NSW Law Reform Commission

REPORT 56 (1988) – EVIDENCE

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Terms of Reference and Participants

New South Wales Law Reform Commission

To the Honourable J R A Dowd, LLB, MP, Attorney General for New South Wales

EVIDENCE

Dear Attorney General,

We make this Report pursuant to the reference to this Commission dated 29 June 1966.

Ms Helen Gamble

(Chairman)

Paul Byrne

(Commissioner)

Keith Mason QC

(Commissioner)

The Honourable Mr Justice Andrew Rogers

(Commissioner)

June 1988

Terms of Reference

On 29 June 1966, the then Attorney General of New South Wales, the Honourable Sir Kenneth M McCaw, QC, MLA made the following reference to the Commission:

> To review the law of evidence in both civil and criminal cases.

Participants

Commissioners

For the purpose of the reference the Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act 1967 on August 1987 comprising of the following members of the Commission:

> Paul Byrne
>
> Ms Helen Gamble
>
> Mr Keith Mason QC
>
> The Honourable Mr Justice Andrew Rogers

Research Director

> Mr William J Tearle

Secretary

John McMillan

Research and Writing

Meredith Wilkie

Judy Reeve

Word Processing

Mrs Nozveen Khan

Ms Glenda Owens

Librarian

Ms Beverley Caska

Administrative Assistance

Ms Zoya Howes

Grant Van Wingerden

Summary of Recommendations

Chapter 1: Introduction

The major recommendation of the report is that uniformity should be sought in the evidence laws applied by all tribunals sitting in this State. To this end, the Commission has set aside many of the reservations it had with the ALRC draft bill in order to achieve a uniform system of law. We acknowledge with the ALRC that the only true way to test the force of its recommendations is to implement the bill and to reassess it's operation after an introductory period. Amendments may then need to be made, hopefully once again with uniformity in mind.

Chapter 2: Draft Evidence Bill

Part 1: Preliminary, clauses 1-10

Adopted with minor amendments to accommodate the change of jurisdiction.

Part 2: Application of Act, clauses 11-17

Adopted with minor amendments to accommodate the change of jurisdiction.

Part 3: Witnesses, clauses 18-49

Division 1: Competence and compellability of witnesses, clauses 18- 25 .

Adoption recommended with some amendments to clause 23, to accord with amendments recommended to clauses 26-29 below.

Division 2: Sworn and unsworn evidence, clauses 26-29.

Amendments recommended to accord with recommendations of this Commission in Report on Unsworn Statements of Accused Persons LRC 45, 1985.

Division 3: Manner of giving evidence, clauses 30-49.

Adoption recommended with minor amendments.

Part 4: Admission of evidence: Relevance Rule, clauses 50-53

Adopted in full.

Part 5. Admission and Use of Evidence: Exclusionary Rules, clauses 54-119

Adopted, although some reservations expressed of identification evidence, clauses 103, 104.

Part 6: Other Aspects of Proof, clauses 120-140 Adopted in full.

Part 7: Miscellaneous, clauses 141-151 Adopted in full.

Chapter 3: Matters beyond ALRC Draft Evidence Bill on which no recommendation made-ACT Evidence ordinance 1971.

Matters identified by the ALRC as beyond its terms of reference and therefore not reported on in ALRC 38, but provided for in the federal sphere by the ACT Ordinance. Implementation of the ALRC Draft Bill leave gaps in the law of NSW.

ACT Ordinance:

s83 Prohibition of publication of evidence.

s85 Publication of disallowed questions

s88 Impounding documents.

Chapter 4: Developments in Case Law since ALRC Report 38

Loss of client legal privilege- *Hooker Corporation Ltd v The Darling harbour Authority* (1987) 9 NSWLR 538.

Judges' power to call witnesses- *Superintendent of Licences v Ainsworth Nominees Pty Ltd* (1987) 9 NSWLR 691.

Voice identification-*R v Hentschel* (Unreported, Supreme Court of Victoria, 11 August 1987).

Legal professional privilege of in-house lawyers-*Waterford v The Commonwealth* (1987) 163 CLR 54.

Hearsay evidence-business records exception-*Ross McConnel Kitchen & Co Pty Ltd (in liq) v Ross-(no 1)* [1985] 1 NSWLR 233.

Chapter 5: Consequential Amendments in New South Wales

Presentation o f evidence by children-Crimes (Personal and Family Violence) Amendment Act 1987, Schedule 3.

Character evidence and evidence o f sexual experience-Crimes Act 1900, ss 413A, 413B.

Police Questioning of Children -Children (Criminal Proceedings) Act 1987.

Evidence of Reproductions Evidence (Reproductions) Act 1967.

Chapter 6: Judicial Powers

To direct affidavit evidence

To expedite proceedings

1. A Uniform Law of Evidence

I. BACKGROUND

1.1 The Commission received a reference "to review the law of evidence in both civil and criminal cases" in 1966. In 1973 a report on *Evidence (Business Records)*[1] was published and, in 1976, the recommendations in that report were implemented in Part IIC, "Admissibility of Business Records", of the Evidence Act 1898. In 1978 the Commission published a report on *The Rule Against Hearsay*[2] and, in 1979 ,a working paper on *Illegally and Improperly Obtained Evidence*.[3] Three discussion papers were published in 1980:

> *Competence and Compellability*;[4]
>
> *Oaths and Affirmations*;[5] and
>
> *Unsworn Statements of Accused Persons*.[6]

1.2 In July 1979 the Australian Law Reform Commission (ALRC) received a reference on evidence in the following terms.

> TO REVIEW the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements AND TO REPORT:
>
> (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts; and
>
> (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.

This Commission determined to suspend our work on evidence pending the outcome of the ALRC's inquiry and the publication of its report. In the course of that inquiry, and particularly in the period between the publication of the Interim and Final Reports, members of this Commission consulted with the ALRC as part of our own ongoing responsibility in the field. In May 1986 the Commission, in conjunction with the ALRC and the New South Wales Bar Association, presented three seminars in Sydney on the ALRC's interim proposals. In 1985 Commission produced a Report *Unsworn Statements of Accused Persons*[7] under our Criminal Procedure reference. In the research and consultative stages, we co-operated fruitfully with both the ALRC and the Victorian Law Reform Commission.

1.3 The ALRC produced an Interim Report in two volumes in 1985.[8] The then Chairman of this Commission, Mr Keith Mason QC, now a member of this Division, addressed one of the above mentioned seminars on the subject of the proposals , as did Mr Greg James QC, a Commissioner. A member of this Division, Mr Paul Byrne, made two submissions to the ALRC on the interim proposals and another member, Mr Justice Andrew Rogers, earlier made oral submissions in response to discussion and issues papers. Other former members of the Commission to make submissions to the ALRC's inquiry include Professor R Sackville, then Chairman, the Hon Justice P E Nygh of the Family Court of Australia and the late Mr T J Martin QC. Both Mr Justice Nygh and Mr Martin, formerly a judge of the New South Wales District Court and member of the Evidence Division, were consultants to the ALRC on its evidence reference.

1.4 The ALRC's consultation within New South Wales was extensive. In addition to the three seminars mention above, a public hearing was held in Sydney in November 1985. In addition, a number of New South Wales citizens and organisations made written submissions to the ALRC following the release of the Interim Report.

1.5 Although confident of the quality of t h e ALRC's consultations in New South Wales , we determined nevertheless to invite further Submissions on our own reference after the ALRC's final Report was published. We wrote to the Honourable Sir Laurence Whistler Street, KCMG, Chief Justice of New South Wales, His Honour Judge J H Staunton, CBE, QC, Chief Judge of the District Court of New South Wales and Mr C R Briese, Chief Magistrate of New South Wales, inviting judges and magistrates to make submissions. We prefaced this

invitation with the advice that we had determined uniformity to be critical, and that our primary recommendation would be that the legislation proposed by the ALRC should be implemented in this State. We sought advice on proposals unacceptable or unworkable in New South Wales and on matters which should be included but which were excluded by the ALRC. A general request for submissions in similar terms appeared in the November 1987 issues of the *Law Society Journal* and the *Bar News*. The publication of this request was drawn to the particular attention of the Deans of the four New South Wales University Law Faculties, the Senior Crown Prosecutor, the Senior Public Defender, the Director of Public Prosecutions and the Director of the Legal Aid Commission.

1.6 Since the completion of its Final Report in 1987,[9] the ALRC has generously provided this Commission with full access to its records and materials within the evidence reference.

II. GENERAL RECOMMENDATION

1.7 For the reasons set out below (paras 1.8-1.18) we recommend that the bulk of the ALRC's proposals be adopted in New South Wales. The appended draft legislation should be enacted. The draft diverges from the ALRC's draft bill in a number of minor respects which are described in Chapter 2. In addition, this report comments on some matters not raised in the ALRC's draft bill. These matters are discussed in Chapters 4 and 6.

III. IMPLEMENTATION AND MONITORING

1.8 The ALRC Report represents a fundamental reshaping of the law and practice of evidence. The task undertaken by the ALRC was enormous and the full ramifications of implementation of its recommendations are as yet unknown. The ALRC recommends[10] that the operation of any Act passed to implement its proposals be monitored. We agree with the ALRC in this recommendation and recommend that when it comes into operation in this State, a formal. system should be established to ensure that the new law is monitored closely on a regular basis.

IV. FORMAT OF REPORT

1.9 In light of the lengthy and detailed consideration given by the ALRC to its final recommendations, we are of the view that i t is both unnecessary and unwise to repeat the investigation and consultation undertaken and to restate the detailed reasons for adopting particular proposals. The ALRC'S Interim Report details current New South Wales law (as well as current law in other States and Territories) at Appendix C. The Final Report clearly describes the proposals in the text as well as attaching draft legislation. The ALRC's detailed reasoning is found primarily in its Interim Report.

V. FUNDAMENTAL ISSUE: WHY REFORM?

1.10 The laws of evidence differ greatly among the States and Territories. The ALRC was concerned that federal courts may apply a different law of evidence depending on where they happen to be sitting.[11] Should the federal evidence law be changed to require uniformity among federal courts, different laws may apply in different tribunals sitting in one State or Territory. We consider this to be equally undesirable. The federal. and State tribunals sitting in New South Wales should all apply the same rules of evidence. Parties and practitioners should not be confused and inconvenienced by a need to take account of two separate sets of rules in one State. The pending implementation of cross-vesting legislation in all States and federally, which vests State Supreme Courts with the civil jurisdiction of the federal courts (Federal Court and Family Court) and vice versa, and extends to cross-vesting among the State Supreme Courts, heightens the need f o r uniform laws of evidence. In the absence of uniformity, two undesirable consequences could flow. First, a plaintiff may be able to choose the jurisdiction for commencing an action in which the laws of evidence seem most favourable to the claim. The court asked to transfer such an action may also take into account what rules of evidence are likely to be applied in any transferee court. Considerations as to the rules of evidence to be applied would then add another dimension to the choice of forum. Second, the lack of uniformity could result in the absurd situation of one court hearing two similar claims applying a different law of evidence to each. This could occur because a transferee court has a discretion to apply the law of evidence of any superior court in Australia that it considers appropriate to the transferred action before it. However, a court determining a claim which originated before it, must apply the rules of the jurisdiction in which it sits. Uniformity, then, is an important reason for considering reform of evidence law

in New South Wales and is our primary reason for adopting the great bulk of the ALRC's proposals without amendment.

1.11 The existing laws themselves, are clearly in need of reform irrespective of the desire for uniformity. They are excessively technical and have developed in an *ad hoc* manner. There is considerable inconsistency and uncertainty. There is a clear need for systematic revision and the enactment of a comprehensive package of rules. The ALRC proposes such a package which is the result of a carefully considered balancing process. We recognise that amendments to this package should only be proposed with the greatest of care and for the soundest, of reasons.

1.12 The proposals are a package not only because the various provisions balance each other but also because each provision reflects a set of articulated policies and the whole is internally consistent in policy terms. Therefore, as we are in agreement with the ALRC's policy position, we have resisted minor tinkering with the draft legislation.

1.13 We agree with the ALRC that the primary purpose or role of the rules of evidence is to facilitate the fact-finding task of the Court.[12] Our proposals, like those of the ALRC, "are directed primarily to enabling the parties to produce the probative evidence that is available to them".[13] This does not mean that a trial should be exclusively a search for the truth, although it does involve a serious attempt to reach conclusions about what occurred in the past".[14] The fact-finding objective may have to give way on occasion to considerations of fairness, as well as of cost and time.[15]

1.14 We agree that the fact-finding objective is more likely to give way in criminal than in civil trials. Criminal trials have a "larger and more general object", namely, "to serve the purposes of the criminal laws, which are to control, deter and punish the commission of crime for the general good, [doing so] with an approach and underlying philosophy that differs from that of the civil trial".[16] "Individual liberty and civil liberties are at stake in criminal trials".[17]

1.15 We agree with the ALRC's guidelines for striking the balance between the prosecution and the accused in criminal trials.[18]

> The risk of convicting the innocent should be minimised even if that means some, people remain unconvicted and unpunished.
>
> The criminal trial is accusatorial. The accused person is presumed innocent until proven guilty and he or she is under no obligation to assist the prosecution.
>
> Therefore, the central question in a criminal trial is whether the Crown has proved the guilt of the accused person beyond a reasonable doubt.
>
> For a variety of independent reasons, accused people are entitled to the benefits of certain rights and protections:
>
> - in recognition of their personal dignity and integrity;
>
> - as a measure of the overall fairness of the society to the individuals within it; and
>
> - to give credibility to the idea of the adversary system as a genuine contest.

1.16 Civil trials can more readily be conceived as dispute resolution mechanisms. We agree that the rules of evidence in civil trials should:

> facilitate a genuine attempt to find the facts;
>
> enhance procedural fairness;
>
> enable expedition and cost-reduction; and

> avoid anomaly, technicality, and obscurity.[19]

1.17 We agree that generally the law should be expressed in the form of clear and simple rules, minimising judicial discretion. We also agree that the same rules of evidence should apply to both jury and non-jury trials.

> [I]t 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.[20]

1.18 Finally, the rules of evidence should be formulated in the light of modern knowledge about human behaviour and perceptions. They should also take into account modern technological developments.

FOOTNOTES

1. LRC 17.

2. LRC 29.

3. WP 21.

4. DP 7.

5. DP 8.

6. DP 9.

7 LRC 45.

8. ALRC 26 (Interim).

9. ALRC 38.

10. ALRC 38, 19.

11. *Id*, summary, para 3.

12. *Id*, Summary, para 8.

13. *Ibid*.

14. *Id*, para 32.

15. *Id*, Summary, para 8.

16. *Id*, para 35.

17. *Id*, Summary, para 9.

18. See *Id*, para 35.

19. See *Id*, para 34.

20. *Id*, para 28(b).

2. ALRC Draft Evidence Bill

I. INTRODUCTION

2.1 The Commission recommends adoption of the bill subject only to one substantive change in Part 3 in relation to unsworn statements. This is discussed below in paragraphs 2.16-2.30.

2.2 The Commission also makes comment on some drafting matters raised by the New South Wales Office of Parliamentary Counsel. The changes suggested for this and the other, more substantial, purpose mentioned in paragraph 2.1. are highlighted by underlining in the draft legislation which is attached to this Report in Appendix B. They are explained briefly here.

II. THE ALRC DRAFT BILL

Part 1 - Preliminary, clauses 1-10

2.3 *Definitions*. Most of the amendments suggested to the definitional provisions in cl 3 are made to accommodate the differences in constitutional and judicial structures between Federal and State systems. The amendments to the following terms fall into this category: “enactment”, “federal court”, and the changes in wording made to the definitions of “offence” and “police officer”.

2.4 Document. In the Interpretation Act 1987, the word ‘‘document” is defined to include:

> (a) any paper or other material on which there is writing or on which there are marks, symbols or perforations having a meaning f o r persons qualified to interpret them; and
>
> (b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced;

The ALRC definition “is drawn from the definition provided for in the Acts Interpretation Act 1901 (Cth) s25 but expands it slightly”.[1] The ALRC definition of document includes:

> (a) any thing on which there is writing;
>
> (b) a map, plan, drawing or photograph; and
>
> (c) a thing from which sounds or visual images are capable, with or without the aid of a device, of being reproduced, and also includes a part of a document as so defined and a copy, reproduction or duplicate of a document or of a part of a document.

2.5 Although the core meanings of the two definitions are very similar (paper or other material on which there is writing, compared with any thing on which there is writing and disc, tape or other article from which sounds, images or messages are capable of being reproduced, compared with a thing from which sounds or visual images are capable..... of being reproduced) they are not identical . The “marks , symbols or perforations having a meaning for persons qualified to interpret them” are not real equivalents of the ALRC paragraph (b) which includes “a may, plan, drawing or photograph” within the definition, yet they are probably wide enough to incorporate the ALRC material. The ALRC definition is probably wider than the NSW Interpretation Act when it includes “a *thing* which sounds or visual images are capable of being reproduced”, there having a potential to read the list of items in the State Act to things *ejusdem generis* with “any disc, tape or other article”. The ALRC definition also specifically includes a “copy, reproduction or duplicate of a document” and makes specific reference to a part of a document which the State Act does not.

2.6 The ALRC stated in its Report document was “central” to its suggested reforms.[2] The definition in the bill

> includes all the methods available information: ordinary writing, computer disks, computer tapes, microfilm, photocopies and the like. Documents that are part of the records of public bodies such as governmental and statutory authorities, and the records of parliamentary proceedings (Hansards) are included in a separate category of ‘public documents’[3] because of the special provisions made about authentication and identification of these documents and about evidence of their contents.[4]

2.7 There are clearly two competing claims for uniformity involved in the choice of definition. Since the New South Wales Parliament has so recently settled oil its definition of document for all State purposes, the Commission recommends that the definition in the Interpretation Act 1987 be preferred to that suggested in the ALRC bill.

2.8 *References to business*. An amendment is made in cl 4 (1)(c) to replace the word “duties” with the word “functions”. The Commission believes this accords better with the definition of function in cl 3(2).

2.9 *References to examination in chief etc* There is rearrangement of words recommended in cl 5 (1) (a) from examination of a witness in chief of a “examination in chief of a witness”. This corresponds with the use of the term in Part 3, Division 3, cl 32(a), 40(a), 41, 45 and 49 and in cl 5.

2.10 *Witnesses*. The minor change in cl 10 from “Unless the contrary intention appears a reference in this Act” to “A reference in this Act” represents a stylistic preference and no change in substance.

2.11 There are no other changes suggested in Part 1. The Commission recommends, with the minor exceptions mentioned in paras 2.4-2.12, that Part I of the bill be adopted in full.

Part 2 - Application of Act, clauses 11-17

2.12 There are three amendments recommended in this Part. Clauses 12 and 15 should not be included in the State Act as they contain material peculiar to the federal jurisdiction [cl 12 relates to Territories and cl 15 deals with the application of the Judiciary Act 1903 (Cth)]. Clause 13 has been altered to incorporate this State is standard statement to bind the Crown.

Part 3 - Witnesses, clauses 18-49

2.13 The Commission’s one substantial departure from the policies expressed in the ALRC Report is made here in Part 3. It occurs in Division 2 in relation to unsworn statements, but also affects cl 23, in Division 1, the provision which relates to comment on failure to give evidence.

2.14 The ALRC has recommended retention of the unsworn statement in criminal proceedings, but has subjected its maker to liability for perjury.[5] In making the statement the accused is to be allowed to use a previously prepared statement, or notes.[6] If represented, the accused may seek counsel’s assistance in preparation of these materials.[7] With leave of the court the legal representative is also to be permitted to prompt the accused on matters not raised in the unsworn statement.[8]

2.15 The court is to inform the accused of the choices available in giving evidence - to remain silent, to make an unsworn statement or to give sworn evidence. This advice is to be given in the presence of the jury,[9] but the advice to those appearing without legal representation, that unsworn evidence may be more persuasive and unsworn evidence may amount to perjury, is to be given in the absence of the jury.[10]

2.16 The judge and parties other than the prosecutor are to be permitted to comment on the fact that the accused did not give sworn evidence, but not so as to suggest that the decision not to give sworn evidence was made by the accused with a belief in his or her own guilt.[11] There is also to be no suggestion that sworn evidence is *per se* less persuasive than sworn evidence.[12]

2.17 Commission o n several of these recommendations. While we agree that the unsworn statement should be retained, we do not agree that it should be made subject to the offence of perjury.[13] We agree that the accused should be allowed notes or a written statement, prepared if desired with the assistance of counsel, but we recommend that reference should only be made to such materials with leave of the court.[14]

2.18 The Commission agrees with the ALRC that instructions to the accused on the options available in giving evidence should be given before the jury, but we recommend that the jury and the accused person should also be informed of the following, additional, matters:[15]

> accused persons in criminal trials have a choice of giving or not giving evidence.[16]
>
> the person who makes an unsworn statement is not, subject to cross-examination, whereas a person who gives sworn evidence is.[17]
>
> there is no penalty for giving false evidence in an unsworn statement.[18]

We agree with the ALRC that the advice to be given to the accused person who is not represented (that unsworn evidence may be less persuasive than sworn evidence) should not be given in the presence of the jury.[19]

2.19 We adopt the ALRC recommendations on comment on unsworn evidence subject to the following changes. The judge and parties other than the prosecutor should be able to comment on the fact that the accused gave unsworn rather than sworn evidence.[20] They should not, however, be permitted to comment on the fact where the accused has chosen to remain silent.[21] With leave of the court, the prosecutor should be able to comment on both these matters (failure to give evidence and failure to give sworn evidence) but only where the matter has previously been mentioned before the jury.[22]

2.20 The reasons for our departure from the ALRC recommendations are set out fully in our Report on *Unsworn Statements of Accused Persons* (LRC 45, 1985). The primary recommendation in that Report was that "an accused person should retain the right to present his or her case in a matter that is reasonably free from formal restraint and without exposure to cross-examination".[23] We felt, however, that this recommendation should only be implemented if guarantees could be given of a fair balance being struck between the interests of the accused and those of the public in ensuring a fair trial. These interests we believed were represented in the 10 principles we identified as underlying all recommendations made in that Report. Those principles were set out in Chapter 1 of the Report. Amongst the more important for present purposes were:

> *The Pursuit of Truth*
>
> One of the objectives of the rules of evidence and procedure at criminal trials should be to ensure that the material presented ..... is truthful and accurate. To this end, the law and practice in the courts should encourage witnesses to give truthful evidence and discourage them from telling lies.
>
> *The Relevance of Evidence*
>
> The tribunal ... should receive all the evidence presented to it which is relevant to that issue .... Evidence which is irrelevant to the proof of guilt should where possible be excluded.
>
> *Minimising the Risk of Convicting the Innocent*
>
> The rules of criminal procedure should minimise the risk that people who are in fact innocent are wrongly convicted.
>
> *The Use of Lay Juries in Serious Criminal Trials*
>
> It is generally desirable that the trial of serious criminal offences should be conducted before a judge and a representative jury of citizens. If lay persons are to be involved it is necessary for the jury to be given certain information and instructions to enable it to follow the course of the proceedings and to assist it in reaching a conclusion on the question of guilt.
>
> *The Participation of the Accused*
>
> An accused person has the right to participate in the trial of criminal charges brought against him or her. In formulating rules to prescribe the manner of such participation, it should be borne in mind that the accused person occupies a special position in the trial proceedings as the only person who is liable to suffer conviction and punishment.
>
> *The Privilege against Self-Incrimination*

> The accused should not be compelled to assist the prosecution in the proof of the offences with which he or she is charged.
>
> *The Elimination of Misleading Practices*
>
> The rules of criminal evidence and procedure should embody practices which are open and realistic and take account of current standards of knowledge within the community. Procedures that are fictitious or capable of misleading juries should be avoided unless the overriding need to ensure a fair trial compels.

