncertain whether an assertion is intended, the Commissions do not consider that any case has been made for revisiting the policy basis of s 59.

7.50 It is suggested that an objective test of intention should be applied for the purposes of s 59.[622] That is, the test should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended. The surrounding circumstances in which the representation was made should be able to be taken into account in applying the test. The Commissions tentatively conclude that the uniform Evidence Acts should provide expressly for a test of intention. The Commissions are interested in further comment on this issue and on the proposed provision set out in Appendix 1.

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620 See P Roberts and A Zuckerman, *Criminal Evidence* (2004), 585–596; *R v Kearley* [1992] 2 AC 228.

621 T Game, *Consultation*, Sydney, 25 February 2005. For example, in the *Hannes* case, the defence originally sought to admit the written note as exculpatory evidence (that is, showing that Mark existed). By the second trial it was tendered by the Crown as evidence of consciousness of guilt, and a plan by Hannes to make a 'false trail'.

622 S Finch, *Consultation*, Sydney, 3 March 2005; T Game, *Consultation*, Sydney, 25 February 2005.

Proposal 7-1 The uniform Evidence Acts should be amended to provide expressly that, for the purposes of s 59, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.

Evidence relevant to a non-hearsay purpose

7.51 At common law, where hearsay evidence is admissible by virtue of its relevance for a non-hearsay purpose, the court is not usually permitted to use it for its hearsay purpose (that is, as proof of the existence of a fact asserted by it). This applies, for example, to evidence of a prior statement of a witness inconsistent with the evidence of the witness. By contrast, s 60 of the uniform Evidence Acts provides that:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

7.52 This section applies where evidence is relevant for both a non-hearsay and a hearsay purpose. The intention of s 60 was to enable evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, and to do so whether or not the evidence is first-hand or more remote hearsay, subject to the controls provided by ss 135–137.

7.53 Given the emphasis in ALRC 38 on the application of s 60 to evidence admitted as to the factual basis of expert opinion, it is difficult to argue that s 60 is not intended to apply to second-hand hearsay.[623] Further, ALRC 38 gives detailed consideration to the policy distinctions between first-hand and more remote hearsay. Section 60 could have been drafted as an exception applicable only to first-hand hearsay if this had been the intention. Instead, it was intended that s 60 have broad operation, subject to the residual discretions to exclude or limit the use of evidence.

7.54 Reliance was placed on the discretionary provisions to control the admissibility and use of such evidence because the conclusion was reached that rules do not provide a satisfactory approach. The change made to the law was significant and remains so.

7.55 Several issues arise. First, the s 60 approach was and remains controversial and its operation requires careful review. In addition, the High Court, in *Lee v The Queen*[624] has construed s 60 in such a way as to limit its operation. The implications of that decision require examination. Generally, in considering these matters, it is important to identify and review the reasons for the enactment of s 60.

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623 See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144]–[145].
624 *Lee v The Queen* (1998) 195 CLR 594.

Areas to be addressed by s 60

7.56 In recommending the enactment of a similar provision, the ALRC identified two major areas where difficulties arose from the common law principle that evidence relevant and admissible for a non-hearsay purpose, but also a hearsay purpose, could not be used for the hearsay purpose. They are:

- prior consistent and inconsistent statements; and
- the factual basis of an expert's opinion.[625]

Prior consistent and inconsistent statements

7.57 At common law, a prior statement of a witness can be used, in prescribed circumstances, for the purpose of deciding whether to believe the witness but cannot be used for the purpose of deciding the truth of the facts asserted in the statement. Extensive criticism of this situation was identified in ALRC 26.[626] Criticism focused on the following:

- the exclusion of probative evidence;[627]
- the extreme difficulty, if not impossibility, of making the required distinction;
- the undesirability of proceeding on the assumption that such a distinction can be made;
- the difficulty juries have in understanding directions that have to be given to give effect to the distinction; and
- the questionable reasoning involved in the distinction.

7.58 As to the latter, Justice Roden was quoted in ALRC 26 as providing the following comments in relation to prior inconsistent and prior consistent statements respectively. In relation to prior inconsistent statements:

> Illustration:
>
> > Evidence in Court: 'I was there; I saw it happen'
> >
> > Cross-examination: 'Did you not say on a prior occasion, "I was not there; I didn't see it happen"?'
>
> Force of Rule: If the prior statement is admitted, or is denied but independently proved, then, subject to considering any explanation given by the witness:

625 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144].
626 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [334].
627 For example, if the evidence is rejected because it is believed that the prior statement is true, why should the court not be permitted to act upon that statement?

> (a) that statement may be taken as making it less likely that the witness was there and saw it happen (ie may be used to lessen the weight to be given to his testimony), but
>
> (b) it may not be used as rendering it more likely that he was not there and did not see it happen (ie may not be used as evidence of the truth of the prior statement).[628]

7.59 In relation to prior consistent statements, a consequence of the common law distinction is that, while a prior statement which is adverse to a party's evidence is admissible as evidence of the facts stated in it, a prior statement consistent with that evidence which can be used to meet the attack based on the prior adverse statements, cannot be used to confirm the evidence. Justice Roden commented:

> The prior consistent statement is only admissible in special circumstances, and then again not as evidence of the truth of its contents. When it is introduced, eg in answer to a suggestion of recent invention, it can so back-date any 'invention' to make invention at any time unlikely. The effect must be, it seems to me, to make it more likely that the evidence was truthful, and if the evidence and prior statement was to the same effect (as the term 'consistent' seems to require), then the statement is being used as evidence of the truth of its content.[629]

7.60 For many years, the law in Queensland and Tasmania has been that evidence of prior consistent and inconsistent statements is admissible as evidence of the truth of the facts stated.[630] The Commissions are not aware of any significant criticisms of the operation of those provisions. One solution is to enact such provisions; but there is another major area of evidence to be considered—the factual basis of expert opinion evidence.

Factual basis of expert opinion evidence

7.61 An expert's opinion involves the application of the expert's special knowledge to relevant facts. At common law, if those facts are observed by the expert, he or she can give evidence to prove those facts. Typically, however, the expert relies upon statements made to him or her by others about their observations of the relevant facts together with a wide range of factual information from more remote sources. These can range widely and include:

- statements to a medical expert by a person injured about the circumstances in which the injury was suffered and the subsequent progress of those injuries and past and present symptoms;
- information gathered by an expert valuer from a variety of people about the nature and quality of properties and the prices at which they were sold;

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628 See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [334].
629 See Ibid, [334].
630 *Evidence Act 1910* (Tas) s 81L; *Evidence Act 1977* (Qld) s 101.

- information gathered by accountants and auditors for the purpose of expert testimony from financial records and other sources and people for the purpose of expressing opinions about the financial position or the management of companies[631] and other matters;
- knowledge acquired by experts from reading the work of other experts and discussion with them;
- the reported data of fellow experts relied upon by such persons as scientists and technical experts in giving expert opinion evidence;
- factual material commonly relied upon in a particular industry or trade or calling;
- information about the expert's qualifications; and
- information received in the course of gaining experience upon which an expertise is said to be based.[632]

7.62 The common law, and the uniform Evidence Acts,[633] require that the facts and factual assumptions made and relied upon be sufficiently identified and evidence of such matters is relevant for that purpose. The common law hearsay rule, however, can be used to prevent the expert's evidence on these matters being used to prove the truth of the facts relied upon. Necessity has resulted in some ill-defined exceptions being created to cover at least the following:

- the accumulated knowledge acquired by the expert;
- the reported data of other experts; and
- information commonly relied on in a particular industry trade or calling.[634]

7.63 In commenting on the law allowing expert scientists to give evidence about the reported data of other expert scientists, Wigmore said:

> The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must everyday treat as working truths. Hence reliance on the reported data of fellow-scientists, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or

631 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [45]–[46]; *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152.

632 For example, an experienced drug user identifying a drug: *Price v The Queen* [1981] Tas R 306.

633 See Ch 8.

634 See, citations in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [91]; *PQ v Australian Red Cross Society* [1992] 1 VR 19; *R v Vivona* (Unreported, Victorian Court of Criminal Appeal, Crockett, Tadgell and Teague JJ, 12 September 1994); *R v Fazio* (1997) 93 A Crim R 522.

> mathematician because the facts or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards. Yet it is not easy to express in usable form that element of professional competency which distinguishes the latter case from the former. In general, the considerations which define the professional are (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, and (c) the impossibility of obtaining information on the particular technical detail except through the reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and the witness' equipments. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading.[635]

7.64 While these remarks were made in the context of expert scientists giving evidence, the same issues arise in most areas of expertise and the analysis is equally applicable in those areas. It should be noted that Wigmore thought the issues were best dealt with by the exercise of discretion of the trial judge.

7.65 Wigmore also maintained that the hearsay rule does not apply to certain information commonly relied on in an industry, trade or calling; for example, mortality tables, the British Pharmacopoeia, or the *Prescription Proprietaries Guide*.[636] The exception was described in the following way:

> In a few narrow and usually well-defined classes of cases, recognition has been given, by way of exception to the hearsay rule, to certain commercial and professional lists, registers and reports … The necessity in all of these cases lies partly in the usual inaccessibility of the authors, compilers or publishes in other jurisdictions; but chiefly in the great practical inconvenience that would be caused if the law required the summoning of each individual whose personal knowledge has gone to make up the final result.[637]

7.66 In common law jurisdictions, the hearsay issues that exist in relation to the above material rarely seem to be raised in trials. Attention tends to focus on the admissibility of the evidence of an expert as to statements made to the expert about relevant facts in the case. Even as to such evidence, parties do not insist upon a strict application of the hearsay rule in every case. Where the facts that are the subject of such evidence are not in dispute, issue will usually not be taken. Issue tends to be taken where:

- the facts are significant and in dispute or there is a forensic advantage to be gained by taking a technical objection; and
- direct evidence has not been, and will not be, called about those facts by the party relying upon the evidence of the expert.

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635 J Chadbourne (ed) *Wigmore on Evidence* (1979), Vol 2, [665b].
636 See discussion in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [91].
637 J Chadbourne (ed) *Wigmore on Evidence* (1979), Vol 6, [1702].

7.67 But direct evidence is normally called. The forensic reality is that it is extremely important that the party relying upon the evidence of the expert calls direct evidence of the significant facts upon which the expert relies. A failure to prove significant facts may result in the exclusion of the opinion evidence or at least a significant reduction in the weight given to it. Further, the failure to call witnesses who can give direct evidence, especially the plaintiff, will give rise to trenchant criticism and adverse inferences, at least in civil cases.

7.68 It should be noted that, at common law, a failure to prove significant facts will not necessarily result in the evidence of opinion being excluded. There is no strict 'basis rule' at common law. The common law does not require that every fact relied upon by an expert be proved by admissible evidence.[638] The law was stated by the High Court in *Paric v John Holland (Constructions) Pty Ltd*,[639] which held that, while the facts upon which an expert medical opinion is based must be proved by admissible evidence to be of any value, that does not mean that the facts proved must correspond with complete precision to the proposition on which the opinion is based. Rather, it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value.[640] In *Makita (Australia) Pty Ltd v Sprowles*, Heydon JA, in referring to the common law, said that:

> Complete precision in proof of facts intended to support the assumptions of an expert is not called for; it is enough if the case proved is sufficiently like the case assumed to render the expert's opinion valuable.[641]

7.69 At common law, therefore, expert opinion evidence may be received even though some of the facts relied upon have not been established by direct evidence. The question is one of degree. If important facts are not established and, as a result, the opinion lacks probative value, it can be excluded at common law, for it will not be sufficiently relevant.[642] Under the uniform Evidence Acts it can also be excluded in such circumstances by s 135.[643] This can occur even if s 136 has not been used to limit the hearsay use of evidence that s 60 would otherwise allow—its probative value will be affected by the lack of direct evidence and adverse inferences may arise because direct evidence has not been called.

7.70 Therefore, notwithstanding the absence of a strict basis rule, under both the common law and the uniform Evidence Acts there is considerable forensic pressure to prove the factual basis of the opinion by direct evidence. As noted above, this also

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638 See further Ch 8.

639 *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85.

640 Ibid, [9].

641 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [38] citing *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85.

642 *R v Stephenson* [1976] VR 376.

643 See Ch 14 in relation to Uniform Evidence Acts s 135(c) and the common law concept of 'sufficient relevance'.

minimises the occasions on which issues will arise about the use of the expert's evidence in relation to the factual basis of his or her opinion.

7.71 Turning to the operation of s 60, the first issue to review is the effect of its interpretation by the High Court. It will then be necessary to consider the experience of the application of s 60, and the residuary discretions, in the courts.

Lee v The Queen: limiting the operation of s 60

7.72 In *Lee v The Queen*,[644] the High Court confirmed that s 60 is intended to change considerably the common law by allowing what would otherwise be hearsay evidence to be admitted. However, the High Court identified an important limitation on the operation of s 60.

7.73 At trial, the Crown led a prior inconsistent statement of a witness (Calin) in which he described the defendant (Lee) walking up the street near the scene of a robbery and making an admission about the robbery, stating '… leave me alone, cause I'm running because I fired two shots … I did a job and the other guy was with me bailed out'. The evidence of this out of court statement was given by the police officer who took the statement because, at trial, Calin said that he could not recall the conversation and had not read or understood the prior statement. The statement was relevant to Calin's credibility (as evidence of a prior inconsistent statement). The High Court took the view that Calin may be taken as having intended to assert that he had heard Lee say the words attributed to him but did not intend to assert the truth of what Lee had said.

7.74 The High Court held that s 60 did not lift the operation of the hearsay rule in respect of the evidence of the prior statement (orally from the police officer or the written statement of Calin). The reasoning supporting that conclusion, however, is subtle and complex and commentators have found the precise scope of the decision difficult to determine. In essence, the reasoning appears to have been 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.[645] Section 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, the facts of which the witness, Calin, never intended to assert.

7.75 The High Court may have been concerned about the possibility of such evidence being admitted under the uniform Evidence Acts, and about the potential width of operation of s 60 if it was not confined. The power to exclude in s 137 of the uniform Evidence Acts provides another means of dealing with these concerns. However, while the High Court noted s 137,[646] it relied on an interpretation of s 60 itself. A number of

644 *Lee v The Queen* (1998) 195 CLR 594.

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

646 *Lee v The Queen* (1998) 195 CLR 594, [41].

difficulties flow from the approach taken. The first concerns the difficulty of determining the scope of the decision.

7.76 *Cross on Evidence* interprets *Lee* as confirming that:

> since s 60 is an exception to s 59 and s 59(1) prevents the admission of previous representations of a fact which the representor intended to assert, s 60 operates only on evidence of such representations; it does not convert evidence of what was said, out of court, into evidence of what the person speaking out of court did not intend to assert.[647]

7.77 Peter Bayne states:

> The court held that s 60 does not permit evidence of a previous representation made by A, which reports something said to A by B, to be used as proof of the existence of any fact asserted by B to A … Section 60 operates only on A's representation, and it is argued that A cannot have intended to assert the existence of the fact asserted by B.[648]

7.78 Another formulation is that *Lee* decided that s 60 excludes the hearsay rule only in respect of a representation that is relevant for a non-hearsay purpose because of the intended assertion of fact in the representation.

7.79 A difficulty with these interpretations is that they do not fit comfortably with the wording of s 60. By its terms, s 60 operates to lift the hearsay rule, not by reference to the assertion that attracts the hearsay rule, but by express reference to the evidence of the representation which has been admitted for the non-hearsay purpose.

7.80 There may be a further consequence of the approach taken in *Lee*. Section 59 does not apply to evidence of a representation if tendered to prove the existence of a fact that the person did not intend to assert. Accepting that Calin did not intend to assert as a fact that Lee had run away from 'a job' in which he had 'fired two shots', it may nevertheless be argued that the evidence of what was said to Calin by Lee was relevant to prove the facts unintentionally asserted by Calin because, if accepted, it was capable of affecting the probability that such facts did occur. However, analysed in that way, the evidence was not caught by s 59 in the first place and, subject to ss 135–137, was admissible to prove the facts.

7.81 It has also been said that the High Court held that, for the purposes of ss 59 and 60, a person cannot be taken to have intended to assert the truth of facts of which they have no personal knowledge. However, this reasoning has been criticised as, in reality, people often intend to assert the truth of facts related to them by others.[649]

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647 J Heydon, *Cross on Evidence* (7th ed, 2004), [35440].
648 P Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003), [10.520].
649 P Bayne, *Consultation*, Canberra, 9 March 2005.

7.82 *Lee v The Queen* has been followed in subsequent cases by applying s 60 to prior out of court statements.[650] For example, *R v Glasby*[651] involves a previous statement by a witness in a murder case containing various representations about what she said the appellant had told her. An example was a representation that the victim's wife had wanted her husband killed and that she was paying the appellant to do it. At trial the witness gave a version of the relevant events totally at odds with her previous statement. Applying *Lee*, the New South Wales Court of Criminal Appeal held that these statements should not have been admitted as evidence of the truth of the statements made to Mrs Glasby by the appellant.[652]

7.83 It is unclear whether and how the decision in *Lee* applies in other situations. For example, a medical history given to a doctor by a patient and used in the doctor's expert report may be admissible under s 60 as evidence of the truth of the facts—subject to the discretions. 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 so admissible.

7.84 *Lee* was not concerned with the question of second-hand hearsay generally. Rather, the High Court was dealing with the question of evidence of prior statements relevant to the issue of credibility which contained both first-hand and second-hand material and identifying the principle to be applied in determining whether s 60 operated in that situation. Nonetheless, the decision in *Lee* is often said to have the result that s 60 cannot apply to second-hand or more remote hearsay evidence. This, of course, would prevent it applying to an expert's evidence of the basis of his or her opinion which is more remote than first-hand hearsay—such as accumulated knowledge, recorded data, and other factual material commonly relied upon by people with the same expertise. IP 28 notes, however, that, in practice, the decision in *Lee* does not appear to have prevented the application of s 60 to second-hand hearsay evidence relied upon by experts.[653]

7.85 The implications of the decision in *Lee* for the admission of facts upon which expert opinions are based are unclear. Applying the analysis outlined above, which turns on the question of what was the intended representation,[654] the question to be

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650 For example, *R v Glasby* (2000) 115 A Crim R 465; *R v Adam* (1999) 47 NSWLR 267. One view is that the decision in *Lee* can be understood as an attempt by the High Court to ensure that a broad interpretation of s 60 does not allow the Act's constraints on evidence of admissions that are not first-hand to be circumvented: Uniform Evidence Acts, s 82: P Bayne, *Consultation*, Canberra, 9 March 2005; P Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003), [10.520].

651 *R v Glasby* (2000) 115 A Crim R 465.

652 However, there may be other means by which second-hand or more remote hearsay evidence concerning previous inconsistent statements may be adduced: See, eg *Tasmania v S* [2004] TASSC 84, in which it was held that, where a complainant's friend (E) could not recall the complaint being made or E repeating it to her mother, evidence of the complaint could be adduced from E's mother using s 38(1)(a) and (c) and s 43(2). Section 60 would then make the mother's evidence admissible as evidence of the truth of E's statement.

653 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.26].

654 To be distinguished also from an intention to assert that the fact is true.

asked would arguably be—what fact or facts did the person or persons making the previous representation to the expert intend to assert? Even if the previous representations are intended to pass on the representations of others, they may well be intended to assert facts on which the expert will base his or her opinion. That is what the expert is seeking from those making the representations. The expert will assess the representations of fact and may proceed on the basis that he or she accepts them as stating the facts. On that analysis, s 60 could commonly apply to the expert's evidence of the previous first-hand and more remote representations on which his or her opinion has been formed; for they are relevant for a non-hearsay purpose (establishing the basis of the opinion) and the facts intended to be asserted to the expert are relevant for that purpose.[655]

7.86 An alternative analysis of the factual basis of the expert's opinion was advanced in *R v Lawson*[656] by Sperling J. He advanced the argument that the history obtained by an expert is admissible only to enable the court to know the assumptions on which the opinion is based. Sperling J argued that the source of those assumptions is immaterial.[657] The only question is whether the assumptions are sufficiently in accord with the facts of the case to render the opinion based on them relevant evidence. Sperling J reasoned, therefore, that the medical history was not a representation that was relevant for a purpose 'other than proof of the fact intended to be asserted' and, therefore, s 60 did not apply.

7.87 It may be argued, however, that the source of an expert's assumptions is relevant because not only can it affect the probative value of the opinion, it can also assist in assessing the level of judgment exercised by the expert in accepting the assumptions. It may also be relevant to the conduct of civil trials because, if a party has not called evidence from the source of an expert's assumptions, this may lead to an inference that the source's testimony would not have assisted the party's case.[658] The Commissions take the view, however, that evidence of an expert of representations of facts on which the expert has relied will, if accepted, be capable of affecting the assessment of the probability of existence of those facts within the meaning of s 55.

7.88 Another issue referred to in IP 28 is whether 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.[659] Section 60 does not apply to assumptions, only to representations. In *Quick v Stoland*, Branson J stated that

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655 The same reasoning will apply to the other sorts of hearsay on which experts rely and for which the common law has exceptions: See Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [91].

656 *R v Lawson* [2000] NSWCCA 214, [103]–[107].

657 Ibid, [103]–[107].

658 That is, under the rule in *Jones v Dunkel* (1959) 101 CLR 298.

659 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.28].

if s 60 operates to 'give mere form significance in this way, the result cannot be regarded as entirely satisfactory'.[660]

7.89 However, Heydon J 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.[661] Sperling J, after expressing a similar concern to that of Branson J, also stated that, if the facts are contentious 'it will ordinarily be unfair that the opposite party is fixed with assumption evidence as evidence of the truth of the facts stated by reason of those facts having been stated in one form rather than the other'.[662] It is suggested, however, that the critical question is whether the controls provided by ss 135 and 136, in particular, provide a satisfactory mechanism to protect the fact-finding process and fair trial of the party against whom the evidence is led.

7.90 Returning to the implications of the decision in *Lee*, it is unsatisfactory and contrary to the aims of the uniform Evidence Acts to have uncertainty as to the meaning and scope of any provision, especially a provision as important as s 60. Decisions must be made as to whether it should be retained and, if so, as to what hearsay evidence it should apply. In making such decisions, it is critical to consider the experience of the section and the views expressed in consultations and submissions. Particular attention was focused on the operation of s 60 in relation to evidence of experts about the factual basis of their opinions. The consultations and submissions also point to judges and counsel relying on the application of the discretionary provisions to restrict the use of such evidence or on the judge's judgment as to the weight to be given to the evidence, rather than focusing on the interpretation of s 60 itself.

Section 60 and the factual basis of expert opinion

7.91 The operation of s 60 in cases involving expert opinion evidence has been criticised. As has been discussed, under s 60, evidence of statements made to an expert or other data upon which the expert's opinion is based, may be admitted to prove the facts contained in the statements or data, subject to ss 135 and 137. 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 to a non-hearsay use.[663]

7.92 For example, an accountant's expert report may summarise the contents of financial records not otherwise received in evidence. Such evidence has been held admissible on the basis that its purpose is to establish the factual basis upon which the

660 *Quick v Stoland* (1998) 157 ALR 615, 621.
661 J Heydon, 'Commentary on Justice Einstein's Paper' (2001) 5 *The Judicial Review* 123, 137.
662 *Roach v Page (No 11)* [2003] NSWSC 907, [74]. Assumptions, however, will include the expert's accumulated knowledge which is not excluded by the hearsay rule.
663 See, eg, *Quick v Stoland* (1998) 157 ALR 615, 625.

expert held the opinions expressed in the report. Evidence of the factual basis of the expert's opinion can also be relevant as evidence of the truth of that factual basis.[664] Similarly, s 60 of the uniform Evidence Acts may operate (subject to other provisions of the Acts, including the discretions to exclude) so as to lift the hearsay rule from a medical history taken by a doctor from a patient, and upon which the doctor bases his or her expert opinion.[665]

7.93 The operation of s 60 in this context has been identified as an area of particular concern. In *R v Lawson*,[666] Sperling J commented on the dangers of allowing medical histories to be used as evidence of the facts they contain. The trial judge directed the jury that evidence of sexual assault contained in the medical history could be used as evidence of the facts stated in the complaint. On appeal, Sperling J considered whether the evidence might have been admissible under s 60, but 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'.[667] 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.[668] Further, in his view, the 'limited discretionary powers in ss 135–137 are not a complete answer'.[669]

7.94 This issue is part of more general concerns about control of expert opinion evidence under the uniform Evidence Acts. These concerns also arise in common law jurisdictions and various steps have been taken to address them. The provisions of the uniform Evidence Acts which regulate the admission of expert opinion evidence are discussed in detail in Chapter 8.

7.95 The relevant issue in this chapter relates to the controls provided by the uniform Evidence Acts over the admissibility of the evidence concerning the factual basis of an expert's opinion. The Commissions see this issue as one of the most significant in this reference.

Section 60 and the discretionary provisions

7.96 A key issue is the extent to which the discretionary provisions of the uniform Evidence Acts are capable of addressing concerns raised about the operation of s 60. Under ss 135–137 of the uniform Evidence Acts, evidence may be excluded or its use limited by reference, in particular, to the concept of 'unfair prejudice' to a party.[670]

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664 Ibid, 621.
665 *R v Welsh* (1996) 90 A Crim R 364, 369, 371.
666 *R v Lawson* [2000] NSWCCA 214.
667 Ibid, [106].
668 Ibid, [106].
669 Ibid, [106]. See also *Roach v Page (No 11)* [2003] NSWSC 907, [74].
670 Or, in the case of s 137, to a defendant in criminal proceedings. See also Chs 3, 14.

7.97 Section 136 is of particular significance because it permits the use of the evidence to be limited if there is the danger that that use might cause unfair prejudice to a party or be misleading or confusing. *Cross on Evidence* notes that s 60

> cuts across the careful statutory scheme [of the uniform Evidence Acts] creating a series of discriminatingly drafted hearsay exceptions in ss 62–75: the qualifications they apply do not apply to s 60. It is likely that wide attempted reliance on s 60 will have to be controlled by orders under s 136 … 'although the narrowness of that provision does not provide much of a safety net'.[671]

7.98 The relationship between s 60 and s 136 was discussed in *Roach v Page (No.11)*.[672] Sperling J stated that an inability to test the truth of a previous representation is a legitimate ground for rejecting or limiting the use of evidence which is covered by an exception to the hearsay rule and that, where the maker of a previous representation is available and the party tendering the evidence does not call the person, that is a legitimate consideration in favour of a finding of unfair prejudice.

7.99 In addition, Sperling J said that s 60 gives rise to special considerations because, unlike other exceptions to the hearsay rule, it is not the objective of s 60 to facilitate proof but rather to avoid a distinction having to be made about evidence being used for one purpose and not for another:[673]

> Representations of fact become evidence of the truth of the representation, irrespective of whether they are first-hand or remote hearsay and irrespective of whether the source of the information is disclosed. Representations of expert opinion in the document are probative of whatever is the subject of the opinion expressed, irrespective of whether the author of the document is qualified to express the opinion and irrespective of whether the assumptions made for the purpose of expressing the opinion are specified. Such consequences cannot have been intended where the opposite party is disadvantaged by such consequences. Section 136 serves to avoid such unfairness.[674]

7.100 Sperling J also stated that, where s 60 operates, and the truth of facts stated cannot be tested by cross-examination, the consequence of admission of the evidence is 'potentially the more unfair on that account'.[675]

Submissions and consultations

7.101 IP 28 seeks specific comment on the concerns raised by the operation of s 60 in relation to the admissibility of the factual basis of expert opinion evidence.[676] In particular, IP 28 notes suggestions that s 136 should be used more often to limit the use to be made of evidence admitted for a non-hearsay purpose.[677]

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671 J Heydon, *Cross on Evidence* (7th ed, 2004), [35440] citing *R v Welsh* (1996) 90 A Crim R 364, 369.
672 *Roach v Page (No 11)* [2003] NSWSC 907.
673 These comments also apply to s 77, in relation to opinion evidence.
674 *Roach v Page (No 11)* [2003] NSWSC 907, [74].
675 Ibid, [74].
676 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–3.
677 Ibid, [5.32].

7.102 Judicial officers, legal practitioners and academics, however, provide a range of perspectives on the use of s 136 in this context. There are concerns about whether s 136, as presently drafted, provides adequate grounds on which to exclude evidence admissible under s 60. Comments include that resolving problems created by the breadth of s 60 through the exercise of s 136 is unnecessarily complicated and 'inelegant'[678] and overly dependent on the judicial officer.[679]

7.103 Some New South Wales Crown Prosecutors note that psychiatric opinion evidence may be given by an expert who has interviewed the accused and based on a history given to the expert by the accused. The evidence of the accused's history may be admissible under s 60, despite being untested. Different approaches are taken. In some cases judges will not allow the evidence to be given or will prevent the use of the history as evidence of the facts using s 136. In others the evidence may be admitted but the jury's attention is drawn to the fact that the evidence has not been tested. Some Crown prosecutors express concern that, while some judges exercise the discretion to limit the use of evidence under s 136, this does not occur often enough and suggest that, unless the accused is prepared to be cross-examined on this history, the use of this evidence should be limited.[680]

7.104 It may be difficult in practice 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. Similarly, the Queensland Bar Association notes that it is not uncommon in civil cases for bundles of correspondence, containing a multitude of representations, to be led as evidence of the fact of communication between parties. In these circumstances it is said that it can be impractical to seek rulings under s 136, with uncertain effects for the conduct of litigation if admissible hearsay contained in the documents comes to have evidentiary significance that was not recognised earlier.

7.105 On the other hand, in relation to expert opinion evidence given in native title proceedings, the State of South Australia submits that the concerns raised by the operation of s 60 can be adequately addressed by the discretions in ss 135–136 and as matters of weight.[681]

7.106 In addition, the New South Wales Director of Public Prosecutions (DPP NSW) states that the discretion in s 136 is capable of addressing any concerns raised by the operation of s 60 in relation to prior inconsistent statements and the factual basis of expert opinion evidence.[682] Some judges and practitioners state that it is standard practice for counsel to seek a ruling under s 136 to limit the use of factual evidence in expert reports, for example, medical history information. It is said that judges routinely

678 P Bayne, *Consultation*, Canberra, 9 March 2005.
679 P Greenwood, *Consultation*, Sydney, 11 March 2005.
680 Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.
681 State of South Australia, *Submission E 19*, 16 February 2005.
682 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

apply s 136 in such cases or, alternatively, rule that objections will affect the weight to be given to the evidence admitted under s 60.[683] Some judges and practitioners suggest that it is more typical, at least in civil proceedings, for the evidence to be admitted with the parties understanding that, unless the facts are proven, the opinion of an expert will be given little, if any, weight by the judge.[684] Parties often consider that it is unnecessary to seek formal rulings under s 136 to constrain the use of such evidence.

7.107 In family law proceedings, it is generally accepted that, despite s 60, the factual basis of expert and other reports introduced as opinion evidence have to be independently proven because s 136 will be applied to limit their use.[685] However, it is suggested that some counsel may not be sufficiently prepared to be able to introduce the evidence used by the expert, such as Department of Community Services files, police and criminal records and so on.

Reform of s 60

7.108 IP 28 asks whether s 60 should apply to second-hand hearsay evidence admitted for a non-hearsay purpose or have its operation limited to first-hand hearsay, as many suggest is the case under *Lee*. More generally, IP 28 asks whether the operation of s 60 in this regard should be clarified or modified through amendment of the uniform Evidence Acts.[686]

Submissions and consultations

7.109 Submissions and consultations indicate a significant degree of concern about the operation of s 60. The nature of these concerns varies. While some question the underlying rationale of s 60, others have concerns relevant primarily to specific contexts. There is some support for repealing[687] or narrowing the ambit of s 60.[688]

7.110 Peter Bayne suggests that the only real rationale for s 60 is to remove the need to direct juries on permissible uses of admitted evidence and that, as juries are readily capable of understanding such directions, s 60 serves no useful purpose and should be repealed.[689]

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683 B Donovan, *Consultation*, Sydney, 21 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005.

684 Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005; ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

685 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

686 See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 5–3, 5–4.

687 P Bayne, *Consultation*, Canberra, 9 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

688 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; State of South Australia, *Submission E 19*, 16 February 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

689 P Bayne, *Consultation*, Canberra, 9 March 2005. However, as noted above, s 60 also avoids the need to address defining exceptions relating to the factual basis of expert opinion evidence.

7.111 The New South Wales Public Defenders Office (NSW PDO) expresses concern about the role of s 60 in allowing records of interview of unwilling witnesses to be admitted where the accused cannot effectively cross-examine. The NSW PDO observes that:

> The justification for s 60 was said to be that juries could not understand the direction given at common law that a prior inconsistent statement of a witness could not be used as evidence of the fact unless the witness accepted it as the truth. This argument underestimates the intelligence of juries. Other parts of the Act assume that juries are capable of understanding that evidence can be used in one way but not another, including s 136 (limiting the use of evidence) and s 95 (evidence not admitted to prove tendency or co-incidence cannot be used for that purpose).[690]

7.112 Concerns are also expressed that s 60 tends to expand unproductively the evidence in criminal trials—in particular, by allowing complainants and accused persons to introduce prior (and possibly self-serving) statements as evidence of the truth of their contents.[691] It is suggested that evidence should be admitted under s 60 by leave only.[692]

7.113 With reference to expert evidence given during native title proceedings, the State of South Australia submits that the operation of s 60 should be limited to first-hand hearsay and supports an amendment to clarify the scope of s 60 to this effect.[693]

7.114 Others suggest that s 60 should not operate in relation to the factual basis of expert opinion evidence[694] or should be amended to adopt expressly the High Court's approach in *Lee*.[695] Another suggestion is that, if retained, s 60 should operate only where the non-hearsay purpose is credibility-related,[696] for example, in respect to prior inconsistent statements.[697]

7.115 The Law Council submits that, while the s 60 exception may be justified in the case of prior statements of a witness,[698] there is no justification other than convenience in the case of hearsay evidence providing the factual basis for an expert report. The Council does not believe this is a sufficient basis to admit hearsay evidence in criminal

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690 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

691 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005.

692 P Greenwood, *Consultation*, Sydney, 11 March 2005.

693 State of South Australia, *Submission E 19*, 16 February 2005.

694 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Crown Prosecutors, *Consultation*, Sydney, 11 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

695 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005.

696 T Game, *Consultation*, Sydney, 25 February 2005.

697 P Bayne, *Consultation*, Canberra, 9 March 2005.

698 On the basis that the maker of the statement is available for cross-examination—although in such a case s 66 may apply: Law Council of Australia, *Submission E 32*, 4 March 2005. By contrast, Andrew Kirkham QC expresses concern about the use of prior complaint evidence (that is, prior consistent statements) as 'corroboration' in military prosecutions: A Kirkham, *Submission E 36*, 3 March 2005.

proceedings and expresses the view that hearsay evidence tendered against an accused should be excluded, unless one of the specific first-hand hearsay exceptions applies.

7.116 Andrew Palmer suggests that, if s 60 is to be retained, the party seeking the admission of evidence under s 60 should have the burden of showing that the evidence has probative value.[699] Other submissions state that the operation of s 60 should be clarified, without taking a position on whether or not its application should be limited to first-hand hearsay.[700]

The Commissions' view

7.117 The Commissions are of the view that *Lee* is not consistent with the intention or the scheme of the uniform Evidence Acts[701] and is contrary to the original intention of the proposals in ALRC 38.[702] In addition, the decision has created confusion and uncertainty about the operation of s 60. The uncertainty about its scope creates major problems for the future application of the uniform Evidence Acts unless its consequences are addressed by amendment. The distinctions introduced by it also run counter to one of the major aims of the Acts, which was to remove technicality and to simplify the content and operation of rules of evidence.

7.118 The Commissions' view is that this situation should be remedied by amendment of the uniform Evidence Acts. There are several options. The uniform Evidence Acts could be amended to codify and clarify the effect of the High Court's interpretation of s 60 in *Lee*; or conversely, to overrule that decision and confirm that s 60 is not subject to the limitations identified in *Lee*. The formulation of both options is complicated by the difficulty of determining the precise ratio of *Lee*.

7.119 Assuming that the former option would involve limiting the operation of s 60 to first-hand hearsay, the simplest way to achieve this, without introducing any new complexity, may be to relocate s 60 to the first-hand hearsay exceptions found in Division 2 of Part 3.2 of the uniform Evidence Acts.

7.120 Overruling *Lee* would involve ensuring that s 60 does apply to second-hand and more remote hearsay. Such an amendment would need to be carefully drafted because, as discussed above, the decision in *Lee* is not based solely on a reading of s 60. It also rests on the High Court's interpretation of the relationship between s 60 and the hearsay rule in s 59 and, in particular, limiting the application of s 60 to the representations that are relevant for the non-hearsay purpose (credibility). Therefore, a simple legislative statement that s 60 also applies to second-hand hearsay may not be sufficient to change how s 60 is applied.

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699 A Palmer, *Consultation*, Melbourne, 16 March 2005.

700 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

701 Also G Bellamy, *Consultation*, Canberra, 8 March 2005.

702 One submission states that the interpretation given to s 60 in *Lee* 'goes against the clear and sound policy presented by the ALRC [in ALRC 38], which the legislature must have been intending': Confidential, *Submission E 31*, 22 February 2005; also G Bellamy, *Consultation*, Canberra, 8 March 2005.

The Commissions' proposal

7.121 The Commissions' view is that the uniform Evidence Acts should be amended to confirm the original position that s 60 applies to first-hand and more remote hearsay, subject only to the residual discretions to exclude or limit the use of evidence. In substance, the proposal is intended to override the effect of the decision in *Lee*. The Commissions invite comment on how this may best be done and on the proposed provision set out in Appendix 1.

7.122 As discussed above, there has been much criticism, expressed in consultations and submissions, about the extended operation of s 60. However, it is noticeable that much of the concern about the operation of s 60 appears to assume that the evidence is admissible to prove the truth of the facts asserted once s 60 is applied. The evidence, however, is not admissible for that purpose unless ss 135–137 are not invoked or, if invoked, are satisfied. In addition, at times the objectives have been identified in narrower terms than are the case. Some concerns, such as those raised about the handling of opinion evidence in civil cases which involve large volumes of documents, apply equally in common law jurisdictions.

7.123 The challenge is to provide the most satisfactory solution in a situation where there is no perfect solution. Where alternatives have been suggested in consultations and submissions, they do not satisfactorily address the relevant policy considerations or the types of evidence that need to be covered by any proposal. None addresses the practical problems, such as providing a satisfactory statutory exception to the hearsay rule covering all aspects of the factual basis of expert opinions.

7.124 The Commissions' view is that the policy framework and reasons advanced for the uniform Evidence Acts' approach to s 60 remain valid and should still be accepted. The ALRC in formulating its approach, involving a combination of s 60 and ss 135–137, commented that its proposal:

> enables simpler rules and simpler operation of the law … The proposal avoids the need to create a multiplicity of complex exceptions dealing with, for example, the factual material normally relied on by experts. Controls remain, however, and in appropriate cases, the evidence can be excluded.[703]

7.125 The reasons for the approach taken in the uniform Evidence Acts remain valid and flow from the policy framework. The alternatives are either unsatisfactory or would effectively replicate what the uniform Evidence Acts provide. For example, in dealing with the factual basis of expert opinion evidence, one option would be to make exceptions for specific categories of information. This, however, would be likely to result in the exclusion of hearsay that should not be excluded. As Wigmore emphasised, flexibility is required. In addition, specifying exceptions which identify

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

categories of information will only encourage the taking of technical and strategic objections.

7.126 Another alternative would be to take a more general approach and address issues of the kind identified by Wigmore, such as the reliability of the selection of the information by the expert and the difficulty of otherwise obtaining it. Such an approach would require the court to consider the need for the evidence, the reliability of the evidence and any unfair prejudice to the party against whom it is led. These matters are already covered by ss 135 and 137. In those cases where there is an issue about a fact which is the subject of a statement to the expert on which the expert relies, and no direct evidence is foreshadowed or called, s 136 can also be used when appropriate to limit the use—as apparently now occurs.

7.127 As discussed above, the starting point used in framing the ALRC's hearsay proposals was the proposition that the 'best evidence available' to a party should be received.[704] In many instances, evidence covered by s 60 will be the best available evidence—although views may differ.

7.128 For example, it is arguable that the evidence excluded in *Lee* was the best available evidence. In *Lee*, Calin's previous statement was made to the police and recorded by them shortly after the incident and, arguably, was likely to be more accurate than any evidence given at the trial. The High Court accepted that the effect of s 60 was that Calin's assertions about what he saw could be used for a hearsay purpose[705]—but it has been argued that what Calin said in this regard is no less or more reliable than what he said Lee had said.[706] There does not appear to have been any evidence that suggested that Calin was himself a suspect, or that there was anything untoward in the recording of the statement. There was evidence, however, that the reason he had changed his evidence was that he was in fear, having been accused of being a 'dog'. If this was so, then the court was being deprived of evidence by improper pressure on the witness.

7.129 As to minimising the risk of wrongful conviction and ensuring a fair trial, arguably what is critical is that the accused be able to test the evidence. In the *Lee* trial, for example, this required that both Calin and the police be available to be cross-examined. They were so available.

7.130 Cost and time is another consideration. In most cases, the evidence the subject of s 60 will be led and tested in the ordinary way in any event, because it will be relevant for a non-hearsay purpose. It must be acknowledged, however, that, if allowed to be used for a hearsay purpose, time and costs may be added marginally because in some

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704 Ibid, [139].

705 The Court also stated that, if Calin had given evidence, his prior inconsistent statement—which could be admitted to show that his credibility was affected—could have been used for the hearsay purpose: *Lee v The Queen* (1998) 195 CLR 594, [28].

706 P Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003), [10.520].

cases more time and costs may be devoted to testing the evidence by cross-examination if the evidence is admissible for a hearsay purpose.

7.131 Finally, a policy consideration of particular concern in the present context is the quality of the rules of evidence. Anomalies, technicalities, rigidity and obscurity in the rules lessen the credibility and acceptability of the trial system and should be avoided.

7.132 In determining the approach to be taken, it is important to bear in mind that a viable alternative in many cases is to admit the evidence in question for a hearsay purpose and to take into account any weaknesses it may have when deciding what weight to give to it. It is also important to consider the extent and frequency of the use of s 60—and that of ss 135–137.

7.133 As to the last mentioned issue, there are concerns in relation to evidence of prior consistent and inconsistent statements concerning facts in issue which are also relevant to the credibility of the witness. As presently construed,[707] s 102 and the other credibility rules do not apply to control and limit the admissibility of such evidence. However, proposals are advanced in Chapter 11 to ensure that this evidence is subject to the credibility evidence regime set out in Chapter 3.7 of the uniform Evidence Acts.

7.134 In considering the scope and frequency of the operation of s 60 in relation to the factual basis of expert opinion evidence, it should be borne in mind that, in many cases, none of those facts will be in issue and, in those cases where they are, only some of the facts will be in issue. Further, there is considerable forensic pressure on a party calling expert testimony to call direct evidence about any disputed facts that are relied upon by the expert. If those facts are challenged and direct evidence of them is not called, the party seeking to rely on the opinion will be at a serious disadvantage. Not only will the probative value of the factual basis (if admitted) be slight and so detract from the weight that will ultimately be given to the opinion, the failure to call such evidence will, at least in civil proceedings, give rise to damning and powerful adverse comment.[708]

7.135 In the Commissions' view, the critical questions are whether the operation of ss 135–137 provide suitable controls over evidence in respect of which s 60 has lifted the hearsay rule; whether those controls can be improved; and whether there is a better solution.

7.136 The Commissions consider that a key to the satisfactory application of the uniform Evidence Acts in this area is an awareness of, and preparedness to invoke, the discretionary provisions to exclude or limit the use of evidence where appropriate. For example, taking another view of *Lee*, it might be argued that Lee faced being convicted on remote hearsay evidence where it was not possible to get to the truth of the relevant assertions. If s 60 had been held to have operated to lift the hearsay rule, it may have

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707 See Ch 11.

708 *Jones v Dunkel* (1959) 101 CLR 289.

been a case where s 137 should have caused the judge to rule the evidence inadmissible or s 136 should have been applied to limit its use to a non-hearsay use.[709]

Exceptional cases?

7.137 Notwithstanding the considerations mentioned above, submissions and consultations reveal strong opposition to applying s 60 to evidence of previous representations made to an expert for the purpose of providing the basis of an expert's opinion and, in particular, 'factual histories'.

7.138 It is argued that there is no reason to make factual histories evidence of the truth of the facts because, unlike in the case of some other exceptions to the hearsay rule,[710] communications made to an expert for the purpose of providing a factual basis for the expert's opinion have no inherent reliability.

7.139 Further, it is said that there are other reasons why factual histories should not be admissible as evidence of the truth of the facts. These include 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;[711] and
- recourse to the discretionary provisions to exclude or limit the use of evidence covered by s 60 should be unnecessary and involves the determination of complex issues of fact and degree, adding to the time and cost of proceedings and with the potential to produce inconsistent decisions.

7.140 It is suggested that factual histories forming the basis of expert opinion evidence should be excluded from the operation of s 60. Other provisions of the uniform Evidence Acts that provide exceptions to the hearsay rule would continue to operate in relation to such evidence.

7.141 There are also concerns about the operation of s 60 in relation to admissions that are not first-hand and would, therefore, be excluded by Part 3.4 of the uniform Evidence Acts. From one perspective, concerns about the admission of such evidence by virtue of the operation of s 60 can be seen as underlying the decision of the High Court in *Lee*.

7.142 These are important issues. The Commissions are interested in comments on whether, if s 60 is amended to confirm that it operates whether or not the evidence is first-hand or more remote hearsay, the uniform Evidence Acts should also be amended so that previous representations forming the basis of expert opinion evidence, or that are evidence of admissions that are not first-hand, or both, are excluded from the ambit of s 60. In considering the latter issues it will be important to assess how admissibility

709 See Ch 14.
710 Such as Uniform Evidence Acts ss 64(3), 66, 69, 70, 72, 73.
711 However, see [7.88]–[7.89] above.

questions presently handled under s 60 and s 136 would be handled and whether their determination will be made more or less difficult than at present by the suggested changes.

Proposal 7-2 The uniform Evidence Acts should be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

Question 7–1 If Proposal 7–2 is implemented, should the uniform Evidence Acts also be amended to provide that:

- a previous representation of a party to any proceeding made to an expert to enable that expert to give evidence; or
- evidence of admissions that are not first-hand;

or both, be excluded from the ambit of s 60? If so, how should these provisions be worded?

Proceedings if maker available

7.143 Section 64 of the uniform Evidence Acts provides exceptions to the hearsay rule where, in a civil proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Section 64(2) provides that:

> (2) The hearsay rule does not apply to:
>
> (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
>
> (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;
>
> if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

7.144 Questions have been raised about the relationship of s 64(2) and s 64(3). Section 64(3) provides that:

> (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
>
> (a) that person; or
>
> (b) a person who saw, heard or otherwise perceived the representation being made;

> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

The 'fresh in the memory' requirement

7.145 While not explicitly stated, s 64(2) may be interpreted as also requiring that the occurrence of the asserted fact be fresh in the memory of the person giving an affidavit.[712] This is because it would be inconsistent to require, under s 64(3), that the occurrence be fresh in the memory when the person making the representation is being called to give evidence, but not under s 64(2), where the person is not being called.

7.146 The intention of the ALRC's original hearsay proposals was to provide more lenient rules for adducing first-hand hearsay evidence in civil, as compared to criminal, proceedings.[713] It was, nevertheless, a clear intention to limit first-hand hearsay evidence in civil proceedings where the witness is available to representations 'made at the time or shortly after the events referred to in it'—leading to the adoption of the fresh in the memory test in s 64(3).[714]

The Commissions' view

7.147 It is suggested that it is unnecessary and undesirable to apply the fresh in the memory test to first-hand hearsay evidence adduced in civil proceedings.[715] In this context, it is noted that other hearsay exceptions, such as that in s 63 and those relating to business records, do not have any similar temporal qualification.

7.148 It should be noted, however, that the reason for this apparent disparity is that, in the case of the other exceptions, the maker of the representation will not be available and the objective of securing the best available evidence is addressed by imposing no additional qualification other than notice,[716] or by identifying a category of evidence that will have some assurance of reliability independent of its freshness.[717]

7.149 It is also suggested that the requirement is generally ignored in civil litigation where the maker of the representation is called to give evidence. These views tend to be expressed by lawyers who practise in jurisdictions where civil litigation is usually conducted before judges without juries. The significance of that factor will need to be assessed. Other issues to be assessed include the extent to which the requirement is taken into account in preparing for trial, particularly in affidavits and witness statements, and whether there may be other benefits in retaining the requirement.

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712 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005.

713 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [682].

714 See Ibid, [682]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App A, Evidence Bill 1987, cl 57(3).

715 G Bellamy, *Consultation*, Canberra, 8 March 2005; S Finch, *Consultation*, Sydney, 3 March 2005; Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005.

716 Uniform Evidence Acts s 63.

717 Ibid s 69.

7.150 However, the Commissions' preliminary view is that the fresh in the memory requirement should be removed from s 64(3). The admissibility of evidence covered by s 64 can be challenged under ss 135 and 136, including on the basis that the probative value of the evidence is lessened, and its potential to cause unfair prejudice or to be misleading or confusing is increased, because it is not fresh.

Proposal 7-3 Section 64(3) of the uniform Evidence Acts should be amended to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Proceedings if maker not available

Unavailability of persons

7.151 Sections 63 and 65 of the uniform Evidence Acts provide exceptions to the hearsay rule, in civil and criminal proceedings respectively, where a person who made a previous representation is not available to give evidence about an asserted fact.

7.152 The Acts provide that a person is taken not to be available to give evidence about a fact for reasons including that:

> (a) the person is dead; or
>
> (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or
>
> (c) it would be unlawful for the person to give evidence about the fact; or
>
> (d) a provision of this Act prohibits the evidence being given; or
>
> (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
>
> (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.[718]

7.153 Some practitioners suggest that the definition of unavailability could be broadened because it is sometimes difficult to get judges to understand when it is not reasonably practicable to call a reluctant witness, for example, a witness who works for

718 *Evidence Act 1995* (Cth) Dictionary cl 4; *Evidence Act 1995* (NSW), Dictionary cl 4; *Evidence Act 2001* (Tas) s 3B; *Evidence Act 2004* (NI) Dictionary cl 4.

the opposing party's company.[719] Some judges of the New South Wales District Court express concerns about difficulties in relation to witnesses who are co-accused.[720]

7.154 The DPP NSW notes that United Kingdom legislation contains a provision permitting the admission of hearsay evidence of a person who is 'unfit to be a witness because of his bodily or mental condition'.[721]

7.155 Hearsay evidence may also be admitted where 'through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence'.[722]

7.156 By contrast, the uniform Evidence Act provisions do not 'squarely provide for this category of witness'.[723] The DPP NSW submits that the definition should be amended to apply clearly to the situation where a person is '"not available" by reason of his/her bodily or mental/psychological condition or for some other sound reason, he/she is unfit to attend as a witness'.[724]

7.157 The DPP NSW refers to then proposed New South Wales legislation to enable the transcript of evidence given by complainants in sexual offence trials to be admitted as evidence of the complainant in any retrial.[725] The *Criminal Procedure Amendment (Evidence) Act 2005* (NSW), which commenced in May 2005, amended the *Criminal Procedure Act 1986* (NSW) to permit the admission of a record of evidence given by a complainant in a sexual assault proceeding in any new trial that is ordered following an appeal.

7.158 The Commissions observe that, where a complainant in the sexual offence case is unavailable, the transcript of evidence may be able to be admitted under the existing provisions of the uniform Evidence Acts. Section 65(3) provides that:

> (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:
>
> (a) cross-examined the person who made the representation about it; or
>
> (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

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719 S Finch, *Consultation*, Sydney, 3 March 2005.

720 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

721 *Criminal Justice Act 2003* (UK) s 116(2)(b). Similarly, in Queensland, s 93B of the *Evidence Act 1977* (Qld) provides a hearsay exception in prescribed criminal proceedings if the person who made the hearsay statement is unavailable because the person is 'mentally or physically incapable of giving the evidence'.

722 *Criminal Justice Act 2003* (UK) s 116(2)(e).

723 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

724 Ibid.

725 Ibid.

7.159 The Commissions consider that an amendment to the definition of unavailability in the Dictionary of the uniform Evidence Acts is desirable. The proposed provision is set out in Appendix 1. Such an amendment may facilitate, in at least some cases, the admission of the transcript of a complainant's evidence in a retrial.

Proposal 7-4 The uniform Evidence Acts should be amended to provide that a person is taken not to be available to give evidence about a fact if a person is mentally or physically unable to give evidence about the fact.

Representations of complicit persons

7.160 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.
> ...

7.161 In *R v Suteski*,[726] 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.

7.162 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.[727]

726 *R v Suteski* (2002) 56 NSWLR 182.
727 Ibid, [38].

7.163 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.

7.164 IP 28 asks whether concerns are 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.[728]

7.165 The Law Council expresses concern that s 65(2)(d) may apply to admit a prior admission without the availability of cross-examination, as occurred in *Suteski*. The Law Council submits that:

> Whilst tightening the definition of unavailability might mitigate this problem, the Council is of the view that such prior statements do not have sufficient guarantee of reliability to be admissible under s 65(2)(d) and should be removed from that exception.[729]

7.166 The Council states that other categories of statement against interest may not justify allowing the prosecution to tender hearsay evidence against an accused. It notes that it is not inconsistent with this position to take the view that an accused should be permitted to tender out of court admissions to avoid the risk of an innocent person being convicted.[730]

7.167 More generally, the Criminal Law Committee of the Law Society of South Australia expresses concern about statements by a co-offender to a witness being led on the basis that 'the accused will be unable to challenge either the truthfulness, and/or raise any issue of voluntariness or fairness surrounding the making of such statements'.[731]

7.168 The NSW PDO opposes admission of the record of interview of an alleged co-offender. The NSW PDO submits that this problem should be remedied by amending the definition of unavailability in the Dictionary of the uniform Evidence Acts so as not to include a person who 'was unwilling to give evidence'.[732]

The Commissions' view

7.169 While the policy underlying the hearsay provisions is that the best evidence available to a party should be received, in its previous evidence inquiry the ALRC considered that, in criminal trials where the maker of a statement is unavailable, some

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728 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–5.
729 Law Council of Australia, *Submission E 32,* 4 March 2005.
730 Under s 65(8): Ibid.
731 Criminal Law Committee of the Law Society of South Australia, *Submission E 35,* 7 March 2005. Similar concerns were expressed in consultations, eg, ACT Bar Association, *Consultation,* Canberra, 9 March 2005; Law Society of South Australia, *Consultation,* Adelaide, 11 May 2005.
732 New South Wales Public Defenders, *Submission E 50,* 21 April 2005.

guarantees of trustworthiness should be required before hearsay evidence is admissible against an accused.[733]

7.170 The assumption behind s 65(2)(d) is that where a statement was against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may be far from the case. An accomplice or co-accused may be motivated to downplay the extent of their involvement in relevant events and to emphasise the culpability of the other.

7.171 In the High Court special leave application, counsel in *Suteski* argued that s 65(2)(d) should be read as requiring some assurance of reliability.[734] The application was unsuccessful, with Gleeson CJ noting that, given the discretions exist as an 'ultimate safety net', then 'you do not need to torture the language of section 65'.

7.172 While the admission and use of evidence from an accomplice or co-accused can be controlled by ss 135–137, there are good reasons to suggest that s 65 requires amendment to deal with the potential prejudice to an accused of evidence given against interest by an accomplice or co-accused who is not available to give evidence.

7.173 The Commissions propose s 65(2)(d) be amended to require that the representation be made against the interests of the person who made it at the time it was made and in circumstances that make it likely that the representation is reliable. The intent of the proposal is to ensure that the hearsay rule is not lifted where a statement against interest is made in circumstances that would not suggest reliability.

7.174 While the proposal is directed specifically to address problems concerning the evidence of an accomplice or co-accused, it involves an amendment to a provision of broader application (obviously, statements against interest can arise in many other situations). However, amendment of s 65(2)(d) seems a simpler solution than drafting a new provision dealing specifically with the evidence of accomplices, which might introduce unnecessary new complexity into the Acts. The proposed provision is set out in Appendix 1.

Proposal 7-5 Section 65(2)(d) of the uniform Evidence Acts should be amended to require that the representation be made against the interests of the person who made it at the time it was made *and* in circumstances that make it likely that the representation is reliable.

733 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [139].
734 *Suteski v The Queen* [2003] HCATrans 493.

'Circumstances' and the reliability of evidence

7.175 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.[735]

7.176 There has been some conflicting authorities interpreting the scope of the circumstances that may be taken into account in assessing these matters.[736] In *Williams v The Queen*,[737] 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.[738]

7.177 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.

7.178 In *R v Ambrosoli*,[739] the New South Wales Court of Criminal Appeal held that relevant case law, including *Williams*, established that the focus in approaching s 65(2) should be on the circumstances of the making of the previous representation rather than on the accuracy of the representation.[740] That is, evidence tending only to the reliability of the asserted fact should not be taken into account.[741]

7.179 IP 28 suggests that injustice may result when only the circumstances of the making of the representation can be taken into account 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.[742]

7.180 IP 28 asks whether concerns are raised by the limited scope of the 'circumstances' that may be taken into account under ss 65(2)(b) and (c) in assessing the reliability of a previous representation.[743]

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735 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].

736 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.

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

738 Ibid, 503.

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

740 Ibid, 616.

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

742 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.46].

743 Ibid, Q 5–6.

7.181 Some submissions state that the 'circumstances' able to be taken into account under s 65(2)(b) and (c) should be broadened, for example, to include the inherent truthfulness or otherwise of the representation.[744]

7.182 Others consider that the provision should be left unchanged,[745] including for the reason that the question has been effectively settled by *R v Ambrosoli*.[746] The NSW PDO submits that the broader view, rejected in *Ambrosoli*, could lead to a situation 'where the judge had to in effect assess the strength of a party's case, before being able to determine if this particular item was admissible'.[747]

7.183 The Commissions' view is that s 65(2) of the uniform Evidence Acts should be left unchanged in this respect. Bearing in mind that the reliability of the representation will ultimately be a question for the jury, it is reasonable for the legislation to draw the line by reference to the circumstances and their bearing on reliability rather than go to the next step and to require the trial judge to form a view as to the reliability of the representation. Further, an inquiry as to whether the representation is reliable is likely to require the trial judge to consider the whole of a prosecution case and determine guilt before admitting the representation as reliable.

Evidence of a previous representation adduced by a defendant

7.184 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; …

7.185 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.

7.186 IP 28 notes that one question raised by this provision is the scope of the term 'the matter', which may be interpreted narrowly or broadly.[748] In *R v Mankotia*,[749] the

744 Confidential, *Submission E 5*, 6 September 2004; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

745 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

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

747 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

748 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.49]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2220].

749 *R v Mankotia* [1998] NSWSC 295.

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.[750]

7.187 IP 28 asks whether there is significant uncertainty about the scope of the term 'the matter' in s 65(9).[751] Submissions suggest that there is no need to clarify the meaning of this term in s 65(9).[752] For example, the NSW PDO states that it is difficult to see how it could be 'amended or defined in a way which would take into account the wide range of situations to which it might apply'.[753]

7.188 In the Commissions' view, the approach should be to identify the content of the representation to be adduced by the defendant and to consider whether the other representations can be said to be relevant to it. As a result, it should not be necessary to construe the term 'about a matter' and may, in fact, be preferable to avoid defining it. If it is necessary to construe the term, a broad construction should be adopted and, where that may cause unfair prejudice, the discretions should be used. Narrowing the interpretation of any of the hearsay exceptions carries the danger of introducing technicalities, something the uniform Evidence Acts are intended to remove and avoid. The Commissions, therefore, do not propose any amendment to s 65(9) of the uniform Evidence Acts.

Representations 'fresh in the memory'

7.189 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.[754] 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.

750 Ibid.
751 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–7.
752 Law Council of Australia, *Submission E 32*, 4 March 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
753 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
754 Uniform Evidence Acts s 64 contains a parallel provision applicable to civil proceedings. The concept of fresh in the memory is also used in s 32(2), in relation to reviving memory in court by reference to a document.

7.190 In *Graham v The Queen*,[755] the High Court found that a complaint made six years after the sexual assault 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 arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.[756]

7.191 While the judgments 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.[757] 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'.[758]

7.192 *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';[759] including where complaints are made within months of the event.[760] This has led to some concern about the operation of s 66 in such cases.

7.193 Some decisions have shown a degree of flexibility in interpreting 'fresh in the memory'. In *R v Vinh Le*,[761] 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.

7.194 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'.[762] Hidden J stated that:

> s 66 of the *Evidence Act* does not always sit easily with evidence of complaint in sexual cases. Nevertheless, it would be absurd if the section could never apply to complaint of a pattern of behaviour when that pattern has continued up to, or near to, the time at which the complaint was made. Whether the evidence would be admissible

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755 *Graham v The Queen* (1998) 195 CLR 606.
756 Ibid, 608.
757 Ibid, 614.
758 Ibid, 608, 614.
759 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.
760 See, eg, *R v Lawson* [2000] NSWCCA 214, [98].
761 *R v Vinh Le* [2000] NSWCCA 49.
762 Ibid, [52]. The decision in *R v Vinh Le* was not unanimous on this point, and the judgments differ in their interpretation of the decision in *Graham*.

> under the section might depend upon the terms of the complaint and the length of time over which the abuse is said to have occurred. Obviously, each case must be judged according to its own facts.[763]

Criticism of the 'fresh in the memory' test

Sexual offences

7.195 IP 28 notes suggestions 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.[764] 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.[765]

7.196 The New South Wales Health Department Child Protection and Violence Prevention Unit note that there are many compelling and valid reasons why victims of sexual assault do not immediately report sexual assault to the authorities, including the trauma, shame and embarrassment they suffer.

> The nature and impact of child sexual assault, including grooming tactics by the perpetrators and their position of power and trust, act as significant barriers for child victims to disclose the assault. Perpetrators frequently use tactics to instil fear of disclosure in child victims, such as telling them they will not be believed. This power dynamic can also be present in cases of domestic violence and in cases of ongoing sexual assault.[766]

7.197 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. The NSW PDO states that:

> Psychological studies have increasingly emphasized the subjective nature of memory, and the suggestibility of people, especially psychologically damaged people, to the idea that they must have been sexually abused.[767]

7.198 On the other hand, it may be suggested that the 'hours or days' rubric, when applied to sexual offence cases, is analogous to the discredited common law requirement that complaints of rape be spontaneous (the 'hue and cry'), and where

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763 Ibid, [126].

764 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.57] referring to A Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9(2) *Psychiatry, Psychology and Law* 163, 174.

765 A Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9(2) *Psychiatry, Psychology and Law* 163. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 330–333, Rec 102.

766 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

767 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

failure to complain at the earliest possible opportunity could be used as evidence of consent.

7.199 If the 'fresh in the memory' test is considered to produce particular problems in relation to certain offences—such as sexual offences or offences against children—it has been suggested that, rather than amending the uniform Evidence Acts, it would be preferable to deal with the issues outside the Acts, in rape shield laws or other legislation.[768]

Identification and recognition

7.200 IP 28 notes that particular issues arise with respect to the application of s 66 to previous representations concerning identification.[769] In this context, the New South Wales Court of Criminal Appeal, in *R v Barbaro*[770] and *R v Gee*,[771] has held that evidence of identification should be distinguished from evidence of recognition, where the person recognised is someone previously known.[772]

7.201 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[773] (where there is obvious contemporaneity between the act of recognition and the witnessing of this by an observer).[774] 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'.[775]

7.202 The fact that s 66 applies to identification evidence provides additional reasons for favouring a more flexible interpretation of s 66. It can be argued that, for example, evidence of the identification of a war crimes suspect made five years after the events to which a prosecution relates is likely to be more reliable than evidence given by the same witness at a trial taking place another 15 years later.

7.203 The Commissions observe that, if the uniform Evidence Acts were amended (as proposed below) to make it clear that whether a memory is 'fresh' is to be determined, in part, by reference to the quality of the memory, this would be consistent with the distinctions made between cases of recognition and of ordinary identification. That is, where the person recognised is someone previously known, it is likely that the quality of the memory will be stronger.

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768 G Bellamy, *Consultation*, Canberra, 8 March 2005.
769 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.60].
770 *R v Barbaro* (2000) 112 A Crim R 551.
771 *R v Gee* (2000) 113 A Crim R 376.
772 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2300].
773 *R v Gee* (2000) 113 A Crim R 376, 378.
774 *R v Barbaro* (2000) 112 A Crim R 551, 558.
775 *R v Gee* (2000) 113 A Crim R 376, 378.

Submissions and consultations

7.204 IP 28 asks whether concerns are raised by the High Court's interpretation, in *Graham v The Queen*, of 'fresh in the memory' and whether the concept of 'fresh in the memory' needs to be re-examined.[776] IP 28 also asks whether particular concerns are raised by the application of s 66 to evidence of identification.[777]

7.205 The Law Council concedes that the High Court's approach in *Graham*, 'may be criticised in theory as too narrow an approach', but submits that the test is 'sufficiently flexible to admit representations made when the memory was patently reliable'.[778] The Council states that, while the reasoning in *Graham* may exclude prior complaints of children and victims of sexual assaults even where there are good reasons for delay in complaining of assault,

> prior complaints carry too great a risk of unreliability (risk of convicting an innocent accused) to be tendered unless made at a time when a court can feel confident that the witness retained a fresh and reliable memory of the event.[779]

7.206 The existing formulation of s 66 also receives support from the NSW PDO, which states that 'the probative value of an account of what a witness said to others about what he or she saw perceived must be related to the immediacy of the statement in relation to the incident observed'.[780]

7.207 On the other hand, many consider that it should be made clear that the time elapsed since an event is not the only factor that should be considered.[781] The DPP NSW consider that the test has been shown capable of yielding very different results when applied by different judicial officers;[782] does not sit easily with evidence of complaint in sexual offence cases about patterns of abuse in which victims do not recount specific incidents;[783] and places too much emphasis on the time between the offence and the making of complaint and too little on the quality or vividness of the memory.[784]

7.208 The DPP NSW submits that the uniform Evidence Acts should be amended to clarify what is meant by 'fresh in the memory' and 'to give effect to the flexibility originally envisaged by the ALRC when it coined the term'.

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776 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 5–8, 5–9.
777 Ibid, Q 5–10.
778 Law Council of Australia, *Submission E 32,* 4 March 2005.
779 Ibid.
780 New South Wales Public Defenders, *Submission E 50,* 21 April 2005.
781 A Palmer, *Consultation*, Melbourne 16 March 2005; Office of the Director of Public Prosecutions Tasmania, *Consultation*, Hobart, 15 March 2005.
782 Referring to *R v Vinh Le* [2000] NSWCCA 49.
783 Referring to Ibid, [125]–[126]. Also New South Wales District Court Judges, *Submission E 26*, 22 February 2005.
784 Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005; also P Underwood, *Consultation*, Hobart, 15 March 2005.

> A more flexible approach is required which takes into account and gives due regard to the existence of other factors affecting the reliability of the memory, in addition to the elapse of time between the alleged offence and the making of complaint.[785]

7.209 Some New South Wales judges are also critical of the term 'fresh in the memory' as interpreted in *Graham*, including in relation to evidence of patterns of sexual offending.[786]

> The term 'fresh in the memory' has a tendency to conflate two notions, one of recency and one of accurate recall. It is clear from human experience that the former does not of necessity underpin the latter and that to require some temporal prerequisite is to ignore what is sought by the court which is reliability of the recollection of an event or conversation which in turn is reported by another.[787]

7.210 The judges observe that the section appears to mean that only representations capable of accurate recall can be recounted by another to the court. It was submitted that the words 'fresh in the memory' should be replaced by 'capable of accurate recall'. This, it is said, would allow the court to inquire as to the quality of the event and the person making the representation so that the likelihood of the memory being retained and accurately recalled could be determined.[788]

7.211 Alternatively, it is suggested that 'fresh in the memory' be defined to include reference to factors such as the 'the age and health of the witness, the nature of the event being recalled, the circumstances in which the event occurred and the length of time over which the event occurred, that govern the reliability of the evidence'.[789]

7.212 Some New South Wales District Court judges also submit that s 66 has proven difficult to apply in relation to identification where a person has made an identification some time before, but has either resiled from it or has forgotten the person or picture identified.[790] The DPP NSW agrees that the complexity of the reasoning required to distinguish between identification and recognition may provide reasons to remove evidence of identification from the ambit of s 66.

7.213 Some commentators are critical of s 66 and suggest that there should be no such exception to the hearsay rule, unless the statement would be admissible under the common law *res gestae* rule; and that s 66 should be made more, rather than less, restrictive.[791]

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785 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

786 Judicial Officers of the Supreme Court of New South Wales, *Consultation*, Sydney, 18 March 2005; New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

787 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

788 Ibid.

789 Ibid. By contrast, one District Court judge submits that the test in *Graham* appears to work well and there is no need for legislative amendment: Confidential, *Submission E 31*, 22 February 2005.

790 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

791 Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005.

7.214 The distinction between evidence of recognition and evidence of identification (where the latter is made from a previous encounter) follows from the language of the section and is consistent with its intention. In the Commissions' view, s 66 does not need to be revisited on this account.[792]

Psychological research on memory

7.215 IP 28 notes that 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.[793]

7.216 The original ALRC reports referred to the extensive material relating to memory generally and to eyewitness testimony.[794] Since those reports were published, there has been particular interest in the effects of emotion, stress and trauma on memory. This has resulted in a substantial body of literature in that area.

7.217 A preliminary review of some of the old and more recent literature reveals conflicting views about the effects of emotion or trauma on memory. For many years it was generally accepted that emotion and stress had a negative effect on the ability to recall an event.[795] However, there is now persuasive evidence that generalisations about the effects of emotion and stress on memory and rates of forgetting developed in the context of laboratory studies or recall of ordinary events cannot be readily extended to the memory of witnesses to violent crimes. While some witnesses in criminal trials may be asked to recall mundane events (eg, a witness who observed the accused buying a paper, thus establishing their location at a certain time), more commonly, witnesses will be those who have observed a violent act, or who have been the victim of such violence. The proximity and involvement of most witnesses and their resulting emotional state are important factors in their perception of events and their resultant memory and not readily replicable in laboratory conditions.[796]

7.218 Studies on the recall of witnesses to actual crimes suggest that there can be greater detail and accuracy in the recall of those witnesses and greater retention of that memory over a period of time.[797] A number of possible factors may account for this

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792 See also New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

793 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.56].

794 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [664]–[669] (memory generally), [420]–[421] (eyewitness identification).

795 B Clifford and J Scott, 'Individual and Situational Factors in Eyewitness Testimony' (1978) 63 *Journal of Applied Psychology* 352; B Clifford and C Hollin, 'Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory' (1981) 66 *Journal of Applied Psychology* 364; E Loftus and T Burns, 'Mental Shock Can Produce Retrograde Amnesia' (1982) 10 *Memory & Cognition* 318.

796 Compare S Christianson, J Goodman and E Loftus, 'Eyewitness Memory for Stressful Events: Methodological Quandaries and Ethical Dilemmas' in S Christianson (ed) *The Handbook of Emotion and Memory* (1992) 217; K Shobe, 'Is Traumatic Memory Special?' (1997) 6(3) *Current Directions in Psychological Science* 70.

797 J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291; J Yuille and J Cutshall, 'Analysis of the Statements of Victims, Witnesses and

finding including the performance of various parts of the brain under stress, the exceptional nature of the events witnessed and the re-telling of such events to others.

7.219 Research focusing on the recall of victims of crime has also identified a number of divergent effects of trauma on memory. Such effects include fragmented sensory memory rather than narrative recall, attentional focusing, dissociation, and retrograde and anterograde amnesia effects.[798] It has been recognised that Post Traumatic Stress Disorder can lead to 'extremes of retention and forgetting: terrifying experiences may be remembered with extreme vividness, or totally resist integration'[799] with resulting amnesia (temporary or permanent). Thus individual differences are also a significant factor.

7.220 At present, it appears that no academic consensus on the effects of trauma on memory has been achieved. What appears reasonably clear, however, is that there is a growing body of evidence that the effects of emotion, stress and trauma on memory are both complex and distinct from ordinary memory processes.[800]

7.221 The fresh in the memory test was developed in light of contemporary research on memory. That research revealed the rapid loss of memory within days of an event and the many ways in which memory can change over time. While the validity of that research is not questioned, its limitations have been identified particularly in relation to the memory of witnesses to crimes and traumatic events. While a focus on 'hours or days' may be well founded in relation to statements about unremarkable occurrences, the distinct yet complex nature of the memory of violent crime would seem to indicate that a more flexible test is warranted. The variability of individual responses to stress and trauma, particularly amongst victims of crime may also warrant the adoption of a flexible test.

Suspects' in J Yuille (ed) *Credibility Assessment* (1989) 175; S Porter and A Birt, 'Is Traumatic Memory Special? A Comparison of Traumatic Memory Characteristics with Memory for Other Emotional Life Experiences' (2001) 15 *Applied Cognitive Psychology* 101.

798 For reviews of literature in the area, see B van der Kolk and R Fisler, 'Dissociation and Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study' (1995) 8(4) *Journal of Traumatic Stress* 505; S Christianson, 'Emotional Stress and Eyewitness Memory: A Critical Review' (1992) 112(2) *Psychological Bulletin* 284.

799 B van der Kolk and R Fisler, 'Dissociation and Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study' (1995) 8(4) *Journal of Traumatic Stress* 505.

800 S Porter and A Birt, 'Is Traumatic Memory Special? A Comparison of Traumatic Memory Characteristics with Memory for Other Emotional Life Experiences' (2001) 15 *Applied Cognitive Psychology* 101; J Yuille and J Cutshall, 'A Case Study of Eyewitness Memory of a Crime' (1986) 71(2) *Journal of Applied Psychology* 291; J Yuille and J Cutshall, 'Analysis of the Statements of Victims, Witnesses and Suspects' in J Yuille (ed) *Credibility Assessment* (1989) 175; J Yuille and J Daylen, 'The Impact of Traumatic Events on Eyewitness Memory' in C Thompson and others (eds), *Eyewitness Memory: Theoretical and Applied Perspectives* (1998) 155; L Nadel and W Jacobs, 'Traumatic Memory is Special' (1998) 7(5) *Current Directions in Psychological Science* 154.

The Commissions' view

7.222 There is significant dissatisfaction with the 'fresh in the memory' test used in s 66 of the uniform Evidence Acts. This derives from the decision of the High Court in *Graham*, which is perceived by many as having taken an overly restrictive approach (that is, the 'hours or days' rubric).

7.223 Since *Graham*, judges have striven to retain flexibility in the interpretation of s 66. In particular, passages in *Graham* that refer to non-temporal factors are emphasised.[801] One judge has stated that the judgment in *Graham*

> was not intended to confine the expression 'freshness' strictly or exhaustively in terms of mere hours or days … In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after events of the kind here involved. Having regard to the normal expectation and experience of life, I would regard a statement made at that point of time as still being fresh in the memory of a relevant witness.[802]

7.224 Additional special elements in the circumstances of a case may be used to justify departure from the 'hours or days' formulation. In *R v Vinh Le*,[803] discussed above, the 'constant refreshing effect' of a pattern of abuse was found to justify such a departure. It is possible that judges will find other special elements in future cases, particularly in those involving children or sexual offences.

7.225 In IP 28, the ALRC refers to the need to consider the balance between admissibility under s 66 and s 65, particularly in light of s 65(2)(c), which refers to representations 'made in circumstances that make it highly probable that the representation is reliable'.[804] 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.

7.226 While the decision in *Graham* may not prevent the courts from developing more flexible approaches to the admission of evidence under s 66, it does create a major difficulty in situations where the relevant time period is measured in weeks or months. The same issue and considerations apply to the other provisions of the uniform Evidence Acts that use the term 'fresh in the memory'.[805]

7.227 The Commissions' preliminary view is that the uniform Evidence Acts should be amended to make it clear that whether a memory is 'fresh' is to be determined by reference to the quality of the memory, as well as the temporal relationship between

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801 For example, the judgment of Callinan J (with whom Gleeson CJ agreed) stated that 'it cannot be doubted that the quality or vividness of a recollection will generally be relevant in an assessment of its freshness': *Graham v The Queen* (1998) 195 CLR 606, 614.

802 *R v Adam* (1999) 47 NSWLR 267, 282. The New South Wales Court of Criminal Appeal stated that this view of the trial judge (Wood CJ at CL) had 'much to commend it'.

803 *R v Vinh Le* [2000] NSWCCA 49.

804 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.59].

805 Uniform Evidence Acts ss 32(2), 64(3).

the occurrence of the asserted facts and the making of the representation. The quality of the memory can be influenced by many factors, including by the nature of the events and the characteristics of the witness. This reform could be implemented by a new legislative definition of the words 'fresh in the memory' or by replacing this with some other form of words. A proposed provision is set out in Appendix 1.

7.228 More in depth analysis is required than has been possible for the purposes of this Discussion Paper. To inform further a discussion of the 'fresh in the memory' test and its application it is necessary to derive a more meaningful picture of the psychology of memory affected by emotion, stress or trauma. Of particular significance will be studies on the accuracy of traumatic memory over time.[806] It is proposed to continue with this investigation during the course of the Inquiry and to canvass these issues further in the consultation phase and in the context of the final report.

Proposal 7-6 The uniform Evidence Acts should be amended to make it clear that, for the purposes of s 66(2), whether a memory is 'fresh' is to be determined by reference to factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. These factors may include the nature of the event concerned, and the age and health of the witness.

Business records

7.229 Section 69 of the uniform Evidence Acts provides exceptions to the hearsay rule relating to the admissibility of business records.[807] The relevant parts of s 69 read:

> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
> (3) Subsection (2) does not apply if the representation:
> (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
> (b) was made in connection with an investigation relating or leading to a criminal proceeding.
>
> …

806 'While trauma may leave indelible sensory and affective imprints, once these are incorporated into a persona narrative this semantic memory, like all explicit memory, is likely subject to varying degrees of distortion': B van der Kolk and R Fisler, 'Dissociation and Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study' (1995) 8(4) *Journal of Traumatic Stress* 505.

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

> (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).

Assertions of opinion

7.230 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.[808] An 'asserted fact' is defined to mean a fact the existence of which is intended to be asserted in the representation.[809] A statement in the form of an opinion as to the existence of a fact appears to qualify as a 'representation'.[810]

7.231 IP 28 notes that there may be difficulty in admitting assertions of opinion under s 69, given the requirement of personal knowledge as defined in s 69(5).[811] 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.[812]

7.232 It was held in *Ringrow Pty Ltd v BP Australia Limited*[813] 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'.[814] Odgers claims that a better answer is that the expert will still have personal knowledge for these purposes if his or her opinion ('knowledge') is based on what the expert saw, heard or otherwise perceived. Alternatively, evidence would be admissible under Part 3.3 (opinion evidence) on the basis that any previous representation involved was not caught by the hearsay rule at all or came within one of the hearsay exceptions.[815]

7.233 IP 28 asks whether concerns are raised by the application of s 69 of the uniform Evidence Acts to opinion contained in business records.[816]

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

809 Uniform Evidence Acts s 59(2).

810 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].

811 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.65]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2860].

812 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2860].

813 *Ringrow Pty Ltd v BP Australia Limited* [2003] FCA 933.

814 Ibid, [19].

815 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.2860].

816 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–11.

7.234 A few concerns are raised about the operation of s 69. One senior practitioner suggests that the personal knowledge requirement can allow the admission of 'obvious' business records to be contested where it is difficult to demonstrate that the representation was made by a person 'who had or might reasonably be supposed to have had personal knowledge of the asserted fact'.[817]

7.235 By contrast, another senior practitioner has no problem with s 69(2)(a) but expresses concern about the breadth of the exception in s 69(2)(b), which allows the admission of a business record containing information 'directly or indirectly supplied' by a person. He suggests that the minimum requirement should be that the person who supplied the information is identifiable.[818]

7.236 Generally, however, the Commissions find a high level of satisfaction with the operation of the business records provisions of the uniform Evidence Acts.[819] The Commissions are interested in further comments on whether there is sufficient reason to propose any amendment to s 69 of the uniform Evidence Acts in this regard.

Question 7–2 What concerns are raised by the operation of s 69(2) of the uniform Evidence Acts with respect to business records? Should these concerns be addressed through amendment of the Acts and, if so, how?

Police records

7.237 In ALRC 38, it was proposed that the business records exception not be available 'if the representation was prepared or obtained for the purpose of conducting, or in contemplation of or in connection with, a legal or administrative proceeding'.[820] The rationale for this proposal included that, without this provision, 'any note of information and rumour in police or private records gathered during the investigation of a crime would be admissible'.[821]

7.238 The DPP NSW raises issues surrounding the application of s 69(3) to business records of the New South Wales Police Service. The effect of s 69(3) is said to be that:

> Documents made in the ordinary course of police business, such as transcriptions from '000' calls, records made by crime scene examiners which account for the continuity of exhibits and routine COPS entries which are unrelated to the offence

817 P Greenwood, *Submission E 47*, 11 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.
818 B Donovan, *Consultation*, Sydney, 21 February 2005.
819 For example, New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
820 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App A, Evidence Bill 1987, cl 61(2).
821 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [707].

> which is the subject of the current proceedings, are not admissible because it is frequently not possible to locate the police officer who made the original entry …[822]

7.239 The DPP NSW submits that there should be a discretion to admit records of this type, instead of the 'blanket prohibition' in s 69(3)(b).

7.240 In *Vitali v Stachnik*, Barrett J stated that the purpose of s 69(3)(b) is to prevent the introduction of hearsay material

> which is prepared in an atmosphere or context which may cause it to be self-serving in the sense of possibly being prepared to assist the proof of something known or at least apprehended to be relevant to the outcome of identifiable legal proceedings.[823]

7.241 Where documents are not covered by s 69(3), ss 65 and 66 will often remain available. The Commissions remain to be convinced that there is any compelling reason to depart from the existing formulation, which provides an important safeguard against the admission of self-serving police records.

Question 7-3 Should s 69(3) of the uniform Evidence Acts be amended to provide the judge with a discretion to admit documents made in connection with an investigation relating or leading to a criminal proceeding and, if so, on what criteria?

Contemporaneous statements about a person's health etc

7.242 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.

7.243 In the original evidence inquiry, the ALRC did not recommend the inclusion of this provision in the uniform evidence legislation. The ALRC considered that such representations were covered adequately by confining the definition of 'hearsay' to intended assertions and by the first-hand hearsay proposal.[824]

7.244 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.[825]

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822 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005. Also Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.

823 *Vitali v Stachnik* [2001] NSWSC 303, [12].

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

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

7.245 IP 28 notes that the breadth of this provision has been criticised in several respects.[826] First, 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.[827]

7.246 However, to date, courts have not interpreted s 72 this broadly.[828] There is reason to suggest that, in practice, evidence of belief or memory sought to be admitted under s 72 would be inadmissible under s 55 (the relevant evidence test).[829]

7.247 For example, in *R v Hillier*, Gray J found that while s 72 might permit evidence to be given of a deceased's fear of the accused as recounted to other persons, that only applied 'when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial'.[830]

7.248 IP 28 also notes that it may not be 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.[831] However, the use of the evidence of the representation will have been identified in determining its relevance.

7.249 Finally, IP 28 notes 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.[832] There is some support for amending s 72 to remedy this position.[833]

7.250 The Commissions agree that there can be no justification for this provision applying to second-hand and more remote forms of hearsay and that the provisions should be moved to the first-hand hearsay exceptions contained in Division 2 of Part 3.2 of the *Evidence Act 1995* (Cth) (see Appendix 1).

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826 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [5.70]–[5.72].

827 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].

828 New South Wales Public Defenders, *Submission E 50*, 21 April 2005; *R v Polkinghorne* (1999) 108 A Crim R 189.

829 See, eg, *R v Hannes* (2000) 158 FLR 359, [480]; *Roach v Page (No 11)* [2003] NSWSC 907, [15]–[16].

830 *R v Hillier* [2004] ACTSC 81, [25].

831 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.72] referring to J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [72.40].

832 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.71] referring to S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3400].

833 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

Proposal 7-7 The uniform Evidence Acts should be amended so that the s 72 exception to the hearsay rule, which relates to certain contemporaneous statements, applies to first-hand hearsay only.

Hearsay in interlocutory proceedings

7.251 In interlocutory proceedings, parties often rely on affidavits, rather than on witness testimony. Where such evidence is hearsay, s 75 of the uniform Evidence Acts will apply. Section 75 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.[834]

7.252 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.[835]

7.253 This is the case with other provisions of the uniform Evidence Acts, which deal with proof of certain matters by affidavit or written statements.[836] 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'.[837]

7.254 IP 28 asks whether s 75 should 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. There is some support for this idea.[838]

7.255 Given the existence of s 172, which already requires that the person set out the source of the knowledge or information or the basis of the belief, the only issue that remains is whether a person should swear to a belief in the information.

7.256 In the typical affidavit in interlocutory proceeding, the person giving the affidavit generally states 'I am informed by ... and verily believe …'. The uniform Evidence Acts do not impose this requirement but, at the same time, do not prevent rules of court adding such requirements. All that the Acts do is prescribe the circumstances in which the hearsay rule does not apply. They do not purport to spell out complete requirements as to form and content of affidavits. The Commissions do not propose any amendment to s 75 of the uniform Evidence Acts.

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834 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.3700].
835 A Hogan, *Submission E 1*, 16 August 2004.
836 Uniform Evidence Acts s 172.
837 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.
838 Ibid; Confidential, *Submission E 31*, 22 February 2005.

Hearsay and children's evidence

7.257 The hearsay rule is particularly significant in cases involving child witnesses, as children are often incompetent to give sworn or unsworn evidence, or unwilling to give evidence due to the trauma involved.[839] 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.[840] The lack of evidence from child witnesses may mean that some cases are not prosecuted.[841]

7.258 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.[842] 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).[843]

7.259 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 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.[844] It is 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 can reduce the stress and trauma on the child of testifying in court.[845]

7.260 For these reasons, in the report *Seen and Heard: Priority for Children in the Legal Process*[846] (ALRC 84), the ALRC and HREOC make the following recommendation (the ALRC/HREOC 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-

839 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].
840 Ibid, Ch 14.
841 Ibid, [14.78].
842 Uniform Evidence Acts ss 64, 66.
843 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) 195 CLR 594 and the discussion above regarding the limitation on the operation of s 60.
844 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].
845 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Ch 8.
846 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997).