2.21 Applying those principles to the matter in issue, we stated the following:

> *Perjury and unsworn statements*

2.22 There is no inherent reason why an unsworn statement could not attract a sanction for false swearing....The real issue, however, is whether there should be a sanction for making a false statement. The argument in favour of creating a sanction is that it in might contribute to the truthfulness of the material advanced in the statement by deterring accused persons from telling lies. It is not right that the accused should be given a “free kick” to tell lies with legal impunity as part of a collection of rights designed to ensure any balance of fairness in his or her favour. By rendering the making of a false statement a crime, the criminal law would be performing its declaratory function. This is seen to serve a legitimate purpose irrespective of the approach taken by t lie responsible authorities to the prosecution of accused persons alleged to have made a false statement.

2.23 The contrary viewpoint looks at the practical realities of the Situation. Whilst the principles of double jeopardy do not preclude the prosecution for perjury of an accused person who gives false evidence, the fact is that such prosecutions a rarely if ever brought in New South Wales. If the law were altered so as to render the making of a false statement a criminal offence it would be likely that defence Counsel would feel obliged to draw attention to this fact, if only in an endeavour to minimise what is already seen as the individuals distinction between the value of sworn evidence and that of the unsworn statement. Counsel would riot be doing his or her client justice without referring to features of the unsworn statement which may increase stature in the eyes the jury. Bearing in mind the practical reality that there is no risk of prosecution such an approach might be seen as technically legitimate but as actually allowing the jury to be misled. A judge might then feel inclined to make some comment to the jury on the issue but would probably be precluded from doing so. A final practical consideration advanced by those who hold the view that there should be no change in the present law is that, in all probability, few accused persons who were determined to lie in criminal proceedings would be deterred by the presence of a sanction.[24]

> *Reading a prepared statement*

2.24 Currently an accused person has no right to read a prepared statement. The present practice is inconsistent; some judges will allow an accused person to read a proposed statement, others will not, and others will simply allow the accused to use notes to prompt the memory. This discrepancy in practice is itself unsatisfactory since it has a tendency to create confusion as well as leading to inconsistent treatment of accused persons. We consider that in most cases an accused person’s statement will have a more favourable impact on the jury if it is delivered without reference to a document , since presentation by reading can be mechanical. There are, however, cases such as trials for commercial fraud in which the volume of material that an accused person can legitimately put before a jury is so large as to make it unrealistic to present it without the assistance of an aid to memory. In current practice in New South Wales, this will usually mean prompting of some kind by counsel for the accused. Strictly there is little difference between such prompting and reference being made to written material. For this reason, we suggest that reading of a statement should be allowed but it should not be done as a matter of course. In cases in which the defence involves the accused making a long statement or in any case in which the accused person appears to have exhausted his memory and to have forgotten something which lie wishes to put before the jury, we would anticipate that leave would be granted. We see no difficulty in leaving this practice to the discretion of the trial judge to be exercised as he or she thinks fit in the circumstances of the case.[25]

Comment on unsworn evidence

2.25 One of the matters to which the Commission gave particular attention in its Report was the question of judicial and other comment on the accused person's choice to make an unsworn statement. We found several deficiencies in current practice in the area. One related to use of a formula statement when summing up on the matter to the jury.[26] We found the wording of the formula to be ambiguous and unbalanced and capable itself of being construed as comment on the accused personas failure to give sworn evidence.[27] We also found that, dissatisfied with the formula, many judges were tempted to depart from it,[28] often giving grounds for appeal in doing so.

2.26 Under existing conditions we found that often the first occasion on which the jury would be instructed on the accused person's options in the matter was during the judge's summing up and that the prohibition on comment about the accused person's failure to give sworn evidence often led to confusion amongst the jury as to the accused's rights, some jurors believing the accused to be unable to give sworn evidence while others were aware of the choice which had been made.[29]

2.27 In view of the potential the existing law and practice had to operate capriciously, the Commission recommended that "the judge should be entitled to inform the jury that an accused person may give sworn evidence, give evidence by way of an unsworn statement, or give no evidence and to inform the jury of the legal characteristics of each option".[30] These legal characteristics would be:

that the accused is not liable for perjury; and

that the accused cannot be cross-examined.

2.28 In making this recommendation, however, a majority of those considering the matter in the Commission thought that some restraints had to be imposed on judicial comment to ensure that inflammatory statements were not made about the accused's choice o f way in which to evidence. The Report recommend s that some forms of judicial comment be prohibited. These are:

comment on the failure of an accused person to give evidence;

suggestions that unsworn evidence is by reason only that it is unsworn or that it was not subject to cross-examination, necessarily less persuasive than sworn evidence; and

comment on the reasons why any of the options available was or was not taken unless the issue is raised by the accused person or by a co-accused in the presence of the jury.[31]

2.29 The Commission also recommended that there continue be constraints imposed upon the types of comments available to the prosecution. We recommended that the prosecution be permitted to refer to the, fact that the statement was unsworn and to the fact that there can be no cross examination of the accused person. However, no comment was to be allowed the prosecution on the fact that the accused person remained silent or that the evidence could have been given in a sworn statement.[32]. The only exceptions to the prohibition which were recommended , allowed the prosecutor t o comment on the failure to give evidence, or the failure to give sworn evidence, where the issue had been raised before the jury by the accused, a co-accused or by their legal representatives. Even in those circumstances, the Commission recommended that the judge must give leave before comment could be made by the prosecution.[33]

Comment on failure to give evidence

2.30 In consequence of recommendations on cl 28 the Commission recommends substantial changes to cl 23 as well. The ALRC proposal in cl 23 is that the Judge and any party other than the prosecutor be permitted to comment on the failure of the accused person to give evidence, although not so as to suggest that the failure indicates guilt.

2.31 The current law in this State is contained in the Crimes Act 1900, s407(2). That provision prohibits comment by the Judge or counsel for the Crown on the failure of the accused to give evidence, except where such comment is introduced before the jury by a co-accused.

2.32 In accordance with recommendations made f o r the amendment of cl 28, the Commission recommends that cl 23 be amended to allow the prosecutor (and not the Judge or any other party) to comment on the accused person's failure to give evidence in limited circumstances. When the accused has raised the fact of his or her failure to give evidence before the jury as an issue in the trial the Commission believes that it should be open to the prosecution to comment on that issue. In making this recommendation, however, the Commission does not intend to deny the Judge the right to comment on any statement made by the prosecution. Although we would prevent the Judge commenting directly on the failure of the accused to give evidence, we do not wish to restrict the right to ensure a fair trial. If prejudicial material is introduced by way of comment by the prosecution on the accused person's failure to give evidence, this should be able to be dealt with by the Judge in the same way as he or she would deal with any other material which may prejudice the conduct of a fair trial. If it is thought necessary to do so, an amendment should be made to cl 23 to ensure the continuance of this right.[34]

2.33 There are other amendments we recommend to Part 3 which are of less consequence. In cl 21 we recommend that a change of wording in both paragraphs from "a person who is *acting* as a judge" to "the Judge or juror". We believe the wording "acting as" could be ambiguous.

2.34 Minor changes are also recommended in cl 22 and 24. In cl 22(S) and (8) a stylistic change is made by the addition of the words "without limiting the matters" to the beginning of the paragraph to ensure that the court's discretion is not unintentionally restricted to the matters appearing in the sub-paragraphs which follow. This change has been made at several places throughout the bill. In cl 22(5)(b) "the completion or termination of the prosecution" has been altered to read "the completion or termination of the prosecution of the person" to avoid any ambiguity. In cl 24(5) the wording "that the witness is aware *of the effect of*" has been used to correspond with cl 22(4).

2.35 In cl 24(10) the wording used by the ALRC to describe a de facto spouse has been amended to correspond to the definition of that term appearing in the De Facto Relationships Act 1984. The ALRC wording was chosen to accord with the Sex Discrimination Act 1984 (Cth).

2.36 Other changes made in Part 3 do not require explanation. They are listed here for the sake of completeness:

Cl 31 "Subject to this Act".

Cl 33(2) "in oral or written narrative form".

Cl 36(4) and 37(l) changes to the wording of the clause lion the request of a party" for consistency of expression.

Cl 45(2)(c) "the cross-examiner" introduced for consistency with cl 3 definition and cl 46(2).

Cl 46(3) For the purpose, instead of the plural, purposes.

Cl 48(l) Where a *party* instead of "cross-examiner".

Part 4-Admission of Evidence: Relevance Rule, clauses 50-53

2.37 This Part is accepted without change.

Part 5-Admission and Use of Evidence: Exclusionary Rules, clauses 54-119

2.38 The Commission recommends that this Part be adopted in full. The more significant drafting amendments are explained here, the others are self-explanatory and merely highlighted by underlining in the legislation in Appendix B. The more significant drafting changes are:

Clause 59 has been redrafted to achieve better internal consistency within the clause and to make it correspond with the order of the wording in cl 56 and 57. There has been no change in substance.

In cl 60(1) it was decided that it was more appropriate that the manner of giving notice of the intention to adduce hearsay evidence should be prescribed in rules of court rather than regulations under the Evidence

> Act. As some tribunals may not have power to make rules to govern their own procedures, we have retained the ALRC's reference to regulations as well.
>
> In cl 82 a saving is made in relation to the Defamation Act 1974, which does not need to appear in the ALRC bill.
>
> In cl 89(3) amendments have been made to delete sub-paragraph (d) by incorporating the substance of what appeared there in the preceding two sub-paragraphs, (b) and (c). No change has been made to the substance of the clause.
>
> Clause 90(2) has been redrafted for the sake of clarity and brevity. There has been no change of substance.
>
> In cl 106 the term "involve" in sub-cll (1) and (3) has been changed to "result in" to coincide with the use of that term in sub-cl (2).
>
> In cl 106(l)(b) the wording has been altered to correspond with cl 106(3)(b), "that was prepared *by or at the direction or request of* the client or a legal practitioner". Similar changes have been made in cl 107(4)(b) and 107(11)(b).
>
> In cll 107(15), 109(6), 110(6) and 113(5)(d) a statement has been included to ensure that the commission of an act includes an omission.
>
> Cl 113(l)(b) has been redrafted to accord with cl 106(l)(b). This involves no change of substance. with the use of that term in sub-cl (2).

2.39 The Commission has one reservation in relation to its recommendation to adopt Part 5. This relates to the need for special rules to regulate identification procedures. We believe that there is a need for special rules to govern these procedures and we propose that they should be contained in separate legislation covering police investigation of criminal offences. If such legislation were introduced, breach of any of the rules contained in it would become a matter to be taken into account by a court exercising the general discretions for the admission of evidence in cll 117, 118 and 119.

2.40 One of the members of the Division, Mr Paul Byrne, the Commissioner in charge of the reference on Criminal Procedure in the Commission, expressed concern in relation to two provisions in Part 5.

2.41 Mr Byrne's first reservation related to the use of the word "intentionally" in sub-cll 103(l)(b) and 104(2). it is his view that identification evidence given by someone who has been influenced to make it should not be admitted whether or not the influence exercised was intentional. Inadvertent or subconscious influence could be just as prejudicial to the accused person as influence exercised intentionally. Mr Byrne recommends that the word "intentionally" be removed from cll 103 and 104.

2.42 In cl 105(1) Mr Byrne recommends the removal of the wording if the defendant so requests". In substitution he recommends:

> unless he or she is of the view that it would not be in the interests of justice to do so ...

Mr Byrne's intention is that the decision whether a direction is made to the jury about the need to exercise caution before relying on identification evidence should not be left entirely to the accused person.

Part 6-Other Aspects of Proof, clauses 120-140

2.43 The Commission recommends that the provisions of this Part be adopted subject to the minor drafting changes noted in the legislation attached.

Part 7-Miscellaneous, clauses 141-151

2.44 Subject to the drafting amendments made in cl 144(3) the Commission recommends this Part be adopted unaltered.

FOOTNOTES

1. ALRC 38, App A 7, 216.

2. ALRC 38, 61; ALRC 26, Vol 1, S18.

3. Given in cl 3 as well.

4. See cll 12S(l)(f) and 131.

S. ALRC 26, Vol 1, S86; cll 27 (1); 27(11).

6. Cl 27(3).

7. Cl 27(4).

8. Cl 27(7).

9. Cl 29(2).

10. Cl 29(3).

11. Cl 28(2)(a).

12. Cl 28(2) (b).

13. Cl 27(11) has been omitted from our recommended draft legislation.

14. Cl 27(3), (4).

15. 29(2), (3).

16. Cl 29(2)(b).

17. Cl 29(2)(c)(ii), 29(2)(d).

18. Cl 29(2)(c)(iii).

19. Cl 29(4)

20. Cl 28(1)

21. Cl 23(1)

22. Cll 23(2), 28(2).

23. LRC 45, 4.3, 4.16.

24 LRC 45, 4.19-4.21.

25. LRC 45, 5.4-5.6

26. *Id* 4.50-4.52.

27. *Ibid*.

28. LRC 45, 4.51, 4.54.

29. *Id* 4.57.

30. *Id* 4.62.

31. LRC 45, 4.68.

32. *Id* 4.72.

33. *Id* 4.74

34. In making this recommendation the Commission has in mind the restrictive interpretation given to the Judges' powers in *Greciun-King* (1981) 4 A Crim R 88.

3. ACT Evidence Ordinance 1971

3.1 There are several matters dealt with in the Evidence Ordinance 1971 (ACT) which the ALRC did not consider in its Report because they were considered to be outside its terms of reference. As implementation of the ALRC draft bill in this State will not import the provisions of that Ordinance into the law of New South Wales, there may be gaps in the law of New South Wales which will not exist in the ACT.
3.2 The relevant provisions of the ACT Ordinance are: s83 Prohibition of publication of evidence s85 Publication of disallowed questions s88 Impounding documents.

3.3 The prohibition of publication of evidence, s83, and the publication of disallowed questions, s85 are dealt with to a certain extent in this State by s578 of the Crimes Act 1900. That section provides that the judge presiding at the trial of a sexual offence or an offence of abduction may forbid the publication of evidence "or any report or account of that evidence either as to the whole or portions thereof". The provisions of the ACT Ordinance have much wider application. In the first place, they are not restricted to trials of criminal matters, let alone to trials of sexual and abduction matters. They are also more explicit in the powers they grant to the court . Section 578 of the Crimes Act allows the court to "forbid publication of the evidence 'given at the trial' or any report or account of that evidence either as to the whole or portions thereof", but the section gives no guidance as to the circumstances in which the power should be used. In contrast s83 of the ACT Evidence Ordinance provides that the power to forbid publication arises only where "it appears to a court" that the publication " i s likely to prejudice the administration of justice". The section also expressly allows the court to withhold the name of a party or witness if it is in the interests of the administration of justice to do so. Unlike s 578, s83 of the Evidence Ordinance also allows the court to forbid publication of evidence which is "intended to be given" and can direct that the name of an "intended witness" be withheld from publication also. In making the order under s 83, the court is also given power to require some people to "remain outside the courtroom for such period" as it specifies.

3.4 The penalties for non-compliance with an order under s83 of the Ordinance are a fine or imprisonment, or both.[1]

3.5 There is also no equivalent of that ACT Evidence Ordinance in the statutory law of this State of s88. That provision provides:

> Where a document has been tendered or produced before a court, the court may, whether or not the document is admitted in evidence, direct that the document shall be impounded and kept in the custody of an officer of the court or of another person for such period and subject to such conditions as the court thinks fit.

3.6 The Commission makes no recommendation on these matters, but draws the possible gaps in New South Wales' law to attention for consideration following implementation of the ALRC bill.

FOOTNOTES

1. Evidence Ordinance 1971 (ACT) s84.

4. Developments in Case Law Since ALRC 38

I. LOSS OF CLIENT LEGAL PRIVILEGE BY INADVERTENT DISCLOSURE

4.1 In *Hooker Corporation Ltd v The Darling Harbour Authority*[1] the notes of a conference with its legal advisers taken by one of the defendants' officers were inadvertently produced to the plaintiff without claim of privilege. In the circumstances of the case Rogers J held that there had been no waiver of privilege by the defendant . In arriving at that conclusion Rogers J pointed out that the disclosure had been made by the unintentional inclusion of the notes in one of numerous folders of papers produced to the plaintiff by the defendant and that there had been no misconduct by the plaintiffs and no use of the documents, by plaintiff or defendant, which would make it unfair to withhold the notes from evidence.

4.2 In the Commission's view the law as stated in this case is not represented in the provisions in the ALRC bill. The relevant provisions are clauses 106 and 107. Clause 105 protects confidential communications made between client and legal practitioner and clause 107 deals with the circumstances in which it can be lost. There is no provision in clause 107 to cover the *Hooker Corporation* situation, however. Subclauses (6) and (9) touch on the question by providing that the "substance" of evidence "voluntarily disclosed" by a party may be adduced in evidence despite the cl 106 protection, so long as the party has given express or implied consent to the disclosure. Subclause (7) adds the further protection that disclosure by an agent or employee will not operate as a waiver of privilege unless the agent was authorised to make the disclosure.

4.3 Although offering reasonable protection to the client in the circumstances they address, these provisions do not cover the situation in which a party or his or her agent or employee makes the disclosure inadvertently. The Commission recommends that provision to cover inadvertent disclosure be made in the new law of evidence in New South Wales.

II. JUDGES' POWER TO CALL WITNESSES

2.4 This matter was not dealt with in the ALRC Report for two reasons:

> It was regarded as a procedural matter; and
>
> "A proper assessment of the question would depend on a detailed analysis of the nature and purpose of the adversary system .... The ALRC did not regard the analysis as either appropriate or manageable in the reference, on evidence. [Letter from Stephen Mason, Secretary and Director of Research of the ALRC of 13 October, 1987.]

4.5 There has, however, been substantial support for a change in the law in Australia in recent years. It began with an article in 1982 by the Honourable Mr Justice I F Sheppard entitled "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?".[2] In the article Sheppard J argued that judges should be able to call witnesses in both civil and criminal proceedings. The main reason Sheppard J gave for his view related to cases in which the rule preventing the party who calls a witness from attacking the witness's general credibility sometimes made it unattractive for the party to call a witness who may have important evidence to give. Several examples are given in the article of situations in which it would be useful to allow the judge to call a witness without the parties consent. We find this reasoning persuasive.

4.6 At present in civil cases the judge may only call a witness with the consent of both parties. In criminal cases, it is doubtful whether the judge may call a witness, and the right to question witnesses called by the parties is conceded only in rare and exceptional circumstances.[3] Sheppard J recommended that both rules be reversed to allow the judge to call witnesses in all cases, criminal and civil, although the power to do so was to be "exercised sparingly and with great care".[4]

4.7 Support for this view has been expressed by Street CJ in *R v Damic*,[5] Wilcox J in *Obacelo Pty Ltd v Taveraft Pty Ltd*,[6] Samuels JA in *Superintendent of Licences v Ainsworth Nominees Pty Ltd*[7] and most recently by Kirby P in *Marguet v Marquet*.[8] The question of whether further powers should be given to judges to allow them greater control of the proceedings is discussed in Chapter 6.

III. VOICE IDENTIFICATION

4.8 In August 1987 the Victorian Court of Criminal Appeal handed down its decision in *R v Hentschel*.[9] That decision conflicts with established authority in this State on the question of the admissibility of voice identification evidence.