> 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.[847]

7.261 The ALRC/HREOC recommendation is based on a hearsay exception created by the Supreme Court of Canada in *R v Khan*.[848] In Canada, courts may admit children's hearsay statements about an issue at trial if the admission is 'necessary' and the statement is reasonably reliable.[849] 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 that giving evidence might be traumatic for or harm the child.

7.262 ALRC 84 notes the *R v Khan* necessity test provides a much broader set of circumstances for the admissibility of a child's statement than the 'unavailability' test under the uniform Evidence Acts. Further, the *R v Khan* reasonable reliability test is less stringent than the high probability of reliability tests in s 65(2)(c) of the uniform Evidence Acts.[850]

7.263 This issue has also been canvassed (in a non-uniform Evidence Act jurisdiction) by the VLRC in its report on sexual offences.[851] The VLRC recognises that direct evidence given by a child in court may not be better than hearsay evidence of a child's earlier statements about sexual abuse and recommends a child-specific hearsay exception applicable to child sexual offence cases.[852]

7.264 In its interim report, the VLRC proposed that the courts should have a discretion to admit the hearsay evidence of children, regardless of whether the child is available to give evidence. However, the final report expresses reservations about the fairness of such an approach where the child's evidence cannot be tested in cross-examination because the child is not available to give evidence. The VLRC also notes that provisions allowing the court to admit hearsay evidence of sufficient probative value where the child is not available to give evidence may have limited effect because courts may routinely exercise their discretion to exclude evidence in this situation.[853]

7.265 In its final report, the VLRC recommends that a hearsay exception be enacted for evidence of statements to prove facts in issue in any criminal case involving child sexual assault allegations where the child is under the age of 16; available to give

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847 Ibid, Rec 102.

848 *R v Khan* (1990) 2 SCR 531, 546; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.81]–[14.82].

849 *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.

850 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [14.82], fn 217.

851 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.97]–[5.130].

852 Ibid, [5.105]–[5.115].

853 Ibid, [5.125]–[5.127].

evidence; and the court, after considering the nature and content of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.[854]

Existing laws

7.266 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.[855]

7.267 In New South Wales and Tasmania, in certain criminal proceedings the evidence of certain previous statements made by a child may be admitted.[856] 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.[857] In Western Australia, a statement made by a child before the proceedings were commenced that relates to any matter in issue in the proceedings may be admitted at the discretion of the judge.[858] Northern Territory legislation provides an exception to the hearsay rule in sexual offence proceedings for evidence of a child's statement to another person.[859]

Submissions and consultations

7.268 IP 28 asks whether there should be an additional exception to the hearsay rule regarding children's hearsay statements about a fact in issue, making such statements admissible to prove those facts and, if so, subject to what restrictions.[860]

7.269 Victoria Legal Aid opposes proposals for 'special "child hearsay" rules'. It states that 'present arrangements for children to make statements and to give evidence-in-chief by way of a video recorded interview adequately protect the welfare of child

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854 Ibid, Rec 139.

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

856 *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.

857 *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.

858 *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.

859 *Evidence Act 1939* (NT) s 26E.

860 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–15.

complainants and enable investigators to obtain admissible evidence without unnecessary difficulty'.[861]

7.270 The NSW PDO and the Law Council also oppose a new hearsay rule for child witnesses.[862] The Law Council states:

> The Council does not believe that such an exception can be based on necessity where the result of admitting hearsay evidence creates an unreasonable risk that an innocent person may be convicted. Where possible, children should testify orally and their testimony be subject to cross-examination.[863]

The Commissions' view

7.271 There are significant barriers to the development of any recommendation for the introduction in the uniform Evidence Acts of a hearsay exception directed to children's evidence. There is no consensus on the form of any such exception. The parameters of existing and proposed exceptions to the hearsay rule vary significantly in scope. For example, some apply only to evidence in sexual offence cases, others to family law proceedings, or to all civil or criminal proceedings in which allegations of child abuse are made.

7.272 As discussed above, the ALRC and HREOC recommended an exception applicable when a child witness is unavailable (in a broad sense), while the VLRC takes a different approach by restricting the ambit of its proposed exception to situations where the witness is available to give evidence. In these circumstances it could be a significant task to develop a uniform provision.

7.273 As discussed in Chapter 18, the Commissions do not propose that evidentiary provisions relating specifically to child witnesses should be included in the uniform Evidence Acts at this stage. This is because of the Commissions' common policy that the uniform Evidence Acts should remain Acts of general application and due to the close links between such provisions and complex procedural issues.

7.274 The Commissions will be giving further consideration to the development of a hearsay exception directed to children's evidence. However, the best way to address concerns about this issue, at least in the medium term, may be through hearsay exceptions specific to certain offences and located outside the uniform Evidence Acts.

7.275 In this context, it should be noted that the Commissions' proposals for reform of some provisions of general application may, in some circumstances, reduce barriers to the admission of children's hearsay evidence specifically. These are the proposed

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861 Victoria Legal Aid, *Submission E 22*, 18 February 2005.

862 New South Wales Public Defenders, *Submission E 50*, 21 April 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

863 Law Council of Australia, *Submission E 32*, 4 March 2005. The Law Council does, however, support modified procedures for the giving of evidence by children.

amendments to the uniform Evidence Acts in relation to the 'fresh in the memory' test under s 66(2); and as to when a person is taken not to be available to give evidence.[864]

Notice where hearsay evidence is to be adduced

7.276 Section 67 of the uniform Evidence Acts 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.

7.277 Notices are to be given in accordance with any regulations or rules of court made for the purposes of s 67.[865] Section 67(4) provides that failure to give notice may be excused by the court. The section does not set out criteria for the exercise of this discretion. However, the factors set out in s 192 of the Acts will apply, including the extent to which making a direction would be unfair to a party or witness, the importance of the evidence and whether it is possible to grant an adjournment.

Notice in civil proceedings

7.278 IP 28 states 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.[866] IP 28 asks how s 67 of the uniform Evidence Acts has operated in civil proceedings.[867]

7.279 Some practitioners state that it is important to comply with the notice requirements because New South Wales judges do not hesitate to exclude hearsay evidence where notice has not been given.[868] Others say that the notice provisions are rarely used,[869] but do not call for any change. One comment is that s 67 provides a simple procedure, the commonsense use of which should be encouraged.[870]

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864 See Proposals 7–6, 7–4.

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

866 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.90]. In relation to notice in criminal proceedings, the NSW PDO states that 'the traditional time for service of these notices appears to be the Friday afternoon before the trial is to commence. Judges appear not to be prepared to apply any sanctions for late notice of tendency and coincidence evidence': New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

867 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 5–16.

868 For example, B Donovan, *Consultation*, Sydney, 21 February 2005.

869 For example, P Greenwood, *Submission E 47*, 11 March 2005; S Finch, *Consultation*, Sydney, 3 March 2005.

870 P Greenwood, *Submission E 47*, 11 March 2005.

7.280 IP 28 notes suggestions 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.[871]

7.281 Section 67 simply provides that the party must give notice of the intention to adduce hearsay evidence, and that meaningful notice could not be given without indicating what the evidence is, and the statutory provisions and grounds on which the party intends to rely. It is up to courts to decide what, if any, additional rules are needed. The Commissions have identified no significant need to change the hearsay notice provisions of uniform Evidence Acts on this basis.

Notice in criminal proceedings

7.282 The Law Council raises a substantive issue concerning the giving of notice in criminal proceedings. As discussed above, s 65(9) allows another party to adduce hearsay evidence that qualifies or explains a representation about a matter adduced by a defendant and admitted under s 65(8)(a). The Law Council submits:

> The vagueness of the term 'the matter' [in s 65(9)], the possible ignorance of the accused about the evidence available to the prosecution, and the unavailability of an advance ruling by the trial judge make it difficult for the defence to decide whether to call hearsay evidence under s 65(8). Section 67(1) requires the defence to give notice of its intention to call hearsay evidence under s 65(8) but there is no subsequent corresponding obligation on the prosecution. The Council believes such notice should be given.[872]

Question 7-4 Should s 67 of the uniform Evidence Acts be amended to require the prosecution to give notice of an intention to adduce evidence under s 65(9)?

Hearsay in civil proceedings

7.283 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.

7.284 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

871 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [5.91].
872 Law Council of Australia, *Submission E 32*, 4 March 2005.

(b) references to hearsay include hearsay of whatever degree.

7.285 Under the United Kingdom legislation, the party proposing to adduce hearsay evidence must provide notice of that fact to the other party.[873] The Act also contains detailed provisions setting out considerations relevant to the weighing of hearsay evidence by the court.[874]

7.286 The ALRC requested 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,[875] but only if the parties consent.[876] 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.[877]

7.287 In consultations, the abolition of hearsay rules in civil proceedings was opposed. It is considered that the breadth of the exceptions to the hearsay rule and the waiver provisions were sufficient to allow for appropriate use of hearsay evidence. One New South Wales District Court judge comments:

> The hearsay provisions are, in my view, basic to the requirement of fairness in the courts, despite the criticisms that have been levelled at them. In some situations it is conceivable that all parties might consent to allow the admission of hearsay evidence, but in my view these would be relatively rare. In my submission it is better that the Act remain as it is.[878]

7.288 In addition, some judges oppose the abolition of the hearsay rule on case management grounds. That is, leaving aside concerns about the reliability of evidence, liberalising the admission of hearsay evidence could add to the volume of evidence before the court, potentially prolonging trials and increasing costs. The Commissions propose no change to the uniform Evidence Acts in this regard.

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873 *Civil Evidence Act 1995* (UK) s 2.
874 Ibid s 4.
875 Uniform Evidence Acts s 190(1). The following provisions may be waived, in relation to particular evidence or generally: Divs 3, 4 or 5 of Pts 2.1, Pt 2.2 or 2.3; or Pts 3.2 to 3.8. (Part numbers differ slightly in the Tasmanian legislation.)
876 Section 190(2) contains safeguards with regard to the consent of a defendant in criminal proceedings.
877 Uniform Evidence Acts s 190(3).
878 Confidential, *Submission E 31*, 22 February 2005. See also P Greenwood, *Consultation*, Sydney, 11 March 2005.

8. The Opinion Rule and its Exceptions

Contents

Introduction

8.169 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.

8.170 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'.[879]

8.171 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

879 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.

and evidence in the form of opinion, the one at times passing imperceptibly into the other'.[880] However, in its earlier inquiry into the laws of evidence, the ALRC considered that retaining the distinction (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.[881]

8.172 The uniform Evidence Acts provide a range of exceptions to the opinion exclusionary rule.[882] These include exceptions in relation to lay opinion[883] and opinion based on specialised knowledge[884] ('expert opinion evidence').

8.173 A number of concerns are raised in relation to the operation of these exceptions, which are discussed in this chapter. The chapter proposes amendment of the uniform Evidence Acts to provide an exception to the opinion and credibility rules for expert opinion evidence on the development and behaviour of children. A number of other possible reforms are also discussed, but rejected, notably in relation to requirements to prove the factual basis of expert opinion evidence.

8.174 Aspects of the opinion rule in specific contexts, including in relation to evidence of Aboriginal and Torres Strait Islander traditional laws and customs; evidence in family law proceedings; in sexual offence cases; and from child witnesses are discussed in Chapters 17–18.

Lay opinion

8.175 At common law, lay opinion evidence was inadmissible unless it fitted within 'an apparently anomalous miscellany' of exceptions.[885] 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.

8.176 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

880 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [738].
881 Ibid, [738].
882 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).
883 Uniform Evidence Acts s 78.
884 Ibid s 79.
885 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [739].

weather, a road or the floor of a factory,[886] and the comparative intelligence amongst the inhabitants of a small town of a person with whom the witness has had dealings.[887]

8.177 The ALRC gave consideration to including an express requirement that lay opinion be rationally based in order to fall under s 78, but considered that the words that now comprise s 78(b) provided sufficient protection.[888] In *R v Panetta*, the New South Wales Court of Criminal Appeal held that opinion evidence that is not rationally based will not satisfy the test of relevance in s 55 of the uniform Evidence Acts.[889] That is, the evidence must be logically probative—capable of rationally affecting the assessment of the probability of the existence of a fact in issue.[890]

8.178 IP 28 noted suggestions that:

- some approaches to the application of s 78 are 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;[891]
- in some circumstances, it may not be entirely clear where the divide lies between lay opinion evidence and expert opinion evidence; and
- 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'.[892]

Submissions and consultations

8.179 IP 28 asked what concerns exist with regard to the admission of lay opinion evidence under s 78 of the uniform Evidence Acts; and whether any concerns should be addressed through amendment of the uniform Evidence Acts.[893]

8.180 Victoria Legal Aid states that it opposes allowing lay opinion evidence to be given because such a course could lead, for example, to the police routinely giving opinion evidence as to the identity of an offender.[894]

8.181 In this context, two submissions and consultations[895] refer to the decision of the High Court in *Smith v The Queen*.[896] In *Smith*, two police officers gave similar

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886 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4180].
887 *R v Fernando* [1999] NSWCCA 66.
888 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [740].
889 *R v Panetta* (1997) 26 MVR 332.
890 Ibid, 336.
891 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [78.15]; *R v Leung* (1999) 47 NSWLR 405.
892 *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 529. See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.7]–[6.12].
893 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–1.
894 Victoria Legal Aid, *Submission E 22*, 18 February 2005. Other submissions and consultations do not suggest any significant problem with the way in which s 78 is operating: eg, P Greenwood, *Submission E 47*, 11 March 2005.

evidence at trial, over the objection of the appellant. Both said that they had had previous dealings with the appellant and that they recognised the person depicted in the bank robbery photographs as the accused. The High Court allowed the appeal and ordered a new trial.

8.182 With the exception of Kirby J, the judges found that the identification evidence of the police officers was inadmissible because it was not relevant under s 55—the police witnesses were in no better position to make a comparison between the appellant and the person in the photographs than the jurors.[897] The judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that, because the witness' assertion of identity was founded on material no different from the material available to the jury from its own observation, it was not evidence that could rationally affect the jury's determination of whether the accused was shown in the photographs:

> The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision-maker permitting substitution of the view of another, for the decision-maker's own conclusion.[898]

8.183 Kirby J found that the evidence was relevant but that it was not covered by the lay opinion exception because neither police officer was present at the 'matter or event' for the purposes of s 78, which Kirby J considered to be the robbery. Kirby J stated that ALRC 26:

> makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses. It exists to allow such witnesses to recount, as closely as possible, 'their original perception [so as] to minimise inaccuracy and encourage honesty'.[899]

8.184 This interpretation has been criticised on the basis that the term 'matter or event' is not necessarily related to the offences or other events in question in the trial, but rather to what the person expressing the opinion 'saw, heard or otherwise perceived'

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895 Victoria Legal Aid, *Submission E 22*, 18 February 2005; New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

896 *Smith v The Queen* (2001) 206 CLR 650.

897 Ibid, [9].

898 Ibid, [11]. No attention had been given to the question of relevance in the arguments advanced at trial, or on appeal to the New South Wales Court of Criminal Appeal: *Smith v The Queen* (2001) 206 CLR 650, [6]; *R v Smith* (1999) 47 NSWLR 419.

899 *Smith v The Queen* (2001) 206 CLR 650, [60] citing Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [739]–[740].

and that this can involve, for example, a photograph, the appearance of the accused and a comparison of the two.[900]

8.185 Some New South Wales Local Court magistrates state that issues concerning the admission of identification evidence from police arise frequently and that, as a result of the decision in *Smith*, magistrates are not able to rely on police opinion evidence as to identification. It is said that, as a result, magistrates are left to reach their own opinion on identification—in effect themselves identifying the person in police photographs and other evidence. This determination often occurs in a very short timeframe, given the speed with which matters are dealt with in the Local Court.

8.186 The magistrates' view is that the opinion of police officers, who may be familiar with the physical appearance of the accused, may be the most reliable and should therefore be admissible, whether under s 78 or otherwise. In this context, the New South Wales Court of Criminal Appeal in *R v Smith* held that the evidence given by the police officers was not evidence of an opinion but was direct evidence that a person shown in the photograph was the accused. As such it was not excluded by s 76; and there was no need to consider the application of s 78 or other statutory exceptions to the opinion rule.[901]

The Commissions' view

8.187 The decision of the High Court in *Smith v The Queen* can constitute a barrier to the admission of police opinion evidence on identification. The majority decision indicates that such evidence is not relevant, at least where there is no suggestion that the physical appearance of the accused has changed materially, or that the police, by reason of their previous observations, are at some advantage in recognising the person in the photographs.[902]

8.188 The decision in *Smith* has implications beyond the evidence of police officers. The reasoning also applies to others who know the accused.[903] Opinion evidence concerning identification can only be considered relevant where the witness is at some advantage in recognising the person in the photographs. What may constitute a sufficient advantage is not a matter elaborated on in the majority judgment. However, Kirby J stated that there were several grounds for upholding the relevance of the police evidence.

> In past decisions, it has been observed that such identification evidence may be relevant if the jury require further assistance on the interpretation of photographs; if the appearance of the accused has changed and the witness can testify to the specific

900 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.2.4180].
901 *R v Smith* (1999) 47 NSWLR 419, [24].
902 *Smith v The Queen* (2001) 206 CLR 650, [9].
903 Ibid, [9]: If a member of the public had been called as a witness, 'the same question of relevance would have arisen'.

> appearance at the time of the offence; or if the witness has an advantage over the jury based on sufficient familiarity with the accused or other expertise.[904]

8.189 In the circumstances, decision makers 'could properly consider that witnesses were better placed to recognise the person in the photographs than they were'.[905] In particular, Kirby J highlighted the fact that, while the jury may have spent as much time in the presence of the accused as the police officers:

> Members of a jury watch a person such as the appellant (especially where, as here, that person gives no evidence) sitting immobile in the courtroom. The police witnesses had repeatedly viewed the appellant in daylight. They had seen him in motion. They had observed him from different angles. They had had the opportunity to view him engaged in varying and more natural facial movements.[906]

8.190 On one view, the relevance requirement may have been set too high by the majority decision in *Smith*. By contrast, Kirby J found that the evidence of the police officers was relevant according to the broad test provided by uniform Evidence Acts.[907] However, there is room for the decision in *Smith* to be distinguished on the facts in subsequent cases.

8.191 The reasoning of the majority in *Smith* was that the opinions of the police officers were not based on anything in substance additional to that upon which the jury would base their view. If in any future case it is demonstrated that a police officer had regard to facts or matters that were in substance additional to, or different from, those before the jury, the evidence of the police officer would be capable of rationally affecting the assessment of the probability of the existence of a fact in issue.

8.192 Similarly, in a case before a magistrate or other judicial officer sitting alone and where the judicial officer will not have any great opportunity to observe the accused, opinion evidence of police officers as to identification could be considered as rationally affecting the probability that the accused is depicted in photographs before the court. The admissibility of the evidence in such a case would then fall to be determined under s 78.

8.193 The Commissions would be interested in further comment on whether amendment to the uniform Evidence Acts is required in the light of the judgments of the High Court in *Smith v The Queen*. However, if any problem created by *Smith* is primarily attributable to an interpretation of relevance under s 55, it may be hard to remedy.

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904 Ibid, [41].
905 Ibid, [43].
906 Ibid, [42].
907 See Ibid, [22], [45].

Question 8-1 Does the decision of the High Court in *Smith v The Queen* overly constrain the admission of police opinion evidence on identification and, if so, how should this be remedied?

Opinions based on specialised knowledge

8.194 In contrast to other witnesses, expert witnesses are permitted to offer opinions to the court as to the meaning and implications of other evidence. Views differ among commentators about the rules that control the admissibility at common law of expert opinion evidence. Dr Ian Freckelton and Hugh Selby have described these rules of evidence as follows:[908]

- 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;
- 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.

8.195 Another view is that such a reductive analysis of the 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 judge's discretion to exclude prejudicial evidence'.[909]

8.196 As discussed below, at common law there is conflicting authority and problems of definition in relation to the ultimate issue and common knowledge rules, which have been abolished by the uniform Evidence Acts. There is also debate about the existence and content of a field of expertise and basis rule, both at common law and under the uniform Evidence Acts. Nevertheless, in considering the admissibility of expert

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

909 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 243. Similarly, in the UK, Paul Roberts and Adrian Zuckerman argue that at common law none of these criteria 'constitutes a formal *rule* of admissibility constraining the court's reception of expert evidence at trial' and that decided cases on admissibility of expert evidence 'do not systematically conform to any of these criteria': P Roberts and A Zuckerman, *Criminal Evidence* (2004), 306.

opinion evidence under the uniform Evidence Acts, these 'rules' provide useful terms of reference.

Section 79 of the uniform Evidence Acts

8.197 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.

8.198 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.

8.199 A 'field of expertise rule' and a 'basis rule' were not specifically incorporated in the uniform Evidence Acts' 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.[910]

8.200 This chapter discusses selected aspects of the expert opinion provisions of the uniform Evidence Acts, including:

- the 'specialised knowledge' requirement and related field of expertise tests;
- the requirement that expert opinion evidence be based on 'training, study or experience' and the status of the so-called ad hoc expert;
- 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.[911]

Field of expertise and 'specialised knowledge'

8.201 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,

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

911 A related issue concerns the extent to which facts stated by an expert as forming the basis for the expert's opinion can be admitted as evidence of the facts stated. This issue is discussed in Ch 7, in relation to the operation of s 60 of the uniform Evidence Acts.

polygraph evidence, bushfire behaviour evidence, DNA profiling evidence and battered woman syndrome evidence.[912]

8.202 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 nature or content of the test.[913]

8.203 Andrew Ligertwood identifies a 'liberal relevancy approach' to expert knowledge as being that 'traditionally followed in common law courts, including those in Australia'.[914] This approach downplays the significance of any field of expertise test:

> By this approach, once the court determines the witness qualified by training or practical experience in an area of knowledge beyond that possessed by the trier of fact, and of apparent assistance to it, then the witness may testify. There is no further threshold of reliability to be applied to that area of knowledge. The expert testimony can be scrutinised in cross-examination and contradicted by opposing experts and the trier of fact is left to determine whether to act upon the expert knowledge presented.[915]

8.204 Ligertwood observes that, as new and sophisticated areas of knowledge have developed, courts have been drawn increasingly into determining the reliability of areas of expertise. In doing so, courts commonly look to see whether a field of expertise has 'general acceptance' in the relevant scientific discipline (the '*Frye*' test).[916] While South Australian case law adopts the 'general acceptance' field of expertise test,[917] 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.[918]

8.205 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*.[919] *Daubert* held that, in applying Rule 702

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

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

914 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.47].

915 Ibid, [7.47].

916 Derived from the United States decision in *Frye v United States* 293 F 1012 (1923). See Australian cases cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4260].

917 *R v Bonython* (1984) 38 SASR 45: 'Expertise must be 'sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience': 47. In Victoria, see *R v Johnson* (1994) 75 A Crim R 522, 535: 'Provided the judge is satisfied that there is a field of expert knowledge … it is no objection to the reception of the evidence of an expert within that field that the views which he puts forward do not command general acceptance by other experts in the field'.

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

919 *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

of the *Federal Rules of Evidence*,[920] the court must make an assessment of whether the reasoning or methodology underlying expert opinion evidence is scientifically valid.[921]

8.206 Discussion about the possible influence of the *Daubert* approach on Australian evidence law has centred on whether the adoption of similar criteria would usefully restrict the admission of evidence based on 'junk' science. While some have supported the application in Australia of the *Daubert* approach as setting more rigorous admissibility criteria,[922] others have concluded that it would be unlikely to lead to any significant improvement in the quality of scientific expert opinion evidence.[923]

Specialised knowledge

8.207 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'.[924] In recommending the provision that became s 79 of the uniform Evidence Acts, the ALRC did not intend to introduce a field of expertise-type test but, rather, to rely on

> the general judicial discretion to exclude evidence when it might be more prejudicial than probative, or tend to mislead or confuse the tribunal of fact. This could be used to exclude evidence that has not sufficiently emerged from the experimental to the demonstrative.[925]

8.208 In *HG v The Queen*,[926] Gaudron J (Gummow J agreeing) referred to the need, at common law, for the expert's knowledge or experience to be in an area 'sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience'.[927] The judge 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

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Reception of Daubert v Merrell Dow Pharmaceuticals Inc' (1997) 20(1) *University of New South Wales Law Journal* 48.

920 Rule 702 is similar to s 79 of the uniform Evidence Acts in referring to the need for 'scientific, technical, or other specialized knowledge' in order for expert evidence to be admitted. In 2000, Rule 702 was amended in response to the decision in *Daubert*, affirming the trial court's role as gatekeeper and providing some general standards that the trial court must use to assess the reliability of expert testimony.

921 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.

922 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.

923 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.

924 Uniform Evidence Acts s 79.

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

926 *HG v The Queen* (1999) 197 CLR 414.

927 Ibid, referring to *R v Bonython* (1984) 38 SASR 45, 46–47; *Clark v Ryan* (1960) 103 CLR 486, 491.

which is in any respect narrower or more restrictive than the position at common law'.[928]

8.209 Together with the comments of other High Court judges,[929] this leads Stephen Odgers to conclude that, while recognition may be one basis for a conclusion of reliability, under the uniform Evidence Acts 'it appears clear that the ultimate test is reliability'.[930]

8.210 The rejection by the uniform Evidence Acts of a field of expertise test is supported by decisions in the New South Wales Supreme Court. In *Idoport Pty Ltd v National Australia Bank Ltd*, Einstein J stated that s 79 is a 'direct rejection' of the *Frye* test, which had required that an expert's opinion be related to a recognised field of expertise or result from the application of theories or techniques accepted in that field.[931] In *Lakatoi Universal Pty Ltd v Walker*, Einstein J stated that this position

> is reflected in s 79 of the Evidence Act, which requires only that the expert have 'specialised knowledge', with the exclusionary rules regarding irrelevant, prejudicial or misleading evidence presumably operating to exclude the opinions of specialists in unreliable and unacceptable fields of expertise.[932]

8.211 The 'specialised knowledge' requirement of s 79 can 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.[933]

8.212 Aspects of the various field of expertise tests, including 'general acceptance' and *Daubert*-style reliability criteria may, nevertheless, be able to be used to help determine the probative value of evidence in the exercise of the general discretions to exclude or limit the use of evidence.[934] There may be concern that such an interpretation of s 79 may restore a field of expertise rule, contrary to legislative intent. Alternatively, there may be concerns that, without a field of expertise test, courts will not be able to control effectively the admission of expert opinion evidence.

8.213 IP 28 asked for 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.[935]

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

929 *Velevski v The Queen* (2002) 187 ALR 233, [154] (Gummow and Callinan JJ).

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

931 *Idoport Pty Ltd v National Australia Bank Ltd* [1999] NSWSC 828, [242].

932 *Lakatoi Universal Pty Ltd v Walker* [2000] NSWSC 633, [8]. See also *Lipovac v Hamilton Holdings Pty Ltd* [1996] ACTSC 98, [547]–[548], in which Higgins J said that the correct view may be that 'the relative novelty or eccentricity of the field of expertise goes to weight rather than admissibility', but that s 79 and s 135 'combine to permit exclusion, even in civil cases, of evidence not sufficiently based on a recognised field of expertise not on admissibility grounds but on grounds of lack of probative value'.

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

934 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 88.

935 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.

8.214 Specifically, the paper asked whether the uniform Evidence Acts should be amended to introduce additional criteria for the admissibility of expert evidence in scientific or technical fields or, alternatively, whether the Acts should be amended to remove threshold admissibility rules for expert opinion evidence, leaving judges to decide on the weight to be given to such evidence.[936]

Submissions and consultations

8.215 The Commissions received a range of comments and submissions relevant to the field of expertise requirement. In general, however, most people consulted are reasonably satisfied with the way in which s 79 is interpreted and applied by the courts.[937]

8.216 The Law Council of Australia (Law Council) states that while some threshold requirement for the admission of expert evidence may be appropriate in civil proceedings to enable the exclusion of 'junk experts', it supports an approach that focuses on the weight to be given to expert evidence, rather than on constraining admissibility. The Council indicates that a stricter approach may be justified for expert evidence tendered by the prosecution in criminal proceedings, but considers that s 79 'is adequate, and sufficiently flexible for this purpose'.[938]

8.217 By contrast, the Criminal Law Committee of the Law Society of South Australia (Law Society SA) submits that additional statutory criteria are desirable and suggests defining specialised knowledge 'such that it encompasses the "field of expertise rule" while allowing for new "fields of knowledge" to accommodate advances in technology'.[939]

8.218 Ian Freckelton confirms his view that, while the *Daubert* approach may provide useful guidance as to the probative value of expert opinion evidence, it is not desirable to enact additional criteria for admissibility.[940] That is, the *Daubert* criteria can be used to exclude or limit the use of dubious expert opinion evidence under the discretionary provisions of the uniform Evidence Acts:

> In order to determine what constitutes probative value, and also unfair prejudice, criteria are needed. Both the general acceptance *Frye* rule and the reliability rule of the *Daubert* decision offer such criteria. … [*Daubert*] provides a sophisticated means of distinguishing between evidence that is not yet capable of being effectively evaluated by the courts from that which is falsifiable and has been tested within the

936 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–2; 6–3.
937 For example, Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005; S Finch, *Consultation*, Sydney, 3 March 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.
938 Law Council of Australia, *Submission E 32*, 4 March 2005.
939 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.
940 I Freckelton, *Consultation*, Melbourne, 17 March 2005.

> medium of peer review and debate amongst those constituting the intellectual marketplace.[941]

The Commissions' view

8.219 There will always be debate and tension about the best means to control the admission of expert opinion evidence. In its original evidence inquiry, the ALRC concluded that the attempt to deal with the underlying problems associated with expert testimony by various rules had not been successful and that the best solution was to rely ultimately upon the discretions, particularly s 135. Using the discretions directly focuses on the key issue—the probative value of the evidence as against the disadvantages of receiving because of unfair prejudice, the capacity to mislead or confuse or the potential for unduly wasting time.

8.220 The current scheme of the uniform Evidence Acts allows the courts a wide discretion in how they assess the evidentiary value of an expert's specialised knowledge; whether for the purposes of s 79, or in order to determine whether the expert's opinion evidence should be excluded under the discretionary provisions.

8.221 The Commissions have concluded that there is nothing to be gained by enacting additional statutory criteria dealing with permissible fields or areas of expertise for expert opinion evidence and, in fact, any attempt to do so may simply introduce new uncertainties.

8.222 In particular, determining the admissibility of expert opinion evidence by reference to the scientific validity of a field of expertise, as suggested by *Daubert*, is not always practical or appropriate. The *Daubert* criteria cannot be applied easily to fields such as psychiatry, psychology or family counselling, in which opinion evidence inevitably relies on subjective interpretation. *Daubert* reasoning may also be criticised as an inadequate representation of science and its methodology. Gary Edmond and David Mercer have written that:

> science cannot simply be defined by its possession of a unique transferable method or set of behavioural norms or institutional structures. We noted the importance to scientists of tacit knowledge and skilled judgments, and the diversity of norms and institutional constraints under which scientists work. In this context, attempts such as falsificationism, to define a set of transferable rules for what constitutes valid science will always face difficulties accounting for the diversity of the ways such rules can be interpreted and applied in practical contexts.[942]

8.223 It is likely that courts will continue to struggle to develop completely satisfactory approaches to determining the validity of fields of expertise, especially in relation to novel scientific or technical areas. However, resolving these issues is no more difficult, and arguably less technical, than it was at common law.

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941 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 88.

942 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, 97.

Training, study or experience

8.224 It has been held that the term 'specialised knowledge' is not restrictive and expressly encompasses specialised knowledge based on experience.[943] 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.[944]

8.225 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.

8.226 The concept of an ad hoc expert was recognised by the High Court in *R v Butera*.[945] Cases since the enactment of the uniform Evidence Acts have recognised that s 79 is sufficiently broad as to encompass ad hoc experts. In *R v Leung*, the prosecution sought to lead evidence from an interpreter, who had listened repeatedly to listening device tapes and tapes of police interviews with the accused, that the voice on the listening device tapes was that of the accused. It was held that, even if such evidence fell outside the scope of s 78, it was covered by s 79 because the interpreter's expertise and familiarity with the voices and languages on the tapes qualified him as an ad hoc expert.[946]

8.227 IP 28 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'.[947] 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.[948]

8.228 IP 28 asked whether concerns exist with regard to the admission of so-called 'ad hoc' expert opinion evidence and whether any concerns should be addressed through amendment of the uniform Evidence Acts.[949]

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943 See *ASIC v Vines* (2003) 48 ACSR 291, 294–295.
944 See Ibid, 297–299.
945 *R v Butera* (1987) 164 CLR 180.
946 *R v Leung* (1999) 47 NSWLR 405. See also *Li v The Queen* (2003) 139 A Crim R 281.
947 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.30] citing J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [78.15].
948 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 235.
949 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–4.

Submissions and consultations

8.229 The Commissions did not receive many comments on this question, which raises similar concerns about the reliability and probative value of evidence as were discussed above in relation to the concept of specialised knowledge. Again, the Commissions' overall impression has been that this element of s 79 has not caused significant concern in practice.

8.230 However, the Law Society SA submits that s 79 should be amended to replace the words 'the person's training, study or experience' with 'the person's training *and* experience' or, alternatively, 'the person's study *and* experience'. It is said that this would limit the numbers of those who could be classified as ad hoc experts.[950]

8.231 The Commissions disagree with this suggestion, which would rule out the admission of opinion evidence based on specialised knowledge obtained solely through experience. Rather, any problems caused by the broad scope of the words 'training, study or experience' should be left to be dealt with through the discretionary provisions.

The factual basis of expert opinion evidence

8.232 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.[951]

8.233 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 a basis rule.

8.234 The ALRC recommended that a basis rule (if it existed) should not be a precondition to admissibility under the uniform Evidence Acts[952] and that such matters should be resolved under the general discretion to exclude.[953]

The Makita decision

8.235 Under the uniform Evidence Acts, expert opinion evidence must be 'wholly or substantially based' on the expert's 'specialised knowledge'.[954] In the New South Wales Court of Appeal, this requirement was interpreted by Heydon JA in *Makita*

950 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.
951 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.4320].
952 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [750].
953 Uniform Evidence Acts s 135.
954 Ibid s 79.

(Australia) Pty Ltd v Sprowles[955] 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 must explain how the field of 'specialised knowledge' applies to the facts assumed or observed so as to produce the opinion propounded.[956]

8.236 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 understand fully 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.

8.237 In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,[957] 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.[958] The *Makita* criteria, it was said, should commonly be regarded as going to weight rather than admissibility.[959]

8.238 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'.[960] 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.[961]

8.239 On the other hand, Justice Heydon has noted that such evidence to be dealt with as a matter of weight at the end of the trial may be difficult to reconcile with the

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955 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.
956 Ibid, [85].
957 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157.
958 Ibid, [7], [16].
959 Ibid, [16], [87]. This approach was endorsed by the New South Wales Court of Appeal in *Adler v Australian Securities and Investment Commission* [2003] NSWCA 131, [631]–[632].
960 *Neowarra v State of Western Australia* (2003) 205 ALR 145, [24].
961 Ibid, 154.

'practical exigencies of conducting litigation' and with the relevance requirement,[962] which contemplates that evidence cannot be admitted unless there is some evidence leaving it reasonably open to conclude that its assumptions are sound.[963]

8.240 Applying the reasoning in *Makita* has proven problematic in some subsequent cases. For example, in *Australian Securities and Investments Commission v Rich*,[964] Austin J in the New South Wales Supreme Court purported to follow the decision in *Makita*. He confirmed that the requirement of proving the assumed or admitted facts (or proving facts sufficiently like them) is a matter going to admissibility. In effect, he said, 'the basis rule has been transposed from the common law into the Evidence Act, notwithstanding the Law Reform Commission's contrary intention'.[965]

8.241 Austin J observed that, if an expert fails to identify and articulate the assumed, accepted and observed facts upon which his opinion is based, the court may well be unable to identify those facts, with consequences of several kinds.

> First, if the court is uncertain about the factual basis used by the expert, it may be unable to comprehend the opinion so as to decide how much weight or probative value to give it. Secondly, if the factual basis is not articulated, the court may be unable to determine whether the facts assumed or accepted by the expert correspond to the facts proved or admitted at the hearing … Thirdly, in extreme cases the consequence of failure to articulate the factual basis may even be inadmissibility for irrelevancy.[966]

8.242 The judge noted that, given these various consequences of failure to identify the facts upon which the expert's opinions are based, and therefore the likelihood that the court will exclude the evidence under s 135 of the uniform Evidence Acts, 'it will seldom be necessary to choose' between the views of Heydon JA in *Makita* and those of Branson J in *Red Bull*, as a matter of strict admissibility.[967]

8.243 However, in *Rich*, it was contended that the expert's report was strictly inadmissible because of its failure to set out comprehensively the true facts upon which the opinions were based, and that the matter was not merely one going to discretion. Therefore, the discrepancy between the judicial views had to be addressed. Austin J observed that the ALRC had concluded (in ALRC 26) that a basis rule did not exist and that, if it did, it should go to weight rather than admissibility.[968] In reaching the latter conclusion, the ALRC concentrated on situations where the basis for the expert's opinion was hearsay.[969] By contrast, it was said that *Makita* accepted a basis rule as part of the common law of evidence and saw the requirement of proving the assumed

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962 Uniform Evidence Acts s 57(1).
963 D Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript.
964 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149.
965 Ibid, [323].
966 See, Ibid, [297].
967 See, Ibid, [299].
968 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [750].
969 Ibid, [362]–[363], [750].

or admitted facts (or proving facts sufficiently like them) as a matter going to admissibility.[970]

8.244 On appeal, aspects of this interpretation of *Makita* were overruled by the New South Wales Court of Appeal. Spigelman CJ (with whom Giles JA and Ipp JA agreed) found that Heydon JA's analysis in *Makita* supported what Spigelman CJ characterised as an 'asserted factual basis approach' rather than a 'true factual basis approach' and that Austin J had erred in adopting the latter.[971]

8.245 The New South Wales Court of Appeal held that expert evidence is covered by s 79 of the uniform Evidence Acts if it discloses the facts and reasoning process that the expert *asserts* justify the opinions expressed:

> The mere fact that the expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at that stage. The assumed facts may be proved later by other evidence … The fact that the expert's opinion was at one time—or even still is—reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion (although these matters may go to weight).[972]

8.246 Further, the New South Wales Court of Appeal held that, in excluding the evidence, Austin J had not conducted the balancing exercise required in the exercise of the s 135 discretion.[973]

Submissions and consultations

8.247 IP 28 asked whether 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 and whether any concerns should be addressed through amendment of the uniform Evidence Acts.[974]

8.248 This issue provoked much interest and comment in submissions and consultations, although it was sometimes difficult to distinguish concerns relating to the law of evidence from procedural concerns about the way in which courts control the adducing of expert opinion evidence.

8.249 The Commissions have received comments supporting[975] and opposing[976] approaches to the factual basis of expert opinion evidence said to be based on the

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970 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [321]–[322] referring to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [64].

971 *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152, [134].

972 Ibid, [135].

973 Ibid, [164].

974 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–5.

975 For example, Confidential, *Submission E 31*, 22 February 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; P Greenwood, *Submission E 47*, 11 March 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

decision in *Makita*. Comments in support included those from one New South Wales District Court judge, who states:

> I do not regard the judgment of Heydon J in *Makita* as a 'counsel of perfection', although there are cases where it must be applied with some latitude. It is, however, a sound statement of the principles which govern the admissibility of expert evidence. In my view it would be a retrograde step to remove the threshold admissibility rules, which, in my view are properly and clearly stated in *Makita*.[977]

8.250 Similarly, the Law Society SA submits that:

> Any approach which has the capacity to erode the quality of evidence and hence its acceptability by the Courts and the public generally should be resisted. If a choice needs to be made the *Makita* approach should be preferred.[978]

8.251 The Committee states that 'to remove ambiguity and to limit subjectivity' the words 'wholly or substantially' should be deleted from s 79 and the words 'based on' should be defined to encompass the guidelines set out in *Makita*.[979] Some members of the Victorian Bar also suggest that the fundamental basis of an expert opinion should not be a matter for discretion, but elevated to a rule that goes to the admissibility of evidence.[980] However, other members express concern that a basis rule would lead to more lengthy disputes about the admissibility of expert opinion evidence and that it is impractical to expect the factual basis of every opinion to be established.[981]

8.252 The New South Wales Public Defender's Office (NSW PDO) states that there is a fundamental problem with treating objections to expert opinion evidence as matters going only to 'weight':

> This approach leaves counsel in the dark about what evidence should be called to rebut the expert evidence, which has been objected to, and how to approach the evidence in submissions. If expert evidence is in truth inadmissible, rejecting it at the outset reduces costs and delays and focuses the parties on the material, which the judicial officer will actually take into account in reaching his or her decision.[982]

8.253 One Aboriginal Land Council considers that any de facto reintroduction of a basis rule in relation to expert opinion evidence would work against native title claimants.

> Such a rule, as demonstrated by the respondents' approach to the expert evidence in the *Jango* and *Harrington-Smith* decisions, can be easily exploited by respondent parties who, with greater resources than indigenous representatives, could use such provisions in an overly technical and pedantic fashion as a procedural weapon in undermining the substantive case of the applicants.[983]

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976 For example, I Freckelton, *Consultation*, Melbourne, 17 March 2005.
977 Confidential, *Submission E 31*, 22 February 2005.
978 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.
979 Ibid. Also New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
980 Victorian Bar, *Consultation*, Melbourne, 16 March 2005.
981 Ibid.
982 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
983 Confidential, *Submission E 49*, 27 April 2005.

8.254 However, while some counsel and judges may assert that an expert opinion is not admissible if the factual basis of the opinion has not been proved (and not just identified), this is not strictly the case, at common law or under *Makita*. The purported rigour of the basis requirement in *Makita* may be questioned.[984] In *Rich*, for example, the trial judge noted the importance, in applying the *Makita* principles, of taking a 'pragmatic approach':

> Logically every expression of expert opinion employs unarticulated assumptions at a basic level: depending upon the expertise in question, basic assumptions about such things as human nature, human anatomy, atmospheric conditions on earth, the workings of the market economy and so on. It would be absurd to suggest that background facts of these kinds must be stated in the expert's report, and the reasoning processes surrounding their application must be explained.[985]

The Commissions' view

8.255 The decision in *Makita* and its subsequent interpretation in other cases has caused some uncertainty about the admissibility criteria for expert opinion evidence under the uniform Evidence Acts.

8.256 Part of the problem has been the tendency of some judges to rely heavily on the common law, laying down what appear to be strict rules of general application, before qualifying them. There appears to be a dichotomy between those judges who would wish to impose a stricter regime with regard to the admission of expert opinion evidence and those who see the law as requiring a more flexible approach. Some judges require the facts upon which an expert opinion is based to be proven. Others invariably admit such evidence, and rule later on the weight to be given to the relevant opinions.

8.257 In the Commissions' view the issue should be approached simply by reference to the provisions of the uniform Evidence Acts. A good example of this approach is that adopted by Branson J in *Red Bull*.[986] Other judgments do not take this approach and this can result in confusion.

8.258 For example, in *Rich*, the trial judge established that the opinion at issue was based in part on unidentified information, which was substantial, and was never going to proven.[987] This, Austin J held, meant that the opinion did 'not comply with the requirements for admissibility set out in *Makita*'. Alternatively, it was said, the evidence should be excluded on discretionary grounds under s 135.[988]

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984 See, eg, *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [38].
985 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [186].
986 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157.
987 See *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [365].
988 See Ibid, [365].

8.259 In the Commissions' view, the proper approach is to follow the overall scheme of the uniform Evidence Acts, applying the relevance test, followed by the opinion rule and its exceptions and, finally, the discretionary provisions.

8.260 Applying the Acts, the first section to consider is s 55. To enable the judge to determine whether the expert evidence, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'[989] it will be necessary for the party tendering the evidence to:

- sufficiently identify the facts relied on (observed, assumed or accepted);
- lead, or foreshadow the leading, of sufficient admissible evidence of those facts which require proof;
- sufficiently indicate the reasoning and expert basis upon which the opinion is reached.

8.261 These matters must be established to an extent sufficient for the trial judge to be satisfied that the opinion, if accepted, is capable of affecting the probabilities. If, for example, the tendering party does no more than present a statement of the expert setting out the qualifications of the expert and the opinion, but makes no reference to the facts upon which the expert relies, the evidence of the opinion should be ruled irrelevant and inadmissible because a view could not be formed as to whether, if accepted, it is capable of affecting the probabilities.[990]

8.262 However, it is not necessary that the facts be proved at the time that s 55 is being applied. It will be enough to demonstrate that the facts are reasonably open (that is, of provisional relevance).[991] Assuming provisional relevance is established, the evidence must then satisfy s 79. To enable the trial judge to be satisfied that the opinion evidence comes within the description in s 79 and is 'wholly or substantially based' on an expert's 'specialised knowledge' requires (as Heydon JA held in *Makita*) that there must be sufficient:

- identification of the specialised knowledge upon which it is said the expert has wholly or substantially relied;
- identification of the various types of facts relied upon, because without that information it will not be possible to determine whether the opinion is wholly or substantially based on the alleged specialised knowledge;
- explanation as to how the opinion is wholly or substantially based on that specialised knowledge as applied to those facts.

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989 Uniform Evidence Acts s 55.
990 *Quick v Stoland* (1998) 157 ALR 615, 617.
991 Uniform Evidence Acts s 57.

8.263 As discussed above, aspects of the *Makita* requirements arise under the uniform Evidence Acts; but not as rules which must be complied with strictly and literally in all cases. In *Makita* itself, Heydon JA stated that:

> Complete precision in proof of facts intended to support the assumptions of an expert is not called for; it is enough if the case proved is sufficiently like the case assumed to render the expert's opinion valuable.[992]

8.264 At the same time, a party preparing expert opinion evidence would be well advised to do so on the basis of Heydon JA's analysis—because to do so will both avoid any admissibility problems and provide compelling expert testimony.

8.265 Section 79 does not, however, require that the facts relied upon be proved or that it be demonstrated that they will be proved.[993] What must be clarified is what the expert asserts as to such matters. That does not mean that, if it becomes apparent during the proceedings that important facts are not going to be the subject of admissible evidence, the opposing party will be without remedy or the court unable to control the admission of the evidence. Failure to prove the factual basis may be extensive enough to require exclusion under s 135 or, in extreme cases, under s 55. However, s 79 itself does not, and cannot by its terms, provide the mechanism for exclusion. Section 79 of the uniform Evidence Acts does not require the factual basis of the expert opinion to be proved.

8.266 In the Commissions' view, if the provisions of the uniform Evidence Acts are interpreted and applied as described above, there is no need for any amendment to clarify the operation of s 79. Arguably, this approach is consistent with case law and will be reinforced in subsequent court decisions, removing some of the uncertainty that now exists.[994]

Expert opinion evidence in practice

8.267 IP 28 noted that 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.[995] For example, a particular problem is said to be presented by expert reports in native title cases. *Jango v Northern Territory of Australia (No. 2)* involved two expert reports in respect to which the government party made at least 1,100 objections. Sackville J noted that it was apparent

992 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [38], citing *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85.

993 As confirmed in *Neowarra v State of Western Australia* (2003) 205 ALR 145, [24].

994 See, eg, *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152.

995 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.41].

the reports had been prepared with 'scant regard' for the requirements of the uniform Evidence Acts; and that this was not a new phenomenon.[996]

8.268 IP 28 asked whether there is 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.[997]

8.269 In response, the NSW Young Lawyers Civil Litigation Committee submits:

> legal practitioners generally have sufficient understanding of the need to have an expert demonstrate that their opinion is based on the application of specialised knowledge to facts or factual assumptions. This is buttressed by a growing number of judgments and academic literature and also by court rules which make similar requirements for expert witnesses.[998]

8.270 In this context, the decision in *Makita*[999] is seen as 'reinforcing the view that trial judges should be careful only to pay regard to the evidence of sound experts who can state the reasons that support their views'.[1000]

8.271 In submissions and consultations, the Commissions received many comments favouring stricter enforcement of rules of evidence in relation to expert opinion.[1001] It was clear that serious concerns exist among some judicial officers and legal practitioners about lenient approaches to the admission of expert evidence. These include, but are not limited to, concerns that the relevant specialised knowledge of experts may not be adequately demonstrated (for example, experts may not be formally 'qualified' before the court); and that the facts or assumptions relied on by the expert are not adequately identified.

8.272 In this context, the Commissions consider that, rather than new rules of admissibility, the best way forward is through rules of court and education and training of lawyers and expert witnesses. There is a risk that, in placing emphasis on formal admissibility rules, courts may 'concentrate on technical formal compliance without proper regard to the purpose of the formal rules'.[1002] That purpose is, in words used in *Makita*, to address:

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996 *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [8]–[9]. The application of the opinion rule to evidence of Aboriginal and Torres Strait Islander traditional laws and customs is discussed in more detail in Ch 17.

997 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–6.

998 NSW Young Lawyers Civil Litigation Committee, *Submission E 34,* 7 March 2005.

999 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

1000 NSW Young Lawyers Civil Litigation Committee, *Submission E 34,* 7 March 2005, citing *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1084, [8].

1001 P Greenwood, *Submission E 47,* 11 March 2005; P Greenwood, *Consultation,* Sydney, 11 March 2005; Confidential, *Submission E 31,* 22 February 2005; Criminal Law Committee of the Law Society of South Australia, *Submission E 35,* 7 March 2005; C Einstein, *Consultation,* Sydney, 6 August 2004.

1002 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [259].

> whether the trier of fact (the court, where there is no jury) has been supplied with criteria enabling it to evaluate the validity of the expert's opinions.[1003]

8.273 IP 28 noted that 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.[1004] The increased use of such schedules'[1005] was favoured by several judges and practitioners.[1006]

8.274 In addition, rules of court now require expert witnesses to prepare expert reports in such a way as to promote transparency as to the basis of expert opinion. For example, the Federal Court's Practice Direction *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* states, among other things, that:

- An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- All assumptions of fact made by the expert should be clearly and fully stated.
- The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.
- The expert should give reasons for each opinion.
- There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
- The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.[1007]

The role of lawyers

8.275 IP 28 noted some judicial comments suggesting that, in order to ensure that the legal tests of admissibility are addressed, lawyers should be more involved in the

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1003 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [59].
1004 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.41].
1005 Such schedules are sometimes referred to as 'Ellicott' schedules.
1006 C Einstein, *Consultation*, Sydney, 6 August 2004; I Freckelton, *Consultation*, Melbourne, 17 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.
1007 *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia 2004* (Cth) r 2. See also *Supreme Court Rules 1970* (NSW), Sch 11, r 5.

writing of reports by experts.[1008] For example, in *Harrington-Smith v Western Australia*, Lindgren J stated:

> Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the NT Act, the requirements of s 79 (and of s 56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence.[1009]

8.276 The Commissions received a number of divergent views about the involvement of lawyers in the preparation of expert reports. The dominant view is that lawyers should be closely involved in order to ensure that expert reports are admissible.[1010] Lawyers are involved in drafting affidavits for lay witnesses, so there is no logical reason why they should be excluded from assisting in the preparation of expert reports.[1011]

8.277 While some express concerns that this may increase the risk that expert evidence will adopt a overly partisan position,[1012] this problem can be seen as an ethical question that should be addressed through rules of court, legal practitioners' rules of professional conduct and expert witness codes of conduct, rather than by eliminating necessary contact between lawyers and experts.

Procedural concerns

8.278 Many of the concerns expressed in relation to opinion evidence are primarily procedural in nature, including those relating to costs or delay attributable to the adducing of expert opinion evidence; or about undue partisanship or bias on the part of expert witnesses. For example, concerns were expressed that measures to limit the number of expert witnesses or allowing the use of court-appointed experts[1013] may operate to prevent the adducing of relevant evidence, for example, in personal injury cases.[1014]

1008 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.42] citing *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [8]–[9] (Sackville J); *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424, [19] (Lindgren J).

1009 *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424, [19] (emphasis in original).

1010 P Greenwood, *Consultation*, Sydney, 11 March 2005; Department of Justice (NT), *Consultation*, Darwin, 31 March 2005.

1011 B Donovan, *Consultation*, Sydney, 21 February 2005.

1012 ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

1013 For example, see *Federal Court Rules* (Cth) r 34.2 (appointment of a court expert); r 34.6 (restrictions on further expert evidence).

1014 ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

8.279 The Commissions consider that these issues do not directly concern the operation of the uniform Evidence Acts. Issues relating to the control of expert evidence in federal civil proceedings were considered in depth in the ALRC's 2000 Report *Managing Justice: A Review of the Federal Civil Justice System*.[1015]

8.280 More recently, the New South Wales Law Reform Commission has commenced an inquiry on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales. The inquiry will examine the extent of partisanship or bias on the part of expert witnesses and possible measures to reduce the problem, including through the formulation of standards and codes of conduct, accreditation schemes for experts, restricting the use of 'no win no fee' arrangements and sanctions for inappropriate or unethical conduct by expert witnesses.[1016]

8.281 A specific issue relating to the partisanship of expert evidence is raised by the New South Wales Young Lawyers Civil Litigation Committee. The Committee submits that the Commissions should consider recommending that the uniform Evidence Acts be amended 'to exclude parties from being able to give expert evidence, or that evidence be prima facie inadmissible'.[1017] It is said that expert evidence adduced from a party to proceedings is likely to be biased and in breach of obligations to assist the court impartially.

8.282 The Committee refers to *Mulkearns v Chandos Developments Pty Ltd*,[1018] in which a party, who was a licensed real estate agent, sought to give expert evidence under s 79 of the *Evidence Act 1995* (NSW) as to the market value of a property. In that case Young CJ noted that while the position has been taken in England that where a person is a party, or a close friend of a party, the evidence should not be received, in Australia expert evidence is admissible, under proper conditions, from a party or close associate who shows the appropriate expertise.[1019] The judge noted, however, that:

> when one gets the situation where a party, without even paying lip service to [the expert witness code of conduct], gets into the box and tries to give expert evidence, when there is no reason why the availability of first class expert evidence has not been presented, then that party starts behind scratch.[1020]

8.283 The Commissions are not convinced that it is necessary to amend the uniform Evidence Acts to deal with this issue. Attempts to adduce expert evidence from a party to proceedings can be expected to occur only rarely and, in some cases, the party may not be able to afford to engage another expert. Further, concerns about the reliability of such evidence can be dealt with as a matter of weight.

1015 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), in which the ALRC made a number of recommendations dealing with the use of expert evidence in Federal Court, Family Court and Administrative Appeals Tribunal proceedings.

1016 New South Wales Law Reform Commission, *Expert Witnesses*, IP 25 (2004).

1017 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

1018 *Mulkearns v Chandos Developments Pty Ltd* [2003] NSWSC 1084.

1019 Ibid, [14].

1020 Ibid, [15].

Opinion on an ultimate issue

8.284 The ultimate issue rule at common law 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.[1021] At common law, the prohibition on opinion evidence containing a legal standard has almost exclusively been applied in jury cases.[1022]

8.285 IP 28 noted calls for the ultimate issue rule to be revived,[1023] 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'.[1024]

8.286 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'.[1025] 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.[1026] 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'.[1027]

8.287 Other cases throw doubt on this view of the ambit of s 80. In *Idoport Pty Ltd v National Australia Bank*,[1028] 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'.[1029]

8.288 The Commercial Bar Association of the Victorian Bar submits that there is some confusion arising as to the interpretation of s 80 of the Act as a result of the conflict between *Allstate* and decisions of the Supreme Court of the Australian Capital

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1021 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [743].
1022 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 262.
1023 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.46].
1024 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.
1025 *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6)* (1996) 64 FCR 79, 84. However, while the court is presumed to know the public laws of the State, foreign law is proved 'as fact': 83.
1026 Ibid, 84.
1027 Ibid, 83.
1028 *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640.
1029 Ibid, 656–657.

Territory.[1030] It states that an 'authoritative statement by a superior court will, no doubt, clarify the confusion'.[1031]

8.289 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'.[1032] This provision is said to permit 'expert argument'.[1033]

8.290 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.[1034]

8.291 IP 28 noted suggestions 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 a submission.[1035]

Submissions and consultations

8.292 IP 28 asked what concerns exist with regard to the admission of expert opinion evidence about an ultimate issue or expert opinion by way of submission or argument and whether these should be addressed through amendment of the uniform Evidence Acts.[1036]

8.293 There is some support for reintroduction of the ultimate issue rule, including because of concerns about the possible influence such evidence may have on juries.[1037] Some judges of the New South Wales District Court submit that the abolition of the ultimate issue (and common knowledge) rules has led to a significant increase in the tendering of opinion evidence which, while relevant, is redundant and that the rules should be re-established.[1038]

8.294 Others consider that the experience under the uniform Evidence Acts does not suggest any problems that could be remedied by reintroducing an ultimate issue

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1030 *John Edward Platts v The Nominal Defendant* [1996] ACTSC 87; *Walton v Corporate Venture Pty Ltd* [1996] ACTSC 55: suggesting that s 80 has entirely displaced the common law relating to evidence on an ultimate issue.

1031 Commercial Bar Association of the Victorian Bar, *Submission E 37*, March 2005.

1032 *Federal Court Rules* (Cth) O10 r 1(2)(j).

1033 R French, *Submission E 3*, 8 October 2004.

1034 Ibid.

1035 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.51]; R French, *Submission E 3*, 8 October 2004.

1036 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–7.

1037 P Greenwood, *Submission E 47*, 11 March 2005; Confidential, *Submission E 31*, 22 February 2005; Victorian Bar, *Consultation*, Melbourne, 16 March 2005.

1038 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.

rule.[1039] There are comments that the ultimate issue rule is too technical and hard to apply; is not needed in trials before a judge alone; and restricts the expression of expert opinion unnecessarily.

8.295 While submissions and consultations emphasise the need to distinguish clearly between submissions based on expert opinion and expert opinion evidence itself, there are no calls for amendment to the uniform Evidence Acts in relation to expert submissions or argument.

The Commissions' view

8.296 *Cross on Evidence* suggests that there is no modern rule of evidence that an expert 'may not give an opinion upon an ultimate fact in issue'.[1040] The following statement by Giles J in *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd*[1041] is said to be accurate. Giles J stated:

> It is almost impossible for a rule in those terms to be applied, there are many cases in which an expert has given such an opinion, and a rule in those terms has been doubted in the High Court: see *Murphy v The Queen* (1989) 167 CLR 94 at 110, 126–127. A lesser restriction has been recognised, that the expert may not give an opinion on an ultimate issue where that involves the application of a legal standard—for example, that the defendant was negligent, that a risk for reasonably foreseeable, that a testator possessed testamentary capacity, that a representation was likely to deceive or that a publication was obscene.[1042]

8.297 The main justification for an ultimate issue rule is to prevent the expert becoming involved in the decision-making process. However, as *Cross on Evidence* observes, 'it is difficult to believe that a properly directed jury, or a fortiori a court comprising a judge sitting alone, would allow its functions to be usurped by an expert's answer to the question it has to decide'.[1043]

8.298 Concerns about the influence of expert opinion on juries in criminal proceedings may not alone be sufficient to justify an ultimate issue rule. In the United Kingdom, Paul Roberts and Adrian Zuckerman have written:

> The policy of maintaining jury standards in criminal adjudication does not, however, require a formal rule of admissibility forbidding expert evidence going to the elements of the offence. It merely dictates judicial vigilance against allowing the scope of expert evidence, regarding offence elements or any other issues in criminal adjudication (including witness credibility), to extend beyond matters on which the community at large regards experts to be suitable arbiters. Indeed, the modern trend in

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1039 B Donovan, *Consultation*, Sydney, 21 February 2005; S Finch, *Consultation*, Sydney, 3 March 2005; I Freckelton, *Consultation*, Melbourne, 17 March 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

1040 D Byrne and JD Heydon, *Cross on Evidence: Australian Edition*, vol 1, [29125]. Also Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

1041 *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129.

1042 Ibid, 130.

1043 D Byrne and JD Heydon, *Cross on Evidence: Australian Edition*, vol 1, [29125].

> common law jurisdictions has been towards repudiating the existence of a formal ultimate issue rule.[1044]

8.299 Leaving aside whether there would be any benefit in doing so, an attempt to introduce an ultimate issue rule into the uniform Evidence Acts would be made more difficult by uncertainty about the existence and scope of the rule at common law. The Commissions do not propose any change to s 80 of the uniform Evidence Acts in this regard.

Opinion on matters of common knowledge

8.300 Section 80 of the uniform Evidence Acts also abolished the common knowledge rule. IP 28 noted suggestions 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.[1045]

8.301 In particular, s 80 may have facilitated attempts to introduce expert opinion evidence in relation to identification (identification expert evidence).[1046] Such evidence involves opinion based on knowledge of research by psychologists into factors affecting the accuracy of eyewitness identification. The Commissions also understand that expert evidence on 'facial mapping' using data from facial recognition information technology is increasingly being used in criminal proceedings.[1047] 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'.[1048]

8.302 In *R v Smith*,[1049] it was accepted that because the uniform Evidence Acts expressly abolished the common knowledge rule, identification expert evidence may be covered by 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'.[1050] 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.

1044 P Roberts and A Zuckerman, *Criminal Evidence* (2004), 321.
1045 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [6.52].
1046 This may address historic problems with the handling of eyewitness identification, by allowing juries and judicial officers to be informed by the psychological evidence about the unreliability of eyewitness accounts.
1047 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.
1048 *Smith v The Queen* (1990) 64 ALJR 588.
1049 *R v Smith* (2000) 116 A Crim R 1.
1050 Ibid, [59].

Submissions and consultations

8.303 IP 28 asked whether 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.[1051]

8.304 Some judges of the New South Wales District Court submit that the common knowledge rule should be re-established to address the admission of redundant expert opinion evidence.[1052]

8.305 The ACT Bar states that, in practice, s 135(c) is seldom formally invoked in these circumstances to allow a court to refuse to admit evidence that might 'cause or result in undue waste of time'. Rather, where expert opinion evidence is unhelpful it is either ignored by the other party or subject only to brief cross-examination and given 'the weight it deserves' by the judge.[1053]

8.306 Phillip Greenwood SC considers that any problems with the abolition of the common knowledge rule could be addressed through the discretionary provisions, particularly if these were broadened to allow evidence to be excluded where it has minimal probative value.

The Commissions' view

8.307 The intention of the uniform Evidence Acts was to rely upon the relevance provisions and the discretions, in order to exclude or limit the use of unnecessary evidence.[1054]

8.308 The effect of the uniform Evidence Acts is that evidence previously challengeable under the common knowledge rule, for example evidence from psychologist or psychiatrists about human behaviour or on child development, is admissible, subject to the discretions. In the Commissions' view the important issue is whether the discretionary provisions of the uniform Evidence Acts are capable of addressing concerns raised about the admission of such evidence.

8.309 The decision of New South Wales Court of Criminal Appeal in *R v Smith*,[1055] shows that s 135(c) can be used to address problems attributable to the admission of evidence that would have been challengeable under the common knowledge rule.

8.310 There remain concerns about whether s 135, as presently drafted, provides adequate grounds on which to exclude evidence on matters of common knowledge. However, the Commissions have concluded that the answer lies in a more robust approach to the application of s 135(c). Such an approach provides adequate latitude

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1051 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–7.
1052 New South Wales District Court Judges, *Submission E 26*, 22 February 2005; Confidential, *Submission E 31*, 22 February 2005.
1053 ACT Bar Association, *Consultation*, Canberra, 9 March 2005.
1054 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [741].
1055 *R v Smith* (2000) 116 A Crim R 1.

for courts to exclude evidence on matters of common knowledge. The Commissions do not consider that there is any reason to propose the reintroduction of the common knowledge rule and do not propose any amendment to s 80.

Expert opinion regarding children's evidence

8.311 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.[1056] There is growing psychological research demonstrating that even very young children are capable of giving reliable evidence.[1057]

8.312 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 civil or criminal proceedings where the child is an alleged victim of abuse.[1058]

8.313 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.[1059]

8.314 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.

8.315 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.[1060] 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

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1056 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.

1057 A Ligertwood, *Australian Evidence* (4th ed, 2004), [7.30].

1058 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.

1059 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [13.45].

1060 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55: Part 2 (2000), Ch 15.

the jury); or because the expert is not properly qualified to give the evidence.[1061] Freckelton and Selby consider that Australian courts will continue to be cautious in admitting expert evidence regarding patterns of behaviour in child abuse victims.[1062]

8.316 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, 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.

8.317 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 contradiction to the common law, it is possible that the courts will apply a narrow interpretation and make such evidence subject to the credibility rule.

8.318 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.[1063] For example, there may be doubt over whether that evidence, if it is found to be relevant only 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.[1064]

8.319 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

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1061 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.

1062 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 367.

1063 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].

1064 This is because of the High Court's literal interpretation of s 102 in *Adam v The Queen* (2001) 207 CLR 96. See Ch 11 for discussion of this interpretation.

about a young child's knowledge of sexual matters (which was beneficial to the defence case) in the case of *HG v The Queen*.[1065] While Gaudron J (with Gummow J agreeing) accepted that such evidence would not be excluded by the opinion rule, her Honour found that it was excluded by the credibility rule.[1066]

8.320 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'.[1067] 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.[1068]

8.321 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,[1069] 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.

8.322 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.[1070] The Wood Royal Commission supported this amendment.[1071]

8.323 The New South Wales Legislative Council Standing Committee on Law and Justice recommended, in its 2002 report on child sexual assault prosecutions, that the *Evidence Act 1995* (NSW) be amended to permit in child sexual assault proceedings, the admission of expert evidence relating to child development (including memory

1065 *HG v The Queen* (1999) 197 CLR 414, [71]–[74].
1066 Ibid. The majority excluded the evidence under *Crimes Act 1900* (NSW) s 409B.
1067 S Odgers, *Uniform Evidence Law* (6th ed, 2004) [1.3.8200].
1068 See Ch 11.
1069 See, eg, *C v The Queen* [1993] SASC 4095, [14].
1070 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].
1071 Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.131].

development) and the behaviour of child victims of sexual assault, along the lines of s79A of the *Evidence Act 2001* (Tas).[1072]

8.324 South Australian[1073] and Canadian courts[1074] have allowed the admission of expert evidence concerning child witnesses. Tasmania, Queensland[1075] and New Zealand[1076] 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.

Submissions and consultations

8.325 IP 28 asked whether the *Evidence Act 1995* (Cth) should be amended to allow clearly for the admission of expert evidence regarding the credibility or reliability of child witnesses and, if so, whether s 79A of the *Evidence Act 2001* (Tas) is the appropriate model.[1077]

8.326 Differing views were expressed in submissions and consultations. The Law Council and the NSW PDO oppose a special provision for expert evidence regarding child witnesses.[1078] The NSW PDO submits that questions regarding the credibility or reliability of child witnesses are matter which a 'jury can and should be able to consider, untainted by an expert's opinions'.[1079]

8.327 Others support the enactment in the uniform Evidence Acts of a provision similar to that in Tasmania.[1080] The New South Wales Director of Public Prosecutions (DPP NSW) states that:

1072 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002), Rec 21.

1073 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'.

1074 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.

1075 *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.

1076 *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.

1077 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 6–9.

1078 Law Council of Australia, *Submission E 32*, 4 March 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005. Also P Greenwood, *Submission E 47*, 11 March 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

1079 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

1080 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Confidential, *Submission E 31*, 22 February 2005; I Freckelton, *Consultation*, Melbourne, 17 March 2005.

> Such evidence may place in context behaviour which is otherwise perplexing, such as the absence of complaint, or the continued association with the alleged offender after the alleged offence. Its purpose would be to address common misconceptions held by jurors arising from lack of information about or experience of the behaviour of children generally.[1081]

8.328 Justice Mullane notes that children are rarely witnesses in Family Court proceedings[1082] and, therefore, evidence covered by an amendment to the uniform Evidence Acts needs to extend beyond child 'witnesses', and to the credibility and reliability of statements by children.[1083]

8.329 There is concern that the provision be drafted so as clearly to override the credibility rule.[1084] It is said that s 79A is intended to permit expert evidence about the credibility or reliability of children in general, but not credibility evidence about the particular child witness.[1085]

The Commissions' view

8.330 In the Commissions' view expert opinion evidence on child development and behaviour is covered by s 79. However, case law and comments received by the Inquiry confirm that Australian courts continue to demonstrate a reluctance to admit such evidence.

8.331 The Commissions recognise that there is some danger in admitting this category of evidence. In particular, the evidence may invite a jury to reason illegitimately that as some children behave in certain way when they are sexually abused and the complainant behaved in a similar way as others who have been sexually abused, therefore, the complainant is likely to have been sexually abused, or is likely to be telling the truth about being sexually abused.[1086] In fact, many experts consider that the reactions of children to sexual abuse are diverse.

8.332 However, the danger of such expert opinion evidence being misused can be addressed adequately by judicial comments or directions. Submissions and consultations have identified a need for expert assistance in interpreting the statements and behaviours of children and, in particular, in relation to 'counterintuitive evidence' relevant to the credibility or reliability of children.

8.333 In Chapter 7, the Commissions noted that the Commissions' policy position that evidentiary provisions relating specifically to child witnesses should not generally be

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1081 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
1082 In part, because *Family Law Act 1975* (Cth)s 100A allows the admission of childrens' hearsay evidence.
1083 Justice G Mullane, *Submission E 53*, 10 May 2005.
1084 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; I Freckelton, *Consultation*, Melbourne, 17 March 2005.
1085 I Freckelton, *Consultation*, Melbourne, 17 March 2005.
1086 J Dowsett and F Feld, 'Opinion Evidence' (Paper presented at Evidence Acts Review Workshop for the Judiciary, Sydney, 30 April 2005).

included in the uniform Evidence Acts dictates against the idea of introducing a hearsay exception directed to children's evidence.

8.334 However, the balance of convenience and policy principle may differ in the case of expert evidence on development and behaviour of children. The Commissions do not see the proposed reform as constituting any major departure from the existing law, but as highlighting the admissibility of a particular type of expert opinion evidence. Further, there is an existing model provided by the Tasmanian legislation. There are, however, some issues to resolve in the drafting of the proposed amendment.

8.335 In s 79A of the *Evidence Act 2001* (Tas), the use of the phrase 'may, where relevant, give evidence in proceedings' is unclear. If it is intended to mean simply that the evidence can be tendered, it adds nothing to the provision. If it is intended to mean that such evidence will be admissible if relevant, it needs to be borne in mind that relevant evidence is defined in section 55; no more is required than a mere logical connection. Further, as drafted, s 79A can be interpreted as overriding other admissibility provisions. This is clearly inappropriate as, for example, the discretions to exclude or limit the use of evidence under ss 135 to 137 of the uniform Evidence Acts should apply.

8.336 This problem arises because the drafting does not fit comfortably with the approach taken in the uniform Evidence Acts to questions of admissibility. To conform with this approach, the provision should be drafted consistently with the other exceptions to the opinion rule. This is the approach taken in all other admissibility rules—all evidence is potentially subject to each exclusionary rule. It will also be necessary to include a section to provide an exception to the credibility rule. This aspect is addressed in Chapter 11 in the context of a general exception to the credibility rule applying to expert testimony. The proposed provisions are set out in Appendix 1 (new ss 79(2) and 108AA(2)).

Proposal 8-1 To avoid doubt, the uniform Evidence Acts should be amended to provide an exception to the opinion and credibility rules for expert opinion evidence on the development and behaviour of children.

Expert opinion regarding other categories of witness

8.169 There may be other categories of witness in relation to whom there is a need for expert assistance in interpreting statements and behaviours. In particular, assistance may be needed in relation to 'counterintuitive evidence' relevant to credibility or reliability—that is, evidence that is capable of dispelling myths or rectifying erroneous assumptions that may be held by the jury on a particular issue.[1087]

1087 Ibid; I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002), 16.

8.170 For example, the DPP NSW submits that consideration should be given to recommending the enactment of an exception to the credibility rule which would permit the adducing of expert evidence in relation to complainants suffering from an intellectual disability.[1088] The DPP NSW states that:

> Where the complainant in respect of a criminal proceeding suffers from an intellectual disability, and where the disability is not charged as an aggravating feature and is thus not an element of the offence, the prosecution cannot lead evidence of the nature of the complainant's disability and the effect that such a disability has on behaviour and development.[1089]

8.171 It is suggested, for example, that an intellectually disabled person may have difficulty with dates and details or other relevant concepts as a result of the disability. Evidence from an expert as to a particular disability may assist the jury in evaluating the truthfulness and reliability of the evidence:

> Otherwise the jury may assess the difficulty in recalling dates or other details or other mannerisms commonly associated with the disability as indicators that the account is a fabricated one.[1090]

8.172 Victims of family violence may constitute another category of witness to which similar considerations may apply. The Commissions are interested in further comment on this issue.

Question 8-2 Should the uniform Evidence Acts be amended to provide for the admissibility of expert opinion evidence on the credibility or reliability of other categories of witness, such as victims of family violence or people with an intellectual disability?

1088 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
1089 Ibid.
1090 Ibid.

9. Admissions

Contents

Introduction

9.1 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.[1091] 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.

9.2 The definition of an 'admission' in the uniform Evidence Acts covers admissions in both civil and criminal proceedings.[1092] However, given the serious consequences of admitting evidence of admissions and confessions[1093] 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.

1091 *Evidence Act 1995* (Cth) Dictionary, Pt 1; *Evidence Act 1995* (NSW) Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3(1); *Evidence Act 2004* (NI) Dictionary, Pt 1.

1092 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.

1093 Confessions are 'statements which amount to admissions of actual guilt of the crime in question': *R v Lee* (1950) 82 CLR 133, 150. In the context of criminal proceedings, Coldrey J in *Hazim v The Queen* (1993) 69 A Crim R 371, 380 stated that 'the accepted distinction between confessions and admissions is that the former involve admissions of actual guilt of the crime, whereas the latter relate to key facts which tend to prove the guilt of the accused of such crime. The category of admissions includes relevant false denial'.

9.3 Under the common law there are three grounds by which otherwise admissible evidence of out of court admissions made by the accused can be excluded. These are voluntariness, unfairness to the accused and where the admission was illegally or improperly obtained.[1094] 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.[1095]

9.4 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 from the original evidence inquiry (ALRC 26) maintains that it is difficult to determine 'the extent to which an individual's capacity for choice had been impaired'.[1096]

9.5 Part 3.4 of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2004* (NI), and Chapter 3, Division 3, Part 4 of the *Evidence Act 2001* (Tas) deal with admissions. Admissions and related representations are excepted from the hearsay and opinion rules. However, evidence of the admission must be first-hand hearsay to be admissible.[1097] Evidence of admissions against a third party is not excluded from the application of the hearsay or opinion rules unless the third party consents. This is intended to ensure that one defendant's admission cannot be used against another defendant in the same proceedings without the latter's consent.[1098]

9.6 Sections 84 and 85 replace the common law test of voluntariness and shift the focus to a set of conduct or circumstances likely to render an admission unreliable.[1099] 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.

9.7 Section 85 is aimed at excluding admissions 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 adversely affected'. It foresees the situation where a person able to influence the decision to prosecute has induced the defendant into making an admission.[1100] Section 90 provides a discretion to exclude

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1094 D Byrne and JD Heydon, *Cross on Evidence: Australian Edition*, vol 1, [33,605], [33,610], [33,760]; see also P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 1.

1095 *R v Lee* (1950) 82 CLR 133.

1096 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [372].

1097 Uniform Evidence Acts s 82.

1098 Ibid s 83.

1099 P Zahra, *Confessional Evidence* (2002) Public Defenders Office (NSW), 6.

1100 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 is 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.

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'

9.8 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.[1101]

9.9 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.[1102] Section 85 of the uniform Evidence Acts is drafted along similar lines to many of those provisions.

9.10 '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 The Queen* 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).[1103] The decision has broader implications because of the similarity of wording used in s 85(1)(a) of the uniform Evidence Acts.

9.11 The majority in *Kelly* (Gleeson CJ, Hayne and Heydon JJ) took a narrow view of the section. They accepted that the object of the section is to overcome 'the "perceived problems" with the so-called police "verbal"', including the possibility of fabrication of evidence by police, especially alleged admissions that are uncorroborated and which the accused would have the practical burden of disproving.[1104]

9.12 However, their Honours held that the 'purpose or object' identified does not compel any particular construction of the quite detailed language of s 8 of the Act. The correct construction must depend on the particular words used in the Act.[1105] They considered that 'in the course of official questioning' marks out a period of time running from when questioning commenced to when it ceased;[1106] and that statements

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1101 Uniform Evidence Acts s 85(1).

1102 *Crimes Act 1914* (Cth) s 23V; *Crimes Act 1914* (Cth) s 23V as applied to the Australian Capital Territory by *Crimes Act 1914* (Cth) s 23A(6) (for indictable offences); *Crimes Act 1900* (ACT) s 187(3) (for summary offences); *Criminal Procedure Act 1986* (NSW) s 281; *Police Powers and Responsibilities Act 2000* (Qld) ss 246, 263–266; *Crimes Act 1958* (Vic) s 464H; *Criminal Code* (WA) s 570D; *Evidence Act 2001* (Tas), s 85A; *Summary Offences Act 1953* (SA) s 74D; *Police Administration Act* (NT) ss 142–143.

1103 *Kelly v The Queen* (2004) 205 ALR 274. Section 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) has now been replaced by *Evidence Act 2001* (Tas) s 85A, in similar but not identical terms.

1104 *Kelly v The Queen* (2004) 205 ALR 274, [42].

1105 Ibid, [43].

1106 Ibid, [52].

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.[1107] 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 is inconsistent with the statutory language.[1108]

9.13 By contrast, McHugh and Kirby JJ considered that a broader interpretation of the term is required to fulfil the policy behind its enactment. McHugh J argued that the section should be interpreted broadly to cover the mischief at which the section is aimed, which is 'the attack on the integrity of the administration of justice by false or unreliable confessions or admissions' regarding serious criminal offences. Defining 'in the course of official questioning' narrowly would 'make the section's operation hostage to the oral evidence of the police officers as to when the questioning commenced and ended'.[1109] McHugh J concluded that given the purpose of the section, the words 'confession or an admission … made in the course of official questioning' refer to a confession or admission made in connection with police questioning.[1110]

9.14 Similarly, Kirby J favoured the purposive approach to construing s 8(2), but gave the section an even wider interpretation. His Honour considered that the mischief which the section is intended to address is both the wrongful conviction of an accused, and '*the protection of the system* itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society'.[1111] He held that the 'course of official questioning' begins 'when reasonable suspicion arose, or ought reasonably to have arisen, in the minds of the police officer detaining that person', and does not conclude

> at the termination of any formal interview, the termination by police of video recording or other decisions wholly within the power of the police officers. The termination occurs when the investigation of the offence whilst the accused person is in police detention is terminated either by release of that person or by the action of police in bringing the accused to a judicial officer upon a charge laid by the police officer concerning an offence.[1112]

9.15 It has been argued that the majority's approach grants a wide discretion to police to nominate when 'official questioning' begins and ends.[1113] As a consequence, considerable court time could be spent examining the admissibility of uncorroborated admissions or confessions obtained in this way.[1114] On the other hand, there is an

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1107 Ibid, [48].
1108 Ibid, [49].
1109 Ibid, [104].
1110 Ibid, [106].
1111 Ibid, [146] (emphasis in original), quoting Lamer J in *Rothman v The Queen* [1981] 1 SCR 640, 689.
1112 *Kelly v The Queen* (2004) 205 ALR 274, [170].
1113 N Boyden, 'The Thin End of the Verballing Wedge' (2004) 42(6) *Law Society Journal* 62, 63.
1114 Ibid, 65.

argument that the law should be such that the police would be able to determine with some degree of certainty as to what is considered 'official questioning'.[1115]

9.16 *Kelly* was recently considered by the High Court in *Nicholls v The Queen*.[1116] As in *Kelly*, *Nicholls* is also concerned with the failure on the part of the police to record an alleged off-camera admission by an accused that was later tendered by the prosecution at trial. Although the legislative provisions and the terms under consideration in *Nicholls* are not identical to the ones in *Kelly*, there are similarities between the two provisions,[1117] and the two provisions are directed at the same mischief.[1118] Therefore a question has been raised as to whether the decision in *Kelly* was overruled by *Nicholls*.

9.17 In *Nicholls*, the High Court considered the meaning of the term 'interview' under s 570D of the *Criminal Code* (WA). One of the issues in the case was whether there was reasonable excuse for the failure to videotape alleged admissions by an accused. If there was no reasonable excuse, the evidence is not admissible. Section 570D(2)(c) of the *Criminal Code* (WA) states that 'reasonable excuse' includes where 'the accused person did not consent to the interview being videotaped'. Under s 570 of the *Criminal Code* (WA), the term 'interview' is relevantly defined as 'an interview with a suspect by a member of the Police Force'.

9.18 The majority of the High Court (McHugh, Gummow, Kirby and Callinan JJ) in *Nicholls* favoured the purposive interpretation of the legislation. McHugh J held that both the natural and ordinary meaning and the purposive construction of 'interview' in s 570D of the *Criminal Code* (WA) support interpreting 'interview' to mean 'the entirety of a discussion between a police officer and a suspect carried out on a particular day for the purpose of eliciting statements from the suspect concerning the commission of a serious office'.[1119] Therefore s 570D applies to the times when filming was suspended.[1120] In so holding, his Honour relied on the unanimous view of the High Court in *Kelly* regarding the mischief at which such legislation is directed.[1121] Furthermore, his Honour found that the disputed admission does not constitute 'reasonable excuse' given the conduct of the police in encouraging the accused to speak off-camera and the unfairness to the accused of permitting the tendering of the admissions in evidence.[1122]

9.19 In their joint judgment, Gummow and Callinan JJ observed that the legislation considered in *Kelly* is different from the relevant provisions of the *Criminal Code*

1115 *R v Sharp* [2003] NSWSC 117, [19].
1116 *Nicholls v The Queen* (2005) 213 ALR 1.
1117 Namely, s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas), considered in *Kelly*, and s 570D of the *Criminal Code* (WA), considered in *Nicholls*.
1118 *Nicholls v The Queen* (2005) 213 ALR 1, [98] per McHugh J; [154] per Gummow and Callinan JJ; [216] per Kirby J; [331] per Hayne and Heydon JJ.
1119 Ibid, [103]–[104].
1120 Ibid, [105].
1121 Ibid, [98]–[101].
1122 Ibid, [106].

(WA).[1123] However, their Honours held that the *Criminal Code* (WA) is intended to address the same mischief as the legislation in *Kelly*,[1124] and that the assertion by police that the accused 'was anxious to speak off-tape' could not constitute 'reasonable excuse' for their failure to record the alleged admissions.[1125]

9.20 Kirby J held that *Kelly* did not apply because *Kelly* concerned different legislation, there were different provisions for exceptions from the recording requirement, and the facts were different.[1126] He maintained his view in *Kelly* that such legislation should be given a purposive construction, but did not define the term 'interview'.[1127] He agreed, for the reasons given by Gummow and Callinan JJ, that the explanation given by the police did not provide a 'reasonable excuse' for their failure to record the alleged off-camera admission by the accused.[1128]

9.21 In their dissenting judgment, Hayne and Heydon JJ (with whom Gleeson CJ agreed) held that there was reasonable excuse for the accused's admissions not being videotaped on one of three bases.[1129] First, the discussion in the period that was not videotaped was a separate interview. Second, in the alternative, if there was a single interview, there was reasonable excuse for the failure of the police to record the admission under s 570(4)(c) of the *Criminal Code* (WA) because the accused consented to parts of the interview being videotaped, but not the entire interview. Third, if s 570(4)(c) does not apply, the fact that the definition of 'reasonable excuse' in s 570D(4) commenced with the word 'includes' means that the definition is non-exhaustive, therefore there must be other circumstances in which admissions made in interviews that were not video-taped can be tendered in evidence, including the fact that the accused in this case did not want the relevant part of the discussion to be videotaped. Although their Honours referred to *Kelly*, they did not expressly apply *Kelly* in *Nicholls*.[1130]

9.22 The above analysis shows that *Kelly* was not overruled by the decision in *Nicholls*. First, the terms and the legislation under consideration in the two cases are different. On one view, the meaning of 'interview' may be synonymous with 'questioning'.[1131] In *Kelly*, Kirby J remarked that the Tasmanian Minister for Justice clearly understood the term 'in the course of questioning' in the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) to be 'generally equivalent' to the expression 'interview'.[1132] However, as noted by the majority in *Kelly*, there is

1123 Ibid, [154].
1124 Ibid, [154].
1125 Ibid, [152].
1126 Ibid, [215].
1127 Ibid, [216].
1128 Ibid, [218].
1129 Ibid, [336].
1130 Ibid, [331].
1131 *R v Raso* (1993) 68 A Crim R 495, 525.
1132 *Kelly v The Queen* (2004) 205 ALR 274, [153].

authority[1133] for the proposition that 'interview' and 'in the course of official questioning' are not synonymous.[1134] The majority in *Kelly* did not decide whether the two terms are synonymous, but commented that 'either "official questioning" is identical with an interview with an accused, or it is broader, because it cannot be narrower'.[1135]

9.23 Second, even if the terms 'in the course of questioning' and 'interview' can be considered synonymous, the decisions of three of the four judges (Gummow, Kirby and Callinan JJ) in the majority in *Nicholls* turn on the interpretation of the term 'reasonable excuse' rather than 'interview'.[1136] Only McHugh J appears to have relied on the unanimous view of the High Court in *Kelly* regarding the mischief at which such legislation is directed in order to reach a broad interpretation of the term 'interview'.[1137] Therefore, not only was *Kelly* not overruled by *Nicholls*, but it is also doubtful that *Nicholls* has a significant impact on the interpretation of the phrase 'in the course of official questioning'.