4.9 The law in New South Wales was first stated by O'Brien CJ of Cr D in *Smith*,[10] approved by the Court of Criminal Appeal on the appeal in *Smith*[11] and *Raymond George Brownlowe*.[12] O'Brien CJ said that in describing how to exercise its discretion to assess whether the prejudicial effect of the evidence outweighed its probative value, the court had to be clear that either the witness making the identification by voice had recognised the voice at the time of the crime because of previous familiarity with it or, white there was no previous familiarity, the witness must have recognised the voice at a subsequent occasion because it was very distinctive when first heard at the time of the crime.[13]

4.10 In *Hentschel*, the Victorian Court of Criminal Appeal rejected the law as stated in *Smith*. Murphy J said:

> The difficulty which I have with the decision in ... Smith (to which my brethren both refer) is that it purports to lay down as a rule of law apropos aural identification evidence, propositions which cannot, I believe, be supported as a matter of principle. Moreover, it lays down these propositions as conditions of the admissibility of such evidence, when I believe that at most they can only go to the weight of the evidence to be led.
>
> I agree that in a case where the only evidence of the identification of the accused man with the person who in f act committed the crime is evidence that his voice sounds like the voice of her assailant (as she remembers it was heard) by a complainant or witness, consideration such as "close familiarity beforehand" or "very distinctive features" in the voice would be most relevant. In their absence, it might well be altogether unsafe to base a conviction on such evidence alone.
>
> However, to require that such conditions exist before allowing any aural identification evidence to given in any case, is surely not the law.[14]

4.11 Brooking and Hempel JJ also rejected the New Wales authority. Brooking J said:

> Notwithstanding the great persuasive weight of decisions of the Court of Criminal Appeal of New South Wales I have reached a clear conclusion that the rule of law laid down in *Smith's Case* is not supported either by principle or by authority. Nor do I accept the submission ... that the rule should be adopted in the modified sense of requiring the exclusion of evidence of an identification which does not answer its requirements in the exercise of a discretion to exclude admissible evidence.
>
> I am pleased to be able to conclude that the rule in *Smith's Case* does not exist, for I should be sorry to think that we were in this country in the early stages of the development of a jurisprudence of voice identification, a set of principles and detailed rules dealing with the admissibility, the exercise of the discretion and the warning given to a jury. For, while judges will not admit it, and like to think that everything depends on the facts of the particular case and that they have not forged fetters and formed formulas, I find it hard to resist the conclusion that we have, essentially in the last few years, gone very close to creating a whole jurisprudence of identification by trying to reduce into a set of principles and rules what is really only a matter of common sense. This development has gone hand in hand with the ever increasing prominence of "the discretion" and its handmaid, the voir dire, with the sometimes ludicrous results on which I had occasion to comment in *R v Haidley & Alford* [1984] 1 VR 229 at p 255.I fear that the voice provides a whole new field in which the seeds of many novel propositions are even now germinating.[15]

In *Haidley and Alford*, Brooking i had pointed out that if all the matters raised in previous cases in relation to the discretion to admit identification evidence were to be taken into account there would be in excess of so items to be put to the jury.

4.12 In view of the conflict between the authorities in the two States it is thought likely that the question will go before the High Court for decision in the near future. As the Commission regards it as a substantive rather than an evidentiary issue, it makes no recommendation for resolution of the conflict in this Report.

IV. LEGAL PROFESSIONAL PRIVILEGE OF IN-HOUSE LAWYERS

4.13 The High Court decision in *Waterford v The Commonwealth*[16] was also handed down after the release of ALRC 38. The decision confirms established principles of common law that confidential communications between government agencies and their salaried legal staff are protected by legal professional privilege so long, as the communications are made for the sole purpose of furnishing legal advice on anticipated or pending litigation.[17] However, in his judgment, Brennan J suggested that there may be a distinction to be made between retained and salaried lawyers in allowing the privilege. Brennan J said:

> The purpose of legal professional privilege is to facilitate the seeking and giving of legal advice and thereby to ensure that the law be applied and litigation be properly conducted. ... If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent.
>
> Competent, in order that the legal advice be sound ani the conduct of litigation be efficient; 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. ...
>
> It is a question of judicial policy, not yet a question of law, whether the privilege should apply when the legal adviser is an employee of the client: to what extent does a contract of employment by the client impair a legal adviser's independence? I find great weight in the view of the European Court of Justice that an independent lawyer is "one who is not bound to his client by a relationship of employment".[18] That view faces up to reality; by contrast, the aspirations which Lord Denning MR expresses in *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners*[*No.2*][19] sound, in my ears, pious but unreal His Lordship said that salaried legal advisers "must uphold the same standards of honour and of etiquette... [and] are subject to the same duties to their client and to the court" as are legal advisers who are not salaried. The difficulty, which His Lordship appreciated, is that the employment relationship creates a conflict between the independence necessary for a legal adviser and the loyalties, duties and interests of an employee. ... Lord Denning's observation which clothed salaried legal advisers with independence has been followed by some judges in other common law countries... as well as by Gibbs CJ, Wilson and Dawson JJ in *Attorney General (NT) v Kearney*.[20] However, in that case, as in this, the legal advisers were the salaried employees of government and their position is, for reasons presently to be mentioned, distinguishable from the position of salaried employees of other clients.[21]

4.14 Bretinan J then discussed the position of the salaried lawyer in non-government employment and said that the cowers of professional disciplinary tribunals to sanction breaches of ethics were greatly diminished when "the breach is committed in the interests of an employer and the security and environment of employment tend to insulate a salaried lawyer from the chief disciplinary influence of the profession - the opinion of one's professional peers".[22] For these reasons Brennan J was "unable to accept the notion that salaried lawyers are generally to be assimilated to the position of the independent legal profession for the purpose of determining t lie availability of legal professional privilege".[23] Other matters had to be weighed in relation to lawyers in government employment, however. Brennan J said:

> The Commonwealth, State and Territorial statutes under which officers are employed in the offices of Crown Solicitors, the Australian Government Solicitor and in the Departments of the respective Attorneys-General give them a certain security of tenure and those statutes Would be construed, in the absence of contrary express provisions, as leaving these officers completely professionally independent. The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers, so that none of them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day. ... I would therefore reject the submission that the officers of the Attorney-General's Department or the Commonwealth Crown Solicitor's Office lack the independence which is essential if legal professional privilege is to attach to documents brought into existence for the purpose of their giving advice or f o r the purpose of obtaining, advice from them.[24]

4.15 Although Brennan J was the only justice to discuss the matter, his judgment leaves the position of salaried lawyer's employed privately or by government agencies other than the Department of the Attorney General in some doubt . Courts in jurisdictions outside Australia have not expressed such doubts.

4.16 In England the leading authority is *Alfred Crompton Ltd v Customs and Excise* (No 2)[25] which states that in-house and retained lawyers are regarded by the law as being in an identical position, and with the same privileges with respect to their clients. This principle was not challenged on appeal to the House of Lords. *Crompton* was applied by the Supreme Court of Ireland in *Geraghty v Minister for Local Government*.[26]

4.17 *Crompton* was followed in Canada in *Crown Zellerbach Canada Ltd v Department of the Attorney General of Canada*[27] in which the Court stated there is no distinction for the purpose of a claim to legal professional privilege, between lawyers in private practice and salaried legal officers".[28] The lawyer in question was the vice-president, secretary and general counsel of the petitioner company. The Court added that the privilege could "arise only in respect of those communications made to or by him while wearing his legal hat".[29] In *Re Director of Investigation and Research and Shell Canada Ltd*[30] the question whether the lawyer-client privilege was abnegate by an Act empowering, the Director to search and enter was considered. The Court took it to be "common ground that the principles applicable are the same in this case, where the communications were between Shell and its salaried lawyers, as they would have been had the communications been between Shell and a firm of general legal practitioners".[31] However, in *Duncan City of Vancouver*[32] it was held that a solicitor appointed head of the City's legal department and serving exclusively in that capacity, was examinable for discovery as an "officer" of the corporation.

4.18 In the United States corporate house counsel qualify as attorneys f o r the purposes of the attorney-client privilege, although mere solicitors of patents do not.[33] In *US v United Shoe Machinery Corp*[34] it was held that a corporation's resident general counsel and his juniors receiving annual salaries and occupying offices in the corporation's buildings, although having the status of employees rather than independent contractors, stood in the same position as outside counsel for the purposes of attorney-client privilege.[35] The Supreme Court in *Ford Motor Co v OW Burke Co*[36] held that the fact that an attorney was employed in the plaintiff's legal department, as distinguished from being a specially retained outside counsel, did not in itself vitiate client-attorney privilege. This was the case notwithstanding that attorneys in corporation' legal departments were paid annual salaries, used the corporations' buildings and advised them, alone and not a number of clients.[37]

4.19 The privilege has been held to extend beyond the provision of solely legal material as well. In *Burlington Industries v Exxon Corp*,[38] a case involving an action for patent infringement, the plaintiff corporation relied on attorney-client privilege to protect confidential communications between members of its control group and in-house counsel from compulsory disclosures, even though the communications contained some non-legal. data. The US District Court held, that such communications could attract the privilege so long as they were primarily legal in nature.

4.20 There has also been judicial comment in the United States on the nature of the protection offered. In *Steel Corp v US*[39] in-house counsel were described as being officers of the court in the same way as are retained counsel. They were said to be bound by the same code of professional responsibility and subject to the same sanctions as members of the private profession. Access to information before the Court of International. Trade was therefore to be granted or denied to both in-house and retained counsel on the same principles. There is some qualification to be made to the extension of the privilege to in-house counsel, however. In the *Re Sealed Case*[40] a corporation under investigation by a grand jury was held to be entitled to assert attorney-client privilege with regard to the advice of a lawyer who served as both in-house attorney and company vice-president. Such advice was only protected upon clear demonstration that it was given in a professional legal capacity.

4.21 The ALRC draft bill does not resolve the doubts raised by Brennan J in Waterford. The definitions of "client" and "legal practitioner" contained in clause 108 of the attached draft[41] contemplate that employees or agents of either party to a confidential communication may be included within the privilege. There is no clear indication that those lawyers working as salaried employees, either in business or government, would fall within the definition of legal practitioner. As the definition of "client" goes no further than to include its employees and agents within the term, it is open to doubt whether it can properly be construed to include the corporate or government employer.

4.22 Two matters are left outstanding following Brennan J's comment in *Waterford*:

> Does legal professional privilege extend to the relationship between a non-government employer and its in-house legal advisers or are these employees to be treated as third parties? if they are treated as third parties they will not be protected by the privilege unless litigation is in prospect , as they were by Cooke J in the New Zealand Court of Appeal in *Guardian Royal Exchange, Assurance of New Zealand Ltd v Stuart*?[42]
>
> Does legal professional privilege extend to all communications between an in-house lawyer and the employer? The accepted test at common law was laid down by the High Court in *Grant v Downs*[43] and approved in *Waterford*.[44] This is the so-called "sole purpose" test which grants privilege only to those documents which are created for the sole purpose of giving or seeking legal advice. Once the purpose of the document is established to be within this purpose, "then the fact that it contains extraneous matter will not deny it the protection of the privilege".[45] The High Court in *Waterford* did acknowledge, however, that "the presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence" but commented that the answer to that question was "simply a question of fact".[46] The ALRC draft bill changes the *Grant v Downs* test from "sole purpose" to "dominant purpose",[47] thus accepting the test as formulated by Diplock J in *Longthorn v British Transport Commission*[48] and approved in New Zealand.[49]

4.23 The ALRC accepted that the dominant purpose test may be more difficult to apply than the sole purpose test, but indicated that in its view the dominant purpose test struck the correct balance between the competing public interests of having full disclosure and of allowing free and frank communication with one's legal adviser.[50] It may be that application of the new test will be exacerbated by the doubts left by *Waterford*. The Commission does not make any recommendations on these matters. It regards them as best settled by the development of case law following implementation of the bill.

V. HEARSAY EVIDENCE - BUSINESS RECORDS EXCEPTION

4.24 The business record exception to the hearsay rule is contained in clause 61 of the ALRC draft bill. It provides *inter alia* that previous representations container in a document forming part of a record made in the course of business will be admissible in evidence despite the Hearsay rule if made by a person reasonably supposed to have personal knowledge of the asserted fact or on the basis of knowledge supplied by that person. Applied to the facts of the recent case of *Ross McConnel Kitchen & Co Pty. Ltd (in lig) v Ross (No 1)*[51] this provision would seem to give the opposite result to the decision arrived at by the Supreme Court under Part IIC of the Evidence Act 1898.

4.25 In the case a series of sheets marked "Current Account Statement" were submitted in evidence. They had been processed by the clearing house of the Sydney Futures Exchange from material supplied by tile plaintiff. Under s14CE of the Evidence Act such material is admissible in evidence if it is part of a business record, made in the course of or for the purposes of business and prepared by a qualified person. "Qualified person" as defined by s14CD means the owner of the business, an employee or agent, a person retained for the purposes of the business or a person associated with the business in the course of another business.

4.26 In *Ross McConnel* the clearing house was held not to come within this definition of "qualified person". The most relevant part of the definition, "person associated with the business in tile course of another business" could not be read widely enough to cover the clearing house, for to do so would have deprived the definition of its purpose, which was to ensure that only documents prepared by "insiders" were admissible.[52] Nor could the clearing house be included in the part of the definition which covered servants and agents engaged in tile business. This had to be read "ejusdem generis with employee" to "connote the sort of situation where a person is doing some service for the business under a contract for services or the like not as an actual employee."[53] There was insufficient evidence in *Ross McConnel* to show what the contractual relationship was between the clearing house and the plaintiff, to enable the Court to find that the clearing house was an employee or agent of the plaintiff company.

4.27 If the facts of the case were to be decided under clause 61 of the ALRC draft bill, the Current Account Statement would seem to qualify is a business record which could be submitted evidence. Under paragraph

61(1)(d) the record must have been made "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 assented fact". The status of the clearing house as insider, employee or agent is unimportant to the definition, the crucial element being who supplied the information.

4.28 It would also seem that the evidence obtained from the clearing house could be introduced under cll 56(b) and 125(1)(d) and (e) of the draft bill. In spite of the hearsay rule, cl 56(b) allows evidence of a previous representation to be addressed by the production of a document "to which it is reasonably necessary to refer to understand the representation". It only applies, however, where the person who made the previous representation is unavailable. Cl 125 is specifically directed to the problem of adducing evidence from computer banks. It would allow a computer print out to be used for the purposes of cl 56.

4.29 The Commission sees no need to make a recommendation on the issue. We merely draw attention to the possible reversal of New Wales authority which may be caused by implementation of the bill.

FOOTNOTES

1. (1987) 9 NSWLR 538.

2. (1982) 56 ALJ 234

3. *Titheradge v The King* (1917) 24 CLR107, 114.

4. 56 ALJ at 243.

5. [1982] 2 NSWLR 750, 755-56.

6. (1986) 66 ALR 371.

7. (1987) 9 NSWLR 691, 698-699.

8. Unreported NSW Court of Appeal 23 September 1987.

9. Unreported, 11 August 1987.

10. (1984) 12 A Crim R 439; [1984] 1 NSWLR 462.

11. (1986) 7 NSWLR 444.

12. (1987) 24 A Crim R 377.

13. Summary from judgment of Hunt J in Brownlowe, *cit* 379.

14. Hentschel, 4-5.

15. *Id* 7.

16. (1987) 163 CLR 54.

17. Id Mason and Wilson JJ, 63-64.

18. [1983] QB 878, at 951.

19. [1972] 2 QB 102.

20. [1985] 158 CLR 500 at 510, 520-521, 530-531.

21. *Waterford*, at 71.

22. Id at 72.

23. *Ibid*.

24. *Id* at 72-73.

25. [1972] 1 QB 102, 129.

26. [1975] 1 R 300, 312.

27. [1982] CTC 121 (BC SC).

28. *Id* at 123.

29. *Ibid*

30. (1975) 55 DLR (3d) 713, 721.

31. *Id* at 721.

32. (1917) 36 DLR 218.

33. 328 AM Jur 2d 554 174.

34. (1950) 89 F Supp 357 (DC Mass).

35. See also *US v Aluminium Co of America* (1960) 193 F Supp 251 (DC NY).

36. (1969) 299 NYS 2d 946, 59 Misc 2d 543.

37. See also *8 in 1 Pet Products Inc v Swift & Co* (1963) 218 F Supp 2S3 (DC NY): legal advice rendered to a corporation by in-house counsel was said to fall clearly within the attorney-client privilege.

38. (1974) 65 FRD 26 (DC Md).

39. (1984) 730 F 2d 1465 (US District Court in the District of Maryland).

40. (1984) 237 App DC 312, 737 F 2d 94.

41. Clause 108 of the draft bill attached to ALRC 38.

42. [1985] 1 NZLR 596, 602.

43. (1976) 135 CLR 674.

44. Waterford, 66.

45. *Ibid*.

46. *Id* 66.

47. Clause 106.

48. [1959] 1 WLR 530.

49. *Guardian Royal Exchange Assurance v Stuart, op cit* at 603.

50. ALRC 26, 881, discussed also in *Waugh v British Railways Board* [1979] 1 WLR 150, 154.

51. [1985] 1 NSWLR 233.

52. *Id* at 236.

53. *Ibid*.

5. Consequential Amendments in New South Wales

I. INTRODUCTION

5.1 It has not been possible for the Commission or the Parliamentary Counsel's Office to undertake a full examination of the consequential amendments which may be necessary following implementation of the ALRC draft bill in this State. With one exception, the Evidence (Reproductions) Act 1967, the following comments are limited to inconsistencies apparent between the bill and recent amendments to State legislation.

II. COMPARISON OF STATE LEGISLATION AND THE ALRC DRAFT BILL

A. Crimes Act 1900, ss413A, 413B and ALRC bill c11 91-9S -Character Evidence and Credibility

5.2 The ALRC draft bill would seem to cover the same field as is covered by the Crimes Act 1900. As a consequence we recommend that ss413A and 413B be repealed expressly.

5.3 Section 413A(1) protects the accused from cross-examination on any matter which tends to reveal

(i) a previous charge or conviction of an unrelated offence; or

(ii) bad disposition or reputation.

The protection only extends to tendency evidence, and not to evidence admissible to prove commission of the offence by the accused [sub-s 2]. The protection is also lost if the evidence is necessary to prove the innocence of a co-accused [sub-s 3]. Where such evidence is sought from a witness, the court may admit it if it is of the opinion that the main purpose of the question is to raise an issue of the witness I s credibility [ss4]. This exception does not extend to questioning of the accused unless the court permits it "in the interests of justice". It does not prevent a co-accused from questioning the accused on tendency evidence. [ss5].

5.4 Clause 91 of the ALRC draft bill allows tendency evidence to show bad character where evidence of good character has previously been admitted. Clause 91 allows tendency evidence of both good and bad character despite the hearsay, opinion and tendency rules, but cl 93 requires leave of the court before the accused can be cross-examined on it. In combination cls 91 and 93 would seem to cover the field of ss413A (1), (2) and (5).

5.5 Clause 92 deals with the character of co-accuseds. It permits evidence of expert opinion in relation to a co-accused and evidence to rebut it. This is inconsistent with s413 which permits evidence of the witness s own knowledge of the habits disposition and conduct of another person (whether the accused or another) whether the witness has expert knowledge or not. Evidence going to the credibility of a witness is permitted by cl 96, so long as it has "substantial probative value" as that is defined in cl 96(3). This would seem to overtake much of cross-examination of the accused in the interests of justice untouched (this is also contained in s413A(4). Cl 93 provides the necessary protection for the accused. Our conclusion is that s413A should be repealed.

5.6 Section 413B permits the accused to give evidence of good character or call and question witnesses on such evidence, but s 413B (2) provides that where the accused does this, the prosecution and co-accuseds may offer evidence of bad disposition and cross-examine the accused on the issue. Clause 91(4) would seem to achieve the same. It makes the general statement that where tendency evidence has been called to prove good character of the accused, the hearsay, opinion and tendency rules will not prevent evidence of bad character. We recommend that s413B be repealed.

B. Crimes Act s409B and ALRC bill, Part 5, Divisions 5 and 6-Admissibility of Evidence of Previous Sexual Experience.

5 7. Section 409B(3) makes evidence of sexual reputation inadmissible in "prescribed sexual offence proceedings" [s405B(l) offences] with some exceptions. The exceptions are:

evidence of experience at or about the time of the offence and events forming part of the offence

evidence of an existing or recent relationship between the complainant and the accused

evidence of sexual disease possibly transmitted between the parties

evidence of an allegation that commission of the offence had followed the discovery of pregnancy or disease in the complainant

Such evidence may be sought if "its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission" (s409B(3)).

5.8 The final exception to the admission of this evidence appears in s409B(5). This concerns evidence of sexual experience which is revealed in the prosecution case and which indicates that prejudice to the accused is likely if cross-examination of the complainant is not permitted (s409B(5)). None of these questions is to be put without prior leave of the Court sought in the absence of the jury.

5.9 This provision is part of a Code Established for the trying of sexual offences introduced by the Crimes (Sexual Assaults) Amendment Act 1981. The detail does not appear in the ALRC Bill, although its provisions may be affected by the general provisions in Divisions 5 and 6 covering conduct, character and credibility. A savings provision will be needed in the new Evidence Act to ensure s409B is preserved. Some examples may be given of the likely effect of the ALRC bill if s409B is not preserved:

Clause 84(3)- Division 5 does not apply where the evidence of character or conduct is a fact in issue. This is similar to s409B(3) which permits evidence of sexual experience forming part of the offence or occurring at about the same time as it.

Clause 87 would seem to allow reception of evidence of sexual experience in circumstances in which s409B would exclude it, eg evidence of previous intercourse with the accused is allowed by s409B(3)(b) in relation to all existing or recent relationship between the complainant and the accused.

Clauses 96, 98 and 101 , in relation to proof of credibility, may be interpreted inconsistently with s409B in that they are more general than s409B.

C. Children (Criminal Proceedings) Act 1987, s13 and ALRC bill, Part 5, Division 3 Police Questioning of Children

5.10 Section 13 of the Children (Criminal Proceedings) Act 1987 continues a procedure which has been a feature of this State's criminal law since 1977.[1] It prevents the police using evidence obtained from children in criminal proceedings unless the interview from which the evidence was obtained was conducted in the presence of a responsible adult. Exceptions to the regime, provided in s13(l) (b) , are in the discretion of the court.

5.11 There is no equivalent scheme in Part 5 of the ALRC bill, however, cl 14 of the bill which saves other State legislation, should have the effect of preserving s13 of the Children (Criminal Proceedings) Act.

D. Evidence (Reproductions) Act 1967 and ALRC draft bill, Part 6, Divisions 2 and 3, c11 123-

5.12 The ALRC provisions are intended to "address the issue of the method by which the contents of writings and modern documents such as tapes and discs may be proved".[2] The intention was "to avoid adding to the requirements of the existing common law and statutory rules" there being "no need to complicate matters further".[3] Thus, the existing law, "as to the permitted methods of proving the contents of a document"[4] (including the best evidence rule)[5] was abolished "a new rule of exclusion substituted to which exceptions were then provided."[6]

5.13 The general rule proposed in the ALRC draft bill is that oral evidence and copies are generally "inadmissible as evidence of the contents of the original document. There were proposed, however, a number of exceptions covering all modern information storing media, such as computer discs, tapes and microfilm".[7]

5.14 The ALRC has t has proposed a new code for the proof of contents of documents which is not intended to coexist wine existing models. The Commission has approved the ALRC model and therefore recommends repeal of the Evidence (Reproductions) Act 1967.

E. Jury (Amendment) Act 1987, ss68A, 68B and ALRC bill, c1 111(3)-Disclosure of Jury Deliberations

5 15. These provisions all address the question of the disclosure by jurors of information about their deliberations. They are not inconsistent and therefore may stand together. Section 68B forbids a juror from wilfully disclosing information about the jury's deliberations during the trial , unless with the consent or at the request of the judge or coroner, while s68A forbids the soliciting of such information. Clause 111(3) is complementary to these provisions in that it prevents the information being used in evidence, except in the proceedings before the court.

F. Interpretation Act 1987, ss44, 4S, 51, ALRC bill c11 120, 129, 130-and Evidence Act 1898, ss15-19, 24,24A-Judicial Notice of Documents and Presumptions of Validity

5.16 Although phrased in different language, these provisions are not inconsistent. The provisions of the Evidence Act 1898 which relate to the same or similar matters are more detailed, however, and will need to be examined f o r consistency on implementation of the ALRC bill. The sections of the Evidence Act concerned are ss15, 16, 17, 18, 19, 24 and 24A.

G. Evidence Act 1898, s42A and ALRC Bill cl 139-Uncorroborated evidence of children.

5.17 On the implementation of the ALRC bill it may be necessary to make provision to ensure that s42A of the Evidence Act continues to operate. Section 42 allows the jury to be warned that it is unsafe to convict a person on the uncorroborated evidence of a child. The provision is not saved by cl 14 of the ALRC bill because cl 139(3) applies "notwithstanding any rule, whether law or practice, to be contrary". Cl 139 Makes it unnecessary to warn the jury that

> "it is dangerous to act on uncorroborated evidence". Although the provisions are not inconsistent, it may be wise to ensure that ambiguity does not arise from their coexistence.

FOOTNOTES

1. Child Welfare Act 1939, s81C (inserted in 1977).

2. ALRC 26m 649; ALRC 38, 231.

3. *Id* 65I.

4. ALRC 38, 231.

5. ALRC 26, cl 48.

6. ALRC 38, 231.

7. ALRC 38, 229.

6. Expedition of Court Proceedings

I. BACKGROUND

6.1 In a letter of 9 July 1986 to the Attorney General the Chief Justice, Sir Laurence Whistler Street, KCMG, said:

> Expressions of concern regarding the length of Court proceedings continue to escalate. As things stand at present, the Courts do not really have effective control over the time taken by the profession in the varying aspects of a hearing. At the same time, the public perception is that the Court, and to some extent the Government, is responsible for the cumbersomeness with which litigation proceeds on its stately way.

Our Court facilities are an expensive resource and I feel that it is uneconomic simply to deliver our facilities up to the hands of the profession once a case is called on for hearing. Judges and Magistrates need positive powers to control the scope and length of proceedings, this requirement having become particularly relevant in the modern climate of legally aided litigation.

6.2 Sir Laurence made two suggestions to redress the situation. The first gave express power to the judge "to limit or restrict the subject matters or topics or the scope of any subject matters or topics" canvassed in evidence and the second allowed the judge to direct that in some circumstances evidence in chief should be given by affidavit. The full text of the Chief Justice's proposals appears in Appendix A. The Attorney General at that time, the Honourable T W Sheahan BA, LLB, MP, sought comment on the proposals from the Law Reform Commission. It was decided that the Commission's comment should be given as part of this Report on the implementation of the Australian Law Reform Commission Report on Evidence.

II. EXPEDITION OF COURT PROCEEDINGS- EXISTING POWERS

6.3 There are three sources of power by which the Supreme Court might expedite proceedings:

> the inherent jurisdiction
>
> Supreme Court Act 1970, s82
>
> Supreme Court Rules, Part 26 Rule 1

A. The Inherent Jurisdiction

6.4 In *Cocker v Tempest* Alderson B said:

> The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own powers abused for the purpose of injustice. [1]

This description of the powers of the courts has been approved in New South Wales in *Tringali v Stewardson Stubbs & Collett Ltd*.[2] The powers are apparently wide enough to encompass the matters raised by the Chief Justice,[3] but have never began exercised to achieve those purposes. Indeed, there are many statements in the decided cases that these powers should be exercised very sparingly. [4]

B. Supreme Court Act 1970

6.5 Section 82(1) of the Supreme Court Act 1970 gives power "at any stage of the proceedings" to (a) "dispense with the rules of evidence for proving any matter which is not bona fide in dispute" and (b) to "require any party... to make admissions with respect to any document or to any question of fact" Subsection (1)(a) also allows the Court to dispense "with such rules as might cause from any commission to take evidence or arising elsewhere...".

C. Supreme Court Rules

6.6 The Supreme Court has power under Part 26 Rule 1 "at any time and from time to time" to "give such directions and to make such orders for the conduct of any proceedings as appears convenient ...for the just,

quick and cheap disposal of the proceedings". These directions and orders may be made 'whether or not inconsistent with the rules".

D. Discussion

6.7 Section 82(1)(a) is taken from the Commercial Causes Act 1903 and, with Part 26 Rule 1, is clearly intended to assist the Supreme Court in expediting its proceedings. [5] However, it has been used conservatively and has never allowed the Supreme Court to gain full control of proceedings before it. There are probably two reasons for this conservatism:

the Court has been concerned not to derogate, from the rules of natural justice; and

deference has been paid to the very limited interpretations given to similar provisions in other jurisdictions.

III. EXPERIENCE IN OTHER AUSTRALIAN JURISDICTIONS

6 8. The earliest reported reference to use of such provisions in Australia appears in the Victorian case of *Murine Eye Reinedy Co v Eldred*.[6] Section 25 of the Supreme Court Act 1915 (Vic) gave the Court power to make rules 'regulating and directing the means by which particular facts may be proved and the mode in which evidence thereof may be given".[7] Dixon A.J (as he was then was) said this power was 'very wide" and wide enough to permit "the enactment of a rule which empowers, the Court to authorise or direct the proof of facts...by some particular means not allowed by the common-law rules of evidence".[8]

6.9 Equivalent powers of the Federal Court are also contained in rules made under the enabling Act.[9] Although Order 33 rule 3(b) is expressed in wide terms- "to dispense with compliance with the rules of evidence where such compliance might occasion or involve unnecessary or unreasonable expense or delay..." it has been interpreted narrowly. *In Pearce v Button*[10] Lockhart J of the Federal Court expressed the view that the power given by s59 of the Act was wide enough to "authorise a rule which empowers the court to allow the proof of facts at the hearing by some means not allowed by the rules of evidence".[11] However, he and the other two judges on the Court[12] held that some limits had to be placed on the power in O33 R 3(b) to dispense with the rules of evidence. The power did not only allow the Court to dispense with the rules of evidence when necessary to facilitate proof of merely formal matters. It could be used for matters going to the "heart of the case" but where the matter was of central importance in this way "a judge should be slow to invoke" the power to dispense.[13] Spender J stated the applicable principles in the following way:

> The right to be heard is a major component of the principles of natural justice. Implicit in that right is the right of a party reasonably to test the case presented against it... a clear and serious breach of the requirements of natural justice occurs when a party to proceedings, on a matter central to those proceedings, is denied a fair and reasonable Opportunity to challenge what is said against it.[14]

Fox and Lockhart JJ expressed themselves to be in general agreement with such principles when dealing with matters which were "central to the case".[15]

6.10 Similar views had been expressed on behalf of the Queen's Bench Division of the English High Court by Bingham J in *H v Schering Chemicals Ltd.*[16] He said:

> I think that the object of the rule is to permit the proof of matters, or to facilitate the proof of matters, which, although in issue, are largely peripheral to the major issue in the action, that as to facilitate the proof of matters which are largely, although not completely formal.[17]

6.11 Other courts have been even more cautious in their approach to these powers. *In Downs Irrigation Co-operative Association v National Bank of Australasia (No. 2)*,[18] Andrews SPJ restricted the powers of the Queensland Supreme Court under a similar provision to the "proof of peripheral matters, or purely formal matters" and said that they did not "extend to proof contrary to rules of evidence or by way of extension of rules of evidence of matters bearing upon issues central to an action or matters".[19]

IV. ANALYSIS OF EXISTING POWERS

6.12 In that it is restricted to matters "not bona fide in dispute" the power of the Court to dispense with the rules of evidence under s82 of the Supreme Court Act is limited in the same way as the powers of courts in other jurisdictions. This is the same wording as used in the rules of court interpreted in *Pearce v Button* and therefore the power could be expected to be interpreted in a similarly restrictive way. Thus, if the evidence to be adduced goes to an issue which is "central to the case" (the wording used by Fox J in *Pearce v Button*) the Court will be slow to depart from the rules of evidence.

6.13 Although not circumscribed in the same manner, the powers of the Court under the Rules and in the inherent jurisdiction are also likely to be given a limited interpretation. The powers under consideration in *H v ScherinQ Chemicals Co and Downs Irrigation Co-operative Association v National Bank* were not subject to the constraint that they were to be exercised only in relation to peripheral matters, yet they were interpreted as not applying to proof of matters which were central to the dispute.

6.14 The reasons for restraint were stated by Spender J in *Pearce v Button*. He said that the "paramount consideration" in determining whether to exercise the power to dispense was "justice between the parties"[20] and he added (as quoted above) 'the right to be heard is a major component of the principles of natural justice". These views, in particular that parties have a right to test the case against them, have been supported in several courts.[21]

V. PARTY AUTONOMY AND PROSECUTION

6.15 It is reasonably clear that express provision is needed if the courts are to exercise the types of powers proposed by the Chief Justice. The question is whether it is appropriate to vest those powers in the courts.

A. Consistency of Proposals with ALRC Report

6.16 In its Interim Report the ALRC dealt with the issue under the headings Party Autonomy and Party Prosecution.[22] These headings contained "two distinct principles" said to be assumed in any adversary system:

> *Party Autonomy*. The parties have the right to pursue or dispose of their legal rights as they wish. In addition the parties define the dispute.
>
> *Party Prosecution*. The parties have the right and the responsibility to choose the manner in which they will go forward with their case and the proof they will present to support it. The judge's role is to evaluate passively the merits case as and when it is presented to him.[23]

The latter principle was said to be reflected in Australian law and reference was made to authorities which supported the view.[24] The ALRC made it clear that the proposals for reform it was putting forward were made in a context in which the existing powers of judges would not change. The Commission said:

> Generally, arguments for change in the judge's powers are based on criticisms of the consequences of an adversary system. A detailed examination of that system is needed if the issues are to be dealt with satisfactorily. A reference on the trial system or on civil and criminal procedure would be required to raise issues of this nature. Any statutory statement of the law of evidence should assume the present law concerning the right or lack of right of the judge and the parties to call and question witnesses.[25]

6.17 The ALRC accepted, however, that both the parties and the community would make judgments about the civil trial process by reference to its efficiency and that therefore "any rules or proposals "would have to be "evaluated in the light of their effect on the time and cost of the trial". Greater tolerance was expected in relation to the criminal law process, but in making recommendations in this field the Commission kept in mind the constraints imposed by the time and cost of litigation. [26]

6.18 The Commission looked at some aspects of the powers to dispense with rules and to call for evidence by affidavit, ut only so far as they were ancillary to matters within its terms of reference.[27] Thus clause 142 of the draft bill allows evidence of some limited matters to be given by affidavit (first hand hearsay, business records,

tags and labels and telecommunications).[28] Clause 143 permits the court to require a party to comply with a request from another party to produce documents or call witnesses where the request is reasonable. Amongst the matters the court is to take into account in making an order under cl 143 is the practicality of the request and any delay which may be caused by compliance with it. 29 Clause 147 allows the court to waive the rules of evidence in some circumstances 30 if it has the consent of the parties. Cl 147(2) imposes special restrictions in relation to obtaining the consent of the defendant in criminal proceedings, while cl 147(3) gives power to dispense with the rules of evidence in relation to those matters mentioned in cl 147(1) which are not "genuinely in dispute". Power is also given to dispense with the rules of evidence in relation to the same matters where their application "would cause or involve unnecessary expense or delay".[31]

6.19 It is clear that the proposals made by the Chief Justice go beyond recommendations made in the ALRC Report. The Commission must seek guidance from other sources.

B. Case Law

6.20 The case law is ambiguous in its treatment of the role of the judge in adversary proceedings. On the one hand there is authority that a trial is a proceeding *inter partes*, whether the Crown is a party or not, aid the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties".[32] on the other hand, Lord Denning MR has said:

> The judge's part... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; *to exclude irrelevancies and discourage repetition*; to make sure the wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies.[33] (emphasis added).

6.21 There is authority to support both views of the role of the judiciary; none of it inconsistent because no court has directed itself to the broad policy issues involved. Where the powers have been interpreted restrictively the court has been dealing with the possibly serious incursion on the parties autonomy which is involved in a judges summonsing witnesses without their consent.[34] By contrast there have been more expansive interpretations of judicial power when the court is undertaking a survey of judicial functions in an attempt to develop principles of a more general application.[35]

C. Learned Commentary

6.22 Sir Richard Eggleston is one of the few in Australia who have commented on the judicial powers to control proceedings. In an article in 1975 he suggested that judges should have power to control the cross examination of witnesses.[36] As his comments were made in the context of a proposal that witnesses be permitted to present their evidence in narrative form, they are probably not of general application, although earlier in the article, he had indicated that one of the problems of the adversary system was delay occasioned by the court's inability to control the conduct of the case.[37]

6.23 In a Paper published in the same journal, J. Doyle Davies QC, from Victoria, cast the responsibility for court delays elsewhere than the courts.[38] He thought that it was for the profession to take active steps to reduce delays, both in proceedings in court and in pre-trial procedures. Apart from a reference to the possibility in future that judges may call for the parties' submissions on some matters to be made in writing, instead of being delivered orally, Davies did not see the responsibility for reducing delays as lying with the court.[39]

6.24 What is more important to extract from these two articles, and from the contributions of other writers overseas, is the fact that the emphasis for the conduct of the proceedings is placed not on judicial responsibility but on the responsibility owed by the profession. [40] R.M. Jackson puts the point in the following way:

> The responsibility of the parties is not confined to settling the issue to be decided, but extends to the preparation of the evidence and its presentation. There is no rule in civil cases that all the available evidence must be put before the court.[41]

At least until 1977 the judge was not regarded as able to take a very active role in the conduct of the proceedings. Indeed, it was regarded as potentially harmful to the system of justice that the judge should "descend into the arena" so as to "have his vision clouded by the dust of conflict".[42]

VI. JURISDICTIONS OUTSIDE AUSTRALIA

6 25. It is interesting to note that when seeking an example of an extensive judicial discretion to control proceedings in court Fox J chose s82(1)(a) of the Supreme Court Act 1970 (NSW).[43] Others regard s82 as going no further than the common law. [44]

6.26 When the American Law Institute began developing the Model Code of Evidence in 1942, it said of a provision (Rule 105) that gave the judge power to control "the conduct of the trial to the end that the evidence shall be presented honestly, expeditiously and in such form as to be readily understood"... "This Rule recognises in its introductory clause the power of the judge as it exists under the English common law". [45] The comment was not repeated in relation to Rule 303, however. Rule 303 states:

> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
>
> > (a) necessitate undue consumption of time, or
> >
> > (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
> >
> > (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.
>
> (2) All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated.

In an article appended at the end of the Code, Judge J Rus-sell McElroy does claim that Rule 303 merely "follows in paths widely beaten out by common law decisions. P-aragraph (a) is right down the line with numerous common law decisions". He cited US case law and Sir James Fitzjames Stephen as authority.[46]

6.27 A task force of the Uniform Law Conference of Canada in 1982 did not think Rule 105 of the 1942 US Model Code represented the common law. They rejected it as giving the trial judge "too much control".[47] The Task Force also thought a proposal put forward by the Canadian Law Reform Commission in 1972 extended the trial judge's discretion too far, after the Commission had attempted merely "to codify the authority that the trial judge has under the present law to control the conduct of the trial".[48]

Clause 58 of the Canadian Law Reform Commission's Code read:

> 58. (1) Subject to this section, the parties to a proceeding have the responsibility of presenting the evidence and examining the witnesses.
>
> (2) The judge shall exercise reasonable control over the presentation of evidence and the examination of witnesses so as to make them effective for the ascertainment of the truth, to avoid needless consumption of time, and to protect witnesses from harassment or undue embarrassment.
>
> (3) The judge may exceptionally call, recall or examine a witness to clarify or elicit evidence if this appears essential to the just determination of the proceedings.

6.28 The more modest powers suggested by the Task Force were in the following terms:

> Subject to the power of the court to exercise reasonable control over a proceeding, to protect witnesses from harassment and to avoid prolixity, the parties to a proceeding shall determine the manner in which they present the evidence and examine witnesses.[49]

6.29 This is the style of provision also adopted in the Uniform Rules of Evidence in the USA:

> (a) Control by court. The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on dire-t examination.
>
> (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified- with an adverse pity, interrogation may be by leading questions. [50]

In turn this provision seems to have been justified as representing nothing more than the common law.

VII. CONCLUSION

6.30 The Commission agrees with the ALRC that the matters raised in the Chief Justice's suggestions go well beyond the terms of its current reference on evidence. [51] This brief survey of the law and practice of the courts indicates that judges probably have the powers proposed but that they do not use them. When it examined law and practice in its courts the Canadian Law Reform Commission came to a similar conclusion, that the courts had the powers desired but chose not to use them. The Canadian Commission's recommendation was that a provision giving express powers to expedite proceedings was necessary "because in many instances trial judges appear to be [52] in doubt about their discretionary powers".

6.31 The matter for decision is whether express provision should be made in the terms sought by the Chief Justice. A detailed examination of the nature and function of the adversary system would be required to settle that question. As the Commission has had neither the time nor the resources to undertake such a study in the course of this reference, we make no recommendations on the issues raised.

FOOTNOTES

1. (1841) 7 M & W 5011 503-504; 151 ER 864, 865

2. (1966) 66 SR (NSW) 33S, 344.

3. H Jacob, The Inherent Jurisdiction of the Court (1970) 23 *Current Legal Problems* 23, 27 32- 33 sets out the background to and uses of the power; see also K Mason, the Inherent Jurisdiction of the Court (1983) 57 *ALJ* 449 and The Honourable Mr Justice A J Rogers, Judges in Search of Justice (1987) 10 *UNSWLJ* (No 1) 93.

4. *Id Tringali* 344-345 and the English cases mentioned therein.

5. Ritchie's Supreme Court Procedure (NSW) 1149, 2421.

6. [1926] VLR 425.

7 A similar provision appeared in the Supreme Court Act of 1958 and it has been continued in the Supreme Court Act 1986 (Vic) s25(1)(a).

8. *Id Murine Eye Remedy Co. v Eldred*, 426.

9. Federal Court of Australia Act 1976, s59.

10. (1986) 65 ALR 83.

11. *Id* 97.

12. Fox and Spender JJ.

13. Id 97 per Lockhart J, 101 per Spender J.

14. *Id* 102.

15. *Id* 90, 101.

16. [1983] 1 All ER 849.

17. *Id* 8S3.

18. [1983] 1 QdR 475.

19. *Id* 480.

20. *Id* 101.

21. *Downs Irrigation* 477-478; *H v Scherins Chemicals* 853-854; *Meer v Guardian Assurance Co Ltd*(1964) 80 WN (NSW) 940, 943 where the evidence was admitted but comment made that "its weight will be lessened by the lack of cross-examination".

22. ALRC 26, paras 38-44, 56-64.

23. Adopted from N. Brooks "The Judge and the Adversary System" in AM Linden (ed) *The Canadian Judiciary* (Osgoode Hall Law School, York University, Toronto, 1976).

24. The cases cited at ALRC 26, para 43, note 44 are: Titheradge v R (1917) 24 CLR 107; U (1952) 85 CLR 365; *Richardson v R* (1974) 48 ALJR 181 and *Whitehorn v R* (1983) 57 ALJR 809, 814 ff.

25. ALRC 26, para 43.

26. ALRC 38, para 46(d).

27. *Id* paras 242, 247; Draft Bill clauses 142, 143, 147, 148.

28. Matters raised in clauses 56-58 and 61-63.

29. Cl 143(4)(g).

30. In relation to Part III, Division 3- the Manner of Giving Evidence, Part V, Divisions I and 6 hearsay and evidence relevant to credibility and Part VI, Division 2 documents and the best evidence rule.

31. Cl 147(3)(b).

32. *Titheradge v The King* (1917) 24 CLR 107, 117 per Barton J.

33. *Jones v National Coal Board* (1957) 2QB 55, 64.