Submissions and consultations

9.24 IP 28 asks what, if any, concerns are raised by the definition given to the term 'in the course of official questioning' by the High Court in *Kelly*, and if these concerns require amendment of s 85 of the uniform Evidence Acts or the definition of 'official questioning'.[1138]

9.25 Some do not consider that s 85 requires amendment. For example, in consultation, one judge of the New South Wales Supreme Court observes that s 85 was never intended to cover situations outside of interviews by investigating officials. The New South Wales Office of the Director of Public Prosecutions (DPP NSW) submits that the interpretation of the majority in *Kelly* is appropriate and promotes certainty and consistency of application of the provision. It does not consider that the scope of s 85 should extend to statements made before the questioning commenced, statements made within a reasonable time after the conclusion of questioning, or statements made as a result of questioning but which do not otherwise fall within the period of official questioning as defined by the majority in *Kelly*.[1139]

1133 *R v McKenzie* [1999] TASSC 36, [14]. In *R v McKenzie*, Wright J of the Tasmanian Supreme Court remarked that '"interview" seems to be used in contradistinction to the words "official questioning" which appear as part of the definition of "confession or admission" used in s 8(1) [of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas)]. The words "official questioning" are not then used again in the section. The very requirement that the "interview" must be videotaped tends to confirm that it is a formal, unhurried interrogation procedure, conducted in circumstances in which electronic recording aids are likely to be available, which is the real target of s 8.'

1134 *Kelly v The Queen* (2004) 205 ALR 274, [54].

1135 Ibid, [54].

1136 *Nicholls v The Queen* (2005) 213 ALR 1, [152] per Gummow and Callinan JJ; [218] per Kirby J.

1137 Ibid, [98]–[104].

1138 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 110, Q 7–1.

1139 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 17.

9.26 The Australian Securities and Investments Commission (ASIC) also opposes broadening s 85.[1140] It contends that since s 85(2) is mandatory in its application and casts the burden of proof of admissibility upon the prosecution, any broadening of its scope carries with it the risk that highly probative evidence will not be considered by the trier of fact. Further, in ASIC's view, no other provisions of the uniform Evidence Acts would appear to provide a specific mechanism for excluding evidence of potentially untruthful admissions, made to an investigating official, other than in the course of official questioning. Subject to the operation of s 88, the evidence becomes a matter for the trier of fact. However, ASIC concedes that there does not appear to be any logical reason why an admission made to an investigating official, the validity of which is in question, should be excluded if made at one point in time rather than at another.[1141]

9.27 Alternatively, if the scope of s 85 is to be extended, ASIC submits that the exclusion of evidence under any such extension should be discretionary rather than mandatory. It suggests that a mandatory exclusion under all circumstances is too rigid, and that any extension of the operation of s 85 should continue to be confined to admissions made to an investigating official. [1142]

9.28 Others favour amending s 85 so that it covers all conversations between suspects and the police. The Law Council of Australia (Law Council) submits that the best protection for an accused against fabrication of an admission is to require that all conversations between the police and a suspect be electronically recorded, with the court having a discretion to admit unrecorded admissions where the interests of justice so demand. In the Law Council's opinion, s 85 needs to be amended to make clear that it applies to all conversations between a suspect and police, not merely conversations which can be categorised as official questioning.[1143]

9.29 The New South Wales Public Defenders Office (NSW PDO) submits that the majority interpretation of the phrase 'in the course of official questioning' in *Kelly* is 'an extremely narrow one, effectively limiting the period of official questioning to the time between the turning on and the turning off of the recording equipment machine'.[1144] It is submitted that there are 'no good policy reasons for limiting the protections afforded by s 85 to this period' and that the entire phrase should be deleted.[1145]

9.30 One judicial officer expresses concern that the majority of the High Court in *Kelly* has significantly weakened the policy that only in the most exceptional of circumstances should an admission be admissible in the absence of either an electronic

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1140 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005, 3.
1141 Ibid, 3.
1142 Ibid, 3.
1143 Law Council of Australia, *Submission E 32*, 4 March 2005, [36].
1144 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 21.
1145 Ibid, 21–22.

recording or a written record signed (or otherwise adopted) by the accused. It is suggested that where an investigating official asks questions and receives oral or written statements from a suspect, the possibility of abuse or fabrication is such that any such statements made contrary to the policy should be rendered inadmissible in the interest of the proper administration of justice.[1146]

9.31 A third view supports a return to the common law requirement of voluntariness. The Legal Services Commission of South Australia[1147] and the Criminal Law Committee of the Law Society of South Australia (Law Society SA)[1148] support a reinstatement of the common law approach to the question of voluntariness, in particular, the importance of whether the accused was able to exercise a genuine choice to speak or remain silent. Alternatively, it is suggested that s 85(1) should be expanded to cover 'any conversation' or 'every conversation' between the suspect and the police where the investigating official suspects, or has reasonable grounds to suspect, a person of having committed an offence.[1149]

The Commissions' view

9.32 There is support both for and against expanding the scope of s 85. Those involved in investigation or prosecution of criminal offences tend to be against any expansion of the section, while those involved in assisting accused persons tend to favour broadening the scope of s 85.

9.33 In the Commissions' view, it is significant that all the judgments in *Kelly* acknowledge that the mischief intended to be addressed by s 85 is to overcome the perceived problems of the so-called 'police verbal'—that is, the possible fabrication of evidence by police officers.[1150] The point of divergence between the majority and dissenting judgments is whether the statutory language supports the purposive interpretation. In addition, the Commissions are particularly persuaded by the argument that the majority interpretation may allow the police to circumvent s 85 by nominating times for the beginning and end of questioning.

9.34 Given that the purpose of s 85 is to counter the problem of unreliable confessions and admissions and to uphold the integrity of the justice system, limiting the period of 'official questioning' to one that is determined by the investigating officials is unsatisfactory. Therefore, the Commissions propose that s 85 be amended to reflect Kirby J's interpretation in *Kelly*.

9.35 As regards the submission that the voluntariness rule be reinstated, ALRC 26 and the final report of the original ALRC evidence inquiry (ALRC 38)[1151] point out

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1146 Confidential, *Submission E 31*, 22 February 2005, 4.
1147 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 6.
1148 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, [7].
1149 Law Society of South Australia, *Consultation*, Adelaide, 11 May 2005.
1150 *Kelly v The Queen* (2004) 205 ALR 274, per Glesson CJ, per Hayne and Heydon JJ at [43]; per McHugh J at [104]; per Kirby J at [146].
1151 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

that the voluntariness test is deficient in a number of respects. ALRC 26 states that the test suffers from the following uncertainties:

- the precise meaning of 'voluntary' and the related concept of 'free choice' in the test;
- the relationship between the 'voluntariness test' and the specific rules relating to threats and promise, by persons in authority and the context of those rules;
- the meaning and relevance of 'oppression';
- the relevance of the use of deception;
- the relevance of personal characteristics of the accused;
- whether the test applies only where there has been (police) misconduct;
- whether there always needs to be a causal link between the external conduct and the confession;
- whether the test, and its subsidiary categories, are primarily subjective or objective.[1152]

9.36 ALRC 38 also highlights the problem that although the onus of proving voluntariness was formally on the prosecution, the need for the accused to demonstrate that he or she was overborne in some way or induced to confess by threats or promises made by a person in authority means that, in practice, the onus was placed on the accused.[1153]

9.37 The Commissions are persuaded by this analysis. Due to these deficiencies of the voluntariness test, the Commissions maintain that there should not be a return to the common law requirement of voluntariness.

Proposal 9-1 Section 85(1) of the uniform Evidence Acts should be amended to provide that the section applies only to evidence of an admission made by a defendant (a) to an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. A consequent amendment should be made to s 89(1) to incorporate (a) above.

1152 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [764].
1153 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [156].

The circumstances of the admission

9.38 Section 85(2) of the uniform Evidence Acts provides that 'evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected'.

9.39 Section 85(3) provides a non-exhaustive list of matters that the court may take into account for the purposes of s 85(2):

> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
>
> (b) if the admission was made in response to questioning:
>
> (i) the nature of the questions and the manner in which they were put; and
>
> (ii) the nature of any threat, promise or other inducement made to the person questioned.

9.40 In the original evidence inquiry, 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.[1154] As a preliminary issue the judge would determine whether, in all the circumstances, the way the admission was obtained may have impaired its reliability.[1155] 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.[1156]

9.41 Stephen Odgers SC 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) (PACE) provides that:

> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) …
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

1154 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765].
1155 Ibid, [765].
1156 Ibid, [765]. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

9.42 Thus the PACE provision 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'.[1157] 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.

9.43 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.[1158]

9.44 There is some judicial support for the objective test.[1159] For example, in *R v Esposito*, Wood CJ stated that in considering whether the circumstances were such that the truth of the admission might have been adversely affected, the question of whether an admission was in fact made, or whether it was true or untrue, is a question for the jury rather than the judge.[1160] This decision was referred to by Wood CJ in *R v Moffatt*[1161] and applied by Gray J in *R v Fischetti & Sharma*.[1162]

9.45 However, Odgers points out that the general trend of cases shows a subjective analysis of the contested admissions, with a focus on the actual contents of a particular admission to conclude whether the admission is reliable.[1163] In fact, there is authority for the proposition that the terms of the particular admission are a relevant consideration in determining the reliability of the admission. In *R v Donnelly*, Hidden J in the New South Wales Supreme Court held that 'in examining whether the circumstances in which a confession was made were such as to make it unlikely that its truth was adversely affected, the terms of the confession itself are not to be ignored'.[1164] This approach was subsequently applied in *R v Waters*.[1165]

9.46 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' in s 85(2) 'is intended to mean the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions are relevant'.[1166] Furthermore, he held that the untruthfulness or unreliability of admissions produced in circumstances

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1157 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

1158 Ibid, [1.3.5220]; see also I Dennis, 'The Admissibility of Confessions under Sections 84 and 85 of the Evidence Act 1995: An English Perspective' (1996) 18 *Sydney Law Review* 34, 46–47.

1159 *R v Esposito* (1998) 105 A Crim R 27, 44; see also *Inspector Wade v Mid North Coast Area Health Service* [2004] NSWIRComm 254, [100].

1160 *R v Esposito* (1998) 105 A Crim R 27, 44.

1161 *R v Moffatt* (2000) 112 A Crim R 201, [46].

1162 *R v Fischetti and Sharma* [2003] ACTSC 9, [9].

1163 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].

1164 *R v Donnelly* (1997) 96 A Crim R 432, 438–439.

1165 *R v Waters* (2002) 129 A Crim R 115, [38]–[44].

1166 *R v Rooke* (Unreported, New South Wales Court of Criminal Appeal, 2 September 1997), 15–16.

other than through official questioning is not a question for the judge but rather is a question for the jury.[1167]

9.47 *Rooke* was followed in *R v Munce*.[1168] 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.[1169]

9.48 This approach may be contrasted with that in *R v Taylor*, where Higgins J in the Australian Capital Territory Supreme Court held that 'circumstances of the admission' under s 85(2) were not limited to those circumstances that were known to the investigating officials or 'to any objective tendency in the questions or the manner in which they had been put to produce an unreliable or untruthful answer'.[1170] His Honour observed that s 85(3) makes it clear that 'the range of such circumstances can and will include the physical and mental characteristics of the person being interviewed'.[1171]

9.49 Odgers suggests that a lack of clarity in s 85(2) may be the result of changes in the ALRC's views between ALRC 26 and ALRC 38 when it seems that the objective test was favoured. However, this change of policy is not reflected in the legislation. The section may therefore require legislative amendment to address any ambiguity.[1172]

Submissions and consultations

9.50 IP 28 asks whether the test under s 85(2) of the uniform Evidence Acts requires clarification to indicate whether it is a subjective or objective test.[1173]

9.51 Both the DPP NSW[1174] and ASIC[1175] consider that s 85(2) should be amended to specify an objective test. ASIC further submits that it is quite clear from s 85(3) that the circumstances that a court can have regard to, when determining an issue pursuant to s 85(2), are very wide and include matters that may well be beyond the knowledge or control of investigating officials.[1176] However, despite the lack of knowledge or control of these circumstances, it is the investigating officials that have the task of adducing evidence to prove that the truth of the admission was not adversely affected. ASIC argues that having regard to the range of factors that may be considered by the trial judge in determining the admissibility of the evidence, if the evidence is not

1167 Ibid, 16–17.
1168 *R v Munce* [2001] NSWSC 1072.
1169 Ibid, [26]–[28].
1170 *R v Taylor* [1999] ACTSC 47, [29]–[30]: cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].
1171 *R v Taylor* [1999] ACTSC 47, [29]–[30].
1172 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5220].
1173 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 111, Q 7–2.
1174 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 17.
1175 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005, 3.
1176 Ibid, 3–4.

excluded on the basis of an objective assessment of such factors, it is appropriate that the court or trier of fact determine what weight should be attached to that evidence.[1177]

9.52 ASIC accepts that it is appropriate to place on the prosecution the burden of establishing that those acts or omissions over which the investigating officials have control were unlikely to have adversely affected the truthfulness of the admission. However, they contend that the existence of matters solely within the knowledge of the defendant that may have had such an effect are matters that the defendant should have the onus of proving.[1178] The Legal Services Commission of South Australia[1179] and the Criminal Law Committee of the Law Society of South Australia[1180] also expressly agree with Odgers that the objective test is preferable.

9.53 By contrast, the submission of the NSW PDO does not consider that amendment of s 85 is necessary.[1181] It is observed that there are conflicting authorities concerning the extent to which the subjective features of the accused, as distinct from the circumstances of the interview, are relevant to s 85. However, the view of the NSW PDO is that s 85(3) already expressly states that the characteristics of the accused, including any mental, intellectual or physical disability, are to be taken into account. Therefore s 85(2) does not require amendment.

9.54 On one view, s 85 is not ambiguous and the subjective/objective distinction is not helpful.[1182] Any personal conditions or characteristics would clearly be included under s 85.

9.55 In consultation, Stephen Odgers SC indicates that although he considers s 85(2) to be unclear as to whether the court should take an objective or a subjective approach, given the limited amount of case law on the issue, it might be too early for amendment of this section.[1183]

9.56 Others suggest that there is some confusion as to the purpose of s 85.[1184] The Law Council suggests that s 85 should be amended to make it clear that the section concerns the reliability of the admission.[1185]

The Commissions' view

9.57 The Commissions' view is that the subjective/objective distinction unnecessarily complicates discussion of this issue. In essence, in the context of s 85(2), the

1177 Ibid, 3.
1178 Ibid, 4.
1179 Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 6.
1180 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, [7].
1181 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 22.
1182 G Bellamy, *Consultation*, Canberra, 8 March 2005.
1183 S Odgers, *Consultation*, Sydney, 9 August 2004.
1184 C O'Donnell, *Submission E 9*, 26 December 2004.
1185 Law Council of Australia, *Submission E 32*, 4 March 2005, [36].

subjective/objective distinction raises questions about whether its application should involve consideration of:

- the circumstances of the interrogation and their likely impact on any person being interrogated; or
- those circumstances and their likely impact on the particular accused when he or she was interrogated.

9.58 The latter interpretation, however, includes a degree of objectivity in the sense that the question is not whether the circumstances did adversely affect the truth of the admission. Rather, the question is whether they were likely to do so.

9.59 The Commissions consider that, consistently with ALRC 26, s 85(2) is intended to enhance the truth of admissions.[1186] In canvassing the various proposals to enhance the truth of the admissions, the 'truth test' (which was eventually adopted as s 85(2)) was contrasted with the 'ordinary man test' (which was not adopted). The proposed 'ordinary man test' involves 'an objective test based on the hypothetical person of average or ordinary firmness, a construct of common experience'.[1187] However, the ALRC indicated that a subjective test is preferable because:

> there can be no doubt that the effect of various techniques of interrogation will vary depending on the personality and condition of the particular interviewee. Moreover, characteristics of an interviewee which render him or her particularly susceptible to psychological manipulation may not be readily apparent to the officer interrogating. A resulting admission may well be untrue regardless of whether the officer should or should not have been aware of those characteristics.[1188]

9.60 The Commissions consider that it is evident from s 85(3) that, in the context of s 85(2), the circumstances of the admission includes, amongst other things, the characteristics and conditions of the accused. Nor does s 85(3) confine those characteristics and conditions to those that are known to the investigating officials.[1189] This is clearly the correct view. Therefore the Commissions consider that no change to s 85(2) is warranted.

Section 90 discretion

9.61 Section 90 provides an overarching discretion to exclude admissions in a criminal proceeding where, having regard to the circumstances in which the admission was made, it would be unfair to the defendant to use the evidence. This provision reflects the common law.[1190]

1186 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [765].
1187 Ibid, [765].
1188 Ibid, [765].
1189 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5260].
1190 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [761].

9.62 ALRC 26 criticises the fairness discretion on the basis that it is a vague concept and had not been properly defined by the courts.[1191] However, ALRC 38 concludes that is necessary to cover situations that are unfair, but which do not meet the test of an illegally or improperly obtained admission.[1192]

9.63 Odgers argues that the vagueness associated with 'fairness' under the common law remains in the legislation.[1193] 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.[1194] Compulsion is not required to constitute unfairness.[1195]

Development of the unfairness discretion

9.64 The common law has two discretionary grounds for excluding evidence: unfairness to the accused and consideration of public policy.[1196] The focus of the two discretions is different: the unfairness discretion focuses on the effect of the unlawful conduct on the accused, while the public policy discretion focuses on 'large matters of public policy'.[1197]

9.65 It would appear that the reason for identifying separately the unfairness discretion (reflected in s 90) and the public policy discretion (reflected in s 138) was that the fairness discretion forms part of a cohesive body of principles and rules specifically on evidence of confessional statements, whereas the discretion to exclude evidence of a confessional statement on public policy grounds is part of a general discretion to exclude unlawfully obtained evidence.[1198]

9.66 Before the reformulation of the fairness discretion in *R v Swaffield*,[1199] there were two approaches to the exercise of the fairness discretion at common law—the 'narrow approach' that only considers 'whether the reception of the evidence is likely to preclude a fair trial', in the sense that it involves a risk of the wrongful conviction of an accused; and the 'broad approach' which also takes into account additional factors that do not affect the outcome of the trial, but violate more general notions of fairness.[1200]

1191 Ibid, [967].
1192 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160]. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].
1193 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].
1194 *Foster v The Queen* (1993) 67 ALJR 550.
1195 *R v Swaffield* (1998) 192 CLR 159, 127.
1196 *Pollard v The Queen* (1992) 176 CLR 177, 201.
1197 *Foster v The Queen* (1993) 67 ALJR 550, [11].
1198 *Pollard v The Queen* (1992) 176 CLR 177, 201.
1199 *R v Swaffield* (1998) 192 CLR 159.
1200 J Clough, 'The Exclusion of Voluntary Confessions: A Question of Fairness' (1997) 20(1) *University of New South Wales Law Journal* 25, 26–27.

9.67 Dr Jonathan Clough argues that, in the exercise of the fairness discretion, the 'narrow approach' is preferable to the 'broad approach' because additional factors that do not affect the outcome of the trial should only be justified on the basis of the public policy discretion and should not be dealt with under the fairness discretion.[1201] The admissibility of evidence of such factors should be balanced against public interest in conviction of the guilty, especially where the interests of an accused have already been largely protected by admissibility rules on voluntariness and reliability.[1202]

9.68 In 1998, the High Court in *Swaffield* finally settled on the narrow approach.[1203] The approach adopted in *Swaffield* has influenced the application of the fairness discretion under s 90.[1204]

The meaning of 'fairness'

9.69 In analysing the concept of fairness, the majority in *Swaffield* acknowledged that fairness is an inherently vague concept.[1205] They accepted the criticism that the exercise of the unfairness discretion is uncertain because the courts have not defined the policy behind the discretion or the relevant considerations.[1206] Nevertheless, they considered that 'the very nature of the concept inhibits great precision'.[1207]

9.70 Unfairness under s 90 arises from the use of the admissions by the prosecution and not necessarily whether the police treated the accused unfairly.[1208] 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'.[1209] A forensic advantage obtained by the Crown constitutes a forensic disadvantage for the accused. The meaning of 'forensic disadvantage' may be gleaned from the following statement in the majority judgment in *Swaffield*:

> Unreliability is an important aspect of the unfairness discretion but it is not exclusive … the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.[1210]

9.71 It is suggested that the admission of an improperly obtained confession into evidence would not constitute a forensic disadvantage per se. In order for the

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1201 Ibid, 32.
1202 Ibid, 35.
1203 See B Presser, 'Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 760.
1204 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5760].
1205 *R v Swaffield* (1998) 192 CLR 159, [66].
1206 Ibid, [66].
1207 Ibid, [66].
1208 *Van Der Meer v The Queen* (1988) 35 A Crim R 232, [248]; *R v Em* [2003] NSWCCA 374, [104].
1209 *R v Em* [2003] NSWCCA 374, [104] citing *R v Swaffield* (1998) 192 CLR 159, 189.
1210 *R v Swaffield* (1998) 192 CLR 159, [78].

admission to constitute a forensic disadvantage, the disadvantage must affect the conduct of the defence,[1211] in the sense that 'the accused is forced to defend him or herself against unreliable evidence'.[1212]

9.72 Although the fairness discretion primarily involves questions of reliability,[1213] reliability is not 'the sole touchstone' of unfairness. Once the fairness discretion involves considerations other than reliability, 'the line between unfairness and policy may become blurred'.[1214]

9.73 The majority in *Swaffield* developed a principle that merges the unfairness discretion and the public policy (illegal or improperly obtained evidence) discretion, by reference to the fundamental principle of the accused's leave as 'right' to choose to speak or remain silent.[1215] When the freedom to choose to speak to the police has been impugned, the court has a discretion to exclude the evidence, on the basis that either the circumstances were such that it would be unfair to the accused if the confession is admitted, or 'having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards'.[1216]

9.74 There is potential overlap between s 90 and the discretion in s 138 to exclude improperly or illegally obtained evidence.[1217] 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. As stated above, the focus of the unfairness discretion (reflected in s 90) 'will tend to be on the effect of the unlawful conduct on the particular accused', whereas the focus of the public policy discretion (reflected in s 138) 'will tend to be on "large matters of public policy" and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case'.[1218]

9.75 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 unfair to admit an admission by a

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1211 A Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325, 332.

1212 B Presser, 'Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 760.

1213 A Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325, 340.

1214 *R v Swaffield* (1998) 192 CLR 159, [54].

1215 J Edelman, 'Judicial Discretion in Australia' (2000) 19(3) *Australian Bar Review* 285, 294.

1216 *R v Swaffield* (1998) 192 CLR 159, [91].

1217 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 14.

1218 *Foster v The Queen* (1993) 67 ALJR 550, [11]; cited with approval in *R v Swaffield* (1998) 192 CLR 159, [24].

defendant. This approach could possibly resolve any confusion as to the considerations upon which s 90 are based.

9.76 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.[1219] 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.[1220]

9.77 It has, therefore, been asked whether a broader fairness discretion that applies to evidence beyond admissions is required under the uniform Evidence Acts.[1221] Odgers writes:

> The discretion conferred by [s 90] applies only to evidence of an admission. Accordingly, there is no discretion to exclude other prosecution evidence on the basis that, having regard to the circumstances in which the evidence was obtained, it would be unfair to a defendant to use the evidence. This contrasts with the position at common law, and may require amendment of the Act. [1222]

9.78 A number of common law authorities have held that the fairness discretion (reflected in s 90) is not limited to evidence of admissions, but can extend to other evidence such as identification evidence and real evidence.[1223] In *R v Grant*, Smart AJ observed:

> The question remains whether the court still retains the discretion to exclude otherwise admissible evidence where that is necessary to ensure a fair trial, if the discretions conferred by the Act do not cover the position which has arisen. As I am of the opinion that the use of the evidence in question (the prescribed statement) would not result in an unfair trial for the appellant the question need not be answered and it would be best left to a case where the court receives full argument on the *Evidence Act* … I would be reluctant to see such a discretion disappear as it is an important aspect of a court's ability to ensure a fair trial. Experience has shown that it is necessary. It enables the court to deal with new and unforeseen situations.[1224]

1219 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5860].

1220 *R v Schuurs* [1999] QSC 176, [27].

1221 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.78].

1222 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5860].

1223 *R v Edelsten* (1990) 51 A Crim R 397, 408; *Police (SA) v Jervis* (1998) 101 A Crim R 1, 14; *Pearsall v The Queen* (1990) 49 A Crim R 439, 442–443.

1224 *R v Grant* [2001] NSWCCA 486, [85]. Smart AJ also referred to the following cases: *McDermott v The King* (1948) 76 CLR 501, 506–507, 513–515; *R v Lee* (1950) 82 CLR 133, 150–151; *MacPherson v The Queen* (1981) 147 CLR 512, 519–520; *Cleland v The Queen* (1982) 151 CLR 1, 18, 31, 34; *Phillips v The Queen* (1985) 159 CLR 45, 51.

9.79 The Commissions are not persuaded that s 90 should be extended beyond evidence of admissions. As Odgers points out, although s 138(1) does not expressly refer to 'unfairness' to the accused in criminal proceedings as a factor in determining whether it would be undesirable to admit improperly or illegally obtained evidence, it is clear that fairness to an accused may be taken into account in the exercise of that discretion.[1225] However, in *R v Em*, Howie J (with whom Ipp JA and Hulme J agreed) stated that:

> section 138 is not, in its terms at least, concerned with the court ensuring a fair trial for the accused. Certainly that is not a paramount consideration when exercising the discretion. The discretion exercised under s 138(1) seeks to balance two competing public interests, neither of which directly involves securing a fair trial for the accused.[1226]

9.80 Odgers comments that 'while it must be correct that fairness is not "paramount", in the sense of determinative, there is clearly a public interest in an accused receiving "a fair trial"', and that admitting evidence that would result in an 'unfair' trial for the accused is clearly undesirable.[1227] The issue of whether the uniform Evidence Acts should be amended to include a general obligation to ensure a fair trial is considered further in Chapter 2.

Submissions and consultations

9.81 IP 28 asks if s 90 of the uniform Evidence Acts should define the circumstances in which it would be unfair to admit an admission against a defendant.[1228]

9.82 Some consider the fairness discretion too open-ended. There is support for the inclusion in s 90 of additional guidance as to the circumstances that may constitute unfairness,[1229] possibly in the form of a list of factors to be weighed in deciding whether evidence is sufficiently probative.[1230] The DPP NSW also supports the call for additional guidance, but suggests that that guidance should not be prescriptive, nor should it be exhaustive of all the factors that would meet that description.[1231] For example, s 90 could state that any significant infringement of the rights of the accused would constitute unfairness within the section. Alternatively, it is suggested that further guidance on the exercise of discretions could be established through guideline judgements.[1232]

1225 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.15020].
1226 *R v Em* [2003] NSWCCA 374, [74].
1227 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.15020].
1228 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), 113, Q 7–3.
1229 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 17; J Gans, *Consultation*, Sydney, 6 September 2004; W Roser, *Consultation*, Sydney, 17 August 2004.
1230 W Roser, *Consultation*, Sydney, 17 August 2004.
1231 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 17; J Gans, *Consultation*, Sydney, 6 September 2004.
1232 J Gans, *Consultation*, Sydney, 6 September 2004.

9.83 Rather than defining the circumstances in which it would be unfair to admit an admission, some New South Wales District Court judges suggest that fairness should be partially defined.[1233] By contrast, the NSW PDO submits that any attempt to define 'fairness' as used in s 90 would cause a narrowing of the meaning of the concept. The NSW PDO does not believe that 'fairness' can or should be defined.[1234]

9.84 ASIC submits that no attempt should be made to prescribe the circumstances in which the admission of a defendant's admission would be unfair.[1235] ASIC argues that any attempt to prescribe the circumstances of unfairness is likely to result in complex legislation, and that such legislation would provide fertile ground for argument as to whether a given fact situation fits within the prescribed circumstances. ASIC considers that a list of investigative techniques that are considered either legitimate or unfair would be of limited value because a legitimate technique may be carried out in a manner or circumstance that results in unfairness.

9.85 The Law Council submits that it would not be helpful to define the circumstances in which it would be unfair to admit an admission against a defendant.[1236] The phrase 'unfair to a defendant' is capable of a broad interpretation, ensuring a fair trial by taking into account matters going to the justice of individual cases and to the moral integrity of the trial process.

9.86 Concerns have also been raised that the exercise of judicial discretion might become more complex if the factors that the court must consider increase.[1237]

9.87 As regards the overlap between s 90 and s 138, the Law Council points out that there will inevitably be such an overlap, as s 138 also seeks to uphold the moral integrity of the trial. The Law Council does not see this overlap as a problem. However the Council is of the view that the fairness discretion in s 90 should apply generally to all evidence tendered against an accused, not simply admissions.[1238] The Law Council's view is that such enactment would serve to emphasise that the uniform Evidence Acts are based upon deep rooted common law notions of fair trial.[1239]

The Commissions' view

9.88 In the Commissions' view, any attempt at definition would limit the discretion and could have unforeseen consequences. In *Swaffield*, the majority of the High Court conceded that the ALRC's criticism in ALRC 26 of the uncertainty of the discretion 'has force though the very nature of the concept inhibits great precision'.[1240]

1233 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.
1234 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 22.
1235 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005, 4.
1236 Law Council of Australia, *Submission E 32*, 4 March 2005, [37].
1237 P Zahra, *Consultation*, Sydney, 18 August 2004.
1238 Law Council of Australia, *Submission E 32*, 4 March 2005, [37].
1239 Ibid, [56].
1240 *R v Swaffield* (1998) 192 CLR 159, [66].

9.89 The Commissions consider that it would not be appropriate for s 90 to define the circumstances when it would be unfair to admit an admission by a defendant. As Odgers observes, given the elusiveness of the concept of 'fairness', it is difficult to provide comprehensive guidance on the relevant considerations in the exercise of this discretion.[1241]

9.90 A review of the case law shows that comprehensive guidance would not be practicable. In the exercise of the fairness discretion, examples of relevant considerations include the nature and extent of any infringement of the accused's rights and privileges, and where 'the circumstances in which the admission was made rendered it unreliable'.[1242] However, the discretion is not limited to such cases. Furthermore, there are certain matters that may not necessarily be regarded as unfair to an accused—whether they would be so regarded would depend on the circumstances of the case—thus making the provision of comprehensive guidance even more difficult. Examples of matters which would not necessarily be regarded as unfair include:

- the use of an admission that was compelled by law;[1243]
- an interview conducted despite the suspect's objection;[1244]
- continuation of an interview despite an indication from the suspect that they did not wish to participate further;[1245]
- interviewing a suspect who is intellectually handicapped or who suffers from disease or disorder of the mind;[1246]
- interviewing an accused who is affected by alcohol and drugs;[1247] and
- admissions made to police informers.[1248]

9.91 It has been noted that there is difficulty in being prescriptive in the exercise of the fairness discretion because it involves an evaluation of circumstances.[1249] The Law Reform Commission of Canada noted that:

> there is an undeniable advantage in granting judges discretionary power, since it keeps the court continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities.[1250]

1241 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5770].
1242 Ibid, [1.3.5770].
1243 *Director of Public Prosecutions (NSW) v Alderman* (1998) 104 A Crim R 116.
1244 *R v Phan* (2001) 123 A Crim R 30, [54]–[55].
1245 *R v Clarke* (1997) 97 A Crim R 414.
1246 *R v Donnelly* (1997) 96 A Crim R 432.
1247 *R v Helmhout* (2000) 112 A Crim R 10, [39].
1248 *R v Swaffield* (1998) 192 CLR 159; see also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.5840], citing *R v Pfennig (No 1)* (1992) 57 SASR 507; *R v Bailey and Smith* (1993) 97 Cr App R 365; *R v Lowe* [1997] 2 VR 465; *R v Juric* (2002) 129 A Crim R 408.
1249 B Selway, 'Principle, Public Policy and Unfairness: Exclusion of Evidence on Discretionary Grounds' (2002) 23 *Adelaide Law Review* 1, 5.

9.92 This passage was quoted with approval by the High Court in *Swaffield*. The Commissions consider that in order for the concept of 'fairness' to remain 'broad enough to adapt to changing circumstances as well as evolving community values',[1251] s 90 should not be amended.

9.93 Finally, the aim of the s 90 discretion is to allow the trial judge the discretion to exclude evidence of admissions where that evidence was 'obtained in such a way that it would be unfair to admit the evidence against the accused who made them', but was not otherwise covered by the discretion to exclude illegally or improperly obtained evidence. That is, s 90, unlike s 138, is not confined to unlawfully obtained evidence.[1252] As pointed out in ALRC 38, the public policy discretion is capable of dealing with illegally or improperly obtained evidence but not in the way the unfairness discretion does.[1253] This is because the discretion to exclude illegally or improperly obtained evidence (s 138) requires a balancing of public interests and therefore is less effective where the accused chose to speak to the police but on the basis of false assumptions.[1254]

9.94 Since s 90 is intended to deal with unfair situations that are not otherwise covered by admissibility rules, the courts should be given a wide power in the exercise of this discretion. The Commissions' view is that the principles expounded in *Swaffield* are sufficient guidance for the exercise of the fairness discretion and that further rules or list of factors may narrow the scope of the discretion unnecessarily. Therefore the Commissions do not propose that s 90 be amended.

1250 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964], citing Law Reform Commission of Canada, *Compellability of the Accused and the Admissibility of His Statements: A Study Paper* (1973).

1251 *R v Swaffield* (1998) 192 CLR 159, [53].

1252 *Foster v The Queen* (1993) 67 ALJR 550, [11]; cited with approval in *R v Swaffield* (1998) 192 CLR 159, [24].

1253 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [160].

1254 Ibid, [160].

10. Tendency and Coincidence Evidence

Contents

Introduction

10.1 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, they acted or thought in the same way on the occasion in question. Evidence may also be 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 is commonly referred to as 'propensity' and 'similar fact' evidence respectively.

10.2 A famous example of tendency evidence is the case of *R v Straffen*.[1255] To identify Straffen as the killer of a young girl, evidence was admitted that:

- Straffen was in the vicinity at the time of the murder;

1255 *R v Straffen* [1952] 2 QB 911.

- he had escaped for two hours from a nearby prison where he was being detained; and
- the detention was for killing two young girls in precisely the same circumstances as the killing in question.

10.3 The fact that Straffen had killed the other two young girls in the circumstances alleged was not disputed. The evidence was admitted because it showed that Straffen had a tendency to kill in a particular manner and his presence in the vicinity and the similarities with the killing in question identified him as the killer.

10.4 The relevance and admissibility of the evidence can also be justified using coincidence reasoning. The situation was one where the evidence showed that three young girls had been killed in similar circumstances and it was improbable that the killing would have been the act of different people. It was established that Straffen had killed two other young girls and therefore it was highly improbable, he being in the vicinity, that he had not killed the third.

10.5 Reference is made in Chapter 3 to the dangers of this sort of evidence, particularly when it concerns evidence of other discreditable conduct. There is a tendency to overestimate the probative value of such evidence. Where the evidence is of other discreditable conduct, it will tend to prejudice unfairly the fact finder against the person concerned.

10.6 At common law, evidence that discloses a criminal propensity must satisfy the extremely stringent 'no rational explanation' test. Under the uniform Evidence Acts, evidence may not be admitted for tendency or coincidence purposes unless it has 'significant probative value' and reasonable notice of intention to adduce such evidence has been given to the other parties to the proceedings. Where such evidence is adduced by the prosecution against a defendant in criminal proceedings, it must satisfy the further requirement that the probative value of the tendency or coincidence evidence must substantially outweigh any prejudicial effect it may have on the defendant.[1256]

10.7 This chapter will consider a number of issues that have been raised concerning the operation of each of the relevant substantive sections (ss 97, 98, and 101) and the notice requirement (s 99). Attention will then focus on a major issue raised—whether, for criminal trials, ss 97–101 should be replaced by a provision which relies upon 'the interests of justice' as the test for admissibility—for example, s 398A of the *Crimes Act 1958* (Vic).

Tendency evidence

Determining whether evidence is tendency evidence

10.8 Section 97(1) provides:

1256 Uniform Evidence Acts ss 97–101.

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

10.9 IP 28 refers to the different view taken in *R v Cakovski*[1257] as to whether certain evidence was tendency evidence.[1258] The accused had been charged with murdering Petroff. The accused maintained that he had acted in self defence when Petroff threatened to kill him, as he had been genuinely in fear for his life. The prosecution's position at the trial was that this was a concoction. The accused sought to have evidence admitted that in 1978, Petroff had murdered three people and killed a dog. The prosecution also sought to have admitted evidence of a witness, Logounov, that on the night in question, Petroff had threatened to put a knife in Logounov's head and threatened to kill him like he had three other people. Neither matter was known to the accused prior to the incident in which Petroff was killed.

10.10 All judges on the New South Wales Court of Criminal Appeal agreed that the evidence had significant probative value. Hodgson JA and Hulme J took the view that it was not tendency evidence. Hidden J, however, held it was tendency evidence. Hodgson JA expressed his reasoning as follows:

> In the absence of that evidence, the appellant's evidence that the deceased threatened to kill him in such a way as to make him fearful for his life, and continued to make such threats and to attack him notwithstanding the appellant's use of a knife, seems on the face of it highly improbable. In my opinion it becomes less so once one knows that the deceased had committed three murders in the circumstances outlined, albeit as long ago as 1978, and also had made reference to those three murders in uttering a threat to kill Mr Logounov just a few hours before.[1259]

10.11 His Honour went on to say:

> the main relevance of the evidence is not to prove that the deceased had 'a tendency to act in a particular way', but rather to suggest that the deceased was a person who was not subject to very strong inhibitions against killing and contemplation of killing in the same way as are the great majority of people. This is not to say that the deceased had a tendency to kill, but rather that there is less improbability in the deceased killing

1257 *R v Cakovski* (2004) 149 A Crim R 21.
1258 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [8.7].
1259 *R v Cakovski* (2004) 149 A Crim R 21, [36].

> or making a serious threat to kill another person, than there would be for the great majority of people.[1260]

10.12 Hulme J took a similar view, stating:

> in my view the only basis upon which the evidence was admissible was that it rendered less improbable the Appellant's account that the deceased had threatened to kill him. Killing, and thoughts and threats of killing another human being are sufficiently extreme or unusual that the fact that the deceased had killed people in the past was relevant because it rendered more probable, or perhaps more accurately, less improbable, that the deceased uttered the threats the Appellant attributed to him.[1261]

10.13 Hidden J reached the same conclusion but with a different analysis. His Honour said:

> I agree that the evidence had probative force for the reasons identified by their Honours, that is, that it lent some credence to the appellant's account of the deceased's behaviour, which otherwise would have seemed highly improbable. However, in my view, it did so because it demonstrated a propensity on the part of the deceased to retaliate in an extremely violent way against anyone who crossed him. (Whether he was affected by alcohol is not the point.) This, it appears to me, is necessarily tendency evidence. The incident involving Mr Logounov although of a very different character, might be seen as a demonstration of the same propensity.[1262]

10.14 The judgments demonstrate that views can differ as to the reasoning processes involved in determining the relevance and probative value of evidence and the characterisation of those reasoning processes. The difference of view does not point to any problem with the uniform Evidence Acts definition of tendency evidence. Legislative amendment cannot resolve in advance the resolution of such differences of opinion as may occur from case to case. The only submission addressing this issue expresses the view that the definition is satisfactory.[1263]

The Commissions' view

10.15 Although pointing to potential problems in characterising the reasoning process, *R v Cakovski* provides an example of the robustness of the package provided by the uniform Evidence Acts. For, while the construction of Hodgson JA and Hulme J had the result that ss 97 and 101 did not control the admissibility of the evidence because it was not tendency evidence, the uniform Evidence Acts provided the means to control admissibility through s 135. It should also be noted that all members of the New South Wales Court of Criminal Appeal agreed that the evidence should have been admitted at the trial and a new trial was ordered. The Commissions do not propose any change to the definition of tendency evidence in s 97.

1260 Ibid, [37].
1261 Ibid, [56].
1262 Ibid, [70].
1263 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

Notice requirements

10.16 The Director of Public Prosecutions New South Wales (DPP NSW) express concerns that the notice requirements in relation to tendency evidence are too onerous. Clause 6(2) of the *Evidence Regulation 2000* (NSW) states:

> A notice given under section 97(1)(a) of the Act (relating to the tendency rule) must state:
>
> (a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce, and
>
> (b) if that evidence consists of, or includes, evidence of conduct of a person, particulars of:
>
> (i) the date, time, place and circumstances at or in which the conduct occurred, and
>
> (ii) the name of each person who saw, heard or otherwise perceived the conduct, and
>
> (iii) in a civil proceeding—the address of each person so named, so far as they are known to the notifying party.[1264]

10.17 The DPP NSW, quoting from the case *R v AB*, notes that it is sufficient compliance with the regulation if the notice states 'either in its own body or by reference to documents readily identifiable, the nature and substance of the evidence sought to be tendered'.[1265] The DPP NSW submits that:

> the notice provisions are interpreted such that where the Crown wishes to rely on tendency evidence in an alleged sexual assault prosecution involving a number of complainants, the Crown must nominate in the notice each paragraph of each complainant's statement which refers to the alleged offences against the other complainants. In our view notice by the Crown that it intends to rely upon the alleged offences committed against complainants A, B and C as set out in their statements dated x, y and, z respectively, should constitute adequate notice.[1266]

The Commissions' view

10.18 The construction of the regulations and the practice developed in New South Wales,[1267] if complied with, is onerous. However, the detail required has the benefit of requiring careful thought on the part of the prosecution in identifying the evidence on which it seeks to rely. It is critical in determining the admissibility of this class of evidence to identify the evidence with precision, and then to identify with precision the relevance of the evidence and the way the prosecution intends to rely upon it. Precise

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1264 The same wording appears in *Evidence Regulations 1995* (Cth) cl 6(2) and *Evidence Regulations 2002* (Tas) cl 5(2).

1265 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, citing *R v AB* [2001] NSWCCA 496, [15].

1266 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1267 See Judicial Officers of the Supreme Court of New South Wales, *Consultation*, Sydney, 18 March 2005.

identification of the evidence should also enable defence lawyers to prepare, with reasonable confidence, the evidence sought to be led. It should also limit the scope for misunderstanding between the prosecution and the defence and reduce time spent in court while clarification is given. The benefit of the detailed process can be seen from reported cases where it is common to read in reasons for judgment lists of tendency evidence and lists of coincidence evidence.

10.19 It is suggested, therefore, that the advantages to all parties and to the trial system of the present rules and practice outweigh the burden placed upon the prosecution. The Commissions consider there is no change required to the notice provisions under s 97 of the uniform Evidence Acts or the regulations.

Coincidence evidence

The scope of s 98—is it too narrow?

10.20 The critical provisions of s 98 of the uniform Evidence Acts are as follows:

> (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
>
> (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
>
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
>
> (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
>
> (a) they are substantially and relevantly similar; and
>
> (b) the circumstances in which they occurred are substantially similar.

10.21 For the section to apply, the evidence must satisfy the definition of 'related events'. As pointed out in IP 28, that definition has the effect that the intended controls on admissibility only apply if the events and circumstances are substantially similar.[1268] As a result, the section will not apply to exclude evidence where the events are not substantially and relevantly similar, or the circumstances are not substantially similar. Such evidence, however, is likely to be of little probative significance or value and may be highly prejudicial. Not only will s 98 not be available in that situation but, the other intended control, s 101, will have no application. The only controls left are those contained in ss 135 to 137. Paradoxically, therefore, there will be a high test of

1268 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [8.20].

admissibility for 'related events' (which by definition will be satisfied) but not for unrelated events.[1269]

The Commissions' view

10.22 Two options for amendment were suggested in IP 28. One was to delete the word 'related' from ss 98(1) and (2). Another option suggested was an amendment to make it clear that evidence of the events will not satisfy the requirements of the section unless the conditions of similarity set out in s 98(2) are satisfied.

10.23 The provision relating to coincidence evidence proposed in the final report of the original ALRC evidence inquiry is in the following terms:

> 88. Evidence that 2 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 unless it is reasonably open to find that—
>
> (a) the events occurred and the person could have been responsible for them; and
>
> (b) all the events, and the circumstances in which they occurred, are substantially and relevantly similar.[1270]

10.24 A problem with the original proposal was that it could operate inappropriately to exclude circumstantial evidence except where it was substantially and relevantly similar. The same problems could arise if s 98 is amended to delete the references to related events. The other option mentioned in IP 28 does not address this issue or the problem created by the present drafting.

10.25 One option may be to remove the words 'substantially and' from s 98(2)(a). However, the definition may still be too limiting, particularly in requiring similar circumstances. The Commissions prefer a wider option, treating circumstances as relevant but not definitive.[1271] A draft provision appears in Appendix 1.

10.26 The Commissions are concerned about another issue in s 98, namely, the difficulty in understanding the provision which arises from the use of the word 'if' in the text immediately before subparagraphs (a) and (b) and the resulting need for double negatives in the section. The same concerns arise in relation to s 97. If the word 'unless' is substituted for 'if', the double negatives can be removed. The revision of s 98, set out in Appendix 1, takes this into account.

1269 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 319–320.

1270 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App A, 173.

1271 This approach is supported in consultations: Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005 and also in Confidential, *Submission E 31*, 22 February 2005.

Proposal 10–1 Section 98(1) of the uniform Evidence Acts should be amended to provide that evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless the party adducing the evidence gives reasonable notice in writing to each other party of the party's intention to adduce the evidence; and the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, has significant probative value.

Proposal 10–2 Section 97 of the uniform Evidence Acts should be amended to replace the word 'if' in s 97(1) with 'unless', and to replace the word 'or' in s 97(1)(a) with 'and'.

Section 98—'2 or more' events

10.27 Another issue raised is whether the events referred to by the expression '2 or more' events include the event in question in the proceeding. Commentators suggest that the section is ambiguous on that issue.[1272]

10.28 It was the intention of the original ALRC proposals that the events which are the subject of the charge would be included in appropriate cases. That is, in fact, typical of cases where coincidence reasoning is employed. It was the approach taken in *R v Milat*.[1273] For example, if the issue in a trial is whether the accused was the person who committed the particular crime alleged and: (i) it and another crime were of a similar kind; and (ii) the two crimes were committed in a similar manner and in similar circumstances, an inference would arise from that coincidence that they were committed by the same person.

10.29 If the Crown has evidence that the accused committed the other crime, it could go to the jury on the basis that, if it is satisfied beyond reasonable doubt that: (i) the accused committed the other crime; and (ii) the same person committed that crime and the crime charged, the jury should be satisfied that the accused committed the crime with which he or she is charged.

The Commissions' view

10.30 Having taken into consideration the opinion of expert commentators, the Commissions take the view that there is, in fact, no ambiguity. The Commissions

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1272 Jill Anderson, Jill Hunter and Neil Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [98.20].

1273 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 5 September 1996) cited in J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [98.25] fn 121.

consider there is no need for amendment to s 98 to change the expression '2 or more', and the proposed restatement of s 98, outlined in Appendix 1, includes this expression.

Tendency and coincidence evidence in civil proceedings

10.31 The issues discussed above were considered in the context of criminal proceedings. The Law Council of Australia (Law Council) submits that, in civil proceedings, the rules of evidence should be kept to a minimum, and the admission of tendency and coincidence evidence should be left to principles of 'sufficient relevance'. The Law Council also refers to the difficulty of defining tendency evidence and coincidence evidence, as discussed above, and argues that those matters only serve to distract the court from the central issue of determining whether such evidence is of sufficient relevance to admit it.[1274]

10.32 The Law Council does not identify the way in which its proposal might be implemented. The concept of 'sufficient relevance' is the common law requirement of relevance. It is reasonable to proceed on the basis, therefore, that what is proposed is that the issue of probative value will be considered under s 135—the relevance discretion. That is, s 135 will be available to determine whether the evidence has sufficient relevance. Implicit in the Law Council's recommendation is that there be no notice requirement.

10.33 The approach has the merit of simplifying the statement of the rules to be applied in civil proceedings. It will not, however, remove the need to argue and consider the probative value of the evidence in question. Removing ss 97 and 98 in civil proceedings could in fact increase the scope for argument because they will not be available to sift out and exclude evidence at the outset on the basis of insignificant probative value. As a result, in all civil cases, admissibility would be dealt with by a balancing process under s 135. The absence of a notice requirement may not pose a problem in those cases which proceed using witness statements or affidavits. It would, however, be problematic in those cases where the evidence is given orally.

10.34 Removal of the provisions also has the potential to inject its own uncertainty into the admissibility process, an uncertainty reduced by the provisions which in effect require that before evidence of prior conduct is admissible, it has to have significant probative value.

10.35 It should be borne in mind that the concerns giving rise to the uniform Evidence Acts approach were that the typical evidence—prior conduct—may have minimal probative value, raise collateral issues, take parties by surprise and have a significant impact on the time and costs of litigation.[1275] There was also found to be uncertainty

1274 Law Council of Australia, *Submission E 32*, 4 March 2005.
1275 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [790].

and a range of approaches to the control of the admission of such evidence.[1276] The absence of a notice requirement has the potential to put the party against whom the evidence is led at a disadvantage.

10.36 At present, therefore, the Commissions do not consider that there will be any advantage gained in ss 97 and 98 not applying in civil proceedings. The next phase of the Inquiry will explore the issue further with judges and practitioners to determine which approach, on balance, is the most sound in principle and practice.

The operation of s 101

10.37 Section 101 is in the following terms:

> **101 Further restrictions on tendency evidence and coincidence evidence adduced by the prosecution**
>
> (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
>
> (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect[1277] it may have on the defendant.
>
> (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
>
> (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

10.38 IP 28 raises two issues:

- whether the common law requirements developed by the High Court in *Hoch v The Queen*[1278] (*Hoch*) and *Pfennig v The Queen*[1279] (*Pfennig*) must be applied when determining, under s 101, whether the 'probative value' substantially outweighs any prejudicial effect;[1280] and
- whether that test should be replaced by an 'interests of justice' test articulated by McHugh J in *Pfennig*.[1281]

1276 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), App C, [172]–[175]; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), App C, [24].

1277 The expression 'prejudicial effect' is not qualified by the word 'unfair'. One commentator, Peter Bayne, considers the significance of this omission but concludes, correctly it is suggested, that properly construed the prejudice in question is unfair prejudice: P Bayne, *Uniform Evidence Law: Text and Essential Cases* (2003), [6.260], citing *W v The Queen* (2001) 115 FCR 41, [61], [89]; *R v AH* (1997) 42 NSWLR 702; *R v Colby* [1999] NSWCCA 261.

1278 *Hoch v The Queen* (1988) 165 CLR 292.

1279 *Pfennig v The Queen* (1995) 182 CLR 461.

1280 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 8–6(a).

1281 Ibid, Q 8–6(b).

10.39 A further issue raised after the publication of IP 28 is whether s 101 should be amended to apply in terms to any relevant evidence of prior misconduct of the defendant.

Application of Hoch and Pfennig to s 101

10.40 IP 28 refers to the common law test of admissibility for propensity evidence developed in *Hoch* and *Pfennig*, namely, that the evidence must possess sufficient 'probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged'.[1282]

10.41 IP 28 then sets out the history of the interpretation of the section, which reveals that the courts of the Australian Capital Territory and the federal courts[1283] have taken the position that this common law test is not to be applied when applying s 101, but that the New South Wales Court of Criminal Appeal has taken a contrary view.[1284] IP 28 notes that subsequently the New South Wales Court of Criminal Appeal, in the case of *R v Ellis*,[1285] rejected the previous line of authority in New South Wales in holding that the common law test referred to above is not applicable under s 101.[1286]

10.42 At the time IP 28 was published, the High Court had given leave to appeal the decision in *Ellis*.[1287] Subsequently, that leave was rescinded and the High Court when revoking leave indicated that it agreed with the decision of Spigelman CJ in *R v Ellis* on the construction of the uniform Evidence Acts.[1288]

10.43 In the leading judgment in *R v Ellis*, Spigelman CJ, among other things, emphasised the fact that the High Court in *Papakosmas v The Queen*[1289] rejected the argument that the language of the uniform Evidence Acts should be construed in a manner that conforms to the pre-existing common law. Spigelman CJ went on to demonstrate convincingly the inconsistency between the *Pfennig* requirements and the requirements of s 101.[1290] It should be noted, however, that his Honour commented that:

> My conclusion in relation to the construction of s 101(2) should not be understood to suggest that the stringency of the approach, culminating in the *Pfennig* test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative

1282 *Pfennig v The Queen* (1995) 182 CLR 461, 481. See also *Hoch v The Queen* (1988) 165 CLR 292, 294.
1283 See, eg, *W v The Queen* (2001) 115 FCR 41, [53], [60].
1284 See, eg, *R v Lock* (1997) 91 A Crim R 356; *R v AH* (1997) 42 NSWLR 702; *R v Fordham* (1997) 98 A Crim R 359; *R v WRC* (2002) 130 A Crim R 89; *R v Joiner* (2002) 133 A Crim R 90.
1285 *R v Ellis* (2003) 58 NSWLR 700.
1286 *R v Ellis* (2003) 58 NSWLR 700, [70], [74], [83].
1287 *Ellis v The Queen* [2004] HCATrans 311.
1288 *Ellis v The Queen* [2004] HCA Trans 488.
1289 *Papakosmas v The Queen* (1999) 196 CLR 297, 302, 312.
1290 *R v Ellis* (2003) 58 NSWLR 700, [74]–[95].

> value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied.[1291]

10.44 Following *Ellis*, the relevance of the possibility of concoction to the balancing test of s 101 was considered by Underwood J, as he then was, in *Tasmania v S*.[1292] Underwood J referred to the above quoted passage and, after referring to some discussion in pre-*Ellis* cases, commented that:

> it seems to me that [in] the proper exercise of the balancing act that is demanded by the Act, s 101(2) requires that evidence of possibility of concoction be taken into account, and if there is a reasonable possibility of concoction, then the prejudicial effect will ordinarily outweigh the probative value of the tendency or coincidence evidence.[1293]

10.45 Underwood J noted that for the possibility of concoction to be considered in applying s 101, there needs to be 'a reasonable possibility, based upon some factual foundation and not merely fanciful possibility', and that the question for the judge is whether there is 'a real chance of concoction or contamination rather than a merely speculative chance'. His Honour held a *voir dire* on the issue and in light of the evidence received on the *voir dire*, concluded that there was no rational factual basis to suggest a possibility of concoction.[1294]

10.46 The decision in *Ellis* has also been applied in the Supreme Court of the Australian Capital Territory.[1295]

The Commissions' view

10.47 A number of submissions and consultations support the adoption of the *Pfennig* test for the admission of tendency and coincidence evidence in a criminal case.[1296] On the other hand, it is suggested that the *Pfennig* test starts with a premise of guilt and then works backwards, and that the *Ellis* test makes more sense.[1297] It is also noted that the *Pfennig* test essentially puts the judge in the position of the jury, thus taking away

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1291 Ibid, [96].

1292 *Tasmania v S* [2004] TASSC 84.

1293 Ibid, [11].

1294 Ibid, [33].

1295 *R v Gibbs* (2004) 146 A Crim R 503. It has also been applied subsequently in NSW in *R v Mason* (2003) 140 A Crim R 274; *R v Milton* [2004] NSWCCA 195; *R v Folbigg* [2005] NSWCCA 23.

1296 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Confidential, *Submission E 31*, 22 February 2005. See also E Kerkyasharian, *Submission E 15*, 4 February 2005 who draws attention to the absence in s 101 of the expression 'and other evidence to be adduced' which is found in ss 97 and 98. This issue of construction does not appear to have been raised in litigation. It is suggested that the absence of the expression in s 101 should not result in an approach where the weighing of the probative value and prejudicial effect of the evidence is made by focusing solely on the evidence in question. The balancing test involves the consideration of all the evidence. It seems likely that the words are included in ss 97 and 98 out of an abundance of caution.

1297 Crown Prosecutors, *Consultation*, Sydney, 11 February 2005. See also T Game, *Consultation*, Sydney, 25 February 2005.

from the jury the responsibility of determining the guilt or innocence of the accused in stipulated cases.[1298]

10.48 The present view of the Commissions is that the *Pfennig* test is too narrow and should not be the test for admission. The Commissions consider that the reasoning of Spigelman CJ in *Ellis* is to be preferred both as a matter of construction and as a matter of policy. This approach is supported in the majority of submissions and consultations addressing the issue.[1299] Given that the recent comments of the High Court support the decision of Spigelman CJ in *Ellis*, the Commissions do not propose that any amendments be made to the legislation.

10.49 A further issue is raised. In assessing the probative value of evidence of prior disreputable conduct, should the assessment proceed on the basis that the evidence is correct? Alternatively, should the assessment of the probative value of such evidence take into account other matters, for example whether the evidence is credible?[1300] These issues are discussed in detail in Chapter 14. No proposals are put forward at this stage of the Inquiry. The issues will be discussed further in the next phase of the reference.

10.50 Finally, reference should be made to the discussion in IP 28 about whether the law should be amended in its application to proceedings for sexual offences against children.[1301] The Commissions are of the view that the decision in *Ellis* adequately addresses this issue.

Broadening the categories of evidence to which s 101 applies

10.51 An issue is raised as to whether s 101 should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although allegedly tendered for a non-tendency or coincidence purpose. An example given is evidence of prior conduct relevant to establish the relationship between the defendant and the victim of the crime charged in sexual assault cases. Reference should also be made to evidence said to be relevant as setting the context in which the alleged events occurred.

10.52 Such evidence will be subject to the control of s 101 if it is adduced to show a tendency or a coincidence. Sometimes, however, it is sought to avoid s 101 by limiting the purpose of the tender to the establishment of the relationship or the context, disavowing any intention of using it to establish any tendency or coincidence, and arguing that an appropriate warning can be given that the evidence not be used for any

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1298 Law Council of Australia, *Submission E 32,* 4 March 2005.

1299 Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005; Crown Prosecutors, *Consultation,* Sydney, 11 February 2005; G Bellamy, *Consultation,* Canberra, 8 March 2005; P Bayne, *Consultation,* Canberra, 9 March 2005; P Underwood, *Consultation,* Hobart, 15 March 2005; A Palmer, *Consultation,* Melbourne, 16 March 2005.

1300 For example, the approach taken in *Tasmania v S* [2004] TASSC 84.

1301 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 8–8, 8–9.

tendency or coincidence purpose. Thus, to that extent, s 101 will not have an impact on the admission and use of such evidence. The issue requires further investigation and discussion to determine whether s 101 should be amended to cover any evidence led against an accused person which reveals disreputable behaviour.

Question 10–1 Should s 101 apply to any evidence led against an accused person which reveals disreputable behaviour whether or not relevant as showing a tendency or coincidence and whether or not tendered for such purposes? If so what form should the provision take?

'Interests of justice' alternative for s 101

10.53 Another issue raised in relation to ss 97 to 101 is whether the uniform Evidence Acts should take a different approach by incorporating an 'interests of justice' test to control admissibility of tendency and coincidence evidence in criminal trials. In considering this issue, it is relevant to consider the criticisms of the uniform Evidence Acts provisions by the Law Commission of England and Wales and others, Victorian legislation which was enacted to incorporate an interests of justice test, and the proposals of the Law Commission of England and Wales which combine elements of the uniform Evidence Acts and Victorian approaches.

Overseas criticism of the uniform Evidence Acts

10.54 In October 2001, the Law Commission of England and Wales (Law Commission) published the Report *Evidence of Bad Character in Criminal Proceedings*.[1302] The Report considers, amongst other things, the admissibility of tendency and coincidence evidence tendered against an accused person. It includes an analysis of the English common law 'justice' test and of the uniform Evidence Acts provisions, which it looked at as an option. The Law Commission rejects both approaches. The discussion in the Report instructively revisits the longstanding debate.

10.55 In analysing the uniform Evidence Acts provisions, the Law Commission refers to the concerns it expressed in its consultation paper. The concerns were that:

- the Law Commission was 'unsure what it might mean for the probative value of evidence to outweigh the risk of prejudice substantially, or for evidence to have significant probative value as opposed to some probative value';
- it considered 'the effect of the rules was that tendency and coincidence evidence would sometimes be inadmissible even if its probative value outweighed its prejudicial effect'; and

1302 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001).

- it considered 'the Australian statutory scheme unnecessarily complicated'.[1303]

10.56 In its Report, however, the Law Commission indicates that it is persuaded that there should be an 'enhanced relevance' requirement before such evidence can be admitted and choses a requirement that the evidence have 'substantial probative value' (not 'significant'). It notes that 'we now accept that there is a meaningful difference between evidence having some probative value and having substantial probative value'.[1304]

10.57 Turning to the question of the appropriate balance between prejudicial effect and probative value, the Law Commission states that it considered as an option an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect.[1305] This option was subsequently rejected. It offered no scope for excluding evidence whose probative value did outweigh its likely prejudicial effect but it was of 'negligible significance', and introducing such evidence would simply distract the fact-finders from the real issues.[1306] The Law Commission also argues that such an option amounts to an abandonment of any attempt to minimise reliance on judicial discretion, 'the unpredictability of which we have identified as a defect of the present law'.[1307]

10.58 The Law Commission indicates that its preference is for 'an exclusionary rule subject to exceptions which are not wholly dependent on judicial discretion, but, are as far as possible objectively defined'.[1308] It remains concerned, however, that the uniform Evidence Acts' requirement that the probative value of the evidence in question substantially outweigh the risk of prejudice will have the result that, on occasion, evidence will be rendered inadmissible even though its probative value outweighed the risk of prejudice. The Law Commission notes that 'we see no reason why it should be excluded merely because it does not *substantially* outweigh that risk'.[1309]

10.59 On that issue, the Report refers to an argument advanced in justification of the uniform Evidence Acts provision—that it is needed as the minimum requirement if the concern is to minimise wrongful conviction. The Law Commission then comments:

> The point made … is that the judge may underestimate the prejudicial effect of the evidence and, if he or she does so, then the risk of wrongful conviction is greatly increased. If, on the other hand, the evidence is only admissible if there is a significant margin between its probative value and its prejudicial effect then a minor under-

1303 Ibid, [11.19].
1304 Ibid, [11.22].
1305 Ibid, [6.66].
1306 This consideration is dealt with under Uniform Evidence Acts s 135.
1307 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [6.66].
1308 Ibid, [6.66].
1309 Ibid, [11.24].

> estimation will not result in the admission of evidence which is in fact more prejudicial than probative.[1310]

10.60 It might be said, however, that it is not just the risk of underestimating the prejudicial effect that poses the danger of wrongful conviction. It is also the risk of overestimating the probative value of the evidence. Further, the prejudicial effect of the evidence has the capacity to affect the assessment by the judge of the probative value and prejudicial effect and whether the former outweighs the latter, in a manner adverse to the accused. The word 'outweigh' means no more than to exceed in weight, value, importance or influence.[1311] Without the requirement 'substantially', the balancing test would be satisfied by the merest excess of one over the other. Having regard to the difficulties and dangers of the balancing task, the possibility of wrongful conviction is very great unless the balancing task is weighted.

10.61 In support of its concern that 'if there has to be a significant margin, it is possible for evidence which is more probative than prejudicial to be excluded',[1312] the Law Commission quotes the following example of a situation where the higher standard will, it thinks, lead to the exclusion of evidence which should not be excluded:

> the fact-finders might already know (perhaps because the fact has been admitted as 'background evidence', or because the defendant is notorious) that the defendant has a long history of serious crime. The additional prejudice likely to result from the revelation of one more minor offence is very small, and would be outweighed by a comparatively small degree of probative value. In such a case we think that the evidence ought to be admissible, even if the probative value of the evidence is not 'significant'. Similarly, if the evidence's probative value outweighs the risk of prejudice, we see no reason why it should be excluded merely because it does not *substantially* outweigh that risk.[1313]

10.62 The Law Commission acknowledges in its Report that the example is not so convincing in view of the fact that it was now proposing a test of enhanced relevance and comments that:

> if the prejudice attaching to the evidence is indeed slight then given that the character evidence must be of substantial probative value, it is likely that the probative value *would* substantially outweigh the prejudice.[1314]

10.63 The Law Commission returns to the question of what degree of risk of wrongful conviction is acceptable. It acknowledges the reality that views will differ on whether one fact tends to prove or disprove another and the degree to which one fact tends to do so.[1315] It adds that if the test 'is that the probative value must substantially outweigh the

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1310 Ibid, [11.26].
1311 This definition is taken from *The Shorter Oxford Dictionary: On Historical Principles* (3rd ed, 1973).
1312 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [11.27].
1313 Ibid, [11.27].
1314 Ibid, [11.28].
1315 Citing J McEwan, 'Law Commission Dodges the Nettles in Consultation Paper No 141' (1997) *Criminal Law Review* 93.

prejudice, then a court will exclude evidence which it might have let in after hesitation'.[1316] The Law Commission concludes:

> Our view is that such an approach runs the risk of focusing on a question which, though it might be useful to ask, is not the real issue to be addressed. The purpose of a trial is to do justice. We believe that there is no better way to express the test than in terms of this central purpose. Thus the test is best expressed in qualitative rather than quantitative terms, that is, what the interests of justice require.[1317]

10.64 Thus the Law Commission proposes a test for admissibility in terms of what it describes as the ultimate policy objective and not a test of admissibility couched in terms that would guide the court towards that objective.

Australian criticism of the uniform Evidence Acts

10.65 The Law Council is critical of the uniform Evidence Acts provisions and expresses a preference for the more flexible approach taken in England.[1318] Its concerns about the uniform Evidence Acts provisions appear to turn on two issues.

10.66 The first is the view expressed that the sections apply only to evidence that is 'tendered as tendency or coincidence evidence'. As noted above, the construction placed on these provisions by the Commissions is that they apply to control the admissibility, and so the use of such evidence, according to what it discloses, and are not confined to the purpose for which the evidence is ostensibly tendered. The language does not so limit the operation of the sections.

10.67 The other matter raised is that, properly construed, the views of the majority expressed by Spigelman CJ in *R v Ellis*[1319] have the effect that there is

> no presumption against the admissibility of tendency and coincidence evidence and courts must simply look to the words of the Act, not previous common law authority, in deciding whether the probative value of the evidence substantially outweighs any prejudicial effect.[1320]

10.68 The Law Council expresses its concern that the approach of the majority articulated by Spigelman CJ would 'undermine the common law principle which ensures an accused a fair trial by presumptively regarding evidence revealing an accused's misconduct as prejudicial'.[1321]

10.69 The Law Council proposes that the uniform Evidence Acts should be redrafted to ensure

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1316 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [11.29].
1317 Ibid, [11.30].
1318 Law Council of Australia, *Submission E 32*, 4 March 2005.
1319 *R v Ellis* (2003) 58 NSWLR 700, [99].
1320 Law Council of Australia, *Submission E 32*, 4 March 2005, [40].
1321 Ibid, [41].

> that every accused is given the benefit of such a presumption through the exclusion of such evidence unless the prosecution can demonstrate its reception will not unfairly prejudice the accused … a value judgement needs to be made in each case with the onus on the prosecution to persuade the court that if the evidence is admitted the accused can still receive a fair trial.[1322]

10.70 The language of the provisions does not appear to justify these concerns. In fact the sections do exactly what is sought. In particular, s 101 plainly puts the onus on the prosecution to show that the probative value substantially outweighs the prejudicial effect. The source of the concern appears to be a perceived conflict between the judgment of Spigelman CJ and that of Hidden and Buddin JJ in *R v Ellis*.

10.71 After indicating agreement with Spigelman CJ as to the orders he proposed and his reasons, Hidden and Buddin JJ stated:

> We would add only this. Underlying the various formulations of the test for admission of similar fact or propensity evidence in the common law authorities is the recognition that evidence of that kind is likely to be highly prejudicial, and of the need to ensure that it is admitted only when the interests of justice require it. Its admission at common law is exceptional for reasons of policy, not of logic. These considerations should guide the balancing exercise required by the statutory provision, so that the test for admissibility under that provision remains one of very considerable stringency.[1323]

10.72 Spigelman CJ (with whom Sully and O'Keefe JJ agreed) said:

> Since writing the above I have read the additional observations of Hidden and Buddin JJ. I do not agree with their Honours. In my opinion, the statutory formulation should operate in accordance with its terms. There is no need for an assumption that all such evidence is 'likely to be highly prejudicial', nor for guidance that the test for admissibility is 'one of very considerable stringency'.[1324]

10.73 Spigelman CJ was stating that it is inappropriate to go outside the language of the sections and to seek to add assumptions and guidelines. He went on, however, to make the point that there was no 'need' to do so in the manner suggested. The Commissions agree with this analysis. Obviously, evidence of discreditable conduct is likely to be highly prejudicial. That is the principal reason for the provisions. Further, the requirements of ss 97, 98 and 101 are very stringent. For the prosecution to have the evidence admitted, it must have significant probative value and the probative value must substantially outweigh the prejudicial effect. The accused is adequately protected.

Section 398A of the Crimes Act 1958 (Vic)

10.74 Section 398A of the *Crimes Act 1958* (Vic) provides as follows:

> (1) This section applies to proceedings for an indictable or summary offence.
>
> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all circumstances it is just to admit it

1322 Ibid, [41].
1323 *R v Ellis* (2003) 58 NSWLR 700, [104].
1324 Ibid, [99].

> despite any prejudicial effect it may have on the person charged with the offence.
>
> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
>
> (5) This section has effect despite any rule of law to the contrary.

10.75 'Propensity evidence' is not defined but has been held to include evidence which discloses the commission of offences other than those with which the accused is charged. It is not confined, however, to such evidence and covers any evidence which, if accepted, discloses conduct which is discreditable or reflects badly on his or her character.[1325] It covers what has been called in the past 'similar fact evidence' and can also include relationship evidence. It may go to the identity of the offender or reliance may be placed on the improbability of a number of similar incidents occurring coincidentally.[1326]

10.76 Section 398A was enacted in 1997 to overrule the common law principle, referred to above, that propensity evidence is inadmissible if there is a reasonable view of the evidence that is consistent with the innocence of the accused.[1327] Typically, that issue arises where there exists a possibility of concoction, collusion, or infection of the evidence or it can be explained on the basis of mere coincidence.

10.77 Section 398A(2) is said to adopt the test that applied in England in determining the admissibility of evidence of this nature.[1328] It is accepted, however, that:

> The flexibility of the test in subs (2) means that, properly applied, it will not greatly alter the conduct of criminal trials. Propensity evidence will be admissible whenever it is just to do so 'in all the circumstances'. Those circumstances will sometimes include the impossibility of conducting a trial in a sensible fashion unless the evidence is received. Its probative value is correspondingly high. Similar fact evidence will still be received with great caution because, as McHugh J pointed out in *Pfennig's* case at 530, the risk of prejudice is ordinarily at its highest in such cases. The area of practice that will change is that affected by subs (3) and (4).[1329]

1325 *R v Best* [1998] 4 VR 603, 608.
1326 Ibid, 606.
1327 *Pfennig v The Queen* (1995) 182 CLR 461, 483, 485, 506–507; *Hoch v The Queen* (1988) 165 CLR 292, 296.
1328 *Director of Public Prosecutions v P* [1991] 2 AC 447; *R v Best* [1998] 4 VR 603, 608, 612.
1329 *R v Best* [1998] 4 VR 603, 612, citing *R v Tektonopoulos* [1999] 2 VR 412, [19] and see discussion [19]–[26].

10.78 Thus, the courts in applying s 398A will look to English and Australian common law authorities in resolving the ultimate question—the justice, in all the circumstances, of admitting the evidence. It should be noted that the section, while it involves questions of degree and value judgments, states a rule of admissibility not a discretion.[1330] The interpretation of s 398A is considered in detail in Appendix 2.

Criticism of the 'interests of justice' alternative

10.79 The Law Commission Report *Evidence of Bad Character in Criminal Proceedings* also includes an analysis of the English common law 'justice' test which forms the basis for s 398A of the *Crimes Act 1958* (Vic). It rejects that test.

10.80 In considering the common law, the Law Commission is critical of the difficulties for parties and courts in establishing exactly what the law is in the area. It argues that 'this area of the law is ripe … for codification which would bring greater clarity, certainty and accessibility'.[1331]

10.81 The Law Commission criticises the justice test set out in *Director of Public Prosecutions v P* as being 'too vague'.[1332] After referring to the test it notes:

> To state that the evidence is admissible when it is 'just' to do so does not settle the question of how the probative value ought to relate to the prejudicial effect in order for it to be admitted.[1333]

10.82 After discussing a number of possibilities the Law Commission states that:

> In a matter requiring the exercise of judgment in an individual case, it is impossible for a test based on what is just to be so precise that there is no room for argument in individual cases, but we do think that there is scope for more guidance. For example, there is no indication of the factors that are relevant in assessing the probative value of similar fact evidence (such as *dis*similarities in the evidence), or in assessing its likely prejudicial effect.[1334]

10.83 The Law Commission also expresses concern about recent developments in the law concerning evidence that is relevant only because it reveals a propensity.[1335] It refers to authority[1336] that evidence of possession of homosexual pornographic magazines by a person charged with indecent assault of young persons was not admissible because his defence was that there had never been any sort of indecency, and therefore the only basis upon which the evidence could be said to be relevant was via propensity reasoning. The Law Commission comments that while in the particular

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1330 *R v TJB* [1998] 4 VR 621, 631–632; *R v Tektonopoulos* [1999] 2 VR 412, [27].
1331 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.2].
1332 Ibid, [4.3].
1333 Ibid, [4.4].
1334 Ibid, [4.5].
1335 Ibid, [4.8].
1336 *R v Wright* (1990) 90 Cr App R 325 and *R v B (RA)* [1997] 2 Cr App R 88.

case the evidence may have lacked sufficient probative value, the authorities went too far in stating that propensity evidence could never be advanced.[1337]

10.84 The Law Commission Report identifies as another area of difficulty a recent line of cases concerning evidence that might be regarded as similar fact evidence, but which was categorised as 'background evidence' and held to fall outside the test in *Director of Public Prosecutions v P*.[1338] The Report comments that it is admitted because it is 'so closely entwined and involved with the evidence directly relating to the facts in issue that it would amount to distortion to attempt to edit it out'.[1339]

10.85 The Law Commission comments that this approach can be used to 'smuggle in similar fact evidence which would otherwise be inadmissible'.[1340] It also states that it is not clear when evidence 'counts as' background evidence and when it does not and there is also contrary authority as to whether, if it does count as background evidence, the test in *Director of Public Prosecutions v P* should still be applied.[1341]

10.86 The Report goes on to examine other areas, including the cross-examination of accused persons and concludes that:

> it can be seen from all the defects set out above that the law is not satisfactory as it stands. We conclude that the law is in need of reform, and we recommend that all the rules on the admissibility of bad character evidence in criminal proceedings be contained in a single statute, and that the common law rules (including the hearsay exception for evidence of reputation) be abolished.[1342]

Recommendation of the Law Commission of England and Wales

10.87 In light of the Law Commission's analysis and criticisms of the interests of justice test and the uniform Evidence Acts provisions, it is relevant to consider in more detail what is recommended by the Law Commission. Putting to one side the distinction drawn in the Law Commission's proposed Bill between evidence with explanatory value and evidence going to matters in issue, in essence, the Bill requires leave to be obtained and that, in particular, before leave is given, that:

- the evidence in question has substantial probative value;[1343] and

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1337 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.8]–[4.9].

1338 Ibid, [4.11]. For more detail see Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, CP 141 (1996), [2.70]–[2.84].

1339 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.11], quoting C Tapper, *Cross and Tapper on Evidence* (9th ed, 1999), 343.

1340 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.11], quoting C Tapper, *Cross and Tapper on Evidence* (9th ed, 1999), 343.

1341 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.12].

1342 Ibid, [4.84].

1343 It states that the term 'substantial' means 'more than minor or trivial': Ibid, [7.17].

- taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible.[1344]

10.88 The proposed Bill also attempts to give guidance in the assessment of the interests of justice by requiring consideration of the following:

> (i) how much probative value [the evidence] has in relation to the matter in issue,
>
> (ii) what other evidence has been, or can be, given on that matter, and
>
> (iii) how important that matter is in the context of the case as a whole.[1345]

10.89 The trial judge is also directed, in determining whether the two conditions are met, to consider the following matters:

> (2) In assessing the probative value of evidence for the purposes of this section the court must have regard to the following factors (and any others it considers relevant)—
>
> (a) the nature and number of the events, or other things, to which the evidence relates;
>
> (b) when those events or things are alleged to have happened or existed;
>
> (c) where—
>
> (i) the evidence is evidence of a person's misconduct, and
>
> (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
>
> the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
>
> (d) where—
>
> (i) the evidence is evidence of a person's misconduct,
>
> (ii) it is suggested that that person is also responsible for the misconduct charged, and
>
> (iii) the identity of the person responsible for the misconduct charged is disputed,
>
> the extent to which the evidence shows or tends to show that the same person was responsible each time.[1346]

10.90 Thus the Law Commission concludes that there should be an enhanced relevance requirement, as occurs in the uniform Evidence Acts. However, the Law Commission also decides to retain an ultimate 'interests of justice' test and to address its criticisms of the 'interests of justice' approach by providing detailed guidelines concerning the

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1344 It does not in terms require a balancing of probative value and prejudice: Ibid, [11.46], Draft Bill ss 7 and 8.

1345 See Ibid, Draft Bill s 8(3)(b) in relation to evidence going to a matter in issue, not explanatory evidence.

1346 See Ibid, Draft Bill cls 8(4), 5(2).

assessment of probative value. These guidelines are also relevant to the question of whether the evidence has 'substantial probative value'.

10.91 The analysis and resulting recommendations confirm the difficulty of this area of evidence law and the challenge of providing satisfactory rules of admissibility. All solutions can be criticised, and the same criticisms often apply equally to the alternatives offered.

The Commissions' view

10.92 The Commissions do not see, at present, any benefit in adopting the approach recommended by the United Kingdom in preference to the uniform Evidence Acts. The basic difference between the approaches appears to be whether the balancing test should be expressed in terms of probative value substantially outweighing prejudicial effect or in terms of admission 'in the interests of justice' having regard to the probative value and the prejudicial effect. Whatever its failings, the uniform Evidence Acts test gives trial judges a defined task and a two-stage test. The problem of the lack of guidance in the 'interests of justice' approach is borne out by the need to include guidelines. The guidelines, however, focus on the issue of probative value and do not attempt to address the issue of prejudice. If guidelines were to be used this should be done. The uniform Evidence Acts approach is preferable to that of the Law Commission of England and Wales.

10.93 The issue remains whether the uniform Evidence Acts approach or the Victorian s 398 approach should be applied. These approaches need to be compared to see which best serves the policy objectives.

The uniform Evidence Acts and the Victorian approach

Focus on disclosure or purpose

10.94 The uniform Evidence Acts, like the common law and s 398A, require initially that the ways in which the evidence could be relevant be identified.[1347] This involves consideration of what the evidence discloses and how it relates to what is in issue in the trial. It will then be necessary to consider the purpose or purposes for which it is tendered; for this will provide a focus for the ruling on admissibility and use of the evidence. But the starting point is what the evidence discloses.[1348]

1347 See, eg, *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51, [61].

1348 While much of the debate in the cases focuses on the purpose of the tender of the evidence, that occurs for at least two reasons. First, the purpose of the tender is often the only relevant use. Second, when the evidence discloses more than one relevant use, the purpose of the tender will shape the debate on the admissibility of the evidence and what use or uses will be permitted if the evidence is admitted. See, eg, discussion in *W v The Queen* (2001) 115 FCR 41, [46]–[50]; *R v MM* [2004] NSWCCA 364, [58].

Extent to which evidence is accepted as reliable in determining probative value

10.95 Research to date has not identified any detailed discussion of this issue in the authorities determined under the uniform Evidence Acts.[1349] Consideration of the admissibility and use of tendency and coincidence evidence, however, tends to proceed on the assumption that the evidence is accepted. Reference should be made, however, to the comment of Spigelman CJ in *R v Ellis* about the possibility of cases where the prejudicial effect was such that the probative value required would be of such a high order that it would be insufficient if there was a reasonable explanation of the evidence consistent with innocence.[1350] The points noted in Appendix 2 in relation to s 398A are also applicable; namely, about disputed evidence having less probative value than undisputed evidence, and the obligation to consider the reliability of the evidence should there be an issue raised as to whether no reasonable jury could accept it. It is to be expected under both approaches, however, that in the normal case issues of assessment of the credibility of witnesses whose evidence is in question will be assumed in favour of the witness at the time of admissibility and left to the jury to determine.

Relevant to facts in issue?

10.96 Section 398A expressly requires that the evidence be relevant to facts in issue. The uniform Evidence Acts require relevance to facts in issue through the general relevance provisions, s 55 and following (the primary admissibility provisions). Relevance is the first requirement stated in s 398A. A reading of the decided cases points to the same types of facts in issue being raised,[1351] and the same arguments advanced to support the relevance of the evidence to those issues including corroboration of the evidence of each complainant by the testimony of others.[1352]

'Probative value' compared with 'just in all the circumstances'

10.97 While the uniform Evidence Acts require a consideration of whether the evidence has 'significant probative value' and whether probative value substantially outweighs prejudicial effect, s 398A requires a consideration of what is just in all the circumstances.

1349 The possibility of concoction and collusion was raised on appeal in *R v Barton* as new evidence but it was not necessary to determine whether such evidence would be relevant to the question of admissibility: *R v Barton* [2004] NSWCCA 229, [41]. A *voir dire* was apparently held in *W v The Queen* in which the learned trial judge found the evidence of the complainants to be 'clear and compelling', and this was said, on appeal, to provide a firm basis for the trial judge's ruling that the probative effect of the evidence substantially outweighed the danger of likely prejudicial effect: *W v The Queen* (2001) 115 FCR 41, [56]. A similar procedure was followed in *Tasmania v S* [2004] TASSC 84.

1350 *R v Ellis* (2003) 58 NSWLR 700, [96].

1351 Issues of intent, identity, and/or the alleged criminal act and reliance on the argument that the evidence demonstrates a relationship, a tendency, an improbable coincidence and/or corroborates other disputed evidence.

1352 See, eg, *R v Milton* [2004] NSWCCA 195.

10.98 Decisions under the two schemes, however, do not reveal that the application of the different tests has produced, or is likely to produce, different outcomes.[1353] This is not surprising because statements in the Victorian authorities support the propositions that the evidence must have strong probative value and the probative value must clearly transcend the prejudicial effect and similar propositions.[1354]

10.99 A reading of the decisions, however, does reveal a difference in approach. As might be expected, judges applying the uniform Evidence Acts tend to follow a structured approach involving, particularly, the application of ss 97, 98 and 101.[1355] Under s 398A, judges assess probative value and prejudicial effect and determine what is just in all circumstances.

Onus of proof

10.100 The drafting of both sets of provisions places the onus on the party tendering the evidence to establish its admissibility. On appeal, where the defendant is the appellant, an onus inevitably falls on the appellant to establish error and that affects the form of the discussion on appeal. Under s 398A, the Court of Appeal reviews the decision on the basis that the trial judge applied a rule of admissibility not a discretion. Under the uniform Evidence Acts, it has been held that the appellant is required to demonstrate that it was not reasonably open to the trial judge to reach the conclusion that the test prescribed by s 101 of the uniform Evidence Acts was satisfied.[1356]

10.101 The adoption of this test in appeals about whether evidence should have been admitted under s 101 may make it more difficult for appellants successfully to challenge the admission of such evidence. A benefit may be a reduction in appeals. But this test reduces the scope of one of the protections of the trial system against miscarriages of justice and arguably makes it even more important to require that, before such evidence can be admitted, its probative value substantially outweighs its prejudicial effect.

1353 For cases on s 398A see: *R v Tektonopoulos* [1999] 2 VR 412 (relevance/probative value); *R v Alexander* (2002) 6 VR 53 (relevance/probative value); *R v Rajakaruna* [2004] VSCA 114 (relevance/probative value). For cases on the uniform Evidence Acts see: *Symss v The Queen* [2003] NSWCCA 77 (relevance/probative value); *R v Gibbs* (2004) 146 A Crim R 503 (evidence not relevant); *R v Whaddy* [2001] FCA 1648 (probative value); *R v Wu Li* [2003] NSWCCA 407 (relevance and probative value).

1354 *R v Best* [1998] 4 VR 603; *R v Tektonopoulos* [1999] 2 VR 412; *R v Dupas* (2004) 148 A Crim R 185.

1355 See, eg, *W v The Queen* [2001] FCA 1648, [42]ff; *R v Ellis* (2003) 58 NSWLR 700, [31]ff. Note that the practice of counsel is not at times as rigorous as it might be: Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.

1356 *R v Milton* [2004] NSWCCA 195, [33]. See also *W v The Queen* [2001] FCA 1648, [98]; *R v Wu Li* [2003] NSWCCA 407, [10].

Relationship evidence

10.102 Evidence of the relationship between the accused and another person may be relevant for a variety of reasons.[1357] It may simply provide a background or context to the events in issue. It may, however, be relevant to the issue of the likely state of mind of the accused or, for example, the victim of an assault. It may reveal a relevant 'guilty passion' of the accused for a victim of an alleged sexual assault.

10.103 Under both legislative approaches, if such evidence discloses a relevant propensity or tendency, it must comply with the statutory provisions before it can be admitted to prove such propensity or tendency. If it does not comply with the statutory provisions, it may still be admissible for a non-propensity or non-tendency purpose but cannot be used for a propensity or tendency purpose.

10.104 If the evidence does not disclose a relevant propensity or tendency, then the admissibility of the evidence will depend ultimately on the application of the exclusionary discretions. Section 137 of the uniform Evidence Acts deals with the issues addressed by the common law *Christie* discretion[1358] (see discussion below). Section 135 of the uniform Evidence Acts mirrors the concealed discretion contained in the common law requirement of sufficient relevance. It is unlikely, therefore, that relationship evidence will be approached differently under the two legislative systems.[1359]

Res gestae

10.105 A question is raised as to whether s 398A would apply to evidence properly described as *res gestae*.[1360] It is difficult to see why it would not apply, just as it is difficult to see why the uniform Evidence Acts provisions would not apply. Any evidence which reveals a 'propensity' (s 398A) or a 'tendency' or related events (uniform Evidence Acts) must satisfy the provisions. The fact that the evidence is of matters which were part of the criminal transaction, however, will give such probative value to the evidence that the evidence will ordinarily be admissible under both sets of provisions.