34. *Richardson v The Queen* (1974) 48 ALJR l81, 182; *Whitehorn v The Queen* 57 ALJR 8091 818-819.

35. *Id Jones v National Coal Board; Whitehorn* at 816.

36. R. Eggleston, What is Wrong with the Adversary System? (1975) 49 *ALJ* 428, 437.

37. *Id* 429-430.

38. J.D. Davies, Updating Civil Court Procedures for the 1980s (1975) 49 *ALJ* 380.

39. *Id* 386.

40. R.M. Jackson, *The Machinery of Justice in England* (7th ed Camb. UP 1977) Neil Brooks, *id* 94- 97 : P Deviln, *The Judge* (OUP 1981), 62.

41. *Id* Jackson 87.

42. *Yuill v Yuill* (1945) P 15, 20, quoted in *Jones v NCBP* 63.

43. R W Fox, Expedieicy and Truth - finding in the Modern Law of Evidence, Chapter 6 in E Campbell & L Waller, *Well and Truly Tried* (Law Book Co 1982) 140, 163.

44. Fox himself says the procedure used in the Commercial Court in England from 1895 was “remarkable” because “it functioned within the existing judicial and legislative framework”, *id* 163; Ghana Law Reform Commission, *Commentary on the Evidence Decree 1975* (NRCD 323) 49 makes the comment in respect of wider powers granted in the Ghanain Code.

45. American Law Institute *Model Code of Evidence* (1942) 104.

46. J R McElroy, Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute’s Code of Evidence, *Model Code* (1942) *id* 356p 361.

47. Uniform Law Conference of Canada, *Report of the Federal/Provisional Task Force on Uniform Rules of Evidence* (Carswell 1982) 273.

48. Canadian Law Reform Commission, *Study Paper Evidence* (August 1972) Comment 2; and it’s *Report - Evidence* (December 1975) cl 58.

49. *Id* Report 273, Also used by the Institute of Law Research and Reform, Alberta, *The Uniform Evidence Act* 1981 (Report 37A).
50. *Uniform Laws Annotated*, Vol 13A, *Uniform Rules of Evidence* (West Pub Co, St Paul Mimm 1986) Rule 611.

5l. Referred to in 4.16 above.

52. *Id* note 48, *Study Paper - Evidence*, Comment on s1, at 1.

Appendix A - The Chief Justice, Sir Laurence Street's Proposals for Amendments to the Evidence Act 1898

Expeditious Disposal of Proceedings

1. Where a judge considers it desirable in the interests of the expeditious disposal of proceedings in the court, commission or tribunal to which he belongs, he may by direction limit or restrict the time which may be taken by any party in addressing, in adducing evidence in chief, in cross-examining or in adducing evidence in reply and may by direction limit or restrict the subject matters or topics or the scope of any subject matters or topics which may be canvassed in address, examination in chief, cross-examination or reply.

2. Without limiting the width or exercise of the power conferred by this section, a direction may be particular in limiting or restricting the time which may be taken or the scope which may be canvassed in respect of particular subject matters or topics or it may be general or it may be partly particular and partly general.

3. The power conferred by this section may be exercised in any proceedings whether civil or criminal, whether with or without a jury, and may be exercised at any stage of the proceedings whether before the commencement of or at the commencement of or during the currency of any hearing whether final or interlocutory within the proceedings.

4. A judge may at any time and from time to time vary in any way or wholly vacate any direction under this section.

5. The provisions of this section apply in proceedings in the Supreme Court, the Industrial Commission, the Land and Environment Court, the District Court, the Workers' Compensation Commission and such other, courts, commissions and tribunals as may by regulations under this Act be prescribed.

6. In this section judge means a judge or member of the court or commission or prescribed member of the tribunal and includes a master or magistrate.

7. The power conferred by this section may be exercised in any proceedings current when this section comes into force or commenced thereafter.

Affidavit Evidence

1. A judge may direct that the evidence in chief of any witness or the evidence in chief on behalf of any party on any matter or topic in any proceedings in the court, commission or tribunal to which he belongs be by affidavit and notwithstanding any procedural rules relating to affidavit evidence may make such ancillary or procedural orders in connection therewith as he may consider expedient.

2. Subject to any such ancillary or procedural order the procedural rules, if any, applicable in the court, commission or tribunal shall apply to any direction under this section.

3. The power conferred by this section may not be exercised in respect of any evidence to be tendered in a hearing with a jury but otherwise the power may be exercised in any proceedings whether civil or Criminal and may be exercised at any stage of the proceedings, whether before the commencement of or at the commencement of or during the currency of any hearing whether final or interlocutory within the proceedings and may be exercised notwithstanding that some evidence of the witness or on the matter or topic has already been given orally.

4. A judge may at any time and from time to time vary in any way or wholly vacate any direction under this section provided that no such variation or vacation shall affect the admissibility of any evidence or Affidavit which has already been tendered and admitted in consequence of a direction under this section.

5. The provisions of this section apply in proceedings in the Supreme Court, the Industrial Commission, the Land and Environment Court, the District Court, the Workers' Compensation Commission and such other courts, commissions and tribunals as may by regulations under this Act be prescribed.

6. In this section judge means a judge or member of the court or commission or prescribed member of the tribunal and includes a master or magistrate.

7. The power conferred by this section may be exercised in any proceedings current when this section comes into force or commenced thereafter.

Appendix B - Evidence Bill 1988

TABLE OF PROVISIONS

NOTES

1. Clauses 12, 15 and 150 are not included so as to retain uniform numbering with the ALRC draft Bill. The clauses referred to matters applicable to the Commonwealth.

2. Clause 27 (11) of the ALRC draft Bill is omitted for the reason stated in the Report.

3. Apart from the above, variations from the ALRC draft Bill are indicated by underlining.

EVIDENCE BILL 1988

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

NSW Law Reform Commission: REPORT 56 (1988) - EVIDENCE

An Act relating to evidence in proceedings in State courts.

The Legislature of Nev South Wales enacts:

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Evidence Act 1988.

Commencement

2. This Act shall commence on a day to be appointed by proclamation.

Definitions

3. (1) In this Act-

"admission" means a previous representation made by a person who is or becomes a party to a proceeding, being a representation that is adverse to the person's interest in the outcome of the proceedings;

"case", in relation to a party, means the facts in issue in respect of which the party bears the legal burden of proof;

"civil proceeding" means a proceeding in a court, other than a criminal proceeding;

"confidential communication" or "confidential record" means a communication made or a record prepared in such circumstances that, at the time when it was made or prepared-

(a) the person who made or, prepared it; or

(b) the person to whom it was made or for whom it was prepared,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

"credibility rule" means section 94 (1);

"criminal proceeding" means a prosecution in a court for an offence and includes a proceeding for the commitment of a person for trial for an offence;

"cross-examiner" means a party who is cross-examining a witness;

"enactment" means an Act, a British Act applying as part of the law of the State or a regulation, rule, by-law or ordinance made under such an Act;

"evidence" includes unsworn evidence;

"federal court" means the High Court or any court created by the Parliament of the Commonwealth;

"hearsay rule" means section 54 (1);

"identification evidence",, in relation to a criminal proceeding, means evidence that is-

(a) an assertion by a person to the effect that a defendant was, or resembles 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 that is connected with 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 first-mentioned person saw, heard or otherwise noticed at that time and place; or

(b) a report (whether oral or in writing) of an assertion as mentioned in paragraph (a);

"investigating official" means a police officer or a person whose functions include functions in respect of the prevention or investigation of offences;

"Judge", in relation to a proceeding, means the Judge, Magistrate or other person before whom the proceeding is being held;

"leading question" means a question asked of a witness that-

(a) directly or indirectly suggests a particular answer to the question; or

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked;

"legal or administrative proceeding" means a proceeding (however described) -

(a) in a court, a federal court or a court of another State or a Territory or of a foreign country; or

(b) before a person or body (other than a court) authorised by law, including a Commonwealth law or a law of another State or a Territory or of a foreign country, or by consent of parties, to hear and receive evidence, and includes a proceeding in a coroner's court and a proceeding in a court martial;

"legal practitioner" means a barrister or a solicitor; "offence" includes an offence against or arising under a law of or in force in another State or Territory or under a law of the Commonwealth;

"official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence;

"opinion rule" means section 66 (1);

"person who has been prosecuted for a related offence", in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted (being a prosecution that has not been completed or terminated) for-

(a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or

(b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted;

"police officer" means a member of the police force, a member of the Australian Federal Police or a member of the police force of another State or a Territory;

"previous representation" means a representation made otherwise than in the course of the giving of evidence in the proceeding in which evidence of the representation is sought to be adduced;

"prior consistent statement", in relation to a witness, means a previous representation that is consistent with evidence given by the witness;

"prior inconsistent statement", in relation to a witness, means a previous representation that is inconsistent with evidence given by the witness;

"probative value", in relation to evidence, means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

"public document" means a document that-

(a) forms part of the records of-

(i) the Crown in any of its capacities;

(ii) the government of a foreign country; or

(iii) a person or body holding office or exercising a function under or by virtue of an Act or law, whether of the State, the Commonwealth, another State or a Territory or of a foreign country; or

(b) is being kept by or on behalf of the Crown, such a government or such a person or body,

and includes the records of the proceedings of a House of Parliament, a House of the Parliament of the Commonwealth or another State, a Legislative Assembly of a Territory (including the Australian Capital Territory House of Assembly) or the legislature of a foreign country;

"representation" includes an express or implied representation (whether oral or in writing) and a representation to be inferred from conduct;

"sworn evidence" means evidence given by a person who, before he or she gave it, had sworn an oath or made an affirmation in accordance with this Act; telecommunications installation and

"telecommunications service" have the meanings that they respectively have under the Telecommunications Act 1975 of the Commonwealth;

"tendency rule" means section 86;

"unsworn evidence" means evidence that is not sworn evidence.

(2).In this Act-

(a) a reference to a function includes a reference to a power, authority or duty; and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

References to businesses

4.(1) A reference in this Act to **a** business includes a reference to-

(a) a profession, calling, occupation, trade or undertaking;

(b) an activity engaged in or carried on by-

(i) the Crown in any of its capacities; or

(ii) the government of a foreign country;

(c) an activity engaged in or carried on by a person or body holding office or exercising power under or by virtue of the Australian Constitution or of **a** law, whether of the State, the Commonwealth, another State or a Territory or of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power; and

(d) the proceedings of a House of Parliament, a House of the Parliament of the Commonwealth or another State, a Legislative Assembly of a Territory (including the Australian Capital Territory House of Assembly) or the legislature of a foreign country.

(2) A reference in this Act to **a** business also includes a reference to-

(a) a business that is not engaged in or carried on for profit; and

(b) a business engaged in or carried on outside Australia.

References to examination in chief etc.

5. (1) A reference in this Act to-

(a) examination in chief of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination;

(b) cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence;

(c) re-examination of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning conducted after the cross-examination of the witness by some other party,

and "examine in chief". "cross-examine" and "re-examine" have corresponding meanings.

(2) Where a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to questioning of the witness by that party before the witness is questioned by some other party.

References to civil penalties

6. For the purposes of this Act, a person shall be taken to be liable to a civil penalty if, in a legal or administrative proceeding (not being a criminal proceeding), the person would be liable to a penalty arising under a law of or in force in the State, the commonwealth, another State, a Territory or a foreign country.

Unavailability of persons

7. (1) For the purposes of this Act, a person shall be taken not to be available to give evidence about a fact if-

(a) the person is dead;

(b) the person is not competent to give evidence about the fact;

(c) it would not be lawful for the person to give evidence about the fact;

(d) the evidence, under a provision of this Act, may not be given;

(e) all reasonable steps have been taken to find the person or to secure his or her attendance, but without success; or

(f) all reasonable steps have been taken to compel the person to give the evidence, but without success.

(2) In all other cases the person shall be taken to be available to give evidence about the fact.

Unavailability of documents

8. (1) For the purposes of this Act-

(a) a document that cannot be found after reasonable enquiry and search shall be taken not to be available to a party; and

(b) a document that has been destroyed shall be taken not to be available to a party if it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith or was destroyed by some other person.

(2) A document other than a document referred to in subsection (1) shall be taken not to be available to a party if-

(a) it cannot be obtained by any judicial procedure of the court;

(b) it is not in the possession or under the control of the party and is in the possession or under the control of some other party who knows or might reasonably be supposed to know that evidence of the contents of the document is likely to be relevant;

(c) it is not in the possession or under the control of the party and, at a time when it was in the possession or under the control of some other party, that party knew or might reasonably be supposed to have known that evidence of the contents of the document was likely to be relevant; or

(d) the contents of the document are not closely related to an issue that is important in the proceeding.

(3) In all other cases the document shall be taken to be available to the party.

Representations in documents 9. For the purposes of this Act, where a representation is contained in a document that-

(a) was written, made, dictated or otherwise produced by a person; or

(b) was recognised by a person as his or her representation by signing, initialling or otherwise marking the document,

the representation shall be taken to have been made by the person.

Witnesses

10. A reference in this Act-

(a) to a witness includes a reference to a party giving evidence; and

(b) to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.

PART 2 - APPLICATION OF ACT

Courts and proceedings to which Act applies

11. (1) This Act applies to and in relation to all proceedings in a court, including such a proceeding that-

(a) relates to bail;

(b) is an interlocutory proceeding or a proceeding of a like kind; or

(c) is heard in chambers.

(2) This Act does not apply to or in relation to-

(a) a proceeding the hearing of which began before the commencement of this Act; or

(b) a criminal proceeding, so far as that proceeding concerns the determination of the penalty to be imposed in respect of an offence.

12. ****

Act binds Crown

13. This Act binds the Crown in right of New South Wales and, in so far as the legislative Power of Parliament permits, the Crown in all its other capacities.

Operation of other Acts

14. The provisions of an enactment other than this Act have effect notwithstanding this Act.

15. ****

Parliamentary privilege preserved

16. Parts 4 and 3 do not affect the law relating to the privileges of Parliament or a House of the Parliament.

General powers of the court

17. It is the intention of the Parliament that the power of a court to control the conduct of a proceeding is not, except as expressly or by necessary intendment provided by this Act, to be affected by this Act.

PART 3 - WITNESSES

Division 1 - Competence and compellability of witnesses

Competence and compellability

18. Except as otherwise provided by this Act-

(a) every person is competent to give evidence; and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Competence: lack of capacity

19.(1) A person who is incapable of understanding that, in giving evidence in a proceeding, he or she is under an obligation to give truthful evidence is not competent to give evidence.

(2) 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.

(3) Where-

(a) a person is incapable of hearing or understanding, or of communicating a reply to, a question about a fact; and

(b) that incapacity cannot be overcome, or cannot be overcome without undue cost or undue delay,

the person is not competent to give evidence about the fact.

(4) Unless it appears otherwise, it shall be presumed that a person is not incompetent by reason of subsection (1), (2) or (3).

(5) Evidence that has been given by a witness does not become inadmissible by reason only that, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(6) For the purpose of determining a question arising under this section, the court may inform itself as the court thinks fit.

Compellability: Sovereign etc.

20. (1) The Sovereign, the Governor-General, the Governor, the Governor of another State, the Administrator of a Territory, a foreign sovereign or the Head of State of a foreign country is not compellable to give evidence.

(2) Where, if a member of a House of Parliament or a member of the legislature of the Commonwealth, another State or a Territory were to be compelled to give evidence, the member would thereby be prevented from attending-

(a) a sitting of the House or the legislature, or a joint sitting of Parliament or the legislature, of which he or she is a member; or

(b) a meeting of a committee of such a House or legislature, the member is not compellable so to give evidence.

Competence and compellability: Judges and jurors

21.(1) A person who is a Judge or Juror in a proceeding is not competent to give evidence in the proceeding.

(2) A person who is or was a Judge in a legal or administrative proceeding is not compellable to give evidence about the proceeding unless the court gives leave.

Competence and compellability: defendant etc. in criminal proceedings

22. (1) This section applies only in a criminal proceeding.

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) A person who is being prosecuted for a related offence

(a) is not compellable to give evidence; and

(b) except with the leave of the court, may not give evidence as a witness for the prosecution.

(4) Where it appears to the court that a witness called by the prosecutor may be a person who is being prosecuted for a related offence, the court shall satisfy itself (if there is a jury, in the absence of the jury) that the witness is aware of the effect of subsection (3).

(5) Without limiting the matters that may be taken into account by the court, in determining whether to give leave it shall take into account-

(a) whether the person has or appears to have a motive to misrepresent a matter as to which the person is to give evidence; and

(b) whether the completion or termination of the prosecution of the person before the person gives evidence is reasonably practicable.

Comment on failure to give evidence

23. (1) In a criminal proceeding, where a defendant has not given evidence, the Judge or a party other than the prosecutor shall not comment on the failure of the defendant to give evidence.

(2) A Prosecutor may, with the leave of the court, comment on the fact that the defendant did not give evidence where that fact is mentioned in the presence of the Jury by the defendant or a person who is being prosecuted for a related offence.

Compellability of spouses etc. in criminal proceedings

24. (1) This section applies only in a criminal proceeding.

(2) A person who is the spouse, the de facto spouse, a parent or a child of a defendant may object to being required to give evidence as a witness for the prosecution.

(3) The objection shall be made before the witness gives evidence or as soon as practicable after the witness becomes aware of the right so to object, whichever is the later.

(4) A witness who is the spouse, the de facto spouse, a parent or a child of a defendant may object to being required to give evidence of a communication made between the witness and that defendant.

(5) Where it appears to the court that a witness may have a right to make an objection under subsection (2) or (4), the court shall satisfy itself that the witness is aware of the effect of that provision as it may apply to the witness.

(6) If there is a jury, the court shall hear and determine any objection under subsection (2) or (4) in the absence of the jury.

(7) Where, on an objection under subsection (2) or (4), the court finds that-

(a) the likelihood of the harm that would or might be caused, whether directly or indirectly, by the witness giving evidence or giving evidence of the communication, as the case may be, to-

(i) the person who made the objection; or

(ii) the relationship between that person and the defendant concerned; and

(b) the nature and extent of any such harm, outweigh the desirability of having the evidence given, the person shall not be required to give the evidence.

(8) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (7) it shall take into account-

(a) the nature and gravity of the offence for which the defendant is being prosecuted;

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;

(c) whether any other evidence concerning the matters to which the evidence of the witness would relate is reasonably available to the prosecutor;

(d) the nature of the relationship between the defendant and the person; and

(e) whether, in giving the evidence, the witness would have to disclose matter that was received by the witness in confidence from the defendant.

(9) Where an objection under subsection (2) or (4) has been determined, the prosecutor may not comment on the objection, on the decision of the court in relation to the objection or on the failure of the person to give evidence.

(10) In this section-

(a) a reference to the de facto spouse of a person is a reference to a person of the opposite sex to the first-mentioned person who is living with the first-mentioned person as that person's husband or wife on a bona fide domestic basis although not married to that person;

(b) a reference to a parent, in relation to a person, includes a reference to an adoptive parent of that person and, in relation to a person who was an ex-nuptial child, also includes a reference to the natural father of that person; and

(c) a reference to a child is a reference to a child of any age and includes a reference to an adopted child and an ex-nuptial child.

Compellability of spouses in **civil proceedings**

25. In a civil proceeding (not being a proceeding concerning the custody, guardianship or wardship of a child or a proceeding for access to a child), a person who is married is not compellable to give evidence of a communication between the person and his or her spouse made during the marriage.

Division 2 - Sworn and unsworn evidence

Evidence of witnesses to be on oath or affirmation

26. (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.

(2) It is for the person who is to give evidence to choose whether to swear an oath or make an affirmation.

(3) It is not necessary that a religious text be used in swearing an oath.

(4) The court may direct a person who is to give evidence to make an affirmation if-

(a) the person refuses to choose whether to swear an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to swear an appropriate oath.

(5) An oath is effective for the purposes of this section notwithstanding that the person who swore it-

(a) did riot have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

(6) A person who is called merely to produce a document or object to the court need not swear an oath or make an affirmation before doing so.

Unsworn evidence in criminal proceedings

27. (1) In a criminal proceeding, a defendant may give unsworn evidence.

(2) A defendant who gives unsworn evidence may not also give sworn evidence unless there are special circumstances and the court gives leave.

(3) In giving unsworn evidence, the defendant may, with the leave of the court, read from a statement in writing and may use notes.

(4) Where a legal practitioner appears for the defendant, the legal practitioner may assist the defendant to prepare the statement or notes.

(5) Where a defendant proposes to use a statement in writing or notes, the court may, before the defendant gives the evidence,' direct that the statement or notes be produced to the court or to some other party.

(6) Where the defendant is unable to read from a statement in writing, the legal practitioner may, with the leave of the court, read the statement to the court.

(7) After unsworn evidence has been given, the legal practitioner may, with the leave of the court, direct the defendant's attention to matters as to which the defendant has not given unsworn evidence or as to which the defendant might wish to give further unsworn evidence.

(8) A defendant who has given unsworn evidence shall not be cross-examined.

(9) Unsworn evidence given by a defendant may not be used for or against any other defendant.

(10) Subsections (8) and (9) do not apply if the defendant gives both sworn and unsworn evidence.

(11) [omitted]

Comment on unsworn evidence

28. (1) In a criminal proceeding, where a defendant has given unsworn evidence and has not also given sworn evidence, the Judge or a party other than the prosecutor may comment on the fact that the defendant did not give sworn evidence.

(2) A prosecutor may, with the leave of the court, comment on the fact that the defendant did not give sworn evidence where that fact is mentioned in the presence of the Jury by the defendant or a person who is being prosecuted for a related offence.

(3) A comment by a Judge or a party (including a prosecutor) shall not-

(a) except where a reason why unsworn evidence was given or sworn evidence was not given is mentioned in the presence of the Jury by the defendant or a person who is being prosecuted for a related offence, refer to any reason-why unsworn evidence was given or sworn evidence not given;

(b) suggest that the defendant did not give sworn evidence, or did not offer himself or herself for cross-examination, because the defendant believed that he or she was guilty of the offence concerned; or

(c) suggest that unsworn evidence is, by reason only that it is unsworn evidence or that it was not subject to cross-examination, necessarily less persuasive than sworn evidence.

Court to advise jury and witnesses

29. (1) Except as mentioned in subsection (3), before a witness gives evidence, the court shall inform the witness that witnesses have a choice of swearing an oath or making an affirmation before giving evidence.

(2) In a criminal proceeding, before any defendant in the proceeding gives evidence, the court shall inform the jury, if there is a jury, that-

(a) witnesses have a choice of swearing an oath or making an affirmation before giving evidence;

(b) defendants in criminal Proceedings have a choice of giving evidence or not giving evidence;

(c) defendants in criminal proceedings need not swear an oath or make an affirmation before giving evidence, but a defendant in such a proceeding who gives evidence without first having sworn an oath or made an affirmation-

(i) may not also give sworn evidence without the leave of the court;

(ii) is not subject to cross-examination; and

(iii) is not subject to any Penalty for giving false evidence; and

(d) defendants in criminal proceedings who give evidence after swearing on oath or making an affirmation are subject to cross-examination.

(3) In a criminal proceeding, before each defendant gives evidence, the court shall inform the defendant of the matters set out in subsection (2).

(4) In a criminal proceeding, where a defendant is not represented in the proceeding by a legal practitioner, the court shall, before the defendant gives evidence, inform the defendant (if there is a jury, in the absence of the jury) that sworn evidence may be more persuasive than unsworn evidence.

Division 3 - manner of giving evidence

Subdivision A - General rules

Court to control Questioning of witnesses

30. Subject to this Act, the court may, in its discretion, make such orders as are just in relation to-

(a) the manner in which witnesses are to be questioned;

(b) the production and use of documents and things in connection with the questioning of witnesses; and

(c) the order in which the parties may question a witness.

Parties may question witnesses

31. Subject to this Act, a party may question any witness.

Examination in chief to be completed before other questioning

32. Unless the court otherwise directs-

(a) cross-examination of a witness shall not take place before the examination in chief of the witness; and

(b) re-examination of a witness shall not take place before all other parties who wish to do so have cross-examined the witness.

Manner and form of questioning witnesses

33. (1) Except as otherwise provided by this Division or as directed by the court, a party may question a witness in any way the party thinks fit.

(2) Evidence may be given in whole or in part in oral or written narrative form and the court may direct that it be so given.

Interpreters

34. A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand fully, and to make an adequate reply to, questions that may be put about the fact.

Deaf and mute witnesses

35. (l) A witness who cannot adequately hear may be questioned in any appropriate manner.

(2) A witness who cannot adequately speak may give evidence by any appropriate means.

Attempts to revive memory in court

36. (1) A witness may not, in the course of giving evidence, use a document to try to revive his or her memory about a fact without the leave of the court.

(2) Without limiting the matters that may be taken into account by the court, in determining whether to give leave it shall take into account-

(a) whether the witness will be able to recall the fact adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that-

(i) was written or made by the witness at a time when the events recorded in it were fresh in his or her memory; or

(ii) was, at such a time, found by the witness to be accurate.

(3) Where a witness has, while giving evidence, used a document to try to revive his or her memory about a fact, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact.

(4) Where leave has been given as mentioned in this section, the court shall, on the request of a party, give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

Attempts to revive memory out of court

37. (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) Where, without reasonable excuse, the directions have not been complied with, the court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory.

Direction not to extend to certain documents

38. (1) Where, by virtue of section 106 (Privilege in respect of legal advice and litigation etc.), evidence of the contents of a document may not be adduced, a direction under section 37 (1) shall not be made so as to require the production of the document.

(2) The objection required under section 106 is also required in connection with the operation of subsection (1).

Effect of calling for production of documents

39. (1) A party shall not be required to tender a document by reason only that the party, whether under this Act or otherwise, called for the document to be produced to the party or inspected it when it was so produced.

(2) Where a document so called for has been produced or inspected and the party to whom it was produced or who inspected it has failed to tender it, the party who produced it is not for that reason entitled to tender it.

Subdivision B - Examination in chief and re-examination

Leading questions

40. A leading question, other than a question that relates to a matter introductory to the evidence of the witness or to a matter that is not in dispute, shall not be put to a witness in examination i-n chief or in re-examination unless the court gives leave.

Unfavourable etc. witnesses

41. (1) Where a witness gives evidence that is unfavourable to the party who called the witness, that party may, with the leave of the court, question the witness about that evidence as though the party were cross-examining the witness.

(2) Where, in examination in chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about that matter as though the party were cross-examining the witness.

(3) A party who is questioning a witness as mentioned in subsection (1) or (2) may also, with the leave of the court, question the witness about matters relevant only to the credibility of the witness, and such questioning shall be taken to be cross-examination for the purposes of this Act.

(4) Unless the court otherwise directs, questioning as mentioned in this section shall take place before the other parties cross-examine the witness.

(5) Where the court so directs, the order in which the parties question the witness shall be as the court directs.

(6) Without limiting the matters that may be taken into account by the court, in determining whether to give leave, or give a direction, under this section it shall take into account-

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by some other party.

Limits on re-examination

42. On re-examination, a witness may be questioned as to matters arising out of or related to evidence given by the witness in cross-examination and other questions may not be put to the witness without the leave of the court.

Subdivision C - Cross-examination

Witness called in error

43. A party may not cross-examine a witness who has been called in error by some other party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

Improper questions

44. (1) If a misleading question, or a question that is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, is put to a witness in cross-examination, the court may disallow the question or inform the witness that it need not be answered.

(2) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it shall take into account any relevant condition or characteristic of the witness, including age, personality and education and any mental, intellectual or physical disability to which the witness is or appears to be subject.

Leading questions

45. (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account, in determining whether to disallow the question or give such a direction it shall 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;

(b) the witness has an interest consistent with an interest of the cross-examiner;

(c) the witness is sympathetic to the Party who is ,cross-examining the witness, either generally or in relation to a particular matter; and

(d) the facts will be better ascertained if leading questions are not used.

(3) Subsection (1) does not limit the power of the court to control leading questions.

Prior-inconsistent statements of witness 46.

(1) It is not necessary that complete particulars of a prior inconsistent statement alleged to have been made by a witness be given to the witness, or that a document that contains a record of the statement be shown to the witness, before the witness may be cross-examined about the statement.

(2) Where, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner may not adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner-

(a) gave the witness such particulars of the statement as are reasonably necessary to enable the witness to identify the statement; and

(b) drew the attention of the witness to so much of the statement as is inconsistent with the evidence of the witness.

(3) For the purpose of adducing that evidence, the party may re-open the party's case.

Previous representations of other persons

47. (1) Except as provided by this section, a cross-examiner may not, in cross-examination of a witness, use a previous representation alleged to have been made by a person other than the witness.

(2) Where evidence of such a representation has been admitted or the court is satisfied that it will be admitted, the cross-examiner may question the witness about it and its contents.

(3) Where-

(a) such a representation is recorded in a document; and

(b) evidence of the representation has not been admitted and the court is not satisfied that, if it were to be adduced, it would be admitted,

the document may only be used as follows:

(c) the document may be produced to the witness;

(d) the witness may be asked whether, having examined the contents of the document, he or she adheres to the evidence that he or she has given;

(e) neither the cross-examiner nor the witness shall identify the document or disclose its contents.

(4) A document used as mentioned in subsection (3) may be marked for identification.

Production of documents

48. (1) Where a Party -

(a) is cross-examining or has cross-examined a witness about a prior inconsistent statement alleged to have been made by the witness; or

(b) in cross-examination of a witness, is using or has used a previous representation alleged to have been made by some other person,

being a statement or representation that is recorded in a document, the party shall, if the court so orders or if some other party so requires, produce the document, or such evidence of the contents of the document as is available to the party, to the court or to that other party.

(2) Where a document or evidence has been so produced, the court may-

(a) examine it;

(b) give directions as to its use; and

(c) subject to this Act, admit it notwithstanding that it has not been tendered by a party.

(3) A party shall not, by reason only of having produced a document to a witness who is being cross-examined, be required to tender the document.

Certain matters to be put to witness

49. Where a party adduces evidence-

(a) that contradicts evidence already given in examination in chief by a witness called by some other party; or

(b) about a matter as to which a witness who has already been called by some other Party was able to give evidence in examination in chief,

and the evidence adduced has been admitted, the court may, if the first-mentioned party did not cross-examine the witness about the matter to which the evidence relates, give leave to the party who called the witness to re-call the witness to be questioned about the matter.

PART 4 - ADMISSION OF EVIDENCE: RELEVANCE RULE

Relevant evidence

50. (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence shall not be taken to be irrelevant by reason only that it relates to-

(a) the credibility of a party or a witness;

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

Relevant evidence to be admissible

51. Evidence that is relevant in a proceeding is, except as otherwise provided by this Act, admissible, and shall be admitted, in the proceeding and evidence that is not relevant in the proceeding is not so admissible.

Provisional relevance

52. (1) Where the determination of the question whether evidence adduced by a party is relevant depends on the court's making some other finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant-

(a) if it is reasonably open to make that finding; or

(b) subject to further evidence being admitted such that, at some later stage of the proceeding, it will be reasonably open to make that finding.

(2) Without limiting subsection (1), where the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had a common purpose to effect an unlawful conspiracy, the court may use the evidence itself in determining whether such a common purpose existed.

Inferences as to relevance

53. (1) Where 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.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

PART 5 - ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

Division 1 - Hearsay evidence

Subdivision A - The hearsay rule

Exclusion of hearsay evidence

54. (1) Evidence of a previous representation is not admissible to prove the existence of a fact intended by the person who made the representation to be asserted by the representation.

(2) Such a fact is in this Division referred to as an asserted fact.

(3) Where evidence of a previous representation is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of an asserted fact.

Subdivision B - "First-hand" hearsay

Restriction to "first-hand" hearsay

55. (1) A reference in this Subdivision to a previous representation is a reference to a previous representation that was made by a person whose knowledge of an asserted 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 some other person about the asserted fact.

(2) Such knowledge is in this Division referred to as personal knowledge.

Exception: civil proceedings where maker not available

56. In a civil proceeding, where the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply in relation to-

(a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably, necessary to refer to understand the representation.

Exception: civil proceedings where maker available

57. (1) This section applies in a civil proceeding where a person who made a previous representation is available to give evidence about an asserted fact.

(2) Where it would cause undue expense or undue delay, or would not be reasonably practicable, to call that person to give evidence, the hearsay rule does not apply in relation to-

(a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer to understand the representation.

(3) Where the person who made a previous representation has been or is to be called to give evidence, the hearsay rule does not apply in relation to evidence of the representation that is given by-

(a) that person; or

(b) a person who saw, heard or otherwise perceived the making of the representation,

if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) Where subsection (3) applies in relation to a representation, a document containing the representation shall not, unless the court gives leave, be tendered before the conclusion of the examination in chief of the person who made the representation.

Exception: criminal proceedings where maker not available

58. (1) This section applies in a criminal proceeding where a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply in relation to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the making of the representation, being a representation that was-

(a) made under a duty to make that representation or to make representations of that kind;

(b) made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication;

(c) made in the course of giving sworn evidence in a legal or administrative proceeding if the defendant, in that proceeding, cross-examined the person who made the representation, or had a reasonable opportunity to cross-examine that person, about it; or

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

(3) For the purposes of subsection (2) (c), a defendant who was not present at a time when the cross-examination of a person might have been conducted but could reasonably have been present at that time may be taken to have had a reasonable opportunity to cross-examine the person.

(4) If a representation-

(a) tends to damage the reputation of the person who made

(b) tends to show that that person has committed an offence; or

(c) tends to show that that person is liable in an action for damages,

then, for the purposes of subsection (2) (d), the representation shall be taken to be against the interests of the person who made it.

(5) The hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a defendant, being evidence that is given by a person who saw, heard or otherwise perceived the making of the representation.

(6) Where evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply in relation to evidence of a previous representation about the matter adduced by some other party, being evidence that is given by a witness who, saw, heard or otherwise perceived the making of the second-mentioned representation.

Exception: criminal proceedings where maker available

59. (1) In a criminal proceeding, where the person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply in relation to evidence of the previous representation that 4 is given by-

(a) that person if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person; or

(b) a person who saw, heard or otherwise perceived the making of the representation being made, if-

(i) at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; and

(ii) the person who made it has been or is to be called to give evidence in the proceeding.

(2) Subsection (1) does not apply in relation to evidence adduced by the prosecutor of a representation that was made for the purpose of indicating the evidence that the person who made it would be able to give in a legal or administrative proceeding.

(3) Where subsection (1) applies in relation to a representation, a document containing the representation shall not unless the court gives leave, be tendered before the conclusion of the examination in chief of the person who made the representation.

Notice to be given

60. (1) Subject to the succeeding provisions of this section, the provisions of section 56 and sections 57 (2), 58 (2) and 58 (5) do not apply in relation to evidence adduced by a party unless that party has given notice in writing in accordance with rules of court or the regulations to each other party of the intention to adduce the evidence.

(2) Where such a notice has not been given, the court may, on the application of a party and subject to such conditions (if any) as the court thinks fit to impose, direct that one or more of those provisions is to apply-

(a) notwithstanding the failure of the party to give such notice; or

(b) in relation to specified evidence with such modifications as the court specifies.

(3) In a civil proceeding, where the writing by which notice is given discloses that it is not intended to call the person who made the previous representation concerned on a ground referred to in section 57 (2), a party may, not later than 7 days after notice has been given, by notice in writing in accordance with rules of court or the regulations given to each other party, object to the tender of the evidence, or of a specified part of the evidence.

(4) The notice shall set out the grounds on which the objection is based.

(5) The court may determine the objection on the application of a party made at or before the hearing.

(6) If the objection is unreasonable, the court may order that the party objecting shall, in any event, bear the costs (ascertained on a solicitor and client basis) incurred by another party-

(a) in relation to the objection; and

(b) in calling the person who made the representation to give evidence.

Subdivision C - other hearsay

Exception: business records

61. (1) Where a previous representation-

(a) is contained in a document that is or forms part of the records belonging to or kept by a business or at any time was or formed part of such a record; and

(b) was made or recorded in the document in the course of, or for the purposes of, a business-

then, if the representation was made-

(c) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(d) 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,

the hearsay rule does not prevent the admission or use of the document so far as it contains the representation.

(2) Subsection (1) does not apply 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.

(3) Where-

(a) the happening of an event of a particular kind is in question; and

(b) in the course of a business, a system has been followed of making and keeping a record of the happening of all events of that kind,

the hearsay rule does not prevent the admission or use of evidence that tends to prove that there is no record kept in accordance with that system of the happening of the event.

Exception: contents of tags, labels etc.

62. Where a document has been attached to an object or writing has been placed on a document or object, being a document or writing that may reasonably be supposed to have been so attached or placed in the course of a business, the hearsay rule does not prevent the admission or use of the document or writing.

Exception: telecommunications

63. Where a document has been-

(a) produced by a telecommunications installation; or

(b) received from the Australian Telecommunications Commission,

being a document that records a message that has been transmitted by means of a telecommunications service, the hearsay rule does not prevent the admission or use of a representation in the document as to-

(c) the identity of the person from whom or on whose behalf the message was sent;

(d) the date on which, the time at which or the place from which the message was sent; or

(e) the identity of the person to whom the message was addressed.

Exception: reputation as to certain matters

64. (1) The hearsay rule does not prevent the admission or use of evidence of-

(a) reputation that a man and a woman cohabiting at a particular time were married to each other at that time;

(b) reputation as to family history or a family relationship; or

(c) reputation as to the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply in relation to evidence adduced by the prosecutor, but, where evidence as mentioned in subsection (1) has been admitted, this subsection does not prevent the admission or use of evidence that tends to contradict it.

Exception: interlocutory proceedings

65. The hearsay rule does not prevent the admission or use of evidence adduced in an interlocutory proceeding if the party who adduces it also adduces evidence of its source.

Division 2 - opinion evidence

Exclusion of opinion evidence

66. (1) Evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.

(2) Where evidence of an opinion is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of a fact as to the existence of which the opinion was expressed.

Exception: lay opinions

67. Where-

(a) an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event; and

(b) evidence of the opinion is necessary to obtain an adequate account of the person's perception of the matter or event,

the opinion rule does not prevent the admission or use of the evidence.

Exception: opinions based on specialised knowledge

68. Where a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not prevent the admission or use of evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Ultimate issue and common knowledge rules abolished

69. Evidence of an opinion Is not inadmissible by reason only that it is about-

(a) a fact in issue; or

(b) a matter of common knowledge.

Division 3 - Admissions

Definition: sound recording

70. A reference in this Division to a sound recording includes a reference to a recording of visual images and sounds.

Hearsay and opinion rules: exception for admissions

71. (1) The hearsay rule and the opinion rule do not prevent the admission or use of-

(a) evidence of an admission; or

(b) evidence of a previous representation made in relation to an admission at the time when the admission was made or shortly before or shortly after that time, being a representation to which it is reasonably necessary to refer to understand the admission.

(2) Subject to subsection (3), where, by reason only of the operation of subsection (1), the hearsay rule and the opinion rule do not prevent the admission or use of evidence of an admission or of a previous representation as mentioned in subsection (1) (b), the evidence may, if admitted, be used only in relation to the case of the party who made the admission concerned and the case of the party who adduced the evidence.

(3) The evidence may be used in relation to the case of some other party if that other party consents but consent may. not be given in respect of part only of the evidence.

Exclusion of admissions influenced by violence etc.

72. Evidence of an admission is not admissible unless the court is satisfied that the-admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether toward the person who made the admission or toward some other person, or by a threat of conduct of that kind.

Criminal proceedings: reliability of admissions by defendants

73. (1) This section applies only in a criminal proceeding and only in relation to evidence of an admission made by a defendant.

(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) For the purposes of subsection (2), evidence that the admission is true or untrue is not relevant.

(4) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (2) it shall take into account-

(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 representation made to the person questioned.

Criminal proceedings: admissions by suspects

74. (1) This section applies only-

(a) in a criminal proceeding;

(b) in relation to evidence of an admission trade by a defendant who, at the time when the admission was made, was or ought reasonably to have been suspected by an investigating official of having committed an offence; and

(c) where the admission was made in the course of official questioning.

(2) Evidence of the admission is not admissible unless-

(a) there is available to the court-

(i) a sound recording of the questioning, and of the admission; or

(ii) if it was not reasonably practicable to have made such a recording - a sound recording of questioning of the person who made the admission about the making of the admission, and of a representation by that person in the course of that questioning that the admission was made; or

(b) the questioning was conducted, and the admission made, in the presence of a person (not being an investigating official) who-

(i) was a legal practitioner acting for the person who made the admission; or

(ii) if no such legal practitioner was reasonably available, had been chosen by that person,

or it was not reasonably practicable to make such a recording or have such a person present.

(3) The hearsay rule and the opinion rule do not prevent the admission or use of a sound recording as mentioned in subsection (2) (a) (ii).

(4) Evidence of the admission is not admissible unless, before the admission was made, the person who made it was informed by an investigating official that, except and to the extent that the person is required by law to furnish specified information to the investigating official, the person need not say or do anything, or answer any questions, in connection with the investigation but that anything that he or she said or did might be given in evidence.

Exclusion of records of oral questioning

75. (1) where an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official is not admissible in a criminal proceeding to prove the contents of the question, representation or response unless the defendant has, by signing, initialling or otherwise marking the document, acknowledged that the document is a true record of the question, representation or response.

(2) In subsection (1), "document" does not include a sound recording or a transcript of a sound recording.

Admissions made with authority

76. (1) Where it is reasonably open to find that-

(a) at the time when a previous representation was made, the person who made it had authority to make statements on behalf of a party in relation to the matter with respect to which the representation was made;

(b) at the time when a previous representation was made, the person who made it-

(i) was an employee of a party; or

(ii) had authority otherwise to act for a party,

and the representation related to a matter within the scope of the person's employment or authority; or

(c) a previous representation was made by a person in furtherance of a common purpose (whether lawful or not) that the person had with a party or with a party and one or more other persons,

the representation shall, for the purpose only of determining whether it is to be taken to be an admission, be taken to have been made by the party.

(2) For the purposes of the application of subsection (1), the hearsay rule does not prevent the admission or use of a previous representation made by a person that tends to prove-

(a) that the person had authority to make statements on behalf of a party in relation to a matter;

(b) that the person-

(i) was an employee of a party; or

(ii) had authority otherwise to act for 4 party;

(c) the scope of the personal employment or authority; or

(d) the existence at any time of a common purpose.

Proof of making of admission

77. Where it is reasonably open to find that a particular person made a previous representation, the court shall, for the purpose of determining whether evidence of the representation is admissible, find that the person made the representation.

Evidence of silence

78. (1) An inference unfavourable to a party may not be drawn from evidence that the party or some other person failed or refused to answer a question, or to respond to a representation put or made to the person in the course of official questioning.

(2) Where evidence of that kind may only be used to draw such an inference, it is not admissible.

(3) Subsection (1) does not prevent the use of the evidence to prove that the person failed or refused to answer the ' question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

Discretion to exclude admissions

79. In a criminal proceeding, where evidence of an admission is adduced by the prosecution and, having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence, the court may-

(a) refuse to admit the evidence; or

(b) refuse to admit the evidence to prove a particular fact.

Division 4 - Evidence of judgments and convictions

Exclusion of evidence of judgments and convictions

80. (1) Evidence of the decision in a legal or administrative proceeding is not admissible to prove the existence of a fact that was in issue in the legal or administrative proceeding.