The common law Christie discretion

10.106 The equivalent provision in the uniform Evidence Acts to the common law *Christie* discretion is s 137, which, strictly speaking, does not provide a discretion but provides a rule obliging the trial judge to refuse to admit evidence adduced by the prosecution if its probative value is outweighed by the danger of unfair prejudice to the defendant. In practice, that should not affect outcomes at trial level but could

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1357 For example, evidence of the nature of the de facto relationship between the deceased and the accused showing its violent nature, relevant to the issue of self-defence (as in *R v Lock* (1997) 91 A Crim R 356).

1358 The discretion to exclude evidence where its prejudicial effect outweighs its probative value.

1359 See discussion in T Smith and O Holderson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part 1' (1999) 73 *Australian Law Journal* 432, 494.

1360 Evidence of conduct forming part of the transaction giving rise to the crime charged.

theoretically affect consideration of decisions by appellate courts because of the different rules applying to the review of the exercise of discretions and the application of rules. Bearing in mind the language of s 101 of the uniform Evidence Acts and the language of s 398A of the *Crimes Act 1958* (Vic), if evidence passes the admissibility tests contained in those provisions, it is difficult to envisage a situation in which there would be scope for the common law *Christie* discretion (although left open by the authorities) and s 137 of the uniform Evidence Acts. If evidence fails to satisfy the admissibility tests where tendered for propensity, tendency or coincidence purposes, but is tendered and admissible for other purposes, the *Christie* discretion, in common law jurisdictions, and s 137, in uniform Evidence Acts jurisdictions, will have operation. Again, however, it is difficult to conceive of a situation where the result would differ depending on which regime is applied.

Evidence led by the accused

10.107 Under the common law, the rules of admissibility that were developed for evidence revealing a propensity were applied to evidence adduced by the prosecution against the accused.[1361] It has been held that the criterion for admissibility is somewhat lower where an accused seeks to lead such evidence because the accused 'need only raise a reasonable doubt as to guilt'.[1362] Section 398A does not distinguish between evidence led on behalf of the prosecution and evidence led on behalf of the accused. The uniform Evidence Acts provisions contained in ss 97 and 98 are of general application and apply in both civil and criminal proceedings and to an accused who adduces such evidence.[1363] Section 101, however, distinguishes between the prosecution and the accused and in terms applies only to evidence adduced by the prosecution.[1364] The question arises, therefore, whether this may result in different outcomes for such evidence when adduced by an accused depending on which sections are applied. Research to date has not identified any appellate cases in which consideration has been given to the application of s 398A where evidence is tendered by an accused. The fact that it is the accused tendering the evidence would arguably need to be taken into account when considering the overriding requirement—'just in all the circumstances'.

Comparison in addressing policy objectives

10.108 ***Fact finding.*** The uniform Evidence Acts provisions use language that might be expected to result in a more stringent approach than that required by s 398A of the *Crimes Act 1958* (Vic) and produce different admissibility results in similar cases. But

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1361 A Ligertwood, *Australian Evidence* (4th ed, 2004), [3.7]–[3.8]; K Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties?' (1999) 23(2) *Melbourne University Law Review* 263, 266.

1362 See *Cheney v The Queen* (1991) 28 FCR 103, [18] and the cases cited.

1363 In *Symss v The Queen* [2003] NSWCCA 77 under the uniform Evidence Acts provisions, the accused failed to satisfy ss 97 and 98.

1364 See, eg, *R v Lockyer* (1996) 89 A Crim R 457; *R v Cakovski* (2004) 149 A Crim R 21.

this cannot as yet be discerned, probably because of the way in which s 398A has been interpreted. In particular, the requirements of strong probative value and that the probative value clearly transcends the prejudicial effect. This also appears to be the situation in relation to *res gestae* and relationship evidence. There is a greater potential for different results where the accused tenders the evidence.

10.109 ***Fair trial.*** To the extent that the uniform Evidence Acts provisions require the trial judge to apply rules with less value selection and more structure, there will be seen to be a trial by rules, rather than judicial whim, and in that regard a fairer trial. As to the effect of unfair prejudice, it is difficult to form a judgment as to whether in particular cases a fairer trial will be had pursuant to one set of provisions or the other. It may be said, however, that the more precise and structured approach of the uniform Evidence Acts may better enable judges to deal with the impact on them of the prejudicial effect of the evidence when considering its admissibility.

10.110 ***Minimising risk of wrongful conviction.*** Again it is difficult to form a judgment as to whether in particular cases one set of provisions or the other is likely to increase the risk of wrongful conviction. Arguably, that risk would be less under the uniform Evidence Acts provisions because the requirements are more specific. Professor CR Williams, however, argues that s 101 of the uniform Evidence Acts may 'raise the bar to admissibility unduly high'. He indicates a preference for the English approach, and the s 398A approach, which he describes as 'the most suitable', recognising 'the wide measure of discretion called for in determining the admissibility of similar fact evidence'.[1365] Williams has also, however, commented:

> As a means of describing the situation where the probative force of evidence is sufficient to warrant admissibility, the word 'just' is appropriate. There is a real danger, however, that if regarded as a test rather than the word used to describe the situation where admissibility is warranted, it will come to serve as a substitute for factual analysis and may perhaps lead too readily to admissibility. [1366]

10.111 It should be noted that the English approach, followed in s 398A, has its critics. Professor Colin Tapper, commenting on *Director of Public Prosecutions v P*,[1367] says:

> It is not satisfactory that so important a principle of English criminal evidence should be diluted in this way. Every effort should be taken to ensure that the prejudice inevitably attaching to the accused through the revelation of discreditable conduct on other occasions alleged against him should be admitted only if clearly established, only when of central relevance to an issue, and only subject to every effort to minimise its prejudicial effect. It is far from clear that in [*DPP v P*] the House of Lords advanced such an aspiration.[1368]

1365 C Williams, 'Approaches to Similar Fact Evidence: England and Australia' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 21, 42–43.

1366 Cited in Ibid, 30.

1367 *Director of Public Prosecutions v P* [1991] 2 AC 447.

1368 C Tapper, 'The Probative Force of Similar Fact Evidence' (1992) 108 *Law Quarterly Review* 26, 30.

10.112 On balance, it is suggested that there is a greater risk of wrongful conviction under s 398A and the requirements of the uniform Evidence Acts appropriately address that issue without raising the bar too high.

10.113 ***Accessibility.*** Experience of the uniform Evidence Acts has demonstrated that it provides a more accessible law of evidence than the common law approaches. It is like a 'pocket bible'. If a provision along the lines of s 398A was included in the uniform Evidence Acts in substitution for the present provisions, it would make the law less accessible in this particular area because anyone applying such a section would have to go back to the decided cases, Victorian and English, to establish its content—defeating the purpose of having a statutory statement of law.

10.114 ***Predictability.*** Because of the difficulty of the issues in some cases, it will on occasions be difficult for persons to prepare for trial confident as to the admissibility or otherwise of propensity, tendency or coincidence evidence, whichever approach is used. Where the uniform Evidence Acts apply, the language used is flexible and it may be that views will differ as to the proper exercise of the relevant provisions in some cases. The application of the 'just in all the circumstances' standard used in s 398A, however, has the potential to be less predictable. Everything will turn on what the trial judge considers 'just'.

10.115 ***Cost and time.*** This is another issue that is difficult to assess. It is suggested, however, that it is likely that there will be less cost and time involved in the structured debate that occurs under the uniform Evidence Acts compared with the unstructured debate involved in the concept of 'just in all circumstances'. In addition, under the latter system it is always worth the defence objecting to the evidence and challenging its admission on appeal; for there is always a chance that the judges constituting the appeal court will be persuaded that the evidence should not have been admitted.

10.116 ***Uniformity.*** The less structure and direction given by the legislation, the greater the scope for variation in the application of the provisions. Accepting uniformity as an objective, it is likely to be better served by the uniform Evidence Acts.

The Commissions' view

10.117 As noted above, the Commissions consider that the uniform Evidence Acts approach is to be preferred to the proposal of the Law Commission of England and Wales for a hybrid approach.

10.118 In considering the uniform Evidence Acts, as compared to s 398A of the *Evidence Act 1958* (Vic), the Commissions find that the impact of the two approaches on the fact-finding process is difficult to assess on the state of the current authorities and that it cannot be said that the two approaches have produced significantly different outcomes. However, in the Commissions' view, the uniform Evidence Acts better serve a number of other policy objectives, notably: a fair trial; minimising the risk of

wrongful conviction; accessibility; predictability; cost and time; and uniformity.[1369] The Commissions prefer the approach of the uniform Evidence Acts.

1369 The DPP NSW submits that the uniform Evidence Acts provisions should not be replaced by an 'interests of justice' test: Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

11. The Credibility Rule and its Exceptions

Contents

Introduction

11.1 Part 3.7 of the uniform Evidence Acts[1370] 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.

11.2 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

1370 The equivalent Tasmanian provisions are labelled *Evidence Act 2001* (Tas) Ch 3, Pt 7.

prevent side issues from being pursued.[1371] Relevant considerations in this regard include preventing proceedings from being burdened by detailed investigation of collateral issues and, on the other hand, allowing a judge or jury sufficient information to assess the reliability of a witness.

11.3 The application of the credibility rule depends upon a distinction between evidence relevant to the credit of a witness and evidence 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.[1372] The rules relating to the admissibility of credibility evidence have, therefore, been described as being based upon pragmatism rather than logic.[1373]

The credibility provisions

11.4 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.[1374]

11.5 The exclusionary rule for credibility evidence 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.[1375]

11.6 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);
- is admitted to re-establish credibility (s 108);
- relates to the credibility of accused persons (s 104); and
- relates to the credibility of a person who made a previous representation of which evidence has been admitted.

11.7 This chapter discusses selected aspects of the credibility provisions of the uniform Evidence Acts where issues have been identified, including:

1371 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [102.05].

1372 See, eg, McHugh J (in dissent) in *Palmer v The Queen* (1998) 193 CLR 1, [51].

1373 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 307; *Palmer v The Queen* (1998) 193 CLR 1, [51]–[53].

1374 Uniform Evidence Acts Dictionary, Pt 1; *Evidence Act 2001* (Tas) s 3.

1375 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].

- the interpretation of 'evidence that is relevant only to a witness's credibility' under ss 102, 103 and 104;
- the interpretation of 'substantial probative value' in s 103 and whether the Acts should specify additional matters to which the court may have regard in deciding whether evidence has substantial probative value;
- the interaction of the credibility rule and its exceptions and the character provisions contained in Part 3.8;[1376]
- the limits on cross-examination in criminal proceedings of a defendant as to the defendant's credibility;
- rebutting denials in cross-examination by other evidence under s 106;
- the admission under s 108A of evidence of the credibility of a person who has made a previous representation;
- whether there should be further exceptions to the credibility rule;
- the provisions relating to unsworn statements by the accused; and
- aspects of credibility issues in sexual offence cases.

Evidence relevant only to a witness' credibility

11.8 IP 28 refers to the interpretation of s 102 of the uniform Evidence Acts by the High Court in *Adam v The Queen*.[1377] The High Court held that the section should be interpreted literally. As a result, it will not apply if evidence is relevant both to credibility and evidence of facts in issue—for example, prior inconsistent or consistent statements about the events in question. The majority in *Adam* expressly rejected the interpretation that had until then been applied by the Court of Criminal Appeal in New South Wales,[1378] namely, that the section applied to evidence which was not admissible on any basis other than relevance to the credibility of a witness. As IP 28 notes, in so concluding, the High Court implicitly overruled aspects of its decision in *Graham v The Queen*.[1379]

11.9 Prior to the decision in *Adam*, the provisions in Part 3.7 had been used to control the admissibility of evidence relevant for more than one purpose but admissible only on the issue of the credibility of a witness. This approach provided an important control over such evidence. As a result of *Adam*, that control no longer exists. Stephen

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1376 The equivalent Tasmanian provisions are labelled *Evidence Act 2001* (Tas) Ch 3, Pt 8.

1377 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.9]–[9.14], referring to *Adam v The Queen* (2001) 207 CLR 96.

1378 See discussion, T Smith and O Holdenson, 'Comparative Evidence: The Uniform Evidence Acts and the Common Law' (1998) 72 *Australian Law Journal* 363.

1379 *Graham v The Queen* (1998) 195 CLR 606.

Odgers SC identifies two areas where Part 3.7 will not now apply, with significant negative consequences.[1380]

11.10 First, evidence of a prior statement, consistent or inconsistent with a witness' evidence, may not be admissible to prove the facts stated in it because it does not come within one of the hearsay exceptions. It is likely, however, also to be relevant to the witness' credibility. The literal interpretation of s 102 has the result that Part 3.7 is not available to control the admissibility of such evidence in those circumstances, so that it will be admissible for a credibility use without having to satisfy the requirements of that Part. Having escaped the controls of Part 3.7, and being admitted for credibility purposes, s 60 will then apply to lift the hearsay rule so that the evidence is admissible as evidence of the facts stated.

11.11 Secondly, there are consequences where an accused person gives evidence. Evidence of the accused's prior convictions for offences can be relevant to show a tendency to commit such offences and so may be relevant both to the issues of the case and to the assessment of the credibility of the accused. Such evidence, however, may be inadmissible to prove a tendency or coincidence because of the operation of ss 97 or 101. At the same time, Part 3.7 will have no application to control the admission of the evidence for credibility purposes—as the dual relevance renders ss 102, 103 and 104 inapplicable. Each of those sections is needed to control the admissibility and use of the evidence for credibility purposes.

11.12 The result of the decision in *Adam* is that control of evidence, relevant for more than one purpose including credibility, will depend entirely upon the exercise of the discretions and exclusionary rules contained in ss 135 to 137. This is unsatisfactory and has the potential to lead to greater uncertainty in the preparation of cases and the conduct of trials.[1381]

11.13 Concern has also been expressed generally about the difficulty of distinguishing between evidence going to credibility and evidence going to a fact in issue.[1382] The distinction is sometimes a difficult one and is made more critical by narrowing the scope of s 102 to evidence that is relevant only to credibility. The issue would be less critical if s 102 applied also to evidence relevant to facts in issue but which is not admissible to prove such facts.

Submissions and consultations

11.14 There is support in submissions and consultations for amending the uniform Evidence Acts to address the consequences of the decision in *Adam*.[1383] The Law Council of Australia (Law Council) states that the decision in *Adam*:

1380 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7660].
1381 Ibid.
1382 Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.
1383 Law Council of Australia, *Submission E 32*, 4 March 2005; T Game, *Consultation*, Sydney, 25 February 2005; Confidential, *Submission E 31*, 22 February 2005; A Palmer, *Consultation*, Melbourne, 16 March

> seriously undermines the entire structure of the credibility rule and its exceptions … It is left to the court to control the situation through exercise of discretion. One could tolerate this situation in civil cases where the more extensive reception of relevant hearsay evidence might be seen as desirable, but in criminal cases rules of evidence need to ensure that the accused knows in advance how evidential rules are likely to operate at trial. And the important protections in s 104 against cross-examination of the accused about credibility are seriously undermined.[1384]

11.15 The Law Council submits that s 102 should be amended to read:

> Evidence is not admissible that is either (a) relevant only to credibility; or (b) relevant to credibility and, insofar as it is also otherwise relevant, inadmissible under this Act.[1385]

11.16 By contrast, others submit that the decision in *Adam* does not justify any amendment to s 102.[1386] The Director of Public Prosecutions New South Wales (DPP NSW) considers that s 136 provides a sufficient safeguard.[1387] The New South Wales Public Defenders Office (NSW PDO) criticises as 'alarmist' the view that *Adam* renders otherwise inadmissible evidence admissible, so long as it is relevant.[1388]

The Commissions' view

11.17 In the Commissions' view, while ss 135 to 137 provide a mechanism to cope with the effect of a literal interpretation of s 102, it is preferable to have rules applying prior to the application of those sections. Section 102 should be amended to enable it to operate as was originally intended.

11.18 IP 28 identifies a further problem arising from the literal construction of the s 102.[1389] Substantially similar terminology ('relevant only because it is relevant to the defendant's credibility') is used to define the evidence which attracts the additional protections provided in s 104 to an accused person when cross-examined.[1390] Limiting this provision to the situation where the evidence is not admissible for another purpose reduces the protection available to the accused. The Commissions consider that this issue also needs to be addressed; and should be addressed in conjunction with the consideration and redrafting of s 102.

11.19 It is suggested that the preferable solution is to reword the rule to apply simply to 'evidence that is relevant to a witness's credibility' and to define such evidence. Draft

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2005; S Finch, *Consultation*, Sydney, 3 March 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005.

1384 Law Council of Australia, *Submission E 32*, 4 March 2005.

1385 Ibid.

1386 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005; P Bayne, *Consultation*, Canberra, 9 March 2005.

1387 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1388 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

1389 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.26].

1390 See uniform Evidence Acts ss 104(2), (4), s 108A(1).

provisions s 101A (defining credibility evidence) and a reworded s 102 are included for discussion in Appendix 1. In the subsequent provisions, ss 104 and 108A in particular, the phrase 'evidence relevant to a witness's credibility', amended where appropriate to reflect the context, could be substituted for the phrase 'evidence relevant only to a witness's credibility' or similar phrases.

11.20 The suggested changes address the problems created by the literal interpretation of s 102. For example, evidence of a prior statement which is relevant for both a credibility purpose and a hearsay purpose, but not admissible for a hearsay purpose, will be controlled under Part 3.7. The changes also have the potential to make the subsequent sections easier to follow and apply because it will be clear whether the evidence is evidence to which those sections apply before consideration is given to their application.

Proposal 11–1 The uniform Evidence Acts should be amended to ensure that the credibility provisions apply to evidence:

- relevant only to the credibility of a witness; and
- relevant to the facts in issue, but not admissible for that purpose, which is also relevant to the credibility of a witness.

Substantial probative value

The definition of substantial probative value

11.21 IP 28 notes debate as to the interpretation of the expression 'substantial probative value' in s 103.[1391] At present, s 103 provides:

> 103(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

11.22 The expression 'probative value' is defined in the uniform Evidence Acts as meaning:

> the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[1392]

11.23 It has been argued that this definition cannot apply to the phrase in s 103 because the definition refers to the relationship between evidence and a fact in issue, rather than to issues of credibility. The interpretation of 'probative value' in s 103 was the subject of a decision of the New South Wales Court of Criminal Appeal. In *R v RPS*, Hunt CJ at CL suggested that the context in which the phrase appears and the subject matter of s 103

1391 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.19]–[9.21].
1392 Uniform Evidence Acts, Dictionary Pt 1; *Evidence Act 2001* (Tas) s 3(1).

> indicate that the definition does not apply … Evidence adduced in cross-examination must therefore have substantial probative value in the sense that it could rationally affect the assessment of the credit of a witness.[1393]

11.24 The approach in *R v RPS* to the interpretation of 'probative value' in s 103 is plainly open because s 6 of the *Interpretation Act 1987* (NSW) states that the expressions defined by statutes apply to their construction 'except insofar as the context or subject matter otherwise indicates or requires'.[1394]

11.25 There is some support for further defining the term 'substantial probative value' for the purposes of s 103.[1395] However, the Law Council states that:

> The exact probative limits are impossible to define in the abstract and must necessarily depend upon the circumstances of the individual case. The Council feels that the current formulation of s 103 gives trial judge's appropriate discretion and that any further attempt to define the probative value required would be counterproductive. However it would not be inappropriate to amend s 103 to make it clear that the substantial probative value required is either to the witness's credibility or the material facts in issue.[1396]

11.26 The *R v RPS* interpretation has stood for some seven years. It is practical and simple and does not appear to have given rise to any difficulty. It has the consequence, however, that to understand the meaning of the expression, people need to be aware of the above case law which requires the departure from the definition in the Dictionary of the uniform Evidence Acts. The Commissions consider that this detracts from the utility of the uniform Evidence Acts as a 'pocket bible' and it would be desirable to amend the section to incorporate expressly the construction that has been adopted by the courts. A draft rewording of s 103, and consequential amendments to s 108A, are included in Appendix 1.

Is the test too high?

11.27 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'.[1397]

11.28 There are some suggestions that the requirement of substantial probative value is too high and might exclude evidence relevant to credibility, which on its own would not have substantial probative value but in combination with other evidence would do

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1393 *R v RPS* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL and Hidden J, 13 August 1997).

1394 See also *Evidence Act 1995* (Cth) s 3(3).

1395 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1396 Law Council of Australia, *Submission E 32*, 4 March 2005.

1397 *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.

so.[1398] However, the Commissions have not identified any cases in which credibility evidence has been excluded on this basis.[1399]

11.29 In the Commissions' view, like all other evidence, the probative value of credibility evidence is not determined in isolation but in the context of other related evidence, and the combination of the evidence in question with such other evidence is a matter relevant to its probative value. The Commissions do not propose any amendment to redefine the expression 'substantial probative value' in s 103 to make it easier to admit credibility evidence.

Proposal 11–2 Section 103(1) of the uniform Evidence Acts should be amended to read as follows: 'The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness'.

Matters to which the court may have regard

11.30 Section 103 of the uniform Evidence Acts controls cross-examination of witnesses as to credibility. Section 108A provides rules about the admission of evidence relevant to the credibility of the person who made a previous representation which has been admitted into evidence. Each section imposes a requirement of 'substantial probative value' and contains a subsection (ss 103(2) and 108A(2)) which lists, by way of example, the following matters as relevant to the issue of substantial probative value:

- whether the evidence tends to prove that the person in question knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- 'the period that has elapsed' since the events to which the evidence in question relates or, in the case of a representation, the period between the events and the representation.

11.31 Odgers notes that there are many more examples of evidence that may satisfy the requirements of s 103(1). Cross-examination may be permitted regarding such matters as bias, opportunities of observation, powers of perception and memory, special circumstances affecting incompetency and prior statements inconsistent with testimony.[1400] In this context, IP 28 asks whether further examples of evidence capable of having substantial probative value should be listed in the legislation.[1401]

1398 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005.

1399 See *R v Galea* (2004) 148 A Crim R 220 for a recent case in which s 103 was applied to limit cross-examination of a witness by the accused's counsel.

1400 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3 7760].

1401 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.21].

11.32 In ALRC 26, the ALRC expressed concern about the failure to use appropriately the common law power to control cross-examination as to credit—particularly the tendency to permit any negative aspect of character or misconduct to be explored on the basis that it was relevant to credibility.[1402] It considered including a narrowly defined section but regarded that as too limiting. To address these concerns, the requirement of substantial probative value was included. In addition, the first example in ss 103(2) and 108A(2) was included to emphasise the importance of the circumstances in which prior alleged dishonest behaviour occurred. Again, the ALRC was influenced by extensive psychological research demonstrating the dangers of seeking to rely upon prior conduct as a predictor of future conduct unless there was significant similarity in circumstances surrounding that conduct.

11.33 There is no evidence that the lack of other examples of matters affecting whether evidence has substantial probative value is causing any significant problems.[1403] Adding further examples carries the risk of undermining the purpose of the sections which is to limit the situations in which evidence can be admitted relevant to credibility. Doing so also carries the danger that attention and debate will tend to focus on the examples rather than the rule. In the Commissions' view, there is no clear benefit in adding to the provisions and the Commissions do not propose that any further examples be added to ss 103 or 108A.

Credibility and the character provisions

11.34 Sections 104 and 110 of the uniform Evidence Acts operate in criminal proceedings. Section 104(4)(a) 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 is also relevant in that context.

11.35 Section 110 excludes the operation of the credibility, hearsay, opinion and tendency rules with respect to 'evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character'.[1404]

11.36 Such evidence admitted under s 110 may be relevant to both the facts in issue and the credibility of the defendant. Section 110 continues the common law exception for accused persons arising from the concern to minimise the risk of wrongful conviction.[1405] Sections 110(2) and (3) exclude the operation of the credibility, hearsay, opinion and tendency rules with respect to rebuttal evidence and cross-examination that seek to rebut evidence of a defendant's good character. The effect of ss 110(2) and

1402 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [817]–[819] .
1403 For example, see *R v Lumsden* [2003] NSWCCA 83.
1404 Uniform Evidence Acts s 110(1).
1405 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [802].

(3) is to limit the prosecution's rebuttal evidence to the same features as were adduced in evidence for the defendant.

The interaction of ss 104 and 110

11.37 IP 28 highlighted certain 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.[1406]

11.38 Leave is required before a defendant can be cross-examined under s 104(4)(a) or s 110. However, under s 110 the prosecution may, with leave, cross-examine the defendant only if the defendant has adduced evidence with the positive intention of proving that he or she is a person of good character.[1407] In addition, cross-examination of a defendant under s 110 must respond as a 'mirror image' to the good character evidence adduced by the defendant. Section 104(4)(a) does not appear to be confined in these ways. In particular, it applies where evidence has been adduced by the defendant 'that tends to prove' that the defendant is of good character and is not confined to the parameters of the character evidence adduced on behalf of the defendant. Thus, as to those aspects, a wider power is given to the prosecution in cross-examination relevant only to credit under s 104(4)(a).

11.39 At the same time, cross-examination under s 104 must satisfy the requirements of s 103, with the result that leave can only be given under s 104 where the cross-examination relates to evidence of 'substantial probative value'. That requirement is not laid down in s 112, the leave provision applying where the accused has deliberately adduced evidence of good character.

The Commissions' view

11.40 The principal reason for these differences between the credibility and character provisions is that ss 110 to 112 deal with a situation where the accused has deliberately led evidence intending to prove that he or she is of good character, which evidence is relevant both to the issues of fact and to credibility. That is, the defendant has deliberately chosen to open the issue of his or her good character. By contrast, ss 103 and 104 deal with cross-examination relevant only to credibility.

11.41 Therefore, as presently drafted, where the defendant produces evidence with the intention of proving his or her good character under s 110, ss 103 and 104 should have

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1406 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.29]–[9.30]; see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.7920]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.50]; S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 357.

1407 For example, *Gabriel v The Queen* (1997) 76 FCR 279.

no application.[1408] If that construction is correct, a question arises as to why s 110 purports to exclude the operation of the credibility rule. This may reflect the original assumption that s 102 would also apply to such evidence.[1409] Alternatively, the explanation may be that it was done out of an abundance of caution.

11.42 In practice, the interaction of these provisions is a source of confusion and uncertainty.[1410] The potential overlap is undesirable. One option to address these concerns would be to remove s 104(4)(a), which allows leave for cross-examination to be given where:

> evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character …

11.43 This would have the consequence that where the defendant has put his or her character in issue by adducing and having admitted evidence as to character, s 104 would have no application and cross-examination on matters going to credibility would be controlled by ss 110 and 112. In that case, cross-examination would be confined to cross-examination on evidence which mirrors that which the defendant had adduced; and the evidence sought to be adduced in cross-examination going to credibility would not have to pass a substantial probative value test. Where the defendant has not put his or her character in issue, any cross-examination as to credibility will continue to be controlled by ss 103 and 104.

11.44 It may be questioned whether this change would make any real difference in practice. Under the character evidence provisions, leave is required and cross-examination will be confined to situations where the defendant has intentionally put his or her character in issue. As a result, cross-examination allowed under s 110 is likely to be cross-examination on evidence which has substantial probative value on the question of credibility. Under s 104, substantial probative value is necessary,[1411] and leave is also required. Whether the defendant has deliberately put his or her character in issue will be particularly relevant to both of those aspects. On the other hand, the proposed change is likely to make the sections and the two Parts of the uniform Evidence Acts easier to understand and apply.[1412]

11.45 The deletion of s 104(4)(a) also has to be considered in the light of any changes to ss 102 to 104 to deal with the use of the phrase 'relevant only to a witness's

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1408 See S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 348.

1409 Applying the interpretation of s 102 that was accepted prior to *Adam v The Queen* (2001) 207 CLR 96.

1410 Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

1411 Uniform Evidence Acts ss 104(1), 103.

1412 If s 104(4)(a) is retained, another issue arises. The subsection refers to the situation where evidence has been 'adduced' by the defendant. The shield available to the defendant should only be lost when evidence of the kind referred to has been 'admitted'. In the Commissions' view, if s 104(4)(a) is retained, it should be amended to require that the evidence has been admitted. This would, in turn, simplify the drafting.

credibility', discussed above. For example, if Proposal 11–1 is implemented, ss 103 and 104 will apply to:

- cross-examination on evidence relevant only to the credibility of a witness; and
- evidence relevant to the facts in issue, but not admissible for that purpose, which is also relevant to the credibility of a witness.

11.46 Where an accused has adduced evidence under s 110, such evidence is admitted for both credibility and non-credibility purposes. As a result, ss 103 and 104 would have no operation and cross-examination in that situation will be controlled by s 112, which requires leave.

11.47 Therefore, it will continue to be necessary for s 110 to provide that the credibility rule not apply in the circumstances described in each of its subsections. That is needed to remove any argument about whether, in a situation where the defendant deliberately adduces evidence with the intention of proving good character, the provisions of Part 3.8 are the provisions to which reference should be made.

11.48 In the Commissions' view, the uniform Evidence Acts should be amended to delete s 104(4)(a), so removing the reference to evidence adduced by the defendant that tends to prove that the defendant is a person of good character.

11.49 At the same time, a minor drafting inconsistency between the language used in ss 104(2) and 112 should be remedied. As suggested by Associate Professor Sue McNicol, s 112 should be amended, consistently with s 104(2), to substitute the words: 'A defendant must not be cross-examined' for the words: 'A defendant is not to be cross-examined'.[1413] A draft of s 104(2) incorporating this change is set out in Appendix 1.

Proposal 11–3 Section 104(4)(a) of the uniform Evidence Acts should be deleted from s 104(4).

Proposal 11–4 Section 112 of the uniform Evidence Acts should be amended by substituting 'A defendant must not be cross-examined' for 'A defendant is not to be cross-examined'.

Leave to cross-examine the defendant

11.50 Under s 104 of the uniform Evidence Acts, cross-examination in criminal proceedings of a defendant as to the defendant's credibility can only occur with court leave, except in limited circumstances.[1414] However, there is a difference between

1413 S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 348.

1414 Uniform Evidence Acts s 104(3) provides that 'leave is not required for cross-examination by the prosecutor about whether the defendant: (a) is biased or has a motive to be untruthful; or (b) is, or was,

s 104 of the Tasmanian legislation and the other uniform Evidence Acts, which is discussed below.

The Tasmanian provisions

11.51 Section 104(4) of the uniform Evidence Acts states that leave must not be given for cross-examination of the defendant by the prosecutor on credibility issues unless certain specified circumstances exist. The first circumstance, discussed above, is that:

> (a) evidence has been adduced by the defendant that tends to prove the defendant is, either generally or in a particular respect, a person of good character;

11.52 The approach of the Tasmanian legislation then diverges. Section 104(4)(b) of the other uniform Evidence Acts states:

> 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.

11.53 The *Evidence Act 2001* (Tas) substitutes the following provisions (referred to in this chapter as the Tasmanian provisions):

> (b) the defendant or the person representing the defendant has questioned the witnesses for the prosecution to prove that the defendant is, either generally or in a particular respect, a person of good character; or
>
> (c) the nature or conduct of the defence involves imputations on the character of the prosecutor or any witness for the prosecution.[1415]

11.54 Thus, under the *Evidence Act 2001* (Tas), leave may be given to cross-examine where the conduct of the defence includes questioning of prosecution witnesses to establish the good character of the defendant, or an attack on the character of the prosecutor or any witnesses for the prosecution, or both. Under the other uniform Evidence Acts, leave is confined to situations where evidence is adduced by the defendant relevant solely or mainly to the credibility of prosecution witnesses, and it has been admitted.

11.55 The Law Reform Commissioner of Tasmania explained the different approach as follows:

> under the [uniform Evidence Acts], the accused can cross-examine Crown witnesses uphill and down dale with respect to their bad character or his own good character but so long as their answers consist of denials the accused will not be exposed to loss of the character shield. This seems inherently unfair, particularly where the cross-examination relates to the witnesses' possible bad character. The process is equally

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unable to be aware of or recall matters to which his or her evidence relates; or (c) has made a prior inconsistent statement'.

1415 Provisions to similar effect are to be found in *Crimes Act 1958* (Vic) s 399(5)(b). The *Evidence Act 2001* (Tas), consistently with its s 104(4)(b) and (c), does not include s 104(5) of the Commonwealth and New South Wales Acts.

> harrowing, demeaning and potentially damaging for the witness in terms of the jury's perceptions where the witness simply denies the accused's suggestions as where the evidence is actually adduced.[1416]

Submissions and consultations

11.56 IP 28 asks whether the uniform Evidence Acts should be amended to mirror s 104 of the *Evidence Act 2001* (Tas).[1417] The Commissions received divergent views in response to this question.

11.57 The Tasmanian provisions are supported by the DPP NSW.[1418] The DPP NSW submits that the restrictions contained in the other uniform Evidence Acts (on the circumstances in which an accused's character may be put in issue) are 'too onerous and illogical':

> The present restrictions have the potential to leave the jury with a misleading impression of the character of the witness and the character of the accused; because it allows the accused to cross-examine the Crown witness as to character (and impugn character) without adducing any evidence at all that the witness has a tendency to be untruthful.[1419]

11.58 The DPP NSW considers that it is unfair that an accused can cross-examine Crown witnesses in relation to their bad character or the accused's good character when the Crown is prevented from cross-examining an accused as to character unless the accused actually adduced evidence to prove the Crown witness 'has a tendency to be untruthful' and the Crown obtains leave to cross-examine.

> The potential impact of such cross-examination on the jury is to impugn the credit of the Crown witness. The jury is left with an unfavourable impression of the witness, without the accused actually having adduced any evidence of substance.[1420]

11.59 The rationale behind s 104(4)(b) is said to be to allow the Crown to cross-examine the accused as to character when the accused impugns the character of the Crown witness, irrespective of how this is achieved.[1421] The DPP NSW submit that if the section is amended in line with the Tasmanian provisions, it would further discourage an accused from cross-examining Crown witnesses as to character.[1422]

11.60 The Office of the Director of Public Prosecutions Tasmania (DPP Tasmania) observes that the Tasmanian provisions are based, in part, on provisions contained in the *Evidence Act 1910* (Tas)[1423] and had, therefore, already been part of evidence law in Tasmania. The DPP Tasmania considers that these provisions are justifiably fairer to

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1416 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), 24.
1417 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 9–4.
1418 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
1419 Ibid.
1420 Ibid.
1421 Ibid.
1422 Ibid.
1423 *Evidence Act 1910* (Tas) s 85.

the Crown than those under the other uniform Evidence Acts.[1424] Consultations confirm that cross-examination under s 104(4)(c)—on the basis that the defence has raised 'imputations on the character of the prosecutor or any witness for the prosecution'—is very rare.[1425]

11.61 The NSW PDO opposes any suggestion that the Tasmanian provisions should be adopted, characterising them as 'alarming' because they appear to mean that:

> in any case where it was suggested that prosecution witnesses were lying, the accused could be cross-examined about his or her criminal record. It would follow that in many, if not most, trials the defendant's criminal record would be admitted.[1426]

11.62 The Law Council expresses support for the existing uniform Evidence Acts provisions which, it is said, permit an accused to question prosecution witnesses about the circumstances of the events in issue and its investigation without running the risk of 'losing the shield':

> This ensures a fair trial by allowing an accused to fully test prosecution evidence without running the risk of a prejudicial past being revealed.[1427]

Policy considerations

11.63 The stated rationale for the Tasmanian provisions, and some of the comments discussed above, raise issues that were considered in developing the original ALRC proposals. ALRC 26 refers to the special position of an accused person as a witness and the need for control of credibility evidence before considering the appropriateness of loss of the accused's protection where an attack is made on the credit of prosecution witnesses. ALRC 26 states:

> *Attack on Prosecution Witnesses*. The exception permitting the prosecution to cross-examine the accused as to bad character and prior misconduct where the accused has attacked the character of a prosecution witness has been justified on the basis that the jury 'is entitled to know the credit of the man on whose word the witness' character is being impugned', and as a disincentive to unjustifiable attacks on prosecution witnesses. But it is suggested that the first argument, founded on a 'tit for tat' basis, has little merit. The attack on the credibility of prosecution witnesses may not be based on the accused's instructions. Furthermore, the purpose of the cross-examination is to suggest that such witnesses are unworthy of credit. The question of their credibility is altogether unrelated to the existence of a record of misconduct on the part of the accused. The fact that the accused has been guilty of past misconduct does not in any way reduce the danger of convicting him on the testimony of witnesses whose vulnerability as to credibility is demonstrable. The second argument has some merit, in that the approach provides some disincentive to unjustifiable attacks on prosecution witnesses. But objectionable methods of defence ought not to be punished by the admission of prejudicial evidence. More important, the rule is a

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1424 Office of the Director of Public Prosecutions Tasmania, *Consultation*, Hobart, 15 March 2005.
1425 Ibid; P Underwood, *Consultation*, Hobart, 15 March 2005.
1426 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1427 Law Council of Australia, *Submission E 32*, 4 March 2005.

> disincentive to justifiable attacks on credibility. The mechanism for solving the problem is too broad in effect. It is suggested that there are other methods which do not entail unjustifiable detriment to the accused. Apart from doubting the validity of the traditional rationales of this exception, a number of very powerful criticisms may be made of it … In addition, to permit such evidence underestimates its prejudicial impact.[1428]

11.64 ALRC 26 notes criticism of laws that take a lenient approach towards permitting cross-examination where the accused has attacked the character of a prosecution witness. In this context, the report records the United Kingdom Criminal Law Revision Committee's summary of the major arguments against this approach, which state that:[1429]

- it discourages an accused with a criminal record from attacking the credibility of Crown witnesses. If the Crown witnesses' credibility is properly open to attack, then the jury should know about it;
- the admissibility of evidence adverse to the accused will depend on the tactics of the defence. This is wrong. The legal advisers are placed in the invidious position of having to choose between leaving the tribunal of fact in ignorance of the facts behind the evidence given by the prosecution witnesses and revealing such facts, but allowing the prosecution as a result to introduce prejudicial evidence against the accused including evidence of prior convictions. Whether the accused is convicted or not may depend on the way in which this choice is made, but it is not one that legal advisers should be called on to make. A Rule that operates in this way turns a criminal trial into a kind of game;
- the sanction will apply whether the attack made is necessary for the accused's defence or not and whether the attacks made on the prosecution witness are true or not;
- if a sanction is required for false attacks on prosecution witnesses, the sanction should not be one which will make it more likely that the accused will be convicted because of prejudice that may be raised against him because of the allegations made in cross-examination to demonstrate his bad character;
- if cross-examination of an accused as to his bad character is not permitted because it would be prejudicial, it does not become any less prejudicial because the accused makes an attack on the character of prosecution witnesses;
- the law allows an attack on the accused's credibility where he does not in his evidence attack the character of a prosecution witness, but his complete defence involves such an attack. If 'tit for tat' is the justification, the law goes further than is warranted … [1430]

1428 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [821].

1429 Criminal Law Revision Committee England and Wales, *Evidence (General)*, Report 11 (1972).

1430 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411] citing Criminal Law Revision Committee England and Wales, *Evidence (General)*, Report 11 (1972).

11.65 The Law Commission of England and Wales (Law Commission), in its 2001 report *Evidence of Bad Character in Criminal Proceedings*, repeated similar criticisms of the English equivalent of the Tasmanian provision.[1431] In particular, the Law Commission does not support the 'tit for tat' argument and notes a lack of clarity as to what constitutes an imputation, how the allegation has to be made to count as an imputation, and uncertainty as to the circumstances in which the judicial discretion to exclude the cross-examination can or will be exercised.[1432]

11.66 ALRC 26 also notes a further compelling objection to the broader approach:

> it could tempt the police to extract confessions by violence from persons of bad character who cannot set up the violence at their trial for fear of exposing their records.[1433]

11.67 ALRC 26 comments that evidence as to the credibility of the accused is generally

> not of the same importance as that of Crown witnesses. What the accused says in his own defence is naturally suspect in any case. What is important is not the accused's bare assertion, but the extent to which his version of the facts may cast doubt on the prosecution's version. It helps very little in arriving at a just conclusion to know that the accused is an habitual liar, because of the circumstances in which he is placed even a normally honest person would be strongly tempted to lie and would quite possibly do so.[1434]

The Commissions' view

11.68 In the Commissions' view, there are strong arguments in favour of retaining the approach taken by the uniform Evidence Acts and for rejecting the Tasmanian provisions. The reasons articulated in ALRC 26 and by reports of United Kingdom law reform bodies for rejecting a more permissive approach towards allowing cross-examination of defendants remain applicable.

11.69 It should be noted that the ALRC originally recommended an approach narrower than that eventually taken in the uniform Evidence Acts. The ALRC proposal was limited to the situation where:

> evidence has been admitted that—
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> (i) was given by the defendant;
>
> (ii) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and

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1431 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.24]–[4.84].

1432 Ibid, [4.68].

1433 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411] citing *Curwood v The Queen* (1944) 69 CLR 561, 577.

1434 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [411].

(iii) was adduced solely or mainly to impugn the credibility of that witness.[1435]

11.70 By contrast, the uniform Evidence Acts provision applies where evidence is adduced by the defendant from any witness, including the defendant, and admitted. Nonetheless, the relevant policy concerns support a much more limited approach than that adopted in the Tasmanian Act.

11.71 Turning to the justifications advanced for the Tasmanian provisions, several points may be made. First, it is asserted that under the other uniform Evidence Acts, Crown witnesses can be cross-examined 'uphill and down dale with respect to their bad character'.[1436] This should not happen having regard to the sections in the uniform Evidence Acts which limit cross-examination[1437] and further limit cross-examination as to credibility through the requirement of substantial probative value.[1438] Properly applied, these provisions should prevent cross-examination of the kind suggested and limit such cross-examination to appropriate cross-examination.

11.72 It is also suggested that it is unfair that the defendant can put allegations and not lose the character shield when those allegations are denied. However, in that situation there is no evidence before the jury of any blemish on the witnesses' character—only an allegation. Further, the jury will be told that allegations in questions are not evidence and it is the answers that are the evidence.

11.73 It is, of course, extremely unpleasant, and can be 'harrowing, demeaning and potentially damaging',[1439] for witnesses to face allegations reflecting badly on their character. However, it is both unethical and imprudent for counsel to put such allegations to witnesses if they are without reasonable foundation or there are no reasonable grounds for believing that the suggestion would diminish the witness' credibility.[1440] Putting allegations of bad character to witnesses which the witnesses deny can prejudice the attitude of the tribunal of fact towards the case of the party putting the allegations—particularly if that is repeated.

11.74 Particular concerns have arisen about attacks on the credibility of witnesses in sexual assault cases. These concerns have, to some extent, been addressed by rape shield laws, which are discussed in Chapter 18.

1435 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Appendix A, Evidence Bill 1987, cl 97(4)(b).

1436 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), 24.

1437 Uniform Evidence Acts s 41 gives the judge wider powers of control than those under the previous Tasmanian provision: *Evidence Act 1910* (Tas) s 103.

1438 The Law Commission of England and Wales recommends an enhanced relevance requirement of 'substantial probative value' to address concerns about inadequate protection of prosecution witnesses in preference to the loss of shield approach: Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [4.55]–[4.56].

1439 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996), 24.

1440 See, for example, *The Victorian Bar Inc Practice Rules* (Vic), rr 38–40.

11.75 In the Commissions' view, the arguments in support of the Tasmanian provisions are significantly overstated and the relevant policy concerns support the narrower approach of the other uniform Evidence Acts. The Commissions do not propose any amendment to s 104 of the uniform Evidence Acts in this regard.

Rebutting denials in cross-examination by other evidence

11.76 Section 106 of the uniform Evidence Acts 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.

11.77 Explaining the proposal on which s 106 of uniform Evidence Acts is based, the ALRC considered that the collateral facts rule should not be retained in the same form that existed at common law. The ALRC considered that the common law 'finality rule' is 'an artificial and inflexible limitation which may result in the court being misled'.[1441] 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.[1442]

11.78 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.[1443] 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.[1444]

11.79 Section 106 provides that the credibility rule does not apply to certain categories of evidence that tend to rebut denials in cross-examination of matters put to a witness that are relevant only to credibility, provided that the witness has previously denied the substance of such evidence. Section 106 allows the following categories of evidence to be adduced otherwise than from the witness:

- the witness' bias or motive to be untruthful;

1441 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [409].

1442 Ibid, [409].

1443 Gans and Palmer comment 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.

1444 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' ability to be aware of matters to which his or her evidence relates;[1445]
- the making of a prior inconsistent statement by the witness;[1446]
- the witness' conviction of an offence, under Australian law or the law of another country; or
- the making of a knowingly or recklessly false representation by the witness while under an obligation (imposed under Australian law or the law of another country) to tell the truth.[1447]

11.80 IP 28 notes that,[1448] while the list of exceptions in s 106 appears to be exhaustive, courts have suggested that the list of exceptions to the collateral facts rule under the common law is not closed, and a flexible approach to the rule should be adopted.[1449] The uniform Evidence Acts may have 'fallen behind the developments achieved at common law' in this area[1450] and be more restrictive than the common law.

11.81 It is 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'.[1451] Associate Professor Sue McNicol argues that such an amendment would be consistent with the general tenor of the uniform Evidence Acts.[1452]

Developments at common law

11.82 McHugh J has highlighted the difficulty on occasions in drawing the distinction that the common law requires, between evidence relevant to credibility and evidence relevant to facts in issue, and in determining whether a matter is properly to be regarded as a collateral matter for the purposes of the collateral fact rule.[1453] In the recent case of *Nicholls v The Queen*, McHugh J stated:

1445 Compare s 104(3)(b) which also includes an express reference to the inability to 'recall' matters to which the witness' evidence relates: see further, *R v PLV* (2001) 51 NSWLR 736. See also S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8200]; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [104.35].

1446 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.

1447 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.

1448 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [9.45].

1449 *Natta v Canham* (1991) 104 ALR 143; *R v Lawrence* [2002] 2 Qd R 400; *R v Lowrie and Ross* [2000] QCA 405; *Kurgiel v Mitsubishi Motors Aust Ltd* (1990) 54 SASR 125; *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 7 April 1996).

1450 *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 23 April 1996), [6].

1451 S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 351.

1452 Ibid, 351.

1453 *Nicholls v The Queen* (2005) 213 ALR 1, [42]–[43].

> Given the problems with the finality rule and the cases that are not explicable in terms of the rule, common law courts should now regard that rule as a rule of convenience—a rule for the management of cases—rather than a fixed rule or principle. Once it is recognised that it is a rule of convenience, courts should take a more liberal approach to admitting evidence showing a lack of credit or credibility of a witness than the traditional approach of the common law.[1454]

11.83 McHugh J later continued:

> The finality rule is important to the efficient conduct of litigation. Without it, the principal issues in trials would sometimes become overwhelmed by charge and counter-charge remote from the cause of action being litigated. In many cases, the finality rule also protects witnesses from having to defend themselves against discreditable allegations that are peripheral to the issues. But the common law should not have any *a priori* categories concerning the cases where the collateral evidence rule should or should not be relaxed. It should be regarded as a flexible rule of convenience that can and should be relaxed when the interests of justice require its relaxation. Avoiding miscarriages of justice is more important than protecting the efficiency of trials.[1455]

11.84 The judge concluded:

> The collateral evidence rule should therefore be seen as a case management rule that is not confined by categories. Because that is so, evidence disproving a witness's denials concerning matters of credibility should be regarded as generally admissible if the witness's credit is inextricably involved with a fact in issue. Consistently with the case management rationale of the finality rule, however, a judge may still reject rebutting evidence where, although inextricably connected with the fact in issue, the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. In such cases, the interests of justice do not require relaxation of the general rule that answers given to collateral matters such as credit are final.[1456]

11.85 The other judges in *Nicholls* declined the opportunity to redefine the collateral evidence rule.[1457] However, similar policy reasoning to that employed by McHugh J could be used to support broadening s 106 of the uniform Evidence Acts.

Submissions and consultations

11.86 IP 28 asks whether s 106 of the uniform Evidence Acts should be amended to expand the categories of rebuttal evidence relevant to a witness' credibility that are admissible.[1458]

1454 Ibid, [53].
1455 Ibid, [55].
1456 Ibid, [56].
1457 Ibid, expressly: Gleeson CJ, [2]; Kirby J, [204] (referring to the existence of the uniform Evidence Acts; the fact that the Acts are under consideration in common law jurisdictions; and the inappropriateness of the High Court embarking on a significant task of law reform when adoption of the Acts would solve at least some of the problems); Hayne and Heydon JJ, [289] (rejecting the suggestion of a discretion).
1458 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 9–6.

11.87 Some submissions and consultations agree that the common law may provide a broader basis on which to admit such evidence;[1459] and there is some support for amending s 106 to add a broader discretion to cover situations where the evidence does not fall within the existing exceptions.[1460]

11.88 The DPP NSW submits that (as suggested by Associate Professor McNicol) s 106 should be amended to include a general discretion to allow proof of collateral matters where the court is satisfied that the probative value outweighs the disadvantages of time, cost and inefficiency.[1461] The Law Council agrees with this position and comments that:

> Such a provision will focus the attention of the court on the substantial issues in the case rather than upon the requirements of a technical rule seeking to define the indefinable. This approach should avoid the sophistry of discussion found in the recent High Court decision of [*Nicholls*]. It would also importantly give the court a discretion to admit expert evidence relating to the credibility of a witness where it was felt this would usefully contribute to an ultimate determination of the material facts in issue.[1462]

The Commissions' view

11.89 The debate in this area is a product of the tension between certainty and predictability on the one hand and flexibility and uncertainty on the other. Is a rules approach to be preferred to a discretionary approach?

11.90 In the Commissions' view, the need is for more flexibility. One option is to include a balancing discretion to allow proof of collateral matters where the probative value outweighs the disadvantages of time, costs and inefficiency that may flow from its admission.[1463] A variation of that option would be to require that the probative value substantially outweigh the various disadvantages. Another option is to allow such evidence to be led with the leave of the court. That would import the provisions contained in s 192, in particular, the following inclusive list of matters would need to be considered:

> (a) the extent to which [granting leave] would be likely to add unduly to, or to shorten, the length of the hearing; and
>
> (b) the extent to which [granting leave] would be unfair to a party or to a witness; and

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1459 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005.

1460 Queensland Bar Association, *Consultation*, Brisbane, 9 February 2005; Law Council of Australia, *Submission E 32*, 4 March 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1461 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1462 Law Council of Australia, *Submission E 32*, 4 March 2005.

1463 S McNicol, 'Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth)' (1999) 23 *Criminal Law Journal* 339, 351.

(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.

11.91 The Commissions' present view is that the latter option should be adopted. The issue is one of case management and the leave requirements are directed precisely to that issue. To adopt a balancing test in either form may impose a test that is too high and may be confusing because of the similarities of its language to that of s 135. It is also suggested that the best approach is to combine a leave requirement with the current provision, so that the trial judge and parties have the predictability and trial management advantage of a list of categories to which regard can be had while, at the same time, having the opportunity in appropriate cases to have evidence admitted that is not within those categories.

11.92 Another issue raised in IP 28 is whether s 106 should be amended to allow rebuttal evidence in respect of the credibility of a witness to be adduced if the witness has 'not admitted', rather than denied, the substance of particular evidence put to the witness on cross-examination.[1464] That is, should s 106 also apply where the witness has not admitted the substance of the evidence put to him or her—for example, where the witness does not remember?

11.93 While some opposed this suggestion,[1465] the Commissions accept that unless a broad interpretation is given to the requirement of denial, there will be cases where witnesses claim a lack of recollection and other evidence supporting the allegation put should be received. The view is expressed that the courts may give the requirement of denial a broad interpretation.[1466] But it would be unwise to rely upon broad interpretation of such a provision in light of the past strict literal interpretation of a number of other sections.[1467] Accordingly, the provision should include the words 'or not admitted' after the words 'has denied'. A draft rewording of s 106 is included in Appendix 1.

11.94 Another concern raised is the interpretation of the phrase 'a false representation while under a legal obligation … to tell the truth' in s 106(2)(e). Plainly, this phrase refers to situations where it is alleged that someone has lied in previous legal proceedings. An issue has been raised, however, as to whether the language of the

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1464 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 9–5.

1465 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1466 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.40]–[106.45], relying on *R v Souleyman* (Unreported, New South Wales Supreme Court, Levine J, 5 September 1996).

1467 There might be legitimate concerns as to the opening of 'floodgates' save for the requirement in s 103 that the initial cross-examination should be as to matters having substantial probative value and the requirements of the suggested discretion to admit.

subsection would enable the admission of evidence to prove that any answer given by a witness in cross-examination was a lie.[1468] It is suggested that this would make all other exceptions in s 106 redundant.[1469]

11.95 Accepting for present purposes that the suggested construction is open, it should, applying the rules of statutory construction, be rejected because it would render the rest of the section redundant. That could not have been the intention of the legislature.[1470] In those circumstances, the Commissions consider there is no need to change these words.

Proposal 11-5 Section 106 of the uniform Evidence Acts should be amended to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination.

11.96 Finally, an issue has been raised as to whether a provision should be included to permit the calling of evidence relevant to meet the rebuttal evidence adduced under s 106. Section 108 limits such evidence to evidence from the person whose credibility has been attacked and to evidence of prior consistent statements. The need for widening the scope of s 108 needs to be investigated and, if necessary, the appropriate changes identified.

Question 11–1 Should s 108 be extended to refer to any evidence relevant to rebuttal evidence adduced under s 106? If so, in what way should it be extended?

Credibility of persons making a previous representation

11.97 As discussed in Chapter 7, 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.[1471] 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

1468 C Maxwell, 'Credibility, Collateral Facts and the Evidence Act' (1996) 8(7) *Judicial Officers Bulletin* 51, 51–52. Note: the section presumably applies to non-curial situations—eg, statutory declarations.

1469 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [106.35]; S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8220]. This point was left open in *R v Spiteri* [2004] NSWCCA 321, [50]–[51]: Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.

1470 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 303, 311, 321; *Norton v Long* [1968] VR 221, 223—applying the maxim, *ut res magis valeat guam pereat*.

1471 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.

admitted evidence relevant to the credibility of the person who made that representation.[1472]

11.98 Concern has been expressed about whether s 108A extends to evidence relevant to re-establishing the credit of the person who made the previous representation after evidence has been admitted attacking that credit.[1473]

11.99 Research and consultations have not revealed any examples pointing to such a problem in practice. The Commissions suggest that the problem does not in fact arise because s 108A is not limited by reference to the particular phase of the credibility issue—it applies to evidence led both to attack credit and to rehabilitate credit. It is the view of the Commissions that the section enables evidence to be admitted in either situation as long as it 'could substantially affect the assessment of the credibility of the person who made the representation'.

Expert evidence going to credibility

11.100 Issues have been raised about the need to provide further exceptions to the credibility rule to allow expert opinion evidence to be led from witnesses in examination in chief on matters going to the credibility of other witnesses.[1474]

11.101 In this context, reference has been made to *Toohey v Metropolitan Police Commissioner*.[1475] In this case, the House of Lords held that an accused person should be permitted to adduce medical evidence as to the hysterical and unstable nature of the alleged victim of an assault. Pearce LJ commented:

> Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, it must be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.

1472 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.

1473 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.8580].

1474 Evidence Acts Review Workshop for the Judiciary, *Consultation*, Sydney, 30 April 2005.

1475 *Toohey v Metropolitan Police Commissioner* [1965] AC 595.

11.102 Pearce LJ stated that it is 'obviously in the interests of justice that such evidence should be available':

> The only argument that I can see against its admission is that there might be a conflict between the doctors and that there would then be a trial within a trial. But such cases would be rare and, if they arose, they would not create any insuperable difficulty, since there are many cases in practice where a trial within a trial is achieved without difficulty. And in such a case (unlike the issues relating to confessions) there would not be the inconvenience of having to exclude the jury since the dispute would be for their use and their instruction.[1476]

11.103 While reservations have been expressed about admitting such evidence,[1477] it appears from more recent authority to be well established that, at common law, expert testimony can be admitted into evidence where it is relevant to the assessment of the credibility of a witness[1478] or relevant to the reliability of evidence such as the intellectual capacity of an accused person to answer questions put during an interview.[1479]

11.104 The revised s 106 might enable the situation that arose in *Toohey* to be addressed. The question of the mental state of the alleged victim could be made the subject of cross-examination and, depending upon the response, might be the subject of expert testimony. If, however, the alleged victim admits the matters put in cross-examination, it would not be possible to lead additional evidence such as expert evidence to give a complete picture of the alleged victims' disabilities. In addition, there will be cases where the evidence to be given by the expert could not be put to the witness and so could not be brought within s 106.[1480] There will also be cases where a party will want to lead evidence from an expert relevant to the credibility of the witness it has called and whom it cannot cross-examine.[1481]

11.105 The issue was touched on in *R v Rivkin*,[1482] a case tried under the uniform Evidence Acts. The defendant Rivkin gave evidence at trial. He was convicted. An appeal was brought on the basis that fresh evidence had emerged, namely, that when he gave evidence at the trial he was suffering from a brain tumour. It was argued that this raised the possibility that the jury may have misinterpreted his behaviour while giving evidence and this may have adversely affected their view as to his credibility.

11.106 The New South Wales Court of Criminal Appeal did not have to resolve the question of the admissibility of such evidence. Assuming, however, that expert

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1476 Ibid, 606.
1477 For example, *R v Turner* [1975] QB 834, 842; *R v Smith* (1987) VR 907.
1478 *Farrell v The Queen* (1998) 194 CLR 286.
1479 *Murphy v The Queen* (1989) 167 CLR 94.
1480 *Farrell v The Queen* (1998) 194 CLR 286 was a case where the expert testimony concerned the nature of the mental disorders from which the complainant suffered, matters about which the complainant could not be questioned.
1481 As in *Murphy v The Queen* (1989) 167 CLR 94.
1482 *R v Rivkin* (2004) 59 NSWLR 284.

evidence as to the effect of the brain tumour could only be said to be relevant to the credibility of the accused, the credibility rule would have excluded it.

11.107 The case is an extreme one. In the vast majority of cases, a party calling a witness will not wish to call evidence as to the credibility of the witness to suggest that there may be some weaknesses in that witness' credibility. However, there may be cases where there is a critical witness, who a party must call, who suffers from mental or physical disabilities which may be misinterpreted in the absence of expert testimony.

11.108 Cases such as these need to be addressed. Great care is required, however, because of the potential for a proliferation of issues, evidence and arguments which could add seriously to the time and cost of trials with only marginal benefit to the fact-finding task. It is suggested, however, that provided the exception is limited to expert testimony capable of substantially affecting the assessment of the credibility of the witness, and it is also made subject to the leave of the court, the need can be addressed with minimal risk of disadvantages for the conduct of trials.

11.109 In the Commissions' view, the uniform Evidence Acts should be amended to include a new exception to the credibility rule relating to expert testimony of substantial probative value, subject to the leave of the court. The new provision should be drafted so as to attract the admissibility requirements of s 79 of the uniform Evidence Acts. A draft provision (s 108AA) is set out in Appendix 1. The Commissions considered requiring that the evidence have substantial probative value. However, it is desirable to maintain the same test as applies elsewhere in Part 3.7. Should an issue arise in any trial as to whether such evidence should be admitted in relation, for example, to the credibility of a minor witness, that issue can be addressed by the use of s 135.

11.110 This proposal will also remove an obstacle in appropriate cases to the receipt of expert testimony relevant to the victims of crime, such as sexual offences, where their behaviour during and subsequent to the alleged offences may be relevant to the assessment of the credibility of their evidence.[1483]

Proposal 11–6 The uniform Evidence Acts should be amended to include a new exception to the credibility rule which provides that, if a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge; and (b) could substantially affect the credibility of a witness; and (c) is adduced with the court's leave.

1483 The admission of such expert opinion evidence in relation to child witnesses is discussed in Ch 18.

Unsworn statements by a defendant

11.111 Sections 105, 108(2) and 110(4) of the *Evidence Act 1995* (Cth) contain provisions addressing credibility issues that could arise where a defendant in criminal proceedings gives an unsworn statement.

11.112 These provisions are not found in the other uniform Evidence Acts. They were included in the *Evidence Act 1995* (Cth) because the right to adduce evidence in these circumstances continued to exist in criminal proceedings on Norfolk Island. However, these rights have now been abolished in Norfolk Island law by the *Evidence Act 2004* (NI).[1484] As there is no longer any need for these provisions in the *Evidence Act 1995* (Cth), they should be repealed.

Proposal 11–7 Sections 105 and 110(4) of the *Evidence Act 1995* (Cth) should be repealed.

Credibility issues in sexual offence cases

11.113 As discussed in Chapter 18, 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. One of the aims of these 'rape shield laws' is to exclude the use of a complainant's sexual history as an indicator of his or her credibility.

11.114 Chapter 18 also discusses whether evidentiary provisions found in rape shield laws should be incorporated into the uniform Evidence Acts and, if so, in what form. In addition, aspects of evidence law relating to credibility in sexual offences are also discussed in the chapters on hearsay evidence, opinion evidence, and warnings and directions to juries (Chapters 7, 8 and 16).

1484 *Evidence Act 2004* (NI) s 25.

12. Identification Evidence

Contents

Introduction

12.1 The uniform Evidence Acts address a number of issues concerning prosecution evidence that identifies a defendant as being present at or near a place where an offence for which the defendant is being prosecuted was committed. This chapter discusses selected aspects of the identification evidence provisions of the uniform Evidence Acts, including:

- the definition of identification evidence and whether it covers DNA evidence and exculpatory evidence;
- identification using pictures kept for the use of police officers ('picture identification evidence'); and
- directions to the jury regarding identification evidence.

Identification evidence under the uniform Evidence Acts

12.2 Part 3.9 of the uniform Evidence Acts (except the Tasmanian legislation) requires visual identification of an accused to take place in an identification parade, subject to certain exceptions.[1485] Picture identification is permitted in limited circumstances only and is subject to limitations that seek to minimise the prejudicial effect to the accused.[1486]

1485 *Evidence Act 1995* (Cth) s 114; *Evidence Act 1995* (NSW) s 114; *Evidence Act 2004* (NI) s 114.
1486 *Evidence Act 1995* (Cth) s 115; *Evidence Act 1995* (NSW) s 115; *Evidence Act 2004* (NI) s 115.

12.3 The *Evidence Act 2001* (Tas) does not contain equivalent provisions. Tasmania has, however, enacted s 116 of the uniform Evidence Acts, dealing with directions to the jury and the associated definition of 'identification evidence'.[1487] 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

12.4 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:
>
> (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

12.5 It has been said that the words 'or otherwise perceived' may be intended to cover 'such unusual cases as identification by touch or identification by the sound of a person's particular gait'.[1488]

12.6 IP 28 notes suggestions 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.[1489]

12.7 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'.[1490] This requirement may exclude DNA evidence—which requires the use of machinery such as thermal cyclers and

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1487 *Evidence Act 2001* (Tas) ss 3, 116.

1488 *R v Adler* (2000) 52 NSWLR 451, [36].

1489 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [10.6].

1490 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [114.15]. Therefore, the definition may not cover identification based on 'facial mapping' using data from facial recognition information technology.

chemical primers and reagents to produce a DNA profile.[1491] It may not be as easy to exclude fingerprints from the definition of identification evidence.

Submissions and consultations

12.8 IP 28 asked whether the definition of identification evidence in the uniform Evidence Acts inadvertently encompasses DNA and fingerprint evidence and, if so, whether this position should be remedied.[1492]

12.9 One view is that the definition does not cover DNA evidence. The definition requires that the evidence be 'an assertion by a person' to the effect that a defendant was, or resembles, a person who was present at a place where an offence or related act was committed.

12.10 It can be argued that experts in DNA or fingerprint analysis do not usually make any such assertion. Rather, such experts make a comparison between samples obtained at the relevant scene and samples obtained from the defendant and express opinions about the degree of similarity between the samples. The prosecution then invites the judge or jury to accept that evidence and draw the inference from it that the defendant was in fact present or at or near the place concerned.

12.11 The New South Wales Public Defenders Office (NSW PDO) states that the suggestion that the definition of 'identification evidence' covers DNA evidence and fingerprint evidence is 'ingenious' but highly unlikely to be accepted by the courts.[1493]

12.12 However, another view is that it may depend on how the evidence is presented in court.[1494] The Director of Public Prosecutions New South Wales (DPP NSW) submits that, given directions under s 116 of the uniform Evidence Acts are not suitable to this type of evidence, the position should be placed beyond doubt by excluding DNA and fingerprint evidence.[1495]

12.13 The Law Council of Australia (Law Council) states that the admissibility of DNA raises complexities that should be dealt with outside Part 3.9 of the uniform Evidence Acts. The Council also submits that the Commissions should consider extending the protection provided by Part 3.9 'beyond visual identification by witnesses'.[1496]

1491 See, Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), [39.5].

1492 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–1.

1493 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

1494 I Freckelton, *Consultation*, Melbourne, 17 March 2005.

1495 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1496 Law Council of Australia, *Submission E 32*, 4 March 2005.

The Commissions' view

12.14 In the Commissions' view, the definition of identification evidence in the uniform Evidence Acts does not, and was not intended to, cover DNA or fingerprint evidence used in identification.

12.15 There are two reasons for this conclusion. First, it would be most unusual for a witness to give evidence in the form of an assertion along the lines required by the definition. Secondly, at least in the case of DNA evidence, identification evidence is limited to identification 'by a person'. There have been no judicial decisions considering this issue. This is consistent with the view that, despite some academic commentary, the problem is conjecture.

12.16 In relation to DNA evidence specifically, Commonwealth, state and territory forensic procedures legislation, such as Part 1D of the *Crimes Act 1914* (Cth) (*Crimes Act*),[1497] regulates aspects of the admissibility of DNA evidence. Part 1D of the *Crimes Act* provides that evidence obtained from a forensic procedure (such as the taking of a DNA sample) is inadmissible if there has been a breach of, or failure to comply with, its provisions in relation to the forensic procedure or in relation to recording or use of information on the DNA database system.

12.17 However, the court has a discretion to admit the evidence if it is satisfied on the balance of probabilities of matters that justify its admission in spite of the non-compliance; or if the person who is the subject of the forensic evidence does not object to its admission.[1498] These exclusionary provisions do not apply to DNA evidence obtained outside the framework of Part 1D—for example, a crime scene sample or an informally obtained sample.[1499] In that case, admissibility will be determined under the uniform Evidence Acts or other evidence laws of the relevant jurisdiction.

12.18 In ALRC 96, the ALRC noted concerns that, due to the highly probative nature of DNA evidence, judges might tend to exercise their discretion in favour of admission rather than properly balancing each of the relevant interests, including the privacy of the accused. This would undermine the value of the protection intended by forensic procedures legislation.[1500] Therefore, the ALRC recommended that the Commonwealth amend the *Crimes Act* to provide that, with the exception of crime scene samples, law

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1497 *Crimes (Forensic Procedures) Act 2000* (NSW); *Crimes (Forensic Procedures) Act 2000* (ACT); *Forensic Procedures Act 2000* (Tas); *Crimes Act 1958* (Vic); *Criminal Law (Forensic Procedures) Act 1998* (SA); *Criminal Investigation (Identifying People) Act 2002* (WA).

1498 *Crimes Act 1914* (Cth) s 23XX. The legislation provides a list of matters that a court may consider in making this decision: *Crimes Act 1914* (Cth) s 23XX(5). If the judge admits the evidence, he or she must inform the jury of the breach or failure to comply with the legislation and give whatever warning about the evidence the judge thinks appropriate in the circumstances: *Crimes Act 1914* (Cth) s 23XX(7). Evidence obtained as a result of a forensic procedure is not admissible in proceedings against a person if it is required to be destroyed under Part 1D: *Crimes Act 1914* (Cth) s 23XY.

1499 For example, DNA evidence obtained on the analysis of a cigarette butt discarded by the accused at a police station: see *R v White* [2005] NSWSC 60.

1500 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), [44.102].

enforcement officers may collect genetic samples only from: (a) the individual concerned, pursuant to Part 1D; or (b) a stored sample, with the consent of the individual concerned (or someone authorised to consent on his or her behalf), or pursuant to a court order.[1501]

Exculpatory identification evidence

12.19 In *R v Rose*,[1502] 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 of 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.

12.20 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).[1503] In *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'.

12.21 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 AJ 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.[1504]

12.22 IP 28 asks whether concerns are raised by the application of the uniform Evidence Acts to identification evidence that is exculpatory of the accused.[1505] The NSW PDO does not propose any amendment of s 165, but is critical of the decision in *Rose*. It is said that *Rose* does not sufficiently take into account the fact that exculpatory identification evidence 'needs only to raise the possibility of a mistake, whereas identification evidence tendered by the Crown needs to affirmatively prove that the accused was the offender'.[1506]

12.23 Others who address the matter consider that the uniform Evidence Acts provisions, as interpreted in *Rose*, are adequate and do not require amendment.[1507] The Commissions share this view and do not propose any change.

1501 Ibid, rec 41–13.
1502 *R v Rose* (2002) 55 NSWLR 701.
1503 See also Ch 7, in relation to hearsay evidence of identification.
1504 *R v Rose* (2002) 55 NSWLR 701, 712–713.
1505 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–2.
1506 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1507 For example, Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

Picture identification

12.24 Section 115 of the uniform Evidence Acts (except the Tasmanian legislation) places 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.[1508]

12.25 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.[1509] Picture identification evidence is not admissible if the pictures examined suggest that they are pictures of persons in police custody.[1510] Section 115 also 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.[1511]

12.26 The terms 'in the custody of a police officer' and 'police custody' are not defined but have been interpreted as meaning 'under physical restraint'.[1512] 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.[1513]

Submissions and consultations

12.27 IP 28 asks whether the *Evidence Act 1995* (Cth) should be amended to ensure that the provisions relating to the admission of picture identification evidence where defendants are in 'police custody' are not able to be avoided by police.[1514]

12.28 The DPP NSW submits that the uniform Evidence Acts should be amended, and states:

> This could be partly achieved by including a broad definition of 'police custody' which extends to situations where the accused is either under physical restraint or voluntarily co-operating with police. The circumstances in which picture identification evidence is not admissible could be extended beyond situations where the defendant was in police custody when the pictures were examined, so as to further discourage the use of picture identification.[1515]

1508 *Evidence Act 1995* (Cth) s 115(1); *Evidence Act 1995* (NSW) s 115(1); *Evidence Act 2004* (NI) s 115(1).

1509 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 2 (1985), [189].

1510 *Evidence Act 1995* (Cth) s 115(2); *Evidence Act 1995* (NSW) s 115(2); *Evidence Act 2004* (NI) s 115(2).

1511 *Evidence Act 1995* (Cth) s 115(3); *Evidence Act 1995* (NSW) s 115(3); *Evidence Act 2004* (NI) s 115(3).

1512 *R v McKellar* [2000] NSWCCA 523. It has also been held that an accused who is in gaol is not 'in the custody of a police officer' for the purposes of s 115: *R v Batty* (Unreported, New South Wales Court of Criminal Appeal, McInerney, Abadee and Bruce JJ, 6 August 1997).

1513 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800].

1514 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–3.

1515 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005. The DPP NSW states that it is not implying that it is aware of any occasion on which police have avoided the application of the picture identification provisions.

12.29 The NSW PDO observes that, given that an accused person is only in the custody of the investigating police for a short time before being either granted bail or taken to prison, the safeguards in s 115 apply only 'to the short period when the accused is still at the police station'. The NSW PDO submits that this limitation should be removed.[1516]

12.30 Some judges of the New South Wales District Court criticise the drafting of s 115(3):

> If the intention of s 115(3) is to preclude a jury arriving at an inference adverse to an accused by propensity reasoning then it is clumsily drafted and excludes the use of photographs taken in the course of investigation where defendants have been under observation for months.[1517]

12.31 The judges state that situations involving picture evidence are usually dealt with by an explanation from the bench to the jury as to how the police came into possession of the photograph used—for example, that the picture was the photograph taken by police at arrest or taken prior to arrest but in the course of the investigation.[1518]

The Commissions' view

12.32 The picture identification provisions give primacy to identification evidence from an identification parade and are structured accordingly. The policy objective is to ensure that where a person is in police custody (the police having established the identity of the offender to their satisfaction), any attempt to secure identification evidence should be by an identification parade, that being the best method available for that purpose.[1519]

12.33 It would be a serious cause for concern if the policy objective of s 115 were able to be deliberately avoided by the police. However, it is hard to evaluate whether this situation occurs. Submissions and consultations do not indicate that police deliberately avoid the application of s 115.

12.34 The case *R v McKellar*[1520] has been cited as an example of the problem. In *McKellar*, the police officer investigating a robbery had made intensive efforts to find people in Bourke who were sufficiently similar to the appellant and willing to participate in an identification parade.[1521] When he was unsuccessful, he determined to conduct identification using a photograph of the appellant taken by police while the appellant was at the police station following his arrest on another matter. Picture

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1516 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1517 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.
1518 Ibid.
1519 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [838].
1520 *R v McKellar* [2000] NSWCCA 523.
1521 Ibid, [16]. In this he was assisted by the appellant's father, an Aboriginal Community Liaison Officer and a message on local radio stations seeking volunteers.

identification took place after the appellant had been released on bail and was held to be no longer in police custody.[1522]

12.35 *McKellar* is far from a clear cut example of police deliberately avoiding the application of s 115 and has not been cited in subsequent cases to justify picture identification.

12.36 The case also highlights some of the difficulties involved in developing a reform to place additional constraints on the use of picture identification. In *McKellar*, counsel for the appellant argued that the words 'in the custody of a police officer' in s 115(5) should be construed in a broad way to cover any kind of 'legal power or influence over the person'. The New South Wales Court of Criminal Appeal observed that, even under the widest possible interpretation, it is hard to assert that, once the appellant had been released on bail from the police station, the police had any additional 'legal power or influence' over the appellant than they had over any other member of the community.[1523] As recognised by Odgers:

> Whatever interpretation is given to the term 'police custody', it is clear that it does not extend to a situation where the police suspect that the defendant committed a crime but choose to engage in picture identification before asking or compelling the defendant to come to a police station. It follows that, in such circumstances, the picture identification evidence will not be excluded by s 115, no matter how unreasonable this decision was (unless the pictures used suggest that they are pictures of persons in police custody).[1524]

12.37 An alternative formulation was considered by the ALRC in the original evidence reports.[1525] The provision could focus on the state of knowledge of the police and on whether, for example, the person to be identified was a 'definite suspect'.[1526] In *R v Carusi*, decided under the common law, Hunt CJ at CL noted with respect to police picture identification that:

> The accused will have a harder task in persuading the exercise of the judge's discretion to exclude such evidence if the police did not then know that he was the person to arrest and charge, notwithstanding that it may at that time have been reasonable and practicable to have requested him to participate in such a parade.[1527]

12.38 Under the uniform Evidence Acts, where investigating police have deliberately sought to avoid the picture identification constraints, s 138 may be able to be used to exclude the evidence.[1528] This may be a sufficient safeguard and reduces the need to

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1522 Ibid, [17].

1523 Ibid, [34]. It was not a condition of the appellant's bail that he attend an identification parade nor could such a condition legitimately have been imposed. The bail determination and the conditions, if any, imposed upon the appellant related to other offences unconnected with the robbery.

1524 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800].

1525 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [838], fn 32; Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [188]–[190].

1526 See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800], referring to the minority judgment of Stephen and Murphy JJ in *Alexander v The Queen* (1981) 145 CLR 395, 417.

1527 *R v Carusi* (1997) 92 A Crim R 52, 64.

1528 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9800].

consider possible reforms to s 115. Subject to any further information received on this issue, the Commissions do not intend to make any proposal for reform relating to police use of picture identification.

Directions to the jury

12.39 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.

12.40 In *Dhanhoa v The Queen*, the High Court noted that, if read literally, s 116 could be taken to mean that a judge is always required to inform the jury that there is a special need for caution before accepting identification evidence whenever identification evidence has been admitted, even if the reliability of the evidence is not in dispute.[1529]

12.41 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'.[1530] So understood, the provision means that directions must be given only where the reliability of the identification evidence is disputed.[1531]

12.42 IP 28 asks whether s 116 of the uniform Evidence Acts should be amended to clarify that directions to the jury in relation to identification evidence are not mandatory.[1532]

12.43 The NSW PDO states that warnings about identification evidence under s 116 are 'so fundamental that they should be given whether or not the accused's counsel remembers to ask for them' and opposes amendment of s 116.[1533]

12.44 The DPP NSW submits that s 116 should be amended to make it clear that directions under s 116 are mandatory only where the reliability of the identification evidence is disputed.[1534] The Law Council notes that any 'technical demand' for a

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1529 *Dhanhoa v The Queen* (2003) 199 ALR 547, 551.
1530 Ibid, 552.
1531 Ibid, 552.
1532 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 10–4.
1533 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1534 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

mandatory warning under s 116 can be dealt simply 'under appellate rules which make it clear that such a technical error cannot give rise to a substantial miscarriage of justice'.[1535]

12.45 While *Dhanhoa* may solve the problem, the option remains, for example, to amend s 116(1) by adding after the words 'if identification evidence has been admitted' the words 'and the reliability of that evidence is in dispute'.

12.46 However, the Commissions consider that this could create problems of interpretation in the future, which could only be avoided by ensuring that other provisions in the uniform Evidence Acts which assume the operation of the adversarial system contain similar riders. Therefore, it is preferable to rely upon *Dhanhoa* and not amend s 116.

In-court identification

12.47 The NSW PDO notes that Part 3.9 of the uniform Evidence Acts does not deal with the question of in-court identification:

> No doubt the drafters of this provision assumed that practitioners would take it as read that in court identification was impermissible. However this was not the case, and initially the Crown argued that 'visual identification evidence' did not include in court identification.[1536]

12.48 The NSW PDO submits that a new provision should be inserted into the uniform Evidence Acts, making it clear that, subject to the exceptions set out in s 114(3), in-court identification is inadmissible.

12.49 The Commissions' view is that the definition of visual identification evidence, as defined in s 114(1), clearly covers in-court identification—for example, an identification of the defendant sitting in the dock by a witness who observed the offender at the scene of the crime[1537]—and that no amendment is necessary.

12.50 The extent to which in-court identification is currently used in court proceedings, and in what contexts, is unclear. Subject to any further information received on this issue, the Commissions do not intend to make any proposal for reform relating to in-court identification.

Question 12-1 To what extent is in-court identification used in practice and is this a problem? Should Part 3.9 of the uniform Evidence Acts be amended to make it clear that, subject to the exceptions set out in s 114(3), in-court identification is inadmissible?

1535 Law Council of Australia, *Submission E 32*, 4 March 2005.

1536 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, citing *R v Taufua* (Unreported, New South Wales Court of Criminal Appeal, Priestley AP, James and Barr JJ, 11 November 1996).

1537 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9500].

13. Privilege

Contents

Introduction

13.1 A privilege is essentially a right to resist disclosing information that would otherwise be ordered to be disclosed.[1538] Privileges are generally established as a matter of public policy. For example, client legal privilege is premised on the principle that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive fully informed legal advice. Privileges are not only available as part of the rules of evidence, but also apply outside court as a substantive doctrine wherever information may be compulsorily acquired, including by administrative agencies.[1539] Privilege may, therefore, be claimed in the production of documents before a trial (including with respect to an application for discovery or the

1538 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

1539 *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.

issue of a subpoena), the answering of interrogatories, the giving of testimony or in the course of an administrative investigation.

13.2 Under the *Evidence Act 1995* (Cth), the following privileges are available:

- client legal privilege;[1540]
- privilege in respect of religious confessions;[1541] and
- privilege in respect of self-incrimination in other proceedings.[1542]

13.3 In addition, there are three types of evidence which may be excluded in the public interest:

- evidence of reasons for judicial decisions;[1543]
- evidence of matters of state (public interest immunity);[1544] and
- evidence of settlement negotiations.[1545]

13.4 The *Evidence Act 1995* (NSW) contains these and two additional privileges: a professional confidential relationship privilege and a sexual assault communications privilege.[1546]

13.5 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 (by a victim of a sexual offence in the course of receiving counselling or treatment for any harm suffered in connection with the offence) respectively. Section 127A operates only in civil proceedings and s 127B operates only in criminal proceedings.

13.6 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. The Terms of Reference of the original evidence inquiry limited the extent to which the ALRC could deal with privileges in the pre-trial context. However, the ALRC suggested that it was not necessarily unreasonable that, for example, access could be

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1540 *Evidence Act 1995* (Cth) Pt 3.10, Div 1.
1541 Ibid s 127.
1542 Ibid s 128.
1543 Ibid s 129.
1544 Ibid s 130.
1545 Ibid s 131.
1546 *Evidence Act* 1995 (NSW) Part 3.10, Div 1A and Div 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). These provisions are discussed further below.

granted to documents under the common law at the investigation stage that were then protected in the courtroom by the Act.[1547]

13.7 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.[1548]

13.8 Kirby J has stated that a 'great deal of inconvenience would be avoided if the bringing forward of evidence for use in a later trial (as by responding to an order for discovery, a subpoena or some other ancillary process) were held to fall within the Act'.[1549]

Potential areas for reform

13.9 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.[1550] 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'.[1551]

13.10 In IP 28, the ALRC asked whether the client legal privilege section of the Acts should be extended to cover pre-trial matters, and whether the other privilege sections of the Acts should similarly be extended.[1552] Submissions and consultations to date have indicated such a move is widely supported.

13.11 Since the commencement of the Commonwealth and New South Wales legislation in 1995, a number of appellate cases have applied the privilege provisions to discovery and inspection of documents on the basis that the uniform Evidence Acts have a derivative application to the common law.[1553] However, in *Mann v Carnell*[1554] and *Esso v Commissioner of Taxation*,[1555] 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

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1547 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [199].
1548 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 416.
1549 *Mann v Carnell* (1999) 201 CLR 1.
1550 See Ch 2.
1551 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [108].
1552 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 11–1, 11–2.
1553 See *Telstra Corporation v Australis Media Holdings (No 1)* (1997) 41 NSWLR 147; *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.
1554 *Mann v Carnell* (1999) 201 CLR 1.
1555 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49.

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.[1556]

13.12 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.[1557] 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 has also amended its rules in line with the Supreme Court of New South Wales.[1558]

13.13 Client legal privilege is the area identified in this Inquiry as being most significantly affected by the operation of two legal regimes. As noted below, there are some significant differences between the rules of legal professional privilege under the common law and the client legal privilege sections of the uniform Evidence Acts. 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.[1559]

13.14 Most of the submissions dealt with issues regarding privileges separately (or were only concerned with client legal privilege), although there was the general support noted above. On that basis, in this chapter the possible extension of the Acts to pre-trial proceedings will be discussed in relation to each of the privileges, starting with client legal privilege.

13.15 The chapter then proposes amendments to some of the client legal privilege sections with the aim of clarifying unclear terms or, in some cases, aligning the Acts with developments at common law that are supported by the Commissions.

13.16 The chapter then looks at the confidential communications, sexual assault communications and medical communications privileges available under the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) and asks whether one of these models should be adopted by the Commonwealth Act.

1556 Ibid, 62.

1557 These rules apply Pt 3.10 of the *Evidence Act 1995* (NSW) to discovery, interrogatories, subpoenas, notices to produce and oral examinations: *Supreme Court Rules* Pts 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.

1558 *Supreme Court Rules 1937* (ACT) O 34, r 2.

1559 For example, Pt 7 of the *Criminal Procedure Act 1986* (NSW). These privileges are discussed further below.

13.17 The chapter also considers criticisms of the certification process available under the sections dealing with the privilege against self-incrimination. Finally, the chapter briefly considers submissions received regarding the three types of evidence that may be excluded in the public interest, but makes no proposal for change.

Client legal privilege

13.18 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.

13.19 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.[1560] The privilege may also be considered a human right. Wilson J in *Baker v Campbell* commented that 'the adequate protection according to law of the privacy and liberty of the individual is an essential element of a free society and … [the] privilege … is an important element in that protection'.[1561]

13.20 On balance, the benefits of this freedom are considered to outweigh the alternative benefit of having all the 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'.[1562] The protection only applies where it is intended for a proper purpose—communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected.[1563]

13.21 In the Interim Report of the original ALRC evidence inquiry (ALRC 26), the rationale for the privilege was set out according to the types of communications it protected.

- *Communications between the Lawyer and Client*. Privilege attaches where advice only is sought in addition to the situation where litigation is pending or anticipated. The privilege has been regarded as that of the client and the rationale has been the need for frank and complete communication between lawyer and client so that the client can receive adequate assistance in the protection, enforcement or creation of legal rights.
- *Third Party Communications*. Three arguments were advanced for this protection. First, it has been argued that it is necessary that the client be able to prevent disclosure by the lawyer of anything obtained by him or her when

1560 *Baker v Campbell* (1983) 153 CLR 52.
1561 Ibid; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877] citing *Baker v Campbell* (1983) 153 CLR 52, 416.
1562 *Baker v Campbell* (1983) 153 CLR 52.
1563 See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Evidence Act 1995* (Cth) s 125.

> employed by the client. If information obtained by a solicitor for promoting his or her client's cause were not privileged, it would be impossible to employ a solicitor to obtain the evidence and information necessary to support a case. Secondly, the principle of protection of the lawyer's brief. Thirdly, and integral to the adversary system, the need not to disclose a party's evidence to an opponent.[1564]
>
> The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.[1565]

13.22 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).[1566]

The test

13.23 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*.[1567] In 1999, the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation*[1568] 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.[1569]

13.24 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*.[1570]

13.25 Section 118 creates a privilege for legal advice. ALRC 26 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*:

1564 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

1565 *Baker v Campbell* (1983) 153 CLR 52; Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

1566 *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.

1567 *Grant v Downs* (1976) 135 CLR 674.

1568 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49.

1569 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [881].

1570 *Grant v Downs* (1976) 135 CLR 674, 678. See S Odgers, *Uniform Evidence Law* (6th ed, 2004), 457.