(2) Where evidence of such a decision is relevant otherwise than as mentioned in subsection (1), it may not be used for the purpose mentioned in that subsection.

Exceptions

81. (1) Section 80 (1) does not prevent the admission or use of evidence of a grant of probate, letters of administration or like order of a court to prove-

(a) the death or date of death of the person concerned; or

(b) the due execution of the testamentary document concerned.

(2) In a civil proceeding, section 80 (1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction-

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined;

(b) that has been quashed or set aside; or

(c) in respect of which a pardon has been given.

(3) where, by virtue of subsection (1) or (2), section 80 (1) does not prevent the admission or use of evidence, the hearsay rule and the opinion rule do not prevent the admission or use of that evidence.

Savings

82. Sections 80 and 81 do not affect the operation of-

(a) section 55 of the Defamation Act 1974 or any other law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation;

(b) a judgment in rem; or

(c) the law relating to res judicata or issue estoppel.

Division 5 - Evidence of conduct and character relevant to issues

Subdivision A - Preliminary

Definition

83. A reference in this Division to the doing of an act includes a reference to a failure to act.

Application

84. (1) This Division does not apply in relation to evidence that relates only to the credibility of a witness.

(2) This Division does not apply so far as 4 proceeding relates to bail.

(3) This Division does not apply in relation to evidence of the character, reputation or conduct of a person, or in relation to evidence of a tendency that a person has or had, if that character, reputation, conduct or tendency, respectively, is a fact in issue.

Use of evidence for other purposes

85. Where evidence is, because of this Division not admissible to prove any one of the following-

(a) a tendency of a person;

(b) whether a person did or could have done a particular act or had or could have had a particular state of mind; or

(c) the character of a person, but is admissible to prove any other of them or some other matter, the evidence may not be used to prove the tendency, act, state of mind or character.

Subdivision B - Tendency evidence

Exclusion of tendency evidence

86. Evidence of the character, reputation or conduct of a person, or of 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.

Subdivision C - conduct evidence

Exception: conduct (including of accused) to prove tendency

87. Where there is a question whether a person did a particular act or had a particular state of mind and it is reasonably open to find that-

(a) the person did some other particular act or had some other particular state of mind, respectively; and

(b) all the acts or states of mind, respectively, and the circumstances in which they were done or existed, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the person did the other act or had the other state of mind, respectively.

Exclusion of evidence of conduct (including of accused) to prove improbability of co-incidence

88. Evidence that 2 or more events occurred is not admissible to prove that, because of the improbability of the events occurring co-incidentally, 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.

Further protections: prosecution evidence of conduct of accused

89. (1) This section applies in relation to evidence in a criminal proceeding adduced by the prosecutor and so applies in addition to sections 87 and 88.

(2) Evidence that the defendant did or could have done a particular act or had or could have had a particular state of mind, being an act or state of mind that is similar to an act or state of mind the doing or existence of which is a fact in issue, is not admissible unless-

(a) the existence of that fact in issue is substantially in dispute in the proceeding; and

(b) the evidence has substantial probative value.

(3) Without limiting the matters that the court 'may have regard to in determining whether the evidence has substantial probative value, it shall have regard to-

(a) the nature and extent of the similarity;

(b) in the case of evidence of a state of mind - the extent to which the state of mind is unusual or occurs infrequently; and

(c) in-the case of evidence of an act-

(i) the extent to which the act is unusual;

(ii) the likelihood that the defendant would have repeated the act;

(iii) the number of occasions on which similar acts have been done; and

(iv) the period that has elapsed between the time when the act was done and the time when the defendant is alleged to have done the act that the evidence is adduced to prove.

Notice to be given

90. (1) Subject to subsection (2) -

(a) section 87 does not apply in relation to evidence adduced by a party; and

(b) evidence adduced by a party to which section 88 applies is not admissible,

unless that party has given notice in writing in accordance with [rules of court] the regulations to each other party of the intention to adduce the evidence.

(2) The court may, on the application of a party and subject to such conditions (if any) as the court thinks fit to impose, direct that one or more of sections 87 or 88 is or are to apply-

(a) notwithstanding the failure of the party to give such notice; or

(b) in relation to specified evidence - with such modifications as the court specifies.

Subdivision D - Character evidence

Exception: character of accused

91. (1) This section applies only in a criminal proceeding.

(2) The hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence adduced by a defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character.

(3) Where evidence that tends to prove that the defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that the defendant is not generally a person of good character.

(4) Where evidence that tends to prove that the defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that the defendant is not a person of good character in that respect.

Exception: character of co-accuseds

92. (1) In a criminal proceeding, the hearsay rul e and the tendency rule do not prevent the admission or use of evidence of an opinion about a defendant adduced by some other defendant if-

(a) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(b) the opinion is wholly or substantially based on that knowledge.

(2) Where evidence of an opinion as mentioned in subsection (1) has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence to prove that that evidence should not be accepted.

Cross-examination of accused by leave only

93. A defendant in a criminal proceeding may not be cross-examined as to matters' arising out of evidence to which section 91 or 92 applies unless the court gives leave.

Division 6 - Credibility

Exclusion of evidence relevant to credibility

94. (1) Evidence that relates to the credibility of a witness is not admissible to prove that the evidence of the witness should or should not be accepted.

(2) Where such evidence is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove that the evidence of the witness should or should not be accepted.

Exception: character of accused

95. (1) This section applies only in a criminal proceeding.

(2) The hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence adduced by a defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character.

(3) Where evidence that tends to prove that the defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the defendant is not generally a person of good character.

(4) Where evidence that tends to prove that the defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the defendant is not a person of good character in that respect.

Exception: cross-examination as to credibility

96. (1) The credibility rule does not prevent the admission or use of evidence that relates to the credibility of a witness and has been adduced in cross-examination of the witness.

(2) Where such evidence-

(a) is relevant only because it is relevant to the credibility of the witness; and

(b) does not have substantial probative value as to the credibility of the witness, it is not admissible.

(3) Without limiting the matters that the court may have regard to, in determining whether the evidence has substantial probative value it shall have regard to-

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation at a time 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.

Further protections: cross-examination of accused

97. (1) This section only applies in a criminal proceeding and so applies in addition to section 96.

(2) Subject to this section, a defendant may not be cross-examined as to a matter that is relevant only because it is relevant to the credibility of the defendant unless the court gives leave.

(3) Leave is not required for cross-examination by the prosecutor as to whether the defendant-

(a) is biased or has a motive to be untruthful;

(b) was or is 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 shall not be given for cross-examination by the prosecutor as to any other matter that is relevant only because it is relevant to the credibility of the defendant unless-

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or

(b) evidence has been admitted that-

(i) was given by the defendant;

(ii) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and

(iii) was adduced solely or mainly to impugn the credibility of that witness.

(5) A reference in subsection (4) to evidence does not include-a reference to evidence of conduct-

(a) in the events in relation to which; or

(b) in relation to the investigation of the offence for which, the defendant is being prosecuted.

(6) Leave shall not be given for cross-examination by some other defendant unless the evidence that the defendant to be cross-examined has given includes evidence adverse to the first-mentioned defendant and that evidence has been admitted.

Where unsworn evidence given

98. In a criminal proceeding, where a defendant has given unsworn evidence only, sections 96 and 97 apply in relation to evidence that is relevant only because it is relevant to the credibility of that defendant as if that defendant had given sworn evidence and the evidence concerned had been adduced in cross-examination of the defendant.

Exception: rebutting denials by other evidence

99. (1) Where evidence that a witness-

(a) is biased or has a motive to be untruthful;

(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,

is adduced otherwise than from the witness, the credibility rule does not prevent the admission or use of the evidence if the witness has denied the substance of the evidence.

(2) Where evidence that a witness-

(a) was or is unable to be aware of matters to which his or her evidence relates; or

(b) knowingly or recklessly made a false representation while under an obligation imposed by or under a law, including a-law of the Commonwealth, another State or a Territory or of a foreign country, to tell the truth,

is adduced otherwise than from the witness, the credibility rule does not prevent the admission or use of the evidence if-

(c) the witness has denied the substance of the evidence; and

(d) the court has given leave to adduce the evidence.

Exception: application of certain provisions to maker of representations

100. Where

(a) by virtue of one of the provisions of Division 1, the hearsay rule does not prevent the admission of evidence of a previous representation;

(b) evidence of the representation has been admitted; and

(c) the person who made the representation has not been called to give evidence,

the credibility rule does not prevent the admission or use of evidence about matters as to which the person could have been cross-examined if he or she had given evidence.

Exception: re-establishing credibility

101. (1) The credibility rule does not prevent the admission or use of evidence adduced in re-examination of a witness.

(2) The credibility rule does not prevent the admission or use of evidence that explains or contradicts evidence adduced as mentioned in section 98 or 100, if the court gives leave to adduce that evidence.

(3) Without limiting subsection (1) or (2), where-

(a) evidence of a prior inconsistent statement of a witness has been admitted; or

(b) it is suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

the credibility rule does not prevent the admission or use of evidence of a prior consistent statement of the witness if the court gives leave to adduce the evidence.

Division 7 - Identification evidence

Application of Division

102. This Division applies only in a criminal proceeding.

Exclusion of identification evidence

103. (1) Identification evidence adduced by the prosecutor is not admissible unless-

(a) either-

(i) an identification parade that included the defendant was held before the identification was made; or

(ii) it would not have been reasonable to have held such a parade; and

(b) the identification was made without the person who made it having been intentionally influenced to make it.

(2) Without limiting the matters that may be taken into account by the court, in determining whether it was reasonable to hold an identification parade as mentioned in subsection (1) it shall take into account-

(a) the kind of offence, and the gravity of the offence, concerned;

(b) the importance of the evidence;

(c) the practicality of holding such a parade having regard, among other things-

(i) if the defendant refused to co-operate in the conduct of the parade - to the manner and extent of, and the reason (if any) for, the refusal; and

(ii) in any case - whether the identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such a parade having regard, among other things, to the relationship (if any), between the defendant and the person who made the identification.

(3) Where-

(a) the defendant refused to co-operate in the conduct of an identification parade unless a legal practitioner acting for him or her was present while it was being held; and

(b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such a legal practitioner so to be present,

it shall be presumed that it would not have been reasonable to have held an identification parade at that time.

(4) In determining whether it was reasonable to have held an identification parade, the court shall not take into account the availability of pictures that could be used in making identifications.

Exclusion of evidence of identification by pictures

104. (1) This section-

(a) applies in relation to identification evidence adduced by the prosecutor where the identification was made wholly or partly as a result of the person who made the identification examining pictures kept for the use of police officers; and

(b) applies in addition to section 103.

(2) Where a defendant was in the custody of a police officer in connection with the investigation of an offence at the time when the pictures were examined, the identification evidence is not admissible unless-

(a) the picture of the defendant that was examined was made after the defendant had been taken into that custody; or

(b) the pictures examined included a reasonable number of pictures of persons who were not at the time when the pictures of those persons were made, in the custody of a police officer in connection with the investigation of an offence,

and the identification was made without the person who made it having been intentionally influenced to make it.

(3) In any other case to which this section applies, the identification evidence is not-admissible unless the pictures examined included a reasonable number of pictures of persons who were not, at the time when the pictures were made, in the custody of a police officer in connection with the investigation of an offence.

(4) Where evidence concerning an identification of a defendant that was made after examining a picture has been adduced by that defendant, the preceding provisions of this section do not render inadmissible evidence adduced by the prosecutor, being evidence that contradicts or qualifies that evidence.

(5) In this section-

(a) "picture" includes "photograph"; and

(b) a reference to the making of a picture includes a reference to the taking of a photograph.

Directions to jury

105. (1) Where identification evidence has been admitted, the Judge shall, if the defendant so requests, inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for that need for caution, both generally and in the circumstances of' the case.

(2) In particular and without limiting subsection (1), the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the defendant was a person by whom the relevant offence was committed unless-

(a) there are, in relation to the identification, special circumstances that tend to support the identification; or

(b) there is substantial evidence (not being identification evidence) that tends to prove the guilt of the defendant and the jury accepts that evidence.

(3) Special circumstances include-

(a) the defendant being known to the person who made the identification; and

(b) the identification having been made on the basis of a characteristic that is unusual.

(4) Where-

(a) it is not reasonably open to find the defendant guilty except on the basis of identification evidence;

(b) there are no special circumstances of the kind mentioned in subsection (2) (a); and

(c) there is no evidence of the kind mentioned in subsection (2) (b), the Judge shall direct that the defendant be acquitted.

(5) Where identification evidence has been admitted, the Judge shall, if the defendant is not represented in the proceeding by a legal practitioner, inform the defendant that he or she may make a request under subsection (1).

Division 8 - Privileges

Subdivision A - Client legal privilege

Privilege in respect of legal advice and litigation etc.

106. (1) Where, on objection by a person (in this Subdivision called the client), the court finds that the adducing of evidence would result in the disclosure of-

(a) a confidential communication made between-

(i) the client and a legal practitioner; or

(ii) 2 or more legal practitioners acting for the client; or

(b) the contents of a document (whether delivered or not) that was prepared by or at the direction or request of the client or a legal practitioner,

for the dominant purpose of the legal practitioner, or of one of the legal practitioners, providing legal advice to the client, the court shall direct that the evidence not be adduced.

(2) Where, on objection by a person (in this Subdivision also called a client), the court finds that the adducing of evidence would result in the disclosure of-

(a) a confidential communication made between-

(i) 2 or more of the persons mentioned in subsection (1) ;

(ii) a person referred to in subsection (1) and some other person; or

(iii) the employees or agents of the client; or

(b) the contents of a document (whether delivered or not) that was prepared,

for the dominant purpose of providing or receiving professional legal services in relation to a legal or administrative proceeding, or an anticipated or pending legal or administrative proceeding, in which the client is or may be a party, the court shall direct that the evidence not be adduced.

(3) Where, on objection by a party who is not represented in the proceeding by a legal practitioner, the court finds that the adducing of evidence will result in the disclosure of-

(a) a confidential communication made between that party and some other person; or

(b) the contents of a document (whether delivered or not) that has been prepared by or at the direction or request of the party,

for the dominant purpose of preparing for or conducting the proceeding, the court shall direct that the evidence not be adduced.

Loss of client legal privilege

107. (1) Section 106 does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Section 106 does not prevent the adducing of evidence relevant to a question concerning the intentions or competence in law of a client or party who has died.

(3) Where, if the evidence were not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of a court, including a federal court or a court of another State or a Territory, section 106 does not prevent the adducing of the evidence.

(4) In a criminal proceeding, section 106 does not prevent a defendant from adducing evidence other than evidence of-

(a) a confidential communication made between a person who is being prosecuted for a related offence and a legal practitioner acting for that person in connection with that prosecution; or

(b) the contents of a document that was prepared by or at the direction or request of a person who is being prosecuted for a related offence or by a legal practitioner acting for that person in connection with that prosecution.

(5) Section 106 does not prevent the adducing of evidence of the making of a communication, or document, that affects a right of a person.

(6) Where a client or party has voluntarily disclosed the substance of evidence, not being a disclosure made-

(a) in the course of the making of the confidential communication or the preparation of the confidential record;

(b) as a result of duress or deception; or

(c) under compulsion of law, section 106 does not prevent the adducing of the evidence.

(7) Where the communication or document was disclosed by a person who was, at the time, an employee or agent of a client or a legal practitioner, subsection (6) does not apply unless the employee or agent was authorised to make the disclosure.

(8) Where a confidential communication is contained in a document and a witness has used the document as mentioned in section 36 (1), section 106 does not prevent the adducing of evidence of the document.

(9) Where the substance of evidence has been disclosed with the express or implied consent of the client or party, section 106 does not prevent the adducing of the evidence.

(10) A disclosure by a client of a legal practitioner to a person who is a client of the same legal practitioner shall not be taken to be a disclosure for the purposes of subsection (9) if the disclosure concerns a matter in relation to which the legal practitioner is providing or is to provide professional legal services to both of them.

(11) Where, in relation to a proceeding in connection with a matter, 2 or more of the parties have, before the commencement of the proceeding, jointly retained a legal practitioner in relation to the matter, section 106 does not prevent one of those parties who retained the legal practitioner adducing evidence of-

(a) a communication made by any one of them t the legal practitioner; or

(b) a document prepared by or at the direction or request of any one of them, in connection with that matter.

(12) Section 106 does not prevent the adducing of evidence of-

(a) a communication made or a document prepared in furtherance of the commission of-

(i) a fraud;

(ii) an offence; or

(iii) an act that renders a person liable to a civil penalty; or

(b) a communication or a document that the client knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power conferred by or under an enactments Commonwealth Act, an Act of another State or a British Act applying as part of the law of another State.

(13) For the purposes of subsection (12), where-

(a) the commission of the fraud, the offence or act, or the abuse of power, is a fact in issue; and

(b) there are reasonable grounds for finding that-

(i) the fraud, offence or act, or the abuse of power, was committed; and

(ii) the communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared, respectively.

(14) Where, by virtue of one of the preceding provisions of this section, section 106 does not prevent the adducing of evidence of a communication, that section does not prevent the adducing of evidence of a communication that is reasonably necessary to enable a proper understanding of the first-mentioned communication.

(15) A reference in this section to the commission of an act includes a reference to a failure to act.

Definitions

108. In this Subdivision-

"client" includes-

(a) an employer (not being a legal Practitioner) of a legal practitioner;

(b) an employee or agent of a client;

(c) if the client is a person in respect of whose person, estate or property a manager or committee or other person (however described) is for the time being acting under a law, including a law of another State or a Territory that relates to persons of unsound mind - a person so acting; and

(d) if the client has died - a personal representative of the client,

and, in relation to a confidential communication made by a client in respect of property in which the client had an interest, also includes a successor in title to that interest;

"legal practitioner" includes an employee or agent of a legal practitioner;

"party" includes-

(a) an employee or agent of a Party;

(b) if the party is a person in respect of whose person, estate or property a manager or committee or other person (however described) is for the time being acting under a law, including a law of another State or a Territory that relates to persons of unsound mind - a person so acting; and

(c) if the party has died - a personal representative of the party,

and, in relation to a confidential communication made by a party in respect of property in which the party had an interest, also includes a successor in title to that interest.

Subdivision B - Other privileges

Privilege in respect of confidential communications and records

109. (1) Where, on the application of a person who is an interested person in relation to a confidential communication or a confidential record, the court finds that, if evidence of the communication or record were to be adduced in the proceeding, the likelihood of-

(a) harm to an interested person;

(b) harm to the relationship in the course of which the confidential communication was made or the confidential record prepared; or

(c) harm to relationships of the kind concerned, together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be adduced.

(2) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it shall take into account-

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

(b) if the proceeding is a criminal proceeding - whether the evidence is adduced by the defendant or by the prosecutor;

(c) the extent, if any, to which the contents of the communication or document have been disclosed;

(d) whether an interested person has consented to the evidence being adduced;

(e) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(f) any means available to limit publication of the evidence.

(3) Subsection (1) does not apply to a communication or document-

(a) the making of which affects a right of a person;

(b) that was made or prepared in furtherance of the commission of-

(i) a fraud;

(ii) an offence; or

(iii) an act that renders a person liable to a civil penalty; or

(c) that an interested person knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power conferred by or under an enactment, a Commonwealth Act, an Act of another State Act or a British Act applying as part of the law of another State.

(4) For the purposes of subsection (3), where-

(a) the commission of the fraud, offence or act, or the abuse of power, is a fact in issue; and

(b) there are reasonable grounds for finding that-

(i) the fraud, offence or act, or the abuse of power, was committed; and

(ii) the communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared, respectively.

(5) In this section, "interested person", in relation to a confidential communication or a confidential record, means a person by whom, to whom, about whom or on whose behalf the communication was made or the record prepared.

(6) A reference in this section to the commission-of an act includes a-reference to a failure to act.

Privilege in respect of self-incrimination in other proceedings

110. (1) Where a witness objects to giving evidence on the ground that the evidence may tend to prove that the witness-

(a) has committed an offence against or arising under a law of or in force in this State, the Commonwealth, another State or a Territory or the law of a foreign country; or

(b) is liable to a civil penalty,

the court shall, if there are reasonable grounds for the objection, inform the witness-

(c) that he or she need not give the evidence but that, if he or she gives the evidence, the court will give a certificate under this section; and

(d) of the effect of the certificate.

(2) If the witness declines to give the evidence, the court shall not require the witness to give it but, if the witness gives the evidence, the court shall cause the witness to be given a certificate under this section in respect of the evidence.

(3) Where-

(a) the objection has been overruled; and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection, the court shall cause the witness to be given such a certificate.

(4) Evidence in respect of which a certificate under this section has been given is not admissible against the person to whom the certificate was given in any legal or administrative proceeding, not being a criminal proceeding in respect of the falsity of the evidence.

(5) In a criminal proceeding, the preceding provisions of this section do not apply in relation to evidence that a defendant-

(a) did an act the doing of which is a fact in issue; or

(b) had a state of mind the existence of which is a fact in issue.

(6) A reference in this section to the doing of an act includes a reference to a failure to act.

Subdivision C - Evidence excluded in the public interest

Exclusion of evidence of reasons for judicial etc. decisions

111. (1) Evidence of the reasons for a decision made by a person-

(a) acting as Judge in a legal or administrative proceeding; or

(b) acting as an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration, or the deliberations of a person so acting interrelation to such a decision, may not be given by that person, or by a person who was under the direction or control of that person, in a proceeding to which this Act applies that is not the legal or administrative proceeding concerned.

(2) Subsection (1) does not prevent the admission or use, in a legal or administrative proceeding, of 'published reasons for a decision.