> 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.[1571]

13.26 Section 118 provides that evidence is not to be adduced if, on objection by the client, the court finds that adducing the evidence would result in disclosure of:

> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between two or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

13.27 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. 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.[1572]

13.28 Although there is alignment of the common law with the uniform Evidence Acts in relation to the dominant purpose test, IP 28 identified 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.[1573] 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.[1574]
- There may be a difference between the common law and the uniform Evidence Acts as to whether a lawyer must have a current practicing certificate

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1571 *Baker v Campbell* (1983) 153 CLR 52, 408, cited in Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [438].

1572 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [877].

1573 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

1574 A Ligertwood, *Australian Evidence* (4th ed, 2004), 281.

- In relation to waiver of the privilege, s 122 applies if the client or party has knowingly and voluntarily disclosed the substance of the evidence. The common law, in contrast, imposes an 'inconsistency' test, whereby the privilege will be lost where the disclosure is incompatible with the retention of confidentiality.[1575]

Application to pre-trial proceedings

13.29 Legal professional privilege at common law can be claimed in civil proceedings at the interlocutory stage, during the course of a criminal or civil trial, and in non-judicial proceedings.[1576]

13.30 Associate Professor Sue McNicol has described the history of legal professional privilege under Australian law as follows:

> Prior to the enactment of the *Evidence Act 1995* (Cth), legal professional privilege was governed by the sole purpose test at common law due to the 1976 decision of the High Court in *Grant v Downs*. Then, since 1983 in Australia, legal professional privilege has applied not only in curial and quasi-curial contexts, but also in non-curial contexts, such as administrative and investigative proceedings, and in the extra-judicial processes of search and seizure and in proceedings before bodies having the statutory power to require the giving of information. This was mainly due to the landmark 4:3 decision of the High Court in *Baker v Campbell* which proclaimed legal professional privilege as more than just a mere rule of evidence capable of applying in judicial proceedings but as a fundamental and substantive common law principle capable of applying to all forms of compulsory disclosure, unless some legislative provision expressly or impliedly abrogated it. Then, in 1995, the *Evidence Act* (Cth) created a privilege, known as client legal privilege, with a dominant purpose test that applies only in the 'adducing of evidence' in a curial context (in the Federal courts to which the Act applies) and remained silent on other, especially pre-trial contexts. Such a course of action has led to both much litigation and confusion, especially on the question whether the Act has an indirect or implied effect on pre-trial contexts.[1577]

13.31 In the case of client legal privilege, one evidence text notes that in all but a small proportion of cases, all of the privilege issues will arise in relation to pre-trial procedures.[1578] McNicol notes that most claims of privilege are raised in the interlocutory stages of civil proceedings.[1579]

1575 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 204.

1576 S McNicol, *Law of Privilege* (1992), 52.

1577 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 189–190.

1578 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 416.

1579 S McNicol, *Law of Privilege* (1992), 52.

13.32 As outlined above, in *Mann v Carnell*[1580] and *Esso v Commissioner of Taxation*,[1581] the High Court found that the uniform Evidence Acts applied to the adducing of evidence only in relevant proceedings.

13.33 In New South Wales, the Supreme Court and the District Court have amended their rules to provide specifically that the *Evidence Act 1995* (NSW) applies pre-trial.[1582] These rules apply Part 3.10 of the *Evidence Act 1995* (NSW) to discovery, interrogatories, subpoenas, notices to produce and oral examinations. For example, Rule 23 of the *Supreme Court Rules* defines a 'privileged document', in part, as a 'document of which evidence could not be adduced in the proceedings over the objection of any person, by virtue of the operation of Part 3.10 Division 1 of the Evidence Act'. These rules apply the Act only to civil proceedings and not, for example, to subpoenas in criminal matters.[1583]

Submissions and consultations

13.34 IP 28 asked whether the uniform Evidence Acts should 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).[1584]

13.35 There was general support for this proposition in the submissions and consultations.[1585] One senior judicial officer told the Inquiry that if the uniform Evidence Act provisions were considered good for trials, then they should be applied pre-trial.[1586]

13.36 The Law Council of Australia (Law Council) can see no justification for different privilege rules applying at trial and prior to trial.

> The difficulties posed by the failure of the Acts directly to cover pretrial proceedings can be seen in litigation concerning client legal privilege where parties have sought to apply the statutory privilege at the important discovery and inspection stage of civil litigation. With this stage being crucial to decisions about settlement and trial it is here that in practice issues of privilege are necessarily fought. In the Council's opinion it makes little sense for discovery and inspection to be governed by common

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1580 *Mann v Carnell* (1999) 201 CLR 1.

1581 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 2001 CLR 49.

1582 *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.

1583 It should be noted that the *Civil Procedure Act 2005* (NSW), which provides for the making of uniform civil procedure rules consistent with the Act, received assent on 1 June 2005. A date of commencement had not been proclaimed at time of publication. The new *Civil Procedure Act* continues the application of the *Evidence Act 1995* (NSW) to pre-trial proceedings.

1584 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–1.

1585 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005; T Game, *Consultation*, Sydney, 25 February 2005; Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005; High Court of Australia, *Consultation*, Canberra, 9 March 2005.

1586 High Court of Australia, *Consultation*, Canberra, 9 March 2005.

> law privilege rules which may enable litigants to obtain discovery and inspection of documents which, under the uniform Evidence Acts, will be unavailable at trial.[1587]

13.37 The Australian Government Solicitor (AGS) argues that the case for applying one set of rules on disclosure of information (in whatever form) at all stages of a legal proceeding is 'overwhelming'.[1588] However, the AGS does not argue that this means the uniform Evidence Act rules should necessarily be extended, but rather that the approach of all jurisdictions should be examined to determine what is the prevailing model.[1589]

13.38 The Director of Public Prosecutions in New South Wales (DPP NSW) agrees that the Acts should be extended to apply pre-trial, subject to concerns regarding the availability of client legal privilege to prosecutors under s 123 of the Uniform Evidence Acts, which are discussed below.[1590]

13.39 The view of the Australian Securities and Investments Commission (ASIC) is that uniform application of client legal privilege is a sensible approach, provided this does not represent an extension of the circumstances in which those privileges currently arise.

> The extension of the regime under the uniform Evidence Acts to replace the common law regime in circumstances where it now applies would assist in simplifying the legal terrain upon which ASIC, and other litigants, currently work.[1591]

13.40 However, in relation to other privileges, ASIC considers that extension of each privilege to contexts such as pre-trial procedure should be considered on a case by case basis, having regard to the underlying policy of the privilege and the development of the law related to the privilege.

13.41 The CPA Australia and Institute of Chartered Accountants in Australia (Australian Accounting Bodies) consider that it would be equitable for client legal privilege to apply, in particular, in response to s 264 notices under the *Income Tax Assessment Act*.[1592]

13.42 There may be sound policy reasons why client legal privilege should not apply at investigatory stages. In the context of developing effective regulatory law systems, it is important to consider the different approaches to regulatory procedure by agencies such as the Australian Competition and Consumer Commission (ACCC), the Australian Taxation Office (ATO) and the Australian Customs Service. It was suggested that this question is 'worth a whole other inquiry'.[1593]

1587 Law Council of Australia, *Submission E 32,* 4 March 2005, 22–23.
1588 Australian Government Solicitor, *Submission E 28,* 18 February 2005.
1589 Ibid, 2.
1590 Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005.
1591 Australian Securities & Investments Commission, *Submission E 33,* 7 March 2005, 5.
1592 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27,* 23 February 2005.
1593 S Mason, *Consultation,* Sydney, 31 January 2005.

The Commissions' view

13.43 The Commissions strongly support the view that a dual system of client legal privilege operating in any one jurisdiction is undesirable. As well as producing inevitable confusion, there is increasing disparity between the common law and the uniform Evidence Acts. As outlined below, client legal privilege is the subject of extensive litigation and the law continues to develop in response to changing business and legal practices. Should the common law continue to operate pre-trial and the uniform Evidence Acts at trial, the disparity between the two systems is likely to increase.

13.44 As noted above, the civil courts in New South Wales currently apply the *Evidence Act 1995* (NSW) sections to pre-trial matters, via rules of court. There has been no suggestion to this Inquiry that any issue or difficulty has arisen from this application. Some New South Wales District Court judges express the view that if the rules applying the Act to pre-trial matters are working well in a civil context, there is no reason why they should not be applied pre-trial in criminal matters.[1594]

13.45 It is, therefore, the Commissions' view that the client legal privilege sections of the uniform Evidence Acts should apply to pre-trial contexts and to any situation where a person is requested to produce a document. One particular concern regarding s 123 in the pre-trial context is addressed below.

13.46 Some legislation that gives administrative agencies investigative powers, such as those exercised by the ACCC and the ATO, seeks to abrogate legal privilege. In *Daniels v ACCC*, the High Court held that s 155 of the *Trade Practices Act 1974* (Cth)[1595] did not abrogate legal professional privilege, because the privilege is an important common law right that can only be abrogated with express words to that effect.[1596]

13.47 The ALRC considered this issue in its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95).[1597] In that Report, the ALRC acknowledged that there may be circumstances where it is appropriate that legal professional privilege not be available due to the particular investigatory difficulties of commercial regulators (such as ASIC or ACCC). However, the ALRC said that the approach to that difficulty should be abrogation of the privilege by clear legislative statement. The ALRC argued that, given the importance of these issues, Parliament should consider and debate the circumstances where legal professional privilege should

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1594 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.

1595 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*.

1596 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

1597 Australian Law Reform Commission, *Principled Regulation: Federal and Civil Administrative Penalties in Australia*, ALRC 95 (2002), Ch 19.

not be available.[1598] ALRC 95 also noted the huge disparity between the investigative powers of regulators and advocated that a review be undertaken of federal investigative powers and the operation of legal professional privilege with a view to providing greater certainty and consistency.[1599]

13.48 It is the clear position of the courts in Australia since *Baker v Campbell*[1600] that legal professional privilege is a fundamental right that applies both to court and administrative and investigative proceedings. The Commissions' view is that, in the interests of clarity and uniformity, the client legal privilege sections of the uniform Evidence Acts should be extended to apply to these pre-trial contexts, as currently regulated by the common law rules of legal professional privilege.

13.49 The Commissions acknowledge that further consideration will be required to determine how the client legal privilege provisions should best be applied to pre-trial processes. In terms of drafting amending legislation, each section will need to be considered carefully to determine the effect of such an extension. Whilst a majority of the provisions of this part of the uniform Evidence Acts are in line with the common law, and therefore amendment should not produce a significant change in practice, there are some exceptions, such as s 123, discussed further below. Therefore, at this stage of the Inquiry, the Commissions make the general proposal below as a matter of policy. Further consideration will be given to the specific legislative amendments required to give effect to the proposal in the Inquiry's final report.

Proposal 13–1 The client legal privilege provisions of the uniform Evidence Acts should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Definitions

13.50 Commentators suggest there are a number of drafting difficulties with the client legal privilege provisions of the uniform Evidence Acts.[1601] Section 117 defines the terms used within the division dealing with client legal privilege. IP 28 asked whether the definitions of 'client', 'lawyer' and 'party' in s 117 of the uniform Evidence Acts required reconsideration or redrafting.[1602]

1598 Ibid, [19.48].
1599 Ibid, Rec 19–4.
1600 *Baker v Campbell* (1983) 153 CLR 52.
1601 See S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189; J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 417.
1602 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–3.

Definition of client

13.51 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 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.

13.52 The major issue raised in this Inquiry regarding the definition of 'client' under the Acts is 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 so restricted.[1603]

Submissions and consultations

13.53 It has been put to this Inquiry that, provided sufficient independence is established, there is no sound policy reason why legal advice cannot be provided to a lawyer, that lawyer being a client of a lawyer in their employ.[1604] One commentator notes that, with increasing fields of specialisation, it is not unreasonable to think that law firms will want to seek advice on particular matters perhaps from their own specialists.[1605]

13.54 The DPP NSW submits that the definition of 'client' under the Act should be amended to include:

- an employer of a lawyer if the employer is a statutory officer holding office under an Australian law (so as to include 'clients' such as the Director of Public Prosecutions who is appointed under the *Director of Public Prosecutions Act 1986* (NSW) and
- the private employer of a lawyer who is a lawyer.[1606]

1603 This issue is also discussed by S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 192.

1604 S McNicol, *Consultation*, Melbourne, 17 March 2005.

1605 Ibid.

1606 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

13.55 The original ALRC evidence inquiry did not make specific reference to this issue and, in the drafting of the Bill, the proviso that a private employer of a lawyer not be a lawyer was added.

13.56 In *Waterford v Commonwealth*, the court considered the issue of whether the government could claim legal professional privilege in respect of legal advice from its own salaried legal officers, and found that the privilege did apply.[1607] Although this case involved a specific context of government employees exercising statutory functions, the judges also considered the case of the employed legal advisor more generally. Independence and competence were established as the basis on which the privilege could be granted. To show the requisite independence, Deane J said that salaried legal advisors should be 'persons who, in addition to any academic or other practical qualifications, were listed on a roll of current practitioners, held a current practicing certificate, or worked under the supervision of such a person'.[1608]

13.57 In the case of government employees, Brennan J drew a distinction between salaried employees of government and non-government agencies. His Honour considered that the professional independence of government lawyers was protected by the statutes under which lawyers in the public service are employed.[1609] It is presumably on this basis that the distinction currently drawn in the uniform Evidence Acts is based.

13.58 In *ASIC v Rich,*[1610] Austin J stated that independence may be construed as something to be proved as a matter of fact in each circumstance. He cited with approval the summation of Debelle J in *Southern Equities Corporation Ltd (in Liq) v Arthur Anderson & Co (No 6)* that:

> the question whether the relationship between the employed solicitor and his employer is such that the communications between them will give rise to legal professional privilege is a question of fact. The party claiming the privilege has the onus of proving that fact.[1611]

13.59 Provided the requisite independence exists between the lawyer employer and the legal advisor, it is arguable that the privilege should apply.[1612] The Commissions are sufficiently persuaded that the increasing complexity of legal practice is such that it is appropriate for legal advice provided to a private employee lawyer to be covered by the privilege. A proposed provision is set out in Appendix 1. To ensure that the privilege is not used inappropriately the lawyer must be operating to a requisite degree of independence from his or her employer. The issues of independence and competence are discussed below.

1607 *Waterford v Commonwealth* (1987) 163 CLR 54.
1608 Ibid, 360 cited in S McNicol, *Law of Privilege* (1992), 78.
1609 *Waterford v Commonwealth* (1987) 163 CLR 54, 356 cited in S McNicol, *Law of Privilege* (1992), 78.
1610 *ASIC v Rich* [2004] NSWSC 1089, [41].
1611 *Southern Equities Corporation Ltd (in Liq) v Arthur Anderson & Co (No 6)* [2001] SASC 398, [11].
1612 The issue of independence and competence is discussed further below.

Proposal 13–2 Section 117(a) of the uniform Evidence Acts should be amended to allow that a 'client' is an employer of a lawyer, which may include lawyers who employ other lawyers.

Definition of lawyer

13.60 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.[1613] Whether that definition of a 'lawyer' means that a person must hold a current practicing certificate was raised in a number of consultations, particularly with reference to the increasingly common scenario of the in-house lawyer employed by a corporation or government department who does not have a practising certificate.[1614]

13.61 It is unclear under the Act whether 'a barrister or solicitor' means that the lawyer must hold a current practicing certificate or whether it is sufficient to be admitted as either type of legal practitioner on the roll of the relevant court. Given that most legal professional privilege matters occur pre-trial, case law regarding the definition under the uniform Evidence Acts has not developed. ASIC submitted that it would be preferable for confusion over this issue to be settled by legislation.[1615]

13.62 At common law, whilst there have been conflicting authorities, it has been considered that a lawyer for the purpose of the privilege must be a *practising* barrister or solicitor.[1616] This position was 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.[1617] Crispin J based this finding on the rationale for legal professional privilege,[1618] being the public interest in proper representation of clients. Where a legal advisor has no right to represent a client, no privilege should attach.[1619] His Honour noted that, in Australian jurisdictions, the statutory right to *practice* law generally depends on the holding of a practising certificate.[1620] The only other example of a statutory right to practice noted by his Honour was that conferred on certain Commonwealth officers by the *Judiciary Act 1903* (Cth) or Acts granting powers to the

1613 Uniform Evidence Acts s 3.
1614 See, eg, S McNicol, *Consultation*, Melbourne, 17 March 2005.
1615 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.
1616 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189.
1617 *Vance v McCormack* [2004] ACTSC 78. This case concerned advice given by legal and military officers employed by the Department of Defence.
1618 This case concerned an application for an order to produce documents for inspection pre-trial, so the common law of legal professional privilege applied rather than the uniform Evidence Acts.
1619 *Vance v McCormack* [2004] ACTSC 78, [38]–[40].
1620 Ibid [28], citing, eg, *Legal Practitioners Act 1970* (ACT) s 22; *Legal Profession Act 1987* (NSW) s 25; *Legal Practice Act 1996* (Vic) s 314.

holders of specified positions such as a Director of Public Prosecutions or Solicitor-General.[1621]

13.63 The Criminal Law Committee of the Law Society of South Australia (Law Society of SA) argues that the uniform Evidence Acts may need to be amended to bring them in line with the common law and define a lawyer to include a barrister or solicitor with a practising certificate.[1622]

13.64 However, Downes J in the Administrative Appeals Tribunal has stated that he does not agree with the reasoning in *Vance*, preferring other authorities which state that, provided the advice given met the criteria of independence, it does not matter that the lawyer does not have a practising certificate.[1623]

> The real test is whether the advice had had the necessary quality of being independent advice. Whether or not legal professional privilege is attracted should be determined by the substance not the form. The rise of requirements for practicing certificates is relatively recent and is associated primarily with regulatory considerations and matters associated with lawyers holding themselves out to the public as qualified.[1624]

13.65 Downes J cited *Australian Hospital Care v Duggan (No 2)* in support of this view.[1625] That case concerned advice given by an in-house company lawyer who had been admitted to practice and held a practising certificate in the past, but did not hold a current Victorian practising certificate. In that case, Gillard J extensively outlined the case law establishing independence as a crucial element of the features that must be present for legal professional privilege to apply in respect of a confidential communication between a private sector employer and its own employee lawyer.[1626]

> [I]n my opinion there is sufficient dicta to support the proposition that the employee legal adviser when performing his role in a communication concerning a legal matter must act independently of any pressure from his employer and if it is established that he was not acting independently at the particular time then the privilege would not apply or if there was any doubt the court should in those circumstances look at the documents.[1627]

1621 At the time of writing, an appeal has been argued in *McCormack v Vance*. The decision has been reserved.

1622 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

1623 *McKinnon and Secretary of Department of Foreign Affairs and Trade* [2004] AATA 1365, [51]. See also Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.

1624 *McKinnon and Secretary of Department of Foreign Affairs and Trade* [2004] AATA 1365, [51].

1625 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131.

1626 Ibid, [35]–[59]. See, eg, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v Commonwealth* (1987) 163 CLR 54.

1627 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131, [54]. This view was also espoused in *ASIC v Rich* [2004] NSWSC 1089. See also Brennan J in *Waterford v Commonwealth* (1987) 163 CLR 54, 71: 'If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. ... Independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in

13.66 Gillard J came to the conclusion that 'the facts of qualification and entitlement to practice are safeguards against a legal practitioner failing to act independently' but were not conclusive.

> In some circumstances the failure to have a practising certificate would carry substantial weight on the question of lack of independence but each case must depend on its own particular circumstances and no doubt a court would be more concerned with the qualifications and experience of the lawyer in question more so than the question of registration.[1628]

13.67 The views of Gillard and Downes JJ identify the key criterion behind the privilege—that it is the substance of the relationship that is of importance, rather than a strict requirement that the lawyer hold a practising certificate. It is at the time of admission that professional standards and obligations are conferred on a practitioner and it is these professional obligations that serve as a mark of the lawyer's independence. The foundation for the availability of the privilege goes beyond just the individual services provided to the client—the privilege is also granted to 'enhance the function of the adversarial system of justice'.[1629] On this basis, the privilege should be flexible enough to take into account changing practices and contexts in which lawyers are employed.

13.68 The impetus to limit the privilege to lawyers with current practising certificates may stem from fears that lawyers providing general policy or risk management advice might have the entirety of their work covered by the privilege. However, the dominant purpose test remains the ultimate limitation on the operation of the privilege. The Commissions believe that, provided the communication meets the test of being provided for the dominant purpose of providing legal advice, the fact that the lawyer does not have a practising certificate will not extend the scope of the privilege in an unwarranted fashion.

13.69 In *Kennedy v Wallace*,[1630] the Full Federal Court considered whether legal professional privilege[1631] could apply to advice obtained from an overseas lawyer. Allsop J (with whom Black CJ and Emmett J agreed on this point) found that the rationale of the privilege—serving the public interest in the administration of justice—and its status as a substantive right meant it should not be limited to serving the administration of justice only in Australia.[1632] His Honour stated that the nature of modern commercial life and the increasingly global interrelationship of legal systems 'make the treatment of the privilege as a jurisdictionally specific right, in my view, both impractical and contrary to the underlying purpose of the protection in a modern

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giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted'.

1628 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131, [99].

1629 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.10340].

1630 *Kennedy v Wallace* (2004) 213 ALR 108.

1631 This case concerned the common law as it was in relation to a pre-trial application.

1632 *Kennedy v Wallace* (2004) 213 ALR 108, 141.

society'.[1633] It is unnecessary to show that the overseas lawyer has the same ethical and legal responsibilities as an Australian lawyer. Black CJ and Emmett J stated that, in the ordinary case of a client consulting a lawyer about a legal problem, proof of those facts would be a sufficient basis for a conclusion that legitimate legal advice is being sought and given, irrespective of the particular legal and ethical obligations of an Australian lawyer.[1634]

13.70 The Commissions agree that the privilege under the uniform Evidence Acts should apply to advice sought from an overseas lawyer, for the reasons stated by Allsop J in *Kennedy*.

13.71 In order to clarify the definition of a lawyer under the uniform Evidence Acts, the Commissions propose that the current definition of a 'barrister or solicitor' in the Dictionary of the Acts should be amended to read a 'person admitted to practice as a legal practitioner, barrister or solicitor in an Australian jurisdiction or in any other jurisdiction'.

Proposal 13–3 The definition of a 'lawyer' in the Dictionary of the uniform Evidence Acts should be amended to allow that a lawyer is a person who is admitted to practice as a legal practitioner, barrister or solicitor in an Australian jurisdiction or in any other jurisdiction.

13.72 The Australian Accounting Bodies submit that, in view of the significant role accountants now have in advising on tax and financial related matters, the definition of 'lawyer' should be extended to include accountants who are members of an approved professional body who are giving taxation and financial advice for which the main purpose is the giving or receiving of advice on taxation and financial laws.[1635]

13.73 The rationale for client legal privilege, as outlined above, relates specifically to the administration of justice and the particular role of the lawyer in the adversary process. In *Baker v Campbell*, Dawson J justified the protection on this basis:

> The restriction of privilege to the legal profession serves to emphasise that the relationship between client and his legal advisor had a special significance because it is part of the functioning of the law itself. Communications which establish and arise

1633 Ibid, 141.
1634 Ibid, 113.
1635 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27*, 23 February 2005. The New Zealand government has introduced legislation establishing a new privilege for opinions on tax law by registered tax practitioners. The statutory privilege is 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: M Cullen (Minister of Finance New Zealand Government), 'Statutory Privilege for Legal Advice Extended' (Press Release, 14 September 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.

> out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.[1636]

13.74 In the Commissions' view, the accountant and client relationship is best considered in terms of the confidential relationship privilege currently available in New South Wales, discussed later in this chapter, rather than through amendment to the client legal privilege provisions.

Availability of client legal privilege to corporations

13.75 In its submission, ASIC raises an additional issue in its submission regarding the exclusion of companies or corporations from the definition of 'client' under s 117. ASIC notes that the decision of the High Court in *Daniels v ACCC*[1637] ended debate regarding the ability of corporations to continue to claim legal professional privilege. However, ASIC believes that this question should be considered further.[1638]

13.76 In ASIC's view, the same policy arguments upon which the privilege against self-incrimination is denied to corporations can be applied to deny them client legal privilege. In support of this position, ASIC cites Mason CJ and Toohey J's comments in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* on the availability to corporations of the privilege against self-incrimination.

> In general, a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively.[1639]

13.77 ASIC's position is supported by Wilcox J, in the Full Federal Court decision in *Daniels*.

> [T]he policy considerations that influenced the High Court in *Pyneboard*, in relation to self incrimination, are equally apposite to legal professional privilege. Conduct that involves a contravention of the *Trade Practices Act* often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer it may be impossible for ACCC to see the whole picture.[1640]

13.78 However, whilst not directly commenting on the availability of the privilege to corporations, on appeal, the majority of the High Court found that legal professional

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1636 *Baker v Campbell* (1983) 153 CLR 52.
1637 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
1638 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.
1639 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.
1640 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 128 ALR 114, [57].

privilege is 'not merely a rule of substantive law. It is an important common law right or, perhaps more accurately an important common law immunity'.[1641]

13.79 Kirby J in *Daniels* noted the argument that the right to the privilege as a 'fundamental human right' should only apply to humans—and acknowledged that the interests of the public may be well served in some cases by allowing these documents to be in the public realm. However, he ultimately drew a distinction between the privilege against self-incrimination and legal professional privilege, based on their very different historical origins.

> Occasionally, in any case, a fundamental human right is an expression of an even larger concept, namely a fundamental civil right belonging also to artificial persons such as corporations. Protection from self-incrimination rests upon different historical, legal and policy considerations almost all related to individual human beings. The entitlement to sound legal advice, immune from compulsory disclosure to investigating or prosecuting public authorities, is arguably necessary both for natural and artificial persons.[1642]

The Commissions' view

13.80 The ALRC considered this issue in ALRC 95.[1643] In that Report, the ALRC did not advocate that legal professional privilege be abrogated for corporations, preferring the position of the High Court in *Daniels* that the privilege be available to both individuals and corporations, subject to express abrogation.[1644]

13.81 As noted above, the ALRC acknowledged that there may be circumstances where it is appropriate that legal professional privilege not be available due to the particular investigatory difficulties of commercial regulators (such as ASIC or ACCC). However, the ALRC said that the approach to that difficulty should be abrogation of the privilege by clear legislative statement rather than by implication or circumlocution.[1645] The Commissions adopt and support the ALRC's views as expressed in ALRC 95.

Copies of documents

13.82 At common law, the extent to which copies of documents are afforded privilege has been a question of some contention.[1646] It is clear that when a copy is made of an original that attracts privilege (ie, for the purpose of record keeping or administration)

1641 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [5] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

1642 Ibid, [21] (Kirby J).

1643 Australian Law Reform Commission, *Principled Regulation: Federal and Civil Administrative Penalties in Australia*, ALRC 95 (2002), Ch 19.

1644 Ibid, Rec 19–1. Recommendation 19–4 also advocated that a review be undertaken of federal investigative powers and the operation of legal professional privilege with a view to providing greater certainty and consistency.

1645 Ibid, [19.48].

1646 A Ligertwood, *Australian Evidence* (4th ed, 2004), 293.

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.[1647]

13.83 The majority of the High Court in *Australian Federal Police v Propend Finance*[1648] found that privilege could exist in copies of documents made for the purpose of seeking legal advice or pending litigation.[1649] Where a copy is made for the purpose of seeking legal advice or pending litigation the copy becomes a separate communication in its own right to which the dominant purpose test is applied.[1650] 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'.[1651] 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.[1652]

13.84 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 the 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.[1653]

13.85 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.

Submissions and consultations

13.86 There is some support in submissions for the uniform Evidence Acts to make reference to the *Propend* situation. The DPP NSW submits that, in the interests of clarity and certainty, it would prefer the uniform Evidence Acts to reflect the position at common law as stated in *Propend*.[1654]

13.87 The AGS states that, in its view, the majority in *Propend* was correct in finding that client legal privilege could exist in copies of documents made for the purposes of seeking legal advice or pending litigation. In support of this position, the AGS cites the case where disclosure of a group of documents not otherwise privileged would disclose

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1647 Ibid, 291.
1648 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501.
1649 Ibid, 509.
1650 A Ligertwood, *Australian Evidence* (4th ed, 2004), 96.
1651 Ibid, 291.
1652 Ibid, 293.
1653 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.
1654 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

a legal strategy being adopted, recommended or considered by a party's lawyers. However, the AGS does not indicate whether the uniform Evidence Acts should be amended in this regard.[1655]

13.88 Others do not consider that the Acts require amendment in this regard.[1656] The Australian Accounting Bodies consider that that the issue of whether a copy of a document can be privileged where the original document is not privileged, is currently reflected in the common law and each matter needs to be decided on its own facts. Given that the courts have not had any problem with deciding whether copies are privileged, to amend the legislation may lead to an unnecessary broadening of the privilege.[1657]

13.89 In ASIC's view, there is no need for a specific provision which applies client legal privilege to copies of non-privileged documents which have been made for a privileged purpose. ASIC argues that in many cases, such documents will have been produced in order to be included in briefs to counsel or other compilations of documents prepared in order to seek advice on a particular issue or in support of another privileged communication.

> Where the nature of the document copied or the compilation provides evidence as to nature of the advice sought or received or as to some other form of privileged communication, the copy or compilation would already be subject to client legal privilege under sections 118 and 119 of the uniform Evidence Act. In circumstances where the creation of the copy or its existence in a particular compilation provide no indication of the nature of communications attracting privilege under sections 118 and 119, there is no basis for attaching client legal privilege to the document.[1658]

13.90 The Commissions agree with ASIC's view that ss 118 and 119 of the uniform Evidence Acts already contemplate the situation where a copy is made for the dominant purpose of providing legal advice or in relation to litigation.[1659] The Commissions also note the important qualification made by Brennan J in *Propend* that where the original document is destroyed, the copy loses its privilege. Brennan J argued that if legal professional privilege were accorded without qualification to a copy of an unprivileged document where the copy is brought into existence for a privileged purpose, the privilege might well frustrate the power to search and seize and undermine the administration of justice. A person could make a copy for the purpose of litigation, and then destroy the unprivileged original.[1660] On this basis, no amendment to the uniform Evidence Acts is proposed in relation to copies of documents.

1655 Australian Government Solicitor, *Submission E 28*, 18 February 2005.
1656 See eg Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.
1657 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27*, 23 February 2005.
1658 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.
1659 This view was also supported by S McNicol, *Consultation*, Melbourne, 17 March 2005.
1660 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.

Communications with third parties under the common law

13.91 There has been a significant development under the common law regarding the extension of legal advice privilege to cover communications with third parties. This change reflects divergence between the common law and the uniform Evidence Acts (which were intended to replicate the common law in this regard). If the proposal to extend the client legal privilege sections of the Acts to pre-trial proceedings is adopted, the question arises whether the Acts should remain as they are now, or be amended to mirror common law developments.

13.92 In 2004, in *Pratt Holdings v Commissioner of Taxation*, the Full Federal Court held that a third party's communication with a client, even where there is no litigation pending, could potentially be protected by legal professional privilege.[1661] 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.

13.93 Two related issues arose in *Pratt*. First, as noted above, the chief question was whether communication with a third party, who was not operating as an agent could be protected. Secondly, under the common law, as with the uniform Evidence Acts, legal professional privilege encompasses both a communication or advice privilege and a litigation privilege. The rationale for the two types of privilege, as expressed in ALRC 26, is noted above. With the extension of the concept of an 'agent' under *Pratt*, the question is asked whether the distinction between the two types of privilege is meaningful.

13.94 *Pratt* concerned whether legal professional privilege could be extended to cover documents prepared by a firm of accountants for the client. These documents were prepared on the basis that the client would provide them to a firm of solicitors for legal advice.

13.95 At first instance, Kenny J articulated the principles relating to legal professional privilege:

> The common law in Australia is, therefore, that legal professional privilege attaches to:
>
> (1) confidential communications passing between a client and a client's legal advisor, for the dominant purpose of obtaining or giving legal advice (legal advice privilege); and
>
> (2) confidential communications passing between a client, the client's legal advisor and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation (litigation privilege).[1662]

1661 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

1662 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2003] FCA 39, 39. See V Morfuni, 'Legal Professional Privilege and the Government's Right to Access Information and Documents' (2004) 33 *Australian Taxation Review* 89, 107.

13.96 Traditionally, different principles have governed legal advice privilege to those which have governed litigation privilege, in particular, that a client's communication with a third party could only be protected if the third party was 'not truly a third party but, rather, the client's "agent" in making the communication'.[1663] On this basis, Kenny J rejected Pratt Holdings' claim to privilege over the accountant's documents.[1664]

13.97 On appeal, this position was rejected by the Full Federal Court who took the view that, even though the accountants were not the client's 'agent', this did not mean that their communications with the client could not be privileged.[1665] Finn J argued that it was not the relationship but the function which the third party performed which was of importance. Where that function was to enable the client to make the communication necessary to obtain legal advice, the third party 'has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege'.[1666]

13.98 Stone J argued that the requirement that a third party be an agent led to an artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. In her Honour's view, provided the dominant purpose requirement is met, there is no reason why privilege should not extend to the communication to the expert by the client.[1667]

13.99 Finn and Stone JJ considered that it may be difficult for a person seeking legal advice to communicate the problem in respect of which advice is sought without the input from a third party.[1668]

> Extending legal professional privilege to protect communications made for the dominant purpose of obtaining legal advice does not require all communications between legal adviser and client to be protected. If, however, the policy implicit in the rationale for legal professional privilege is not to be subverted, the dominant purpose criterion must be applied recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he or she is to be able to instruct the legal adviser appropriately.[1669]

13.100 Both judges viewed the dominant purpose test as the appropriate limitation on the availability of privilege. Stone J argued that the rationale in *Pratt* would not be likely to extend the boundaries of client legal privilege as the dominant purpose test would still need to be met. Her Honour noted, for example, that advice about commercially advantageous ways to structure a transaction are extremely unlikely to

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1663 J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60.
1664 Ibid, 60.
1665 Ibid, 60.
1666 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [42].
1667 Ibid, [106].
1668 Ibid, [42], [104]; see V Morfuni, 'Legal Professional Privilege and the Government's Right to Access Information and Documents' (2004) 33 *Australian Taxation Review* 89, 108.
1669 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87] (Stone J).

attract privilege because the purpose in putting the advice together will, in most cases, be independent of the need for legal advice. Even if the parties intend that the advice will be submitted to a lawyer for comment, the purpose is still unlikely to be considered the dominant purpose for seeking the advice.[1670]

Maintaining a distinction between advice and litigation privilege

13.101 It is suggested that the decision in *Pratt* is indicative of a move away from distinguishing between legal advice and litigation privilege.

> Arguably, the Full Court's approach represents a significant extension of the advice privilege, to a point where there is now little theoretical distinction between the advice privilege and the litigation privilege.[1671]

13.102 On this view the correct formulation of client legal privilege would be 'a communication made for the dominant purpose of providing legal services'.[1672] The High Court's description of legal professional privilege in *Daniels* is cited as support for this position.

> It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communication between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.[1673]

13.103 By determining that the case could be decided under the head of legal advice privilege, the Full Court did not have to resolve this issue. However, Stone J indicated that the High Court's exposition of the rationale for legal professional privilege in *Daniels* was consistent with the appellants' submission that there is a single rationale in Australia for legal professional privilege. Her Honour found that the rationale applies to both litigation privilege and legal advice privilege, although she did not accept that accepting a single rationale meant that the distinct categories should no longer be recognised.[1674]

The Commissions' view

13.104 The ALRC's view in the original evidence inquiry was that the justifications for allowing privilege for third party communications (as outlined above) should be limited to a situation where litigation is pending or in contemplation, and did not apply to the advice context.[1675] However, there have been considerable developments in common law thinking since that time.

1670 Ibid, [107].
1671 J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60.
1672 S McNicol, *Consultation*, Melbourne, 17 March 2005.
1673 *The Daniels Corporation International Ltd Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 564.
1674 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [86].
1675 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [882].

13.105 In *Pratt*, Kenny J at first instance argued that the precedents were clear, but acknowledged the artificiality and narrowness of the Australian position. After surveying other jurisdictions, her Honour said that the 'more functional' approach adopted in the United States and in Canada (and, to a lesser extent, in New Zealand) may produce a more rational, or less artificial, result.

> In the United States and Canada, a finding that a party is an agent for advice privilege purposes is resolved by finding that a communication was made by the agent for the dominant purpose of obtaining legal advice where the communicator was not acting entirely independently and 'under his own steam'. On the other hand, this more flexible approach puts some strain on the orthodox understanding of privilege, by extending its scope to a wider range of 'agency situations' than that presently accepted in English and Australian law.[1676]

13.106 The Full Court's judgment has been contrasted with the English position:

> the current position under Australian law [after *Pratt*] appears more coherent and, in its more vigourous use of the dominant purpose requirement, more attuned to the realities of the increasing intermingling of commercial advice with managerial and operational issues in the undertakings of commercial corporations.[1677]

13.107 The Law Council submits that it is not clear under the uniform Evidence Acts whether privilege arises where the lawyer obtains information in confidence from a third person for the purposes of advising the client.

> The position under s 118(c) is that confidential documents *prepared by the client or a lawyer* for the dominant purpose of the lawyer providing legal advice to the client are privileged. Literally this privileges such documents when they contain information obtained from third parties for such purposes although some courts have doubted this (*Newcastle Wallsend Coal Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351 at 389 (Powell JA); 393 (Smart AJA disagreeing)). But confidential communications *prepared by third parties* to clients for the purposes of the client obtaining advice are certainly not privileged unless the third party is the employee or agent of the client.[1678]

13.108 The Law Council supports the reasoning of the court in *Pratt* and believes such communications should fall within the scope of the privilege to encourage clients to seek all information required in order to receive proper legal advice.[1679]

13.109 The Commissions are inclined to accept the reasoning of Finn and Stone JJ in *Pratt*—that the policy upon which the privilege is granted is consistent with allowing a third party to prepare documentation for the client for the dominant purpose of providing legal advice. Where the Acts are intended to mirror the common law it is important that they do not fall behind developments in judicial thinking that are

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1676 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2003] FCA 39, [72].
1677 T Wilson, 'The House of Lords Clarifies Purpose and Scope of Advice Privilege' (2005) 32(3) *Brief* 21, 22.
1678 Law Council of Australia, *Submission E 32*, 4 March 2005.
1679 Ibid.

consistent with the overall philosophy on which their provisions are based. The Commissions believe this is one of those examples.

13.110 Section 118(c) should therefore be amended to provide legal advice privilege to extend to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice. The proposed provision is set out in Appendix 1.

13.111 The Commissions are of the view, as espoused by Stone J in *Pratt*, that there remain crucial differences between the two types of client legal privilege. Legal advice privilege exists to protect the relationship between a lawyer and client, litigation privilege respects the important functions of the adversarial system. Therefore the distinction should not be abandoned.

Proposal 13–4 Section 118(c) of the uniform Evidence Acts should be amended to replace the words 'the client or a lawyer' with 'the client, a lawyer or another person'.

Loss of client legal privilege

13.112 Client legal privilege can be lost in circumstances such as: where a party has died; where the court would be prevented from enforcing an order from an Australian court; where the communication affects the right of a person; through waiver of the privilege; where the communication may be adduced by a criminal defendant; where there are joint clients; and where the communication is made in furtherance of the commission of an offence or fraud.

Consent

13.113 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.

13.114 The basis for the test of 'knowingly and voluntarily disclosed' was to address uncertainty about the effect of voluntary disclosure by the client, and not to allow waiver where a person may have inadvertently disclosed or been compelled to disclose the communication.[1680]

13.115 In *Newcastle Wallsend Coal Co Pty Limited v Court of Coal Mines Regulation*,[1681] it was held that giving a recording of interview to a client for the sole

1680 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].
1681 *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351, 389.

purpose of checking its accuracy and prohibiting retention of a copy was not 'knowing and voluntarily disclosing'. However, loss of privilege did occur where a record of interview was given to a witness for his or her own purposes and without the condition that it not be disclosed. In *Department of Public Prosecutions (Cth) v Kane* it was held that inadvertent disclosure of a document due to a clerical mistake did not constitute a 'knowing and voluntary' disclosure.[1682] This was also the position in *Ampolex v Perpetual Trustee Co Limited* where it was held that disclosure by mistake does not amount to voluntary disclosure.[1683]

Waiver at common law

13.116 The approach in s 122 is different to the common law, where traditionally waiver is imputed where the circumstances are such that it is unfair for the client to say that the privilege has not been waived.[1684] What is unfair in the circumstances is determined by the conduct of the client.

13.117 In *Attorney-General (NT) v Maurice*, Mason and Brennan JJ stated the principle as:

> in order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter.[1685]

13.118 Waiver may be express or implied. Waiver of the privilege is implied or imputed where it is considered that particular conduct is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect.[1686] In *Goldberg v Ng* it was said that the basis of an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. That act or omission will ordinarily involve or relate to a limited (actual or purported) disclosure of the contents of the privileged material.[1687]

13.119 In 1999, *Mann v Carnell* focused the common law test on inconsistency, rather than fairness alone.

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive between the conduct of the client and the maintenance of confidentiality; not some overriding principle of fairness operating at large.[1688]

1682 *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468, 481.
1683 *Ampolex v Perpetual Trustee Co Limited* (1996) 40 NSWLR 12, 18–19.
1684 A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.
1685 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 488.
1686 *Mann v Carnell* (1999) 201 CLR 1, 13 citing *Goldberg v Ng* (1995) 185 CLR 83, 95.
1687 *Goldberg v Ng* (1995) 185 CLR 83, 96.
1688 *Mann v Carnell* (1999) 201 CLR 1, 13. See also A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

13.120 In *DSE (Holdings) Pty Ltd v Interan Inc*, Allsop J noted that by subordinating the notion of fairness to possible relevance in the assessment of the inconsistency between the act and the confidentiality of the communication, *Mann v Carnell* had produced an important change to the existing law.[1689]

13.121 This approach was recently restated by the Federal Court in *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs*,[1690] where it was found that waiver occurs 'when a party does something inconsistent with the confidentiality otherwise contained in the communication'.[1691]

'Substance' of the evidence

13.122 There have been number of cases which have discussed the meaning of 'substance' under s 122. *Adelaide Steamship Co Limited v Spalvins*[1692] held that the test of substance is a quantitative one—meaning, has there been sufficient disclosure to warrant the loss of the privilege? In *ACCC v Australian Safeway Stores* it was further held that qualitative assessment should also be incorporated into the test of 'substance'.[1693]

13.123 For example, in *NRMA Limited v Morgan (No 2)*, Giles J held that a reference to instructing counsel to advise on liability was insufficient to amount to disclosure of the substance of the otherwise privileged communication. However, disclosure of a summarised account of what counsel had said was sufficient.[1694] Einfeld J has stated that, 'when the subsection is referring to the substance of advice it is not talking about the, as it were, bottom line of the advice, but to what its content is and possibly even the reasoning which led to it'.[1695]

Inconsistent interpretation of s 122

13.124 The courts have interpreted s 122 inconsistently, in some cases attempting to import the common law notion of fairness into the section.

13.125 In *Telstra Corporation v Australasia Media Holdings [No 2]*,[1696] it was held appropriate to extend the scope of the section to include 'imputed' waivers and, accordingly, apply notions of fairness in accordance with previous common law

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1689 *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [14].

1690 *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs* [2004] FCA 241. See also M Edelstein, 'Legal Professional Privilege' (2004) 78(11) *Law Institute Journal* 54, 57.

1691 *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs* [2004] FCA 241, [17].

1692 *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360.

1693 *ACCC v Australian Safeway Stores* (1998) 81 FCR 526, 570.

1694 *NRMA Limited v Morgan (No 2)* [1999] NSWSC 694, [15]–[16]. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 427.

1695 *SVI Systems Pty Ltd v Best & Less Pty Ltd* [2000] FCA 1507, [6].

1696 *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 351.

decisions. This was also the position taken in *Perpetual Trustees (WA) v Equuscorp Pty Limited*.[1697]

13.126 Conversely, in *Adelaide Steamship*,[1698] the Full Federal Court held that notions of fairness (the common law) did not apply under s 122.

13.127 However, in *Telstra Corporation v BT Australasia Pty Ltd*,[1699] the majority of the Full Federal Court found that consent under s 122 could be taken to extend beyond express consent (to include consent that was real and voluntary, although implied) and therefore that the section could be taken to apply to imputed consent.[1700] The AGS submits that this would give s 122 a similar test to the *Mann v Carnell* inconsistency waiver.[1701]

13.128 Another way of importing 'fairness' into the question of waiver under s 122 is to use the discretion in s 135 to exclude the evidence on the basis of considerations of fairness taken into account under the common law.[1702] Stephen Odgers SC has argued that:

> If this approach is correct, in circumstances where the common law would conclude there has not been waiver (and the privilege continues to operate), the evidence may be excluded under s 135, even if the privilege were lost by reason of the operation of this provision.[1703]

13.129 Odgers notes that this approach could only apply to exclude the privileged material. The discretion cannot allow the court to admit otherwise inadmissible evidence where it would be unfair not to do so.[1704] This view, however, appears to conflate the notions of fairness under the common law and 'unfair prejudice' in s 135. In Chapter 3 of this Discussion Paper, the Commissions note that the notion of 'unfairness', both at common law and under the uniform Evidence Acts, is broader than that of 'unfair prejudice'.

13.130 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'.[1705]

1697 *Perpetual Trustees (WA) v Equuscorp Pty Limited* [1999] FCA 925.
1698 *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360.
1699 *Telstra Corporation v BT Australasia* (1998) 85 FCR 152.
1700 Ibid, 168.
1701 Australian Government Solicitor, *Submission E 28*, 18 February 2005, 3. Although in *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [5], [95] Allsop J was of the view that the majority test in *Telstra* was based on the traditional common law considerations of fairness, and therefore narrowed by *Mann v Carnell*.
1702 See *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunter J, 3 March 1997) cited in S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11040].
1703 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11040].
1704 Ibid, [1.3.11040].
1705 *Carnell v Mann* (1998) 89 FCR 247, 257.

13.131 In IP 28, the ALRC asked whether any concerns are raised by the operation of s 122.

13.132 The major issue identified is whether the prescriptive approach taken in the legislation fails to allow sufficient room for flexibility. One suggested advantage of the common law approach is that it allows the court to decide that there has been an imputed waiver of privilege despite the fact that there has not been an 'express intentional general waiver of privilege'.[1706]

13.133 Odgers has argued that when the courts do not incorporate notions of fairness into s 122:

> the provision might result in loss, or retention, of the privilege in circumstances where fairness to the parties would suggest a different result. If that were the case, the adoption of the more flexible common law approach may be preferable, despite the consequent uncertainty it produces.[1707]

13.134 In contrast, it has been suggested that one of the greatest disadvantages of applying fairness considerations is that it is too subjective. What could be unfair or fair to one person could be completely the opposite to another. McHugh J argued this point at length in his dissenting judgement in *Mann v Carnell*:

> To use an 'unfairness' test for determining waiver after disclosure to a third party also changes the fundamental nature of privilege. It changes privilege from something which inheres in communications as a matter of law to a state of affairs which exists between the parties as a kind of equitable estoppel.[1708]

Submissions and consultations

13.135 The DPP NSW supports the view that s 122 should be amended to reflect the common law test, and to make it clear that a prescriptive approach is not to be taken.[1709] The AGS agrees, arguing that, although it appears that *Telstra* holds that waiver under s 122 can extend to imputed waiver, 'it would appear appropriate to insert an express provision to that effect, rather than relying on the Federal Court judgement [in *Telstra*]'.[1710]

13.136 A number of people express the view that s 122 would be improved by the inclusion of the common law test in *Mann v Carnell.*[1711] The *Mann v Carnell* test allows the court to consider the idea of conduct inconsistent with maintenance of the privilege and to consider all the circumstances.[1712] Some suggest that the words

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1706 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 202.

1707 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11040].

1708 *Mann v Carnell* (1999) 201 CLR 1, 40.

1709 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 26.

1710 Australian Government Solicitor, *Submission E 28*, 18 February 2005, 5.

1711 S McNicol, *Consultation*, Melbourne, 17 March 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005.

1712 S McNicol, *Consultation*, Melbourne, 17 March 2005.

'knowingly and voluntarily disclosed' should be removed from the section, effectively replacing the current test with the common law approach.[1713]

13.137 Others consider that s 122 has not presented many problems in practice, and that amendment could lead to unintended consequences.[1714] One submission said that deletion of the section would allow the common law to apply.[1715]

The Commissions' view

13.138 In relation to potential reform of s 122, the question is whether a residuary discretionary power should be included to impose a waiver on a party whose behaviour is inconsistent with the maintenance of the privilege. Section 122 as it is presently drafted is concerned with the *intention* of the holder of the privilege. Under the common law, the intention of the holder of the privilege may or may not be of relevance, rather it is the *behaviour* of the holder of the privilege that is of concern.[1716]

13.139 Rather than replacing the test of 'knowingly and voluntarily disclosed'—which the Commissions believe is an appropriate part of the test—the Commissions favour the inclusion of additional criteria for waiver of 'an act inconsistent with the maintenance of the privilege'.[1717] The proposed provision is set out in Appendix 1. The Commissions agree that a fairness test alone, as was a feature of the common law during the previous evidence inquiry, is inherently subjective. The test of inconsistency under *Mann v Carnell* sits well with the underlying rationale the ALRC expressed for s 122—that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end.[1718] The addition of that criterion for waiver gives the section greater flexibility to consider all the circumstances of the case.

Proposal 13–5 Section 122(2) of the uniform Evidence Acts should be amended to allow that evidence may be adduced where a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence or has otherwise acted in a manner inconsistent with the maintenance of the privilege.

1713 Ibid.

1714 B Donovan, *Consultation*, Sydney, 21 February 2005; S Finch, *Consultation*, Sydney, 3 March 2005.

1715 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27*, 23 February 2005.

1716 S McNicol, *Consultation*, Melbourne, 17 March 2005. For example, *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs* [2004] FCA 241 which held that waiver can take place even where there is no subjective intention on the part of the client to waive the privilege.

1717 This approach received some support in consultations: A Palmer, *Consultation*, Melbourne, 16 March 2005.

1718 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].

Section 123: Loss of client legal privilege

13.140 Section 123 of the uniform Evidence Acts states that:

> In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:
>
> (a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or
>
> (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

13.141 The result of s 123 is that the right of a party to claim client legal privilege is lost where the evidence is sought to be adduced by an accused in a criminal proceeding, unless the accused is seeking the evidence from a co-accused.[1719] In most cases, the party claiming the privilege will be the prosecution.

13.142 ALRC 26 proposed that one of the circumstances in which the privilege should be lost is when it would result in the withholding of evidence relevant to the defence of an accused.[1720] This position was based on the 1972 case of *R v Barton*,[1721] which established an exception to legal professional privilege in criminal matters, where an otherwise privileged document might establish the innocence of the accused.[1722]

13.143 In ALRC 38, following submissions which argued that the original statement was too broad, the recommendation was narrowed from the position in *Barton* to evidence *adduced* by a defendant in a criminal proceeding. The ALRC's proposed provision also did not operate in respect of communications made between associated defendants and their lawyers. In ALRC 38, the ALRC stated 'it is proposed that the privilege should not apply to communications to the prosecution unless a client/legal adviser relationship is shown to exist between those involved in the communications'.[1723]

13.144 In 1995, in *Carter v The Managing Partner Northmore Hale Davy and Leake* (a common law case), the High Court disapproved of *Barton*, holding that a person who is in possession of documents, which are subject to legal professional privilege, cannot be compelled to produce them on a subpoena issued on behalf of an accused person in criminal proceedings, even though they may establish the innocence of the accused or materially assist his or her defence.[1724]

1719 *R v Pearson* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996).

1720 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [885].

1721 *R v Barton* [1972] 2 All ER 1192.

1722 S McNicol, *Law of Privilege* (1992), 101.

1723 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [195].

1724 *Carter v The Managing Partner Northmore Hale Davy and Leake* (1995) 183 CLR 121.

13.145 Section 123 was considered by the New South Wales Court of Criminal Appeal in the 1996 case *R v Pearson*.[1725] Gleeson CJ observed that counsel had agreed that the practical effect of s 123 (when read together with s 118) was that legal professional privilege does not stand in the way of obtaining access to subpoenaed documents 'in circumstances where a legitimate forensic purpose of the accused at a criminal trial is served by being given access to such documents for the purpose of potential use at the trial'.[1726]

13.146 In its submission, the DPP NSW notes that the position is not entirely clear because the ALRC reports did not canvass this particular issue and, despite the comments in *Pearson*, s 123 has not been the subject of any further judicial consideration.[1727]

13.147 In *Director of Public Prosecutions (Cth) v Kane*,[1728] the Commonwealth Director of Public Prosecutions made a claim for legal professional privilege in regards to an advice prepared by one of its solicitors. Section 123 was not considered in depth because it was conceded that an application for a stay was not a 'criminal proceeding' under the *Evidence Act 1995* (NSW). However, Hunt CJ at CL stated that, under s 123, the ability to uphold the privilege against a defendant (which was available under the common law) was now lost. His Honour further noted that in order to override client legal privilege the communication must be relevant to the defendant's criminal proceedings.[1729] The communication sought was not deemed to be relevant to the committal proceedings.

13.148 As it presently stands, s 123 overides client legal privilege in relation to evidence that is adduced by a defendant in criminal proceedings, and not, for example, the pre-trial production of documents on subpoena although, as noted above, there is some confusion arising from the decision in *Pearson.* Legal professional privilege under the common law might still provide a basis for resisting production of documents to an accused in criminal proceedings on the basis of the decision in *Carter*.

13.149 The DPP NSW is concerned that if the client legal privilege sections of the uniform Evidence Acts are extended to pre-trial matters, s 123 will remove the current common law right to claim legal professional privilege over documents prepared for the purpose of providing legal advice to the Director of Public Prosecutions. The DPP NSW submits that privilege arises most commonly in the context of pre-trial subpoenas, rather than in the context of the adducing of evidence by the defence at trial.[1730]

1725 Ibid.
1726 Ibid.
1727 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
1728 *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468.
1729 Ibid, 478.
1730 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

13.150 The DPP could lose the common law right to claim legal professional privilege in relation to confidential documents containing advice from Crown Prosecutors, the private Bar and the DPP's solicitors. If the DPP did lose the right to claim privilege, the DPP NSW anticipates that 'the defence will routinely subpoena such documents on the basis that it is "on the cards" that the advices will serve some legitimate forensic purpose in relation to the proceedings'.[1731]

> A fertile area for pre-trial applications will be created when our expectation is that very rarely, if ever, will the legal advice to the Director contain any relevant material which has not already been disclosed to the defence (in other documents, such as the statements of witnesses) pursuant to the prosecutor's duty of disclosure.[1732]

13.151 The DPP NSW submits that, if the uniform Evidence Acts are extended to pre-trial proceedings, s 123 should be amended to preserve the existing common law legal professional privilege of the prosecutor in pre-trial proceedings.

13.152 The concerns raised by the DPP NSW were echoed in consultations.[1733] Should the ambit of s 123 be extended pre-trial, one senior practitioner argues that the addition of a 'substantial probative value' test to s 123 would stop baseless claims for documents being made by the defence.[1734]

13.153 Some New South Wales District Court judges argue that the requirement of disclosure on the prosecution means that there will be nothing relevant in the briefs that the defence is not already aware of. They consider that the DPP should be entitled to claim privilege.[1735] There is, however, also support for the abrogation of the privilege for prosecutors, on the basis that defendants should be able to access any evidence that is exculpatory.[1736]

The Commissions' view

13.154 Section 123 overrides the client legal privilege created by s 118 or s 119. Client legal privilege only applies to communications between staff of a prosecutor or Crown prosecutors where a client and legal advisor relationship is shown to exist. ALRC 26 noted that where s 123 renders client legal privilege unavailable, it does not mean that communications cannot be otherwise protected in appropriate cases, possibly by the operation of public interest immunity or a confidential communications privilege.[1737]

13.155 ALRC 26 did not directly canvass the issue of whether s 123 allows the defendant to obtain legal advice provided to a prosecutor. However, it may be inferred

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1731 Ibid.
1732 Ibid.
1733 T Game, *Consultation*, Sydney, 25 February 2005; Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.
1734 T Game, *Consultation*, Sydney, 25 February 2005.
1735 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.
1736 For example, P Bayne, *Consultation*, Canberra, 9 March 2005.
1737 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [886].

from the above comment regarding public interest immunity that it was not envisioned that the defence would be able to adduce any such communication.

13.156 The Commissions agree with the submission of the DPP NSW that it would be undesirable if the extension of the privilege sections of the uniform Evidence Acts to pre-trial proceedings had the effect of abrogating client legal privilege in relation to any legal advice given to the DPP. The foundation of client legal privilege—frank and complete communication between lawyer and client—should apply equally to the DPP. Given the obligation on the prosecution to reveal all material evidence, significant court time could be spent in applications by the defence to gain access to advice that would have little bearing on the substantive issues in the case. Counsel or solicitors may also feel constrained in the provision of their advice for the DPP if such information could be made available later.

13.157 The extension of s 123 to pre-trial contexts may also have an impact beyond the difficulties for prosecutors described above. It would effectively overturn the decision in *Carter* and remove the basis on which any person could claim the privilege in reponse to a subpoena to produce documents from an accused. This would go against the narrowing of the proposal in ALRC 38, which expressly sought to limit the section to evidence adduced by a defendant in a criminal proceeding. At this stage the Commissions are of the view that the limitation on s 123 intended by the original ALRC inquiry should remain. However, the Commissions are interested in further comment.

13.158 On that basis, two alternate proposals are put forward for consideration. The first proposal only addresses the issue of the availability of the privilege to a prosectutor. That is, if Proposal 13–1 is adopted, s 123 should be amended to preserve the availability of client legal privilege to any legal advice provided to a prosecutor. A draft provision is set out in Appendix 1. In the alternative, if Proposal 13–1 is adopted, s 123 could be exempted from the general extension of the client legal privilege sections to pre-trial matters and continue to apply only to evidence adduced at trial.

Proposal 13–6 If Proposal 13–1 is adopted, s 123 of the uniform Evidence Acts should be amended to preserve the availability of client legal privilege to any legal advice—as provided in s 118 and professional legal services as provided for in s 119—provided to the Director of Public Prosecutions and to non-DPP prosecutors.

Alternative Proposal 13–6 If Proposal 13–1 is adopted, s 123 of the uniform Evidence Acts should remain applicable only to the adducing of evidence by an accused in a criminal proceeding.

Misconduct

13.159 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.[1738] 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.

13.160 In *Kang v Kwan*, Santow J stated:

> The 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.[1739]

13.161 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'.[1740] In accordance with s 133, the court may inspect the document in question for the purpose of establishing whether reasonable grounds have been established.

13.162 In IP 28, the ALRC suggested that the onus of proof under s 125 was a high one, and asked whether concerns were raised by the operation of s 125, in particular the proof of misconduct.[1741]

13.163 One submission argues that the standards established in *Kang v Kwan* are appropriate and that amendments to the uniform Evidence Acts are unnecessary.[1742] The AGS submit that the normal rules of evidence in establishing misconduct should apply.[1743]

13.164 The Commissions agree with the submissions and the reasoning in *Kang v Kwan.* On this basis, the Commissions do not propose any amendment to s 125 of the uniform Evidence Acts.

1738 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11620].
1739 *Kang v Kwan* [2001] NSWSC 698, [7].
1740 *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 428, [38].
1741 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–8.
1742 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27*, 23 February 2005, 5.
1743 Australian Government Solicitor, *Submission E 28*, 18 February 2005, 5.

Client legal privilege and government agencies

13.165 The New South Wales Ombudsman submits that serious thought should be given to whether client legal privilege should continue to be a basis for denying a watchdog body access to documents.[1744]

13.166 The Ombudsman argues that, in the context of public sector accountability, there are two sides to client legal privilege:

- on the one side, client professional privilege is said to assist justice by allowing communications between public officials and their lawyers to be kept confidential on the assumption that this will promote frankness and candour in communications between those officials and their lawyers, and
- on the other side, the effect of client professional privilege is to reduce the accountability of public sector agencies and officials by allowing them to keep often vital information from a watchdog body.

13.167 The submission states that:

> it is open to question whether in fact client professional privilege is either necessary or effective in achieving its objective of ensuring frank and candid communication where public sector agencies and public officials are concerned. Further, the experience of the NSW Ombudsman has shown that the privilege can be abused and often serves little or no good purpose in practice.[1745]

13.168 Examples of situations where agencies may have inappropriately claimed legal professional privilege (as reported in Annual Reports of the New South Wales Ombudsman) include:

- in response to requests to produce and review agency legal advice that has been the subject of a complaint under the *Freedom of Information Act 1989* (NSW); and
- in refusing to provide information, access to which may promote the accountability of public officials and agencies.

13.169 To address these issues, the New South Wales Ombudsman proposes two options for amending the uniform Evidence Acts:

- incorporation of provisions of the uniform Evidence Acts that clearly abrogate the privilege in relation to investigations being conducted by watchdog bodies set up by Commonwealth, state or territory governments; or
- amendments to be made to the uniform Evidence Acts to provide that information and documents relating to accountability of government may not be withheld from disclosure to a statutory watchdog—for example information and

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1744 NSW Ombudsman, *Submission E 13,* 27 January 2005.
1745 Ibid.

> documents relating to the affairs of an agency or the conduct of public officials which (i) contain or disclose information likely to contribute to positive and informed debate about issues of serious public interest; and (ii) contain or disclose information likely to assist the investigation of alleged misconduct or illegality by public sector agencies or officials.[1746]

13.170 The Commissions accept the New South Wales Ombudsman's argument that the rationale for client legal privilege must be balanced against the clear public interest in open and accountable government. This balancing act has been discussed by judges in many of the major cases where legal professional privilege has been claimed by government agencies, for example, in *Waterford v Commonwealth*.[1747]

13.171 The uniform Evidence Acts are acts of general application. An analogy can be drawn between the investigatory concerns of the Ombudsman and the arguments raised by regulatory agencies such as ASIC and the ACCC in relation to their investigations. As noted above, ALRC 95 acknowledged that there may be times when the public interest in the conduct of investigations overrides the public interest in client legal privilege. In those circumstances, the ALRC recommended that the privilege be expressly abrogated.[1748]

13.172 At this stage of the Inquiry, the Commissions' preferred model is that the New South Wales Ombudsman's concerns, if substantiated, should be addressed through express abrogation of the privilege via the *Freedom of Information Act 1982* (Cth) or the *Ombudsman Act 1977* (Cth) (and equivalent state and territory legislation). However, the Commissions would be interested in receiving further submissions on this issue.

Question 13–1 Should the uniform Evidence Acts abrogate client legal privilege in relation to investigations being conducted by watchdog agencies, such as the Commonwealth Ombudsman and state and territory ombudsmen? Alternatively, should the client legal privilege sections of the Acts be amended to create an exception for information and documents relating to the accountability of government?

Privileges protecting other confidential communications

13.173 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

1746 Ibid. A number of other examples were given in the submission.
1747 *Waterford v Commonwealth* (1987) 163 CLR 54.
1748 Australian Law Reform Commission, *Principled Regulation: Federal and Civil Administrative Penalties in Australia*, ALRC 95 (2002), [19.48].

include, for example, doctor and patient, psychotherapist and patient, social worker and client or journalist and source.[1749] The ALRC determined that there were many relationships in society where a public interest could be established in maintaining confidentiality.[1750] ALRC 26 noted that, for example, there are circumstances in which confidentiality is crucial to the furtherance of an accountant and client relationship.[1751] Given the controversial nature of the some of these categories, and the aim of the uniform Evidence Acts to allow as much evidence as possible to be made available, the ALRC proposed that such a privilege be granted at the discretion of the court, stating:

> The public interest in the efficient and informed disposal of litigation in each case will be balanced against the public interest in the retention of confidentiality within the relationship and the needs of particular and similar relationships.[1752]

13.174 This proposal was not adopted as part of the *Evidence Act 1995* (Cth). However, the *Evidence Act 1995* (NSW) provides for a professional confidential relationship privilege and a sexual assault communications privilege in civil proceedings.[1753] A sexual assault communications privilege applies in criminal proceedings through Part 7 of the *Criminal Procedure Act 1986* (NSW). Sections 127A and 127B of the *Evidence Act 2001* (Tas) cover medical communications and communications to a sexual assault counsellor respectively. Section 127A operates only in civil proceedings and s 127B operates only in criminal proceedings. The two models operate differently. In New South Wales, the privileges are discretionary, whereas in Tasmania, they are absolute.

13.175 The ALRC's Report *Recognition of Aboriginal Customary Laws* (ALRC 31)[1754] considered whether the law should compel a witness to answer questions in court where the answer would disclose a past violation of Aboriginal customary laws which might bring 'shame' to the witness, or render the witness liable to some retaliation. This issue is discussed in Chapter 17 as part of a broader discussion dealing specifically with the admissibility of evidence of traditional laws and customs.

Confidential relationships privilege: New South Wales

13.176 Under s 126A of the *Evidence Act 1995* (NSW), a 'protected confidence' for the purpose of the section means a communication made by a person in confidence to another person (the confidant):

> (a) in the course of a relationship in which the confidant was acting in a professional capacity, and

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1749 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), 116.
1750 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [911].
1751 Ibid, [955].
1752 Ibid, [955]. See also Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), xxi.
1753 *Evidence Act 1995* (NSW) Pt 3.10, Divs 1A, 1B (applying to civil matters only). The sexual assault communications privilege available in criminal proceedings is in Pt 7 of the *Criminal Procedure Act 1986* (NSW). These provisions are discussed below.
1754 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986).

(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.

13.177 Section 126B provides that the court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence, or

(c) protected identity information.

(2) The court may give such a direction:

(a) on its own initiative, or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that:

(a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding,

(b) the importance of the evidence in the proceeding,

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,

(e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,

(g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

13.178 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*.[1755] 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.[1756]

13.179 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.[1757] The court must balance the matters set out in s 126B(4), including the probative value of the evidence in the proceeding, the nature of the offence, with the likelihood of harm to the protected confider in adducing the evidence, and then decide if it is appropriate to give a direction under the section.[1758]

13.180 Odgers notes that there has been criticism of the section because it is not clear how the court should exercise the discretion.[1759] 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 that 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.[1760]

13.181 There have not been a significant number of cases concerning Division 1A. In *Urquhart v Latham*, Campbell J considered how the test in s 126B should be exercised. His Honour noted that 'there is a policy concerning the protection of confidences which underlies s 126B, which requires matters favouring the protection of professional confidences, of the type defined in s 126A, to be taken into account in the exercise of discretions about what evidence should be admitted in a hearing'.[1761]

1755 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].

1756 New South Wales, *Parliamentary Debates* Legislative Council, 22 October 1997 (J Shaw—Attorney General), 1120: see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

1757 *Evidence Act 1995* (NSW) s 126B; see also *Wilson v New South Wales* [2003] NSWSC 805, [18].

1758 For example, in *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563 it was held that s 126B applies to a journalist and source relationship, however, in that case, the interests of justice in the plaintiff having an effective remedy outweighed the possible harm which could be caused to the reputation of journalists and their ability to obtain information if they were forced to reveal sources.

1759 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

1760 Ibid, [1.3.11940].

1761 *Urquhart v Latham* [2003] NSWSC 109, 15.

Sexual assault communications privilege: New South Wales and Tasmania

13.182 A privilege for sexual assault communications is available under Part 3.10 Division 1B of the *Evidence Act 1995* (NSW) and Part 7 of the *Criminal Procedure Act 1986* (NSW).[1762] 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).[1763] The chief reason for re-enacting the provisions in the *Criminal Procedure Act* was the decision in *R v Young*[1764] 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'.[1765] 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.[1766]

13.183 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.[1767] Part 7 of 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 the document is substantially outweighed by the public interest in allowing its inspection. The requirement that that the public interest in protection be *substantially outweighed* by the public interest in allowing inspection is a higher test than, for example, the similar balancing exercise under s 130 in relation to public interest immunity.[1768]

13.184 Central to the granting of the privilege is the existence of a counselling relationship. Under s 296(5) of the *Criminal Procedure Act*, a definition of counselling is given, including a requirement that the counsellor have undertaken study or have relevant experience, and that support, encouragement, advice, therapy or treatment is given.[1769] The counselling must also be given in relation to any harm the person may have suffered. Under s 295(1), 'harm' includes physical bodily harm, financial loss,

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1762 A similar privilege is available under s 127B of the *Evidence Act 2001* (Tas).

1763 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), 444.

1764 *R v Young* (1999) 46 NSWLR 681.

1765 *Evidence Act 1995* (NSW) s 126H(1).

1766 Ibid s 126H(2).

1767 New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 1997, 1121 (J Shaw—Attorney General).

1768 G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law, 10.

1769 This broad definition of a counselling relationship was adopted following the decision of the New South Wales Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289 which narrowed the definition of the word 'counselling' to a clinical context: G Bartley, *Sexual Assault Communications Privilege* (2005) College of Law, 14.

stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation or fear).

13.185 The privilege for communications to sexual assault counsellors under s 127B of the *Evidence Act 2001* (Tas) differs from the privilege under the *Criminal Procedure Act*, as the former provides absolute protection of the communications, unless the complainant consents to their production. Section 127B applies only to criminal proceedings and was enacted following a review of sexual offences in Tasmania.[1770] After examining the New South Wales legislation, the Tasmanian government determined that, given the nature of the material, an absolute protection was warranted.[1771]

13.186 In August 2004, the VLRC released its final report on sexual offences.[1772] In that report, the VLRC considered both the New South Wales and Tasmanian models. Although considerable support was received for the Tasmanian approach, the VLRC recommended that the Victorian evidence legislation adopt a model closer to the New South Wales model for trial or plea proceedings. Under this recommendation, a counselling communication must not be disclosed in any trial or plea proceedings except with the leave of the court.[1773] Where a person objects to production of a document which records a counselling communication in relation to a trial or plea proceedings, they cannot be required to produce the document unless the document is produced for examination by the court for the purposes of ruling on the objection; and the court is satisfied that:

- the contents of the document have substantial probative value;
- other evidence of the contents of the document or the confidence is not available; and
- the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication.[1774]

13.187 However, the VLRC recommended that a counselling communication must not be disclosed in committal proceedings. At committal a person could not be required (whether by subpoena or otherwise) to produce a document that records a counselling communication; and evidence of a counselling communication cannot be admitted or adduced.[1775]

1770 Taskforce on Sexual Assault and Rape in Tasmania, *Report* (1998), Rec 20.
1771 P Underwood, *Consultation*, Hobart, 15 March 2005.
1772 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).
1773 Ibid, Rec 77.
1774 Ibid, Rec 78.
1775 Ibid, Rec 76.

13.188 The VLRC considered that these recommendations struck the right balance between protection of the communication and the rights of the accused.

> Our recommendations will allow evidence of confidential communications to be accessed by counsel and used in evidence where specified criteria are satisfied. These criteria balance the competing public interests of ensuring a fair trial for the accused and preserving the confidentiality of protected communications to the greatest extent possible.[1776]

Medical communications privilege: Tasmania

13.189 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).

13.190 This privilege was carried over from the *Evidence Act 1910* (Tas) and can also be found in the evidence legislation of Victoria and the Northern Territory. In these jurisdictions, the privilege is only available in civil proceedings. The ALRC considered this privilege in ALRC 26 and found three main benefits—protecting patients' privacy, encouraging people to seek treatment, and promoting the public interest in effective treatment of patients. The ALRC noted that many of the arguments in favour of the privilege focused more on a right to privacy, rather than on whether problems are caused by the absence of the privilege or benefits that would follow on its implementation.[1777]

13.191 The ALRC found that this rationale suggested a need for a power to excuse medical witnesses in certain cases rather than a blanket privilege, or primary rule of privilege with exceptions.[1778] It contrasted the position of a doctor with that of a lawyer. While each relationship is aided by confidentiality, and confidentiality would encourage both groups of professional services to be sought, unlike the doctor, the lawyer's role could not be conducted if he or she could be compelled to give evidence against a client.[1779] As such, the ALRC proposed that the doctor–client relationship could fall under the general privilege proposed to cover confidential relationships.

Submissions and consultations

13.192 IP 28 asked whether a confidential communications, sexual assault communications and medical communication privilege should be included in the *Evidence Act 1995* (Cth).[1780]

1776 Ibid, [4.89].
1777 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [911].
1778 Ibid, [915].
1779 Ibid, [916].
1780 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 11–9, 11–10, 11–11.

13.193 The extension of privilege to relationships other than lawyers and clients is a controversial issue. The Law Council remains sceptical about creating privileges beyond client legal privilege, the privilege against self-incrimination (both of which further the administration of justice) and public interest immunity (which only prevents access to evidence where the interests of the state so demand).

> The effect of a privilege or immunity is that relevant information is withheld from a court and the interests of justice suffer accordingly. Whilst the Council appreciates arguments in privileging confidential communications within particular relationships, the Council believes there should a clear onus upon any person claiming the 'privilege' to show that the interests of justice are not, in the circumstances of the particular case, unfairly affected. Where information may point to there being a reasonable doubt about an accused's guilt the Council remains unconvinced that further privileges should stand in the way of access to this evidence. [1781]

13.194 The Law Council emphasises that courts already have powers to maintain the confidentiality of information disclosed to them for the specific purpose of ensuring justice in the individual case.[1782]

13.195 ASIC agrees that great care should be taken before a principle akin to client legal privilege is applied in the context of other professional relationships such as the relationship between accountant and client. This is because many of the underlying policy reasons for client legal privilege do not apply in the case of other professional relationships.

> In ASIC's experience, there are circumstances in which the close involvement of legal advisers in the structuring of transactions can be tantamount to an abuse of client legal privilege. ASIC is concerned that these abuses may flourish if a similar privilege was applied to professionals who may be subject to less rigorous supervision.[1783]

13.196 Another commentator argues that where the evidence is relevant to facts in issue, then the privilege should not apply. Relevant evidence might include matters communicated to a rape crisis counsellor by a complainant shortly after the event that contradict a later version of events.[1784]

13.197 The Bar Association of the Australian Capital Territory expresses the view that the *Evidence Act 1995* (Cth) should not include a confidential relationships privilege, as the issue of which relationship should be covered is a political one, and something best left to individual states.[1785] The Law Society of SA does not believe that a confidential relationships privilege should be legislated.[1786]

1781 Law Council of Australia, *Submission E 32*, 4 March 2005.
1782 Ibid.
1783 Australian Securities & Investments Commission, *Submission E 33*, 7 March 2005.
1784 P Bayne, *Consultation*, Canberra, 9 March 2005.
1785 ACT Bar Association, *Consultation*, Canberra, 9 March 2005.
1786 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

13.198 However, most consultations supported the adoption of a qualified confidential relationships and sexual assault communications privilege.[1787] Generally, practitioners and judges are unaware of areas in which the operation of either privilege has caused concern in New South Wales. For example, some New South Wales District Court judges indicate that the issue has not been raised in many (if any) trials over which they have presided.[1788]

13.199 However, the support for new privileges is premised on the view that the privileges should be qualified ones and should only apply where the interests of justice so dictate. One senior practitioner considers that it is important that the privilege be a balancing exercise, not absolute. He argues that, from a defence point of view, it is hard to justify a particular privilege for sexual assault communications because a particular category of defendant is being singled out, rather than a category of information.[1789] A Victorian practitioner echoed these comments, stating that a confidential relationships privilege should only be a qualified one, as there are many examples where the communication might include something that could be very important for the defence.[1790]

13.200 The Australian Accounting Bodies strongly support the adoption of a similar provision to the New South Wales confidential relationships privilege in the *Evidence Act 1995* (Cth) to protect confidences between accountants and their clients.[1791]

13.201 Some Family Court judges (and one Federal Magistrate) favour the introduction of a confidential relationships privilege in the Commonwealth Act, provided the best interests of the child are factored into its operation in family law proceedings. For example, any confidentiality between a father and his therapist dealing with issues of sexual assault should not take precedence over the interests of the child in disclosure.[1792]

13.202 The Inquiry has also been told that the operation of s 19N of the *Family Law Act 1975* (Cth) is an issue in some state criminal courts. Section 19N relates to the admissibility of certain admissions made to family counsellors and mediators. Section 19N(2) provides that evidence of anything said, or any admission made, at a meeting or

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1787 See, eg, Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005; B Donovan, *Consultation*, Sydney, 21 February 2005; A Palmer, *Consultation*, Melbourne, 16 March 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005. The Law Society of SA did not object to the adoption of a sexual assault communications privilege along the lines of the NSW provisions within the *Evidence Act 1995* (Cth), although it preferred the absolute protection in criminal matters as under the Tasmanian Act: Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005.

1788 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.

1789 T Game, *Consultation*, Sydney, 25 February 2005.

1790 A Palmer, *Consultation*, Melbourne, 16 March 2005.

1791 CPA Australia and Institute of Chartered Accountants in Australia, *Submission E 27*, 23 February 2005.

1792 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

conference conducted by a person to whom the section applies (listed in s 19N(1)) while the person is acting as such a person is not admissible in any court (whether exercising federal jurisdiction or not); or in any proceedings before a person authorised by a law of the Commonwealth or of a state or territory, or by the consent of the parties, to hear evidence. State criminal courts have regularly held that s 19N does not apply to their proceedings on the basis that the reference in s 19N to 'any court (whether exercising federal jurisdiction or not)', is limited by the definition of 'court' under s 4 of the *Family Law Act* as 'the court exercising jurisdiction by virtue of this Act'.[1793] The Inquiry has been informed that community organisations, particularly those providing counselling services to parties involved in family law proceedings, are concerned about the limited application of s 19N.

13.203 Concerns are raised that s 19N could also be an issue in relation to the soon to be established Family Relationship Centres and to communications made in that context. The enactment of a confidential communications privilege in the *Evidence Act 1995* (Cth) could therefore clarify the position of notes covering such admissions in the family law jurisdiction.

13.204 In relation to the medical communications privilege in Tasmania, one Crown Prosecutor told the Inquiry that he prefers the more general communications privilege available in New South Wales because it also applies to criminal proceedings and operates for the benefit of the accused and witnesses. In relation to the sexual assault communications privilege, he argues that the New South Wales qualified privilege means that a judge still needs to view the material, which may be distressing for the complainant. The absolute privilege in Tasmania is preferable in that regard, as the complainant maintains complete control of the material.[1794]

The Commissions' view

13.205 The Commissions believe that the ALRC's original reasoning for proposing a confidential relationships privilege remains sound. Where there is an identified need for statutory recognition of some confidential relationships, a tension exists as to whether to leave the discretion with judges or to try and craft a statutory statement of the relationships to which privilege will apply.[1795] The New South Wales approach of a guided discretion is an attempt to negotiate a middle path through this dilemma.

13.206 The Commissions do not support the addition of an absolute confidential relationships privilege to the *Evidence Act 1995* (Cth) for the same reason it was not supported in the original inquiry.

> The provision of a discretionary privilege would allow the competing public interests to be taken into account when the court is assessing whether evidence ought in the

1793 See, eg *R v Liddy (No. 2)* (2001) 28 Fam LR 377; *R v Olig* [2000] NSWSC 1096.
1794 Office of the Director of Public Prosecutions Tasmania, *Consultation*, Hobart, 15 March 2005.
1795 S Mason, *Consultation*, Sydney, 31 January 2005.

> circumstances to be compelled from witnesses, thus allowing the courts to be sensitive to the individual needs of witnesses and of relationships.[1796]

13.207 The Commissions have considered whether to recommend that the *Evidence Act 1995* (Cth) adopt the original proposal in ALRC 38. However, given the support expressed for the New South Wales provision, it is in the interests of consistency and uniformity for the Commonwealth Act to adopt the New South Wales confidential communications provisions.[1797] A draft provision is set out in Appendix 1.

13.208 The view of ASIC regarding the potential abuse of such a privilege is noted. However, the fact that the privilege is discretionary, and that parties are able to make an argument as to why the material should be released, will allow a judge to circumvent illegitimate attempts to claim the privilege.

13.209 The Commissions agree that, in family law proceedings concerning children, the interests of the child may outweigh the harm that may be caused, whether directly or indirectly, to the person who imparted the confidence. It is noted that the Family Law Council has released a discussion paper which asks whether the law should be amended to allow the paramountcy principle— which requires that the court treat the best interests of the child as the paramount consideration in deciding children's issues—to qualify the application of the *Evidence Act 1995* (Cth) in some circumstances.[1798]

13.210 At this stage of the Inquiry, the Commissions propose the adoption of the sexual assault communications privilege, as enacted in Division 1B of the New South Wales Evidence Act and Part 7 the *Criminal Procedure Act 1986* (NSW). Whilst the confidential communications privilege could be considered to cover such relationships, the Commissions agree with the view of the New South Wales Parliament that records of the relationship between a sexual assault victim and a counsellor are of particular importance and require a particular privilege. The Commissions also agree with the recent finding of the VLRC that such legislation recognises the public interest in encouraging people who have been sexually assaulted to seek therapy and may also encourage people who are sexually assaulted to report the crime to the police.[1799] The Commissions consider that the proposal made by the VLRC which is to some extent a hybrid of the Tasmanian and New South Wales approaches warrants further examination. The Commissions welcome views on the VLRC proposal. A draft provision of a sexual assault communications privilege has not been included in Appendix 1.

13.211 The Commissions further propose that the confidential communications privilege and the sexual assault communications privilege should apply to pre-trial

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1796 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [918].

1797 These provisions are contained in the *Evidence Act 1995* (NSW) Pt 3.10, Div 1A.

1798 Family Law Council, *The 'Child Paramountcy Principle' in the Family Law Act* (2004), 31, Qs 1, 2. See Ch 18.

1799 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71].

processes. This is currently what occurs in New South Wales. It is noted that the extension of these provisions will resolve the difficulty in *R v Young* and allow the sexual assault communications privilege sections currently located in Part 7 of the *Criminal Procedure Act 1986* (NSW) to be re-enacted in the *Evidence Act 1995* (NSW).

13.212 The Commissions do not see a need for the *Evidence Act 2001* (Tas) to be similarly amended to follow the New South Wales provisions. Whilst improved uniformity is clearly a goal of this Inquiry, it is acknowledged that states may choose a different path in the enactment of the uniform legislation for good reasons, such as consistency with previous legislation or, as in the case of s 127B, following the recommendations of law reform bodies in that state.

Proposal 13–7 Part 3.10 of the *Evidence Act 1995* (Cth) should be amended to adopt the equivalent of Division 1A of the *Evidence Act 1995* (NSW).

Proposal 13–7a Part 3.10 of the *Evidence Act 1995* (Cth) and Part 3.10, Division 1B of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault counselling privilege of a discretionary kind applicable to both civil and criminal proceedings.

Proposal 13–7b If Proposal 13–7a is accepted, Part 7 of the *Criminal Procedure Act 1986* (NSW) should be repealed.

Proposal 13–8 Both the confidential communications privilege and the sexual assault communications privilege should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Privilege in respect of self-incrimination in other proceedings

13.213 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.[1800] 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).

1800 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

13.214 Section 128(1) of the uniform Evidence Acts applies where a witness objects to giving particular evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty.[1801] Under s 128(2):

> Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:
>
> (a) that he or she need not give the evidence; and
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> (b) that, if he or she gives the evidence, the court will give a certificate under this section; and
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> (c) of the effect of such a certificate.

13.215 Under s 128(5), a witness claiming the privilege on 'reasonable grounds' is not required to give that particular evidence unless the court finds that the 'interests of justice' so require. In this regard, the Acts differ from the common law, which grants an absolute right to claim the privilege.[1802] If the witness does give evidence, the court must give the witness a certificate which grants that person use and derivative use immunity in relation to the particular evidence (except in criminal proceedings in respect of the falsity of the evidence).[1803] Where the court has denied a claim for privilege and where, after the giving of evidence, the court finds that there were indeed reasonable grounds for the claim, the witness must also be given a certificate.[1804] 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.[1805]

1801 Clause 3 of Pt 2 of the Dictionary in the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) defines a 'civil penalty' as a penalty (other than a criminal penalty) arising under Australian law or a law of a foreign country. The protection of a certificate does not appear to extend to use of the evidence for administrative purposes, such as cancellation of a licence or a banning order under the *Corporations Act 2001* (Cth). Administrative actions have been traditionally held by the courts to have a protective purpose, rather than that of a penalty or punishment: eg, *ASC v Kippe* (1996) 67 FCR 499. However, in relation to the common law privilege against self-exposure to a penalty, the High Court has found that disqualification orders may have both a protective and a penal purpose, and therefore the privilege may apply: *Rich v Australian Securities and Investments Commission* (2004) 209 ALR 271.

1802 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.05].

1803 Under the *Evidence Act 1995* (Cth) the protection afforded under the certificate only extends to any proceeding in a NSW court. However, under s 128(10) and 128(11) of the *Evidence Act 1995* (Cth), a certificate given under the NSW Act operates as though it were given under the federal Act, thereby extending the protection to any Australian Court. That extended effect also applies to the direct and derivative use immunities contained in s 128(7).

1804 Uniform Evidence Acts s 128(4).

1805 Ibid s 187.

13.216 Section 128 differs from the ALRC's original proposal, which provided only for an optional certificate, and did not allow a court to compel a witness to give the evidence.[1806]

13.217 IP 28 asked whether any general concerns were raised by the issuing of certificates under s 128 of the uniform Evidence Acts.[1807]

Submissions and consultations

13.218 Concerns raised with the Inquiry regarding the operation of s 128 focused on the procedure of certification, rather than the aims or scope of the section.

13.219 Judges, in particular, state that the process under s 128 is cumbersome and hard to explain to witnesses. One New South Wales Supreme Court judge told the Inquiry that there is widespread misunderstanding about certificates issued under s 128. He said witnesses tend to assume that they will be exempted from answering questions, rather than understanding that they will be required to give the evidence and then be issued with a certificate.[1808]

13.220 Some New South Wales District Court judges submit that generally s 128 serves a useful purpose. However, their view is that the provision is clumsy to apply and requires redrafting. In particular the judges submit that:

- the form of words used by the judge is confusing to witnesses;
- the necessity to invoke the process in relation to each question is clumsy. It should be the broader 'subject matter' of the evidence (rather than 'particular evidence') that is protected, for example, 'the use of cocaine by the witness when living in Kings Cross in 1997–98';
- it should be sufficient for a judge to confirm the granting of the certificate in the record of proceedings, rather than having to create an actual document; and
- the Act should require a prosecutor to keep a permanent record of all certificates granted under s 128 in any proceedings.[1809]

13.221 Some New South Wales magistrates agree that it is not clear whether you have to go through each question that is to be asked of the witness or whether you can issue a blanket certificate. Given the time constraints of the local court, some magistrates tend to give a blanket certificate. However, they consider the correct approach is to offer the certificate on a question by question basis. They submit that the process requires streamlining.[1810]

1806 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [215].
1807 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–12.
1808 Judicial Officers of the Supreme Court of New South Wales, *Consultation*, Sydney, 18 March 2005.
1809 New South Wales District Court Judges, *Submission E 26*, 22 February 2005.
1810 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

13.222 This is also identified as a problem in the Family Court where a witness, for example, wishes to give evidence to the Court about drug use or social security fraud. Some Family Court judges state that the situation where a person must be asked the question, then object to it, is a charade.[1811]

The Commissions' view

13.223 The process of certification in s 128 was based on a model adopted in the (then) Australian Capital Territory Court of Petty Sessions. ALRC 26 noted that the procedure was invoked around 25 times a year and elicited useful additional information from witnesses.[1812] As noted above, the ALRC at that time recommended an optional certification procedure. This would still allow witnesses to invoke his or her common law right not to be compelled to say anything which might lead to further inquiries or to the gathering of evidence against him or her.[1813]

13.224 One suggestion made to the Inquiry is that s 128 could be clarified by redrafting the order in which the process of certification is outlined in the section. This would involve moving s 128(5), where the court may require the witness to give evidence, closer to s 128(2), where the witness makes the objection.[1814]

13.225 Rather than the current practice, where a certificate is required to be issued for each question, one option would be to define 'particular evidence' under the section to include 'evidence both in response to questions and evidence on particular topics'. Section 128(1) could state the section applies to witnesses giving 'any or some evidence which may tend to prove' that the witness has committed an offence or is liable to a civil penalty.

13.226 The Commissions are interested in receiving submissions on how the section might be redrafted.

Proposal 13-9 Section 128 should be re-drafted to clarify the procedure by which a witness is able to object to giving evidence, may be compelled to give evidence and may be granted privilege in respect of self-incrimination in other proceedings.

Question 13-2 On what terms should s 128 be redrafted to clarify its procedure?

1811 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.
1812 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [861].
1813 Ibid, [861].
1814 S McNicol, *Consultation*, Melbourne, 17 March 2005.

Application of s 128 to pre-trial proceedings

13.227 Section 128 provides a mechanism for allowing a witness to object to answering questions on the grounds that, to do so, may expose the witness to the risk of criminal and other proceedings. Its policy aim is premised on the desirability of encouraging witnesses to testify. Given that this section is concerned with witnesses and testimonial evidence, it is not proposed that the certification procedure be applied to pre-trial matters, along the lines of this Discussion Paper's other proposals. In this case, the common law rules regarding the privilege against self-incrimination will continue to apply in pre-trial and non-curial contexts.

Application of s 128 to ancillary proceedings

13.228 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.[1815] 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.

13.229 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.[1816] 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.
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> 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

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1815 J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [128.10].

1816 Ibid, [128.10], citing, eg, *In the Marriage of Atkinson* (1997) 136 FLR 347; *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538.

> 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.[1817]

13.230 In *Ross v Internet Wines Pty Ltd*,[1818] the New South Wales Court of Appeal held, in effect, that a respondent could not be compelled to disclose assets before any claim to the privilege against self incrimination was adjudicated upon. The Supreme Court of New South Wales, in *Pathways Employment Services v West*,[1819] considered the *Bax* practice in some detail. Campbell J questioned whether the approach taken in *Bax* is correct, because in essence it is the court directing the defendant to become a witness only so that the privilege against self-incrimination can be compromised.[1820]

> 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.[1821]

13.231 Campbell J considered that the interaction between the law concerning privilege against self-incrimination and the law concerning compulsory disclosure of information for the purpose of civil proceedings was not coherent.[1822] 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'.[1823] 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.[1824]

13.232 Campbell J argued that the Commissions' 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.[1825]

13.233 In *Macquarie Bank Ltd v Riley Street Nominees Pty Ltd*,[1826] Campbell J made orders designed to meet the requirements of the Court of Appeal decision in *Ross v Internet Wines*. One of the orders stated that if the respondents considered that the order to produce an affidavit of assets may incriminate them, they had to file and serve

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1817 *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538, [41]–[46].
1818 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436.
1819 *Pathways Employment Services v West* [2004] NSWSC 903.
1820 Ibid, [40].
1821 Ibid, [40].
1822 Ibid, [46].
1823 Ibid, [12].
1824 Ibid, [13].
1825 Ibid, [49].
1826 *Macquarie Bank Ltd v Riley Street Nominees Pty Ltd* [2005] NSWSC 162.

within seven days an affidavit setting out their claim to the privilege against self-incrimination. If that claim for privilege was upheld, then the respondents did not need to disclose that information.

Submissions and consultations

13.234 A committee of the Council of Chief Justices of Australia and New Zealand is currently investigating the question of the harmonisation of rules of court, practice notes and forms in relation to *Mareva* orders and *Anton Piller* orders. The Committee has made a submission to this Inquiry suggesting that the uniform Evidence Acts be amended to abrogate the privilege so that an order for disclosure of the general kind mentioned must be obeyed.[1827]

13.235 The Committee notes that, in the United Kingdom, the privilege has been abrogated by statute in intellectual property and passing off proceedings.[1828] It is in proceedings of these kinds that *Anton Piller* orders are most commonly made.

13.236 There are a number of potential ways in which s 128 could be amended to abrogate the privilege in civil proceedings for *Mareva* orders and *Anton Piller* orders. The section could be amended to abrogate the privilege in civil proceedings generally, where any order is made against an individual or a question is put to an individual. Alternatively, the privilege could be specifically abrogated where an order is made requiring an individual to disclose assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. The information would not, however, be available to be used against that individual in any criminal proceeding or in any proceeding that would expose the individual to a penalty, (except a proceeding for perjury or contempt of court).

13.237 The Commissions consider that a general abrogation of the privilege in civil proceedings in unwarranted and prefers the limited abrogation of the privilege to specific types of orders to rectify the present problem with s 128. A draft provision is set out in Appendix 1.

Proposal 13-10 Section 128A should be inserted in the uniform Evidence Acts to apply in respect of orders made in a civil proceeding requiring an individual to disclose assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched.

Definition: use in any proceeding in an Australian court

13.238 Section 128(7) of the *Evidence Act 1995* (Cth) states:

1827 Committee of the Council of Chief Justices of Australian and New Zealand, *Submission E 52,* 22 April 2005.

1828 See *Supreme Court Act 1981 (UK)* s 72.

> In any proceeding in an Australian court:
>
> (a) evidence given by a person in respect of which a certificate under this section has been given; and
>
> (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;
>
> cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

13.239 The term 'proceeding' is not defined, although 'Australian court' is given a wide definition.[1829] Odgers argues that both concepts should be given a liberal interpretation based on the underlying protective purpose of granting the privilege.[1830] Section 128(7) is mirrored in the other uniform Evidence Acts, although, for example, under the *Evidence Act 1995* (NSW), the section applies to 'any proceeding in a NSW court'.

13.240 As noted in Chapter 2, the definition of an Australian court in the *Evidence Act 1995* (Cth) is broader than the definition of a NSW court in the New South Wales *Evidence Act*. A 'NSW court' is defined in the Dictionary as the Supreme Court or another court created by Parliament including a body, other than a court, that is required to *apply* the rules of evidence.[1831] The definition of an Australian court under the Commonwealth Act includes a person or body authorised under an Australian law to hear, receive and examine evidence (regardless of whether the rules of evidence must be applied). This means that the protection offered by a s 128 certificate under the *Evidence Act 1995* (NSW) is more limited than under the Commonwealth Act as it does not extend to tribunals that are not required to apply the rules of evidence, such as disciplinary tribunals and other administrative bodies.[1832]

13.241 One issue raised by the term 'any proceeding' is the status of a retrial. In *R v Cornwell*,[1833] the accused was granted a certificate under s 128 in his first trial for evidence given by him that might incriminate him in relation to other possible charges. The jury at the trial could not decide on a verdict and a re-trial commenced before Blackmore DCJ in the District Court of New South Wales. Blackmore DCJ determined that the trial before him was a different proceeding for the purposes of s 128(7) and, therefore, that the certificate issued by Howie J in the Supreme Court of New South Wales would apply to the proceeding in the District Court, preventing the tendering of the evidence that was the subject of the certificate. The issue was whether a retrial

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1829 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13100]. See discussion of what is meant by 'proceeding' in Ch 2.

1830 Ibid, [1.3.13100].

1831 The same definition of a 'Tasmanian court' is given under *Evidence Act 1991* (Tas) s 3.

1832 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.13100].

1833 *R v Cornwell* [2004] NSWSC 45.

could be considered a 'proceeding' for the purpose of a s 128 certificate or whether it is part of the original proceedings.[1834]

13.242 Following Blackmore DCJ's ruling, the parties appeared before Howie J regarding the issuing of the certificate from the first trial. The Crown contended that the certificate should not be issued because of the defence delay in seeking it and the use to be made of it in the District Court proceedings.

13.243 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'.[1835] The process set out by s 128 is mandatory not discretionary once the requirements of the section are met.

13.244 Howie J expressed concern about the situation in *Cornwell*, stating that it was difficult to see 'any justifiable policy which would permit an accused to give evidence in a trial on the basis that some or all of it could not be used against him in any subsequent proceedings for the same offence'.[1836] 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.[1837]

> It is clear from the reasons for judgement and the transcript of proceedings that the purpose of issuing the certificate was to protect the applicant from prosecution for other offences not charged before the Court … As the Crown has sought to lead evidence of uncharged criminal activity as part of its case in proving the offence charged, it seemed to me that the applicant was entitled to defend himself free of running the risk of his evidence being used against him in subsequent proceedings for criminal activity for which he was then not being tried. It was not my intention, nor was it ever suggested during the course of argument, that the certificate could be used by the accused to protect himself from the use of his evidence in a proceeding for the charge in respect of which the evidence was given.[1838]

13.245 IP 28 asked whether there were any concerns about the definition of 'any proceeding in an Australian court' under s 128 of the uniform Evidence Acts.[1839]

Submissions and consultations

13.246 There is general support for the proposition that a 'proceeding' for which a certificate may be used under s 128 should not include its use in a retrial for the same

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1834 Ibid.
1835 Ibid, [12].
1836 Ibid, [11].
1837 Ibid, [18].
1838 Ibid, [9]–[10].
1839 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–14.

offence.[1840] The view is put that where a proceeding is aborted, the parties 'start from square one' so that any certificate granted in the aborted trial would have no effect in the new trial.[1841]

13.247 The issue of a retrial was not considered in the ALRC's first inquiry. However, the Commissions consider that Howie J's analysis is persuasive. Section 128 should be clarified to reflect this position. The proposed provision is set out in Appendix 1.

13.248 The Commissions also believe that the current definition of a 'NSW court' under the *Evidence Act 1995* (NSW) unduly limits the application of s 128 certificates. In order to reflect the policy basis of the section, the ambit of the protection of a certificate under the uniform Evidence Acts should be the same. As under the *Evidence Act 1995* (Cth), the protection offered by a s 128 certificate should extend to administrative tribunals and disciplinary bodies authorised to receive and examine evidence. The Commissions recommend amendment of the Dictionary of the *Evidence Act 1995* (NSW) to reflect the position under the *Evidence Act 1995* (Cth) in this regard.[1842] A draft provision is set out in Appendix 1.

Proposal 13-11 Section 128(7) of the uniform Evidence Acts should be amended to clarify that a 'proceeding' under that section does not include a retrial for the same offence or an offence arising out of the same circumstances.

Proposal 13-12 The definition of a 'NSW court' in the Dictionary of the *Evidence Act 1995* (NSW) should be amended to include 'any person or body authorised by a New South Wales law, or by consent of the parties, to hear, receive and examine evidence'.

Religious confessions

13.249 A specific privilege in respect of religious confessions was not recommended by the ALRC in its earlier inquiry because it was considered that confessions fell under the confidential communications privilege.[1843] Such a privilege was nevertheless enacted in s 127 of the uniform Evidence Acts. The religious confessions privilege applies in pre-trial matters, as it relates not only to the adducing of evidence but also allows a member of clergy (of any religious denomination) to refuse to divulge that a religious confession was made or to divulge the contents of the confession.[1844]

1840 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; G Bellamy, *Consultation*, Canberra, 8 March 2005; B Donovan, *Consultation*, Sydney, 21 February 2005.
1841 S Mason, *Consultation*, Sydney, 31 January 2005.
1842 See also Proposal 2–1.
1843 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), proposed s 109.
1844 *Evidence Act 1995* (Cth) s 127.

13.250 No submissions were received by the Inquiry on this issue nor was it raised in consultations. This suggests to the Commissions that the section is working well in practice, and therefore no change is proposed.

Evidence excluded in the public interest

13.251 A claim of public interest immunity may be made under the common law and is also available under s 130 of the uniform Evidence Acts. Public interest immunity can be distinguished from privilege in that, in the case of privileges, only a party who can claim the privilege is able to invoke it. By contrast, a claim of public interest immunity can be made by the state, a non-governmental party to the proceedings, or by the court on its own motion.

13.252 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 Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.[1845]

13.253 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.[1846] 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.[1847] 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'.[1848]

13.254 Section 130(1) substantially reflects the ALRC's recommendations. It provides:

> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

13.255 In *New South Wales v Ryan*,[1849] the Federal Court held that there was no relevant difference, in relation to a public interest immunity claim for Cabinet papers,

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1845 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].

1846 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [864].

1847 See *Sankey v Whitlam* (1978) 142 CLR 1.

1848 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [866], citing *Alister v The Queen* (1983) 50 ALR 41, 44–45.

1849 *New South Wales v Ryan* (1998) 101 LGERA 246. See also J Anderson, J Hunter and N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), [130.40].

between the common law, as determined in *Sankey v Whitlam*,[1850] and the provisions of s 130.

13.256 The ALRC has recently examined the operation of s 130 in the context of the protection of classified and security sensitive information in court proceedings. In the Report *Keeping Secrets* (ALRC 98), it was estimated that public interest immunity arises as an issue in less than one per cent of cases across all courts.[1851] The ALRC also found that the public interest immunity procedure worked effectively, although the procedures for invoking its use were thought by some to require clarification.[1852]

13.257 ALRC 26 noted that one issue in relation to public interest immunity was whether 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.[1853] At the time, 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.[1854] The availability of advance rulings for evidentiary issues is discussed further in Chapter 14.

13.258 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).[1855]

Need for an appeal process

13.259 IP 28 asked whether any issues were raised by s 130.[1856] The AGS submits that it wishes to have a more clearly defined appeal process for public immunity claims. This is in line with the AGS's submission to the ALRC's earlier inquiry on classified and security sensitive information. The AGS notes that an appeal process was developed by the ALRC in ALRC 98, however, this only relates to security sensitive (or national security) information and not public interest immunity claims more broadly.

13.260 The AGS argues that a clearly defined appeal process would desirably include provision for public interest immunity claims made in interlocutory stages to be determined in sufficient time for an appeal also to be determined before hearing—or alternatively, for the hearing to be deferred in whole or in part as necessary. Such a

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1850 *Sankey v Whitlam* (1978) 142 CLR 1.

1851 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.192].

1852 Ibid, [8.192]–[8.205].

1853 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [8.68].

1854 Ibid, [8.68].

1855 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), [8.208]–[8.211]. The *National Security Information (Criminal Proceedings) Act 2004* (Cth) commenced operation in December 2004.

1856 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 11–18.

process should also overcome a problem that now exists in relation to public interest immunity claims made in the interlocutory stages, this being that the interlocutory ruling does not bind the trial judge. The AGS accepts that a trial judge should have the right to reconsider a public interest immunity claim if circumstances relating to the competing aspects of the public interest change. However, aside from that situation, the AGS believes that public interest immunity rulings in interlocutory stages should be final (subject to appeal).

13.261 The Commissions note the AGS concerns regarding the need for a more defined appeal process from a ruling on a claim for public interest immunity. However, the Commissions consider that this concern is one of procedure and therefore should not be something that falls under the ambit of an Evidence Act of general application. It is noted that appeal procedures in relation to other evidentiary rulings are not included in the uniform Evidence Acts.

Section 130 to cover pre-trial proceedings

13.262 A claim for public interest immunity may be made at trial or in the course of pre-trial procedures.[1857] In the case of tribunals and investigative agencies, public interest immunity is often preserved by the inclusion of statutory provisions.[1858]

13.263 Section 130 is essentially a restatement of the common law, with a non-exhaustive formula indicating how the competing interests are to be balanced. The Commissions believe it would be desirable to extend the operation of s 130 to pre-trial proceedings.

Proposal 13-13 Section 130 of the uniform Evidence Acts should apply to pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings.

Exclusion of evidence of settlement negotiations

13.264 Section 131 of the uniform Evidence Acts provides that evidence is not to be adduced of a communication that is made in connection with an attempt to negotiate a settlement, including communications made with third parties. The section applies only to civil matters, and not in relation to negotiations concerning criminal charges.

13.265 A number of exceptions apply to this general statement, including: where the parties consent; where the substance of the evidence has been partly or wholly disclosed; the communication included a statement that it was not intended to be

1857 S McNicol, *Law of Privilege* (1992), 378.

1858 *Australian Securities and Investments Commission Act 2001* (Cth) s 127(1); *Administrative Appeals Tribunal Act 1975* (Cth) ss 28(2), (3), 36A–36D; S McNicol, *Law of Privilege* (1992), 378.

confidential; or where making the communication or preparing the document affects a right of a person. The exceptions were developed along similar lines to those established under the common law.

13.266 In ALRC 26, the ALRC noted that the primary rationale given for the protection was the public interest in encouraging settlement of disputes.[1859] The Acts mirror a similar 'without prejudice' privilege available at common law, where the judge may exercise his or her discretion to admit evidence of settlement negotiations as part of the inherent jurisdiction of the court. As under the Acts, the court must be satisfied that the communication is genuinely intended to be an attempt at settlement.[1860]

13.267 Examples of matters where the court has admitted evidence of settlement negotiations under s 131 include:

- An offer of compromise on the matter of costs, as it fell within the exclusion under s 131 relating to liability for costs.[1861]
- A letter headed 'Without Prejudice' which suggested a willingness to settle but did not suggest a specific compromise for the dispute. It was held not to be an attempt to negotiate a settlement of a proceeding.[1862]
- An offer of settlement on the question of costs which reserved the right to be tendered on the question of costs.[1863]

13.268 In *Silver Fox Pty Ltd v Lenard's Pty Ltd*,[1864] it was found that the wording of s 131 was clear.

> Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations—whether private or by mediation—are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression 'without prejudice' or by a mediation agreement.[1865]

1859 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [890].
1860 B Leader, 'Public Interest Privilege' (Paper presented at Australasian Government Solicitors Conference, 19 November 1992), 1.
1861 *Bruinsma v Menczer* (1995) 40 NSWLR 716.
1862 *GPI Leisure Corporation v Yuill* (1997) 42 NSWLR 225.
1863 *Bloom v Mini Minors* (Unreported, Supreme Court of New South Wales, McClelland J, 28 August 1996).
1864 *Silver Fox Pty Ltd v Lenard's Pty Ltd* (2004) 214 ALR 261.
1865 Ibid, [36].

13.269 The Commercial Bar Association of Victoria suggests that these decisions are consistent with what would be the expected results at common law and are evidence of the straightforward application of the provisions under the Acts.[1866]

Submissions and consultations

13.270 One submission argues that the exceptions to the 'without prejudice' privilege may mean that certain statements made during mediation or another situation where the privilege would otherwise apply may not be privileged. These include:

- Where the statement forms part of a discussion that is alleged to give rise to an agreement;
- If a party is alleged to have made any mis-statement at a mediation that may be said to amount to a misrepresentation or an estoppel. It may be sufficient that a party simply over-states that strength of their case;
- If the ACCC calls for information of what transpired at a mediation under s 155 of the *Trade Practices Act 1974* (Cth);
- If there is an examination undertaken by ASIC or a liquidator under s 597 of the *Corporations Law 2001* (Cth);
- Possibly, where an administrative decision maker seeks to rely on the admission;
- Where the other party is said to have expressly, or impliedly, waived the privilege;
- If a party makes a statement that is outside the parameters of the precise dispute in question;
- If a party acknowledges that they are impecunious;
- If a party says that they will move assets to make themselves "judgment proof";
- If a party makes a defamatory statement or threatens to institute patent, copyright or trade mark proceedings; or
- If a party concedes that he or she may give evidence contrary to what he or she concedes to be the case during mediation.[1867]

13.271 The submission states that the law should be changed so that nothing that is said or done in mediation, or in preparation for mediation or in consequence of a mediation, should be admissible in any court unless:

- it amounts to a criminal act;
- such disclosure is necessary in order to protect the safety of a person; or
- it vitiates a written agreement that is alleged to have been made.[1868]

1866 Commercial Bar Association of the Victorian Bar, *Submission E 37*, March 2005.
1867 M Hoyne, *Submission E 42*, 21 March 2005.

13.272 Another suggestion is to amend s 131 so that agreements reached as a result of mediation will only be enforceable if, and to the extent that, they are in writing. This would largely remove the need for courts to examine without prejudice discussions to determine if a binding agreement was reached, as they will be required to look at the terms of the written document alone. Parties would not be required to enter into a written agreement, but would be made aware that, if they fail to do so, then the 'agreement' will be unenforceable.

13.273 A drafting discrepancy in the section is also noted. Under s 131(1)(a) the communication is protected where it is made in connection with an attempt to negotiate the settlement of 'the' dispute. Under s 131(1)(b) documents are protected that have been prepared in connection with an attempt to negotiate 'a' dispute. However, the submission notes that Odgers and Gans and Palmer have argued that this should not make any difference in outcome.[1869] However, if the section is amended then any differences in language should be corrected.

13.274 It is also suggested that s 131(2)(h) requires amendment. This section provides an exception to the privilege where the communication or document is relevant to determining liability for costs. It is argued that there is an anomaly in the legislation because the privilege is lost when the court is determining the question of costs but not when it is determining the question of other matters not related to liability, such as the question of interest on damages awarded. On this basis, s 131(2)(h) could be amended to include the words 'liability for costs *or interest*'.

13.275 The Commissions' analysis of case law has not revealed any significant difficulties in the operation of s 131 to date, including in cases that have involved communications made during mediation. On this basis, the Commissions are reluctant to recommend any change to the section without reference to a specific difficulty that requires remedy. The Commissions are interested in receiving further views on this issue.

Question 13-3 Are there any difficulties with the operation of s 131 of the uniform Evidence Acts? In particular, are there difficulties with statements made during mediation, that may not be covered by the privilege, but should be?

1868 Ibid.
1869 Ibid.

14. Discretionary and Mandatory Exclusions

Contents

Introduction

14.1 The uniform Evidence Acts contain a number of provisions that give courts the discretion to exclude, or mandate the exclusion of, otherwise admissible evidence.

14.2 Section 135 provides a discretion in both civil and criminal proceedings 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; be 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 provides a discretion to exclude evidence that has been illegally or improperly obtained.

14.3 In addition, s 136 provides a discretion to limit the use that can be made of evidence that is relevant for more than one purpose. Finally, s 192 provides that, where a court may give leave, permission or direction, it may do so on such terms as it thinks fit, taking into account the factors specified in s 192(2).

14.4 This chapter examines how these sections are operating in practice and how any concerns about their operation should be addressed.

General discretion to exclude evidence

14.5 Section 135 of the uniform Evidence Acts provides that in civil and criminal proceedings:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing; or
>
> (c) cause or result in undue waste of time.

14.6 In practice, 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.

Relevance and the discretion to exclude

14.7 The origins of the discretion contained in s 135 reside in the common law concept of 'sufficient relevance'.

14.8 Both at common law and under the uniform Evidence Acts, relevance is the fundamental requirement for admissibility: evidence that is relevant is admissible, subject to any exclusionary rules; evidence that is not relevant is not admissible.[1870] The uniform Evidence Acts adopt a broad definition of relevance, requiring only that the evidence in question 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.[1871]

14.9 At common law, the distinction is sometimes drawn between 'logical relevance' (the broad test reflected in s 56 of the uniform Evidence Acts) and 'legal relevance' (which requires that a piece of evidence be 'sufficiently relevant' in order to be admissible).[1872] Hence, the threshold requirement of legal relevance is used to exclude

1870 Uniform Evidence Acts s 56.
1871 Ibid s 55(1).
1872 See, eg, *R v Stephenson* [1976] VR 376.

evidence of minimal probative value or evidence which might mislead or prejudice a party or cause an undue waste of the court's time.[1873]

14.10 In its Interim Report from the original ALRC evidence inquiry (ALRC 26),[1874] the ALRC criticised the common law notion of 'sufficient relevance' on the grounds that using it to exclude evidence of minimal probative value or of unfairly prejudicial effect conceals the policy considerations underpinning the exclusion. Hence the ALRC proposed a broad definition of 'relevance', in combination with the mandatory and discretionary exclusions subsequently enacted as ss 135, 136 and 137. It stated that the proposed approach

> articulates the mental processes inherent in existing law. This is done by two provisions—one defining relevance in terms of being capable of affecting the assessment of the probabilities and the other spelling out in a judicial discretion the policy considerations, presently concealed, which lie behind any decision on the relevance of evidence.[1875]

14.11 In contrast to an assessment of probative value (discussed below), a determination of relevance pursuant to s 55 assumes that the tribunal of fact will accept the evidence[1876] and does not require consideration of factors such as prejudice or reliability.[1877]

Probative value

14.12 The uniform Evidence Acts Dictionary defines 'probative value' as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. This is similar to the definition of relevance in s 55, which provides that relevant evidence is 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings'.

14.13 It has been accepted that probative value will be assessed by reference to the degree of relevance of a piece of evidence to a particular fact in issue.[1878]

Credibility and reliability of evidence

14.14 A comparison of the definition in the uniform Evidence Acts of relevance and probative value, with the notable absence of the words 'if it were accepted' from the latter, indicates that an assessment of probative value is not necessarily predicated on the assumption that the evidence will be accepted.[1879] It is therefore a matter of

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1873 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [639].
1874 Ibid.
1875 Ibid, [640].
1876 *Adam v The Queen* (2001) 207 CLR 96, [22].
1877 *Papakosmas v The Queen* (1999) 196 CLR 297, [81].
1878 *R v Lockyer* (1996) 89 A Crim R 457, 459.
1879 *Adam v The Queen* (2001) 207 CLR 96, [59].

contention as to whether an assessment of probative value is solely a qualitative question relating to relevance (in other words, the assessment is made on the basis that the evidence will be taken at its highest) or whether it includes for consideration other matters such as the credibility or reliability of the evidence.

14.15 Authorities have been divided on this issue. The more restrictive view was articulated by Hunt CJ at CL in *R v Carusi*:

> The power of the trial judge to exclude evidence … does not permit the judge, in assessing what its probative value is, to determine whether the jury should or should not accept the evidence of the witness upon which the Crown case depends. The trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect.[1880]

14.16 His Honour felt that this view is supported by the fact that the trial judge has a duty to issue warnings and directions to the jury regarding any factors which may undermine the reliability of the evidence. It is also supported by the supervisory powers of the court to set aside a verdict where it is satisfied that the jury ought to have had a reasonable doubt.[1881]

14.17 That view was supported by Gaudron J (in obiter dicta) in *Adam v The Queen*, who reasoned that:

> The omission from the dictionary definition of 'probative value' of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition.[1882]

14.18 In *Papakosmas v The Queen*, McHugh J took the opposite view, stating that 'an assessment of probative value necessarily involves considerations of reliability'.[1883] His Honour so concluded on two bases: first, the absence of the words 'if it were accepted'; and secondly, the rationale behind the ALRC proposal to remove the distinction between legal and logical relevance is to make evident the policy considerations involved in the decision to admit or exclude particular evidence, such as procedural fairness and reliability. His Honour felt that ss 135–137 are intended to address these policy considerations.[1884]

14.19 In a recent case, *R v Rahme*, Hulme J supported the view expressed by McHugh J, stating that it is inconsistent with the general canons of construction to treat the omission of the words 'if it were accepted' as insignificant.[1885] His Honour reasoned further that where a witness' credibility is in doubt, this will affect the

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1880 *R v Carusi* (1997) 92 A Crim R 52, 66.
1881 Ibid, 66.
1882 *Adam v The Queen* (2001) 207 CLR 96, [60].
1883 *Papakosmas v The Queen* (1999) 196 CLR 297, [86].
1884 Ibid, [81].
1885 *R v Rahme* [2004] NSWCCA 233, [220].

question of whether his or her evidence could rationally affect the probability of the existence of any fact in issue. His Honour said:

> The need to consider the 'extent' in the context of 'rationally affect' to my mind argues for an assessment of the credibility of the author and the likelihood of the evidence being accepted.[1886]

14.20 On the other hand, it can be argued that the question of reliability goes to the assessment of any prejudicial effect the evidence might have.

14.21 If the reliability of the evidence is in question such that the jury may tend to attribute more weight to the evidence than it ought, then this is the prejudicial effect to be weighed against the relevance of the evidence to a fact in issue. In *R v Cook*, Simpson J held that:

> There will be occasions when an assessment of the credibility of the evidence will be inextricably entwined with the balancing process. That means that particular caution must be exercised to ensure that the balancing exercise is not confused with the assessment of credibility, a task committed to the jury … The credibility exercise, in those circumstances, is to determine whether the evidence given by (or on behalf of) the accused is capable of belief by the jury. If it is, then its prejudicial effect must be considered. If it is not, then the balancing exercise may well result in an answer favourable to the Crown. That is essentially because any prejudice arising to an accused from putting a preposterous explanation to the jury would not be unfair prejudice.[1887]

Unfair prejudice

14.22 The first ground for exclusion in s 135 is that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. As noted in Chapter 3, the concept of unfair prejudice appears in ss 135, 136 and 137 and has been interpreted consistently in relation to each of these sections.[1888] The following discussion therefore applies to each of the abovementioned sections.

14.23 The uniform Evidence Acts provide no guidance as to the meaning of 'unfair prejudice'. There is consensus in the case law that evidence will not be unfairly prejudicial simply because it damages the defence's case[1889] or because it has low probative value.[1890] Evidence will be prejudicial if it tends to prove the opponent's case, but will not be *unfairly* prejudicial unless there is some misuse of the evidence by the tribunal of fact. This is outlined in ALRC 26:

> By risk of unfair prejudice is meant the danger that the fact finder may use the evidence to make a decision on an improper, perhaps emotional basis, ie on a basis

1886 Ibid, [222].
1887 *R v Cook* [2004] NSWCCA 52, [43].
1888 *R v BD* (1997) 94 A Crim R 131, 139.
1889 *Papakosmas v The Queen* (1999) 196 CLR 297, [91]; *R v BD* (1997) 94 A Crim R 131, 139.
1890 *R v Lockyer* (1996) 89 A Crim R 457, 460.

> logically unconnected with the issues in the case. Thus the evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decisions on something other than the established proposition of the case. Similarly, on hearing the evidence the fact-finder would be satisfied with a lower degree of probability than would otherwise be required.[1891]

Unfair prejudice arising from procedural considerations

14.24 The question whether the statutory concept of unfair prejudice encompasses procedural unfairness is not addressed explicitly in ALRC 26 or the final Report of the original ALRC inquiry (ALRC 38),[1892] and authorities have been divided on the issue. The more restrictive view, that unfair prejudice relates solely to the misuse of evidence by a tribunal of fact, was favoured by McHugh J in *Papakosmas*, who stated:

> Some recent decisions suggest that the term 'unfair prejudice' may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995 … I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of 'prejudice' in a context of rejecting evidence for discretionary reasons … [ss 135, 136, 137] confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility.[1893]

14.25 Prior to *Papakosmas*, courts appeared to proceed upon the assumption that the concept of unfair prejudice was not limited to misuse of evidence by a tribunal of fact and could encompass procedural disadvantages. For example, in *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike*,[1894] evidence of a transcript otherwise admissible pursuant to s 63 was excluded on the basis that the opposing party was unable to cross-examine the declarant on an important issue in the litigation and was therefore unfairly prejudiced. In *Commonwealth v McLean*,[1895] the court held that the opposing party had been unfairly prejudiced due to an inability to challenge properly the reliability of evidence.

14.26 Subsequent to the caution issued by McHugh J in *Papakosmas*,[1896] the New South Wales Court of Appeal considered the issue in *Ordukaya v Hicks*.[1897] The trial judge had found that it was not reasonably practicable to call the 92 year old defendant to give evidence and hence admitted into evidence a statutory declaration made by the

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1891 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [644].
1892 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).
1893 *Papakosmas v The Queen* (1999) 196 CLR 297, [97].
1894 *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike* (Unreported, Federal Court of Australia, Beaumont J, 1 September 1995).
1895 *Commonwealth v McLean* (1996) 41 NSWLR 389.
1896 *Papakosmas v The Queen* (1999) 196 CLR 297.
1897 *Ordukaya v Hicks* [2000] NSWCA 180.

defendant pursuant to s 64. The plaintiff sought unsuccessfully to have the evidence excluded pursuant to s 135(a) and subsequently appealed on the ground that the trial judge ought to have exercised the discretion as the denial of the opportunity to cross-examine the maker of the statement (which had been admitted as an exception to the hearsay rule) was unfairly prejudicial.

14.27 The majority declined to exercise the discretion to exclude the evidence, stating that the removal of the hearsay rule as an obstacle to admitting particular evidence will necessarily be prejudicial to the opposing party, but that this will not necessarily create prejudice which is unfair to the point that it outweighs the probative value of the evidence.[1898] The majority therefore concluded that the inability to cross-examine the maker of a hearsay statement does not, without more, call for the exercise of the discretion to exclude on the grounds of unfair prejudice, but that the inability to cross-examine is a matter to be taken into account in the weight to be given to such evidence.[1899]

14.28 The approach adopted by the majority in *Ordukaya* was cited with approval in *R v Suteski*, where Wood CJ at CL stated:

> I see no reason why the inability … to cross-examine … should not have been relevant for s 135 and s 137 of the *Evidence Act*. However, the bare fact that a defendant cannot cross-examine a witness is not necessarily decisive of the issue which arises in relation to these provisions … The decisions mentioned clearly depend upon their particular facts, that is, upon the character of the evidence involved and upon the nature or strength of the potential prejudice to the defendant. Each case, in my view, needs to be examined individually by reference to the well understood balancing exercise.[1900]

Warnings and directions to the jury

14.29 It has been generally accepted that warnings and directions to the jury can reduce the prejudicial effects of evidence in some circumstances, and that this should be taken into account when the court undertakes the balancing test in both ss 135 and 137.[1901]

Misleading or confusing

14.30 The second ground for exclusion in s 135 is that the probative value of the evidence is substantially outweighed by the danger that the evidence might be 'misleading or confusing'. This discretion has been used to exclude evidence where

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1898 Ibid, [38]–[39].
1899 Ibid, [41].
1900 *R v Suteski* (2002) 56 NSWLR 182, [126]–[127]. See also *Roach v Page (No 11)* [2003] NSWSC 907; *R v Sing* [2002] NSWCCA 20.
1901 *R v Lock* (1997) 91 A Crim R 356; *Symss v The Queen* [2003] NSWCCA 77; *R v BD* (1997) 94 A Crim R 131; *R v Cook* [2004] NSWCCA 52.

there is a danger that the jury would focus unduly on evidence and give it more significance than it deserved.[1902]

Overlap between 'unfair prejudice' and 'misleading or confusing'

14.31 In ALRC 26, it was said that unfair prejudice would result where a tribunal of fact attributed more weight than it should to a piece of evidence.[1903] In the discussion of s 135(b), it states that a tribunal of fact would be misled or confused in a situation where it incorrectly assesses the weight to be attributed to the evidence.[1904] Accordingly, s 135(b) has been used to exclude evidence where there is a danger that the jury would focus unduly on particular evidence and accord it more significance than it deserved.[1905] The similarity in the definition of the two subsections in ALRC 26 and the use of s 135(b) in subsequent case law indicate that these categories need not be conceived of as mutually exclusive categories, despite being listed in separate subsections.

Undue waste of time

14.32 The third ground for exclusion is that the probative value of the evidence is substantially outweighed by the danger that the evidence may 'cause or result in undue waste of time'. This may, for example, 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.[1906]

Submissions and consultations

Operation of s 135

14.33 IP 28 asks how s 135 of the uniform Evidence Acts has operated in practice, whether it has raised any concerns and how any such concerns should be addressed.[1907]

14.34 The main concern expressed in the submissions and consultations is that judicial officers are reluctant to take a robust approach to the use of the discretionary exclusions.[1908] Some judicial officers express concern that reliance on the discretionary provisions to exclude or limit the use of otherwise admissible evidence could result in

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1902 *Reading v ABC* [2003] NSWSC 716, [32]–[33].
1903 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [644].
1904 Ibid, [644].
1905 For recent examples see: *Reading v ABC* [2003] NSWSC 716; *R v Ngo* (2003) 57 NSWLR 55.
1906 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14600].
1907 See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–1.
1908 B Donovan, *Consultation*, Sydney, 21 February 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

the decision being overturned on appeal.[1909] However, other submissions contend that the provision is being used effectively and on a regular basis.[1910]

14.35 One senior practitioner considers that s 135 is too narrow and recommends that an additional sub-section be included so that evidence can be excluded on the ground that it has insufficient probative value.[1911]

14.36 Otherwise, the general tenor of the submissions and consultations is that the section itself is well drafted and that any problems in practice (such as judicial reluctance to use the provisions) are not amenable to legislative solutions.

Definition of terms

14.37 IP 28 asks whether the terms 'unfair prejudice, 'misleading and confusing' and 'undue waste of time' need to be further defined.[1912]

14.38 Some concern is expressed that the term 'unfair prejudice' is unclear.[1913] The New South Wales Director of Public Prosecutions (DPP NSW) submits:

> there is no objection to including a definition of 'unfair prejudice' reflecting the more restrictive view of the meaning of the term reflected in the judgement of McHugh J in *Papakosmas v The Queen*; and by making it clear that the term excludes procedural unfairness.[1914]

14.39 In contrast, the NSW Young Lawyers Civil Litigation Committee submits that:

> no such definition is required, as these concepts have been long employed at common law and are well understood. Attempting to define the circumstances would be difficult, would probably require a catch-all phrase in any event, and would unnecessarily clutter the Act.[1915]

14.40 The New South Wales Public Defenders Office (NSW PDO) submits that it will not be productive to define these terms, and that any attempt to define them is likely to narrow their meaning.[1916]

Should s 135 be mandatory?

14.41 IP 28 also asks whether s 135 should be made mandatory, so that the court 'must refuse to admit evidence' if its probative value is substantially outweighed by the

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1909 Judicial Officers of the District Court of NSW, *Consultation*, Sydney, 3 March 2005.

1910 S Finch, *Consultation*, Sydney, 3 March 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

1911 P Greenwood, *Consultation*, Sydney, 11 March 2005.

1912 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–3.

1913 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005.

1914 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 32.

1915 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005, 8.

1916 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time.[1917]

14.42 Some submissions favour retaining the existing discretion.[1918] In contrast, the NSW Young Lawyers Civil Litigation Committee submits that:

> Section 135 should be made mandatory, as a corollary of a finding of such danger is the exclusion of the evidence. Particularly as it is highly unlikely (and as a matter of policy is very undesirable), that a Court would consider allowing such evidence after ruling that it is inherently dangerous.[1919]

14.43 The NSW Health Department Child Protection and Violence Unit submits:

> evidence unrelated to the issue of sexual assault continues to be used by the defence in order to harm the reputation and credibility of the complainant, such as mental health issues, disability and drug and alcohol abuse. Introducing prejudicial evidence against the victim perpetuates the social myths of victim blaming. This makes complainants feel that they are responsible for the assault. It also results in complainants feeling frustrated and angry as to the relevance of the evidence, and undermines their belief in a just and fair court system.
>
> Amendment of the *Evidence Act* should occur to include a provision which would remove the court's discretion to refuse to admit evidence where the probative value of the evidence is outweighed by the likelihood of significant harm to the complainant.[1920]

14.44 One view expressed is that it is confusing to classify s 135 as a discretion, as it is difficult to imagine a case where a court, having concluded that the probative value of particular evidence is substantially outweighed by the danger of unfair prejudice, would decide nonetheless to admit the evidence. It is also said that the real discretion conferred by s 135, as with s 137, lies in the balancing exercise specified in the provision, not in the words 'may exclude'.[1921]

The Commissions' view

Operation of s 135

14.45 The Commissions are of the view that the principal problems with the operation of s 135 relate to judicial practice and are not amenable to legislative solutions. In order to ensure that the section operates as intended (as a safeguard in addition to more relaxed rules of admissibility), educational programs should be implemented which

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1917 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–2.

1918 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 32; P Greenwood, *Consultation*, Sydney, 11 March 2005.

1919 NSW Young Lawyers Civil Litigation Committee, *Submission E 34*, 7 March 2005.

1920 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

1921 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14540]; Evidence Acts Review Workshop for the Judiciary, *Consultation*, Sydney, 30 April 2005.

focus on the policy underlying the uniform Evidence Acts' approach to admissibility of evidence.[1922]

14.46 In relation to the submission that an additional ground for exclusion (insufficient probative value) should be added, the Commissions consider that such an amendment is unnecessary, as evidence of insufficient probative value can be excluded on the basis that it would lead to an undue waste of the court's time pursuant to s 135(c).

Definition of terms

14.47 The Commissions do not consider that it is necessary to define the terms contained in the subsections of s 135. To do so carries the risk of narrowing their meaning and thereby fettering the discretion.

14.48 The Commissions acknowledge that there has been uncertainty as to whether unfair prejudice can arise from procedural considerations. As noted in Chapter 2, the basis for the discretion is to prevent the tribunal of fact from being exposed to evidence that is likely to produce incorrect verdicts by misleading it or playing upon its emotions or prejudices. In its original Interim Report, the ALRC referred not only to unfair prejudice arising from evidence which might inflame emotions, but also to unfair prejudice resulting from mis-estimation by the fact finder of the weight to be given to particular evidence.[1923] An inability to test evidence by cross-examination carries with it the danger of such mis-estimation.

14.49 It is therefore consistent with the policy basis for this discretion that evidence should be excluded where, due to procedural considerations, the tribunal of fact will be unable to assess rationally the weight of the evidence. At the same time, it is important to bear in mind the policy changes effected by the uniform Evidence Acts. If it were the case that the inability to challenge the veracity of hearsay statements by non-witnesses were generally to justify a decision to exclude the evidence, this would, in effect, write the hearsay exceptions out of the Acts.[1924] Hence, in the Commissions' view, the correct approach, reflected in *Ordukaya* and *Suteski*, is that the concept of 'unfair prejudice' will take into account procedural unfairness when this will affect the ability of the fact-finder to assess rationally the weight of the evidence. Where a procedure has been sanctioned by the Acts, for example the admission of hearsay evidence, this will not of itself create unfair prejudice.

14.50 There has also been uncertainty in relation to whether factors affecting the reliability or credibility of evidence can be taken into account in balancing the probative value of evidence against any unfair prejudice that may arise. Consistent with the adversarial system and the policy underpinning the uniform Evidence Acts

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1922 See also the discussion in Ch 3.
1923 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [644].
1924 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14560].

that parties should be able to 'produce the probative evidence that is available to them',[1925] the Commissions are of the view that questions of credibility and reliability should generally be left to be determined by the tribunal of fact. Factors affecting the reliability or credibility of evidence are usually elicited in cross-examination. However, where such factors may not be apparent to a tribunal of fact, and hence where there is a real danger that a tribunal of fact will misuse or overestimate the value of a particular piece of evidence, it is appropriate for the court to be empowered to exclude such evidence pursuant to s 135 (or s 137) where appropriate warnings and directions would not be sufficient to cure such dangers. Obviously, whether factors affecting the reliability or credibility of evidence will become apparent during the course of a trial cannot be predicted, hence the discretion may apply differently depending on which stage in the trial an application for exclusion of evidence is made.

Should s 135 be mandatory?

14.51 Whilst there is a persuasive argument in favour of mandatory exclusion on the ground contained in s 135(a), the argument has less force in relation to the grounds in subsections (b) and (c). With the latter grounds, it is appropriate for the Court to have flexible control of the evidence.

14.52 Given that the discretionary nature of the section is not causing a problem in practice, to fragment the section so that exclusion on the grounds of unfair prejudice is mandatory and exclusion on the remaining grounds is discretionary would cause unnecessary difficulties. This is particularly so given that, in practice, a court is unlikely to admit evidence where the probative value is substantially outweighed by the danger of unfair prejudice. If a court were to admit evidence despite having concluded that the probative value was outweighed by the unfair prejudice, the court would be required to explain why it had chosen not to exercise the discretion. If necessary the matter could then be dealt with on appeal.

14.53 The Commissions are of the view that such a change is not warranted and therefore favour retaining the existing discretion.

Exclusion of prejudicial evidence in criminal proceedings

Relationship between ss 135 and 137

14.54 Section 135 provides that the court may refuse to admit evidence where the probative value is *substantially outweighed* by the danger of unfair prejudice, whereas s 137 requires the court to refuse to admit evidence where its probative value is *outweighed* by the danger of unfair prejudice. The wording of s 137 indicates that it is a mandatory exclusion rule, in contrast with s 135, which provides the judge with a discretion to exclude evidence.

1925 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [46].

14.55 The difference in wording between the sections also indicates that there is a heavier onus on the party seeking exclusion under s 135 than under s 137. This is in accordance with the policy underpinning the uniform Evidence Acts that courts should be particularly careful when considering evidence that might prejudice defendants in criminal trials. It is important to note, however, that the tests are weighted neither in favour of nor against exclusion. As stated in ALRC 26, 'the trial judge should balance probative value and the danger of prejudice without any preconceptions'.[1926]

14.56 Another difference between the two sections is that s 135 talks of 'the evidence' being 'unfairly prejudicial', whereas s 137 talks more generally of 'danger of unfair prejudice'. It has been held that this difference in wording means that, where s 137 is being considered, an assessment of unfair prejudice can take into account the likely prejudicial impact of any evidence the opponent may seek to adduce in order to challenge or explain the initial piece of evidence.[1927] This approach has been rejected by the New South Wales Court of Criminal Appeal in relation to s 135.[1928] This is consistent with the policy framework of the Acts, which is concerned particularly with protecting accused persons from improper conviction.[1929]

Submissions and consultations

14.57 IP 28 asks whether the operation of s 137 of the uniform Evidence Acts has raised any concerns.[1930] In particular, IP 28 asks whether a guided discretion would assist to determine whether evidence is unfairly prejudicial.[1931]

A guided discretion

14.58 Few submissions were made in relation to this question. The DPP NSW does not favour a guided discretion.[1932] The NSW PDO recommends that no change be made to s 137.[1933]

Discretion or exclusionary rule?

14.59 Concern is expressed that the fact that s 137 appears in Part 3.11 of the uniform Evidence Acts, entitled 'Discretions to exclude evidence', is misleading as s 137 is an exclusionary rule. It is said that this has caused problems in the lower courts as some judicial officers have regarded the provision as a discretionary rather than mandatory exclusion.[1934]

1926 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [957].
1927 *R v Cook* [2004] NSWCCA 52.
1928 *R v Richards* (2001) 123 A Crim R 14.
1929 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [35].
1930 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–4.
1931 Ibid, [12.25].
1932 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 33.
1933 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1934 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.

The Commissions' view

A guided discretion

14.60 In the Commissions' view, it will not be helpful to guide the discretion further than has already been done by its formulation. The Commissions acknowledge that there have been some difficulties with judicial interpretation of the term 'unfair prejudice', particularly in relation to whether it includes considerations of procedural fairness. However, providing legislative guidance carries the risk of unduly fettering the discretion and may simply add to the confusion.

Clarification of the mandatory nature of s 137

14.61 The wording of s 137 makes it clear that the exclusion is mandatory rather than discretionary. This has been acknowledged in the higher courts. In *R v Blick*, Sheller JA observed:

> When an application is made by a defendant pursuant to s 137 to exclude evidence, the first thing the judge must undertake is the balancing process of its probative value against the danger of unfair prejudice to the defendant. It is probably correct to say that the product of that process is a judgment of the sort which, in terms of appellate review, is analogous to the exercise of a judicial discretion … Even so … there seems to me to be a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected.[1935]

14.62 In light of the fact that there has been some confusion in the lower courts as to whether s 137 is a discretionary or mandatory exclusion, the Commissions are of the view that the heading in Part 3.11 of the uniform Evidence Acts should be amended to read 'Discretionary and mandatory exclusions'.

Proposal 14–1 The heading at Part 3.11 'Discretions to exclude evidence' should be amended to read 'Discretionary and mandatory exclusions'.

Exclusion of improperly or illegally obtained evidence

14.63 Section 138(1) provides:

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or

1935 *R v Blick* (2000) 111 A Crim R 326, [19]–[20]. In *R v GK* (2001) 53 NSWLR 317 Sully J went further and stated that the application of this provision 'does not depend upon any discretionary judgment, still less any merely intuitive response'.

> (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.

14.64 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 was 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.

14.65 Further, s 139(1) provides that evidence will be considered to have been 'improperly obtained' where the investigating official failed to issue a caution to the person being arrested.

14.66 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.

14.67 The statutory discretion contained in s 138, although based on the *Bunning v Cross*[1936] discretion at common law, differs from the latter in the following respects:

- the onus of proof is reversed, so that 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 to both civil and criminal proceedings (s 138(1)).[1937]

The nature of the relevant offence

14.68 The question of how the 'nature of the relevant offence' in s 138(3)(c) is to be applied to the balancing exercise undertaken pursuant to s 138(1) was raised in *R v Dalley*.[1938] In this case Spigelman CJ, with whom Blanch AJ agreed, held that:

> The public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.[1939]

14.69 Spigleman CJ indicated that this view applies to both the common law and s 138(3)(c). This statement accords with the discussion in ALRC 26, which expresses the view that:

> There is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime.[1940]

14.70 In the same case, Simpson J took the opposite view, stating that:

> In my opinion it would be wrong to accept as a general proposition that, because the offence charged is a serious one, breaches of the law will be more readily condoned. In my judgment there may be cases in which the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions concerning the obtaining of evidence. That a person is under suspicion for a serious offence does not confer a licence to contravene laws designed to ensure fairness.[1941]

1936 *Bunning v Cross* (1978) 141 CLR 54.
1937 *Nicholas v The Queen* (1998) 193 CLR 173, [197].
1938 *R v Dalley* (2002) 132 A Crim R 169.
1939 Ibid, [3].
1940 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].
1941 *R v Dalley* (2002) 132 A Crim R 169, [97].

Submissions and consultations

14.71 IP 28 asks how s 138 of the uniform Evidence Acts has operated in practice, whether it has raised any concerns and how any such concerns should be addressed.[1942] In particular, IP 28 asks whether the factors to be taken into account in s 138(3), for example s 138(3)(c) in relation to the influence of the nature of the relevant offence, require clarification.[1943]

14.72 The primary concern expressed in relation to s 138 pertains to the factors in s 138(3) and how they should apply to the balancing test. Whilst some judicial officers express the view that these factors are facilitative and do not create any difficulties,[1944] other commentators express concern that it is uncertain what weight ought to be given to each factor[1945] and whether the factors weigh in favour of or against admission.[1946] One view is that the section should be amended so as to specify how the factors in s 138(3) should be applied to the balancing test.[1947] Another view is that such difficulties should not be resolved via legislative amendment, and that judicial education is a preferable solution.[1948]

14.73 In relation to the question of how the 'nature of the offence' influences a determination as to whether to exclude evidence, the NSW PDO submits:

> The approach taken by the majority [in *R* v *Dalley*] assumes what the prosecution is required to prove; that is, that the accused is guilty. It is further submitted that the more serious the offence, the greater should be the public and private interest in ensuring that accused persons are not convicted on the basis of improperly obtained evidence. It is the Public Defenders submission that the reference to 'the nature of the relevant offence' be omitted from s 138.[1949]

14.74 Another senior practitioner supports Simpson J's reasoning in *R v Dalley*,[1950] that the more serious the offence, the more the public interest weighs in favour of ensuring that correct procedures for obtaining evidence are adhered to.[1951]

14.75 One submission considers that although the section works well in practice, for reasons of principle the wording should be altered so as to render presumptively inadmissible any evidence obtained as a result of any illegal action.[1952] It is stated:

1942 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–7.
1943 Ibid, Qs 12–8, 12–9.
1944 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.
1945 J Garbett, Sydney, 28 February 2005.
1946 G Bellamy, *Consultation*, Canberra, 8 March 2005.
1947 Ibid.
1948 J Garbett, Sydney, 28 February 2005.
1949 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
1950 *R v Dalley* [2002] NSWCCA 284.
1951 S Tilmouth, *Consultation*, Adelaide, 11 May 2005.
1952 Confidential, *Submission E 31*, 22 February 2005.

> There are cases where the public interest in prosecuting offenders is great, and therefore there should be a provision for the admissibility of illegally obtained evidence in exceptional and highly restricted cases, limited to offences of the most serious type, but specifically excluding alleged 'terrorism', 'national security' and immigration cases. In those cases the provisions of the law give such power to law enforcement authorities that there is no need for them to act illegally … it is important that the legislature indicate to law enforcement authorities that any illegal action done in furtherance of investigation will be fruitless.[1953]

14.76 In addition, one view queries whether s 138 should operate at all in civil proceedings to exclude evidence that has been illegally or improperly obtained.[1954] It is also suggested that the onus of proof be reversed so as to reflect the discretion at common law.[1955]

The Commissions' view

14.77 The policy basis for the formulation of s 138 is expressed in ALRC 26 as follows:

> An argument against taking the probative value, the importance of the evidence or the seriousness of the offence into account is that law enforcement agencies will modify their behaviour accordingly, eg they may believe that they can get away with murder in a murder case. As Justices Stephen and Aickin stated in *Bunning v Cross*:
>
> > 'to treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it'.
>
> The question is whether this danger justifies excluding from consideration some, or all, of the factors which support admission of the improperly obtained evidence. This seems too extreme an approach. One solution would be to exclude them from consideration only where officers have deliberately acted improperly only then will consideration of these factors be relevant. But to exclude them from consideration would seem too extreme an approach. The question for the judge is whether the balance of public interest favours admission—he should consider all the factors on both sides of the equation. The officers themselves, while they should avoid improper conduct, will be faced with situations where the legal requirements are vague. It would be legitimate for the judge to consider these factors. Safeguards are provided by the existence of a discretion, by inclusion as a factor on the other side whether the impropriety was part of a wider pattern of misconduct, and by the existence of other forums of review.[1956]

14.78 The *Bunning v Cross* discretion places the onus on the accused to prove misconduct and justify the exclusion. In contrast, s 138 requires the party seeking exclusion to establish that the evidence was improperly or illegally obtained. Once this

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1953 Ibid.
1954 G Bellamy, *Consultation*, Canberra, 8 March 2005.
1955 Ibid.
1956 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].

is done, the onus is on the party seeking admission to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained.[1957] The reason for the shifting of the onus of proof was explained in ALRC 26 as follows:

> the policy considerations supporting non-admission of the evidence suggest that, once misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations support this approach. Evidence is not often excluded under the *Bunning v Cross* discretion. This suggests that the placing of the onus on the accused leans too heavily on the side of crime control considerations.[1958]

14.79 The Commissions are of the view that the onus of proof in s 138 helps to provide an appropriate balance between the public interest in crime control and the rights of accused persons. The Commissions consider that no convincing case has been made out for revisiting the policy basis of s 138 and therefore recommend that no changes be made in relation to the onus of proof or to the balancing test required by the section.

14.80 As regards clarification of the factors contained in s 138(3), the Commissions agree that this is not a matter to be solved via legislative amendment. Amendment of the section may simply result in unnecessary uncertainty and confusion.

14.81 The Commissions note that the primary issue causing concern in relation to s 138 is the relevance of the seriousness of the offence to the balancing process. In accordance with the policy articulated in ALRC 26,[1959] the Commissions are of the view that the correct approach is that the more serious the offence, the more weight should be given to the public interest in admitting evidence which might result in the apprehension of criminal offenders. However, this does not mean that breaches of the law will necessarily be condoned where the offence is a serious one. The nature of the offence is only one of the factors which the court is to take into account in the exercise of this discretion. Whether illegally or improperly obtained evidence is admitted will also depend on factors such as the nature of the impropriety or illegality. Where the infringement involves isolated or accidental non-compliance, the weight to be given to the nature of the offence may be greater than if the infringement involves a serious and deliberate breach of procedure. Hence, the fact that the offence charged is serious is by no means determinative of how the discretion in s 138 will be exercised. The weight to

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1957 *R v Coombe* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ at CL, Smart and McInerney JJ, 24 April 1997).

1958 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [964].

1959 Ibid, [964].

be given to the nature of the offence will vary depending on the other factors to be considered pursuant to s 138(3).

14.82 This approach to the interpretation of s 138(3)(c) is also supported by the fact that s 138 addresses the public interest supporting exclusion (protection of individual rights, deterrence against future illegality, executive and judicial legitimacy)[1960] by placing the onus on the prosecution to justify admission in the event that impropriety or illegality is found.

General discretion to limit the use of evidence

14.83 Section 136 provides the trial judge with a discretion in both civil and criminal proceedings to limit the use to be made of evidence if there is a danger that the evidence might be unfairly prejudicial or misleading or confusing. As noted in Chapter 3 and above in this chapter, the concepts of 'unfair prejudice' and 'misleading or confusing' are used consistently in ss 135, 136 and 137, and hence the preceding discussion of those concepts applies. Section 136 may be used where evidence is relevant for more than one purpose, for example, evidence may be relevant to prove a fact asserted (hearsay purpose) and may also be relevant to a witness' credibility.

14.84 The discretion to limit the use of evidence is not guided. It is suggested 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 that may result from that use.[1961] 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.[1962]

14.85 The discretion may arise, for example, where ss 60 or 77 (exceptions to the hearsay and opinion rules) have been applied. In such cases, the fact that the evidence would not have been admissible for its hearsay or opinion use but for the operation of those sections clearly does not of itself justify the prohibition of such use.

14.86 One of the grounds upon which the use of evidence may be limited is that it may result in unfair prejudice to the opponent. In *Papakosmas* v *The Queen*,[1963] the High Court clarified that the fact that evidence would not have been admissible at common law does not of itself create unfair prejudice. In this case, evidence of recent complaint was admitted pursuant to s 66, and the appellant argued that the trial judge ought to have exercised the discretion in s 136 so that it would not be used for a hearsay purpose (in other words, the appellant sought to use s 136 to limit the use of the evidence to that which would have been permissible at common law). The Court rejected this argument, holding that it amounted to 'an unacceptable attempt to

1960 Ibid, [959].
1961 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.14640].
1962 *R v Lock* (1997) 91 A Crim R 356; *Symss v The Queen* [2003] NSWCCA 77; *R v BD* (1997) 94 A Crim R 131; *R v Cook* [2004] NSWCCA 52.
1963 *Papakosmas v The Queen* (1999) 196 CLR 297.

constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded'.[1964] The Court added, however, that there may be circumstances in which it would be appropriate to limit the use of complaint evidence.[1965] McHugh J cautioned that s 136 should only be used once it has been determined that any dangers arising from the admission of the evidence cannot be cured by a warning to the jury.[1966]

14.87 The relationship between ss 60 and 136 was discussed in *Roach v Page (No.11)*.[1967] Sperling J held that the inability to test the truth of a previous representation is a legitimate ground for rejecting or limiting the use of evidence which is covered by an exception to the hearsay rule.[1968] His Honour also held that where the maker of a previous representation is available and the party tendering the evidence does not call the person, that is a legitimate consideration in favour of a finding of unfair prejudice.[1969] His Honour noted that s 60 gives rise to special considerations because, unlike other exceptions to the hearsay rule, it is not the objective of s 60 to facilitate proof but to avoid a distinction having to be made about evidence being used for one purpose and not for another.[1970]

Submissions and consultations

Use of s 136

14.88 IP 28 asks whether s 136 of the uniform Evidence Acts has operated to limit the use of evidence which is relevant for more than one purpose and whether the operation of s 136 has raised any concerns which should be addressed.[1971] IP 28 also seeks comment about the extent to which s 136 is being utilised in jury and non-jury trials.[1972]

14.89 Judicial officers and legal practitioners provide a range of perspectives on the operation of s 136. Some practitioners express the view that s 136 has not been used much by judicial officers to limit the use that can be made of evidence that is relevant for more than one purpose.[1973] In relation to expert evidence, the view is expressed that s 136 is not often used to control the use made of the factual content of such evidence, but that this does not create any problems in practice as the judge can deal with it as a

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1964 Ibid, [39].
1965 Ibid, [40].
1966 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.
1967 *Roach v Page (No 11)* [2003] NSWSC 907.
1968 Ibid, [74].
1969 Ibid, [74].
1970 Ibid, [74]. See the discussion of unfair prejudice above and the discussion of hearsay evidence in Ch 7.
1971 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–10.
1972 Ibid, [12.41].
1973 S Finch, *Consultation*, Sydney, 3 March 2005; Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.

matter of weight to be given to the evidence.[1974] By contrast, some practitioners consider that the section is being used frequently enough.[1975]

Relationship with s 60

14.90 IP 28 also asked whether s 136 is being used to limit the operation of s 60 and, if so, in what circumstances trial judges are limiting the use of hearsay evidence admitted for a non-hearsay purpose.[1976]

14.91 In addition to the comments noted above, some concerns are expressed that s 136 as presently drafted may not provide adequate grounds on which to exclude evidence admissible pursuant to s 60. Some commentators express concern that s 136 is an 'inelegant' or unnecessarily complicated method of controlling problems created by the breadth of s 60.[1977] The NSW PDO submits that:

> most judges appear to have taken the judgment of the High Court in *Papakosmas v The Queen* (1999) 196 CLR 297 to mean that in no case should evidence of what used to be called 'complaint' evidence admitted under s 66 be limited to evidence of the fact … this problem is best addressed not by the amendment of s 136, but by the repeal of s 60 Evidence Act.[1978]

14.92 On the other hand, the DPP NSW submits that the discretion in s 136 is capable of addressing any concerns raised by the operation of s 60 in relation to prior inconsistent statements and the factual basis of expert opinion evidence.[1979]

14.93 One concern expressed in relation to s 136 is the uncertainty of the scope of the grounds for exclusion. In particular, there is uncertainty as to whether the inability to cross-examine on evidence admissible for a hearsay purpose creates unfair prejudice.[1980]

The Commissions' view

Use of s 136

14.94 Overall, the primary concern expressed (and as noted above, this concern is not expressed unanimously) pertains to the extent to which judges make use of the discretion.

1974 Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005; ACT Bar Association, *Consultation*, Canberra, 9 March 2005.

1975 New South Wales District Court Judges, *Consultation*, Sydney, 3 March 2005; B Donovan, *Consultation*, Sydney, 21 February 2005; T Game, *Consultation*, Sydney, 25 February 2005; Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005.

1976 See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–11.

1977 P Bayne, *Consultation*, Canberra, 9 March 2005.

1978 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

1979 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

1980 P Bayne, *Consultation*, Canberra, 9 March 2005.

14.95 In the Commissions' view, this is not a problem amenable to legislative solution. As noted above, this is a question of judicial practice, to be remedied by judicial and practitioner education.

Relationship with s 60

14.96 In ALRC 38, the rationale for s 60 is explained as follows:

> The proposal enables evidence … to be used for a hearsay purpose, if admitted for other reasons. It enables simpler rules and simpler operation of the law … The proposal avoids the need to create a multiplicity of complex exceptions dealing with, for example, the factual material normally relied upon by experts. Controls remain, however, and in appropriate cases, the evidence can be excluded.[1981]

14.97 The Commissions are of the view that s 136 is operating as such a control in relation to evidence admissible under s 60. The primary concerns raised, aside from the suggestion of reluctance on the part of the judiciary to utilise the discretion, relate to the scope of the exclusionary grounds. As noted above, the Commissions do not consider that legislative amendment would assist in this regard. The Commissions see no basis for revisiting the policy underpinning s 136 and hence recommend that no changes be made.[1982]

Discretion to give leave

14.98 A further discretion operates by virtue of s 192, which provides that a court, where it may give leave, permission or direction, may do so on such terms as it thinks fit. This may arise in the following contexts: in granting leave to a witness to revive their memory pursuant to 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).

14.99 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

1981 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [144].
1982 See also the discussion in Ch 7.

> (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.

14.100 The High Court held in *Stanoevski v The Queen* 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'.[1983]

14.101 In *R v Reardon*, the New South Wales Court of Criminal Appeal held that unless the contrary can be inferred, it should be assumed that the judge will continually be having regard to the matters referred to in s 192(2) during the course of a hearing.[1984]

14.102 In *R v Stevens*, Simpson J explained that:

> *Stanoevski* does not in my opinion require a ritual incantation of each of the five considerations listed in subs 2. What it requires is that such of those matters, as well as other matters, be raised for consideration as relevant to the particular application, be considered and taken into account. What distinguishes *Stanoevski* from many other cases is that the majority in the High Court took the view that if certain of the matters listed in s 192 (2) had been taken into account and given due consideration a different result may well have eventuated. In other words, what the High Court held was that there was real substance in the particular application of s 192(2) in that case. What *Stanoevski* does not hold is that failure to mention the section, or any of the matters listed in sub s (2) necessarily constitute error. Failure to mention either the subsection globally or the individual considerations, provides the foundation for a finding of error. But the finding may only be made if it is also shown that one or more of those conditions was actually material to the decision.[1985]

Submissions and consultations

14.103 IP 28 asks whether there are any concerns in relation to the operation of s 192 and how any such concerns might be addressed.[1986]

14.104 Few comments have been made in relation to the operation of s 192. One judicial officer comments that, despite the ruling in *Stanoevski*, judges are not really giving consideration to the factors in s 192.[1987] Another view expressed is that judges are considering the factors in s 192, but are not making explicit reference to them.[1988]

1983 *Stanoevski v The Queen* (2001) 202 CLR 115, [41].
1984 *R v Reardon, Michaels and Taylor* [2002] NSWCCA 203, [30].
1985 *R v Stevens* [2001] NSWCCA 330, [52].
1986 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 12–12.
1987 New South Wales Local Court Magistrates, *Consultation*, Sydney, 5 April 2005.
1988 P Greenwood, *Consultation*, Sydney, 11 March 2005.

The Commissions' view

14.105 A review of the submissions and consultations and the case law concerning s 192 indicates no need for change. The Commissions are of the view that s 192 has not raised any significant concerns and requires no amendment.

Advance rulings

14.106 It is a matter of contention whether and in what circumstances the uniform Evidence Acts permit the giving of advance rulings. The High Court addressed this issue in *TKWJ v The Queen.*[1989] In this case, counsel for the defence informed the Crown prosecutor that he intended to raise evidence of the accused's good character. The Crown prosecutor indicated that if the defence took this course of action, the Crown would seek to rebut the evidence of good character with evidence of matters that were the subject of a related charge. On this basis, defence counsel decided not to adduce evidence of good character. The accused appealed his subsequent conviction on the grounds that there had been a miscarriage of justice as he had been unfairly denied the benefit of adducing evidence of good character. He argued that his counsel at trial ought to have sought an advance ruling on whether the Crown's character evidence would have been excluded pursuant to ss 135 or 137.

14.107 The High Court held that there is nothing in s 189 of the uniform Evidence Acts conferring the power to give an advance ruling as to how the discretion in ss 135 or 137 will be exercised, and that 'a discretion can only be exercised if and when it is invoked'.[1990] The Court held, however, that it may be appropriate to give an advance ruling where leave is sought pursuant to s 192.[1991] Gaudron J (with whom Gummow and Hayne JJ agreed) stated:

> 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.[1992]

14.108 The Court held that the power to give advance rulings was limited because of the concern that

> 'advance rulings' … 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

1989 *TKWJ v The Queen* (2002) 212 CLR 124.
1990 Ibid, [40].
1991 Ibid, [43].
1992 Ibid, [42]–[43].

> an 'advance ruling' will give rise to the appearance that the trial judge is other than impartial, it should not be given.[1993]

14.109 Prior to *TKWJ*, the New South Wales Court of Criminal Appeal held that the court has the power to give advance rulings,[1994] and in some cases has an obligation to do so.[1995]

Submissions and consultations

14.110 IP 28 seeks comments regarding whether s 192 should be amended to provide the court expressly with the power to give advance rulings.[1996]

14.111 Few submissions have been made in relation to this question. One senior practitioner considers that advance rulings may be beneficial to avoid the need to 'chase evidentiary rabbits'.[1997]

The Commissions' view

14.112 The Commissions are of the view that there is nothing in the uniform Evidence Acts to preclude the giving of advance rulings. This is consistent with the adversarial context in which the Acts operate.

14.113 The power to give advance rulings, a power that has been available at common law,[1998] is important to ensure that issues of admissibility of evidence can be determined prior to evidence being led and that decisions can be made by both parties about the way in which their case will be conducted. It is particularly important in relation to evidence of a prejudicial nature. The outcome of cases should not depend on tactical manoeuvring and bluff and counter-bluff. As long as the power is exercised in a manner that is impartial, the appearance of impartiality should not be lost.

14.114 The Commissions are therefore of the view that the uniform Evidence Acts should be amended so as to provide expressly for the power to give advance rulings. Further, the power should be available to be exercised where appropriate whenever there is an issue as to the admissibility of evidence in civil and criminal trials. A draft provision providing for advance rulings is set out in Appendix 1.

1993 Ibid, [43].

1994 *R v PKS* (Unreported, New South Wales Court of Criminal Appeal, Wood CJ, Sully and Ireland JJ, 1 October 1998).

1995 *R v Robinson* (2000) 111 A Crim R 388, [41]-[42]. In this case, the Court held that the trial judge would have had an obligation to make an advance ruling in relation to character evidence sought to be adduced by the prosecution.

1996 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [12.47].

1997 P Greenwood, *Submission E 47*, 11 March 2005.

1998 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.9040].

Proposal 14–2 The uniform Evidence Acts should be amended to provide the Court with the power to give advance rulings.

15. Judicial Notice

Contents

Introduction

Common law

15.1 'Judicial notice' is a common law doctrine that permits departure from the general rules of leading evidence of a particular matter of fact or law in court proceedings. In broad terms, a court 'takes judicial notice' when it acts upon its own knowledge obtained independently from evidence adduced by the parties. However, a court can only do so in prescribed circumstances. At common law, a court 'notices' a fact whenever the fact is so commonly known that all ordinary people would be reasonably presumed to know about it.[1999]

15.2 The process of taking judicial notice involves a departure from the general rules of leading evidence that:

- the material upon which a court decides a case will be placed before it in the form of evidence formally proved through witnesses; and
- the judge and jury are not permitted in finding any facts, to use their own personal knowledge of relevant facts.

15.3 Two main reasons have been advanced for allowing this departure from the formal rules of leading evidence:

- to maintain consistent findings in court proceedings in areas of common knowledge and experience, and in areas of science and history which have been

1999 *Holland v Jones* (1917) 23 CLR 149, 153.

the subject of earlier community investigation and are not reasonably open to dispute. This maintains the credibility of the trial system;[2000] and

- to save parties time and costs by eliminating the need for formal proof of evidence and cross-examination where dispute between the parties is unlikely on a particular issue.[2001]

Statutory law

15.4 Part 4.2 of the uniform Evidence Acts, being ss 143, 144 and 145, generally restates the common law doctrine of judicial notice in a simplified and clarified form.[2002] It sets out the following principal categories of fact that do not require proof:

- Section 143: legislative instruments, such as an Act, regulation or rule of court.
- Section 144: reasonably established facts forming part of common knowledge or which can be verified by an authoritative document.
- Section 145: certain types of Crown certificates.

Judicial notice of matters of law

15.5 IP 28 sets out an overview of the judicial notice provisions in Part 4.2 of the uniform Evidence Acts.[2003] It calls for submissions on any concerns with the operation of this Part.[2004]

15.6 Section 143 provides that the provisions of legislation and the process by which legislation comes into operation in any Australian jurisdiction do not require proof. It was intended to reflect, but simplify, existing law.[2005] Australian legislation covers:

- statutes;
- subordinate legislation;
- executive government proclamations and orders; and
- instruments of a legislative character, such as rules of court, which by law must be published or notified in a government or other official gazette.

15.7 Section 143(2) allows a judge to inform himself or herself about such matters in any way that the judge thinks fit.

2000 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [969].
2001 Ibid, [969].
2002 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 37.
2003 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Ch 13.
2004 Ibid, Qs 13–1, 13–2.
2005 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [973] on the draft bill proposal.

15.8 Section 5 of the *Evidence Act 1995* (Cth) states that s 143 applies to all proceedings in any Australian court.[2006] '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.[2007]

Interaction of s 143 and s 5 of the *Evidence Act 1995* (Cth)

15.9 The interaction of s 143 and s 5 has been the subject of some academic comment. Professor Jeremy Gans and Andrew Palmer have observed that, assuming s 5 is constitutionally valid, s 143 would appear to have entirely replaced the common law in relation to judicial notice of Australian law.[2008] Stephen Odgers SC has questioned the constitutional validity of s 5 being able to apply to proceedings in a state court exercising state jurisdiction with respect to state legislation.[2009]

15.10 The Criminal Law Committee of the Law Society of South Australia (Law Society SA) and the Legal Services Commission of South Australia (Legal Services Commission SA) commented in their submissions to IP 28 on what would potentially happen if s 143 (via s 5) were read down in the circumstances of totally state-based legislation, jurisdiction and court proceedings. The two submissions similarly observed that the states and the Northern Territory which have not enacted the uniform Evidence Act have similar provisions in their Evidence Acts. Any constitutional invalidity would simply mean these local provisions would operate. They consequently considered that no changes to s 143 are necessary.[2010]

15.11 The Commissions do not consider that the constitutionality of s 5 of the Commonwealth Act is an issue in this context, and have found no problems in practice.

Judicial notice of matters of common knowledge

15.12 Section 144 restates the common law doctrine of judicial notice.[2011] It provides that 'knowledge that is not reasonably open to question' does not require proof. Two types of such knowledge are mentioned:

- local or general common knowledge;[2012] and
- knowledge capable of verification by reference to an authoritative document.[2013]

2006 Note that the *Evidence Act 1995* (NSW) has no equivalent provision to s 5.

2007 *Evidence Act 1995* (Cth) Dictionary.

2008 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 39.

2009 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.540].

2010 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 15; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 7.

2011 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 37. In *Gattellaro v Westpac Banking Corporation* (2004) 204 ALR 258, 262 the High Court commented on the scope of s 144: 'In New South Wales there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the *Evidence Act 1995* (NSW), s 144.'

2012 Uniform Evidence Acts s 144(1)(a).

15.13 The main difference between the two types of knowledge is that the latter category may require reference to an authoritative document to discover or confirm a fact of which judicial notice has been taken, while no such inquiry is needed for facts that form part of general knowledge.[2014]

15.14 Section 144(2) allows a judge to acquire this knowledge in any way that the judge thinks fit. A court (including a jury, if there is one) must take such knowledge into account (s 144(3)). In the process of taking judicial notice of common knowledge or knowledge contained in an authoritative document, a judge must give parties to the proceedings the opportunity to make submissions as to how this knowledge is acquired or taken into account by the judge or court to ensure that the party is not unfairly prejudiced (s 144(4)).

Operation of s 144(4)

15.15 IP 28 suggests that the scope and application of the procedural protection for the parties under s 144(4) might be unclear[2015] and called for submissions on the operation of this sub-section.[2016] In particular, IP 28 indicated a number of points relating to the lack of clarity in the operation of s 144(4).

15.16 IP 28 asks if s 144(4) means that judicial notice cannot be taken of matters of common knowledge (or knowledge contained in an authoritative document), if it is impossible to do so without unfairly prejudicing one of the parties.[2017] In their submissions, the Law Society SA and the Legal Services Commission SA consider this to be an incorrect interpretation of s 144(4).[2018] Rather, they believe that 'the purpose of s 144(4) is to ensure that the parties are given an opportunity to address whatever facts judicial notice is to be taken of, not to prevent them from being taken notice of at all'.[2019]

15.17 IP 28 went on to ask if a judge alone can decide that a party may be unfairly prejudiced, or if the party needs to make a prior submission of unfair prejudice to the judge.[2020] The Law Society SA and the Legal Services Commission SA consider that

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2013 Ibid s 144(1)(b).
2014 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 40.
2015 See Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [13.12]–[13.13].
2016 See Ibid, Q 13–2.
2017 This is the conclusion of Sackville J in *Prentice v Cummins (No 5)* (2002) 124 FCR 67, 87.
2018 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.
2019 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.
2020 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 13–2.

s 144(4) only requires the parties to be given an opportunity to make submissions about facts which are judicially noticed as is necessary to ensure fairness.[2021]

15.18 Another question raised in IP 28 was whether matters of 'general experience' (as distinct from 'common knowledge') were also covered by the procedural protections in s 144(4). Justice Dyson Heydon has suggested in an academic paper that if it were intended that s 144 covered both matters then 'great cumbrousness' would occur.[2022] Judicial notice would 'have to be given constantly about what matters the judge (or jury) was considering in a manner which was not necessary at common law'. Heydon believes this consequence cannot have been contemplated under s 144. The Law Society SA and the Legal Services Commission SA agree with the view expressed in the paper by Heydon that matters of 'general experience' do not fall within the meaning of s 144(1).[2023]

15.19 IP 28 noted generally that despite the availability of judicial notice under the provisions of s 144, parties to a proceeding could still lead formal evidence of matters of common knowledge.[2024]

15.20 The submission to IP 28 by Kylie Burns of Griffith University Law School raises the interesting argument that judicial notice legislation should make a distinction between 'adjudicative' facts and 'legislative and/or social facts'.[2025] In particular, the submission argues that, similar to judicial notice legislation in the United States federal sphere, the ambit of s 144 should be expressly restricted to apply only to facts directly in issue between the parties ('adjudicative' facts).[2026] Burns defines a 'social fact' as statements about human behaviour, nature of society and its institutions, and social values.[2027] The submission argues:

> The use of social fact material whether sourced or unsourced, provided by the parties or sourced by the judge … is not specifically provided for in the Australian law of evidence or practice. The reference to such material has apparently developed without any specific guiding principles as to authenticity, notice or necessary evidential support.[2028]

15.21 Burns's submission, however, also observes that refusing 'to allow admission of facts on the basis that they are not adjudicative facts, or that the reception of such material does not come within the traditional ambit of the doctrine of judicial notice is

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2021 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.

2022 D Heydon, *Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues* (2003) unpublished manuscript, 44.

2023 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.

2024 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [13.10].

2025 K Burns, *Submission E 21*, 18 February 2005, 1.

2026 As in the *Federal Rules of Evidence* (US) r 201: K Burns, *Submission E 21*, 18 February 2005, 2, 8.

2027 K Burns, *Submission E 21*, 18 February 2005, 4.

2028 Ibid, 5.

unnecessarily restrictive'.[2029] Burns proposes, therefore, that consideration be given to 'any further new provisions to specifically govern the admission of legislative and social facts', potentially through judicial discretion, with the parties being given the opportunity to respond.[2030] The submission also observes that 'given the very widespread use of social facts in judicial decision making very explicit evidential rules could prove administratively difficult and costly to implement'. Burns further suggests that methods of improving the reception and accuracy of social fact evidence could include greater encouragement of amicus curiae, and the introduction of practice directions in the relevant appellate courts that encourages parties to include submissions on social fact material, including supporting social scientific material, in written appellate submissions.[2031]

15.22 One senior practitioner considers that s 144(4) is awkward and could be dealt with in a much simpler way.[2032] That is, if a matter were really one of 'common knowledge' and 'not reasonably open to question' under s 144, then there would be no prejudice under s 144(4). However, the practitioner also noted that s 144(4) was not a major problem, since it was not utilised a lot.

15.23 Other submissions consider that s 144(4) as it presently operates gives parties the opportunity to respond if judicial notice is taken of a fact where it has the potential to be unfair.[2033] In summary, the Law Society SA and the Legal Services Commission SA have no concerns about the operation of s 144(4) and do not believe that any change is required.[2034] They conclude:

> Given these provisions [s 144(1), (2), (3)], the obligation on judges contained in s 144(4) is appropriate, in order that the parties receive procedural fairness. If the provision was not in the Evidence Acts, it is likely something similar to it would have been inferred as implicit in the other sub-sections.[2035]

Judicial notice of matters of state

15.24 Section 145 of the uniform Evidence Acts retains the common law principles that apply to judicial notice of matters of State as follows:

> This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

2029 Ibid, 8.
2030 Ibid, 9.
2031 Ibid, 9.
2032 P Greenwood, *Consultation*, Sydney, 11 March 2005.
2033 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.
2034 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.
2035 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 16; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 8.

15.25 This section principally deals with executive government recognition of foreign states and governments, where a certificate issued by the executive government on the recognition issue is decisive evidence. The ALRC has commented in the past that such matters of state should be reviewed in the context of a reference on international or constitutional law, rather than under a reference relating to the rules of evidence.[2036] Submissions on s 145 note it had not changed the common law and that there are no concerns with its operation.[2037]

The Commissions' view

15.26 Only a few submissions and consultations referred to the two issues raised in IP 28 with regard to the operation of the judicial notice provisions under the uniform Evidence Acts.[2038] The submissions generally have no concerns with the practical operation of Part 4.2 of the uniform Evidence Acts, including s 144(4), and do not indicate any change is required—with the exception of the issue of possible new provisions to specifically govern the admission of legislative and social facts.[2039]

15.27 The Commissions note the lack of examples of practical difficulties presently occurring with the operation of Part 4.2, including the procedural requirements in s 144(4). It therefore appears that Part 4.2 is operating effectively in practice.

15.28 The Commissions are, however, interested in further comment on whether there is a need for a legislative provision allowing judges to take account of social facts.

Question 15–1 Should the provisions relating to judicial notice allow judges to take account of social facts? Are there more effective ways of dealing with this issue?

2036 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [977].

2037 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005, 15; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005, 7.

2038 Criminal Law Committee of the Law Society of South Australia, *Submission E 35*, 7 March 2005; Legal Services Commission of South Australia, *Submission E 29*, 22 February 2005; K Burns, *Submission E 21*, 18 February 2005; P Greenwood, *Consultation*, Sydney, 11 March 2005.

2039 See K Burns, *Submission E 21*, 18 February 2005.

16. Comments, Warnings and Directions to the Jury

Contents

Introduction

16.1 In jury trials, generally the role of the judge 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 it must apply to the facts in determining the verdict and can also direct the jury about the manner in which those legal rules should be applied to the facts. A direction warns a jury against following an impermissible path of reasoning and cannot be ignored.[2040] In certain circumstances, the trial judge may also express opinions about the evidence in the form of a judicial comment. The latter is distinct from a direction in that the jury is not obliged to follow it.[2041]

16.2 Although it is not possible to predict all of the ways in which a judge may be required to direct or instruct the jury during the course of a trial, the common law has developed certain warnings in respect of particular types of evidence and inferences that can be drawn from the absence of evidence.

2040 *Azzopardi v The Queen* (2001) 205 CLR 50.
2041 Ibid.

16.3 The uniform Evidence Acts do not contain a specific Part dealing exclusively with comments and directions to the jury. However, the following are expressly provided for:

- in criminal proceedings for an indictable offence, the judge or any party (other than the prosecutor) may comment on the failure of a defendant (or a defendant's spouse, de facto spouse, parent or child) to give evidence (s 20);
- the court has a discretion to limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or misleading or confusing (s 136);
- the judge may give a warning about 'evidence of a kind that may be unreliable' (s 165); and
- where identification evidence has been admitted, the judge is to inform the jury of the need for caution (and of the reasons for the need for caution) before accepting that evidence (s 116).

16.4 The uniform Evidence Acts have abolished the requirement for corroboration warnings[2042] but preserve a trial judge's powers at common law to give warnings in respect of certain types of evidence.[2043] 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.

Failure of the accused to give evidence or to call a witness

Comments by the trial judge on failure to give evidence

16.5 It is a well-established principle at common law that an accused has a right to silence. This right means that a defendant cannot be compelled to give evidence or to answer questions put to him or her in the dock. However, a trial judge may be permitted to comment on the fact that the defendant has not given evidence.[2044] The rules differ across the various jurisdictions as to whether a comment can be made and what form that comment might take.

16.6 In the Interim Report of the original ALRC evidence inquiry (ALRC 26),[2045] the ALRC considered that there were strong arguments in favour of permitting a tribunal of fact to draw adverse inferences from the failure of an accused to give evidence:

2042 Uniform Evidence Acts s 164.
2043 Ibid s 165(5).
2044 *R v Kops* (1893) 14 LR (NSW) 150.
2045 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985).

> If accused persons can avoid giving evidence, and being subject to cross-examination, without any adverse consequences, then there is a risk that guilty persons would escape conviction.[2046]

16.7 The ALRC acknowledged, however, that there may be reasons other than guilt that would lead an accused to choose not to give evidence. For example, giving evidence may result in the disclosure of non-criminal conduct that is embarrassing or shaming. An accused may wish to remain silent to prevent revealing prior convictions or to protect other people. Alternatively, an accused may choose not to give evidence because he or she may present as a poor witness due to particular mannerisms or communication difficulties.[2047]

16.8 The ALRC further argued that prohibitions on judicial comment were unsatisfactory given the reality that 'adverse inferences will be drawn by the tribunal of fact':

> Rather than making no comment and leaving the jury to draw what inferences they will, it seems preferable to permit a trial judge to instruct the jury as to inferences they may, and may not, draw from the accused person's silence.[2048]

16.9 The ALRC therefore recommended that, as a compromise between the considerations outlined above, the tribunal of fact should be entitled to take the accused's failure to testify into account when assessing the other evidence in the case, but not to use it as direct evidence of guilt.[2049] Accordingly, it recommended that any comment by counsel or the trial judge on the failure of an accused to give evidence must be in terms consistent with legally permissible inferences.[2050]

16.10 Section 20 of the uniform Evidence Acts provides that in criminal proceedings for an indictable offence:

> (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.[2051]

2046 Ibid, [552].
2047 Ibid, [553].
2048 Ibid, [557].
2049 Ibid, [552].
2050 Ibid, [555].
2051 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).