(3) Evidence of the reasons for a decision made by a member of a jury in a legal or administrative proceeding, or of the deliberations of a member of a jury in relation to such a decision, may not be given by any of the members

of that jury in a proceeding to which this Act applies that is not the legal or administrative proceeding concerned.
(4) Subsections (1) and (3) do not apply in a proceeding that is-

(a) a prosecution for one of more of the following offences:

(i) an offence against or arising under section 334, 335 or 336 of the Crimes Act 1900;

(ii) an offence against or arising under section 67 of the Jury Act 1977;

(iii) attempting to pervert the course of justice;

(iv) an offence connected with an offence mentioned in subparagraph (i), (ii) or (iii), including an offence of conspiring to commit such an offence;

(b) in respect of a contempt of a court; or

(c) by way of appeal from a judgment, decree, order or sentence of a court.

Exclusion of evidence of matters of state

112. (1) Where the public interest in admitting evidence that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the evidence, the court may, either of its own motion or on the application of any person (whether or not a party), direct that the evidence not be adduced.

(2) For the purposes of subsection (1), evidence that relates to matters of state includes evidence-

(a) that relates to-

(i) the security or defence of Australia;

(ii) international relations or to relations between the Commonwealth and a State or relations between 2 or more States; or

(iii) the prevention or detection of offences or contraventions of the law; or

(b) which, if adduced-

(i) would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law, including a law of the Commonwealth or a State; or

(ii) would tend to prejudice the proper functioning of government, including the government of the Commonwealth or another State.

(3) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it shall take into account-

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

(b) if the proceeding is a criminal proceeding - whether the evidence is adduced by the defendant or by the prosecutor;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the likely effect of the evidence being adduced and any means available to limit its publication; and

(e) whether the substance of the evidence has already been published.

(4) For the purposes of subsection (1), the court may inform itself in any manner the court thinks fit.

(5) A reference in this section to a State includes a reference to a Territory.

Exclusion of evidence of settlement negotiations

113. (1) Evidence may not be adduced of-

(a) a communication made-

(i) between persons in dispute; or

(ii) between one or more persons in dispute and a third party, being a communication made in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply where-

(a) the persons in dispute consent to the evidence being adduced or, if one of those persons has tendered the communication or document in evidence in some other legal or administrative proceeding, all the other persons so consent;

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute;

(c) the communication or document-

(i) began an attempt to settle the dispute; and

(ii) included a statement to the effect that it was not to be treated as confidential;

(d) the communication or document relates to an issue in dispute and the dispute, so far as it relates to that issue, has been settled;

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute;

(f) the making of the communication, or the preparation of the document, affects a right of a person;

(g) the communication was made, or the document prepared, in furtherance of the commission of-

(i) a fraud;

(ii) an offence; or

(iii) an act that renders a person liable to a civil penalty; or

(h) a party to the dispute knew or ought reasonably to have known that the communication was made, or the document prepared, in furtherance of a deliberate abuse of a power conferred by or under an enactment, a Commonwealth Act, an Act of another State or a British Act applying as part of the law of another State.

(3) For the purposes of subsection (2) (g), where-

(a) the commission of the fraud, the offence or the act is a fact in issue; and

(b) there are reasonable grounds for finding that-

(i) the fraud, offence or act was committed; and

(ii) 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 the document so prepared, respectively.

(4) For the purposes of subsection (2) (h), where-

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power, the court may find that the communication was so made or the document so prepared, respectively.

(5) A reference in this section to-

(a) a dispute is a reference to a dispute of a kind in respect of which relief may be given in a legal or administrative proceeding;

(b) an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding;

(c) a party to a dispute includes a reference to an employee or agent of such a party; and

(d) the commission of an act includes a reference to a failure to act.

Subdivision D - General

Court to inform of rights etc.

114. Where it appears to the court that a witness or a party may have grounds for making an application or objection under one of the preceding provisions of this Division, the court shall satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

Court may inspect etc. documents

115. Where a question arises under this Division in relation to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

Certain evidence inadmissible

116. Evidence that, by or under a provision of this Division, may not be adduced or given in a proceeding is not admissible in the proceeding.

Division 9 - Discretions to exclude evidence

General discretion to exclude

117. Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence.

Criminal proceedings: discretion to exclude prejudicial evidence

118. In a criminal proceeding, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court may refuse to admit the evidence.

Discretion to exclude improperly obtained evidence

119. (1) Evidence that was obtained-

(a) improperly or in contravention of a law; or

(b) in consequence of an impropriety or of a contravention of a law,

shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

(2) Without limiting subsection (1), where-

(a) an admission was made during or in consequence of questioning; and

(b) the person conducting the questioning knew or ought reasonably to have known that-

(i) the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(ii) the making Of a false statement was likely to cause the person who was being questioned to make an admission,

but nevertheless, in the course of that questioning, the person conducting the questioning did or omitted to do the act or made the false statement, evidence of the admission, and evidence obtained in consequence of the admission, shall be taken to have been obtained improperly.

(3) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it shall take into account-

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the gravity of the impropriety or contravention;

(e) whether the impropriety or contravention was deliberate or reckless;

(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;

(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 a law.

PART 6 - OTHER ASPECTS OF PROOF

Division 1 - Judicial notice

Matters of law

120. (1) Proof shall not be required about matters of law, including the provisions and coming into operation, in whole or in part, of-

(a) an Act, an Imperial Act, a Commonwealth Act, an Act of another State or an Act or Ordinance of a Territory; or

(b) an instrument of a legislative character (including regulations, statutory rules and by-laws) made or issued under or by authority of such an Act or Ordinance, being an instrument-

(i) that is required by or under an enactment to be published in a government or official gazette (by whatever name called); or

(ii) the making or issuing of which is so required to be notified in a government or official gazette, (by whatever name called).

(2) The Judge may inform himself or herself about those matters in any manner that the Judge thinks fit.

Matters of common knowledge etc.

121. (1) Proof shall not be required about knowledge that is not reasonably open to question and is-

(a) common knowledge in the locality in which the proceeding is being held or generally; or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The Judge may acquire knowledge of that kind in any manner that the Judge thinks fit.

(3) The court (if there is a jury, including the jury) shall take knowledge of that kind into account.

(4) The Judge shall give a party such opportunity to make submissions, and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Certain Crown certificates

122. This Division 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.

Division 2 - Documents

Definitions

123. (1) A reference in this Division to a document in question is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) For the purposes of this Division, where a document is not an exact copy of a document in question but is identical to the document in question in all relevant respects, it mal be taken to be a copy of the document in question.

"Best evidence" rule abolished 124. The principles and rules of the common law that relate to the mode of proof of the contents of documents are abolished.

Proof of contents of documents

125. (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or-

(a) by adducing evidence of an admission made by some other party to the proceeding as to the contents of the document in question;

(b) by tendering a document that-

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing) - by tendering a document that is or purports to be a transcript of the words;

(d) if the document in question is an article or thing on or in which information is stored in such a manner that it cannot be used by the court unless a device is used to retrieve, produce or collate it - by tendering a document that was or purports to have been produced by use of the device;

(e) by tendering a document that-

(i) forms part of the records of or kept by a business (whether or not the business is still in existence); and

(ii) purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such a document; or

(f) if the document in question is a public document - by tendering a document that was or purports to have been printed-

(i) by the Government Printer or by the government or official printer of the Commonwealth, another State or a Territory; or

(ii) by the authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country, and is or purports to be a copy of the document in question.

(2) Subsection (1) applies in relation to a document in question, whether the document in question is available to the party or not.

(3) A party may adduce evidence of the contents of a document in question that is unavailable to the party-

(a) by tendering a document that is a copy of, or a faithful extract from or a summary of, the document in question; or

(b) by adducing oral evidence of the contents of the document in question.

Documents in foreign countries

126. Where a document in question is in a foreign country, section 125 (1) (b), (c), (d), (e) or (f) does not apply unless-

(a) the party who adduces evidence of the contents of the document in question has, not less than 14 days before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or

(b) the court directs that it is to apply.

Division 3 - Facilitation of proof

Evidence produced by machines,, processes etc.

127. (1) This section applies in relation to a document or thing produced wholly or partly by a device or process.

(2) Where it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily does what the party tendering the document or thing asserts it to have done, it shall be presumed, unless the contrary is proved, that, in producing the document or thing on the occasion in question, the device or process did what that party asserts it to have done.

(3) In the case of a document that is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence), then, where the device or process is or was at that time used for the purposes of the business, it shall be presumed, unless the contrary is proved, that on the occasion in question the device or process did what the party adducing the evidence asserts it to have done.

(4) Subsection (3) does not apply in relation to the contents of a document that was produced for the purposes of, or for purposes that included the purposes of a legal or administrative proceeding.

Attestation of documents

128. It is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

Gazettes etc.

129. (1) It shall be presumed, unless the contrary is proved, that a document purporting-

(a) to be the Gazette;

(b) to be a government or official gazette (by whatever name called) of the Commonwealth, another State or a Territory; or

(c) to have been printed by authority of the government or administration of the State, the Commonwealth, another State, a Territory or a foreign country,

is what it purports to be and was published on the day on which it purports to have been published.

(2) Where there is produced to a court-

(a) a copy of the Gazette;

(b) a copy of a government or official gazette (by whatever name called) of the Commonwealth, another State or a Territory; or

(c) a document that purports to have been printed by authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country,

being a copy or document in which the doing of an act-

(d) by the Governor, the Governor-General or by the Governor of another State or the Administrator of a Territory; or

(e) by a person authorised or empowered by law to do the act,

is notified or published, it shall be presumed, unless the contrary is proved, that the act was duly done and, if the date on which the act was done appears in the copy or document, that it was done on that date.

Seals and signatures

130. (1) Where the imprint of a seal appears on a document and purports to be the imprint of-

(a) the Public Seal of the State;

(b) a Royal Great Seal;

(c) the Great Seal of Australia;

(d) some other seal of the Commonwealth;

(e) a seal of Another State, a Territory or a foreign country; or

(f) the seal of a body (including a court or a tribunal), or a body corporate established by or under Royal Charter or the law of this State, the Commonwealth, another State, a Territory or a foreign country,

it shall be presumed, unless the contrary is proved, that-

(g) the imprint is the imprint of the seal of which it purports to be the imprint; and

(h) the document was duly sealed as it purports to have been sealed.

(2) Where the imprint of a seal appears on a document and purports to be the imprint of the seal of-

(a) the Sovereign, the Governor, the Governor-General or the Governor of another State; or

(b) a person holding office under a law of this State, the Australian Constitution, a law of the Commonwealth, another State, a Territory or a foreign country,

it shall be presumed, unless the contrary is proved, that-

(c) the imprint is the imprint of the seal of which it purports to be the imprint; and

(d) the document was duly sealed by the person purporting to seal it acting in his or her official capacity.

(3) Where a document purports to have been signed by a person referred to in subsection (2) (a) or (b), it shall be presumed, unless the contrary is proved, that the document was duly signed by that person acting in his or her official capacity.

Public documents

131. A document that purports-

(a) to be a copy of, or a faithful extract from or a summary of, a public document; and

(b) to have been-

(i) sealed with the seal of a person who, or of a body that; or

(ii) certified as such a copy, extract or summary by a person who,

might reasonably be supposed to have the custody of the public document,

shall be presumed, unless the contrary is proved, to be a copy of the public document, or a faithful extract from or a summary of, the public document, respectively.

Documents produced from proper custody

132. Where a document that is or purports to be more than 20 years old is produced from proper custody, it shall be presumed, unless the contrary is proved, that the document is the document that it purports to be and, where it purports to have been executed or attested by a person, that it was duly executed or attested by that person.

Labels etc.

133. Where-

(a) a document has been attached to an object or writing has been placed on a document or object; and

(b) the document or writing so attached or placed may reasonably be supposed to have been so attached or placed in the course of a business,

it shall be presumed, unless the contrary is proved, that the ownership or the origin of the object or document is as stated in the document or writing.

Posts and telecommunications 134. (1) It shall be presumed, unless the contrary is proved, that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth day after having been posted.

(2) Where a message has been-

(a) sent by means of a telecommunications installation; or

(b) delivered to an office of the Australian Telecommunications commission for transmission by the Commission and any fee payable in respect of that transmission has been paid,

it shall be presumed, unless the contrary is proved, that the message was received by the person to whom it was addressed 24 hours after having been sent or delivered, respectively.

(3) Where a document that has been-

(a) received from the Australian Telecommunications Commission; or

(b) produced by a telecommunications installation, purports to contain a record of a message transmitted by means of a telecommunications' service, it shall be presumed, unless the contrary is proved, that the message-

(c) was so transmitted; and

(d) was sent by the person from whom or on whose behalf it purports to have been sent on the date on which and at the time at which, and from the place from which, it purports to have been sent.

(4) In this section, "postal article" has the meaning it has under the Postal Services Act 1975 of the Commonwealth.

Official statistics

135. Where a document purports to have been published by or on behalf of, or by arrangement with, the Australian Bureau of Statistics or the Australian Statistician, it shall be presumed, unless the contrary is proved, that the statistics contained in it were derived by the Bureau or by the Australian Statistician, as the case may be, from information obtained by the Bureau or by the Australian Statistician, respectively.

Division 4 - standard of proof

Civil proceedings: standard of proof

136. (1) In a civil proceeding, the court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account, in determining whether it is satisfied as mentioned in subsection (1) it shall take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged.

Criminal proceedings: standards of proof

137. (1) In a criminal proceeding, a court shall not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a criminal proceeding, the court shall find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Admissibility of evidence: standard of proof

138. (1) Except as otherwise provided by this Act, in any proceeding the court shall find that the facts necessary for determining-

(a), a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question arising under this Act, have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account, in determining whether it is satisfied as mentioned in subsection (1) it shall take into account the importance of the evidence in the proceedings.

Division 5 - Corroboration

Corroboration requirements abolished

139. (1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a like or related offence.

(3) Notwithstanding any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, where there is a jury, it is not necessary that the Judge-

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or like effect; or

(b) give a direction relating to the absence of corroboration.

Division 6 - warnings

Unreliable evidence

140. (1) This section applies in relation to the following kinds of evidence:

(a) evidence in relation to which Division 1 or 3 of Part 5 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) in a criminal proceeding-

(i) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceeding; or

(ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

(e) in the case of a prosecution for an offence of a sexual nature - evidence given by a victim of the alleged offence;

(f) in the case of a proceeding against the estate of a deceased person - evidence adduced by or on behalf of a person seeking relief in the proceeding, being evidence about a matter about which the deceased person could, if he or she were alive, have given evidence.

(2) Where there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so-

(a) warn the jury that the evidence may be unreliable;

(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) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform, the jury.

PART 7 - MISCELLANEOUS

Inferences

141. Where a question arises as to the application of a provision of this Act in relation to a document or thing, the court may-

(a) examine the document or thing; and

(b) draw any reasonable inference from it as well as from other matters from which inferences may properly be drawn.

Proof of certain matters by affidavit etc.

142. (1) Evidence of a fact that, by virtue of section 56, 57, 58, 61, 62 or 63 or of a provision of Division 2 or 3 of Part 6, is to be proved in relation to a document or thing may be given by a person who, at the relevant time or at some later time, had a position of responsibility in relation to the making or keeping of the document or thing.

(2) Notwithstanding Part 5, the evidence may include evidence based on the knowledge and belief of the person who gives it or on information that that person has.

(3) The evidence may be given by affidavit or, in the case of evidence that relates to a public document, by a statement in writing.

(4) An affidavit or statement that includes evidence based on knowledge, information or belief shall set out the source of the knowledge or information or the basis of the belief.

(5) A copy of the affidavit or statement shall be served on each party a reasonable time before the hearing of the proceeding.

(6) The party who tenders the affidavit or statement shall, if some other party so requests, call the deponent or person who made the statement to give evidence but need not otherwise do so.

Request to produce documents or call witnesses

143. (1) In this section, "request" means a request given by a party to some other party to do one or more of the following:

(a) to produce to the first-mentioned party or to permit that party, adequately and in an appropriate manner, to examine, test or copy the whole or a part of a specified document or thing;

(b) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing or a specified person in whose possession a document or thing is believed to be or to have been at any time;

(c) in relation to a document of the kind referred to in paragraph (c) of the definition of "document" in section 3 - to permit the first-mentioned party, adequately and in an appropriate manner, to examine and test the document and the way in which it was produced and has been kept;

(d) in relation to evidence of a previous representation - to call as a witness the person who made the previous representation;

(e) in relation to evidence that a person has been convicted of an offence, being evidence to which section 81 (2) applies - to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

(2) Where, for the purpose of determining a question that relates to-

(a) a previous representation;

(b) evidence of a conviction of a person for an offence; or

(c) the authenticity, identity or admissibility of a document or thing,

a party has given a reasonable request to some other party and that other party has, without reasonable cause, failed or refused to comply with the request, the court may make one or more of the following orders:

(d) an order directing the other party to comply with the request;

(e) an order that the other party produce a specified document or thing, or call as a witness a specified person, as mentioned in subsection (1);

(f) such order with respect to adjournments or costs as is just,

or may refuse to admit the evidence in relation to which the request was made.

(3) Where the party who has failed to comply with a request proves that the document or thing to be produced or the person to be called is unavailable, it is reasonable cause to fail to comply with the request.

(4) Without limiting the matters that the court may take into account, in relation to the exercise of a function under subsection (2) it shall take into account-

(a) the importance in the proceeding of the evidence in relation to which the request was made;

(b) whether there is a genuine dispute in relation to the matter to which the evidence relates;

(c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence or of the document the contents of which are sought to be proved;

(d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered;

(e) in the case of a request in relation to evidence of a previous representation - whether there is a reasonable doubt as to the accuracy of the representation or of the information on which ie was based;

(f) in the case of a request as mentioned in subsection (1) (e) - whether some other person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained;

(g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and

(h) the nature of the proceeding.

Views etc.

144. (1) A Judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A Judge shall not make an order under subsection (1) unless he or she is satisfied that-

(a) the parties will be given a reasonable opportunity to be present; and

(b) the Judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the Judge may take into account, in determining whether to make an order under subsection (1) the Judge shall take into account-

(a) whether the parties will be present;

(b) whether the usefulness of the holding of the demonstration or inspection is outweighed by the danger of unfair prejudice or the danger that it might mislead or cause or result in undue waste of time;

(c) in the case of a demonstration - the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated; and

(d) in the case of an inspection - the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) may not itself conduct an experiment in the course of its deliberations.

(5) The preceding provisions of this section do hot apply in relation to the inspection of an exhibit by the court or by the jury.

Views etc. to be evidence

145. Subject to this Act, the court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

The voir dire

146. (1) Where the determination of a question whether-

(a) evidence should be admitted (whether in the exercise of a discretion or not); or

(b) a witness is competent or compellable,

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) Where there is a jury, a preliminary question whether evidence of an admission, or evidence to which section 119 (Discretion to exclude improperly obtained evidence) applies. should be admitted shall be heard and determined in the absence of the jury.

(3) Where there is a jury, the jury shall not be present at a hearing to determine any other preliminary question unless the court so orders.

(4) Without limiting the matters that the court may take into account, in determining whether to make an order as mentioned in subsection (3) it shall take into account-

(a) whether the evidence concerned will be adduced in the course of the hearing to determine the preliminary question; and

(b) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at some other stage of the hearing of the proceeding (other than in some other hearing to determine a preliminary question or, in a criminal proceeding, in relation to sentencing).

(5) Section 110 (5) does not,-apply in a hearing to determine a question referred to in subsection (2) or a preliminary question.

(6) In the application of Parts 4 and 5 in a hearing to determine a question referred to in subsection (2) or a preliminary question, the facts in issue shall be taken to include the fact to which the hearing relates.

(7) Where there is a jury and the jury is not present at a hearing to determine a question referred to in subsection (2) or a preliminary question, evidence shall not be adduced otherwise in the proceeding about evidence that a witness gave in that hearing unless that evidence is inconsistent with evidence otherwise given by the witness in the proceeding.

(8) Notwithstanding section 27 (2), a defendant who gives sworn evidence in a hearing to determine a question referred to in subsection (2) or a preliminary question is not thereby precluded from giving unsworn evidence otherwise in the proceeding.

Waiver of rules of evidence

147. (1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of-

(a) Division 3 of Part 3;

(b) Divisions 1 to 6 (inclusive) of Part 5; or

(c) Division 2 of Part 6,

in relation to particular evidence or generally.

(2) In a criminal proceeding, the consent of a defendant is not effective for the purposes of subsection (1) unless-

(a) the defendant is represented by a legal practitioner; or

(b) the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation 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.

(4) Without limiting the matters that the court may take into account, in determining whether to exercise the power conferred by subsection (3) it shall take into account-

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

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

(c) the probative value of the evidence; and

(d) the powers of the court, if any, to adjourn the hearing, to make some other order or to give a direction in relation to the evidence.

Leave etc. may be given on terms

148. (1) Where, by virtue of a provision of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account, in determining whether to give the leave, permission or direction it shall 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;

(b) the extent to which to do so would be unfair to a party or to a witness;

(c) the importance of the evidence in relation to which the leave or permission is sought;

(d) the nature of the proceeding; and

(e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence.

Additional powers

149. (1) The powers of a court in relation to the discovery or inspection of documents extend to enabling the court to make such orders as the court thinks fit (including orders as to methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (c) of the definition of "document" in section 3.

(2) The power of a person or body to make rules of court in relation to any court extends to making rules for or with respect to the discovery of reports of persons intended to be called by a party to give evidence in a proceeding to which this Act applies.

(3) Without limiting subsection (2), rules made under that subsection may provide for the exclusion of evidence if the rules are not complied with, or for its admission on specified terms.

Regulations

151. The Governor may make regulations, not inconsistent with this Act, prescribing matters for or with respect to any matter-

(a) that by this Act is required or permitted to be prescribed; or

(b) that is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

SCHEDULE

(Sec. 26(l))

Oaths by witnesses

I swear by Almighty God (or the person to be sworn may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear by Almighty God (or the person to be sworn may name a god recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.