16.11 The extent to which a judge may make an adverse comment pursuant to s 20 was considered by the High Court in *RPS v The Queen*.[2052] In this case, the trial judge made a comment to the jury that it was entitled to conclude that the accused's election not to deny or contradict certain prosecution evidence was evidence that his evidence would not have assisted him at trial. The majority held that this comment breached the prohibition in s 20(2), stating:

> Section 20(2) should be given no narrow construction inviting the drawing of fine distinctions. In particular, the prohibition contained in the second sentence (forbidding the judge making a comment that suggests the accused failed to give evidence because he or she was … guilty) must be given full operation … It has been said that the line between what is permissible and what is not … may be a fine one. Whether or not that is so, s 20(2) requires a line to be drawn and it should be drawn in a way that gives the prohibition against suggesting particular reasons for not giving evidence its full operation.[2053]

16.12 The Court emphasised that, apart from the prohibition contained in s 20(2), the ability of the judge to make an adverse comment on the failure to give evidence was limited by the fundamental accusatorial principle in criminal trials that the prosecution bears the onus of proving the accused's guilt beyond reasonable doubt. In this regard, it stated:

> It will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In the absence of such evidence or explanation, the jury may more readily draw the conclusion which the prosecution seeks.[2054]

16.13 The Court also discussed an earlier common law decision, *Weissensteiner v The Queen*,[2055] in which the High Court held as permissible the trial judge's comment that 'an inference of guilt may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge'. In this case, the defendant was charged with the murder of two persons who had disappeared whilst sailing in the Pacific. The accused was later found in possession of their boat and possessions. He made a number of inconsistent pre-trial statements as to the whereabouts of the couple, but did not give evidence at trial. The Court approved the judicial comment on the basis that only the accused knew what had happened while he was on the boat with the couple and hence that he was the only person capable of explaining their disappearance. It stated:

2052 *RPS v The Queen* (2000) 199 CLR 620.
2053 Ibid, [20].
2054 Ibid, [27].
2055 *Weissensteiner v The Queen* (1993) 178 CLR 217.

> In a criminal trial, hypotheses consistent with the innocence of the accused may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.[2056]

16.14 Section 20 does not operate to prohibit a *Weissensteiner* comment. However, in *RPS*,[2057] the High Court confined the decision in *Weissensteiner* to its unusual facts. It held that such a comment was only appropriate (both at common law and in uniform Evidence Act jurisdictions) in 'some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could only come from the accused'.[2058]

16.15 In *Azzopardi v The Queen*, the High Court emphasised that a *Weissensteiner* comment will only be appropriate in 'rare and exceptional' cases.[2059] In this case, the accused was charged with soliciting P to murder G. P gave evidence in support of the prosecution's case and the accused did not give evidence. The trial judge commented to the jury that it was entitled to take into account the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge. The High Court held that this breached s 20(2) and confirmed that:

> It is … clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; 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.[2060]

16.16 The Court further held that there is no basis for giving a *Weissensteiner* comment where another witness has given evidence on an aspect of the prosecution case. It stated:

> All that could be said in this case is that the accused did not give evidence *contradicting* evidence which had been led. This was not a case where the accused did not take the opportunity to provide some *additional* factual material for consideration by the jury which would explain or contradict the case sought to be made by the prosecution. This was not a case in which the jury might properly use the absence of evidence of additional, exculpatory, material in considering inferences sought by the prosecution.[2061]

16.17 The Court concluded that a *Weissensteiner* comment will only be appropriate where there is a basis for concluding that there are additional facts, peculiarly in the knowledge of the accused, which would explain or contradict the inference the

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2056 Ibid, [28].
2057 *RPS v The Queen* (2000) 199 CLR 620.
2058 Ibid, [27].
2059 *Azzopardi v The Queen* (2001) 205 CLR 50.
2060 Ibid, [67].
2061 Ibid, [73].

prosecution seeks to draw. The fact that an accused could have contradicted evidence already given will not suffice.[2062]

16.18 In a dissenting judgment, McHugh J stated that it is a misreading of the common law and legislative history to hold that s 20(2) removes the right of comment that trial judges have exercised for more than two centuries.[2063] His Honour noted that until *RPS*,[2064] Australian courts had regularly directed juries that they could, in appropriate circumstances, take into account that the accused had failed to rebut or explain evidence as a reason for accepting that evidence.[2065] His Honour considered that such judicial comments did not suggest that accused persons had failed to give evidence because they were guilty of the offence charged (and hence did not breach s 20(2)), nor were they inconsistent with the accused's right to silence.[2066]

Submissions and consultations

16.19 IP 28 asked whether the operation of s 20 raised any concerns and whether any such concerns should be addressed through amendment of the uniform Evidence Acts. In particular, it asked whether the term 'comment' or the content of permissible judicial comment should be defined.[2067]

16.20 The New South Wales Public Defenders Office (NSW PDO) considers that the comments to be given in a case where the accused does not give evidence are now reasonably well settled (in this regard the NSW PDO refers to *Azzopardi*) and submits that the current law is working satisfactorily and requires no further clarification or amendment.[2068]

16.21 In contrast, the Office of the NSW Director of Public Prosecutions (DPP NSW) submits that the case law has narrowed the circumstances in which judicial comment is permitted beyond that suggested by the terms of s 20 itself, and that clarifying the content of comments permissible under s 20 would help to achieve consistency and decrease the number of appeals on this point.[2069]

16.22 IP 28 also asked whether any concerns were raised by the provision in s 20(3) for judicial comment on the failure of a spouse, de facto, parent or child of a defendant to give evidence.[2070]

2062 Ibid, [64].
2063 Ibid, [90].
2064 *RPS v The Queen* (2000) 199 CLR 620.
2065 Ibid, [91].
2066 Ibid, [86].
2067 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–1.
2068 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
2069 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 34.
2070 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–2.

16.23 The NSW PDO submits that the current provisions are working well and do not require amendment.[2071]

16.24 The DPP NSW again submits that s 20 should be amended to clarify the content of any permissible comment. The DPP NSW further submits that there is some doubt about the meaning of s 20(3)[2072] and refers to the dissenting judgement of McHugh J in *Dyers v The Queen*.[2073] In this case, McHugh J suggested that s 20(3) is open to the construction that the judge may make a comment when the accused fails to call any of the persons nominated in the sub-section to answer a relevant part of the prosecution case, and is not confined to cases where the accused sets up an affirmative case. His Honour also suggested that s 20(3) must be seen as a supplement to the common law right to comment, as it is unlikely that the legislature intended the limit the power to comment to the categories of persons mentioned in that subsection.[2074]

The Commissions' view

16.25 In relation to the question regarding whether 'comment' or the content of permissible judicial comment should be defined, the Commissions are of the view that the law has been settled by the High Court in cases such as *Azzopardi*.[2075] Whilst that decision has perhaps narrowed the scope of s 20 from that envisaged in the original ALRC recommendation, the Commissions consider that the policy underpinning this decision is sound and that no need has been demonstrated to revisit it. It is noted that the NSWLRC examined the operation of s 20 in 2000 and recommended that, in general, the present law concerning the right to silence at trial should not change.[2076]

Prosecutor's comment

16.26 In accordance with s 20, only the trial judge and defence counsel are permitted to make a comment regarding an accused's failure to give evidence. In its report on the right to silence,[2077] the NSWLRC considered whether it would be desirable to permit prosecutors to make such comments. In favour of such a change, it was argued that a jury might interpret a judicial comment as an indication the judge has an opinion adverse to the defendant and may therefore lead it to give the issue undue significance. It was also considered unfair that the prosecution not be permitted to comment on matters that the defence may itself raise with the jury, in anticipation of comments from the trial judge.[2078]

2071 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
2072 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
2073 *Dyers v The Queen* (2002) 210 CLR 285.
2074 Ibid, [43].
2075 *Azzopardi v The Queen* (2001) 205 CLR 50.
2076 New South Wales Law Reform Commission, *The Right to Silence*, Report 95 (2000), Rec 14. This was apart from changes to the prosecutor's right to comment discussed below.
2077 Ibid.
2078 Ibid, 180–181.

16.27 The NSWLRC therefore recommended that prosecutors 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.[2079]

16.28 IP 28 asked whether the prohibition on prosecution comment in s 20(2) of the uniform Evidence Acts should be removed and, if so, whether a prosecutor's ability to comment should be subject to a requirement that it apply for leave to do so.[2080]

Submissions and consultations

16.29 The NSW PDO submits that prohibition on prosecution comment in s 20(2) should be retained:

> It is too easy for prosecutors in the heat of a trial to over-emphasise the importance of the failure of the accused to give evidence. In such cases juries can easily be diverted from the issue of whether the Crown has proved its case, to the issue of why the accused has not given evidence. It is much safer to leave any comments on the failure of the accused to give evidence to the trial judge. The current provisions do not require amendment.[2081]

16.30 Similarly, the Law Council of Australia (Law Council) favours retaining the prohibition on the basis that the judge is the appropriate person to direct the jury that no inferences can be drawn from an accused's silence.[2082]

16.31 In contrast, the DPP NSW agrees with the reasoning in the NSWLRC report and supports the proposal that the prosecutor be able, subject to the leave requirement, to comment on the inferences to be drawn from the failure of an accused to give evidence.[2083]

16.32 Some New South Wales Crown Prosecutors consider that it would be desirable for a prosecutor to be able to make a comment, not in relation to an inference of guilt, but in relation to the credibility of the accused.[2084]

The Commissions' view

16.33 The ALRC considered in its original report the question of whether prosecutors should be able to comment on the failure of an accused to give evidence, and concluded that:

2079 Ibid, 181, Rec 15.

2080 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–3.

2081 New South Wales Public Defenders, *Submission E 50*, 21 April 2005. A similar view was expressed by one judicial officer and one senior practitioner: Confidential, *Submission E 31*, 22 February 2005; T Game, *Consultation*, Sydney, 25 February 2005.

2082 Law Council of Australia, *Submission E 32*, 4 March 2005.

2083 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

2084 Crown Prosecutors, *Consultation*, Sydney, 11 February 2005.

> To allow the prosecution to do so would carry grave dangers. There is a fine line between what is and is not permissible comment. The inexperienced or overzealous prosecutor could overstep that line and cause the trial to be aborted. Further, by subtle use of the right to comment, the prosecutor could focus attention on the choice and shift attention from the burden of proof carried by the Crown to the question of the significance of the choice made by the accused.[2085]

16.34 The Commissions are inclined to agree with the policy outlined in ALRC 38 in relation to this question. No amendment to the uniform Evidence Acts should be made in this regard.

Inferences from the absence of evidence

16.35 At common law, a judge is permitted to direct the jury that it may infer from a party's failure to call evidence that the evidence in question would not have assisted that party's case (known as the rule in *Jones v Dunkel*).[2086] The uniform Evidence Acts are silent as to whether and what inferences can be drawn from a party's failure to call evidence and hence the common law continues to operate.[2087]

16.36 The operation of the rule in *Jones v Dunkel* in criminal proceedings has been restricted by recent authority. In *Dyers v The Queen*, the High Court held that:

> As a general rule a trial judge should not direct the jury in a criminal trial that the accused would be expected to give evidence or call others to give evidence. Exceptions to that general rule will be rare. They are referred to in *Azzopardi*. As a general rule … a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence.[2088]

16.37 The Court reasoned that to allow the rule to operate generally in criminal proceedings would contradict the fundamental requirement that the prosecution prove its case beyond reasonable doubt.[2089] The Court drew further support for its conclusion from the fact that is the duty of the prosecution to call all available material witnesses unless there is a good reason for not doing so.[2090]

2085 Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [97].

2086 *Jones v Dunkel* (1959) 101 CLR 298.

2087 *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1. Section 9 of the New South Wales, Tasmanian and Norfolk Island Evidence Acts provide that the legislation does not affect the operation of an evidentiary principle or rule of the common law or equity in proceedings to which the legislation applies (except in so far as the legislation provides otherwise expressly or by necessary intendment). The Commonwealth Act contains a modified version of this provision. See discussion in Ch 2.

2088 *Dyers v The Queen* (2002) 210 CLR 285, [5]. See discussion above in relation to *Azzopardi v The Queen* and the content of permissible judicial comment on the failure of the accused to give evidence.

2089 Ibid, [9].

2090 Ibid, [11].

16.38 In a dissenting judgment, McHugh J considered that the majority decision was an 'anathema' given the history of the failure to call a witness direction and stated that a trial judge should be able to give a *Jones v Dunkel* direction where an accused establishes an 'affirmative evidentiary case' (in other words, has given an alternative version of events).[2091]

Submissions and consultations

16.39 IP 28 asks whether the uniform Evidence Acts should be amended to provide for comment on the adverse inferences that may be drawn from the failure to call evidence and whether such comment should be limited to civil proceedings.[2092] In particular**,** IP 28 sought comment on whether there is a need for the uniform Evidence Acts to provide specifically for the rule in *Jones v Dunkel*.[2093]

16.40 The Law Council does not favour statutory embodiment of the rule in *Jones v Dunkel*:

> In civil cases inferences are permitted from a party's failure to testify or call other evidence or cross-examine an opponent's witness. However, courts remain wary about such inferences. The Council is wary of legislative formulation of appropriate inferences in civil cases and, in light of its view to reduce evidential rules in civil cases, does not favour statutory embodiment of the 'rule' in *Jones v Dunkel*. Whilst there may be stronger arguments for enacting an equivalent rule in criminal cases the Council is not at present convinced this is necessary in light of the High Court's strong stand against drawing adverse inferences from such failure.[2094]

16.41 Similarly, the NSW PDO supports the majority position in *Dyers*[2095] that the judge should comment on the failure of the defence to call a witness only in the most unusual of circumstances.[2096]

16.42 One submission expresses the view that the rule in *Jones v Dunkel* works well in practice in civil cases and that there is no need for a similar rule in criminal cases.[2097]

16.43 In contrast, the DPP NSW supports the view expressed by McHugh J in his dissenting judgment in *Dyers* and submits that the uniform Evidence Acts should be amended to permit judicial comment in both criminal and civil proceedings where the accused has set up an affirmative evidentiary case and fails to call evidence.[2098]

2091 Ibid, [29].
2092 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–4.
2093 Ibid, [14.18].
2094 Law Council of Australia, *Submission E 32*, 4 March 2005.
2095 *Dyers v The Queen* (2002) 210 CLR 285.
2096 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
2097 Confidential, *Submission E 31*, 22 February 2005.
2098 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

The Commissions' view

16.44 The Commissions are of the view that a case has not been made out for the uniform Evidence Acts to be amended to provide for the inferences that can be drawn from the absence of evidence. The operation of the rule in *Jones v Dunkel* in civil trials appears to be working well in practice. In relation to criminal trials, the Commissions consider that it would be inappropriate to legislate for the rule in light of the majority stance taken in *Dyers*[2099] and *Azzopardi*[2100] that adverse inferences should not be drawn from the failure to give evidence or call witnesses except in the most unusual of circumstances.

Warnings about unreliable evidence

16.45 At common law, certain categories of evidence require a warning from the trial judge where the evidence is uncorroborated. These categories include: evidence of complainants in sexual assault cases;[2101] accomplices;[2102] children giving sworn evidence;[2103] and prison informers' evidence.[2104]

16.46 Section 164 of the uniform Evidence Acts abolishes the common law mandatory corroboration regime, replacing it with the warning requirements set out in s 165. However, it should be noted that s 164 does not prohibit the trial judge from warning that it would be dangerous to convict on uncorroborated evidence.[2105]

16.47 In *R v Stewart*, Spigelman CJ observed that ss 164 and 165 'constitute reform of the law of a fundamental kind'[2106] and that a 'significant change in the law was intended'.[2107] These remarks emphasise that great caution must be exercised in taking into account the comparable common law on the interpretation of s 165.[2108]

16.48 ALRC 26 criticised the common law on the following basis:

> The present law is too rigid and technical. There is a strong case for saying that it does not adequately serve the rationale of minimising the risk of wrongful convictions. Warnings can be required when not necessary and avoided when they should be given in the circumstances of the particular case. In addition, warnings in their present form distract attention from the issue of the reliability of the evidence in question. Finally, the directions to be given are so complex that they are likely to be ignored … What is

2099 *Dyers v The Queen* (2002) 210 CLR 285.
2100 *Azzopardi v The Queen* (2001) 205 CLR 50.
2101 *Kelleher v The Queen* (1974) 131 CLR 534.
2102 *Davies v Director of Public Prosecutions* [1954] AC 378.
2103 *Hargan v The King* (1919) 27 CLR 13.
2104 *Pollitt v The Queen* (1992) 174 CLR 558.
2105 *Conway v The Queen* (2002) 209 CLR 203, [53].
2106 *R v Stewart* (2001) 52 NSWLR 301, [6].
2107 Ibid, [8].
2108 Ibid, [2]–[15], applying *Papakosmas v The Queen* (1999) 196 CLR 297; see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.2860].

> required is a simpler regime, under which the trial judge must consider whether a direction appropriate to the circumstances should be given.[2109]

16.49 The ALRC therefore proposed that there be an obligation to give a warning in respect of certain categories of evidence (including some of the previous common law categories) where the evidence may be unreliable or its probative value may be over-estimated, unless there is a good reason not to do so. The ALRC recommended that the judge's common law powers and obligations to give appropriate warnings and directions remain intact, suggesting that these general powers would be available to cover any new category of unreliable evidence that may emerge.[2110] The ALRC also observed that a judge would not be prevented from suggesting that the jury look for independent evidence to confirm the evidence in question, nor from directing a jury in appropriate cases that it is dangerous to convict an accused on the basis of a particular witness' evidence.[2111]

16.50 The draft legislation in ALRC 38 provided an exhaustive list of the categories of evidence that may require a warning.[2112] By contrast, s 165(1) provides a non-exhaustive list, stating that 'unreliable' evidence includes the following:

> (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
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> (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;
>
> (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.

16.51 Hence s 165 applies not only to the specific categories listed in s 165(1) but also to evidence of a 'kind that may be unreliable'. One issue upon which the case law has diverged is whether the section applies to any evidence which falls within one of the

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2109 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1015].
2110 Ibid, [1017].
2111 Ibid, [1018].
2112 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.

categories listed or whether it must also be established that the evidence is of a kind that is unreliable.[2113] Further, no indication is given in the uniform Evidence Acts as to the breadth of the test of unreliability. It has been held, however, that the section only applies to evidence where there is a risk of a miscarriage of justice that may be apparent to the judge but not to the jury.[2114]

16.52 The required contents of the warning are set out in s 165(2), which 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.

16.53 Section 165(4) provides that it is not necessary that a particular form of words be used in giving the warning or information.

16.54 In relation to s 165(2)(b), the information provided to the jury will depend on the particular matters that lead to the conclusion that the evidence is 'of a kind that may be unreliable'.[2115] Odgers states that where a warning is required, information need not be confined only to those matters which would bear on the reliability of evidence of the 'kind'. Any matter that may cause it to be unreliable should be noted as an assessment of whether a witness' evidence should be accepted will often depend on the totality of matters bearing on its reliability.[2116]

16.55 As recommended by the ALRC, s 165(3) provides that the judge need not give a warning if 'there are good reasons for not doing so'. The uniform Evidence Acts are silent on what may constitute 'good reasons' for refusing to give a warning.

16.56 Section 165 provides no indication as to when a warning should be given. The New South Wales Court of Criminal Appeal has observed that it is 'highly preferable' that a trial judge give any required warnings immediately before or immediately after the giving of the subject evidence, as opposed to waiting to do so in the course of summing-up.[2117]

16.57 Section 165(5) provides that the section 'does not affect any other power of the judge to give a warning to, or to inform, the jury'. Hence it preserves the trial judge's general powers and obligations to give appropriate warnings (except in New South Wales where the common law has been limited in relation to children).[2118] In contrast to the warnings provided for in s 165, at common law a trial judge may be required to

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2113 See *R v Stewart* (2001) 52 NSWLR 301; *R v Clark* (2001) 123 A Crim R 506; *R v Fowler* [2003] NSWCCA 321.

2114 *R v Baartman* (2001) 124 A Crim R 371; *R v Chan* (2002) 131 A Crim R 66.

2115 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.4.2880].

2116 Ibid, [1.4.2880].

2117 *R v DBG* (2002) 133 A Crim R 227, [23].

2118 *Evidence Act 1995* (NSW) ss 165A and 165B.

give a warning where it is not requested by either party[2119] and potentially even where the parties indicate that they do not wish a warning to be given.[2120] Section 165(5) is discussed further below.

Submissions and consultations

16.58 IP 28 asks how s 165 of the uniform Evidence Acts has operated in practice, whether it has raised any concerns and how any such concerns should be addressed.[2121]

16.59 One practitioner considers that s 165 generally works well.[2122] The Law Council also endorses the flexible and non-technical approach of s 165 warnings.[2123]

16.60 In contrast, the NSW PDO submits that s 165 'has proved to be a blunt and ineffective instrument when compared to the common law rules relating to corroboration'.[2124]

16.61 The DPP NSW submits that guidance as to the timing of a warning under s 165 is desirable:

> Section 165 should be amended to indicate that, unless the court is satisfied that it is in the interests of justice to give the warning at some other time, the warning given by the trial judge pursuant to the section, must be given immediately before or immediately after the giving of the evidence that is the subject of the warning. [2125]

16.62 The New South Wales Department of Health Child Protection and Violence Unit submits that the Acts should be amended to provide that the judge must not warn, or suggest to the jury in any way, that the law regards complainants in sexual assault cases as an unreliable class of witness. [2126]

16.63 IP 28 also asks whether further categories of evidence should be included in s 165(1).[2127]

16.64 The NSW PDO supports the inclusion of additional categories in s 165(1). In particular, it proposes the addition of evidence from witnesses who have 'bad character', noting that currently there is authority for the proposition that a s 165 direction for witnesses of bad character is not required.[2128] The NSW PDO also

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2119 *R v Stackelroth* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Powell and Smart JJ, 9 April 1997).
2120 *R v He* [2001] VSCA 58.
2121 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–5.
2122 T Game, *Consultation*, Sydney, 25 February 2005.
2123 Law Council of Australia, *Submission E 32*, 4 March 2005.
2124 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
2125 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
2126 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.
2127 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–6.
2128 New South Wales Public Defenders, *Submission E 50*, 21 April 2005. The case cited for this proposition is *R v Stewart* (2001) 52 NSWLR 301.

proposes that evidence from a person affected by drugs and alcohol be added to the list in s 165(1) on the basis that there are presently conflicting authorities about such witnesses. It is suggested that it is anomalous that a s 165 direction must be given in relation to a witness affected by a physical or mental ill-health, injury, or the like, but not be a witness affected by drugs or alcohol.[2129]

16.65 In contrast, the DPP NSW does not consider that further categories of evidence should be included in s 165(1).[2130]

16.66 IP 28 further asks whether the required content of warnings to the jury under s 165(2) should be amended.[2131]

16.67 The DPP NSW does not support any amendment to s 165(2).[2132] In contrast, the NSW PDO submits that the statutory formulation in s 165(2) is considerably weaker than the common law regarding the uncorroborated evidence of accomplices, and does not indicate which approach is to be taken when there is more than one accomplice giving evidence. It therefore proposes that s 165(2) be amended to include the following:

> (d) that it would be dangerous to act on the evidence of an unreliable witness which is not supported by other independent evidence; and
>
> (e) the evidence of a number of witnesses all criminally concerned in the events giving rise to the proceedings do not provide independent support for each other.[2133]

16.68 The Law Council submits that it might be appropriate to develop uniform model directions (and particularly warnings required under s 165) for criminal cases in uniform Evidence Act jurisdictions. It notes that should such directions be developed, care must be taken to ensure that they do not achieve a mandatory (and hence technical) status.[2134]

16.69 One senior judicial officer considers that it would be difficult to legislate to include different types of directions.[2135]

The Commissions' view

16.70 The Commissions note that relatively few submissions were received in relation to warnings given pursuant to s 165 (excluding common law warnings permitted under s 165(5)).

16.71 One issue raised in relation to the general operation of the section concerns the timing of s 165 warnings. The Commissions agree with the proposition that a warning

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2129 New South Wales Public Defenders, *Submission E 50,* 21 April 2005.
2130 Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005.
2131 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–7.
2132 Director of Public Prosecutions (NSW), *Submission E 17,* 15 February 2005.
2133 New South Wales Public Defenders, *Submission E 50,* 21 April 2005.
2134 Law Council of Australia, *Submission E 32,* 4 March 2005.
2135 High Court of Australia, *Consultation*, Canberra, 9 March 2005.

should be given immediately before or immediately after the giving of the evidence in question (as noted in *R v DBG*[2136]). However, the Commissions do not consider that a case has been made out in favour of legislative amendment in relation to timing.

16.72 In relation to whether further categories of evidence should be included in s 165(1), the Commissions note that s 165(1) does not provide an exhaustive list and parties may therefore request warnings in relation to evidence 'of a kind that may be unreliable'. Given that this is the case, the categories of evidence referred to by the NSW PDO (persons affected by drugs or alcohol and persons of bad character) may fall within the general ambit of 'evidence of a kind that may be unreliable'. Hence, the Commissions are not inclined to propose that further categories be added to s 165(1).

16.73 In relation to whether s 165(2) requires amendment, the only issues raised in the submissions concerned whether a direction in relation to evidence given by accomplices should be given and whether model directions should be formulated.

16.74 In relation to the first question, the Commissions note that a trial judge is not prevented from suggesting that the jury look for independent evidence which may confirm the evidence in question or, in appropriate cases, from directing a jury that it is dangerous to convict an accused on the basis of a particular witness' evidence.[2137] The Commissions consider that no convincing case has been made out for including additional directions.

16.75 In relation to the question of model directions, the Commissions consider that this carries too great a risk of being treated as mandatory by judicial officers, thereby removing the flexibility the section was intended to provide. Accordingly, the Commissions do not propose an amendment to the required content of warnings to the jury under s 165(2).

A targeted inquiry

16.76 The Commissions are of the view that a more targeted inquiry into comments, directions and warnings to the jury is warranted. In part, this is due to the complexity of the issues involved. The focus of the current Inquiry is the uniform Evidence Acts. The Commissions consider that the solutions to problems raised in the context of comments, warnings and directions to the jury require a broader analysis than this Inquiry allows. There is a need to examine not only the uniform Evidence Acts, but also the common law and other pieces of state legislation regarding particular types of witnesses.[2138]

16.77 Any future inquiry should address the need to increase the quality and consistency of trial practice across the various jurisdictions throughout Australia. A

2136 *R v DBG* (2002) 133 A Crim R 227.

2137 Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [1018].

2138 See, eg, *Criminal Code 1924* (Tas) s 371A; *Evidence Act 1929* (SA) ss 12A, 341(5); *Evidence Act 1939* (NT) s 9C; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5)(a).

joint inquiry involving law reform bodies from a number of jurisdictions, as has been the case with this Inquiry, would facilitate such an outcome.

16.78 However, as part of this Inquiry, the Commissions are still considering whether specific changes are required to the uniform Evidence Acts. For example, the Commissions make a proposal and seek further comments in relation to s 165 later in this chapter.

Warnings in respect of children's evidence

16.79 At common law, children are traditionally seen as unreliable witnesses, and there are requirements in all Australian jurisdictions that judges warn juries that it is dangerous to convict on the uncorroborated evidence of a child.[2139] 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.[2140] However, there are differences in the scope of the provisions that allow judges to give warnings about the reliability of children's evidence.

16.80 The *Evidence Act 1995* (Cth) contains no specific provision regarding warnings about the evidence of child witnesses.[2141] Section 165 of the uniform Evidence Acts allows, at the request of a party, the judge 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.

16.81 In the report of an inquiry into children and the legal process (ALRC 84), the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) found that, despite changes to the law removing corroboration requirements, it remains standard practice in many jurisdictions for judges to give warnings to juries concerning the evidence of children.[2142] The concerns raised in submissions to that inquiry were that these judicial warnings are often based on individual judges' assumptions and prejudices rather than modern research findings, effectively discriminating against

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2139 D Byrne and JD Heydon, *Cross on Evidence: Australian Edition*, vol 1, [15140].

2140 Section 164 of the uniform Evidence Acts, s 632(2) of the *Criminal Code Act 1899* (Qld) and s 50 of the *Evidence Act 1906* (WA) abolish corroboration requirements for all types of evidence. In addition, in New South Wales, there are specific provisions prohibiting corroboration warnings relating to children except in certain circumstances: *Evidence Act 1995* (NSW) ss 165(6), 165A, 165B (discussed below). Queensland, Western Australia and the Northern Territory have express provisions which prohibit corroboration warnings in relation to child witnesses on the basis that children are regarded as an unreliable class of witnesses: *Evidence Act 1958* (Vic) s 23(2A); *Criminal Code Act 1899* (Qld) s 632(3) (not restricted to children as a class of witnesses, but applies in relation to 'any class of persons'); *Evidence Act 1906* (WA) s 106D (for indictable offences); *Evidence Act 1939* (NT) s 9C. In the Commonwealth and the Australian Capital Territory, the same prohibition only applies in certain sexual offence proceedings: *Crimes Act 1914* (Cth) s 15YQ(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 70. In South Australia, judges are not obliged to give corroboration warnings in relation to the sworn evidence of children, but they are not prohibited from doing so: *Evidence Act 1929* (SA) s 12A.

2141 The *Evidence Act 1995* (NSW), as originally enacted, similarly had no specific provision regarding warnings on the evidence of child witnesses.

2142 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].

child witnesses.[2143] 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.[2144]

16.82 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.[2145] 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.

16.83 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.

16.84 The New South Wales provisions were inserted in the *Evidence Act 1995* (NSW) upon the recommendation of the Wood Royal Commission into the New South Wales Police Service (Wood Royal Commission).[2146] In the Wood Royal Commission's final report, Justice Wood opposed compulsory corroboration warnings being given in relation to child witnesses because, first, even carefully given warnings can 'easily be mistaken by a jury as an instruction to acquit'; and secondly, research suggests that child witnesses as a class are not inherently more unreliable than adult witnesses.[2147] His Honour expressed support for the recommendations of the ALRC and HREOC in their inquiry into children and the legal process.[2148] The New South Wales Evidence

2143 Ibid, [14.71].
2144 Ibid, Rec 100.
2145 See *Evidence Legislation Amendment Act 2001* (NSW).
2146 Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), Rec 90.
2147 Ibid, [15.140].
2148 The Wood Royal Commission considered a draft recommendation made by the ALRC and HREOC: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *A Matter of Priority: Children and the Legal Process*, DRP 3 (1997), Draft Rec 5.8. The ALRC and HREOC inquiry was completed after the Wood Royal Commission report was released. Recommendation 100 of ALRC 84 was in similar terms to the draft recommendation.

Act Monitoring Committee[2149] recommended the implementation of the Wood Royal Commission's recommendations on child witnesses.[2150]

16.85 Section 164(4) of the *Evidence Act 2001* (Tas) contains a similar provision to s 165A(1) of the New South Wales Act prohibiting warnings or suggestions to a jury that children as a class are unreliable witnesses, but does not contain any of the other restrictions on warnings relating to the reliability of the evidence of child witnesses.

16.86 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.[2151] 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 of the uniform Evidence Acts.

Submissions and consultations

16.87 IP 28 asked how ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW) have operated in practice and whether the *Evidence Act 1995* (Cth) should 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).[2152]

16.88 NSW PDO submits that ss 165A and 165B of the *Evidence Act 1995* (NSW) appear to be working satisfactorily.[2153] Other submissions agree that the New South Wales provisions appear to have worked well, and could usefully be included in the uniform Evidence Acts.[2154] Similarly, the Law Council submits:

> s 165 should be clarified to at least discourage judges from warning that evidence of a certain class is generally unreliable. In the case of some categories of witnesses, children and victims of sexual assault, legislation exists in many jurisdictions to prohibit such general comments and the Council supports similar provisions being contained in the uniform Evidence Acts.[2155]

2149 This was a committee established within the NSW courts to monitor operation of the *Evidence Act 1995* (NSW).

2150 Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19037 (B Debus—Attorney General).

2151 *Crimes Act 1914* (Cth) s 15YQ(a). 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 and Organised Crime Act 2001* (Cth).

2152 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–8.

2153 New South Wales Public Defenders, *Submission E 50*, 21 April 2005, 40.

2154 Confidential, *Submission E 31*, 22 February 2005; Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, 38.

2155 Law Council of Australia, *Submission E 32*, 4 March 2005, [61].

The Commissions' view

16.89 The general tenor of the submissions is that the New South Wales provisions relating to children's evidence have worked well and there is general support for including similar provisions in the uniform Evidence Acts.

16.90 The Commissions agree with the views expressed by Justice Wood in his report into the New South Wales Police Service[2156] and those in ALRC 84.[2157] Amendments should be made to the *Evidence Act 1995* (Cth) to clarify the law in respect of warnings about children's evidence, to ensure that warnings about children as a class are not given and trial judges focus on the particular circumstances of the child giving evidence when considering whether to warn the jury about the reliability of that child's evidence.

16.91 The policy of the Commissions, underpinning the current Inquiry, is that uniformity in evidence laws should be pursued unless there is good reason to the contrary. In view of the desirability of clarity, effectiveness and uniformity in evidence law between Australian jurisdictions, the Commissions have concluded that provisions on warnings to juries regarding the evidence of children, similar to ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW), should be included in the uniform Evidence Acts.

Proposal 16–1 The *Evidence Act 1995* (Cth) should be amended to include similar provisions to ss 165(6), 165A and 165B of the *Evidence Act 1995* (NSW) dealing with warnings in respect of children's evidence.

Other common law warnings

16.92 As noted above, s 165(5) retains the power of the trial judge to give common law directions and warnings. The common law requires a warning to be given to the jury 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.[2158] Such a direction is required even when statute has abolished the requirement of corroboration.[2159] Some examples of situations where the common law requires warnings are where there has been a long delay in the

2156 Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), [15.140–15.142].

2157 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 100.

2158 *Longman v The Queen* (1989) 168 CLR 79, [16].

2159 *Robinson v The Queen* (1997) 197 CLR 162.

reporting of an offence[2160] and in respect of the evidence of prison informers who give evidence of a disputed confession.[2161]

16.93 Since the 1980s, substantial law reform has been undertaken across all Australian jurisdictions to remove those aspects of the common law which required judges to warn juries that it would be unwise or dangerous to convict an accused of a sexual offence charge on the basis of the uncorroborated evidence of the complainant. Significant research has also been undertaken into the issue of delayed complaint in sexual assault matters.[2162] The assumption that a victim of a sexual assault will make an early complaint has been widely discredited, and legislation has been enacted in many jurisdictions (for example, Tasmania and Victoria) requiring a judge to warn the jury that a delay in complaint does not necessarily indicate that the allegation is false.[2163]

16.94 The Tasmania Law Reform Institute (TLRI) has recently released an issues paper examining warnings in sexual offence cases relating to delays in complaint.[2164] The paper argues that, despite legislative reform of the common law corroboration doctrines and of the law relating to early complaint, the High Court has effectively imposed new mandatory directions upon trial judges relating to delay in complaint. By virtue of the operation of s 165(5), these directions apply in the uniform Evidence Act jurisdictions. In the TLRI's view, these directions reinstate, albeit in a muted form, traditional suspicions and beliefs about sexual assault complainants.[2165]

16.95 One common law warning of particular significance is the '*Longman* warning'. *Longman v The Queen*[2166] concerned a warning to the jury about a victim's 20 year delay in complaining about an incestuous assault. The High Court found that a substantial delay in complaint disadvantaged the accused in mounting a defence and that the jury should therefore be warned about convicting on the uncorroborated evidence of the complainant. Brennan, Dawson and Toohey JJ explained the problems with delayed complaint as follows:

> Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attended upon its occurrence

2160 *Jones v The Queen* (1997) 191 CLR 439; *Fleming v The Queen* (1998) 197 CLR 250.

2161 *Pollitt v The Queen* (1992) 174 CLR 558.

2162 For details of this research see Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.43].

2163 See *Crimes Act 1958* (Vic) s 61; *Criminal Code* (Tas) s 371A. This legislation circumvented the decision of the High Court in *Kilby v The Queen* (1973) 129 CLR 460, which said that the jury should be instructed that failure to report a sexual assault promptly could be an important factor in determining a complainant's credibility.

2164 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005).

2165 Ibid, [1.1.8].

2166 *Longman v The Queen* (1989) 168 CLR 79.

> and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial.[2167]

16.96 *Longman* requires a direction to the jury that the delay may have prevented the evidence of the witness being adequately tested and therefore that it would be dangerous to convict the accused on the basis of that evidence alone unless the jury, having scrutinised the evidence with great care, is satisfied of the truth and accuracy of the witness' evidence. *Longman* directions are frequently given in sexual offence cases, where it is common for complainants (and particularly children) to delay in reporting alleged offences.[2168]

16.97 *Longman* has been re-affirmed by the High Court in the more recent cases of *Crampton v The Queen*[2169] and *Doggett v The Queen.*[2170] These cases effectively require trial judges to give strong corroboration warnings to juries about the dangers of convicting should the length of delay, the absence of corroboration or the potential forensic disadvantage suffered by an accused mean the interests of justice in the particular case would be seriously compromised.[2171] A specific form of words for the direction is not required, although the direction must be given as a warning, not merely as a comment or caution.[2172] The warning must, however, cover the matters prescribed by the High Court in *Longman*, *Crampton* and *Doggett*. In *R v BWT*, Sully J stated that:

> The approach of the majority Justices in both *Crampton* and *Doggett* seems to me to entail that a trial Judge who is framing a *Longman* direction must ensure that the final form of the direction to the jury covers in terms the following propositions: *first*, that because of the passage of time the evidence of the complainant cannot be adequately tested; *secondly*, that it would be, therefore, dangerous to convict on that evidence alone; *thirdly*, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy; *fourthly*, that the jury cannot be so satisfied without having first scrutinised the evidence with great care; *fifthly*, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and *sixthly*, that every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction.[2173]

16.98 The TLRI has noted that the complexity of the *Longman* direction, coupled with the necessity to give an adequate warning, poses difficulties for trial judges in giving directions that are 'insulated from successful appeal and that also meet the co-existing

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2167 Ibid, 91.
2168 For further discussion of the use of *Longman* warnings in these cases see Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [7.64]–[7.133].
2169 *Crampton v The Queen* (2000) 176 ALR 369.
2170 *Doggett v The Queen* (2001) 182 ALR 1.
2171 'Longman Warnings under Scrutiny' (2003) 77(4) *Law Institute Journal* 87.
2172 *R v GS* [2003] NSWCCA 73, 95.
2173 *R v BWT* (2002) 54 NSWLR 241, [95].

requirement of intelligibility, simplicity and brevity'.[2174] For example, in *R v Glennon*, Callaway J stated that a *Longman* direction need not contain specific words.[2175] In contrast, Levine J held in *R v SJB* that the words 'dangerous to convict' must be used.[2176] However, the TLRI argues that despite this, it is probably undesirable that a standardised *Longman* warning be developed, on the basis that every warning should be tailored to the circumstances of each case.[2177]

16.99 The TLRI states that the effect of the *Longman* decision is to create an irrebuttable presumption that the accused has been prejudiced by the complainant's delay in making a complaint. In *R v BWT*, Wood CJ at CL criticised this feature of the decision in *Longman* (and subsequent cases) on the basis that it elevates the presumption of innocence to an assumption that the accused was, in fact, innocent, and that he or she might have called relevant evidence, or cross-examined the complainant in a way that would have rebutted the prosecution case had there been a contemporaneity between the alleged offence and the complaint.[2178] Wood CJ at CL emphasised that the facts may suggest that a warning is warranted, however, he questioned the unequivocal nature of the *Longman* warning—and the assumption that the accused was unable to test the prosecution case.[2179]

16.100 There has been much criticism surrounding the role of jury warnings on delay in complaint and their potential to confuse the jury or unnecessarily question the complainant's credibility.[2180] The report of the New South Wales Parliament Standing Committee on Law and Justice on child sexual assault prosecutions found that there was no logic in distinguishing between evidence of recent complaint and delayed complaint because delay bears no relation to the credibility of the complainant and is typical of sexual assault complainants.[2181] In a 2003 paper, Justice Wood argued that without a firm basis for the suggestion that the delay might have affected the complainant's credibility or created actual prejudice to the accused, these kinds of warnings unfairly disadvantage complainants.[2182]

16.101 The TLRI has expressed the view that it is preferable that the circumstances where a *Longman* warning can be given be limited to situations where an accused can

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2174 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.1].

2175 *R v Glennon (No 2)* (2001) 7 VR 631.

2176 *R v SJB* (2002) 129 A Crim R 54.

2177 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.5].

2178 *R v BWT* (2002) 54 NSWLR 241, [15].

2179 Ibid, [18].

2180 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

2181 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22 (2002). See also NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005; Women's Legal Services (NSW), *Submission E 40*, 24 March 2005.

2182 J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003).

show specific disadvantage caused by delay 'rather than a hypothetical, presumptive disadvantage'. Where no such disadvantage can be indicated, application of the *Longman* warning is irrational.[2183] The specific proposal of the TLRI is discussed further below.

16.102 Another common law warning of significance is the '*Crofts* warning'. In *Crofts*,[2184] the High Court considered the situation where there was a delay in making a complaint of sexual assault in a jurisdiction where the legislation required the judge to warn the jury that absence of complaint or delay did not necessarily indicate that the allegation of sexual assault was false.[2185] The judge was also required to inform the jury that there may be good reasons why such a person may hesitate in making or refrain from making a complaint. The Court held that the trial judge was also required to invite the jury to use lack of recent complaint to impugn the credit of the complainant where this was necessary to ensure that the accused secured a fair trial.[2186]

16.103 The TLRI argues that this has given rise to two apparently contradictory warnings to the jury.[2187] For example, if a case involving delayed complaint was tried in Tasmania, s 371A of the *Criminal Code* (Tas) would require a warning that delayed complaint does not indicate that the complainant had fabricated the allegations, and *Crofts* would require a further direction that such delay may be indicative of fabrication. Further, it argues that, like the *Longman* warning, it is unclear when it is required, [2188] and that another source of uncertainty for both warnings is the common law obligation to give such warnings even when not requested.[2189]

Submissions and consultations

16.104 IP 28 asks whether the uniform Evidence Acts should be amended to provide for other common law warnings such as the Longman direction.[2190]

16.105 The DPP NSW submits that it would be useful if the Acts included provision for a *Longman* direction which identified some of the circumstances in which the warning may be required.[2191]

2183 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.2.2]. See also Q 3.

2184 *Crofts v The Queen* (1996) 186 CLR 427.

2185 In that case the legislation was *Crimes Act 1958* (Vic) s 61(1)(b).

2186 In Queensland, the decision in *Crofts* has been overridden by s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld). This section provides that a judge must not warn or suggest to the jury that the complainant's evidence is more or less reliable because of the length of time before a complaint was made.

2187 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [2.1.6].

2188 Ibid, [2.1.8].

2189 Ibid, [2.1.14].

2190 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 14–9.

2191 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

16.106 The NSW PDO agrees that the *Longman* direction should be incorporated into the Acts. It further argues that the Acts should contain the direction given in *R v Murray*,[2192] that where the Crown case depends upon a single witness, the jury should scrutinise the evidence with great care.[2193]

16.107 Victoria Legal Aid submits that the *Longman* warning should be included in the uniform Evidence Acts as it provides a measure of flexibility to ensure judges can tailor their directions to the particular circumstances of the case in order to ensure a fair trial. In that regard it refers to *Doggett v The Queen*, where Kirby J stated that there are strong reasons of legal principle and policy to restrain the court from diminishing the ambit of the rule in *Longman*.[2194]

16.108 In contrast, the Law Council submits that whilst ss 164 and 165 seek to avoid general ritualistic warnings in order to permit judges and counsel to focus on the particular circumstances of the case, judges continue to attempt to formulate directions appropriate to more generalised situations.

> This can be seen in the development of the so-called *Longman* warning which appears to demand ritualistic warning about the danger of acting upon the uncorroborated testimony of a victim of a sexual assault where there is long delay between the assault and the subsequent complaint. Whilst the Council supports careful warnings in such cases, it does not believe there needs to be any ritualistic incantation and that whether a jury has been adequately directed in such cases should be determined upon a case by case basis. The effect of this is to place the onus of the accused to establish that as a result of the direction in question the accused has lost a chance of acquittal.[2195]

16.109 One senior judicial officer considers that the large number of appeals concerning the *Longman* warning would not be alleviated by including it in the uniform Evidence Acts.[2196]

16.110 Two submissions favour the introduction of legislation to abolish the use of all warnings to the jury on delay in complaint to simplify the complexity of the law for juries and reduce the potential for appeal based on judicial error.[2197]

The Commissions' view

16.111 In *BTW*, Wood CJ at CL noted the complexity of the required warnings in sexual assault matters. He concluded that:

> The jury is … faced with a potentially bewildering array of considerations, some of which may appear highly technical, if not inconsistent, to the lay mind and which, in any event, are likely to vex an experienced trial lawyer, even though they related to a

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2192 *R v Murray* (1987) 11 NSWLR 12.

2193 New South Wales Public Defenders, *Submission E 50,* 21 April 2005. This view was also supported by one New South Wales District Court judge: Confidential, *Submission E 31,* 22 February 2005.

2194 Victoria Legal Aid, *Submission E 22,* 18 February 2005.

2195 Law Council of Australia, *Submission E 32,* 4 March 2005.

2196 High Court of Australia, *Consultation*, Canberra, 9 March 2005.

2197 NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23,* 21 February 2005; Women's Legal Services (NSW), *Submission E 40,* 24 March 2005.

> simple factual dispute arising very often within a domestic setting. Added to that is the circumstance that any direction, framed in terms of it being "*dangerous or unsafe*" to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.[2198]

16.112 Both the VLRC and the TLRI have recently suggested amendments to the operation of the *Longman* and *Crofts* warnings to limit and clarify their application.

16.113 The VLRC examined the use of *Longman* directions in its 2004 Report *Sexual Offences* and made recommendations based on the views of Justice Wood, which are mentioned above. The Report recommends that a *Longman* direction should not be given unless there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a delay in reporting a sexual offence or unless there is other evidence that the accused has in fact been prejudiced in the circumstances of the particular case. The VLRC also recommends that in giving a warning it should not be necessary for the judge to use the words 'dangerous to convict'.[2199]

16.114 In relation to the *Crofts* warning, the VLRC proposed adding to s 61 of the *Crimes Act 1958* (Vic)—which forbids any warning or suggestion that the law regards complainants in sexual offence cases as unreliable witnesses—the requirement that where an issue arises as to delayed complaints, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in making a complaint and further require that the judge 'must not state, or suggest in any way to the jury' that the credibility of a complainant is affected by the delay unless satisfied that there is sufficient evidence to justify such a warning. It also provides that the judge must not make any comment on the reliability of evidence given by the complainant if there is no reason to do so in the particular proceeding to ensure a fair trial.

16.115 The TLRI has questioned whether these proposals are sufficient. In relation to the *Longman* warning, it argues that the VLRC proposal may still permit its continued operation because it does not proscribe the use of the 'dangerous to convict' formula, but only provides that its use is not necessary. It also expresses concern that notwithstanding that the provisions require that there be evidence that the accused has been prejudiced, the accepted reasoning in a number of cases has been that delay has necessarily caused a forensic disadvantage. It is therefore concerned that those requirements will not bring about any change. The TLRI issues paper argues that what may be necessary is a provision which requires that before a warning in the *Longman* terms is to be given, it must be established on the balance of probabilities that a specific forensic disadvantage has occurred, and that the mere fact of delay is not

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2198 *R v BWT* (2002) 54 NSWLR 241, [34].

2199 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 170. The recommendation also limited the use of warnings that the credibility of the complainant may be affected by a delay in reporting: *Kilby v The Queen* (1973) 129 CLR 460 (the *Kilby* warning).

sufficient. Alternatively, it suggests that exceptional circumstances should be required and that delay alone should not be sufficient to establish such circumstances.[2200]

16.116 The TLRI also questions whether the VLRC proposal in relation to the *Crofts* warning will be sufficient. It argues that given the evidence that delay in or failure to make complaint is normal in sexual assault cases, it should only be in exceptional circumstances that delay or failure to complain can have any legitimate bearing on the truthfulness of the account of the complainant. Therefore it should be required to be shown on the balance of probabilities, in light of exceptional circumstances, that the delay can be attributed to fabrication, or have some bearing on the credibility of the complainant, before a warning is required.[2201]

16.117 As the *Longman* and *Crofts* warnings apply in uniform Evidence Acts jurisdictions by virtue of s 165(5), one option for reform suggested by the TLRI is to repeal s 165(5). This would encourage judges to give warnings of the kind allowed pursuant to the other subsections in s 165 rather than the common law. The benefits of this approach are identified as follows:

- it would make a warning conditional upon the request of a party;
- subsection (2) states what needs to be said in a warning and does not use the 'dangerous to convict' formula;
- subsection (3) enables the judge to decline to give a warning where there are good reasons for not doing so.[2202]

16.118 The major difficulty with this approach, however, is that the repeal of s 165(5) will not prevent other sections of the Act (such as s 9) operating to permit the common law obligations of the trial judge to continue. For this reason, the TLRI expresses the view that specific and express reform is required.[2203]

16.119 Another option identified is that further categories be added to s 165(1) to deal with the *Longman* and *Crofts* situations. In relation to the *Crofts* warning, the following category could be added: 'evidence given where delay in making or failure to make, a complaint may raise doubts as to the reliability of the evidence'. In relation to *Longman*, the following category could be added: 'evidence that may be unreliable but not demonstrably so because of the inability to test it adequately for any reason including the passage of time'.

16.120 However, this option may not be sufficient to address all issues. It might also be necessary to amend s 165(3) to provide that 'the judge is not obliged to comply with a request unless the party making the request shows that there are good reasons for

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2200 Tasmania Law Reform Institute, *Warnings In Sexual Offence Cases Relating To Delays In Complaint*, Issues Paper No 8 (2005), [3.1.5].
2201 Ibid, [3.1.6].
2202 Ibid, [3.1.1].
2203 Ibid, [3.1.2].

doing so'. Arguably, this will considerably reduce the uncertainty referred to by the TLRI because it will place the onus on the parties seeking a warning to demonstrate the need for it and will go some way to ensuring that there has to be a demonstrable basis for seeking the warnings. Alternatively, a subsection could be added:

> (4A) Without limiting the operation of subsection (4), expressions such as 'dangerous to convict' should only be used in exceptional circumstances.

16.121 Having regard to the fact that the VLRC and TLRI inquiries were carried out recently, the Commissions consider that it would be premature to put forward any proposals. These issues require further consultation within the current Inquiry, with a view to the possible development of uniform proposals. Further, as noted above, the Commissions are of view that a more targeted inquiry into comments, directions and warnings to the jury is warranted.

Question 16–1 Should the recommendations proposed by the Victorian Law Reform Commission or the Tasmania Law Reform Institute in relation to *Longman* and *Crofts* warnings (or any other models) be adopted under the uniform Evidence Acts?

Limitations on s 165(5)

16.122 The TLRI notes the problem of an escalating number of successful appeals on the ground of failure to give an adequate warning.[2204] One significant concern regarding the operation of s 165 is that judges are giving unnecessary warnings in order to avoid decisions being overturned on the ground that a warning should have been given. This may, in part, stem from the fact that s 165(5) preserves the common law powers (and obligations) of the trial judge to give warnings. As the law currently stands, a situation may arise where all the parties agree that a warning is not required, but the decision may be overturned on appeal due to a finding that there has been a miscarriage of justice resulting from the failure to warn. As noted above, the TLRI does not believe that repeal of s 165(5) will overcome the difficulties of *Longman* and *Crofts* warnings because other sections of the uniform Evidence Acts allow the common law to be applied.

16.123 One solution to this problem might be to subject s 165(5) to the same limitation as applies to warnings under s 165(2), namely that the parties must request that the warning be given. Such an approach will not exclude appellate intervention where counsel fails to request a particular warning. The question on appeal will be whether the failure of counsel to request a warning has resulted in a miscarriage of

2204 Ibid, [2.1.1]. In the issues paper, the TLRI presents a (non-exhaustive) list of 63 appeals between 1997 and 2004 on the ground of failure to give an adequate warning.

justice.[2205] Such an amendment will clarify the trial judge's obligation to give warnings and potentially reduce the volume of appeals and retrials in this area.

16.124 Another solution might be to amend the uniform Evidence Acts to provide that the judge's common law obligations to give warnings continue to operate unless all the parties agree that a warning should not be given.

16.125 A further matter for consideration in relation to both solutions is whether a provision should be included in the uniform Evidence Acts to require the judge to raise the issues regarding warnings with the parties and satisfy him or herself that the parties are aware of their rights in this regard.[2206]

16.126 A benefit of either approach is that it should become a matter of routine for the trial judge to ask counsel to consider what warnings they will seek and to identify any such warnings prior to charging the jury. If the judge is concerned that counsel has erroneously failed to seek a particular warning, the judge can question counsel to ensure that the question has been considered and place on the record counsel's reason for not seeking the warning.

Question 16–2 Should the uniform Evidence Acts be amended to require that, where the parties are represented, warnings, including warnings given under s 165(5), are only required to be given on request of one of the parties? In the alternative, should the uniform Evidence Acts be amended to provide that a trial judge's obligation to give warnings at common law continues to operate unless all the parties agree that such a warning should not be given?

Question 16–3 In either case referred to in Question 16–2, should the uniform Evidence Acts be amended to provide that the court is required to inform the parties of their rights in relation to common law warnings?

2205 *TKWJ v The Queen* (2002) 212 CLR 124.
2206 Section 132 of the uniform Evidence Acts provides a possible model for such a provision.

17. Aboriginal and Torres Strait Islander Traditional Laws and Customs

Contents

Introduction

17.1 This chapter discusses two issues concerning the evidence of Aboriginal or Torres Strait Islander (ATSI) witnesses. The discussion focuses on whether the uniform Evidence Acts should be amended to include a provision dealing specifically with the admissibility of evidence of traditional laws and customs.

17.2 The chapter also considers whether there should be a privilege with respect to evidence that, if disclosed, would render an ATSI witness liable to punishment under traditional laws and customs. Other aspects of evidence law and practice applicable to ATSI witnesses are discussed elsewhere, including in Chapter 5 (in relation to the giving of evidence in narrative form).

Evidence of traditional laws and customs

The Recognition of Aboriginal Customary Laws Report

17.3 In 1986, the ALRC released a report *The Recognition of Aboriginal Customary Laws* (ALRC 31). The report presented a wide ranging set of recommendations on the recognition of Aboriginal customary laws in relation to, among other things: marriage, children and family property; criminal law and sentencing; local justice mechanisms for Aboriginal communities; and traditional hunting, fishing and gathering rights.

17.4 Importantly, ALRC 31 gave detailed consideration to problems of evidence and procedure affecting the proof of Aboriginal 'customary law'.[2207] ALRC 31 did not define the term 'customary law', noting instead that narrow legislative definitions 'misrepresent the reality':

> Exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted … But it is clear that definitional questions should not be allowed to obscure the basic issues of remedies and recognition. It will usually be sufficient to identify Aboriginal customary laws in general terms, where these are recognised for particular purposes.[2208]

17.5 In this Discussion Paper, the Commissions have adopted the term 'traditional laws and customs'. This term is consistent with the *Native Title Act 1993* (Cth), and native title proceedings are an important context in which this sort of evidence is relevant. Section 223 of the *Native Title Act* refers to 'traditional laws acknowledged, and the traditional customs observed'.[2209] The rules that constitute traditional laws and customs are rules having 'normative content'.[2210]

17.6 ALRC 31 observed that the central difficulty for proof of traditional laws and customs presented by the rules of evidence arises from the distinction between matters of fact and matters of opinion, and from the insistence on first-hand evidence based on personal knowledge of matters of fact.[2211] That is, the opinion rule and the hearsay rule were both seen as problematic in proving traditional laws and customs, which have been developed and maintained over time as part of an oral tradition.

17.7 After detailed consideration of the application of these rules of evidence, the ALRC concluded:

> It is not satisfactory that the evidence of traditionally oriented Aborigines about their customary laws and traditions should be inadmissible in law unless it can be forced into one of the limited exceptions to the hearsay and opinion evidence rules, or that it should be admitted in practice only by concession of the court or counsel … Both overseas and Australian experience (in the courts and in land claims) demonstrates the importance of Aboriginal testimony about their customary laws. Such testimony has its difficulties, but so does anthropological evidence. The best evidence seems to be a combination of both, with expert evidence providing a framework within which the Aboriginal evidence can be understood and assessed.[2212]

17.8 Despite the problems highlighted in the report, the ALRC did not favour excluding the laws of evidence, which would have the disadvantage of:

2207 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), Ch 24, [614]–[642].

2208 Ibid, [101].

2209 *Native Title Act 1993* (Cth) s 223.

2210 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38].

2211 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [615].

2212 Ibid, [642].

> leaving arguments about admissibility unstructured, and depriving the courts of the assistance which satisfactory rules might give. Only if the existing rules, however modified to assist with proof of Aboriginal customary laws, can be shown to be wholly unsuitable for present purposes, would their wholesale exclusion be appropriate.[2213]

17.9 The ALRC concluded that deficiencies and uncertainties in the law of evidence as it applied to traditional laws and customs should be remedied, recommending that legislation should be enacted so that:

> evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence:
>
> - has special knowledge or experience of the customary laws of the community in relation to that matter; or
> - would be likely to have such knowledge or experience if such laws existed.[2214]

17.10 This recommendation is referred to in this chapter as 'the ALRC 31 recommendation on evidence of traditional laws and customs'.[2215]

17.11 The ALRC stated that such a provision would not make undesirable inroads into the laws of evidence and that, in particular, other discretions to exclude evidence would be retained. Any more extensive provision, excluding the laws of evidence entirely in relation to the proof of Aboriginal customary laws or traditions, was considered unnecessary.[2216]

Hearsay and the ATSI oral tradition

17.12 The hearsay rule has significant implications for an ATSI culture founded on an oral tradition of knowledge. Peter Gray has written:

> Perhaps the greatest clash between Aboriginal and Anglo-Australian systems of knowledge is in relation to the form knowledge takes. Oral traditions and history are usually the basis of Aboriginal connection with land and, accordingly, are of major importance to land claims and native title applications. As well as the dreamings, genealogies, general historical stories and land use information will be transmitted orally in most Aboriginal communities. Yet the Anglo-Australian legal system is the 'most prohibitively literate of institutions'.[2217]

17.13 *De Rose v South Australia*[2218] (*De Rose*) provides an example of the problems involved in dealing with oral history. In *De Rose*, O'Loughlin J considered the

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2213 Ibid, [627].
2214 Ibid, [642].
2215 Ibid, [642]. The ALRC also recommended that legislation provide that such evidence is admissible, notwithstanding that the question of Aboriginal customary laws is a fact in issue in the case.
2216 Ibid, [642].
2217 P Gray, 'Do the Walls Have Ears?: Indigenous Title and Courts in Australia' (2000) 5(1) *Australian Indigenous Law Reporter* 1.
2218 *De Rose v South Australia* [2002] FCA 1342.

admissibility of a witness statement indicating that the witness was told by a deceased Aboriginal person, 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,[2219] as evidence of the fact that it was the grandmother's country.[2220]

17.14 O'Loughlin J referred generally to evidentiary problems relating to the receipt into evidence of statements made by other ATSI people to a witness. For example, he noted that under the ordinary rules of evidence, it would not be possible, in the majority of cases, to prove the place of birth of older generations by means only of oral evidence. Many ATSI people, particularly those living in remote areas, have no such written records of their birth.[2221]

Evidence in native title proceedings

17.15 While evidence of traditional laws and customs is relevant in many different legal contexts (see below), much commentary about the interplay between the law of evidence and the ATSI oral tradition has been centred on native title proceedings.

17.16 When the *Mabo* case was heard by the Supreme Court of Queensland, the Meriam people faced difficulty in presenting evidence of their traditional customs. In the vicinity of 300 objections were made to the evidence given by Eddie Mabo of what his grandfather had told him about the laws and customs of the Meriam people, and the rights and interests he had, on the grounds that it was hearsay.[2222]

17.17 Subsequently, much case law and other commentary has concerned the admission and use of such evidence in native title proceedings under the *Native Title Act*. Determinations under the *Native Title Act* require 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.[2223] The primary issue in establishing traditional laws and customs is whether the law or custom has, in substance, been handed down from generation to generation: that is, whether it can be shown to have its root in the tradition of the relevant community.[2224]

2219 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.

2220 *De Rose v South Australia* [2002] FCA 1342, [263].

2221 Ibid, [265]. The judge noted that s 73 of the uniform Evidence Acts addresses some, but not all, of these problems by providing that the hearsay rule does not apply to evidence of reputation concerning marriage; cohabitation; a person's age; or family history or a family relationship. See also *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 (discussed below).

2222 G McIntyre, *Background Paper: Aboriginal Customary Law—Can it be Recognised?* (2005) Law Reform Commission of Western Australia, 55.

2223 See *Native Title Act 1993* (Cth) s 223.

2224 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655, 688–689.

17.18 Some of the most important issues in native title proceedings 'can only be resolved upon evidence which in other circumstances may be regarded as hearsay'.[2225] 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 direct personal observations of witnesses. Similarly, genealogical connections to ancestors living at or prior to European settlement cannot be proved by reference to official records.[2226]

17.19 In *Yarmirr v Northern Territory (No.2)*, Olney J confirmed that ss 73(1)(d) and 74(1) of the uniform Evidence Acts relating to evidence of reputation concerning history and family relationships and of reputation concerning the existence, nature or extent of a public or general right:

> enable the Court to have regard both to the evidence of witnesses who have recounted details concerning relationships and traditional practices which have been passed down to them by way of oral history and to matters recorded by ethnographers and other observers.[2227]

17.20 However, these provisions may not always be sufficient to prevent the exclusion of oral histories and accounts. Such evidence continues to be challenged as hearsay and may not readily fit within the categories of admissible hearsay provided by the uniform Evidence Acts. For example, there may be disputes about whether particular evidence is of 'reputation concerning' a 'general right' in terms of s 74(1), if it is only a building block in showing the rights of a group of ATSI people in respect to land.

17.21 A Federal Court judge provided another example in a submission to the Inquiry. He suggested that an Aboriginal witness may say:

> When I was a child my late father [X] told me that his father [Y] was an initiated man who came from somewhere in the area of [A] and had two wives, one of whom was [Z], the mother of my father. He told me that his father [Y] roamed around the following places: B, C and D.

17.22 The judge noted that, while some parts of this witness' statement may be seen to concern matters covered by s 73 (whether a person was married and family history or family relationship), it is questionable whether any part of the statement is evidence of 'reputation concerning' those matters. Further, the parts relating to initiation and, perhaps less clearly, where Y came from, lie outside the ambit of the section.[2228]

17.23 In *Ward v Western Australia*,[2229] Lee J said:

> In a proceeding in which native title is in issue any rules of evidence applied to the proceeding must be cognisant of the evidentiary difficulties faced by Aboriginal people in presenting such claims for adjudication and the evidence adduced must be

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2225 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 544.

2226 Ibid, 544. See also Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), Ch 36 on the problems of using genetic testing and genetic information to prove 'Aboriginality'.

2227 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 544.

2228 Confidential, *Submission E 51*, 22 April 2005.

2229 *Ward v Western Australia* (1998) 159 ALR 483.

> interpreted in the same spirit, consistent with the due exercise of the judicial power vested in the court under the Constitution …
>
> Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice …[2230]

Section 82 of the Native Title Act

17.24 Prior to the 1998 amendments to the *Native Title Act*, s 82 of the Act 'explicitly acknowledged the need for different processes to cater for special needs, such as oral tradition'.[2231] 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'.

17.25 However, in 1998, this provision 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.

17.26 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 an order 'relating to the presentation of evidence about a cultural or customary subject'.[2232]

17.27 However, the *Native Title Act* provides no guidance on the factors which may justify an order setting aside the rules of evidence. In *Daniel v Western Australia*,[2233] Nicholson J held that, by abandoning the prior provision, Parliament 'evinced an intention that the rules of evidence should apply to native title applications except where the court orders otherwise' and that it 'requires some factor for the court to otherwise order'.[2234] In *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland & Ors*,[2235] the Federal Court interpreted s 82(1) to mean that the rules of

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2230 Ibid, 504, referring to the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

2231 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

2232 *Federal Court Rules* O 78 r 31(3)(f).

2233 *Daniel v Western Australia* (2000) 178 ALR 542.

2234 Ibid, 552.

2235 *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548.

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'.[2236]

17.28 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'.[2237]

17.29 In *De Rose v South Australia*, O'Loughlin J used s 82 to allow hearsay evidence to be admitted. In doing so, O'Loughlin J highlighted the practical evidentiary issues facing native title applicants. He stated that, given 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'.[2238]

17.30 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'.[2239] As a Federal Court judge stated, it should be accepted that, by amending s 82:

> Parliament did not intend to make it impossible for applicants for a determination of native title to establish the existence of native title. To think otherwise would be to attribute to the Parliament a cynical attempt to have an Act which purported to provide a regime under which determination whether native title does or does not exist might be made, yet to frustrate the achievement of that purpose.[2240]

17.31 The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji Aboriginal Corporation) observed that the additional factor required to allow the rules of evidence to be dispensed with in native title proceedings 'remains an enigma with no judicial determination of what this entails'.[2241] The Yamatji Aboriginal Corporation submitted that s 82 and its subsequent interpretation:

2236 Ibid, [7].

2237 *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483, 499. Similarly, in *Jango v Northern Territory of Australia (No 2)*, Sackville J concluded that the 1998 amendments were intended to ensure that the law of evidence should apply in all but exceptional circumstances. If there was a certain looseness of approach in the past, 'it should have ceased with the enactment of the new s 82': *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, [18]–[20]; Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

2238 *De Rose v South Australia* [2002] FCA 1342, [270].

2239 Ibid, [370].

2240 Confidential, *Submission E 51*, 22 April 2005.

2241 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

> is ambiguous and adverse to the flexible development of the courts' own rules of evidence. For Aboriginal claimants there is uncertainty as to whether their oral tradition evidence is admissible.[2242]

Evidence in other contexts

17.32 While the evidentiary difficulties faced by ATSI parties are highlighted in proceedings under the *Native Title Act*, similar issues arise in many other contexts, including in relation to criminal law defences, sentencing, coronial matters, succession, family law and placement of children.[2243]

17.33 Other important legal contexts in which the admissibility of evidence of ATSI traditional laws and customs may become important include proceedings arising under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and similar state and territory legislation, such as the *Aboriginal Heritage Act 1988* (SA).[2244]

Defences

17.34 Evidence of traditional laws and customs has been used as an element of various defences under criminal law, including in relation to consent, duress, provocation and honest claim of right.[2245] For example, in *R v Judson*,[2246] the defence in an assault case relied on evidence showing the conduct of the accused was consistent with the relevant traditional law, in order to prove that the victim had consented or that the defendants held an honest belief that she had consented. In *Lofty v The Queen*,[2247] the Northern Territory Supreme Court held that it was proper to inform a jury that the conduct of the victim constituted a grave breach of ATSI customary law when assessing the gravity of a provocation.

Sentencing

17.35 Evidence of traditional laws and customs may be taken into account when sentencing offenders. This most often occurs when an Aboriginal person has been (or will be) subjected to traditional punishment by his or her own community, in addition to any punishment provided by the criminal justice system.[2248] Aboriginal defendants

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2242 Ibid.

2243 The following examples are cited and discussed in V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia.

2244 As in the Hindmarsh Island Bridge cases: Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005.

2245 V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 61–62.

2246 *R v Judson* (Unreported, District Court of Western Australia, 26 April 1996).

2247 *Lofty v The Queen* [1999] NTSC 73.

2248 See V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 16–24.

may face traditional spearings, physical beatings, or banishment. Evidence on the nature and likelihood of the traditional punishment (for instance, the degree of harm likely to be caused) may be used as a mitigating factor in sentencing.[2249] Evidence about traditional laws and customs also can be adduced to explain or mitigate a person's state of mind at the time of the offending behaviour.[2250]

Family law and placement of children

17.36 When determining the best interests of the child, the *Family Law Act 1975* (Cth) (*Family Law Act*) requires the court to take into account the background of a child, 'including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders'.[2251]

17.37 The Family Law Council suggests that it would be desirable to consider whether courts should be provided with an express power to receive information relevant to the exercise of their family law jurisdiction in parenting cases involving ATSI people, in light of the outcomes of the Family Court of Australia's Children's Cases Program (CCP).[2252]

17.38 The Family Law Council recommended that the federal Attorney-General bring 'the issue of admissibility of evidence relating to cultural practices' to the attention of the ALRC in its review of the *Evidence Act 1995* (Cth).[2253]

Submissions and consultations

17.39 IP 28 asks a range of questions concerning the admissibility of evidence of traditional laws and customs, with a focus on native title proceedings and the operation of s 82 of the *Native Title Act*.[2254]

17.40 It soon became clear, as confirmed by submissions and consultations, that concerns about evidence of traditional laws and customs are not limited to those in the

2249 See, eg, *R v Minor* (1992) 59 A Crim R 227; *R v Wilson Jagamara Walker* (Unreported, Northern Territory Supreme Court, 10 February 1996). See V Williams, *Background Paper: The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* (2003) Law Reform Commission of Western Australia, 25–60 (for a comprehensive case digest).

2250 For example, *Hales v Jamilmira* [2003] NTCA 9.

2251 *Family Law Act 1975* (Cth) s 68F(2)(f).

2252 Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze* (2004), 29. The CCP is discussed in Ch 18.

2253 Ibid, Rec 6.

2254 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 5–14, 15–6 to 15–8.

context of native title proceedings.[2255] Consultations highlighted the many contexts in which evidence of traditional laws and customs is adduced.[2256]

17.41 The Yamatji Aboriginal Corporation submits that, because the written word dominates the Anglo-Australian legal culture, this results in an undervaluing of the spoken word and that the current statutory mechanisms used to reconcile differences between the two cultures can operate in a manner that is disadvantageous to native title claimants.[2257]

17.42 However, it is also clear that practices in some jurisdictions operate in ways which are more flexible than the strict legal position might indicate. For example, in the Northern Territory, there appears to be an operating assumption in some cases that evidence of traditional laws and customs, taken from ATSI elders or 'lawmen', is not inadmissible as hearsay. Rather, it is treated (to the extent that the basis of admissibility is considered) as expert opinion evidence or as 'real' evidence.

17.43 There is some support for the implementation of the ALRC 31 recommendation on evidence of traditional laws and customs,[2258] and suggestions that such a recommendation would be well received by the Northern Territory legal community,[2259] which is experienced in the reception of such evidence.

17.44 The Human Rights Commissioner referred to the Hindmarsh Island Bridge case,[2260] in which arguments about 'women's business' arose. It was observed that, in the context of arguments about the existence and scope of this evidence, the second clause of the ALRC 31 recommendation would apply—that is, the words 'or would be likely to have such knowledge or experience *if such laws existed*'—to allow the evidence to be admitted. Otherwise, the evidence would not be admissible, except by consent, despite being central to the facts in issue.[2261]

17.45 In relation to evidence used as the factual basis of expert opinion evidence, an Aboriginal Land Council observes that:

> The circumstances in which Aboriginal people divulge information on which an expert's opinion is often based should be borne in mind: the divulgence of information to known and trusted experts in an informal setting is quite different to

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2255 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005.

2256 Department of Justice (NT), *Consultation*, Darwin, 31 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005; S Cox, *Consultation*, Darwin, 31 March 2005; Justice Southwood, *Consultation*, Darwin, 30 March 2005; M Johnson, *Consultation*, Darwin, 30 March 2005.

2257 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

2258 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005; C McDonald, *Consultation*, Darwin, 31 March 2005.

2259 Justice Southwood, *Consultation*, Darwin, 30 March 2005.

2260 This dispute involved several inquiries and numerous court cases including the High Court cases: *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

2261 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 4 March 2005.

> the artificiality and pressure of a court situation. The fact that a statement made by an Aboriginal informant to an expert in the former situation is not repeated directly in direct evidence should not automatically disqualify that statement from going before the fact-finder.[2262]

17.46 The Aboriginal Land Council submits that the court's concern should be the reliability of the information sought to be admitted through an expert's report, rather than the mere fact that a statement has been made out of court.[2263] In relation to the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in native title proceedings, the Council observes that:

> Aboriginal societies do not relegate information passed on via oral tradition to a second class form of knowledge (as do the current provisions of the Evidence Act); what is significant is the fact of the transmission, its source and to whom it has been passed.[2264]

17.47 The Council considers that sufficient protection is provided by the discretionary provisions in ss 135 and 136 of the uniform Evidence Acts to address the concerns of parties as to the appropriate weight to be given to hearsay evidence dealing with matters of Aboriginal traditional laws and customs.

17.48 The Yamatji Aboriginal Corporation is critical of the current operation of s 82 of the *Native Title Act* and proposes reform to address admissibility and to ensure proper weight is accorded to oral tradition evidence. Specifically, the Corporation proposes that the *Evidence Act 1995* (Cth) be amended to provide that:

- the *Native Title Act* is subject to the provisions of the *Evidence Act 1995* (Cth);
- the rules of evidence in native title proceedings should be approached in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims, and courts should interpret that evidence in the same spirit;
- Aboriginal oral knowledge (tradition) evidence is admissible as real evidence in all native title proceedings;
- in conducting proceedings, the court is not bound by technicalities, legal forms or rules of evidence in relation to Aboriginal witness oral knowledge/tradition evidence; and
- in conducting proceedings, the court must do so in a manner that consistently integrates the culture and custom of Aboriginal and Torres Strait Islander people.[2265]

17.49 Similarly, another Aboriginal body submits that the change to s 82 of the *Native Title Act* has removed recognition of the *sui generis* nature of native title claim

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2262 Confidential, *Submission E 49*, 27 April 2005.
2263 Ibid.
2264 Ibid.
2265 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Submission E 16*, 9 February 2005.

proceedings and places greater emphasis on an adversarial claims process, to the disadvantage of Aboriginal native title claimants. This Aboriginal Land Council submits that the *Native Title Act* should be amended to reinsert the original s 82 or a provision reflecting the Federal Court Rules, which permit the court to 'make any order it considers appropriate relating to evidentiary matters'.[2266]

17.50 By contrast, the State of South Australia submits that s 82 of the *Native Title Act* is satisfactory in its present form and that no amendment is required.[2267] It submits that s 82 enables judges to approach the admission of hearsay evidence based on an evaluation of all the circumstances of the case and that, in cases such as *De Rose*, judges have been prepared to use s 82 'to admit evidence that might conventionally be considered hearsay'.[2268]

17.51 A Federal Court judge suggests that the experience of judges in native title proceedings is that while the hearsay evidence of ATSI witnesses is often objected to, ruled inadmissible or limited as to use:

> After a time, the parties resisting the making of a determination that native title exists seem to cease objecting, and a vast body of first-, second- and third-hand hearsay comes to be admitted.[2269]

17.52 The need to make rulings on such evidence can greatly prolong native title proceedings, and in the judge's view, the effective conduct of native title proceedings is dependent on the commonsense of the lawyers who practise in this area—'the simple fact is that a practical course must be, and is found, and in one way or another, the indigenous witnesses manage to tell their story'.[2270]

17.53 The judge submits that s 82 of the Native Title Act should be amended so as to be consistent with both:

(a) the possibility of proof of native title in a reasonable and practicable way; and

(b) protection of the rights of interests opposed to recognition of native title.[2271]

Evolution of the law

17.54 The law in Australia may be moving towards greater acceptance of oral evidence of ATSI traditional laws and customs. Peter Gray observes that the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia*[2272] and that in *Ward v Western Australia*[2273]

2266 Confidential, *Submission E 49*, 27 April 2005; *Federal Court Rules* O 78 r 31(3)(f).
2267 State of South Australia, *Submission E 19*, 16 February 2005.
2268 Ibid.
2269 Confidential, *Submission E 51*, 22 April 2005.
2270 Ibid.
2271 Ibid.
2272 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.
2273 *Ward v Western Australia* (1998) 159 ALR 483.

> may have opened a new chapter in the attitude of common law courts to the use of indigenous oral accounts and the operation of the hearsay rule. The recognition of the intrinsic value of oral traditions, and of oral evidence of them, might even mark the beginning of the creation of a special exception to the hearsay rule, relating to evidence of land tenure systems, and entitlements under them, in oral cultures.[2274]

17.55 Gray notes that, while the provisions of the *Evidence Act 1995* (Cth) are more liberal than the common law rules, they are 'potentially restrictive of any attempt to create new exceptions'. Perhaps, he says, the solution lies in a recognition of oral traditions as a category of real evidence, not hearsay at all.[2275]

17.56 A recent decision in the Federal Court is consistent with a move in this direction. In *Gumana v Northern Territory of Australia*,[2276] Selway J considered the uniform Evidence Acts' hearsay restrictions. He noted that the hearsay rule in s 59 of the uniform Evidence Acts is subject to a number of exceptions:

> First, where the evidence is of a fact, rather than what is said about the fact, then it is not hearsay. This is reflected in s 74 of the Evidence Act which provides that evidence can be given in relation to 'evidence of reputation concerning the existence, nature or extent of a public or general right'. In my view evidence of a 'custom' or tradition including evidence of what is believed about a custom or tradition is evidence of a fact and is not hearsay. It can be treated as evidence of 'reputation' for this purpose. In my view there is no prohibition under the Evidence Act of the admissibility of that evidence. Evidence can be given pursuant to s 74 of the Evidence Act of the 'reputation' of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period.[2277]

17.57 Selway J stated that it did not seem necessary for evidence of ATSI custom and tradition to be considered as a special exception to the usual rules of evidence, even assuming that it were possible to do so in the context of the *Evidence Act 1995* (Cth). Rather, it is 'direct evidence of a fact in issue—the existence of tradition or custom and of rights pursuant to it'.[2278]

17.58 However, it is doubtful whether evidence of 'reputation' can be given by an outside expert who only carries out an investigation for the purpose of giving evidence in particular litigation. In such a case the evidence may not properly be characterised as evidence of 'reputation', but only as evidence of what that person has been told (that is, hearsay).[2279]

2274 P Gray, 'Do the Walls Have Ears?: Indigenous Title and Courts in Australia' (2000) 5(1) *Australian Indigenous Law Reporter* 1, 10.
2275 Ibid, 11.
2276 *Gumana v Northern Territory of Australia* [2005] FCA 50.
2277 Ibid, [157].
2278 Ibid, [158].
2279 Ibid, [159].

The Commissions' view

17.59 ALRC 31 stated that a provision dealing with proof of traditional laws and customs would have advantages, apart from the basic one of rendering relevant Aboriginal evidence admissible, in that it would:

- deal with the problem of 'experiential' evidence given about Aboriginal traditions and customary laws by persons without formal academic qualifications but with long contact and experience with Aboriginal communities; and
- avoid any objection to evidence based on the 'ultimate issue' rule, the 'common knowledge' rule and the problem of opinions based in part on hearsay.[2280]

17.60 These problems in relation to the opinion rule were addressed to a large extent by provisions of the uniform Evidence Acts. As discussed in Chapter 8, s 79 allows specialised knowledge to be based on a person's 'training, study *or* experience'; s 80 abolished the ultimate issue and common knowledge rules; and s 60 lifts the hearsay rule for evidence relevant for a non-hearsay purpose. Further, the hearsay exceptions provided by s 73 and s 74, operate to allow some evidence of traditional laws and customs to be admitted, despite the hearsay rule in s 59.

17.61 The question is whether sufficient reason still exists—in view of the provisions of the uniform Evidence Acts and case law since the ALRC 31 recommendation was made—to recommend a legislative amendment providing that evidence of ATSI traditional laws and customs is not inadmissible on the grounds that it is hearsay or opinion evidence.

17.62 It seems likely that short of such an amendment, the laws of evidence will continue to present difficult barriers in relation to the admission and use of evidence of traditional laws and customs. Submissions and consultations indicate that the admission of such evidence is often contested.

17.63 As Federal Court Chief Justice Michael Black stated in 2002, despite the more flexible hearsay provisions of the uniform Evidence Acts, there remains:

> a serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous traditions.[2281]

17.64 In the Commissions' view, this problem should be addressed through an amendment to the uniform Evidence Acts. This is consistent with the conclusions of a

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2280 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [642].

2281 M Black, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13(1) *Public Law Review* 16, 22.

background paper for the Law Reform Commission of Western Australia, which suggested the need for a 'general statutory relaxation of the complex common law requirements for proof of Aboriginal customary law'.[2282] Evidence of traditional laws and customs, given by those with such knowledge, should be admissible. Any problems arising with regard to the opinion or hearsay character of such evidence should be dealt with as going to weight.

17.65 However, the Commissions now consider that the recommendation made by the ALRC in 1986 may not be broad enough. The ALRC 31 recommendation on evidence of traditional laws and customs requires that the person giving the evidence has or would be likely to have 'special knowledge or experience of the traditional laws or customs of an Aboriginal community'.

17.66 Such a reform would not, for example, cover evidence of the kind referred to in paragraph 17.21 above. To focus on the status of the witness, for example as an elder or 'lawman', may work against ATSI communities that have lost, through the passage of time or intergenerational breaks in transmission of knowledge, people with the required special knowledge. Therefore, the Commissions propose broader amendments to provide exceptions to the hearsay and opinion evidence rules for evidence relevant to ATSI traditional laws and customs (see Proposal 17–1 below). This proposal is reflected in Appendix 1 (new ss 73A, 79A and definition of traditional laws and customs).

17.67 The proposal may still not be broad enough to cover some kinds of evidence based on ATSI oral knowledge. For example, the kind of evidence referred to in paragraph 17.21 may not be sufficiently direct evidence of traditional law or customs to fit within the wording of the proposal. Further, in native title proceedings, 'traditional' has been interpreted to mean the normative rules of ATSI societies existing before the assertion of sovereignty by the British Crown.[2283] For these reasons, the term 'traditional laws and customs' may be overly restrictive for the purposes of this reform. Therefore, the Commissions are seeking further comment on whether the proposed amendment to the uniform Evidence Acts should apply to ATSI 'oral knowledge' (or some similar term) and, if so, how such a term should be defined.

17.68 Questions may also be raised about whether such an amendment should apply to other cultures represented in the Australian community that have primarily an oral tradition[2284]—for example, Polynesian, Melanesian and Micronesian cultures. However, ATSI people are in a special category as they are explicitly obliged under Australian laws to prove certain interests by reference to traditional laws and customs. Further, questions about the admissibility of evidence of the traditional laws and

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2282 G McIntyre, *Background Paper: Aboriginal Customary Law—Can it be Recognised?* (2005) Law Reform Commission of Western Australia, 55. The Law Reform Commission of Western Australia's inquiry into recognition of Aboriginal customary laws is continuing.

2283 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].

2284 Evidence Acts Review Workshop for the Judiciary, *Consultation*, Sydney, 30 April 2005.

customs of other cultures are unlikely to arise very often in Australian legal proceedings. The Commissions are interested in further comment on this issue.

17.69 The proposal to include provisions specific to evidence of ATSI traditional laws and customs in the uniform Evidence Acts is consistent with the Commissions' policy that the Acts should be of general application to all criminal and civil proceedings.[2285] As discussed above, issues concerning the admission of evidence of traditional laws and customs arise in many different proceedings from native title, family and other civil proceedings, through to criminal prosecutions.

17.70 Particular problems exist in relation to native title proceedings which may not be addressed by the Commissions' proposal. The proposal lifts the hearsay rule only in relation to evidence of traditional laws and customs and not, for example, evidence about family relationships that is relevant to showing a continuing connection with land.

17.71 In this context, the Commissions consider that there are strong arguments that s 82 of the *Native Title Act* should be amended. Submissions and consultations dealing with s 82 and its relationship with the *Evidence Act 1995* (Cth), and the Commissions' own research, lead to the conclusion that s 82 is not operating effectively and should be reviewed. The provision does not provide sufficient guidance or certainty on the admissibility of evidence in native title proceedings. However, the Commissions consider that recommendations to amend the *Native Title Act*, albeit only with respect to its evidentiary provisions, fall outside their terms of reference and make no proposal in this regard.

Proposal 17–1 The uniform Evidence Acts should be amended to provide an exception to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.

Question 17–1 Should the proposed amendment in Proposal 17–1 apply to a broader category of evidence such as evidence based on 'oral knowledge' or 'oral tradition' and, if so, how should such a term be defined?

Privilege and traditional laws and customs

17.72 ALRC 31 also considered whether the law should compel a witness to answer questions in court where the answer would disclose a past violation of Aboriginal customary laws which might bring 'shame' to the witness, or render the witness liable to some retaliation.[2286]

2285 See Ch 2.

2286 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [662]–[665].

17.73 The ALRC stated that:

> There have been instances of Aboriginal people seeking to avoid disclosing evidence on the grounds that it might 'incriminate' them under their customary laws. To refuse to extend the privilege to cover incrimination under customary laws would appear to deny the significance of customary laws in the lives of many Aborigines. To allow the privilege to be raised in matters of foreign law but not in matters of Aboriginal customary laws also seems unjustified.[2287]

17.74 The ALRC considered that a court should not compel a witness to answer questions tending to incriminate the witness under Aboriginal customary laws unless there are good reasons for doing so. However, it concluded that an absolute privilege, applicable in all cases, is not desirable because there are other ways of protecting confidential or secret information (including the proposal made in ALRC 26 for a confidential communications privilege).[2288]

17.75 The ALRC recommended that:

> The courts should be given power to excuse a witness from answering a question which tends to incriminate the witness under his or her customary laws. This power should be exercised unless the court finds that the desirability of admitting the evidence outweighs the likelihood of harm to the witness, to some other person concerned, or to the Aboriginal community itself.[2289]

17.76 The factors recommended to be taken into account in making a determination under the privilege provision were to include:

- the importance of the evidence to the proceeding;
- other ways of obtaining the information in question;
- the nature of the proceeding;
- whether the witness is a party to the proceeding; and
- the power of the court to prevent disclosure of the evidence in other ways.[2290]

17.77 In Chapter 13, the Commissions propose that the uniform Evidence Acts should include a confidential communications privilege. This privilege is unlikely to apply to evidence tending to incriminate a witness under his or her ATSI traditional laws and customs as it requires, among other things, that there be a communication made in the course of a professional relationship.

17.78 The Commissions are interested in receiving comments about whether the uniform Evidence Acts should be amended to include a specific privilege applying to ATSI witnesses who risk incriminating themselves under traditional laws and customs.

2287 Ibid, [664].
2288 See Ch 13.
2289 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [665].
2290 Ibid, [665].

Question 17–2 Should the uniform Evidence Acts be amended to allow courts to excuse a witness from answering a question which tends to incriminate the witness under his or her Aboriginal or Torres Strait Islander traditional laws and customs and, if so, on what basis and subject to what criteria?

18. Matters Outside the Uniform Evidence Acts

Contents

Introduction

18.1 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;[2291] warnings to be given to juries in relation to lack of complaint in sexual offence proceedings;[2292] protection of complainants in sexual offence proceedings ('rape shield' provisions); protection of child witnesses; and evidence in family law proceedings.

18.2 The Inquiry is directed to consider whether, in view of the desirability of clarity, effectiveness and uniformity in evidence law, some of these evidentiary provisions should be incorporated into the uniform Evidence Acts and, if so, in what form.

2291 See Ch 13.
2292 See Ch 16.

18.3 IP 28 noted that it is beyond the practical scope of the Inquiry to examine in detail all evidentiary provisions and their relationship with the uniform Evidence Acts.[2293] Rather, this chapter focuses on areas that were highlighted as being of particular significance. These are:

- the 'rape shield' provisions contained in state and territory criminal procedure legislation;
- provisions dealing with child witnesses; and
- evidence in family law proceedings.

18.4 The discussion and conclusions in this chapter are informed by the Commissions' common policy position with regard to matters that should be incorporated in the uniform Evidence Acts and matters that should be enacted elsewhere. This policy is discussed in detail in Chapter 2.

18.5 The policy position is based on the propositions that: (i) uniformity in evidence laws should be pursued unless there is good reason to the contrary; (ii) the uniform Evidence Acts should be a comprehensive statement of the laws of evidence (the evidence law 'pocket bible'); and (iii) the uniform Evidence Acts should be of general application to all criminal and civil proceedings.

Evidence Act and other legislation

18.6 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*.

18.7 It has been held that the legislative intention of s 8(1)[2294] 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.[2295]

18.8 The effect of the reference to the *Judiciary Act 1903* (Cth) is said to be that those provisions which had allowed courts exercising federal jurisdiction to apply the local rules of evidence are significantly modified in their operation by the *Evidence Act 1995* (Cth). The practical result is that:

- federal courts and Australian Capital Territory (ACT) courts apply only the rules of admissibility and rules relating to the competence and compellability of

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2293 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.4].

2294 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'.

2295 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397, 409.

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.[2296]

18.9 The *Evidence Act 1995* (NSW) provides simply: 'This Act does not affect the operation of the provisions of any other Act'.[2297] This means, for example, that evidentiary provisions contained in the *Criminal Procedure Act 1986* (NSW) are not affected by the New South Wales Act.

18.10 The *Evidence Act 1995* (Cth) applies in the courts of the ACT. While the ACT Legislative Assembly may enact evidence legislation, any such legislation will not apply if it is inconsistent with the Commonwealth Act.[2298] Therefore, the ACT effectively may not enact new laws which would make inadmissible evidence that is admissible under the *Evidence Act 1995* (Cth), as this would be inconsistent with s 56 of the Act. In consultations, concern was expressed that a range of ACT evidentiary provisions may be challengeable on this basis.[2299] These include evidentiary provisions in relation to sexual offences and child witnesses.

Rape shield laws

18.11 All states, the ACT and Northern Territory have passed legislation that deals specifically with the admission of evidence in criminal proceedings where someone is charged with a sexual offence.[2300] These 'rape shield laws' are said to have three principal aims. These are to:

- prohibit the admission of evidence of a complainant's sexual reputation;
- prevent the use of sexual history evidence to establish the complainant as a 'type' of person who is more likely to consent to sexual activity; and
- exclude the use of a complainant's sexual history as an indicator of the complainant's truthfulness.[2301]

2296 S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.1.900].
2297 *Evidence Act 1995* (NSW) s 8.
2298 *Evidence Act 1995* (Cth) s 8.
2299 Supreme Court of the ACT Judicial Officers, *Consultation*, Canberra, 8 March 2005; ACT Bar Association, *Consultation*, Canberra, 9 March 2005.
2300 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.
2301 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, 82.

18.12 All Australian rape shield laws take the form of an exclusionary rule and share a similar procedural scope.[2302] However, there are a number of differences between Commonwealth, state and territory rape shield laws.[2303] 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.[2304]

18.13 All existing rape shield laws are associated with other provisions regulating the cross-examination of witnesses and the adducing and admission of evidence of witnesses' sexual history by any party, except in Western Australia where the law only applies to defence evidence.[2305] These provisions may also deal with specific warnings or directions to be given by judges in sexual offence cases.[2306] Aspects of the examination of witness and the giving of directions, including in sexual offence proceedings, are dealt with in Chapters 5 and 16.

18.14 All states and the ACT have provisions which make evidence relating to the sexual reputation of a complainant inadmissible.[2307] 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'.[2308]

18.15 However, Northern Territory legislation allows evidence of the sexual reputation of the complainant to be admitted with the leave of the court, if the court is satisfied that the evidence has substantial relevance to the facts in issue.[2309] 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.[2310]

2302 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.

2303 These differences were highlighted by the High Court in *Bull v The Queen* (2000) 201 CLR 443.

2304 *Crimes Act 1914* (Cth) ss 15YB–15YC.

2305 *Evidence Act 1906* (WA) ss 36A–36BC. See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 293.

2306 For example, *Criminal Procedure Act 1986* (NSW) s 294.

2307 Ibid s 293(2); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50; *Evidence Act 1958* (Vic) s 37A(1)(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1929* (SA) s 34I(1)(a); *Evidence Act 1906* (WA) s 36B.

2308 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.

2309 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).

2310 *Crimes Act 1914* (Cth) s 15YB.

18.16 Australian jurisdictions have adopted different approaches in relation to evidence of the 'sexual activities',[2311] 'sexual experience'[2312] or 'sexual experiences'[2313] of the complainant.

18.17 The most important distinction is between New South Wales, where the admissibility of such evidence depends on whether it falls within specific statutory exceptions,[2314] 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.[2315]

18.18 A further distinction may be drawn within the 'discretionary models'. In Victoria, Western Australia, the Northern Territory and Tasmania, the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the accused. In the remaining jurisdictions, the sexual experience or conduct provisions do not apply to 'recent' sexual activity between the complainant and the accused.[2316]

Concerns about the rape shield laws

18.19 There are concerns about the operation of the rape shield laws, many of which have been canvassed in reports by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), the New South Wales Law Reform Commission and the Victorian Law Reform Commission.[2317]

18.20 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;[2318] and whether the New South Wales legislation[2319]

2311 *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).

2312 *Criminal Procedure Act 1986* (NSW) s 293(3); *Evidence Act 2001* (Tas) s 194M(1)(b).

2313 *Evidence Act 1906* (WA) s 36BC.

2314 *Criminal Procedure Act 1986* (NSW) s 293(4).

2315 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 51–53; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b), (2)–(3); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2)–(3); *Evidence Act 1929* (SA) s 34I(2)–(3); *Evidence Act 2001* (Tas) s 194M(2); *Evidence Act 1958* (Vic) s 37A(3); *Evidence Act 1906* (WA) s 36BC(2).

2316 See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 223–224; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4) (acts which are 'substantially contemporaneous'); *Evidence Act 1929* (SA) s 34I(1)(b) ('recent sexual activities with the accused').

2317 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).

2318 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.

2319 *Crimes Act 1900* (NSW) s 409B. These provisions were re-enacted without significant change in *Criminal Procedure Act 1986* (NSW) s 293.

is too restrictive, so that it excludes not only irrelevant but also relevant material concerning the complainant's sexual experience.[2320]

18.21 The MCCOC report considered the relative merits of the mandatory and discretionary approaches in some detail.[2321] 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'.[2322] MCCOC therefore recommended that the Model Criminal Code should contain a provision that prohibits questioning of a complainant in the trial of a sexual offence as to prior sexual experience unless leave of the judge is obtained.[2323]

Relationship with the uniform Evidence Acts

18.22 The uniform Evidence Acts do not affect the operation of Commonwealth, state or territory rape shield laws.[2324] 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.

18.23 For example, leaving aside the operation of rape shield laws, where evidence of a complainant's sexual reputation or experience is sought to be adduced as relevant to the complainant's credibility, it may be excluded under s 102 of the uniform Evidence Acts unless it is relevant to another purpose or falls within one of the exceptions to the credibility rule. The operation of the credibility rule, including in relation to evidence of sexual reputation or experience, is discussed in Chapter 11.

18.24 Evidence of a complainant's sexual reputation or sexual experience may be admissible under the exception to the credibility rule provided by s 103 of the uniform Evidence Acts. This section provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness (including the complainant in a sexual offence case) if the evidence has substantial probative value. However, the evidence may still be ruled inadmissible under rape shield laws, depending on the applicable law and the exercise of judicial discretion (where available).

18.25 In some circumstances, evidence of a complainant's sexual reputation or experience may be subject to the tendency rule. As discussed in Chapter 10, s 97 of the

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2320 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [1.8].

2321 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.

2322 Ibid, 243. MCCOC also stated that it favours 'the variant that extends the discretionary regime to all incidents of sexual contact between the complainant and the accused'.

2323 Ibid, 245.

2324 Uniform Evidence Acts s 8.

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.

18.26 Again, even where such evidence is admissible under the uniform Evidence Acts, the evidence may be ruled inadmissible under rape shield laws. Conversely, evidence about prior consensual sexual activity involving the complainant and the accused may be admissible under exceptions in the rape shield laws, but still constitutes tendency evidence for the purposes of s 97 of the uniform Evidence Acts. If so, in order to be admissible, notice has to be given to the other party and the evidence must have significant probative value.

Locating rape shield laws

18.27 In some states and territories, rape shield provisions are contained in legislation dealing with criminal procedure[2325] or with evidence and procedure in sexual offence cases specifically.[2326] Some non-uniform Evidence Act jurisdictions have rape shield provisions in general evidence legislation.[2327]

18.28 Tasmania is the only uniform Evidence Act jurisdiction to include rape shield provisions in evidence legislation. In 1996, the Tasmanian Law Reform Commissioner's Special Committee on Evidence recommended that, if Tasmania were to adopt the uniform Evidence Act, then s 102A of the *Evidence Act 1910* (Tas) containing Tasmania's rape shield provisions should be transferred to Chapter XIV of the *Criminal Code Act 1924* (Tas).[2328] However, the provisions were instead re-enacted in Tasmania's uniform evidence legislation.[2329]

18.29 IP 28 notes that, in the interest of uniformity between Australian jurisdictions, and to ensure consistency between rape shield provisions and those of the uniform Evidence Acts, there may be good reasons to recommend including provisions dealing specifically with the admission of evidence of sexual reputation or experience in the uniform Evidence Acts. However, as each jurisdiction which is part of the uniform Evidence Acts scheme has enacted different rape shield provisions, uniform rape shield provisions would need to be developed.[2330]

2325 *Criminal Procedure Act 1986* (NSW).

2326 *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.

2327 *Evidence Act 1929* (SA); *Evidence Act 1958* (Vic); *Evidence Act 1906* (WA).

2328 Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996) rec 5, [6.1.3].

2329 *Evidence Act 2001* (Tas) s 194M.

2330 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.33].

Submissions and consultations

18.30 IP 28 asks whether there are concerns about the relationship between the uniform Evidence Acts and the rape shield provisions in state and territory legislation and whether the uniform Evidence Acts should be amended specifically to include provisions dealing with the admission of evidence of sexual reputation or experience.[2331]

18.31 Women's Legal Services (NSW) and the New South Wales Health Department Child Protection and Violence Prevention Unit submit that the uniform Evidence Acts should be amended to include new provisions specific to sexual assault cases. Among other things, the amendments recommended would require courts to refuse to admit evidence where the probative value of the evidence is outweighed by the likelihood of significant harm to the complainant in sexual assault cases; and make prosecution tendency and coincidence evidence prima facie admissible if relevant in a sexual assault trial.[2332] These submissions are based on the 2004 recommendations of the New South Wales Adult Sexual Assault Interagency Committee.[2333]

18.32 The New South Wales Public Defenders Office (NSW PDO) submits that, if rape shield provisions are to be included in the uniform Evidence Acts, the provisions should be based on the discretionary model, rather than on current New South Wales legislation.[2334]

18.33 The New South Wales Director of Public Prosecutions (DPP NSW) states that while it might be desirable to include rape shield provisions in the uniform Evidence Acts:

> given the differences in the approach taken to the rape shield provisions between NSW and other States (and the unlikelihood of achieving identical provisions) inclusion of these provisions in the Evidence Act is not practicable.[2335]

18.34 Others oppose introducing rape shield and similar provisions into the uniform Evidence Acts because it is considered that the Acts should not contain provisions applicable only to specific offences.[2336]

2331 Ibid, Qs 15–1, 15–2.

2332 Women's Legal Services (NSW), *Submission E 40*, 24 March 2005; NSW Health Department Child Protection and Violence Prevention Unit, *Submission E 23*, 21 February 2005.

2333 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

2334 New South Wales Public Defenders, *Submission E 50*, 21 April 2005. The NSW PDO expressed particular concern about the operation of the *Criminal Procedure Act 1986* (NSW) s 293, which prevents cross-examination about previous false accusations of sexual assault by a complainant.

2335 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

2336 For example, G Bellamy, *Consultation*, Canberra, 8 March 2005.

The Commissions' view

18.35 IP 28 noted that a review of the effectiveness of the rape shield provisions is outside the ALRC's terms of reference and would constitute an unnecessary duplication of effort, given recent reports by other bodies.[2337]

18.36 The Commissions' common policy position is that uniformity in evidence laws should be pursued unless there is good reason to the contrary. Uniformity in rape shield laws could be advanced by an agreed recommendation for enactment in Commonwealth, state and territory evidence laws.

18.37 However, significant differences between existing Commonwealth, state and territory rape shield laws, and outstanding reform proposals,[2338] mean that it is inappropriate for this Inquiry to develop recommendations on uniform rape shield laws. Developing such recommendations would require review of the effectiveness of the provisions in each jurisdiction and review by the Commissions of previous recommendations for reform of rape shield laws. Such a project is beyond the resources and timetable of the current Inquiry.

18.38 The Commissions would support, in principle, the conduct of a separate inquiry into the content and operation of Commonwealth, state and territory rape shield laws, with a view to achieving uniformity. Once agreement is reached on the content of uniform rape shield laws, the desirable location for these provisions could be determined.

18.39 In the meantime, leaving rape shield provisions outside the uniform Evidence Acts is consistent with, and does not detract significantly from, the advantages of the Acts. While it may be perceived as convenient, and consistent with the aim of a 'pocket bible',[2339] to include all evidentiary provisions in the uniform Evidence Acts, the Acts are of general application and do not generally include provisions directed at evidentiary issues arising in the trial of specific offences. Such provisions are saved by s 8 of the uniform Evidence Acts.

18.40 The application of rape shield provisions is confined expressly to specified sexual offences, which inevitably vary from jurisdiction to jurisdiction, and to specific types of evidence, such as evidence of sexual reputation or sexual history. It is consistent with the structure of the uniform Evidence Acts and their intended application for specific evidentiary provisions relating to sexual offence cases to remain outside the Acts.[2340]

2337 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.25].

2338 For example, a discretionary model was recommended by the New South Wales Law Reform Commission in 1998, but has not been enacted: New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998).

2339 See Ch 2.

2340 As noted above, in 1996, the Tasmanian Law Reform Commissioner's Special Committee on Evidence recommended that, if a uniform Evidence Act were adopted in Tasmania, Tasmania's rape shield

18.41 Another option would be to recommend the enactment of the different rape shield laws in the uniform Evidence Acts of each jurisdiction. If this were done, it would be on the basis that the relevant provisions are evidentiary in nature and should be included in the uniform Evidence Acts, despite their lack of uniformity. As discussed in Chapter 2, the same reasoning applies to many other evidentiary provisions relevant to specific offences or categories of witness in each jurisdiction. The approach carries dangers for the objective of the uniform Evidence Acts. Arguably, the more non-uniform provisions included, the less the incentive to maintain uniformity in the existing provisions.

Evidence and child witnesses

18.42 Concerns about the effects of evidentiary and procedural rules on child witnesses have led to the enactment of new evidentiary provisions since the introduction of the uniform Evidence Acts.

18.43 Increased recognition of the difficulties faced by children in the legal system can be attributed to a number of factors, including greater appreciation of the rights of the child (and, in particular, the adoption by Australia of the *Convention of the Rights of the Child* in 1990); expanded research into the psychological development of children; and greater experience of child witness testimony primarily derived from the increased numbers of prosecutions of child sex offences.[2341]

18.44 Elsewhere, this Discussion 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 facilitate the giving of evidence by child witnesses.[2342]

18.45 Most Australian jurisdictions have enacted procedural provisions intended to assist children to give evidence in a manner that reduces stress and trauma and thereby assists the court to have access to relevant evidence. For example, Part IAD of the *Crimes Act 1914* (Cth) provides, in relation to sexual offences, for the giving of evidence by child witnesses (under the age of 18) by closed-circuit television (CCTV), video recording or other alternative means, and that a child witness may be accompanied by an adult when giving evidence. The *Evidence (Children) Act 1997* (NSW) includes similar provisions for alternative means of giving evidence and

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provisions should be transferred to crimes legislation: Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report 74 (1996) rec 5, [6.1.3].

2341 See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.4].

2342 See discussion in relation to: constraints on cross-examination of child witnesses (Ch 5); an exception to the hearsay rule for evidence of child witnesses (Ch 7); admission of expert evidence on the development and behaviour of children (Ch 8); and specific prohibitions on warnings to the jury about the reliability of the evidence of children (Ch 16).

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.[2343]

18.46 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. IP 28 noted that 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).[2344]

18.47 Another issue is whether evidentiary provisions relating specifically to child witnesses should be separated from procedural rules.[2345] While it seems appropriate that procedural rules relating to child witnesses should be contained in legislation outside the uniform Evidence Acts, there are questions about whether specific evidentiary rules should be located with the procedural rules or included in the uniform Evidence Acts, for example, as exceptions to general rules of evidence.

18.48 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.[2346]

18.49 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.[2347] 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.

18.50 Similarly, at the Commonwealth level, one option would be 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.

2343 See also *Evidence (Children and Special Witnesses) Act 2001* (Tas) which applies to children under the age of 17.

2344 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [15.39].

2345 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.

2346 Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 November 1997, 2450 (B Langton—Minister for Transport and Minister for Tourism). See also Royal Commission into the New South Wales Police Service, *Final Report*, vol 5 (1997), Ch 15.

2347 *Evidence Act 1995* (Cth) ss 165(6), 165A, 165B.

18.51 IP 28 asked whether there is a need for a Commonwealth *Evidence (Children) Act* that incorporates relevant evidentiary and procedural laws that should apply to child witnesses, or whether there are particular evidentiary rules relating to child witnesses that should instead be incorporated into the *Evidence Act 1995* (Cth).[2348]

Submissions and consultations

18.52 The Commissions received a range of views in submissions and consultations. Some people consider that the uniform Evidence Acts should not include evidentiary provisions relating specifically to child witnesses.[2349]

18.53 By contrast, some Family Court judges consider that children's evidence provisions should be located in the uniform Evidence Acts.[2350] It is also suggested that the *Family Law Act 1975* (Cth) should cross-reference these provisions so that, for example, unrepresented parties wishing to examine a child witness are more easily made aware of the protections applying.[2351]

18.54 The DPP NSW submits that provisions concerning the warnings to be given by judges about children's evidence should be enacted in the uniform Evidence Acts, as they have in New South Wales,[2352] rather than in any Commonwealth *Evidence (Children) Act*.[2353]

The Commissions' view

18.55 At this stage, the Commissions do not propose that evidentiary provisions relating specifically to child witnesses be included in the uniform Evidence Acts. This view is based on a number of reasons.

18.56 Existing evidentiary provisions relating specifically to child witnesses are closely linked with complex procedural issues and the use of technology—for example, video recording, CCTV and screens.[2354] This may make the provisions more suitable for inclusion in an *Evidence (Children) Act* rather than in the uniform Evidence Acts.

18.57 Some evidentiary provisions concerning children's evidence are directed to proceedings in relation to specific offences (such as sexual offences). The inclusion of such provisions would be inconsistent with the Commissions' policy position that the uniform Acts should be of general application. This was one reason for rejecting the

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2348 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Qs 15–3, 15–4.
2349 B Donovan, *Consultation*, Sydney, 21 February 2005; G Bellamy, *Consultation*, Canberra, 8 March 2005.
2350 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005. Also Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.
2351 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.
2352 *Evidence Act 1995* (Cth) s 165(6), ss 165A–165B.
2353 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005. At the same time, the DPP NSW supports the enactment of a Commonwealth *Evidence (Children) Act*.
2354 G Bellamy, *Consultation*, Canberra, 8 March 2005.

introduction in the uniform Evidence Acts of a hearsay exception directed to children's evidence (see Chapter 7).

18.58 More pragmatically, any recommendation for the enactment of evidentiary provisions relating specifically to child witnesses would require the development of uniform provisions. While there may be more consistency in Commonwealth, state and territory laws concerning children's evidence than in rape shield laws, this is still a major project and may be beyond the resources and timetable of the current Inquiry. Nevertheless, the Commissions intend to conduct further research on existing laws to identify areas in which there is already sufficient uniformity to allow recommendations to be made for the enactment of new provisions in the uniform Evidence Acts.

Family law proceedings

18.59 Family law proceedings raise a particular set of evidentiary concerns, notably in connection with evidence in children's cases. Evidence in family law proceedings before the Family Court of Australia is governed by both the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth).

18.60 The *Family Law Act* contains a number of important evidentiary provisions. Most significantly, s 100A provides that evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child is not inadmissible solely because of the law against hearsay. The *Family Law Act* also contains evidentiary provisions dealing with, among other things:

- the admissibility in evidence of admissions made at a meeting or conference conducted by a family and child counsellor or court mediator;[2355]
- the admissibility in evidence of admissions made by a person attending a post-separation parenting program;[2356]
- the court's power requiring any person to give evidence material to the parentage of a child;[2357]
- the competence and compellability of husbands and wives in proceedings under the Act; [2358]
- children swearing affidavits, being called as witnesses or being present in court;[2359]
- protecting witnesses from offensive or oppressive questioning;[2360]

2355 *Family Law Act 1975* (Cth) s 19N.
2356 Ibid s 70NI.
2357 Ibid s 69V.
2358 Ibid s 100.
2359 Ibid s 100B.
2360 Ibid s 101.

- means of proving birth, parentage, death or marriage;[2361] and
- restrictions on the examination of children.[2362]

18.61 As discussed above, s 8 of the *Evidence Act 1995* (Cth) ensures that these provisions are unaffected by the Act. In addition, s 111D of the *Family Law Act* states that regulations may provide for rules of evidence with effect, despite any inconsistency with the *Evidence Act 1995* (Cth), in proceedings dealing with property, spousal maintenance and maintenance agreements.

Evidence and the paramountcy principle

18.62 One issue of contention concerning the relationship between the *Evidence Act 1995* (Cth) and the *Family Law Act* has been the extent to which the Family Court is bound by the rules of evidence in children's matters—especially in light of the 'paramountcy principle', which requires that the court treat the best interests of the child as the paramount consideration in deciding children's issues.[2363]

18.63 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.[2364] Some decisions limited this principle, noting that statutory provisions relating to evidence could not be overridden by concerns for the welfare of the child.[2365]

18.64 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.[2366] 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.[2367]

18.65 The High Court, in *Northern Territory v GPAO*,[2368] 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 and Callinan JJ stated that the paramountcy principle is to be applied when the evidence is complete and is 'not an injunction to

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2361 Ibid s 102.
2362 Ibid s 102A.
2363 See G Watts, 'Is the Family Court Bound by the Rules of Evidence in Children Matters?' (1999) 13(4) *Australian Family Lawyer* 8.
2364 See, eg, *Hutchings v Clarke* (1993) 16 Fam LR 452.
2365 See, eg, *Wakely v Hanns* (1993) 17 Fam LR 215.
2366 R Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87, 96.
2367 See Ibid, 109–110.
2368 *Northern Territory v GPAO* (1999) 196 CLR 553.

disregard the rules concerning the production or admissibility of evidence'.[2369] 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.

18.66 In *CDJ v VAJ*,[2370] the High Court again considered the application of the paramountcy principle—this time to the admission of further evidence on appeal before the Full Court of the Family Court. The judgments of the High Court in *CDJ v VAJ* are said to support the view that, even if the paramountcy principle does not apply expressly in statute, the child's best interests will remain a significant or 'powerful' consideration in judicial decisions.[2371]

18.67 In December 2004, the Family Law Council released a discussion paper on the paramountcy principle. The Family Law Council discussion paper asks whether, taking account of the observations of the High Court in *CDJ v VAJ* and the differences of view in *Northern Territory v GPAO* there are any decisions where the paramountcy principle (a) does not currently apply to which it should be made applicable; or (b) currently applies to which it should be made inapplicable.[2372]

18.68 The Family Law Council discussion paper also asks whether the law should be amended to allow the paramountcy principle to qualify the application of the *Evidence Act 1995* (Cth) in any circumstances, and whether there are specific applications of the paramountcy principle where it would be appropriate to list other factors which should be considered while treating the best interests of the child as paramount.[2373] The closing date for submissions on the Family Law Council discussion paper was 6 May 2005.

The Children's Cases Program

18.69 In March 2004, the Family Court commenced a pilot for a new Children's Cases Program (CCP), involving cases in the Sydney and Parramatta registries, which has moved towards a more permissive application of the rules of evidence.

18.70 Practice Directions state that all evidence is to be conditionally admitted and that the judge will determine the weight to be given to the evidence.[2374] However, parties to cases in the CCP do not waive their right to appeal an order on the ground of inappropriate weight having been given to evidence.[2375] No objections are to be taken to the evidence of a party or a witness, or the admission of documents, photographs,

2369 Ibid, 629.
2370 *CDJ v VAJ (No 1)* (1998) 197 CLR 172.
2371 Family Law Council, *The 'Child Paramountcy Principle' in the Family Law Act* (2004), 18.
2372 Ibid, 31, Q 1.
2373 Ibid, 31, Qs 1, 2.
2374 *Practice Direction No 2 of 2004: The Children's Cases Program* (Cth), [5.7].
2375 Ibid, [5.8].

videos, tape recordings and so on, other than on the grounds of privilege, illegality or other such serious matters.[2376]

18.71 The Family Court's brochure on the CCP explains that, for example, the judge can take 'hearsay' evidence into account in coming to a decision but that, if the hearsay relates to an important matter, the judge will usually require direct evidence.[2377]

18.72 At present, participation in the CCP requires the informed consent of all parties. The parties' agreement is formalised in a consent order, and parties who are not represented by lawyers have access to legal advice about giving consent.[2378] One of the matters that is the subject of the parties' consent is the waiver of some of the rules of evidence in accordance with s 190 of the *Evidence Act 1995* (Cth).[2379]

18.73 In March 2005, Paul Boers wrote that the private profession's response to the CCP has been 'mixed' and that waiver of the rules of evidence is the main source of concern:

> There is a view that the Court's task is now more difficult. Instead of relying upon lawyers to draft affidavit material which complies with the rules of evidence, and then deal with objections, the judge now has to consider everything that is admitted and then decide whether: it is relevant; it is otherwise admissible under the remaining rules of evidence; it is reliable; and what weight should it be given?[2380]

18.74 The Federal Magistrates Court has not adopted the CCP process. It is said that the Court shares many of the objects of the CCP in terms of its case management, but has expressed the view that the rules of evidence serve the fact-finding process and lead to safer decisions.[2381]

18.75 There is a distinct possibility that the CCP will become the manner in which all children's cases will be determined in the Family Court.[2382] The CCP pilot program will be evaluated externally to determine if the approach should be adopted more widely. The evaluation, which will assess if the CCP is achieving its objectives and determine the best practice model for national implementation,[2383] is expected to be completed by April 2006.

2376 Ibid, [5.9].

2377 Family Court of Australia, *The Children's Cases Program: A New Way of Working with Parents and Others in Children's Cases* (2004), 5.

2378 *Practice Direction No 2 of 2004: The Children's Cases Program* (Cth), [1.5].

2379 Ibid, [1.4].

2380 P Boers, *The Less Adversarial Approach to Determining Children's Cases* (2005) FindLaw Australia <http://www.findlaw.com.au/articles> at 19 April 2005.

2381 Ibid.

2382 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005; Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

2383 Family Court of Australia, *Children's Cases Program: A New Way of Working with Parents and Others in Children's Cases* (2005) <www.familycourt.gov.au/presence/connect/www/home/about/childrens_cases_program/> at 19 April 2005.

18.76 The Commissions understand that the federal Government is considering reforms to mandate the application of the CCP, including in some cases where the parties do not consent or have withdrawn consent. This is likely to involve amendments to the *Family Law Act 1975* (Cth).

18.77 IP 28 asks whether the *Family Law Act* or the *Evidence Act 1995* (Cth) should 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.[2384]

The Commissions' view

18.78 The Commissions received differing views on where evidentiary provisions to facilitate the extension of the CCP should be located.[2385] However, the dominant view is that the *Family Law Act* is the better location as this already contains a range of evidentiary provisions,[2386] and is where family law practitioners turn first to find relevant statute law.[2387]

18.79 Further, were the *Family Law Act* to be amended to mandate the application of CCP processes, then it would be logical for evidentiary provisions relating to the CCP to be located there,[2388] especially given the prevalence of unrepresented parties in family law proceedings.

18.80 For these reasons, the Commissions agree that the *Family Law Act* should remain the primary location for evidentiary provisions applicable to family law proceedings. This is bolstered by the Commissions' policy position that the uniform Evidence Acts should remain Acts of general application.

Other evidentiary provisions

18.81 There are other evidentiary provisions contained in state and territory criminal procedures or evidence legislation which might be included in the uniform Evidence Acts.

18.82 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

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2384 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 15–9.

2385 Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005; Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

2386 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

2387 Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

2388 Judicial Officers of the Family Court of Australia and Federal Magistrates Court, *Consultation*, Parramatta, 28 February 2005.

uniform Evidence Acts do not prevent the admission and use of such recordings. Other jurisdictions have similar provisions.[2389]

18.83 The *Criminal Procedure Act* contains detailed provisions dealing with the compellability of spouses to give evidence in certain proceedings,[2390] evidentiary aspects of certain depositions and written statements,[2391] sexual assault communications privilege,[2392] and warnings to be given to juries in relation to lack of complaint in sexual offence proceedings.[2393]

18.84 The *Evidence Act 2001* (Tas) also contains a range of provisions that are not present in either the Commonwealth or New South Wales legislation—although, in some instances, equivalent provisions may be found elsewhere in those jurisdictions' statute books. The additional Tasmanian provisions include those dealing with:

- procedures for proving certain matters, which are not provided for in the other uniform Evidence Acts;[2394]
- the admissibility of depositions on one charge in the trial of another;[2395]
- the production and use in evidence of certain depositions;[2396] and
- the powers of a court or judge to order examination of witnesses on interrogatories or otherwise.[2397]

18.85 The evidence legislation of other states or territories also contain other 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.[2398]

18.86 IP 28 asked whether there are 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.[2399]

2389 For example, *Crimes Act 1914* (Cth) s 23V; *Crimes Act 1958* (Vic) s 464H.
2390 *Criminal Procedure Act 1986* (NSW) s 279.
2391 Ibid ss 284–289.
2392 See Ch 11.
2393 See Ch 16.
2394 *Evidence Act 2001* (Tas) ss 177A–177D.
2395 Ibid s 181A.
2396 Ibid ss 194A–194B.
2397 Ibid ss 194C–194I.
2398 *Evidence Act 1977* (Qld) s 95A; *Evidence Act 1906* (WA) s 50B; *Evidence Act 1939* (NT) s 24.
2399 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), Q 15–5.

Submissions and consultations

18.87 The DPP NSW submits that evidentiary provisions, based on those in the *Criminal Procedure Act 1986* (NSW), and dealing with the following matters, should be incorporated in the uniform Evidence Acts:[2400]

- admissions by suspects in criminal proceedings;[2401]
- the compellability of spouses to give evidence in certain proceedings;[2402]
- evidentiary aspects of certain depositions and written statements;[2403]
- sexual assault communications privilege;[2404] and
- warnings to be given to juries in relation to lack of complaint in sexual offence proceedings.[2405]

18.88 The NSW PDO notes that, in New South Wales, while admissions generally are dealt with under the *Evidence Act 1995* (NSW), verbal admissions are dealt with under s 281 of the *Criminal Procedure Act 1986* (NSW). The NSW PDO submits that 'it would be more logical and convenient' if the provisions dealing with verbal admissions were incorporated into the *Evidence Act 1995* (NSW).[2406]

The Commissions' view

18.89 Other than those mentioned elsewhere,[2407] the Commissions received few other comments supporting the enactment in the uniform Evidence Acts of provisions already contained in state or territory criminal procedures or other legislation. Accordingly, the Commissions make no proposal.

18.90 In Chapter 13, the Commissions propose that privileges under the uniform Evidence Acts (confidential communications privilege and the sexual assault communications privilege) should apply to pre-trial processes. If this proposal were implemented, some provisions currently outside the uniform Evidence Acts could be brought within it. For example, the sexual assault communications privilege sections in Part 7 of the *Criminal Procedure Act 1986* (NSW), could be re-enacted in the *Evidence Act 1995* (NSW).

2400 Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.
2401 For example, *Criminal Procedure Act 1986* (NSW) s 281.
2402 For example, Ibid s 279.
2403 For example, Ibid ss 284–289.
2404 For example, Ibid ss 295–306.
2405 For example, Ibid s 294.
2406 New South Wales Public Defenders, *Submission E 50*, 21 April 2005.
2407 For example, in relation to confidential communications privilege (see Ch 13); warnings in jury trials involving the evidence of child witnesses (see Ch 16); expert evidence in relation to the development and behaviour of children (see Ch 8).

Appendix 1. Draft Provisions

Note

The following provisions are preliminary drafts only, to demonstrate the way in which the Proposals and some of the options, if adopted, could be implemented in the Commonwealth and New South Wales Evidence Acts.

Draft provisions have not been included for all Proposals or options discussed in the Chapters.

In particular, draft provisions are not included for Proposals to repeal certain provisions and to apply certain privileges in pre-trial and investigation contexts.

Part 1.2—Application of this Act

4 Courts and proceedings to which Act applies

(1) This Act applies to[2408] all proceedings in a federal court or an ACT court, including proceedings that:

(a) relate to bail; or

…

(5) Subject to subsection (5A), the provisions of this Act (other than sections 185, 186 and 187) do not apply to:[2409]

(a) an appeal from a court of a State, including an appeal from a court of a State exercising federal jurisdiction; or

…

(5A) Despite subsection (5), this Act applies to[2410] an appeal to the Family Court of Australia from a court of summary jurisdiction of a State or Territory exercising jurisdiction under the Family Law Act 1975.

5 Extended application of certain provisions

The provisions of this Act referred to in the Table apply to[2411] all proceedings in an Australian court, including proceedings that:

(a) relate to bail; or

2408 Proposal 2–2.
2409 Consequential on Proposal 2–2.
2410 Consequential on Proposal 2–2. Note that there is no consequential amendment to s 4(6), as it is a spent provision.
2411 Consequential on Proposal 2–2.

…

Part 2.1—Witnesses

Division 1—Competence and compellability of witnesses

13 Competence: lack of capacity[2412]

(1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

(2) (a) Subject to subsection (4) a person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence.

(b) Before a person may give unsworn evidence the court must inform the person of the need to tell the truth.

(3) *omitted*

(4) A person is not competent to give evidence (sworn or unsworn) about a fact if for any reason, including physical disability:

(a) the person lacks the capacity:

(i) to understand; or

(ii) to give an answer which can be understood to

a question about the fact; and

(b) that incapacity cannot be overcome,

but the person may be competent to give evidence about another fact.

(5) …

(6) …

(7) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by information from a person who has relevant specialised knowledge based on the person's training, study or experience.

2412 Proposal 4–1.

14 Compellability: reduced capacity[2413]

A person is not compellable to give evidence on a particular matter if the court is satisfied that:

(a) substantial cost or delay would be incurred in ensuring that the person would be capable of understanding, or of giving an answer which can be understood to, questions on that matter; and

(b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

Division 2—Oaths and affirmations

21 Sworn evidence of witnesses to be on oath or affirmation

(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.

(2) Subsection (1) does not apply to a person who gives unsworn evidence.[2414]

…

Division 3—General rules about giving evidence

29 Questioning witnesses and ways of giving evidence[2415]

(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

(2) A witness may give evidence in narrative form.

(3) *omitted*

(4) ...

Division 5—Cross-examination

41 Improper questions[2416]

(1) The court may disallow an improper question put to a witness in cross-examination, or inform the witness that it need not be answered.

2413 Consequential on Proposal 4–1.
2414 Consequential on Proposal 4–1.
2415 Proposal 5–1.
2416 Proposals 5–2, 5–3, 5–4.

(1A) The court must disallow an improper question put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered.

(2) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account any relevant condition or characteristic of the witness, such as the following:

(a) the age, personality and education of the witness;

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject;

(c) the ethnic and cultural background of the witness.

(3) In this section:

improper question means a question that:

(a) is misleading or confusing; or

(b) is annoying, harassing, intimidating, offensive, humiliating, oppressive or repetitive; or

(c) is put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting); or

(d) has no basis other than a sexual, racial, cultural or ethnic stereotype.

vulnerable witness means a witness who, because of age or mental or intellectual disability, should be protected from improper questions.

Part 3.2—Hearsay

Division 1— The hearsay rule

59 The hearsay rule—exclusion of hearsay evidence[2417]

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of an asserted fact.

(2) In this Part, ***asserted fact*** means a fact that the person who made the representation can reasonably be supposed to have intended to assert by the representation.

2417 Proposal 7–1.

(2A) For the purposes of, but without limiting, subsection (2), the court may take into account the circumstances in which the representation was made.

(3) ….

Note: Specific exceptions to the hearsay rule are as follows:

- …
- tags and labels (section 70);
- electronic communications (section 71);[2418]
- …

60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the asserted fact.[2419]

(2) Subsection (1) applies whether or not the evidence is of a previous representation that was made by a person who had personal knowledge of an asserted fact.[2420]

Note: Subsection (2) overcomes the effect of the decision in *Lee v The Queen* (1998) 157 CLR 394.

Division 2—First-hand hearsay

64 Exception: civil proceedings if maker available

(1) ….

(2) ….

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made.[2421]

(4) ….

2418 Consequential on Proposal 6–1.
2419 Consequential on Proposal 7–1.
2420 Proposal 7–2.
2421 Proposal 7–3.

65 Exception: criminal proceedings if maker not available

(1) …

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

(a) made under a duty to make that representation or to make representations of that kind; or

(b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) made in circumstances that make it highly probable that the representation is reliable; or

(d) against the interests of the person who made it at the time it was made and in circumstances that make it likely that the representation is reliable.[2422]

(3) …

66 Exception: criminal proceedings if maker available[2423]

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of an asserted fact was fresh in the memory of a person, the matters that the court must take into account, in addition to the period of time between the occurrence of the asserted fact and the making of the representation, include:

(a) the nature of the event concerned; and

2422 Proposal 7–5.
2423 Proposal 7–6.

(b) the age and health of the person.

(3) *omitted.*

(4) *omitted*.

66A Exception: contemporaneous statements about a person's health etc.[2424]

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.

Division 3—Other exceptions to the hearsay rule

71 Exception: electronic communications[2425]

The hearsay rule does not apply to a representation contained in an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent; or

(b) the date on which or the time at which the communication was sent; or

(c) the communication's destination or the identity of the person to whom it was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about some electronic communications.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

72 Exception: contemporaneous statements about a person's health etc.[2426]

Repealed

73A Exception: Aboriginal or Torres Strait Islander customary laws[2427]

The hearsay rule does not apply to a previous representation relevant to the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community.

2424 Proposal 7–7.
2425 Proposal 6–1.
2426 Consequential on Proposal 7–2.
2427 Proposal 17–1.

Part 3.3—Opinion

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:

(a) the development and behaviour of children generally;

(b) the development or behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.[2428]

79A Exception: Aboriginal or Torres Strait Islander customary laws[2429]

If a person has specialised knowledge of the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community, the opinion rule does not apply to evidence of an opinion of that person relevant to those matters that is wholly or substantially based on that knowledge.

Part 3.4—Admissions

85 Criminal proceedings: reliability of admissions by defendants

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) to or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence;[2430] or

2428 Proposal 8–1.
2429 Proposal 17–1.
2430 Proposal 9–1.

(b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) …

89 Evidence of silence

(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

(a) to answer one or more questions; or

(b) to respond to a representation;

put or made to the party or other person by or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence.[2431]

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) …

Part 3.6—Tendency and coincidence

97 The tendency rule[2432]

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, unless:

(a) the party adducing the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

2431 Proposal 9–1.
2432 Proposal 10–2.

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) ...

98 The coincidence rule[2433]

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless:

(a) the party adducing the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence would, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) …

Part 3.7—Credibility

101A Credibility evidence[2434]

(1) A reference in this Part to evidence that is relevant to a witness's credibility, or to the credibility of a person referred to in section 108A, is a reference to evidence that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person; or

(b) is otherwise relevant but is not admissible.

(2) For the purposes of paragraph (1)(b), ignore sections 60, 77, 135, 136 and 137.

102 The credibility rule[2435]

Evidence that is relevant to a witness's credibility is not admissible.

2433 Proposal 10–1.
2434 Proposal 11–1.
2435 Consequential on Proposal 11–1.

Note 1: Specific exceptions to the credibility rule are as follows:

- …;
- evidence to re-establish credibility (section 108);
- evidence of opinions of persons with specialised knowledge etc (section 108AA);[2436]

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.[2437]

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1),[2438] it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

104 Further protections: cross-examination of accused

(1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

2436 Consequential on Proposal 11–6.
2437 Proposal 11–2.
2438 Consequential on Proposal 11–2.

(a) …[2439]

(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) …

105 Further protections: defendants making unsworn statements

Repealed[2440]

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence relevant to a witness's credibility adduced with the court's leave otherwise than from the witness if, in cross-examination:

(a) the substance of the evidence was put to the witness; and

(b) the witness denied the substance of the evidence or did not admit or agree to it.[2441]

(2) Leave under subsection (1) is not required in relation to evidence that tends to prove that a witness:

(a) is biased or has a motive for being untruthful; or

(b) has been convicted of an offence, including an offence against the law of a foreign country; or

(c) has made a prior inconsistent statement; or

(d) is, or was, unable to be aware of matters to which his or her evidence relates; or

2439 Proposal 11–3.
2440 Proposal 11–7.
2441 Proposal 11–5.

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

108A Evidence of credibility of person who has made a previous representation

(1) If:

(a) because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and

(b) evidence of the representation has been admitted; and

(c) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding;

evidence that is relevant to the credibility of the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the credibility of the person.[2442]

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:[2443]

(a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

108AA Exception: evidence of persons with specialised knowledge etc

(1) If a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that:

(a) is wholly or substantially based on that knowledge; and

(b) could substantially affect the credibility of a witness; and

(c) is adduced with the court's leave.[2444]

(2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour

2442 Consequential on Proposals 11–1, 11–-2.
2443 Consequential on Proposal 11–2.
2444 Proposal 11–6.

(including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:

(a) the development and behaviour of children generally;

(b) the development or behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.[2445]

Part 3.8—Character

110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

(4) *omitted*.[2446]

112 Leave required to cross-examine about character of accused or co-accused

A defendant must not be cross-examined[2447] about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

2445 Proposal 8–1.
2446 Proposal 11–7.
2447 Proposal 11–4.

Part 3.10—Privileges

Division 1—Client legal privilege

117 Definitions

(1) In this Division:

client includes the following:

(a) a person who engages a lawyer, or who employs a lawyer (including under a contract of service), to provide professional legal services;[2448]

(b) an employee or agent of a client;

…

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and a lawyer; or

(b) a confidential communication made between 2 or more lawyers acting for the client; or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, a lawyer or another person;[2449]

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

122 Loss of client legal privilege: consent and acting inconsistently with the privilege[2450]

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (4A), this Division does not prevent the adducing of evidence if the client or party has acted in a way that is inconsistent with its relying on section 118, 119 or 120 in relation to the evidence.

2448 Proposal 13–2.
2449 Proposal 13–4.
2450 Proposal 13–5.

(2A) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(3) The reference in paragraph (2A)(a) to a knowing and voluntary disclosure does not include a reference a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

(4) …

(4A) A client or party is not taken to have acted in a manner inconsistent with its relying on section 118, 119 or 120 in relation to particular evidence merely because:

(a) the substance of the evidence has been disclosed with the express or implied consent of the client or party to a lawyer acting for the client or party; or

(b) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law; or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held; or

(c) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

(d) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact

or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers).

123 Loss of client legal privilege: defendants

(1) In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

(a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or

(b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

(c) any of the following:[2451]

(i) a confidential communication made between the prosecutor and a lawyer;

(ii) a confidential communication made between 2 or more lawyers acting for the prosecutor;

(iii) the contents of a confidential document (whether delivered or not) prepared by any person;

for the dominant purpose of either:

(iv) the lawyer, or one or more of the lawyers, providing legal advice to the prosecutor; or

(v) the prosecutor being provided with professional legal services relating to a criminal proceeding, or an anticipated or pending criminal proceeding, under a law of the [*Commonwealth*][*name of State*][*name of Territory*].

(2) In paragraph (1)(c), ***prosecutor*** includes the Director of Public Prosecutions.[2452]

Division 2—Other privileges

126A Professional confidential relationship privileges[2453]

(1) In this section:

2451 Proposal 13–6.
2452 Proposal 13–6.
2453 Proposal 13–7.

confidential communication mean what it means in Division 1.

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional and psychological harm (such as shame, humiliation or fear).

protected confidence means a confidential communication made by a person to another person (***the confidant***):

(a) in the course of a relationship in which the confidant was acting in a professional capacity; and

(b) when the confidant was under an express or implied obligation not to disclose the contents of the communication, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

protected confider means a person who has made a protected confidence.

protected identity information means information or an opinion (including information or opinions forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

(2) For the purposes of this Division, a communication is not taken not to be a confidential communication merely because it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

Evidence not to be adduced

(3) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

(a) a protected confidence; or

(b) the contents of a document recording a protected confidence; or

(c) protected identity information.

(4) The court may give the direction:

(a) on its own initiative; or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(5) The court must give the direction if satisfied that:

(a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence were adduced; and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(6) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;

(e) the likely effect of adducing the evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;

(f) the means (including ancillary orders that may be made under subsection (8) or otherwise) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is given;

(g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;

(h) whether the substance of the protected confidence or the protected identify information has already been disclosed by the protected confider or any other person.

(7) The court must state its reasons for giving or refusing to give a direction under this section.

Ancillary orders

(8) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

(a) order that all or part of the evidence be heard in camera; and

(b) make orders relating to the suppression of publication of all or part of the evidence given before the court that, in its opinion, are necessary to protect the safety or welfare of the protected confider.

Loss of privilege: consent

(9) This section does not prevent the adducing of evidence with the consent of the protected confider concerned.

Loss of privilege: misconduct

(10) This section does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(11) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed; and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was so made or document so prepared.

128 Privilege in respect of self-incrimination in other proceedings

(1) …

(7A) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the offence or a prosecution of the defendant for an offence arising out of the same, or substantially the same, circumstances as the first-mentioned offence.[2454]

(8) …

128A Privilege in respect of self-incrimination in relation to certain orders etc[2455]

(1) In this section:

asset means property of any kind, including a chattel and a financial asset.

2454 Proposal 13–11.
2455 Proposal 13–10.

court order means an order made by [*a federal court or an ACT court*] [*a [name of State] court*] in a civil proceeding requiring a person (including a party to the proceeding) to do 1 or more of the following:

(a) to disclose information about assets or documents;

(b) to permit premises to be searched;

(c) to permit inspection, copying or recording of assets or documents (whether of the person or another person);

(d) to secure, or to deliver up or permit removal of, assets or documents.

It does not matter who owns the assets or documents.

relevant person means a person to whom a court order is directed.

(2) A relevant person is not excused from complying with a court order on the ground that compliance with it may tend to prove that the person:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country; or

(b) is liable to a civil penalty.

(3) In any proceeding in [*an Australian court*][*a [name of State] court*] to which the relevant person is a party:

(a) evidence of information disclosed by the relevant person in compliance with a court order; and

(b) evidence or any document or thing found in the course of a search of premises under a court order; and

(c) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given that information or as a consequence of such a search;

cannot be used against the relevant person if the court finds that the evidence tends to prove that the relevant person:

(d) has committed an offence against or arising under an Australian law or a law of a foreign country; or

(e) is liable to a civil penalty.

Note: Subsection 128A(3) differs from subsection 128A(3) of the NSW Act. The NSW provision refers to a ***NSW court*** instead of an ***Australian court.***

(4) Subsection (3) does not apply to a criminal proceeding in respect of the falsity of information disclosed by the relevant person in compliance with the court order.

(5) If a person has complied with an order referred to in a prescribed State or Territory provision made in a civil proceeding in a State or Territory court, this section applies in the same way, in a proceeding to which this subsection applies, as if the court order was one to which this section applied.

(6) The following are prescribed State or Territory provisions for the purposes of subsection (5):

(a) section 128A of the Evidence Act 1995 of [*name of State*][*the Commonwealth*]*;*

(b) a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of subsection (5).

(7) Subsection (5) applies to:

(a) a proceeding in relation to which this Act applies because of section 4; and

(b) a proceeding for an offence against a law of [*the Commonwealth*] [*name of State*] or for the recovery of a civil penalty under a law of the Commonwealth, other than a proceeding referred to in paragraph (a).

Part 3.11—Discretionary and mandatory exclusions[2456]

Part 4.3—Facilitation of proof

Division 3—Matters relating to post and communications

161 Electronic communications[2457]

(1A) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours

2456 Proposal 14–1.
2457 Consequential on Proposal 6–1.

after the message was delivered to a post office for transmission as a lettergram or telegram.

(1) If a document purports to contain a record of an electronic communication other than one referred to in subsection (1A), it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:

(a) was made as appears from the document; and

(b) was made by the person from whom or on whose behalf it appears from the document to have been sent; and

(c) was made on the day on which, at the time at which and at the place at which it appears from the document to have been made; and

(d) was received at the destination to which it appears from the document to have been sent; and

(e) was so received at the time at which it appears from the document that its transmission to that destination was concluded.

(2) Subsections (1A) and (1) do not apply if:

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) the relevant subsection is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

162 Lettergrams and telegrams[2458]

repealed

Part 4.5—Warnings

165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

2458 Consequential on Proposal 6–1.

(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;

(g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) Subject to this section, 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.

(3A) The judge must not:

(a) warn or inform a jury that the reliability of evidence given by a child may be affected by the age of the child, or suggest to the jury that children as a class are unreliable witnesses;[2459] or

(b) warn the jury that, or suggest to the jury that, it is dangerous to convict on the uncorroborated evidence of a child witness.[2460]

(3B) Subsection (3A) does not prevent the judge from:

2459 Proposal 16–1: see *Evidence Act 1995* (NSW) s 165(6).

2460 Proposal 16–1; see *Evidence Act 1995* (NSW) s 165A(2).

(a) warning or informing the jury that the evidence of the particular child may be unreliable because of the child's age; or

(b) warning the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;

but only if the judge is satisfied that there are circumstances particular to that child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.[2461]

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section (other than subsections (3A)[2462] and (4)) does not affect any other power of the judge to give a warning to, or to inform, the jury.

Part 4.6—Additional provisions

Division 2—Proof of certain matters by affidavit or written statements

170 Evidence relating to certain matters

(1) Evidence of a fact that is, because of a provision of this Act referred to in the Table, to be proved in relation to a document or thing may be given by a person permitted under section 171 to give such evidence.

TABLE

Provisions of this Act	**Subject matter**
…	
Section 71	Hearsay exception for electronic communications[2463]
…	

2461 Proposal 16–1; see *Evidence Act 1995* (NSW) s 165B.
2462 Consequential on Proposal 16–1.
2463 Consequential on Proposal 6–1.

Chapter 5—Miscellaneous

182 Application of certain sections in relation to Commonwealth records, postal articles sent by Commonwealth agencies and certain Commonwealth documents

(1) Subject to this section, the provisions of this Act referred to in the following Table apply in relation to documents that:

(a) are, or form part of, Commonwealth records; or

(b) at the time they were produced were, or formed part of, Commonwealth records;

as if those sections applied to the extent provided for in section 5.

TABLE

Provisions of this Act	**Subject matter**
…	
Section 71	Hearsay exception for electronic communications
Section 161	Electronic communications[2464]
…	

192A Advance rulings and findings[2465]

Where a question arises in a proceeding, being a question about:

(a) the admissibility of evidence proposed to be adduced; or

(b) the operation of a provision of this Act in relation to evidence proposed to be adduced;

the court may, if it thinks appropriate, give a ruling or make a finding in relation to the question before the evidence is adduced.

2464 Consequential on Proposal 6–1.
2465 Proposal 14–2.

Dictionary

Part 1—Definitions

customary laws, in relation to an Aboriginal or Torres Strait Islander community, means the customary laws, traditions, customs, observances, practices and beliefs of a community or group (including a kinship group) of Aborigines or Torres Strait Islanders.[2466]

de facto relationship means a relationship as a couple between 2 persons who:

(a) are not married to each other; and

(b) are not otherwise members of the same family.[2467]

de facto spouse of a person means a person with whom he or she is in a de facto relationship.[2468]

electronic communication means:

(a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or

(b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.[2469]

fax *omitted*[2470]

lawyer means a person who is admitted to practice as a legal practitioner, barrister or solicitor (whether in Australia or in a country (whether or not an independent sovereign state) outside Australia and the external Territories).[2471]

NSW Act only

NSW court means:

(a) the Supreme Court, or

(b) any other court created by Parliament, or

2466 Proposal 17–1
2467 Proposal 4–2.
2468 Proposal 4–2.
2469 Consequential on Proposal 6–1.
2470 Consequential on Proposal 6–1.
2471 Proposal 13–3.

(c) any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence,[2472] or

(d) any person or body authorised by a law of the State, or by consent of the parties, to hear, receive and examine evidence.[2473]

Part 2—Other Expressions

4 Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

(a) the person is dead; or

(b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or

(ba) the person is mentally or physically unable to give evidence about the fact; or[2474]

(c) it would be unlawful for the person to give evidence about the fact; or

(d) a provision of this Act prohibits the evidence being given; or

(e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

2472 Proposal 2–1.
2473 Proposal 13–12.
2474 Proposal 7–4.

Appendix 2. Application of s 398A of the *Crimes Act 1958* (Vic)

Contents

Introduction

Section 398A of the *Crimes Act 1958* (Vic), provides as follows:

> (1) This section applies to proceedings for an indictable or summary offence.
>
> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
>
> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
>
> (5) This section has effect despite any rule of law to the contrary.

The provisions have been the subject of extensive judicial analysis. It is convenient to consider that analysis by reference to key terms and phrases.

Propensity evidence

Interpreted literally, the section applies to evidence about the particular offence charged—for example, a sexual offence charge. It was presumably assumed that in practice such an interpretation would not be sought or, if it was, it would be just in all the circumstances to receive the evidence.[2475]

An issue yet to be authoritatively resolved is whether and to what extent this section will apply to evidence disclosing discreditable conduct which forms part of the *res*

2475 It will apply where several charges are joined in the one presentment to resolve issues about the admissibility of evidence relevant to one charge when considering the other charges.

gestae,[2476] in the sense of discreditable conduct which is part of the transaction that embraces the crime charged[2477] and points to a propensity on the part of the accused.[2478] The issue arises because the common law has drawn a distinction in its approach to the admissibility of evidence forming part of the *res gestae* and circumstantial evidence consisting of similar fact evidence,[2479] the latter attracting the special rules of admissibility which s 398A seeks to address.

Relevant to facts in issue[2480]

The first element specified is that the evidence be 'relevant to facts in issue'.[2481] Identifying the basis or bases on which the evidence is relevant is particularly important in this area. Typically, the evidence will be relevant for a variety of reasons, but will generally reveal a tendency to behave in a manner which is relevant and reflects badly on the accused. The trial judge must be satisfied that the evidence is relevant before admitting it (where it is just in all the circumstances to do so). Identifying the relevance of the evidence is also important for other reasons—if the evidence is admitted and the judge has to decide what directions should be given to the jury about the way the evidence may and may not be used.

In a number of cases, the question of relevance has been a critical question in determining whether the evidence is admissible. For example, in *R v Tektonopoulos*,[2482] the accused was charged with one count of trespass with intent to commit sexual assault and two counts of indecent assault. The person who had been assaulted had identified the accused in an identification parade. In support of that identification, the Crown relied upon surveillance evidence of the accused entering premises near the premises at which it was alleged he had committed the indecent assaults. It relied upon alleged similarities between the accused's conduct when under surveillance and the evidence of the conduct of the person who committed the indecent assaults. In addressing the issue of relevance, Winneke P said:

2476 *R v Best* [1998] 4 VR 603, 609.

2477 *Harriman v The Queen* (1989) 167 CLR 590, 594, 663. For example, evidence that a man, charged with murdering a fellow employee by violence, had, during the day and night preceding the killing engaged in a connected course of conduct characterised by heavy drinking and repeated acts of violence against others: *O'Leary v The King* (1946) 73 CLR 566.

2478 *R v Best* [1998] 4 VR 603, 608; *R v FJB* [1999] 2 VR 425, [14]–[15]. See also discussion in J Clough, 'Section 398A of the Crimes Act 1958 (Vic): Pfennig Resurrected?' (2000) 24(1) *Criminal Law Journal* 8, 18.

2479 *Harriman v The Queen* (1989) 167 CLR 590, 628–34; cf 594.

2480 For an example of the similar operation of the requirement of relevance at common law, see R v Movis (1994) 75 A Crim R 416.

2481 *R v TJB* [1998] 4 VR 621, 631.

2482 *R v Tektonopoulos* [1999] 2 VR 412; see also *R v Alexander* (2002) 6 VR 53, [43], *R v Rajakaruna* [2004] VSCA 114 and *R v Dupas* (2004) 148 A Crim R 185.

> Within the meaning of s 398A(2), the 'facts in issue' to the proof of which the propensity evidence was relevant was the identity of the offender in Kennedy Street and not the adequacy of the evidence of the complainant.[2483]

After referring to the learned trial judge's conclusion that the evidence was relevant to a fact in issue, whether that be 'the accuracy of the identification made by the complainant or the identity of the assailant', his Honour said:

> On any view it seems to me that his Honour misdirected himself. He appears to have been influenced by the fact that the Crown was seeking to use the evidence as 'corroboration' of the complainant's identification and that a fact in issue was the accuracy of that identification … this seems to me to mistake the fact in issue towards which the propensity evidence was directed.[2484]

In considering the relevance of the surveillance evidence, the Victorian Court of Appeal took the view that there was nothing in those events which rendered it objectively probable that the accused was the person who committed the offences charged and accordingly, the evidence should not have been admitted.[2485]

Consideration of the issue of relevance tends to be less clear in those cases where people are charged with multiple sex offences, particularly against children. Different approaches appear to have been taken which cannot be entirely explained by reference to the issues in dispute in the cases and the evidence in question.

- In some instances, the issue of fact identified is the relationship between the accused and the alleged victims.[2486]
- In a number of cases, reference has been made to the evidence of the complainants pointing to a pattern of conduct involving 'systematic exploitation'[2487] or 'sexual appetite'[2488] or 'the preying nature'[2489] of the behaviour, suggesting reliance upon a specific propensity to prove the commission of the crimes in question—as, for example, was the reasoning in *Pfennig*.[2490] In such situations, it is also often possible to support the relevance of the evidence on the basis that it is improbable that the witnesses would give similar accounts if the events described had not occurred.
- At the same time, the admission of the propensity evidence has been justified because of the probative value given to it from the improbability of the

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2483 *R v Tektonopoulos* [1999] 2 VR 412, [28], Charles and Batt JJA concurring.
2484 Ibid, [30].
2485 Ibid.
2486 For example, *R v ALP* [2002] VSCA 210; *R v Loguancio* [2000] VSCA 33, [18]–[20] (together with lack of complaint for 18 months).
2487 *R v Glennon* [2001] VSCA 17, [101]; *R v PJO* [2001] VSCA 213, [16]; *R v Papamitrou* [2004] VSCA 12, [31].
2488 *R v GAE* [2000] 1 VR 198.
2489 *R v ALP* [2002] VSCA 210, [48].
2490 *Pfennig v The Queen* (1995) 182 CLR 461, 487, 522–528, 541.

> complainants giving connected accounts if they were not true[2491] and the resulting support that each complainant's evidence gives to the evidence of each other.[2492]

The latter analysis was used in *R v Buckley*,[2493] where the accused was charged with 21 counts of sexual offences against a child, KD, under the age of 16 years. The Crown was permitted to adduce evidence from another child, JG, that the accused had shown her his scrotum to demonstrate that he had been sterilised and bragged about his sexual experience with LZ. It appears that, according to KD, he had made similar statements to her. In the Victorian Court of Appeal, Nettle JA commented that the evidence

> did not go directly to a fact in issue. But it was evidence of the applicant's propensity to show his scrotum in order to demonstrate that he had been sterilised and to brag of his sexual experiences with LZ; and propensity evidence like that, which establishes a remarkable modus operandi, is capable of corroborating or confirming other evidence about a matter in issue and it may be admitted on that basis.[2494]

His Honour went on to cite Brennan CJ in *BRS v The Queen*[2495] in commenting on the admissibility of evidence of things said and done by the accused to one victim, tendered to corroborate or confirm the evidence of another.[2496] According to Brennan CJ, in determining the admissibility of such evidence, what is critical is that there be striking similarity between the evidence of what was said and done and that it confirms evidence that is material to facts in issue. Nettle JA emphasised that for the evidence to be used to corroborate, 'it is sufficient that it confirmed evidence that is material to facts in issue'.[2497]

R v DCC is another recent example of multiple counts of sexual offences involving more than one child. Some of the evidence was relevant as relationship evidence and admitted as such. The evidence relating to the various counts themselves was treated as relevant because:

> It was the kind of similar fact evidence where the probative value derived from the improbability of three complainants independently giving such similar counts of sexual abuse by the applicant.[2498]

The difference between propensity reasoning and probability reasoning was described as involving

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2491 See, eg, *R v Glennon* [2001] VSCA 17, [101].
2492 See, eg, *R v Papamitrou* [2004] VSCA 12, [31]; see also the reasoning in *R v Boardman* [1975] AC 421, 441, 444, 453, 454, 462 and *Pfennig v The Queen* (1995) 182 CLR 461, 477. See also *R v Best* [1998] 4 VR 603, 618.
2493 *R v Buckley* [2004] VSCA 185, Winneke P and Charles JA concurred with Nettle JA.
2494 Ibid, [45].
2495 *BRS v The Queen* (1997) 191 CLR 275, 270–277, 283–284.
2496 *R v Buckley* [2004] VSCA 185, [46]–[47].
2497 *R v GWB* [2004] VSCA 185, [47].
2498 *R v DCC* [2004] VSCA 230, [6], per Callaway JA.

> a different train of thought. It is one thing to say that the account of a witness is more likely to be true because of the similarities it bears to the independent account of other witnesses and the improbability that, by sheer coincidence, their accounts would be similar … it is a different thing altogether to reason that, because the evidence of one witness is accepted in relation to offences committed against her, the accused is the kind of person who is likely to have committed similar offences against other complainants, ie, in the present context, to conclude that he is a paedophile. As I have said, the former chain of reasoning is permitted but the latter is not.[2499]

In light of these authorities, it can be argued that, on occasions, the courts treat the disputed evidence as relevant to the credibility of evidence on which the Crown relies in respect of each count. If that is the correct analysis, it may be a qualification to the traditional common law embargo on leading evidence relevant only to the credibility of evidence. Taking that approach to the question of relevance, however, and other approaches relying upon coincidence reasoning, is a less emotive reasoning approach than a propensity reasoning approach. Nonetheless, the serious dangers of unfair prejudice remain and have to be dealt with by adequate directions to the jury.

Whatever is the correct analysis of the reasoning processes, the practice appears to be to direct juries that reliance should not be placed on the evidence in such cases to establish any propensity, specific or general. The standard charge that is recommended to address the issue of the forbidden reasoning is that the jury is told that, if it is satisfied that the accused person engaged in one or more of the other offences (or uncharged acts), it is not to reason that the accused is the kind of person who is likely to have committed the offence charged—or words to that effect.[2500]

Just in all the circumstances

What does the term 'just' require? What is its content and what are its limits? In the context of s 398A, it has been suggested that the term directs attention to the fair trial of the accused but may be given a more expanded meaning, such as taking into account 'the legitimate interests of the Crown and the community'.[2501] As to that, however, it has been argued that 'the public interest in an offender being convicted only extends to that person being convicted after a fair trial'.[2502]

It is not surprising, given the lack of guidance to be obtained from the overarching concept of 'just', that the Victorian Court of Appeal sought to give it content by stating that:

2499 Ibid, [8].

2500 Ibid, [6], [30]; *R v T* (1996) 86 A Crim R 293.

2501 J Clough, 'Section 398A of the Crimes Act 1958 (Vic): Pfennig Resurrected?' (2000) 24(1) *Criminal Law Journal* 8, 12–13.

2502 Ibid, after citing *Pfennig v The Queen* (1995) 182 CLR 461, 507 per Toohey J , and 529 per McHugh J who referred to the 'public interest in adducing all relevant evidence of guilt'. Note also Deane J in *Bannon v The Queen* (1995) 185 CLR 1, [7]: 'The central prescript of our criminal law is that no person should be convicted of a crime unless his or her guilt is established beyond reasonable doubt after a fair trial according to law.'

> The decision on admissibility under s 398A requires attention to be focused on probative value and prejudicial effect, for otherwise the rule will be too uncertain.[2503]

In applying the section, the Victorian courts have followed the common law authorities of England and Australia, other than *Hoch*[2504] and *Pfennig*, in articulating what may be 'just in all the circumstances' in each case. In light of those authorities, the Victorian Court of Appeal has stated that:

> propensity evidence is admissible only if its probative value is such that it is just to admit the evidence despite any prejudicial effect it may have on the accused. In considering the issues, the focus is on what the evidence discloses, not the purpose for which it is tendered.[2505]

The approach to be taken in balancing probative force against prejudicial effect has been the subject of discussion in the judgments of the Victorian Court of Appeal. In *R v Tektonopoulos*, Winneke P—after referring with approval to the comments of Callaway JA in *R v Best*[2506] who noted that, properly applied, the section would not greatly alter the conduct of criminal trials—stated that what the test required

> is not far removed from the test which was customarily applied in Australia before Hoch. In *Sutton v R* (1984) 152 CLR 528, Brennan J described the test of admissibility as follows (547–8):
>
> > Before the trial judge is at liberty to admit similar fact evidence he must be satisfied that the probative force of the evidence clearly transcends its merely prejudicial effect … It is the probative force (or cogency) of the evidence in comparison with the impermissible prejudice that it may produce which determines admissibility …[2507]

After asserting that the section was not intended to 'set at nought the body of common law principles' which had been formulated 'over a period of more than 100 years', Winneke P stated:

> The effect of these principles is that [such] evidence … is prima facie inadmissible because the antipathy which it is apt to engender may unjustly erode the presumption of innocence … Before such evidence may be admitted it must have such a probative force in relation to the offence charged as to justify its admission notwithstanding its inherent prejudicial effect …[2508]

Later he said:

2503 *R v TJB* [1998] 4 VR 621, 631–632, referring in comparison to *Director of Public Prosecutions v P* [1991] 2 AC 447, 460E, 462B, 463A.

2504 *Hoch v The Queen* (1988) 165 CLR 292.

2505 *R v Best* [1998] 4 VR 603, 608.

2506 Ibid, 612, (Phillips CJ and Buchanan JA concurring).

2507 *R v Tektonopoulos* [1999] 2 VR 412, [19], per Winneke P (Charles JA and Batt JA concurring). See also *R v Dupas* (2004) 148 A Crim R 185, [18]–[20].

2508 *R v Tektonopoulos* [1999] 2 VR 412, [20].

> The courts, as I have indicated, have always admitted propensity evidence with great caution and, because it is inevitably attended by prejudice, have required it to go beyond mere disposition to commit crimes or particular kinds of crime and to have a 'strong probative force' in respect of the offence charged … or a probative force which clearly transcends its prejudicial effect …[2509]

In a later case, the Winneke P commented that similar fact evidence

> has generally been treated by courts as a special class of circumstantial evidence which, because of its discrete prejudicial nature, will be excluded unless—in the opinion of the judge—it has a high probative value in proof of the offence charged beyond that of merely demonstrating that the accused is a person of criminal disposition … the ultimate question for the Court to determine is whether the evidence sought to be led has a high degree of probative value in proof of an element of the offence … or in proof that the crime charged has been committed and that the accused was the person committing it.[2510]

The probative value of a piece of evidence is to be considered in combination with the other evidence in the case to determine its probative value and its prejudicial effect.[2511] As a general rule, the judge in determining admissibility under s 398A should proceed on the basis that the evidence is true.[2512] This issue was first discussed by Callaway JA in *R v Best*.[2513] His Honour rejected the argument advanced for the applicant, based on the second reading speech, that:

- subsections (3) and (4) did not operate to prevent consideration of whether there was a substantial risk of concoction or unconscious influence; or
- while a possibility of a reasonable explanation consistent with innocence could not be considered on the question of admissibility, a 'reasonable explanation' supported by 'cogent evidence' could be taken into account.[2514]

His Honour stated:

> subss (3) and (4) should be understood to refer only to explanations, like collusion and unconscious influence, that affect the truth of the propensity evidence sought to

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2509 Ibid, [23]. See also *R v Alexander* (2002) 6 VR 53, [41] and fn 16; *R v Rajakaruna* [2004] VSCA 114, [126].

2510 *R v Alexander* (2002) 6 VR 53, [41].

2511 *R v Tektonopoulos* [1999] 2 VR 412, [36].

2512 *R v Best* [1998] 4 VR 603, 607; *R v Rajakaruna* [2004] VSCA 114, [78].

2513 *R v Best* [1998] 4 VR 603, 609–610.

2514 The Attorney-General of Victoria had stated the following in Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 431 (J Wade—Attorney-General):
Accordingly, the mere possibility of concoction, collusion, infection or coincidence will not be a ground for inadmissibility of propensity evidence leading to the separation of trials. However, implicit in the provision is the notion that where the Court is satisfied that there is a substantial risk of concoction having occurred it would not be just to admit the evidence in a single trial.
Where a joint trial proceeds and there are allegations that victims have concocted or colluded in allegations, or that their allegations are tainted by infection or coincidence, that will be a matter the jury can consider in assessing the credit of the witness, and the judge can direct the jury to that effect. Overall, the provision will ensure a more consistent and fair approach to the prosecution of multiple victims sexual assault cases.

> be adduced and not to extend to explanations like coincidence, because so to construe them would make the judge's task impossible in the case of similar fact evidence … subsection (2) must be read in harmony with subsections (3) and (4), so that 'all the circumstances' bearing on probative value and prejudicial effect are relevant to admissibility but not facts impugning the reliability of the evidence.[2515]

However, in assessing probative value, while the truth of the evidence is to be accepted, issues such as the probability or improbability of coincidence remain relevant to the assessment of probative value.[2516]

His Honour concluded by stating that the question could be expressed in terms of probabilities.

> Assuming that the jury will accept the evidence as true, is the improbability of coincidence so great that it is just to admit it despite its prejudicial effect.[2517]

There may, however, be qualifications.

- In *R v Alexander*, it was said that where evidence 'is disputed "similar facts" evidence, its probative value will be less than would be the case where the similar facts are not in dispute'.[2518]
- In view of the fact that it is generally accepted that s 398A adopts the English approach to admissibility for propensity evidence,[2519] it should be borne in mind that the House of Lords in *R v H*, while stating that the judge should approach questions of admissibility on the basis that the alleged similar facts were true, also commented that 'generally' collusion is not relevant at that stage.[2520] It also stated that, where similar fact evidence has been admitted and later in the trial the judge forms the view that no reasonable jury could accept the evidence as free from collusion, the judge should direct the jury that it cannot be relied upon for any purpose adverse to the defence.[2521] It should be noted that this analysis

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2515 *R v Best* [1998] 4 VR 603, 610; see also 616.

2516 It has been argued that, accepting this analysis of the operation of subsections (3) and (4), the 'no reasonable explanation consistent with the innocence' requirement may still apply in those circumstances where the probative value argument is concerned with explanations affecting the probative force of the evidence and not its reliability: J Clough, 'Section 398A of the Crimes Act 1958 (Vic): Pfennig Resurrected?' (2000) 24(1) *Criminal Law Journal* 8, 14–15.

2517 *R v Best* [1998] 4 VR 603, 610. The general approach that a question as to the possibility of collusion, concoction or innocent infection is for the jury rather than a factor to be taken into account in determining admissibility was confirmed in *R v Glennon* [2001] VSCA 17, [73] per Winneke P and Ormiston JA, [117]–[118].

2518 *R v Alexander* (2002) 6 VR 53, [41] fn 16, citing *Pfennig v The Queen* (1995) 182 CLR 461, 482–483 per Mason CJ, Deane and Dawson JJ. Note Palmer has argued that this proposition is confined to the situation where the evidence is disputed on the basis of joint concoction and does not apply where the issue is the possibility of independent lying—that that is a matter for the jury: A Palmer, 'Propensity, Coincidence and Context: The Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases' (1999) 4(1) *Newcastle Law Review* 46, 80 fn 139, 82 fn 142.

2519 See, eg, *R v Best* [1998] 4 VR 603, 611.

2520 *R v H* [1995] 2 AC 596, 612, 622. See also Lord Russell in *R v H* [1994] 1 WLR 809, 817.

2521 Ibid, 612, 624–626.

was made in the context of English law which gives greater power to the trial judge to take cases away from the jury.[2522] As a result the apparent qualification should be approached with caution. However, the direction is to be given in cases where the case is not taken away from the jury. If such a direction is correct, should the trial judge, in determining admissibility, rule that the evidence should not be admitted if the judge forms the view that no reasonable jury could accept the evidence as free from collusion? Ultimately, the question for the trial judge is what is 'just in all the circumstances'.

- Further, the possibility remains that, in some cases, the prejudicial effect of evidence may be so great that it will only be just to admit that evidence if there is no reasonable explanation for its existence consistent with innocence.

Ultimately, the trial judge can only proceed on the basis of assuming that the evidence is true as long as it would be 'just in all the circumstances' to do so. To do otherwise would be to ignore the section's words.[2523] Further, the weight of any evidence is an aspect of its probative value. As was stated by the Law Commission of England and Wales (Law Commission):

> The heart of the problem is the fact that the question of admissibility turns on the weight to be given to the evidence. In this context credibility is a crucial factor in deciding the probative force (and hence one limb of admissibility) of the evidence. In many cases where this problem arises, for example cases of alleged sexual misconduct, the evidence in question is likely to be very prejudicial. In these cases, if the judge does not pre-test the quality of the evidence, highly prejudicial evidence of dubious quality is likely to be admitted.[2524]

The Law Commission considered the issues in some detail[2525] and advanced the following conclusions:

- in assessing the probative value of tendency and coincidence evidence (referred to by the Law Commission as evidence of bad character), the court should be required to proceed on the assumption that the evidence is true 'except where it appears, on the basis for any material before the court, that no court or jury could reasonably find it to be true';[2526] and
- that a trial judge, in a matter before a jury, should be required to discharge the jury or direct the jury to acquit where the judge came to the conclusion that the

2522 Ibid; *R v Doney* (1988) 37 A Crim R 288.
2523 See, eg, in *R v ALP* [2002] VSCA 210, [51] where the trial judge thought it necessary to investigate whether collusion was deliberate or otherwise had been established.
2524 Law Commission of England and Wales, *Evidence of Bad Character in Criminal Proceedings*, Report 273 (2001), [15.15].
2525 Ibid, [15.1]–[15.38].
2526 Ibid, [15.26].

> evidence was contaminated such that, 'considering the importance of the evidence to the case against the defendant, a conviction would be unsafe'.[2527]

If the correct view of the law in Victoria is that, in all cases, the trial judge must accept the disputed evidence to be true in deciding its admissibility, consideration should be given to the above proposals advanced by the Law Commission.

It should be noted that some of the consequences of the Victorian analysis have been considered in the context of warnings to juries. In *R v Glennon*, Callaway JA referred to the situation where the probative force derived from the improbability of independent, but cohering allegations, but it is reduced because of

> a reasonable possibility that the explanation for the seeming coincidence is collusion, unconscious influence or media publicity of which the complainants were aware.[2528]

In that situation, his Honour stated that the trial judge should direct the jury that it could not use the disputed similar fact evidence unless satisfied beyond reasonable doubt that no such factor was operating.[2529] The other matters raised by the Law Commission have not yet arisen for decision in Victoria and need to be addressed.

Drafting issues

Issues arise in part from the way the section is drafted. It states that, provided the two conditions—that the evidence 'is relevant to facts in issues' and that 'it is just to admit it'—are satisfied, the evidence is 'admissible'.

Interpreted literally, the section has the result that, provided the evidence is relevant to facts in issue and it is just to admit it, it must be admitted. On the face of it, the section does not leave any room for the operation of any other common law exclusionary rules, such as the hearsay rule, the opinion rule, the best evidence rule or the exclusionary discretions. Any issues relevant to those rules or discretions might be considered when determining whether it would be 'just to admit' the evidence, but that issue does not appear to have been authoritatively considered. The Victorian Court of Appeal has referred to but left open the question whether the *Christie* discretion[2530] (that is, the discretion to exclude evidence where its probative value is outweighed by its prejudicial effect) has any room to operate where s 398A applies.[2531]

It was probably intended that such evidence be admissible subject to any other rules of admissibility. The uniform Evidence Acts avoid this problem by stating exclusionary rules and then prescribing exceptions which lifted those exclusionary rules. The

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2527 Ibid, [15.37].
2528 *R v Glennon* [2001] VSCA 17, [117]–[118].
2529 For an example of a case where it was held that the improbability reasoning was weak with the result that the probative force of the evidence was not strong: see *R v Tragear* [2003] VSCA 222.
2530 *R v Christie* [1914] AC 545.
2531 *R v TJB* [1998] 4 VR 621, 632.

uniform Evidence Acts do not state that if an exception applies the evidence is admissible.

Appendix 3. List of Submissions

Name	*Submission Number*	*Date*
Australian Institute of Mining and Metallurgy	E38	21 December 2004
Australian Customs Service	E24	21 February 2005
Australian Government Solicitor	E28	18 February 2005
Australian Securities & Investments Commission	E33	7 March 2005
K Burns	E21	18 February 2005
Clayton Utz	E20	17 February 2005
Commercial Bar Association of the Victorian Bar	E37	March 2005
Committee of the Council of Chief Justices of Australia and New Zealand	E52	22 April 2005
Confidential	E4	3 September 2004
Confidential	E5	6 September 2004
Confidential	E31	22 February 2005
Confidential	E51	22 April 2005
Confidential	E49	27 April 2005
CPA Australia and Institute of Chartered Accountants in Australia	E27	23 February 2005
Criminal Law Committee of the Law Society of South Australia	E35	7 March 2005
A Davidson	E7	20 December 2004
Director of Public Prosecutions (NSW)	E17	15 February 2005
R French	E3	8 October 2004
S Gardner	E18	17 February 2005
P Greenwood	E47	11 March 2005
K Hanscombe	E46	29 March 2005
A Hogan	E1	16 August 2004
M Hoyne	E42	21 March 2005
J Kakos	E41	10 March 2005
E Kerkyasharian	E15	4 February 2005
H Kharbanda	E30	23 February 2005

M Kirby	E44	16 March 2005
A Kirkham	E36	3 March 2005
Law Council of Australia	E32	4 March 2005
Legal Services Commission of South Australia	E29	22 February 2005
B Marchione	E11	17 January 2005
L McGrath	E10	7 January 2005
G Mullane	E53	10 May 2005
New South Wales District Court Judges	E26	22 February 2005
New South Wales Public Defenders Office	E50	21 April 2005
NSW Deputy Ombudsman	E25	16 February 2005
NSW Health Department Child Protection and Violence Prevention Unit	E23	21 February 2005
NSW Ombudsman	E13	27 January 2005
NSW Young Lawyers Civil Litigation Committee	E34	7 March 2005
C O'Donnell	E9	26 December 2004
C O'Donnell	E2	2 September 2004
Optometrists Association Australia (Vic)	E39	9 December 2004
J Orchiston	E48	12 April 2005
R Rana	E8	22 December 2004
Rights Australia Inc	E45	24 March 2005
T Smith	E12	20 January 2005
T Smith	E6	16 September 2004
State of South Australia	E19	16 February 2005
I Turnbull	E43	23 March 2005
Victoria Legal Aid	E22	18 February 2005
C Williams	E14	3 February 2005
Women's Legal Services (NSW)	E40	24 March 2005
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	E16	9 February 2005

Appendix 4. List of Consultations

Name

Magistrate Bob Abood, Local Court of New South Wales

Aboriginal Interpreter Service (Northern Territory)

ACT Bar Association

ACT Law Society

ACT Supreme Court Judges

Mr Peter Bayne, Australian National University

Mr Geoff Bellamy

Mr Darryl Coates SC, Office of the Director of Public Prosecutions (Tasmania)

Justice David Collier, Family Court of Australia

Ms Susan Cox QC, Northern Territory Legal Aid Commission

Mr Brian Donovan QC, NSW Bar

Justice Clifford Einstein, Supreme Court of New South Wales

Mr Stephen Finch SC, NSW Bar Association

Dr Ian Freckelton SC, Victorian Bar

Mr Tim Game SC, NSW Bar

Magistrate James Garbett, Parramatta Local Courts

Mr Phil Greenwood SC, NSW Bar

Justice Thomas Grey, Supreme Court of South Australia

Mr Charles Heunemann, Managing Director, SurfControl

Mr Paul Holdenson QC, Victorian Bar

Justice Roderick Howie, Supreme Court of New South Wales

Human Rights and Equal Opportunity Commission

Associate Professor Jill Hunter, University of New South Wales

Mr Mark Johnson, Northern Territory Bar

Judges of the High Court of Australia

The Hon Michael Lavarch, University of Queensland

Law Institute of Victoria

Law Reform Commission of Western Australia

Law Society of the Northern Territory

Law Society of South Australia

Law Society of Western Australia

Mr Andrew Ligertwood, University of Adelaide

Justice Kevin Lindgren, Federal Court of Australia

Professor Kathy Mack, Flinders University

Mr Wayne Martin QC, Law Society of Western Australia

Mr Colin McDonald QC, Northern Territory Bar

Justice John McKechnie, Supreme Court of Western Australia

Associate Professor Sue McNicol, Monash University

Mr Stephen Mason, Blake Dawson Waldron

New South Wales Bar Association

New South Wales Supreme Court Judges

New South Wales Crown Prosecutors

Northern Territory Department of Justice

Mr Stephen Odgers SC, NSW Bar

Office of the Attorney-General of Western Australia

Magistrate Jillian Orchiston, Local Court of New South Wales

Mr Andrew Palmer, Melbourne University

Queensland Bar Association

Queensland Law Reform Commission

Ms Judy Ryan, Federal Magistrate

Mr Wayne Roser, NSW Crown Prosecutor

Justice Hal Sperling, Supreme Court of NSW

South Australian Department of Justice

Justice Steven Southwood, Northern Territory Supreme Court

Dr Cameron Spenceley

Justice Janine Stevenson, Family Court of Australia

Supreme Court of Victoria Litigation Committee

Tasmanian Law Reform Commission

Mr Sydney Tilmouth QC, South Australian Bar

Chief Justice Peter Underwood, Supreme Court of Tasmania

Victorian Supreme Court and County Court Judges

The Hon Rod Welford, Attorney-General of Queensland

Western Australian Department of Justice

Western Australian Director of Public Prosecutions

Mr Neil Williams SC, NSW Bar

Mr Peter Zahra SC, Public Defenders Office New South Wales

Appendix 5. Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
ALRC 26	Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) (1985)
ALRC 38	Australian Law Reform Commission, *Evidence*, ALRC 38 (1987)
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ATSI	Aboriginal and Torres Strait Islander
Australian Accounting Bodies	CPA Australia and the Institute of Chartered Accountants in Australia
DPP NSW	New South Wales Director of Public Prosecutions
DPP Tas	Tasmanian Director of Public Prosecutions
HREOC	Human Rights and Equal Opportunity Commission
IP 28	Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004)
Law Council	Law Council of Australia
Law Society SA	Criminal Law Committee of the Law Society of South Australia
Legal Services Commission SA	Legal Services Commission of South Australia
LRCWA	Law Reform Commission of Western Australia
MCCOC	Model Criminal Code Officers' Committee
NSWLRC	New South Wales Law Reform Commission
NSW PDO	New South Wales Public Defenders Office
NTLRC	Northern Territory Law Reform Committee
QLRC	Queensland Law Reform Commission
TLRI	Tasmania Law Reform Institute
uniform Evidence Acts	*Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); and *Evidence Act 2004* (NI)
VLRC	Victorian Law Reform Commission
Yamtji Aboriginal Corporation	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation