



Northern  
Territory  
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# EXPLANATORY PAPER

## DISCUSSION DRAFT OF THE UNIFORM EVIDENCE ACT FOR THE NORTHERN TERRITORY

### JANUARY 2011

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**PRIOR TO THE AMENDMENTS OF THE UEA FOLLOWING ALRC 102, THE ACT USED THE TERM 'DE FACTO SPOUSE'. THIS HAS BEEN AMENDED TO THE GENDER NEUTRAL TERM 'DE FACTO PARTNER'. IT IS NOT NECESSARY THAT THE RELATIONSHIP IS BETWEEN 'ADULT' PERSONS.COMMENTS..... 124**

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## CONSULTATION

This is a consultation draft of new evidence legislation for the NT. See page 129 for contact details. Whilst an in principle decision has been made to implement the UEA in the NT, the Department of Justice is keen to ensure that any local issues with its introduction are identified and resolved.

## GENERAL

The Uniform Evidence Act (UEA) is now law in the Commonwealth, the ACT, NSW, Norfolk Island, Victoria and Tasmania. The Northern Territory Government is proposing to also adopt the UEA, and a Northern Territory Bill (the Bill), modelled on the UEA as approved by the Standing Committee of Attorneys-General (SCAG) has been drafted.

At present NT Evidence law is common law modified by a number of discrete, purpose driven statutes.<sup>1</sup> There are also numerous other laws that modify in various ways the application of the general laws, such as those applying to the operation of administrative tribunals that disapply the formal rules of evidence.

The NT law has been criticised for its piecemeal nature, lack of coherent structure, and its difference to evidence law in other jurisdictions.

This Bill is the first of two Bills to introduce model uniform evidence law into the Northern Territory. A further Bill will be introduced at a later date to repeal relevant parts of the **Evidence Act** (NT) the subject matter of which is addressed in this Bill, and to make other relevant amendments and transitional arrangements across the Northern Territory statute book. These will both commence at the same time.

Model uniform evidence law arose out of a comprehensive review of evidence laws by the Australian Law Reform Commission (ALRC) in the 1980s. The ALRC produced a model Bill (the Model Bill) to provide a modernised, structured and reasoned approach to the laws of evidence. The purpose of the Model Bill was to promote and maintain uniformity and harmonisation of evidence laws across

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<sup>1</sup> As well as the *Evidence Act 1939*, there are the *Evidence (Business Records) Interim Arrangements Act*, and the *Sexual Offences (Evidence and Procedure) Act*.

Australian jurisdictions. The Model Bill clarified evidence laws by partially codifying complex common law rules and re-writing statutory rules of evidence in a clear and concise manner.

The policy behind the UEA is that all relevant and reliable evidence that is of an appropriate probative value should be admissible unless such evidence would cause unfair prejudice to a party to a court proceeding.

The UEA is intended to be an exhaustive statement of the law.<sup>2</sup> It is the product of a decade of work by the ALRC, with the aim of creating greater clarity, certainty and accessibility in the law of evidence. It is of course influenced by the common law but is not a restatement of the common law, and it is to be interpreted by 'the language of the statute'.<sup>3</sup>

The UEA is not technically, however, a code of the law of evidence. It does not affect the operation of other legislation, or consistent common law and equitable rules of evidence. Some topics, which are so linked to the substantive law that they can only be considered in that context, are left out. For example it does not deal with the legal and evidential burden of proof, the parole evidence rule, issue estoppel, res judicata, notice of alibi provisions, vulnerable witnesses, the standard of proof and allocation of the burden of proof, or presumptions.<sup>4</sup>

Chapter 3 of the UEA, however, does cover the field of admissibility of evidence, and abrogates the common law rules, by stating in s56(1) 'Except as otherwise provided in this Act, evidence that is relevant in a proceeding is admissible in the proceeding.'<sup>5</sup>

There are significant reforms introduced by the UEA in, for example, the area of hearsay, discretionary exclusion and cross examining of a party's own witness. The 'ultimate issue' rule and 'common knowledge' rule regarding opinion evidence have been abolished. It is now easier to admit computer generated evidence. Various changes have been made in criminal proceedings in, for

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<sup>2</sup> ALRC 26, Vol 1, para 510. see also Stephen Odgers, *Uniform Evidence Law* (8<sup>th</sup> Ed) Lawbook Co. Sydney (2009).

<sup>3</sup> *Papakosmas v The Queen* (1999) 196 CLR 297 @ 302 (Gleeson CJ and Hayne J).

<sup>4</sup> ALRC 26, Vol 1 para 46.

<sup>5</sup> See *Gattellaro v Westpac Banking Corp* (2004) 204 ALR 258; and *Telstra Corp v Australis Media Holdings (No.2)* (1997) 41 NSWLR 346 @ 349B

example, the competence of family to give evidence, and tendency (propensity) and coincidence (similar fact) evidence.

The UEA has been rigorously tested in appellate courts and has won widespread professional acceptance. It has been comprehensively reviewed in ALRC 102 and concerns illuminated in the review have been addressed.

The UEA sets out the rules of evidence that apply to all proceedings with the aim of ensuring a fair hearing for persons appearing before the courts. It is based upon the proposition that the laws of evidence must serve the trial system and is structured so that the provisions follow the order in which issues ordinarily arise in trials. It seeks to maximise certainty for the parties involved in litigation by providing clear rules to enable preparation for, and conduct of, trials.

The UEA seeks to maximise the ability of parties to produce the most probative evidence available, whilst retaining fairness, particularly for an accused in a criminal trial. For this reason, where appropriate, the Bill differentiates between civil and criminal trials.

## **STRUCTURE OF THE BILL**

The Bill is divided into 7 Chapters. Each chapter is itself divided into parts and divisions. The order of the provisions follows the order that evidentiary issues generally arise in a trial.

The main Chapter, which provides the bulk of the Bill, is Chapter 3 'Admissibility of Evidence'. To assist in understanding and applying the rules of admissibility of evidence, the Bill has a flow chart at the start of Chapter 3.

## **CHAPTER 1 PRELIMINARY**

### **Part 1.1 FORMAL MATTERS**

#### **Clause 1 Short title**

The Bill when enacted will be called the *Evidence (National Uniform Evidence Legislation) Act 2010*.

#### **Clause 2 Commencement**

This clause provides for the commencement of the Act. Clauses 1–3 and the Dictionary are to commence on the day after the day on which the Act receives the Administrator’s Assent. The other provisions are to commence on the date fixed by the Administrator by Gazette notice.

### **Clause 2A Object of Act**

The purpose of the Act is to make the Northern Territory’s law of evidence uniform with Commonwealth, ACT, New South Wales, Tasmanian, Norfolk Island and Victorian evidence law.

### **Clause 3 Definitions**

The expressions used in the Dictionary at the end of the Act have the meanings given to them in the Dictionary, and also provides that the notes included in the Bill are explanatory and do not form part of the Act.

## **Part 1.2 APPLICATION OF THIS ACT**

### **Clause 4 Courts and proceedings to which Act applies**

The Bill applies to all proceedings in a Territory Court. These include proceedings relating to bail, proceedings heard in chambers and interlocutory proceedings of a similar kind. Whilst sentencing proceedings are also included, the clause specifies that the Bill applies in such proceedings only if the court directs the law of evidence to apply and then only in accordance with the direction.

There are five Notes to clause 4.

The first Note explains that section 4 of the Commonwealth Act is different, as it applies to federal court or ACT court proceedings.

The second Note explains that ***Territory Court*** is defined in the Dictionary and that the Bill will apply not only to courts of law but also to persons and bodies that, in exercising a function under the law of the Northern Territory, are required to apply the laws of evidence.

The fourth Note makes it clear that the Bill preserves provisions in other Northern Territory Acts which relieve a court (for example the coroner's court) of the obligation to apply the rules of evidence.

### **Clauses 5 and 6**

These contain no substantive provisions. Their inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

### **Clause 7 Act binds crown**

The Act binds the Crown.

### **Clause 8 Operation of Acts**

The Act does not affect the operation of provisions of other Acts, or override existing evidentiary provisions in other Acts. Matters relating to relevant transitional amendments to other Acts will be contained in a separate Bill.

### **Clause 8A Application of the Criminal Code**

Part IIAA of the Criminal Code will apply to offences against this Act.

### **Clause 9 Application of the common law and equity**

The Bill will only affect the operation of the principles and rules of common law or equity relating to evidence in proceedings to which the Bill applies, to the extent that the Bill expressly provides, or by necessary intendment. In particular, the operation of such principles and rules will be preserved to the extent that they are not inconsistent with the Bill.

### **Clause 10 Parliamentary privilege preserved**

The Bill preserves the operation of laws relating to the privileges of any Australian Parliament.

### **Clause 11 General powers of a court**

The general power of courts to control proceedings before them are preserved, except so far as the Bill provides otherwise, either expressly or by necessary intention.



## **CHAPTER 2 ADDUCING EVIDENCE**

### **Part 2.1 WITNESSES**

Part 2.1 deals with adducing evidence from witnesses. The starting point is that everyone is presumed competent to testify and may be compelled to give evidence. This presumption is subject to certain rules and exceptions.

These are 'lack of capacity' (cl.13), 'reduced capacity' (cl.14), being a head of state or the NT Administrator, or a parliamentarian during sittings (cl.15), being a judge or juror (cl.16), being the defendant (cl.17), or being part of the defendant's family (cls.18 and 19). An associated defendant is not compellable to give evidence for or against a defendant unless being tried separately.

### **Division 1 COMPETENCE AND COMPELLABILITY OF WITNESSES**

#### **Clause 12 Competence and compellability**

Except as otherwise provided, everyone is competent and compellable as a witness.

#### **Clause 13 Competence – lack of capacity**

This clause sets out the test for determining a witness's competence to give sworn and unsworn evidence. Clause 17 sets out separate procedures applying to defendants in criminal proceedings.

There are two separate tests for determining competence in relation to giving sworn and unsworn evidence. Each test requires a demonstration of an understanding of the difference between truth and lies. The 2005 joint Law Reform Commission's (Joint LRC) Report noted that these tests have been criticised for being too similar and restrictive. The Bill clarifies the distinction between sworn and unsworn evidence and focuses on the ability of the person to act as a witness.

Subclause (1) of this Bill provides that all witnesses must satisfy the test of general competence. This general test moves away from the 'truth and lies' distinction and focuses instead on the ability of the witness to comprehend and communicate. It provides that a person is not competent to give evidence

(either sworn or unsworn) about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about *that* fact, and that incapacity cannot be overcome.

Subclause (2) provides that even if the general test of competence is not satisfied in relation to one fact, a witness may be competent to give evidence about other facts. For example, a young child may be able to reply to simple factual questions but not to questions which require inferences to be drawn.

When a person is competent to give evidence, the following subclauses set out whether that witness should give sworn or unsworn evidence.

Subclause (3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence.

Subclause (4) provides that, subject to the requirements of subclause (5) being met, a person who is not competent to give sworn evidence about a fact, may be competent to give unsworn evidence about the fact. The provision is intended to allow witnesses such as young children and others (for example, adults with an intellectual disability) to give unsworn evidence even though they do not understand concepts such as 'truth'.

Subclause (5) provides that if a person is not competent to give sworn evidence because of subclause (3), then the person is competent to give unsworn evidence when certain criteria are met. The court is required to inform the person of the importance of telling the truth, explain how the witness should respond to questions to which the witness does not know or cannot remember the answer, and that the witness should not feel pressured into agreeing with any statements that are untrue.

Subclause (6) provides that a person is presumed to be competent to give evidence, unless it is proven that he or she is incompetent.

Subclause (7) provides that evidence given by a witness is not inadmissible merely because, before the witness finishes giving evidence, that witness dies or is no longer competent to give evidence.

Subclause (8) provides that, when a court is determining if a person is competent to give evidence, whether it is sworn or unsworn, the court may inform itself as it thinks fit, including by reference to the opinion of an expert.

People with a lack of capacity to understand a question or give an answer are excluded. The lack of capacity can be from a number of different factors including age, and mental, physical or intellectual competence.

Some incapacities can be overcome for example, where there are deafness or language difficulties, and assistance can be provided to overcome the incapacity. There are, of course, degrees of understanding and simple questions and answers with a child may be admissible where more complex concepts and inferences may not.

The common law test that the witness understands 'the nature and consequences of the oath' has been changed to a focus on the capacity to understand the duty to tell the truth. This obviates the requirement to explore the religious beliefs of a witness and rests on the understanding of the duty to tell "the truth, the whole truth, and nothing but the truth."

The burden of proof rests on the party asserting that the witness is not competent.

A defendant is not competent, and an associated defendant is not compellable, to give evidence. The prosecution can however, by trying the associated defendant separately, make him or her compellable in the defendant's trial.<sup>6</sup>

#### **Clause 14 Compellability – reduced capacity**

This clause provides that a person is not compellable to give evidence on a particular matter if the court is satisfied that substantial cost or delay would be involved in ensuring that the person would have the capacity to understand a question about the matter or to give an answer to it that could be understood.

#### **Clause 15 Compellability – Sovereign and others**

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<sup>6</sup> Clause 3(3)

The Sovereign and others are not compellable to give evidence. The other persons listed are the Governor-General, the Governor of a State, the Administrator of a Territory, a foreign sovereign and the Head of State of a foreign country. The clause also provides that members of a House of any Australian Parliament are not compellable to give evidence if attending court would interfere with attendance at a sitting of that House, a joint sitting of that Parliament or a meeting of a committee of that House or Parliament.

### **Clause 16 Competence and compellability – judges and jurors**

Judges or jurors are not competent to give evidence in the proceeding in which they are acting as judges or jurors. However, a juror in a proceeding is competent to give evidence in the proceeding about matters affecting the conduct of the proceeding. Further, a person who is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave.

### **Clause 17 Competence and compellability – defendants in criminal proceedings**

This clause provides for rules of competence and compellability for defendants in criminal proceedings and for any associated defendant(s) (a defined term). A defendant is not competent to give evidence as a witness for the prosecution. An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant. The court must ensure an associated defendant is aware of this clause if she or he is being jointly tried with the defendant.

### **Clause 18 Compellability of spouses and others in criminal proceedings generally**

Spouses, de facto partners, parents and children of defendants may object to being required to give prosecution evidence. When deciding on the compellability of objecting witnesses, the court must take into account factors such as the gravity of the offence, the importance of the evidence, the relationship between the witness and the defendant, and the confidential nature of a matter that may be disclosed. The witness must not give evidence if the

likelihood that harm would result to the person or their relationship with the defendant, and the extent of that harm, outweighs the desirability of receiving the evidence. This is a critical balancing test, relying of course on judicial discretion.

This is different from the current NT law on the subject where section 9 of the *Evidence Act* provides that husbands and wives are compellable in criminal proceedings.

### **Clause 19 Compellability of spouses and others in certain criminal proceedings**

This clause restricts clause 18 from applying in proceedings regarding Part V of the Criminal Code (sexual offences) or Part VI of the Criminal Code (offences of violence) where the offender is a juvenile. It also does not apply to breaches of the *Domestic and Family Violence Act*, or offences of incitement, attempts or preparation for, or accessory after the fact offences regarding any of the aforementioned offences. Consequently, in matters of assaults on children and other forms of domestic violence, members of the defendant's family may be compelled to give evidence.

### **Clause 20 Comment on failure to give evidence**

This clause applies only to a criminal proceeding for an indictable offence.<sup>7</sup> The clause permits certain comment by the judge or any party (other than the prosecutor) on a failure by a defendant, his or her spouse or de facto partner or child, to give evidence.

Any such comment, however, (except when made by a co-defendant) must not suggest that the failure to give evidence was the result of the defendant's guilt or belief of his or her guilt.<sup>8</sup> If such comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.

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<sup>7</sup> Indictable offence means different things in different jurisdictions. The *Crimes Act 1914* (Cth) provides for more than 12 months imprisonment as the definition of an indictable offence, where the NT *Interpretation Act* says unless otherwise stated any offence with a penalty of more than 2 years is a crime.

<sup>8</sup> "...must not make any 'reference, direct or indirect, and either by express words or the most subtle illusion' suggesting that the accused did not give evidence because he or she was, or believed that he or she was, guilty". *RPS v The Queen* (2000) 199 CLR 620 at [20] quoting *Batalaillard v The King* (1907) 4 CLR 1282.

A co-defendant may, however, comment. A judge can point out that the circumstantial evidence of the prosecution has not been contradicted by the defendant,<sup>9</sup> but the judge should, and usually does, warn the jury against adopting an impermissible chain of reasoning from the silence of the accused.<sup>10</sup>

The judge (or a co-accused), but not the prosecutor, may comment on the failure of the defendant's family<sup>11</sup> not to give evidence, and the same rules apply as regards comments on the defendant's own failure to give evidence, i.e. not to suggest the failure is because of the defendant's guilt or the family member's belief in the defendant's guilt.

## **Division 2 OATHS AND AFFIRMATIONS**

### **Clause 21 Sworn evidence of witnesses to be on oath or affirmation**

A person is required to take an oath or make an affirmation before giving sworn evidence. The requirement does not apply to a person called merely to produce a document or thing to a court or who gives unsworn evidence under clause 13.

### **Clause 22 Interpreters to act on oath or affirmation**

Interpreters must either take an oath or make an affirmation. Oaths or affirmations by interpreters must be made in the forms set out in the Schedule to the Bill, or in a similar form. An affirmation has the same effect as an oath.

### **Clause 23 Choice of oath or affirmation**

Witnesses and interpreters may choose whether to take an oath or make an affirmation and the court must inform these people of this choice. If a witness refuses to take an oath or make an affirmation, or it is not reasonably practicable for the witness to take the appropriate oath, the court may direct the witness to make an affirmation.

### **Clause 24 Requirements for oaths**

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<sup>9</sup> Odgers Stephen *Uniform Evidence Law* (8<sup>th</sup> ed) Law Book Co. 2009

<sup>10</sup> "...it is not an admission of guilt by conduct; it cannot fill any gaps in the prosecution case; it cannot be used as a makeweight..." *Azzopardi v The Queen* (2001) 205 CLR 50

<sup>11</sup> Spouse, de facto partner, parent or child of the defendant.

It is not necessary to use a religious text to take an oath. An oath is deemed effective whether or not the person who takes it has, in fact, a religious belief or actually understands the nature or consequences of the oath.

### **Clause 25**

This clause contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

## **Division 3 GENERAL RULES ABOUT GIVING EVIDENCE**

This division deals with procedural rules to do with giving evidence. The order of examination in chief, cross-examination and re-examination is set out, and evidence may be given by charts, in narrative form or through an interpreter. It has even been held in appropriate cases that evidence may be given in a group.<sup>12</sup> Particular categories of witnesses may give their best evidence in different ways. Experts, children, Aboriginal and Torres Straight Islanders, or people with intellectual disabilities may benefit from a narrative form of giving evidence.

### **Clause 26 Court's control over questioning of witness**

The court may make orders it considers just, regarding the way in which witnesses are questioned, while ensuring that all parties have a fair trial.<sup>13</sup> Such orders may include the way in which witnesses are to be questioned, the use of documents and things, the order in which parties may question the witness and the presence and behaviour of any person in connection with the questioning of a witness.

### **Clause 27 Parties may question witness**

Every party is entitled to question any witness who gives evidence, unless the Bill provides otherwise.

### **Clause 28 Order of examination in chief, cross-examination and re-examination**

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<sup>12</sup> *Harrington-Smith v Western Australia* (2002) 121 FCR 82; [2002] FCA 934 (where women's business evidence was given).

<sup>13</sup> *LGM & CAM* [2008] FamCA 185 at [199]

This clause preserves the traditional order of questioning and sets out the order in which parties are to conduct examination in chief, cross-examination and re-examination, unless the court directs otherwise.

### **Clause 29 Manner and form of questioning witnesses and their responses**

This clause states the general rule that, subject to the Bill and the control of the court, it is up to the parties to determine how to question witnesses.

The customary way in which witnesses are examined is that the witness answers questions. However, this method of giving evidence may be unsuitable for certain witnesses, including, but not limited to, children, people with an intellectual disability and people who otherwise may not be accustomed to this style of communication.

Accordingly, the Bill allows a witness, in certain circumstances, to give evidence wholly or partly in narrative form<sup>14</sup>, and evidence may also be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid comprehension of other evidence.

### **Clause 30 Interpreter**

A witness, who cannot understand and speak English sufficiently to enable them to understand and adequately reply to questions, may give evidence through an interpreter. This does not in any way derogate from the common law requirement for interpreters to be used in order to ensure a fair trial.<sup>15</sup>

The onus is now on the court to reject a request for an interpreter rather than on the party seeking the interpreter to justify the need. The court, of course, controls the use of interpreters.

### **Clause 31 Deaf and mute witnesses**

A witness who cannot speak or hear adequately may be questioned and give evidence in an appropriate way. The court is able to give directions on the manner in which such witnesses may be questioned and the means by which they may give evidence.

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<sup>14</sup> i.e. without being questioned. *LMI Australasia PTY Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31

<sup>15</sup> See for example *Ebatarinja v Deland* (1998) 194 CLR 444



### **Clause 32 Attempts to revive memory in court**

This clause allows a court greater flexibility in reviving a witness's memory in court than the common law. A witness may use a document to revive memory about a fact or opinion, but only with the leave of the court. The clause sets out some of the matters the court may take into account in determining whether to give leave (whether, for example, the witness will be able to recall the fact or opinion adequately without using the document).

The court must first give leave, and the witness who is unable to give a full and accurate account of what occurred from his or her unaided memory, may refresh that memory from documents. The phrase 'fresh in the memory'<sup>16</sup> is used instead of 'contemporaneous' for the time when the document was made, and the court must take the freshness of the memory into account when deciding whether to grant leave.<sup>17</sup> The clause does not, however, disqualify refreshing memory from a document made when the memory was not fresh. The witness may, with leave of the court, read aloud from a document.

### **Clause 33 Evidence given by police officers**

This clause allows a police officer to read, or be led through, his or her written statement (provided it was made at the time or soon after the event) as evidence in chief. The officer does not need to have exhausted his or her memory.

### **Clause 34 Attempts to revive memory out of court**

The court, at the request of a party, may direct production of specified documents used by a witness to revive his or her memory out of court. A police officer for example may have used another police officer's statement to aid memory when preparing his or her statement. The court may refuse to admit the evidence if the witness does not comply with the directions of the court.

### **Clause 35 Effect of calling for production of documents**

This clause provides that a party who calls for another party's document is not required to automatically tender it. Similarly the party who produces the

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<sup>16</sup> "The real test is freshness of memory as a question of fact and not the relationship in time, except that shortness of time makes it easier to accept the witness's assertion that the facts were fresh and the length of time more difficult –" *R v Van Beelen* (1972) 6 SASR 534 @ 537 per Sangster J.

<sup>17</sup> See discussion in *Graham v R* (1998) 157 ALR 404 @ 405

document is not automatically entitled to tender it if the calling party does not tender it.

This means the common law rule in *Walker v Walker*<sup>18</sup> is abolished. The old common law rule was that if one party called for and inspected a document in the possession of the other party the first party could be required to tender the document by the other party even if it was otherwise inadmissible. Clause 35 removes the automatic right to tender, or require the other party to tender, but does not prevent the tender if the document is otherwise admissible.

### **Clause 36 Person may be examined without subpoena or other process**

A court may order a person who is present at proceedings to give evidence or produce documents if the person could be compelled by way of subpoena, summons or other order to testify and produce the documents. It is irrelevant whether or not the document is admissible,<sup>19</sup> and once it has been produced, depending on privilege, it is in the court's discretion whether or not to make it available to a party.<sup>20</sup>

## **Division 4 EXAMINATION AND RE-EXAMINATION**

### **Clause 37 Leading questions**

A leading question cannot be put to a witness in examination in chief or re-examination unless leave is given or one of the specified circumstances in subclause (1) applies. Such circumstances include where the question relates to a matter introductory to the evidence of the witness, or a matter that is not in dispute, or is asked for the purpose of obtaining an expert witness's opinion about a hypothetical statement of facts about which evidence has or is intended to be given.

Leave is also not required where all the parties to the proceeding (other than the party examining the witness) are represented by a lawyer and no objection is made.

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<sup>18</sup> *Walker v Walker* (1937) 57 CLR 630

<sup>19</sup> *Ramirez v The Trustee of the Property of Zoltan Sandor, A Bankrupt* (unreported, NSW SC, Young J, 22 April 1997)

<sup>20</sup> *Madison v Goldrick* [1976] 1 NSWLR 651

Further, unless the court otherwise directs, in civil proceedings leading questions may be put to a witness relating to an investigation, inspection or report the witness made in the course of carrying out public or official duties.

Subclause (3) enables the court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

### **Clause 38 Unfavourable witnesses**

The common law rules regarding 'Hostile' or 'Adverse' witnesses have been changed by clause 38. An unfavourable witness may now, with the leave of the court, be cross-examined by the party who called them. The witness may be cross-examined if the witness gives 'unfavourable' evidence to the calling party, does not appear to be making a genuine attempt to give evidence of a matter about which the witness may reasonably be supposed to have knowledge, or if the witness has made a prior statement that is inconsistent with their in court testimony.

The witness may be cross-examined on only a part of the evidence if the rest of the evidence is favourable.<sup>21</sup> There is conflicting authority on whether the clause permits general cross-examination of the witness.<sup>22</sup>

'Unfavourable' is not defined but has a lower threshold than the word 'hostile' which was the threshold at common law. There is debate over how unfavourable a witness has to be, although 'unhelpful'<sup>23</sup> will probably reach the threshold where 'neutral' would not.<sup>24</sup>

The prosecution can, with the leave of the Court, call a witness known to be unfavourable to the prosecution in order to adduce evidence of a prior inconsistent statement and then, subject to clause 60, (i.e. it is introduced for

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<sup>21</sup> *R v Pantoja* [1998] NSWSC 565 @ 51

<sup>22</sup> *R v Hogan* [2001] NSWCCA 292 says that it does not permit general cross-examination; *R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186 @ [67] per Heydon JA, suggests it does.

<sup>23</sup> *Adams v The Queen* (2001) 207 CLR 96 @ [27]

<sup>24</sup> *Klewer v Walton* [2003] NSWCA 308 @ [20]

another purpose), use it to prove the truth of that prior assertion.<sup>25</sup> This is different to the position at common law.<sup>26</sup>

Unfavourable evidence to the party calling the witness may emerge during cross examination of that witness. This may be unexpected, or it may be because the prosecution is 'keeping its powder dry'. The prosecution can then, in re-examination, ask for leave under clause 38 to cross-examine the witness. If leave is granted the defence can of course then cross-examine the witness again and no unfairness is caused.<sup>27</sup> This clause was included in the UEA to overcome the High Court decision of *Vocisano v Vocisano*,<sup>28</sup> where an authorised insurer who had taken over proceedings on behalf of an insured defendant, was not allowed to cross-examine that insured defendant about his earlier inconsistent statements to the effect that he was not the driver of the car in question.

### **Clause 39 Limits on re-examination**

Re-examination is limited to 'matters arising out of evidence given by the witness in cross-examination', but leave can be given for other questions to be put. For example, credibility issues may have surfaced during cross-examination and it may be appropriate to re-establish the witness's credibility during re-examination. The common law probably still operates in this area to allow the calling of other witnesses to qualify or explain matters that have arisen in cross-examination.<sup>29</sup> It is appropriate to allow further cross-examination where new evidence has been adduced in re-examination.

## **Division 5 CROSS-EXAMINATION**

### **Clause 40 Witness called in error**

A party is prohibited from cross-examining a witness who another party has called in error unless the witness has given evidence in the proceeding.

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<sup>25</sup> *Adams v The Queen* (2001) 207 CLR 96 @ [18-19 cf *Blewitt v The Queen* (1988) 62 ALJR 503 which states the common law position that you cannot call a witness known to be hostile in order to elicit a prior inconsistent statement.

<sup>26</sup> At common law a prior inconsistent statement is admissible only in relation to the credibility of the witness, and not as evidence of the facts in the statement.

<sup>27</sup> In *R v Kingswell* [1998] NSWSC 412 however (Smart J dissenting) it was considered that leave should not be granted where the prosecution anticipated the witness would not testify in accordance with a prior statement. See also *Burrell v The Queen* [2007] NSWCCA 65 @ 246, *R v Parkes* [2003] NSWCCA 12 per IPPS J.

<sup>28</sup> *Vocisano v Vocisano* (1974) 130 CLR 267

<sup>29</sup> Odgers Stephen, *Uniform Evidence Law* (8<sup>th</sup> ed.) Law Book Co. 2009

## Clause 41 Improper questions

The NT Bill differs slightly from the Commonwealth and NSW Acts and follows the Victorian Act. The NT Bill refers to questioning rather than just questions, and can refer to a sequence not just individual questions. The clause is not designed to 'unduly hamper the trial techniques of advocates',<sup>30</sup> but disallows improper questioning and misleading or confusing questioning in cross-examination. Special protection is given to 'vulnerable witnesses'<sup>31</sup>, and there is a mandatory obligation to consider all relevant circumstances which is designed to facilitate a positive culture of judicial intervention for these witnesses.

Subclause (3) defines an improper question or improper questioning in a broad manner, and outlines a non-exhaustive list of the content or style of questions that the court must find to be improper. They include questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive or repetitive, put in a belittling, insulting or inappropriate manner or if the only basis of the question is a stereotype. The court has discretion to disallow these questions in relation to *any* witness, but must disallow them in relation to vulnerable witnesses.

The word 'unduly' qualifies 'annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive'. This implies there are occasions when annoying, harassing etc questions are justified. The right of a party in an adversarial system to properly test a witness's evidence is taken into account and balanced against stress or embarrassment caused to the witness, which may be necessary for effective cross-examination. The onus is on the party putting the question to demonstrate that the proposed question is necessary, and any answer given to an improper question that was not disallowed by the court is still admissible.

Subclause (4) defines vulnerable witnesses as people under the age of 18 years and people with a cognitive impairment. This is intended to prevent argument about whether or not the obligation to disallow, under subclause (2), applies to

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<sup>30</sup> ALRC 102, para 5.116

<sup>31</sup> This is given a wide definition although being the alleged victim of a sexual offence does not automatically qualify someone as a vulnerable witness, whereas under the NT Evidence Act vulnerable witness provisions (s 21A) it does.

such people. The subclause also sets out other conditions or characteristics that may cause people to be categorised as vulnerable.<sup>32</sup> These factors include the;

- age (including, for example, advanced age) and cultural background of the witness;
- mental or physical capacity (for example, where it does not necessarily constitute cognitive impairment) of the witness; and
- context of the case or the context in which the questions are put, including the relationship between the witness and any party to the proceeding.

This is intended to minimise the need for argument about whether a witness is vulnerable. In some cases the vulnerability will be obvious, but in others, it may be the circumstances of the case that cause the witness to be vulnerable. The current NT Evidence Act for example, provides that the alleged victim of a sexual offence is a vulnerable witness, whereas the UEA does not make that automatic assumption, although in the circumstances and context of the case an alleged victim of a sexual offence may well qualify as a vulnerable witness.

Subclause (5) provides that a question is not disallowable merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or the subject of the questions is considered by the witness to be distasteful or private.

Subclause (6) enables a party to object to an improper question put to a witness. However, the absence of such an objection does not remove the court's obligation to monitor questions. Subclause (7) makes it clear that the relevant duties apply whether or not an objection is raised. This subclause is intended to ensure that the court takes an active role in monitoring questions and ensuring the appropriate regulation of questions in cross-examination.

As specified in subclause (8), a failure by the court to disallow a question under clause 41 will not affect the admissibility of the witness's answer. The purpose of this clause is not to diminish the duty on the court to effectively regulate improper

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<sup>32</sup> As mentioned in the previous footnote this does not include, as the NT Evidence Act does, the fact of being the alleged victim of a sexual offence.

questions. Rather, it is designed to ensure that such a failure will not render the evidence elicited inadmissible, and therefore the proceeding subject to appeal.

The first Note to clause 41 is a cross reference to clause 195 which prohibits the publication of disallowed questions unless the express permission of the court has been obtained.

The common law rules as to what is an improper question still apply. For example it is improper to put to one witness that their evidence is different to others and invite an opinion as to why this is so.<sup>33</sup>

The NT rules of evidence relating to sexual offences in the *Sexual Offences (Evidence and Procedure) Act* still apply, and the rules relating to vulnerable witnesses, for example in 26E of the Northern Territory *Evidence Act*, will also remain. A national working group is finalising a uniform approach to children's and other vulnerable witness's evidence in sexual assault cases with a view to harmonisation of the various jurisdictions' differing laws on the subject. The UEA does not at present cover the field, and seems unlikely to do so in the future.

Part VIA of the *Evidence Act* deals with the protection of confidential communications between alleged victims of sexual assault and his or her counsellor. It is intended that these provisions be retained in another Act (i.e. not the UEA).

### **Clause 42 Leading Questions**

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. In deciding whether to disallow a leading question or give a direction the court is to take into account, among other things, unusual susceptibility due to the witness's age, any mental, intellectual or physical disability that may affect the witness's answer and the extent, if any, to which the witness or the witness's evidence is sympathetic to the cross-examiner.

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<sup>33</sup> *R v Gilbert* (unreported, NSWCCA, Grove, Levine, Dowd JJ, 10 December 1998); *R v Dennis* [1999] NSWCCA 23.

Subclause (4) expands the court's power to control leading questions and would expressly allow the court to cover the situation that commonly occurs in NT trials of 'gratuitous concurrence'.

The court is to disallow leading questions if it considers the facts would be better ascertained if a leading question was not used.

#### **Clause 43 Prior inconsistent statements of witnesses**

This clause sets out the manner in which prior inconsistent statements of a witness may be put to the witness in cross-examination.

#### **Clause 44 Previous representations of other persons**

This clause sets out the only manner in which a witness may be cross-examined about a prior statement made by some other person.

#### **Clause 45 Production of documents**

This clause provides for the production and examination of a document during cross-examination about an alleged prior inconsistent statement made by a witness, or a previous representation made by a person other than a witness. Merely showing a document to a witness who is being cross-examined will not require a party to tender it.<sup>34</sup>

#### **Clause 46 Leave to recall witnesses**

A court may give leave to recall a witness where evidence was adduced by another party and the witness was not cross-examined on the matter, if the evidence contradicts that witness's evidence in examination in chief, or the witness could have given evidence about it in evidence in chief (but did not).

This overlaps the rule of fairness in *Brown v Dunn*<sup>35</sup> although it may not extend as far as the common law rule.<sup>36</sup> The rule is narrower in criminal proceedings than in civil proceedings but to some extent still applies.<sup>37</sup> Thus if a defendant has an opportunity to cross-examine on an alleged inconsistency but does not, that failure may prevent a reliance on the alleged inconsistency to undermine the

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<sup>34</sup> *Australian Competition & Consumer Commission v CFMEU* [2008] FCA 678 Finn J at [119]

<sup>35</sup> *Browne v Dunn* (1893) 6 R 67

<sup>36</sup> *R v McCormack (No 3)*[2003] NSWSC 645

<sup>37</sup> *MJW v The Queen* (2005) 80 ALJR 329; [2005] HCA 74.



witness's credibility later on, without that failure to cross-examine being taken into account 'in assessing the weight to be given the inconsistencies'.<sup>38</sup>

The provision is designed to facilitate the recall of a witness in these situations, with the leave of the court, and when it is appropriate.

## **Part 2.2 DOCUMENTS**

Part 2.2 deals with proving the contents of documents. The common law 'best evidence' rule and the 'original document' rule are abolished by clause 51.

Discovery can be ordered by the court under clause 193, and the new rules extend discovery to include tapes, discs and microfilms etc. The rules are designed to be simpler, more flexible and to take into account advances in technology regarding storage and copying of data. The system itself becomes the document with regard to computer records.

Many of the new rules regarding documents have been drawn from the United States *Federal Rules of Evidence*.

### **Clause 47 Definitions**

A copy of a document need not be an exact copy of the document but is 'identical to the document in question in all relevant aspects'. (clause 47(2)) This includes printouts and transcripts.

### **Clause 48 Proof of contents of documents**

Evidence of the contents of a document can be adduced by tendering the document or by any one or more of the following methods:

- (i) adducing evidence of an admission made by another party about its contents;
- (ii) tendering a copy of the document produced by a device (for example, a photocopier or a word processor) that reproduces the contents of documents;

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<sup>38</sup> There is a view that the rule in *Brown v Dunn* is subject to the same limitations as the rule in *Jones v Dunkel* with regard to their application in criminal proceedings. See *Rend v The Queen* [2006] NSWCCA 41, cf *MJW v The Queen* (2005) 80 ALJR 329

- (iii) if the content of the document is not in visible form (for example, a tape-recording) or is in a code (for example, shorthand notes), tendering a transcript;
- (iv) if the document is an article or thing on or in which information is stored in such a way that it cannot be used unless a device is used to retrieve, produce or collate it, tendering a document produced by the device (for example, computer output or a document produced by an optical laser disc reader);
- (v) tendering a business record that is an extract from, or a summary or copy of, the document; and
- (vi) if the document is a public document, tendering an official printed copy of the document.

The clause provides that a party to whom a document is not available may lead evidence of the contents of the document by tendering a copy, extract or a summary of the document or adducing evidence of the contents of the document from a witness.

Thus the tendering of documents and information from computers is rationalised and simplified.

#### **Clause 49 Documents in foreign countries**

As the title suggests, this clause provides for proof of documents in foreign countries.

#### **Clause 50 Proof of voluminous or complex documents**

A party may adduce evidence of documents in the form of a summary if the court considers it is not convenient to examine the evidence otherwise because of the complexity or volume of the documents.

The court may only make such a direction if the applicant has served on each other party a copy of the summary disclosing the name and address of the person who prepared it, and has given each other party a reasonable opportunity to examine or copy the summarised documents.

### **Clause 51 Original document rule abolished**

This clause abolishes the original document rule, which provided that the contents of a document, except in certain limited circumstances, must be proved by production of the original document.

### **Part 2.3 OTHER EVIDENCE**

Views, exhibits, demeanour of witnesses, demonstrations and experiments (or 'real evidence') are covered in Part 2.3. Views and demonstrations are not to be held without parties and their counsel having the opportunity to attend and the judge (and jury) being present. A view or demonstration may however still occur in the absence of a party (clause 53(3)).

The High Court has held that the common law still applies to demonstrations etc held inside the courtroom and Part 2.3 applies to demonstrations, views etc. held outside.<sup>39</sup> Relevance and fairness requirements must, of course, be met and prejudicial demonstrations must not occur. The jury must not conduct an experiment in the course of its deliberations.

### **Clause 52 Adducing of other evidence not affected**

This clause provides that the Bill (except Part 2.3) will not affect an Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence. Other evidence from witnesses giving evidence or documents being tendered, is information that is perceived directly by the court.<sup>40</sup>

### **Clause 53 Views**

A judge, on application, may order that a demonstration, experiment or inspection be held. This clause sets out some of the matters the judge must take into account in deciding whether to make such an order. These include whether the parties will be present and whether a demonstration of an event will properly reproduce the event

### **Clause 54 Views to be evidence.**

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<sup>39</sup> *Evans v The Queen* (2007) 82 ALJR 250

<sup>40</sup> *Evans v The Queen* (2007) 82 ALJR 250

The common law fiction that a view is not evidence has been abandoned.<sup>41</sup> This clause makes it clear that the court (including the jury if there is one) may draw any reasonable inference from what it sees, hears or otherwise notices at a demonstration, experiment or inspection.

## **CHAPTER 3 ADMISSIBILITY OF EVIDENCE**

**Part 3.1** sets out the general inclusionary rule that relevant evidence is admissible.

**Part 3.2** is about exclusion of hearsay evidence, and exceptions to the hearsay rule.

**Part 3.3** is about exclusion of opinion evidence, and exceptions to the opinion rule.

**Part 3.4** is about admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule.

**Part 3.5** is about exclusion of certain evidence of judgments and convictions.

**Part 3.6** is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.

**Part 3.7** is about exclusion of evidence relevant only to credibility, and exceptions to the credibility rule.

**Part 3.8** is about character evidence and the extent to which it is admissible as an exception to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

**Part 3.9** is about the requirements that must be satisfied before identification evidence is admissible.

**Part 3.10** is about the various categories of privilege that may prevent evidence being adduced.

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<sup>41</sup> *Pledge v Roads and Traffic Authority; Ryan v Pledge* (2004) 78 ALJR 572

**Part 3.11** sets out the discretionary and mandatory exclusions that may apply to evidence even if it would otherwise be admissible.

A diagram or flow chart at the start of this chapter explains how Chapter 3 determines whether evidence is to be admitted.

First the evidence must be relevant. Then a series of questions are asked of the evidence, and if the answer to any is 'yes' then the evidence is not admissible.

- (1) Does the hearsay rule apply?
- (2) Does the opinion rule apply?
- (3) Does the evidence contravene the rule about evidence of judgements and convictions?
- (4) Does the tendency rule or the coincidence rule apply?
- (5) Does the credibility rule apply?
- (6) Does the evidence contravene the rules about identification evidence?
- (7) Does a privilege apply?
- (8) Should a discretion to exclude the evidence be exercised or must it be excluded?

### **Clause 55 Relevant evidence**

Evidence is relevant if it could rationally affect (whether directly or indirectly) the assessment of the probability of the existence of a fact in issue.

### **Clause 56 Relevant evidence to be admissible**

If evidence is relevant it is admissible, 'except as otherwise provided by this Act'. If evidence is not relevant it is not admissible.

Relevant evidence is defined as that which 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. This is a very wide definition, but a wide definition is necessary given that clause 56 provides that evidence that is not relevant is not admissible.

Thus, for evidence to be relevant it does not need to render a fact in issue probable, it just needs to render the fact more probable or less probable than it would have been without the evidence.<sup>42</sup> There must, however, be a rational connection between the fact in issue and the evidence, (the ‘fact in issue’ being the ultimate ‘fact in issue’), but the relevance may only be indirect, and affect the probability of the issue only minimally.

The fact that the ‘only’ relevance of a piece of evidence is to do with a witness’s credibility<sup>43</sup>, or the admissibility of other evidence<sup>44</sup>, or a failure to adduce evidence, does not make it irrelevant (and therefore inadmissible). The evidence must nevertheless still be relevant, even if only indirectly.

There has been much discussion on the phrase ‘if accepted’ when deciding the relevance of evidence. The court assesses the ‘probability of the existence of a fact in issue’ on the assumption that the evidence is reliable.<sup>45</sup> This has particular importance in evidence of ‘complaint’ in rape cases, or out of court statements that may or may not be self serving, or otherwise potentially unreliable.<sup>46</sup>

Opinion evidence also has to pass the test of relevance. In the case of *Smith v The Queen*<sup>47</sup> the evidence of Police officers about the identity of a person in a photograph was held to be irrelevant because they ‘were in no better position to make a comparison between the appellant and the person in the photograph than the jurors’ and the jury had probably spent more time in the presence of the prisoner than the police officers. If the witnesses had been in a better position than the jury then the opinion would have been relevant.<sup>48</sup>

For an opinion to be relevant the basis for the opinion must be disclosed. For expert evidence the validity of the ‘scientific knowledge’ must be demonstrated for the evidence to be relevant.

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<sup>42</sup> Kirby J. said in *Smith v The Queen* (2001) 206 CLR 650, that for reasons of legal policy “it is undesirable...to set the hurdle of relevance too high”.

<sup>43</sup> For example a motive to be untruthful might be that an accomplice had been given a discount on sentence to testify against the defendant: *Conway v The Queen* (2000) 98 FCR 204 @ [207].

<sup>44</sup> The evidence may not be admissible in the trial proper but instead be admissible in interlocutory proceedings or a voir dire.

<sup>45</sup> *Papakosmas v The Queen* (1999) 196 CLR 297 per McHugh J, endorsed in *Adams v The Queen* (2001) 207 CLR 96

<sup>46</sup> See for example *R v BD* (1997) 94 A Crim R 131 per Hunt CJ.

<sup>47</sup> (2001) 206 CLR 650

<sup>48</sup> Although ‘recognition’ evidence was classed as ‘Fact’ not ‘Opinion’ in *R v Marsh* [2005] NSWCCA 331

Circumstantial evidence is indirect evidence tending to prove the existence of a fact that is not a 'fact in issue', but from which an inference regarding the existence of a 'fact in issue' can be drawn. The existence of other possible inferences does not make it irrelevant. Evidence led to show 'consciousness of guilt', post event conduct, or evidence of flight, for example, may be led even though there may be innocent explanations.

Tendency or propensity evidence has often been held to be relevant.<sup>49</sup> Relevant evidence may, however, be excluded by an exclusionary rule, the exercise of judicial discretion (clauses 135 – 137), or a procedural provision in the Bill.

### **Clause 57 Provisional relevance**

Evidence may be admitted provisionally even if its relevance is not immediately apparent. It may be dependant on another fact to be relevant. This clause allows the court to make a finding of 'provisional relevance' where the party adducing the evidence undertakes to adduce further evidence which establishes the relevance of the earlier evidence.<sup>50</sup> An example is documentary evidence where the document must be authenticated later, or where evidence of one defendant may become relevant against another when evidence of common purpose is proved. A knife could be accepted as provisionally relevant, subject to proof that it was used in a murder.

### **Clause 58 Inferences as to relevance**

A court may examine a document or thing for the purpose of determining its relevance and to draw any reasonable inference from it, including an inference as to its authenticity. Authenticity should be distinguished from relevance however, and this clause does not necessarily mean a document can authenticate itself.<sup>51</sup>

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<sup>49</sup> See *R v MM* [2004] NSWCCA 364 where collecting pornography was held relevant in a child sexual assault case.

<sup>50</sup> "The section permits a court to say evidence is provisionally relevant where the relevance of any particular piece in the jigsaw cannot be determined conclusively until the court has completed the jigsaw"; *Nodnara Pty Ltd Commissioner of Taxation* (1979) 140 FLR 336 per Young J.

<sup>51</sup> The UEA "does not permit documents to authenticate themselves save in limited circumstances": *Daw v Toyworld* (2001) 21 NSWCCR 389; [2001] NSWCA 25 per Heydon JA

## **Part 3.2 HEARSAY**

This Part begins with the hearsay rule, clause 59, and then provides a series of exceptions to the rule, clauses 60 to 75.

These provisions make significant changes to the common law which the ALRC described as overly complex, technical, inflexible, piecemeal, costly and incoherent, with the added problem of excluding substantially probative evidence.<sup>52</sup>

The hearsay rule is avoided when evidence of a previous representation is admitted for another purpose. First hand hearsay is distinguished from more remote hearsay, and the rules are different between civil and criminal proceedings.

### **Division 1 THE HEARSAY RULE**

#### **Clause 59 The hearsay rule – exclusion of hearsay evidence**

The ‘hearsay rule’ excludes evidence of a ‘previous representation’ if it is adduced to prove the existence of a fact that it can reasonably be supposed the person intended to assert by the representation. The ‘representation’ means both statements and conduct, both express and implied, and includes a representation not intended to be communicated or seen.

When determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied is what a person in the position of maker of the representation can reasonably be supposed to have intended, having regard to the representation and the circumstances in which the representation was made.

A Note to clause 59 sets out specific exceptions to the hearsay rule. It refers to the clauses in the Bill that set out when evidence is admissible (even though it is hearsay evidence).

Examples are given illustrating how the clause is intended to operate.

#### **Clause 60 Exception – evidence relevant for a non-hearsay purpose**

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<sup>52</sup> ALRC 26 paras 329-345



Evidence can be adduced for a non-hearsay purpose i.e. it is not introduced to prove the truth of the fact asserted, but introduced for another purpose (for example to prove the fact that someone made a statement). The party wishing to introduce the evidence will have to show the evidence is relevant and admissible for that other purpose. This is the same as the common law. Examples of this are evidence of conversations to prove the fact of the conversation, evidence of threats to prove someone was acting under duress, and evidence of a representation by a person used to infer the identity of that person.<sup>53</sup>

With respect to implied assertions, the UEA has moved away from the common law. A distinction is drawn between intended (express) assertions and unintended (implied) assertions. Unintended (implied) assertions are outside the hearsay rule. The test of intent or otherwise is external to the maker of the representation. This is an objective test and the intent or state of mind of the person is inferred from the conduct of the person.

If the person intended to assert the fact then the hearsay rule applies, and if the intention was not to assert the fact then the rule does not apply.

Under the common law where a previous representation is admitted for a non-hearsay purpose it can only be used for that purpose and not as evidence of the facts stated. This is a 'schizophrenic task' which the common law imposed on the tribunal of fact. This task would be harder for lay jurors than judges.

The UEA however, takes a different approach,<sup>54</sup> and allows the evidence to be used also as evidence of the facts stated. For example, evidence of a prior consistent statement is admissible as evidence of the fact stated, as is evidence of a prior inconsistent statement. This is a major change to the law. The focus now is on the weight to be accorded the evidence not its admissibility.

The ALRC said "The intention of s.60 was to enable evidence admitted for a non-hearsay purpose to be used as evidence of the truth of the facts asserted in

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<sup>53</sup> *R v Lodhi* (2006) 163 A Crim R 526

<sup>54</sup> *Lee v The Queen* (1998) 195 CLR 594 @ 595

the representation, and to do so whether or not the evidence is first-hand or more remote hearsay, subject to the controls provided by ss.135-137".<sup>55</sup>

The Note to subclause (2) explains that this subclause is a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

Thus where it would be unfair to let the representation in as evidence of the truth of the assertion, due to an inability to cross-examine the maker of the representation, the exclusionary discretion conferred on the court by clause 136 can be used. In a jury trial the trial judge, if requested, must warn the jury that the hearsay evidence may be unreliable. (clause 165(2)).

Subclause (3) inserts a safeguard, to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of clause 60.

The Note to subclause (3) provides that evidence of an admission might still be admissible under clause 81 of the Bill if it is 'first hand' hearsay. The Note makes a cross reference to clause 82 which deals with the exclusion of evidence of admissions that is not first hand.

### **Clause 61 Exceptions to the hearsay rule dependant on competency**

Nothing in Part 3.2 enables the use of a previous representation to prove an asserted fact if the representation was made by a person who at the time it was made was not competent to give evidence of the fact. The clause makes it clear that competence is to be assessed in accordance with the test in clause 13.

Subclause (2) makes it clear that the limitation in clause 61 does not apply to a person's contemporaneous representations about the person's health, feelings, sensations, intentions, knowledge or state of mind.

The Note to subclause (2) refers to clause 66A for further information regarding admissibility of such contemporaneous statements.

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<sup>55</sup> ALRC 102 para 7.65

## **Division 2 FIRST-HAND HEARSAY**

The rules against hearsay do not apply in civil proceedings to first-hand hearsay, in oral or documentary form, if the maker of the previous representation is unavailable to testify, (clause 63), or if the maker is available but it would cause undue expense or delay to call the person (clause 64). Notice must, however, be given (clause 67), and a request can be made to produce the person (clause 167) although the unavailability of the person is a 'reasonable cause' not to produce the person. (clause 169(4))

In a civil proceeding objections can be made to a proposal not to call an available witness whose evidence was proposed to be tendered as hearsay evidence (clause 68). The matter will then be determined by the court.

As one would expect, the situation is different in criminal proceedings (clause 65).

### **Clause 62 Restriction to "first-hand" hearsay**

First-hand hearsay is distinguished by this clause from more remote hearsay. First-hand hearsay is a previous representation that was made by a person who had, or might reasonably be supposed to have had, personal knowledge of an asserted fact. This means the person's knowledge of the fact was based on something heard, seen, or otherwise perceived by the person.

Subclause (3) refers to clause 66A, which also contains a reference to knowledge and ensures that all previous representations covered by clause 66A are considered 'first-hand' hearsay.

### **Clause 63 Exception – civil proceedings if maker not available**

This clause provides an exception to the hearsay rule in civil proceedings where the maker of a 'first-hand' hearsay representation is not available to give evidence about an asserted fact. In these circumstances, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or another representation reasonably necessary to understand it, may be admitted.

The aim of the provision is to allow the best evidence that a party has available to be led. The Notes to clause 63 explain that clause 67 contains notice requirements in relation to this clause, and that clause 4 of Part 2 of the Dictionary is about the availability of persons.

#### **Clause 64 Exception – civil proceedings if maker available**

Two exceptions to the hearsay rule exist in civil proceedings where the maker of the specified 'first-hand' hearsay representation is available to give evidence. First, where it would cause undue expense or undue delay or it would not be reasonably practicable to call the maker of the representation to give evidence, oral evidence of the representation may be given by a person who witnessed it. Secondly, a document containing the representation, or any other representation reasonably necessary to understand it, may be admitted.

The clause does not require that the occurrence of the asserted fact be fresh in the memory of the person who made the representation at the time that the representation is made. ALRC 102 found that in practice, the requirement of freshness in memory is not an important indicator of evidentiary reliability.<sup>56</sup>

#### **Clause 65 Exception – criminal proceedings if maker not available**

In criminal proceedings the rules are different but still more flexible than the common law. Clause 65 allows first-hand hearsay in a number of specified situations in criminal proceedings. First-hand hearsay is not excluded if the representation was made;

- (a) by someone under a duty to make the representation (cl.65(2)(a));
- (b) when or shortly after the asserted fact occurred and in circumstances that make it unlikely the representation is a fabrication (cl.65(2)(b));
- (c) in circumstances making it highly probable that the representation is reliable (cl.65(2)(c)); or
- (d) against the interests of the person making the representation, and in circumstances making it likely the representation was reliable (cl.65(2)(d)).

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<sup>56</sup> ALRC 102 para 8.15

The defendant, when calling first-hand hearsay in oral or documentary form, does not have to satisfy the requirements that the prosecution must satisfy (cl.65(8)). This enables the exonerating statements of alleged victims, confessions of third parties and statements of deceased persons to be admitted in evidence. Another party can adduce hearsay qualifying or explaining hearsay introduced by the defendant (cl.65(9)). This means the Crown can respond and not be limited by the preconditions that govern the leading of first-hand hearsay as part of the Crown case in chief.<sup>57</sup>

A person is taken to be available to give evidence if that person does not fall within the categories listed in Clause 4 of Pt 2 of the Dictionary. The categories include the person being dead or not competent, that it would be unlawful to give the evidence, or all reasonable steps have been taken to find the person and to secure or compel the person's attendance without success.<sup>58</sup> This last category would possibly cover a great many situations in the NT.

The phrase 'shortly after' in clause 65(2)(b) is intended to allow evidence that is unlikely to be fabricated. It is not emphasising whether the events were fresh in the memory or easily recalled, rather it is principally concerned to exclude 'concocted evidence'.<sup>59</sup> The Full Federal Court in *Williams* held a condition of admissibility was that the statement be made spontaneously during (when) or under the proximate pressure of ('shortly after') the occurrence of the asserted fact.<sup>60</sup> The provision has, however, been held to allow for a written statement by an injured victim made to police the next day.<sup>61</sup>

Clause 65(2)(c) 'made in circumstances that make it highly probable that the representation is reliable' seems to adopt the view of Mason CJ in *Walton v The Queen*.<sup>62</sup> The United States *Federal Rules of Evidence* also include an exception to the hearsay rule based on 'circumstantial guarantees of trustworthiness'.<sup>63</sup> The

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<sup>57</sup> *Eastman v The Queen* (1997) 76 FCR 9

<sup>58</sup> *In R v Suteski [No. 4]* [2002] NSWSC 218 an already sentenced accomplice refused point blank to give evidence.

<sup>59</sup> *Williams v The Queen* (2000) 119 A Crim R 490

<sup>60</sup> *Williams v The Queen* (2000) 119 A Crim R 490 @ [48]

<sup>61</sup> *Harris v The Queen* (2005) 158 A Crim R 454 (refused special leave in *Harris v The Queen* [2006] HCATrans 247)

<sup>62</sup> (1989) 166 CLR 283 @ 293. See also Lord Wilberforce in *Ratten v The Queen* (1972) AC 378 @ 388-389.

<sup>63</sup> Federal Rules of Evidence 804(5)

maker of the representation must be unavailable and the circumstances must be such as to 'make it highly probable that the representation is reliable'.<sup>64</sup> It is the probability of the reliability of the narration itself which counts and the Full Federal Court in *Conway v The Queen*<sup>65</sup> held the requirement for admissibility should be interpreted strictly.

Subclause (2)(d) is in accordance with the 2005 ALRC Report<sup>66</sup> finding that admissions against interest cannot automatically be assumed to be reliable. For example, where the person who made the statement is an accomplice or co-accused, he or she may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other. There might be reason to suspect that an accomplice or co-accused would be more inclined to take such a course where, for example, they have immunity from prosecution. Where the accomplice gains immunity from prosecution, the fact that the representation is against self-interest is no longer a reliable safeguard or indicator of reliability.<sup>67</sup>

Accordingly, this subclause contains a requirement that for such admissions to be admitted, they must also be found 'to be likely to be reliable'. The provision is not restricted to accomplices and co-accused, as statements against interest may arise in other situations.

Subclause (3) contains an exception which enables evidence to be given of a representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant affected has cross-examined, or had a reasonable opportunity to cross-examine, the person who made the representation. An example of this is where a person has given evidence in a committal, has subsequently died, and the transcript may be tendered at trial.<sup>68</sup>

Subclause (4) sets out that where such evidence is admitted in a criminal proceeding involving more than one defendant, it cannot be used against a

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<sup>64</sup> *R v Polkinghorne* (1999) 108 A Crim R 189; *R v Mankotia* [1998] NSWSC 295, pp26-28;

<sup>65</sup> *Conway v The Queen* (2000) 98 FCR 204

<sup>66</sup> ALRC 102, para 8.48 "some criteria of trustworthiness is warranted".

<sup>67</sup> ALRC 102 para 8.45-8.46

<sup>68</sup> See for example *R v Cross* (CCA (NSW), 8 September 1998, unreported, BC9804493)

defendant who did not, or did not have reasonable opportunity to, cross-examine the person about the representation.

Subclause (6) sets out that evidence of such a representation may be adduced by producing a transcript or recording that is authenticated in a specified way.

Subclause (7) provides that a representation is to be taken to be against the maker's interest if it tends to damage the reputation of the maker, incriminate the maker or show that the maker is liable in an action for damages.

Subclauses (8) and (9) apply to evidence adduced by a defendant. Subclause (8) provides an exception that enables a defendant to adduce evidence of a representation from a person who witnessed it or to tender a document containing the representation, or another representation reasonably necessary to understand it.

Subclause (9) provides that if evidence of that kind (pursuant to subclause (8)) has been adduced by a defendant about a particular matter, the prosecution or another defendant may adduce evidence of another previous representation about the matter. The ALRC comments that 'matter' should be broadly constructed and if unfairness results then the mandatory and discretionary exclusions can be used. Narrowing the interpretations of any of the hearsay exceptions carries the danger of introducing technicalities, something the Uniform Evidence Acts are intended to remove and avoid.<sup>69</sup>

### **Clause 66 Exception – criminal proceedings if maker available**

Where, in criminal proceedings, the maker of the representation is available, the hearsay rule does not apply to evidence of the representation by that person, or someone else who saw or heard the representation being made, provided the represented fact was 'fresh in the memory' of the maker (clause 66(2)).

This applies to 'complaint' evidence in criminal proceedings. The evidence can be admitted to prove the truth of the facts alleged in the complaint. This is different from the way complaint evidence is used in the common law.

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<sup>69</sup> ALRC 102 at para 8.65

Section 26E of the NT *Evidence Act*, 'Exception to rule against hearsay evidence', however, provides that in a proceeding arising from a charge of a sexual offence or a serious violence offence, the evidence of a statement made by a child to another person to be admitted as evidence of the facts in issue. This is both broader and narrower than the UEA provision. It is narrower in that it applies only to sexual offences or serious violence offences, and then only to the evidence of children, whereas the UEA applies across the board, and it is broader in that it does not carry the requirement of being 'fresh in the memory' of the child. Under the *Evidence Act* the evidence can be admitted as evidence of facts in issue, but not as corroboration, whereas the UEA allows the evidence to go towards the truth of the facts alleged in the complaint, as well as supporting the credibility of the complainant.

The substance of the recently enacted NT procedural reforms concerning evidence in sexual offence matters, including s 26E, will remain in a separate Act.

The words 'fresh in the memory' have proved contentious, and in response to the decision in *Graham v The Queen* (1998) 195 CLR 606, which determined 'fresh' to mean 'recent' or 'immediate', the UEA has been amended to introduce clause 66(2A) which indicates the matters to be taken into account when deciding if an event was 'fresh in the memory'. These matters are the nature of the event, the person's age and health, and the period of elapsed time between the event and the representation. Thus the court is not to focus primarily on the lapse of time between the event and the representation. Demonstrating this, it has been variously held that 66 days is too long,<sup>70</sup> not too long,<sup>71</sup> and that a course of conduct over a period of six months is still admissible.<sup>72</sup>

Subclause (3) provides that if a representation was made for the purpose of indicating the evidence that the maker would be able to give in a proceeding,<sup>73</sup> the exception to the hearsay rule is not to apply to evidence adduced by the prosecutor unless the representation concerns the identity of a person, place or thing.

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<sup>70</sup> *Langbein v The Queen* [2008] NSWCCA 38

<sup>71</sup> *Skipworth v The Queen* [2006] NSWCCA 37

<sup>72</sup> *R v Adam* (1999) 47 NSWLR 267 @ 281 282

<sup>73</sup> For example a statement to a police officer, see *Saunders v The Queen* (2004) 149 A Crim R 174.



Subclause (4) provides that a document containing a representation (pursuant to subclause (2)) must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

The clause has also been used to adduce evidence from an observer of an out of court identification.

### **Clause 66A Exception – contemporaneous statements about a person’s health**

Evidence can be given of a person’s previous representations about their health, feelings, sensations, intention, knowledge or state of mind. The clause is limited to first-hand hearsay and enables the court to assess the reliability of the person who had personal knowledge of the asserted fact. This allows, for example, evidence to be received from people who have conducted surveys of the responses they have received.<sup>74</sup>

### **Clause 67 Notice to be given**

This sets out the notice requirements for a party seeking to adduce hearsay evidence in accordance with Part 3.2.

### **Clause 68 Objections to tender of hearsay evidence in civil proceedings if maker available**

A party in civil proceedings may object to the tender of hearsay evidence where the maker of the representation is available, but has not been called to give evidence. Objections must be made in accordance with the stipulated notice and other requirements. If the objection is unreasonable the court may order that the party pay the costs incurred in relation to the objection and in calling the maker to give evidence.

The Note to clause 68 sets out a difference between this Bill and the Commonwealth Act due to the different way Territory courts ascertain costs.

## **Division 3 OTHER EXCEPTIONS TO THE HEARSAY RULE**

### **Clause 69 Exception – business records**

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<sup>74</sup> *Austereo Pty Ltd v DMG Radio (Aust) Pty Ltd* [2004] FCA 968

Business records are another exception to the rule against hearsay. This includes computer records, with a rationale that they are generally reliable as they must be reliable to be of use to the business.<sup>75</sup> The exception will apply only if the representation was made or recorded in the course of or for the purposes of a business and was made by a person who had or might reasonably be supposed to have had personal knowledge of the fact asserted by the representation or was made on the basis of information supplied (directly or indirectly) by a person who might reasonably be supposed to have or have had such knowledge.

This exception does not, however, apply to material 'in contemplation of proceedings'<sup>76</sup> prepared or adjusted to meet the requirements of litigation,<sup>77</sup> or made in the course of investigation of criminal proceedings.<sup>78</sup> In these situations clause 69(3) guards against a 'risk of mischief' arising.<sup>79</sup> The purpose of this *exception* to the business records exception is to exclude representations made in business records which might have a self serving motivation which could undermine their reliability.

'In contemplation of' and 'in connection with' (a proceeding) have been the subject of differing judicial interpretations. On the one hand representations by witnesses at a Royal Commission were held not to have been made 'in connection with an investigation relating to or leading to a criminal proceeding',<sup>80</sup> in a case for malicious prosecution brought against police. On the other, the NSW Court of Appeal held representations made in a Royal Commission were made 'in connection with' the proceeding constituted by the Royal Commission.<sup>81</sup>

A further exception to the hearsay rule is provided for evidence that tends to prove that there is no record in a business record keeping system of the happening of an event normally recorded in the system, (cl.69(4)(b)).

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<sup>75</sup> ALRC 26 Vol, paras 702-705

<sup>76</sup> cl.69(3)(a)

<sup>77</sup> Regarding self-serving material see *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 303

<sup>78</sup> Regarding criminal proceedings ALRC 26, para 709 states that "...it is appropriate however for the court to have regard to the special nature of the criminal trial. In particular a judge should be more willing to make orders requested by an accused."

<sup>79</sup> *Keane v Caravan City Cowra Pty Ltd* [2006] NSWSC 942

<sup>80</sup> *Nye v State of New South Wales* [2002] NSWSC 1268

<sup>81</sup> *Thomas v State of New South Wales* [2008] NSWCA 316

### **Clause 70 Exceptions – contents of tags, labels and writing**

In certain circumstance an exception to the hearsay rule is the 'contents of tags labels and writing' attached to objects or documents. This applies to the attached label's description of the identity, nature, ownership, destination, origin, weight, or the contents of the object.

The Commonwealth has the very understandable exception to the exception in Customs and Excise prosecutions.

### **Clause 71 Electronic Communications**

The hearsay rule does not apply to electronic representations of identity of the sender, the date and time it was sent or the destination of the communication in documents recording an electronic communication. The term 'electronic communication' is not device-specific or method-specific and includes all electronic technologies, old and new. It is intended to be sufficiently broad to capture future technologies.

Presumptions about electronic communications are contained in clauses 161 and 162.

### **Clause 72 Aboriginal and Torres Strait Islander traditional laws and customs**

This clause provides an exception to the hearsay rule for evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

This exception is in accordance with the recommendations in ALRC 102. It found that the UEA should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition.

The laws of evidence have treated information passed on orally as a second class form of knowledge. In Australian Indigenous societies, the value given to information about traditional law and custom passed on via oral tradition is determined by considering factors such as the actual transmission, the source of the information, and the person to whom it has been passed. This clause does not treat orally transmitted evidence of traditional law and custom as prima facie

inadmissible, as this is the form by which law and custom are maintained under Indigenous traditions.

The intention of this clause is to make it easier for evidence of traditional law and customs to be adduced where relevant and appropriate. The exception shifts the focus away from whether there is a technical breach of the hearsay rule, to whether the particular evidence is reliable. Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted.

The requirements of relevance in clauses 55 and 56 may operate to exclude representations which do not have sufficient indications of reliability. By using judicial powers to control proceedings, and create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs, the reliability of the evidence can be enhanced.

This exception is important for Native Title proceedings, criminal law defences, sentencing, coronial matters, succession, and family law.<sup>82</sup> It is also important in Aboriginal heritage proceedings such as sacred sight matters. The focus is now on the reliability of the evidence not on its hearsay characteristics. 'Traditional laws and customs' is defined in the Dictionary.

In the Northern Territory, however, s 204A of the *Sentencing Act* and ss 90 and 91 of the *Northern Territory National Emergency Response Act 2007* (NTNER Act) still govern the admissibility of evidence of customary law in criminal proceedings. Sections 90 and 91 of the NTNER Act provide for matters a court may have regard to when passing sentence or considering bail. The court must not take into account any form of customary law or practice as a reason for either lessening the seriousness of criminal behaviour, or aggravating the seriousness of criminal behaviour. The *Sentencing Act* s 104A provides for relevant information on customary law, and community views about the offender or offence, to be received by the court, but only from a party to the proceedings and only for the purpose of imposing 'a proper sentence' or restitution, and then only with notice to the other party, with the evidence on oath, an affidavit or statutory declaration.

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<sup>82</sup> ALRC 102 paras 19.16-19.17

### **Clause 73 Exception - reputation as to relationship and age**

This exception to the hearsay rule includes evidence about marriage, cohabitation, age, family history or a family relationship, but not family gossip.<sup>83</sup> The provision is intended to reflect and rationalise existing common law rules in this respect. The clause provides that this exception does not apply to evidence adduced in a criminal proceeding unless it tends to contradict such evidence that has been admitted and, in the case of the defendant, reasonable notice has been given by the defendant.

The provision has been used in Native Title claims,<sup>84</sup> but 'family history' has been held not to include 'detailed real estate transactions.'<sup>85</sup>

### **Clause 74 Exception - Reputation of public or general rights**

This exception to the hearsay rule is based on the common law exception, as to public or general rights. It has been used in Native Title claims.<sup>86</sup> The exception does not apply in criminal proceedings to evidence adduced by a prosecutor unless it tends to contradict such evidence that has been admitted. It cannot, for example, be used in criminal prosecutions because "[t]he existence of a public or general right may be a key issue - is a road a public road (compare proceedings for offences relating to the Franklin Dam)".<sup>87</sup>

### **Clause 75 Exception - Interlocutory proceedings**

The hearsay rule does not apply to interlocutory proceedings provided evidence is given as to its source. This must be enough to allow proper investigation by another party or the court to assess its reliability.<sup>88</sup> This exception applies to first-hand and also more remote hearsay. Care must be taken with the meaning of 'interlocutory' as 'relaxation of the hearsay rule may substantially affect the outcome of the proceedings or the way in which they are conducted.'<sup>89</sup>

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<sup>83</sup> *Ceedive Pty Ltd v May* [2004] NSWSC 33

<sup>84</sup> See for example *Yamirr v Northern Territory* (1998) 82 FCR 533

<sup>85</sup> *Day v Couch* [2000] NSWSC 230

<sup>86</sup> *Yamirr v Northern Territory* (1998) 82 FCR 533; *Gumana v Northern Territory* [2005] FCA 50

<sup>87</sup> ALRC 26, vol 1, para 710

<sup>88</sup> *NSW Crime Commission v Wu* [2009] NSWCA 349 @ [45]

<sup>89</sup> *Malouf v Malouf* (1999) 86 FCR 134

A voir dire has been held *not* to be an interlocutory order,<sup>90</sup> and a 'restraining order' under the *Proceeds of Crime Act 1991* (ACT) has been held to *be* an interlocutory order.<sup>91</sup>

Governing all of the admissibility of hearsay evidence are of course the exclusionary provisions of clauses 135-137.

### **Part 3.3 OPINION**

The opinion rule excludes evidence of an opinion which is sought to be used 'to prove the existence of a fact about the existence of which the opinion was expressed'.

The main exceptions to the opinion rule are specialised knowledge (cl.79) and non-expert opinions which are based on what a witness saw, heard or otherwise perceived. (cl.78)

The difference between evidence of fact and evidence of opinion is often hard to define. Recognition from photographs can be easily classed as either.<sup>92</sup> For example a man identifying his wife of thirty years from a photograph would be probably regarded as evidence of fact, whereas the same man identifying someone in a police line-up would be more likely to be seen as giving opinion evidence.<sup>93</sup>

Evidence of 'experience' and evidence of 'opinion' can also usefully be distinguished. For example someone with experience of how a particular vehicle behaves under certain conditions may give relevant evidence of that experience, which then becomes evidence of fact rather than opinion. The evidence will not become opinion evidence until the witness draws inferences from that experience. Where the witness does draw an inference and thus express an opinion, issues will arise as to the witnesses expertise based on experience (see clause 79).

#### **Clause 76 The opinion rule**

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<sup>90</sup> *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 637

<sup>91</sup> *Director of Public Prosecutions (ACT) v Hiep* (1998) 86 FCR 33

<sup>92</sup> *R v Smith* (1999) 47 NSWLR 419 cf *Smith v The Queen* (2001) 206 CLR 650

<sup>93</sup> *R v Leung* (1999) 47 NSWLR 405 at [43] per Simpson J

This clause states the general exclusionary rule that opinion evidence is not admissible to prove a fact asserted by the opinion (the opinion rule).

The Note to clause 76 sets out a list of the specific exceptions to the opinion rule as contained in other clauses of the Bill. Examples are set out to illustrate how the clause is intended to operate.

### **Clause 77 Exception – evidence relevant otherwise than as opinion evidence**

The opinion rule does not apply to evidence of an opinion that is admitted for another purpose, and not to prove the existence of the fact about which the opinion was expressed. If the opinion has been admitted for that other purpose it may also be used as proof of the fact in respect of which the opinion was expressed.<sup>94</sup>

This is a change from the common law and where unfairness ensues the discretions in clauses 135 and 136 can be used.

### **Clause 78 Exception – lay opinions**

Lay opinions are allowed where the opinion is based on what the person saw, heard or otherwise perceived, and the evidence is necessary to adequately understand the person's perception of the matter or event. The distinction is based on the witnesses perception rather than uninformed speculation. The common law and the UEA both admit lay opinions as to identity,<sup>95</sup> apparent age, the speed at which something was moving<sup>96</sup>, the weather, and whether someone was under the influence of liquor. The courts have generally given this provision a broad application.<sup>97</sup>

### **Clause 78A Exception – Aboriginal and Torres Strait Islander traditional laws and customs**

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or

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<sup>94</sup> *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276 (hypothetical situation about a course of action)

<sup>95</sup> For discussion see *R v Leung* (1999) 47 NSWLR 405 @ [43]

<sup>96</sup> See discussion in *R v Panetta* (1997) 26 MVR 332, regarding evidence of the speed of a car.

<sup>97</sup> In *R v Harvey* (unreported NSWCCA, Beazley JA, Smart, James J, 11 December 1996) evidence was allowed by a witness describing the defendant as having "a look of like sexual gratification – that's the best way I can describe it". See also *R v Van Dyk* [2000] NSWCCA 67

non-existence, or the content of the traditional laws and customs of the group. In the NT this is of course subject in criminal proceedings to s 104A of the *Evidence Act* and ss 90 and 91 of the NTNER Act, which both limit the extent to which customary law can be used.

This clause is in accordance with ALRC 102, which recommended that a member of an Aboriginal or Torres Strait Islander group (the group) should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group.

People who are not members of the group will have their competence to give such evidence determined under clause 79, based on their specialised knowledge based on training, study or experience.

The requirement of relevance in clauses 55 and 56 may operate to exclude opinions which do not have sufficient indications of reliability, for example where the person is a member of the group but has had little or no contact with that group. Reliability can be enhanced through use of judicial powers to control proceedings, to create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs.

The opinion of an anthropologist about the traditional laws and customs of a group, but who is not a member of the group would have to be given under clause 79.

### **Clause 79 Opinions based on specialised knowledge**

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to an opinion based on that knowledge. This is the expert evidence rule. The opinion, however, must be wholly or substantially based on 'specialised knowledge', and the expert must be proved to have that knowledge. This is an area of evidence law that has developed considerably over recent years with a large body of case law



generated since the introduction of the UEA. The guidelines offered in the 1993 US decision of *Daubert*,<sup>98</sup> however, are still important.

It must be established that the person;

(1) has specialised knowledge;

(2) the specialised knowledge is based on the persons training study or experience; and

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

Clause 79(2) clarifies the rules relating to specialised evidence of child development and child behaviour specifically relating to child sex abuse. ALRC 102 found that specialist knowledge on the development and behaviour of children can be relevant to a range of matters in legal proceedings, including testimonial capacity, the credibility of a child witness, the beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions. Such evidence can, in certain cases such as child sexual assault matters, be important in assisting the court to assess other evidence or to address misconceived notions about children and their behaviour. However, the Report found that courts show a continuing reluctance in many cases to admit this type of evidence. The inclusion of subclause (2) makes it clear that this particular type of specialised knowledge is admissible.

The ALRC recognise there are dangers in admitting this category of evidence but suggests the dangers can be addressed by the application of the mandatory and discretionary exclusion provisions of Part 3.11.

At present the law in the NT regarding expert evidence dealing with the evidence of children is contained in the judgement of Riley J, as he then was, in *R v Joyce* (2005) 153 A Crim R 241, where the test is whether the issue is such that it cannot be properly determined without the assistance of an expert.<sup>99</sup> This is obviously different from the UEA where the emphasis is on letting the evidence of the specialised knowledge in, provided of course that it fulfils the other criteria of

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<sup>98</sup> *Daubert v Merrill Dow Pharmaceuticals Inc* 509 US 579 (1993)

<sup>99</sup> Riley J, as he then was, suggested the relevant questions were asked by King CJ in *R v Bonython* (1984) 38 SASR 45 at 46.

being wholly or substantially based on that persons training, study or experience. Upon commencement of the UEA in the NT the law regarding expert evidence on the development and behaviour of children will change.

‘Specialised knowledge’ is not defined in the Act and is not necessarily scientific in nature. The ‘specialised knowledge’ may be based on experience rather than study,<sup>100</sup> or may even be ‘common knowledge’, or may derive from a combination of training study and experience.<sup>101</sup> It may be based on ‘unrecalled learning, experience without recollection of particular instances, conversations with colleagues.’<sup>102</sup> ‘Ad hoc expertise’ based on particular experience has been admitted. The ALRC recognised experience can be a sounder base for opinion than study.<sup>103</sup>

Care must be taken when a new area of expertise is claimed, as occurred in the NT case of *Murdoch*<sup>104</sup> and in NSW in *Tang*<sup>105</sup>, with a new supposed field of facial and body mapping.<sup>106</sup> The tests for what is ‘specialised knowledge’ have varied around ideas of ‘reliability’ and relevance and are arguably the same as existed at common law.<sup>107</sup>

The ‘basis rule’ under the common law states that evidence of the factual basis of the proffered expert opinion must be proved. The expert must disclose the facts upon which the opinion is based and admissible evidence must prove those facts.<sup>108</sup> In ALRC 26 however, the Commission proposed that such matters be left to the ‘relevance discretion’.<sup>109</sup>

The Federal Court, the Family Court and the state and territory Supreme Courts have imposed requirements in regard to expert evidence and reports by experts, that interact with clause 79.

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<sup>100</sup> *Risk v Northern Territory of Australia* [2006] FCA 404

<sup>101</sup> *R v Cassar* [1999] NSWSC 436; *Li v The Queen* (2003) 139 A Crim R 281

<sup>102</sup> *Notaras v Hugh* [2003] NSWSC 167

<sup>103</sup> ALRC 26, para 742

<sup>104</sup> *Murdoch v The Queen* [2007] NTCCA 1

<sup>105</sup> *R v Tang* (2006) 161 A Crim R 377

<sup>106</sup> The professed expert had specialised knowledge in “facial mapping” but only an opinion that “barely, if at all, rose above a subjective belief” regarding “body mapping”. *Tang* (2006) 161 A Crim R 377 per Spiegelman J

<sup>107</sup> See for example *HG v The Queen* (1999) 197 CLR 414; *Veleviski v The Queen* (2002) 76 ALJR 402; *R v Tang* (2006) 161 A Crim R 377

<sup>108</sup> *Ramsay v Watson* (1961) 108 CLR 642

<sup>109</sup> ALRC 26, vol 1, para 750

### **Clause 80 Ultimate issue and common knowledge rules abolished**

The 'ultimate issue rule' prevents a witness from expressing an opinion on an issue to be decided by the court. The 'common knowledge rule' excludes expert opinion evidence on matters of common knowledge.

The UEA however makes evidence of an opinion not inadmissible only because it is about a fact in issue or an ultimate issue; or a matter of common knowledge. This has changed the common law rule and the 'ultimate issue' rule and the 'common knowledge' rule have been abolished.

## **Part 3.4 ADMISSIONS**

### **Clause 81 Hearsay and opinion rules – exception for admissions and related representations**

Neither the hearsay rule nor the opinion rule are to apply to evidence of an admission, or of a contemporaneous representation reasonably necessary to understand the admission.

An admission may be express, or by conduct, or may be adopted. Courts have taken a broad interpretation of the term 'admission', and have held that it may be implied by flight, attempts to suborn witnesses, or by lying.<sup>110</sup> It must however be 'adverse to the person's interests in the outcome of the proceeding' (Dictionary).

The Note to clause 81 sets out the specific exclusionary rules relating to admissions that are contained in other clauses in the Bill.

### **Clause 82 Exclusion of evidence of admissions that is not first-hand**

This clause qualifies the exception created by clause 81. To be admissible, the hearsay evidence of an admission must be first-hand hearsay.

Clause 60, which contains an exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose, does not apply to evidence of an admission in a criminal proceeding.

### **Clause 83 Exclusion of evidence of admissions as against third parties**

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<sup>110</sup> *R v Horton* (1998) 104 A Crim R; *Davies v Nyland* (1974) 10 SASR 76; *R v Esposito* (1998) 105 A Crim R 27.

An admission by one defendant cannot be used against another defendant unless the second defendant consents to the entire evidence being used. Consent cannot be given to only part of the evidence.

#### **Clause 84 Exclusion of admissions influenced by violence and certain other conduct**

If the party against whom evidence of an admission is being led raises an issue in the proceeding about whether the admission was influenced by violent, oppressive, inhuman or degrading conduct, or by a threat of such conduct, evidence of the admission is not admissible unless the court is satisfied that the admission was not influenced by that conduct or by a threat of that conduct.

This clause replaces the 'voluntariness rule' although some judges continue to use the language of 'voluntariness' when applying the Act.<sup>111</sup> It also applies in both criminal and civil proceedings. The relevant test is not 'whether the will has been overcome'.<sup>112</sup> Instead, the admission must not be 'influenced by' violent, oppressive, inhuman or degrading conduct. This is a far lower standard. It is also irrelevant who engaged in the conduct as it is not limited to conduct of an 'investigating official' (compared to clause 85).

As in the common law, the issue of inadmissibility must be raised, although that can be in the prosecution case. Once the issue is raised the prosecution must discharge the onus on the balance of probabilities, (presumably in a voir dire (see clause 189)), that the admission was not influenced by the conduct, before the evidence is admitted.

#### **Clause 85 Criminal Proceedings: reliability of admissions by defendants**

This clause relates to defendants in criminal proceedings. The provision is limited to admissions to or in the presence of 'investigating officials', which replicates to a certain extent the common law requirement of a 'person in authority'.

Evidence of an admission by a defendant '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'. This is decided on the

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<sup>111</sup> See for example *Higgins v The Queen* [2007] NSWCCA 56

<sup>112</sup> *R v Ul-Haque* (2007) 117 A Crim R 348

balance of probabilities. Reliability of the confession is a significant factor at common law.

Clause 85(1) is part of the amendments following ALRC 102. It establishes that the relevant admissions under the clause are either—

- (a) an admission made to or in the presence of an ***investigating official*** (a defined term), who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
- (b) an admission made as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution should be brought or continued.

In comparison, the previous section 85 of the UEA is limited to an admission made ‘in the course of questioning’. The new sub-clause was inserted to address the interpretation of the term ‘in the course of official questioning’ expressed by the majority in the decision of the High Court of Australia in *Kelly v The Queen*<sup>113</sup>. The majority there held that the phrase ‘in the course of official questioning’ in a particular Act ‘marks out a period of time running from when questioning commenced to when it ceased’. This is a narrow interpretation, and gave a wide discretion to police to nominate when the official questioning started and ceased. The new clause gives a broader test not turning on whether the maker of the admission was in custody, arrested, or was suspected of having committed an offence, and there is no requirement of a causal connection between the official’s conduct and the making of the admission. There must, however, be a linkage to the offence.

The requirements in clause 85 are designed to place minimal administrative or resource demands on the police (for instance there is no general duty to ensure that admissions are made in circumstances that are unlikely to adversely affect the truth of the admission). However, it is simultaneously intended to ensure that the prosecution can demonstrate reliability in cases where the truth of an admission may be in doubt due to the circumstances in which it was made.

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<sup>113</sup> *Kelly v The Queen* (2004) 218 CLR 216

Clause 85 is designed to be broad enough to cover the period where the investigating official is performing functions in connection with the investigation of the commission, or possible commission, of an offence. Accordingly, any admissions made to police during this time will fall within the scope of clause 85. The breadth of this provision is consistent with the traditional caution with which the law treats admissions made to police officers and to other persons in authority.

This clause departs from the recommendations in ALRC 102 in two respects.

First, subclause (1)(b) is intended to make it clear that covert operatives are not within the ambit of the provision. The possibility that covert operatives could be covered by the clause was considered by Callaway JA in the Victorian Court of Appeal unreported decision *R v Tofilau*<sup>114</sup>. The definition of ‘investigating official’ in the dictionary specifically excludes an officer involved in covert operations, so the clause will not apply to admissions made to undercover police. Clause 85(1)(b) refers to someone who ‘the defendant knew, or reasonably believed to be capable of influencing the decision whether a prosecution of the defendant should be brought’, which again would exclude an undercover policeman.

Secondly, the term ‘official questioning’ has been removed from other parts of the Bill so as to avoid any uncertainty. This has occurred in clauses 89, 139, 165 and the Dictionary.

Stephen Odgers<sup>115</sup> says there ‘are a number of issues about the application of this provision which have not been authoritatively settled by the Courts.’ These include whether it is a subjective or objective test of whether the admission was likely to be adversely affected, with authority going both ways.

The *Police Administration Act* (NT) provisions (ss139-143) regarding questioning of persons in custody would still be preserved pursuant to clause 8(1).

### **Clause 86 Exclusion of records of oral questioning**

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<sup>114</sup> *R v Tofilau* [2006] VSCA 40

<sup>115</sup> Stephen Odgers *Uniform Evidence Law* (8<sup>th</sup> edn) Lawbook Co. (2009)

The purpose of this clause is to limit the circumstances in which documentary evidence, such as a statement of evidence containing an admission, is used to prove the contents of the statement.

This clause makes inadmissible in a criminal proceeding, any document (other than a sound or video recording, or transcript of such a recording) purporting to be a record of interview by an investigating official with a defendant unless the defendant acknowledged the document as a true record by signing or otherwise marking it.

However, it does not in any way limit the admissibility of oral evidence regarding any such admission, where this evidence comes within an exception to the hearsay rule. Nor does it affect current requirements in relation to the taping, for example, of 'records of interview'. Furthermore, where such documentary evidence is admissible pursuant to other Acts,<sup>116</sup> this clause will not apply.

#### **Clause 87 Admissions made with authority**

This clause sets out the circumstances in which a representation made by another person is treated as being an admission made by a party. A representation made by another person is taken also to have been made by a party if—

- (a) the person had authority to make statements on behalf of the party; or
- (b) it was made by an employee or agent about a matter within the scope of the person's employment or authority; or
- (c) it was made in furtherance of a common purpose with the party.<sup>117</sup>

For the purposes of the clause, an exception to the hearsay rule is provided for evidence of a previous representation made by a person about his or her employment or authority to make statements or act on behalf of a party.

#### **Clause 88 Proof of admissions**

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<sup>116</sup> As for example the *Police Administration Act*.

<sup>117</sup> This reflects the common law, see *Landini v New South Wales* [2007] NSWSC 259

A court can admit evidence of an alleged admission if it is reasonably open to find that the admission was made.

### **Clause 89 Evidence of silence**

This provision is narrower than the common law position.<sup>118</sup> Unfavourable inferences (including an inference of consciousness of guilt or an inference relevant to a party's credibility) are prohibited from being drawn in a criminal proceeding from a failure by a person to answer a question, or respond to a representation, from an investigating official performing functions in connection with the investigation of the commission, or possible commission, of an offence. If the only use that can be made of the evidence of the silence would be to draw such an unfavourable inference, the evidence of the silence itself is inadmissible.

The application of this clause is limited to the evidence of the silence and is not intended to prevent the drawing of adverse inferences from the giving of inconsistent accounts.<sup>119</sup>

The clause does not prevent use of the evidence to prove that the party or other person refused to answer the question or respond to the representation if the refusal is a fact in issue in the proceedings.

In some circumstances silence might be treated as an admission under clause 81. The common law right to silence, the privilege against self incrimination, and the protections over inferences drawn from silence, at and before trial, still apply however.

### **Clause 90 Discretion to exclude admissions**

If, in a criminal proceeding, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit the admission at all, or admit the admission, but limit its use.

Clause 90 is the 'fairness discretion' and to an extent it reflects the common law position. Clause 138 also excludes improperly or illegally obtained evidence, and

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<sup>118</sup> *R v Anderson* [2002] NSWCCA 141

<sup>119</sup> *R v Merlino* [2004] NSWCCA 104 at [71]



it is best the two clauses are looked at in combination. Clause 90 however only applies to admissions.

*R v Swaffield; Pavic v The Queen*<sup>120</sup> states the reformulated common law regarding confessions. The common law test starts with the question of voluntariness, then to considerations of reliability, leading to an overall discretion taking account of all the circumstances to determine whether the admission of the evidence or the obtaining of the conviction is bought at too high a price.

The overall discretion is broad and takes into account questions of fairness, public policy, and 'protection of the rights and privileges of the accused'.<sup>121</sup> This approach has influenced the application of clause 90 and clause 138 (exclusion of illegally or improperly obtained evidence). The majority in *Swaffield* said the approach reflected the UEA when the relevant provisions (i.e. clause 90, & clauses 136-138), are taken in combination.<sup>122</sup> Although 'voluntariness' is not mentioned in the UEA, Stephen Odgers<sup>123</sup> notes that it would be likely to be unfair to admit evidence of an admission that would not have been regarded as voluntary at common law.

It is hard to mark out the full extent of the discretion in clause 90, with the High Court seeming to take a restrictive view as to its application.<sup>124</sup> For example, it has been held it is not unfair to use a confession which has been lawfully compelled at a Royal Commission.<sup>125</sup> Covert recordings are not necessarily unfair.<sup>126</sup> Persistence in questioning leading to unfairness is a matter of degree.<sup>127</sup> Common law principles do, however, apply to admissions made to police informers.<sup>128</sup>

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<sup>120</sup> *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159

<sup>121</sup> *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 @ 189

<sup>122</sup> *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 @ 194

<sup>123</sup> Steven Odgers *Uniform Evidence Law* (8<sup>th</sup> edn) Lawbook Co. (2009)

<sup>124</sup> See *Em v The Queen* (2007) 232 CLR 67 @ [77]

<sup>125</sup> *Director of Public Prosecutions (NSW) v Alderman* (1998) 45 NSWLR 526

<sup>126</sup> *Em v The Queen* (2007) 232 CLR 67

<sup>127</sup> *R v Clarke* (1997) 97 A Crim R 414 per Hunt CJ

<sup>128</sup> *R v Walker* [2000] NSWCCA 130

## **Part 3.5 EVIDENCE OF JUDGEMENTS AND CONVICTIONS**

This Part abolishes the rule known as the rule in *Hollington v Hewthorn*.<sup>129</sup> In that case, evidence of a conviction was held to be inadmissible in civil proceedings to prove the facts on which it was based.

### **Clause 91 Exclusion of evidence of judgements and convictions**

Evidence of a decision or a finding of fact in a proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding. The clause makes it clear that once such evidence is prohibited (under this Part) from proving a fact in issue, even if it is admitted for some other relevant purpose, it cannot then be used in contravention of this clause.

There are exceptions to this in clause 92 for a grant of probate, letters of administration or similar orders to prove a person's death, or the execution of a testamentary document. Evidence of a conviction for a criminal offence may be admitted in civil proceedings. Clause 178 provides for certificate evidence of convictions, sentences, acquittals and other judicial proceedings.

### **Clause 92 Exceptions**

This clause provides two exceptions to the basic rule set out in clause 91.

The first exception provides that evidence of a grant of probate or letters of administration to prove death, date of death or the due execution of a will is admissible.

The second exception provides for the admissibility of evidence in civil proceedings of convictions (but not acquittals)<sup>130</sup> of a party or a person through or under whom a party claims (not being convictions under review or that have been quashed or set aside or in respect of which a pardon has been given).

### **Clause 93 Savings**

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<sup>129</sup> *Hollington v Hewthorn* [1943] KB 587

<sup>130</sup> *Batey v Potts* [2004] NSWSC 606

This clause preserves existing law that enables evidence of convictions to be admitted in defamation proceedings and the rules relating to judgments *in rem*, *res judicata* and issue estoppel.

### **Part 3.6 TENDENCY AND COINCIDENCE**

This Part provides for the admissibility of evidence relating to conduct, reputation, character and tendency of parties and witnesses that is relevant to a fact in issue in the proceedings.

Credibility evidence is dealt with in Part 3.7. Part 3.8 sets out rules relating to evidence of the character of a defendant in a criminal proceeding.

Tendency evidence is excluded under this part (the 'tendency rule' clause 97). Tendency evidence is evidence of conduct or character introduced to prove a 'tendency' to act or think in a particular way. The evidence may, however, be admitted if it has significant probative value and reasonable notice has been given. Tendency evidence may often be relevant but lack significant probative value.

The 'coincidence rule' (clause 98) forbids evidence that 'two or more events occurred' to prove that a person did a particular act or had a particular state of mind, on the basis that having regard to any similarities in the events or the circumstances 'it is improbable that the events occurred coincidentally'. Again, the evidence may be admitted if it has significant probative value and reasonable notice has been given. Both the tendency rule and the coincidence rule apply in civil and criminal proceedings.

#### **Clause 94 Application**

This clause provides that part 3.6 rules do not apply to evidence that relates only to the credibility of a witness, bail or sentencing proceedings, evidence of character, reputation, conduct or tendency if that character, reputation, conduct or tendency is a fact in issue. Examples would be in a defamation case where justification is pleaded, or a parole hearing where a fact in issue may be the prisoner's dangerousness.

### **Clause 95 Use of evidence for other purposes**

Evidence of tendency or coincidence, if admitted for another purpose, may *not* be also used in the prescribed way (i.e. as tendency or coincidence evidence). This is opposite to the way that hearsay evidence is treated where, if the evidence is admitted for another purpose, it can also be used to prove the existence of the fact that the person intended to assert.

Evidence that may not be subject to the tendency rule includes evidence that may be relevant to a fact in issue, where the relevance is not dependent on the drawing of an inference of tendency from the evidence. For example, evidence of prior conduct revealing a motive for the crime charged or evidence relevant to a person's state of mind. If such evidence is admitted, it cannot then also be used for a tendency purpose.

### **Clause 96 Failure to act**

A reference in Part 3.6 to the doing of an act includes a reference to a failure to do the act.

### **Clause 97 The tendency rule**

This clause sets out the tendency rule. The rule deals with the admission of evidence of a person's character, reputation, conduct or tendency where the evidence is being admitted to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind.

There is an exception to the tendency rule. Tendency evidence can be admitted under this clause if appropriate notice is given (or the court dispenses with the notice requirement under clause 100) and the court finds that the evidence has significant probative value.

A common law analysis of what might constitute 'significant probative value' for the purposes of clause 97, can help in the understanding of the UEA requirements.<sup>131</sup> The common law has been said to have 'a healthy scepticism in

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<sup>131</sup> *Jacara Pty Ltd v Auto-Bake Pty Ltd* [1999] FCA 417 @ [10].

relation to similar fact evidence',<sup>132</sup> although care must be taken in applying common law tests of significant probative value to criminal proceedings. It is not essential that the evidence reveal (as in the language of *Hoch*<sup>133</sup>) 'striking similarities' or 'unusual features',<sup>134</sup> but the High Court's acceptance of similar fact evidence in appropriate cases before the enactment of the UEA can still guide the reasoning as to whether evidence is capable of having significant probative value.<sup>135</sup>

**Probative value** is defined as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Once the evidence is found to have probative value, the exception applies where the court thinks the probative value is significant. Although the term 'significant' is not defined, it is not intended to mean 'substantial'. ALRC 102 concluded that the term is well defined in common law, and means something more than mere relevance, but less than a substantial degree of relevance.<sup>136</sup> Whether the probative value of the evidence is significant or not will depend on the circumstances of the case and the fact(s) in issue.<sup>137</sup> The court can consider the evidence alone, or in relation to other evidence.

Evidence of similar fact and evidence of coincidence can be admitted for other purposes than as similar fact or coincidence, but the evidence must not be used for the purpose of similar fact or coincidence. Careful directions as to the use the evidence can be put must be given in jury trials.

For additional consideration regarding admissibility of tendency evidence in relation to criminal proceedings see clause 101 below.

Tendency evidence adduced to explain or contradict tendency evidence adduced by another party is not excluded by this clause.

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<sup>132</sup> *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (No 8) (1999) 92 FCR 375 @ [94]

<sup>133</sup> *Hoch v The Queen* (1988) 165 CLR 292

<sup>134</sup> *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR @ [82]

<sup>135</sup> *R v Fletcher* (2005) 156 A Crim R 308

<sup>136</sup> *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 @ 361

<sup>137</sup> *R v Lock* (1997) 91 A Crim R 356 @ 361

The Note to clause 97 sets out that other specific exceptions to the tendency rule are contained in clauses 110 and 111. These specific exceptions relate to character evidence of an accused and permit the admission of evidence, in some circumstances, that would otherwise be inadmissible due to the tendency rule.

### **Clause 98 The coincidence rule**

The coincidence rule prevents the admission of evidence of the occurrence of two or more events that is being tendered to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.

The clause applies where the party adducing the evidence of the two or more events relies on similarities in the events or any similarities in the circumstances in which the events occurred. The clause also applies where the evidence of the two or more events relies on any similarities in both the events *and* circumstances in which the events occurred.

There is an exception to the coincidence rule the same as the tendency rule. Coincidence evidence can be admitted under this clause if appropriate notice is given and the court finds that the evidence of the two or more events has significant probative value. The assessment of probative value can take into account other evidence, not just the coincidence evidence alone.

The clause applies to both civil and criminal proceedings. For additional consideration regarding admissibility of coincidence evidence in relation to criminal proceedings, see clause 101 below.

The Note to subclause (1) clarifies the intention and effect of the provision by stating that the two or more related events, which constitute the coincidence evidence, may include an event that is a fact in issue in the proceeding.

The exclusionary coincidence rule does not apply to coincidence evidence adduced to explain or contradict coincidence evidence adduced by another party.

### **Clause 99 Requirements for notices**

Notice under clause 97 or 98 is to be given in accordance with the regulations or rules of court.

### **Clause 100 Court may dispense with notice requirements**

This clause sets out the circumstances in which the court may dispense with notice requirements. It enables the court, on the application of a party, to direct that the tendency rule or coincidence rule is not to apply to particular evidence despite the party's failure to give notice under clauses 97 or 98.

### **Clause 101 Further restrictions on tendency evidence and coincidence evidence adduced by the prosecution**

In criminal proceedings tendency evidence and coincidence evidence adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs its prejudicial effect.

This provision is similar to clause 137 (general discretion to exclude evidence), although here the probative value must *substantially* outweigh the prejudicial effect, whereas in clause 137 the probative value must simply outweigh the prejudicial effect. The meaning of substantial is of course ambiguous and 'calculated to conceal a lack of precision'.<sup>138</sup>

Clause 101 also refers to 'any prejudicial effect (the evidence) may have' rather than 'the danger of unfair prejudice' as in clause 137.

The structure of the language in this provision by referring to 'tendency and coincidence evidence adduced by the prosecution...' implies the evidence has already been adduced and the clause then restricts to the point of oblivion the use that may be made of it. The language of clauses 97 and 98, however, states the evidence 'is not admissible to prove that...' The courts have proceeded as if there was no real difference in the two choices of words, and have assumed that if the evidence cannot be used against the defendant it should not be admitted at all.<sup>139</sup>

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<sup>138</sup> *Tillmans Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 @ 348 per Deane J.

<sup>139</sup> *R v Nassif* [2004] NSWCCA 433 @ [46]-[47]

There is much controversy over evidence introduced for other purposes, that happens to overlap with tendency or coincidence evidence, such as evidence of motive or opportunity. Relationship evidence is particularly problematic and can, for example, use a history of sexual or physical violence to explain issues of 'consent', while also showing a tendency to violence. Evidence identifying the defendant with the crime charged could, for example, be evidence of proceeds of other robberies found at the defendant's house and also at the scene of a murder, hence implicating the defendant in the murder and showing he or she was involved in other criminal activity or had a tendency to be involved in criminal activities. Similar allegations can sometimes be cross-admissible as, for example, in some alleged sexual assaults,<sup>140</sup> but where the possibility of joint concoction or contamination exists it probably would not pass the test.

Clause 101(2) requires the prosecution to establish that the probative value of the evidence *substantially* outweighs any prejudicial effect it may have on the defendant. The prejudicial effect of tendency evidence is that the ordinary person thinks that someone with an established tendency to conduct himself or herself in a certain way whenever a particular opportunity arises will yield to that tendency and so conduct himself or herself in the circumstances of the particular case.<sup>141</sup> As such evidence is circumstantial in nature, the prosecution must establish that there is no reasonable view of the evidence available which is consistent with the innocence of the defendant.<sup>142</sup> That is what is required by clause 101(2).<sup>143</sup>

Originally the courts imported the common law test in *Pfennig v The Queen* and *Hoch*<sup>144</sup> to clause 101. The test was that the evidence must possess, 'a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged.'<sup>145</sup>

More recently the Full Federal Court and the NSWCCA have preferred Justice McHugh's less strict formulation of a "balancing" test in *Pfennig* over the 'no

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<sup>140</sup> *AE v The Queen* [2008] NSWCCA 52 (allegations of one step daughter were ruled cross-admissible in the trial regarding other step daughter. The judges decision to include the evidence was overturned on appeal)

<sup>141</sup> *Pfennig* @ 488

<sup>142</sup> *Pfennig* @ 483-484, 165-167

<sup>143</sup> *R v Dann* [2000] NSWCCA 185 at [20]

<sup>144</sup> *Hoch v The Queen* (1988) 165 CLR 292 @ 294

<sup>145</sup> *Pfennig v The Queen* (1995) 182 CLR 461 @ 481



reasonable explanation' test.<sup>146</sup> The balancing will of course turn on the facts of each case.

Where tendency evidence or coincidence evidence is proposed to be introduced, the prosecution bears the onus of establishing that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. This is a more stringent test than clause 137.<sup>147</sup>

This clause does not prevent the prosecution from adducing tendency or coincidence evidence to explain or contradict tendency or coincidence evidence adduced by the defendant, although the defendant can still argue the prejudicial effect outweighs the probative value and clause 137 should be applied.<sup>148</sup>

### **Part 3.7 CREDIBILITY**

Clause 101A defines 'credibility evidence'. Clause 102 creates the 'credibility rule', that credibility evidence about a witness is not admissible. An exception is provided by clause 108C for expert evidence concerning the credibility of a witness. Cross-examination on credibility is allowed by clause 103 if it could 'substantially affect' the assessment of credibility of a witness.

#### **Clause 101A Credibility evidence**

Clause 101A inserts a definition of the evidence to which the 'credibility rule' in clause 102 applies. 'Credibility' evidence is either evidence that is;

- (a) relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) relevant because it affects the assessment of credibility and is relevant, but not admissible, or cannot be used, for some other purpose under Parts 3.2 to 3.6 of the Bill. (Hearsay, opinion, admissions, evidence of judgements and convictions, and tendency and coincidence).

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<sup>146</sup> See for example *R v Ellis* (2003) 58 NSWLR 700 (a coincidence case), and; *W v The Queen* (2001) 115 FCR 41

<sup>147</sup> *R v Chan* [2002] NSWCCA 217 at [49]

<sup>148</sup> *R v Lock* (1997) 91 A Crim R 356 @ 360-361

Paragraph (b) has been inserted to address the decision of the High Court of Australia in *Adam v The Queen*.<sup>149</sup> Prior to *Adam*, the provisions in Part 3.7 controlled the admissibility of evidence so that the credibility rule applied if evidence was relevant both to credibility and a fact in issue, even where the evidence was admissible for the purpose of proving a fact in issue.

The High Court in *Adam* considered section 102 of the UEA's, which is effect the same as clause 101A(a) of this Bill. The result of that decision is that use of evidence for more than one purpose, including credibility, depends entirely upon the exercise of the discretions and exclusionary rules contained in clauses 135 to 137. This has the potential to lead to greater uncertainty, inconsistent outcomes and increased appeals.

The introduction of the elements in clause 101A(b) make evidence relevant to both credibility and a fact in issue, but not admissible for the latter purpose, subject to the same rules as other credibility provisions.

The Note to clause 101A clarifies that clauses 60 (exception to the hearsay rule) and 77 (exception to the opinion rule) are not relevant in the determination of admissibility for another purpose under clause 101A because they cannot apply to evidence which has not yet been admitted. The inclusion of this note is in response to the decision in *Adam*.

If evidence is relevant but **not** admissible because of a prohibited purpose in the provisions of Parts 3.2 to 3.6, (i.e. hearsay, opinion, admissions, evidence of judgements and convictions, tendency and coincidence), and is also relevant because it affects the credibility of a person or witness, the credibility rule applies to the evidence and it is not admissible. If, however, the evidence is not only relevant because it affects the credibility of a person but also relevant and admissible for another purpose, it is not 'credibility evidence' as defined, and Part 3.7 does not apply to the evidence. Thus it may be used to affect the assessment of the credibility of that person or witness. This is of course subject to the operation of the discretion in clause 136.

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<sup>149</sup> *Adam v The Queen* (2001) 207 CLR 96

## **Division 1 CREDIBILITY OF WITNESSES**

### **Clause 102 The credibility rule**

Clause 102 states the 'credibility rule' which is that 'credibility evidence about a witness is not admissible'. There follows a list of specific exceptions to the credibility rule including evidence adduced in cross-examination (clauses 103 and 104), rebuttal of denials (clause 106), evidence to re-establish credibility (clause 108), experts (clause 108C), and the character of accused persons (clause 110).

### **Clause 103 Exception – Cross-examination as to credibility**

Clause 103 provides that although credibility evidence is prima facie inadmissible, credibility evidence may be adduced in cross-examination of the witness if the evidence 'could substantially affect the assessment of the credibility of the witness'. The word 'substantial' imposes a limitation that is different to the common law where almost anything is allowed on the issue of credit.<sup>150</sup>

Under this clause, the test is not whether the evidence has substantial probative value. Under section 103 of the UEA the test was whether the evidence has substantial probative value and common law interpretation of this section considered the co-existing definition of **probative value** in the Dictionary. The two provisions combined had the unintended effect of shifting the focus from issues of credibility.<sup>151</sup> This clause makes it clear that the evidence relevant to credibility must be substantial in order to be admitted.

### **Clause 104 Further protections – cross-examination as to credibility**

Clause 104 provides an additional safeguard in relation to credibility evidence by limiting cross-examination of a defendant who gives evidence in criminal proceedings, unless the court gives leave. This provision only applies to credibility evidence as defined by clause 101A and therefore does not apply to evidence that, although being relevant because it affects the credibility of a witness or person, is also relevant and admissible for another purpose.

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<sup>150</sup> *R v RPS* (unreported, NSW CCA, 13 August 1997) per Hunt J

<sup>151</sup> See *R v RPS* id

This restriction therefore does not include cross-examination bearing upon the defendant's guilt or innocence, or cross-examination about inconsistencies, omissions or other weaknesses in a defendant's evidence. Leave is not required for cross-examination on a defendant's motive to be untruthful, bias, recall, or about a prior inconsistent statement.

The clause is intended to enable the court to exercise control over unwarranted attacks on the credibility of a prosecution witness. Under subclause (4), where leave is required, it must not be given to the prosecution unless the defendant has adduced evidence that tends to prove that a prosecution witness has a tendency to be untruthful and the evidence is relevant solely or mainly to the witness's credibility. Subclause (5) makes it clear that subclause (4) does not include a reference to evidence of conduct in relation to the proceedings.

Under subclause (6) a second (or other) defendant cannot be given leave for cross-examination unless the evidence of the first defendant is adverse to the second (or other) defendant and that evidence has been admitted.

Evidence of a defendant's convictions may be relevant to the defendant's credibility and may also be relevant to guilt by way of tendency reasoning. If relevant to guilt, clause 104 will not apply (although clauses 97, 98, 110, and 112 may). If relevant solely to credibility then the discretionary exclusion provisions in clauses 135 and 137 would be considered.

Stephen Odgers suggests the common law 'resistance to allowing evidence of prior criminal history' may be taken into account when applying the provisions regarding leave to cross-examine.<sup>152</sup>

### **Clause 105**

This clause contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth, Victorian and New South Wales Acts.

### **Clause 106 Exception – rebutting denials by other evidence**

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<sup>152</sup> Stephen Odgers *Uniform Evidence Law* (8<sup>th</sup> Edn) LawBook Co. (2009) p 475

In specific circumstance the credibility rule does not apply to rebutting a witness's denials by other evidence. This changes the 'finality rule' relating to collateral matters that exists at common law, which was described by the ALRC as 'an artificial and inflexible limitation which may result in the court being misled.'<sup>153</sup>

Subclause (1)(a) sets out the specific circumstances—when in cross-examination of the witness, the substance of the evidence is put to the witness and it is denied, or the witness did not admit or agree to it. If the court then gives leave, credibility evidence can be adduced.

The inclusion of the circumstance where the witness 'did not admit or agree to' the substance of the evidence, is in response to ALRC 102<sup>154</sup>. It found that a sole requirement that the substance of the evidence be denied and that the evidence be relevant to a defined category may prevent the admission of important evidence for reasons of efficiency rather than fairness. Clause 106 creates a broader basis on which to admit evidence.

Subclause (2) provides that leave is not required where the evidence falls within paragraphs (a) to (e). These circumstances include where the witness is biased, has made a prior inconsistent statement or where the witness is, or was, unable to be aware of matters to which their evidence relates.

### **Clause 107**

This clause contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth, Victorian and New South Wales Acts.

### **Clause 108 Exception – re-establishing credibility**

This clause provides exceptions to the credibility rule. First, for evidence adduced in re-examination of a witness. Secondly, if the court gives leave, the credibility rule does not apply to evidence of a prior *consistent* statement of a witness if:

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<sup>153</sup> ALRC 26 vol 1 at 226

<sup>154</sup> ALRC 102 para 12.79

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

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

Evidence of recent complaint may be admitted as a prior consistent statement if the suggestion referred to in clause 108(3)(b) has been or will be made, i.e. that the evidence has been fabricated, reconstructed or is the result of suggestion.

## **Division 2 CREDIBILITY OF PERSONS WHO ARE NOT WITNESSES**

### **Clause 108A Admissibility of evidence of credibility of person who has made a previous representation**

Subclause (1) applies to all situations in which evidence of a previous representation has been admitted and where the maker of the representation is not called to give evidence.

This clause reflects the new definition of ***credibility evidence*** (see clauses 102 and 103(2)) so that credibility evidence about the person will not be admissible unless it could *substantially* affect the person's credibility.

Clause 108A only applies where the person who made the representation will not be called to give evidence in the proceeding. Where that person is the defendant or a witness for the defence, it will be up to the defence whether or not to call that person to give evidence. However, this may not be decided (or disclosed) prior to the close of the prosecution case, potentially leading to uncertainty as to whether the relevant person who made the representation will be called. Without this information, the prosecution cannot rely on the provisions of clause 108A to admit credibility evidence.

However, clause 46 of the Bill provides that the court may give leave to a party to recall a witness if another party raised a matter on which the relevant witness was not cross-examined. Further, this problem can be overcome by the prosecution later being able to reopen its case, or being allowed to call a case in

reply: see *R v Siulai* [2004] NSWCCA 152. See clause 108B below for an additional consideration regarding defendants.

**Clause 108B Further protections: previous representations of an accused who is not a witness**

This clause provides further protections in relation to previous representations of a defendant who is not a witness. If evidence of a prior representation made by the defendant in a criminal trial has been admitted, and the defendant has not or will not be called to give evidence, the same restrictions on adducing evidence relevant to the credibility of the defendant should apply as under clause 104. This is to overcome the position in relation to section 108A of the UEA, which could permit a situation where the prosecution could tender a prior representation of the defendant and then lead credibility evidence against the defendant.

Subclause (2) provides that the prosecution must ordinarily seek the court's leave where it wishes to tender evidence relevant only to a defendant's credibility. When deciding whether to grant leave, the court is to take into account matters in subclause (4).

Subclause (3) provides that leave is not required, however, where cross-examination by the prosecutor relates to whether the defendant was biased or had a motive to be untruthful, whether the defendant is, or was, unable to be aware of or to recall matters to which his or her previous representation relates, or whether the defendant has made a previous inconsistent statement.

Under subclause (4), where leave is required, it must not be given to the prosecution unless the defendant has adduced evidence that tends to prove that a prosecution witness has a tendency to be untruthful and the evidence is relevant solely or mainly to the witness's credibility. Subclause (5) makes it clear that subclause (4) does not include a reference to evidence of conduct in relation to the proceedings.

Under subclause (4) there may be a situation where the defence adduces this evidence after the prosecution has closed its case. The issues that arise in this situation are discussed under clause 108A.

Under subclause (6) a second (or other) defendant cannot be given leave for cross-examination unless the evidence of the first defendant is adverse to the second (or other) defendant and that evidence has been admitted.

This clause was inserted in accordance with ALRC 102 (recommendation 12-6).

### **Division 3 PERSONS WITH SPECIALISED KNOWLEDGE**

#### **Clause 108C Exception – evidence of persons with specialised knowledge**

The credibility rule does not apply to witnesses with ‘specialised knowledge based on the persons training study or experience’. This provides an exception for expert opinion evidence that could substantially affect the assessment of the credibility of a witness. This could be regarding, for example: cognitive impairment; lack of capacity to observe; evidence on effects of family violence where it is relevant to credibility of a witness; expert opinion evidence on ‘hysterical and unstable nature of the alleged victim of an assault’<sup>155</sup>; or evidence on the behaviour and development of children and the long term effects of family violence.

This evidence can only be adduced with leave of the court. The purpose of the clause is to permit expert opinion evidence in situations where it would be relevant to the fact-finding process (for example, to prevent misinterpretation of witness behaviour or inappropriate inferences being drawn from that behaviour).

Subclause (2) clarifies that specialist knowledge includes specialised knowledge of child development and behaviour. This clause complements clause 79.

This clause was inserted in accordance with the recommendations of ALRC 102.<sup>156</sup>

If evidence is relevant for some reason other than credibility then it is not caught by the definition of credibility in 101A, as it is *not* ‘only relevant because it affects the assessment of the credibility of the witness or person’. Therefore it is *not* ‘credibility evidence’.

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<sup>155</sup> Compared to *Toohy v Metropolitan Police Commissioner* [1965] AC 595 under the common law

<sup>156</sup> ALRC 102 paras 12.128-12.133



That being so, evidence of a prior conviction for dishonesty for the purposes of coincidence or tendency under Part 3.6 is able to be also used in respect of the credibility of the defendant as a witness. This is of course subject to the general discretion to limit the use of evidence in clause 136.

In practice the difference between evidence relevant to credit and evidence relevant to a fact in issue is often indistinct, but the distinction is regarded as necessary to prevent a trial being burdened with the side issues that would arise if parties could investigate matters whose only real probative value was that they tended to show the veracity or falseness of the witness who is giving the evidence.<sup>157</sup> Sometimes, however, the credibility of a witness is decisive as to the facts in issue. Accordingly, it is irrational to draw a rigid distinction between matters of credit and matters going to the facts in issue.<sup>158</sup>

Although 'fresh complaint' evidence in sexual assault cases is not specifically retained by the UEA clause 108(3)(b) allows evidence of a prior consistent statement if 'it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or reconstructed (whether deliberately or otherwise) or is the result of a suggestion; and the court gives leave to adduce the evidence of the prior consistent statement.' It has been accepted by the NSWCCA<sup>159</sup> that a suggestion made in cross-examination in committal proceedings is sufficient to enliven the clause. Evidence of recent complaint can also be given under clause 66 (Exception to the hearsay rule).

### **Part 3.8 CHARACTER**

This Part only applies to criminal proceedings. Clause 110 allows the defence to adduce evidence of the defendant's good character, either generally or in a particular respect, and the prosecution may then rebut that evidence. Evidence of good character by way of reputation, tendency or credibility can be introduced without the strict tests otherwise required for hearsay, opinion, tendency and credibility evidence.

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<sup>157</sup> *Nichols v The Queen* (2005) 219 CLR 196 per McHugh J @ [43] Sometimes it is difficult to separate the credibility of the witness from the facts in issue.

<sup>158</sup> *Palmer v The Queen* (1998) 193 CLR @ 24

<sup>159</sup> *R v NJF* (unreported, NSWCCA 5 June 1997)

Clause 111 allows the defendant to introduce expert evidence of another defendant's character in the same proceedings, without the application of the hearsay or tendency rules, and that second defendant may adduce rebuttal evidence.<sup>160</sup> This is the same as the common law. The rebuttal evidence in clauses 110 and 111 also are free of the strict tests for hearsay, opinion, tendency and credibility evidence.

Although leave is not required for the prosecution to adduce rebuttal evidence under clause 110, leave must be obtained before cross-examination of the defendant by the prosecution or another defendant about matters of character under clauses 110 and 111. (See clauses 112 and 104).

### **Clause 109 Application**

This clause establishes that this Part applies only in a criminal proceeding.

### **Clause 110 Evidence about character of accused persons**

This clause provides exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule, for evidence adduced by a defendant about his or her own good character, and evidence adduced to rebut such evidence.

Under common law rebuttal evidence is allowed solely for the limited purpose of rebutting the defendant's claim of good character. It is arguable, however, that as a matter of statutory construction, if evidence is allowed under clause 110(1) to prove lack of guilt (by evidence of good character), then evidence adduced in rebuttal under clause 110(2) or 110(3) is admissible to prove guilt.<sup>161</sup> The likelihood that rebuttal evidence will negatively impact on the defendant's case will require the evidence to have a high degree of probity to avoid exclusion under the discretionary provisions of Part 3.11.

Cross-examination of the defendant regarding his or her criminal history is still a vexed question anyway, and 'the common law resistance to allowing evidence of

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<sup>160</sup> *R v Lowery & King* [1972] VR 939.

<sup>161</sup> *Eastman v R* (1997) 76 FCR 9; 158 ALR 107

prior criminal history is still relevant in guiding the exercise of the (clause 104(2)) discretion.<sup>162</sup>

### **Clause 111 Evidence about character of co-accused**

This clause provides an exception to the hearsay rule and tendency rule for expert opinion evidence about a defendant's character adduced by a co-accused.<sup>163</sup> This is again subject to the court's discretion under clause 135 (clause 137 is for evidence adduced by the prosecution)

### **Clause 112 Leave required to cross-examine about character of accused or co-accused**

Leave must be obtained to cross-examine a defendant about matters set out in Part 3.8. This clause amends section 112 of the UEA to correct a minor drafting inconsistency between subsection 104(2) and section 112. The words 'is to be' in clause 112 are replaced with 'must not be'.

## **Part 3.9 IDENTIFICATION EVIDENCE**

This Part changes the common law regarding the admissibility of identification evidence in a criminal trial. It applies only in criminal proceedings and to a certain extent is stricter than the common law.<sup>164</sup>

### **Clause 113 Application of Part**

This clause establishes that this Part applies only in criminal proceedings.

### **Clause 114 Exclusion of visual identification evidence**

This clause provides a general exclusionary rule for visual identification evidence, and broadly reflects the common law. Visual identification evidence means

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<sup>162</sup> *R v El-Azzi* [2004] NSWCCA 445 @ [199] per Simpson J. see also *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1; *Kevin William Phillips v The Queen* (1985) 159 CLR 45.

<sup>163</sup> See *R v Lowery & King* [1972] VR 939, for a common law example.

<sup>164</sup> See *R v Clarke* (1997) 97 A Crim R 414 @ 424-427

evidence of identification based wholly or partly on what a person saw but does not include picture identification evidence. 'Visual identification evidence' is not admissible without an identification parade having been held, unless it would have not been reasonable, or would have been impractical to have held such a parade, or if the defendant refused to take part. This clause applies even to some 'recognition evidence'.<sup>165</sup>

Subclause (3) sets out some of the matters that a court may take into account in determining whether it was reasonable to have held an identification parade. These include the type and gravity of the offence, the importance of the evidence and the practicality of holding such a parade (including, if the defendant failed to cooperate, and the manner and reason for the failure).

Under subclauses (4) and (5), it is to be presumed that it would not have been reasonable to hold an identification parade if it would have been unfair to the defendant to hold the parade or the defendant refused to take part in the parade unless an Australian legal practitioner or other party was present and there were reasonable grounds to believe this was not reasonably practicable.

Subclause (6) stipulates that in determining whether it was reasonable to hold a parade, the court is not to take into account availability of pictures or photographs that could be used in making identifications.

Sometimes, however, the fact that a witness has recognised the defendant has led the judge to decide it would not have been reasonable or appropriate to have held a parade.<sup>166</sup> The impracticality of holding a parade might include such things as logistical difficulties or time taken to organise a parade,<sup>167</sup> but just because it is unreasonable or impractical at one time does not mean it will be at another.<sup>168</sup> Impracticality must not include the fact that police had pictures or photographs that could be used (clause 114(6)).

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<sup>165</sup> *Trudgett v The Queen* [2008] NSWCCA 62. See also *R v Buchanan* (2005) 152 A Crim R 302 discussing s114(3)(d)

<sup>166</sup> *R v Ford* [1998] NSWSC 96, where the identifying witness was familiar with the defendant, who had a distinctive appearance.

<sup>167</sup> *R v Leroy* [2000] NSWCCA 302 @ [19]-[23]

<sup>168</sup> *R v Tahere* [1999] NSWCCA 170

Visual identification evidence does not include security footage or identification by a tracker dog, aural, DNA or fingerprint identification. Importantly it does not include 'picture identification evidence'.

### **Clause 115 Exclusion of evidence of identification by pictures**

Clause 115 sets out the rules governing the admissibility of visual identification evidence where the identification was made wholly or partly after examining pictures (defined to include photographs) kept for use by police officers. It does not include surveillance security or video footage.<sup>169</sup>

Picture identification evidence is inadmissible if the pictures suggest that the person is in police custody (for example by showing an identification number), or if the person *is* actually in police custody and the photo was taken before that custody. This clause is designed to encourage police officers to provide current photographs for the purpose of identification. However, there are exceptions to this exclusion.

Picture identification evidence is, however, admissible if the person was in police custody and (a) the person had declined an identification parade, or (b) his or her appearance had changed after the offence had been committed, or (c) it was not reasonable to hold one. Both picture identification evidence and visual identification evidence may still be excluded under the discretionary powers of the Bill, particularly clauses 137 and 138.

### **Clause 116 Directions to Jury**

If identification evidence is admitted the judge must give directions to the jury as required by clause 116. The direction is of the special need for caution before accepting the evidence and the reasons for that need for caution, both generally and in the circumstances of the case. This provision reflects the common law, although the direction must be given even if not requested. The warning is generally formulated as was the warning in *Domican v The Queen*,<sup>170</sup> although

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<sup>169</sup> *R v Hennessy* [2001] NSWCCA 36

<sup>170</sup> (1992) 173 CLR 555 @ 561-562

there is no mandatory method of expression. The warning will depend on 'the issues in the case as a whole'.<sup>171</sup>

Warnings against evidence that may be unreliable are also required by clause 165.

### **Part 3.10 PRIVILEGES**

This Part sets out evidence that is protected from disclosure on grounds of privilege or for public policy considerations, and deals with confidential and privileged communications and documents. It includes client legal privilege, professional confidential relationship privilege, sexual assault communications, religious confessions (which were not protected at all under the common law, although section 12 of the *Evidence Act 1939* (NT) protects communications to clergymen and medical practitioners), the privilege against self-incrimination, and public interest privilege.

The UEA is concerned with the admissibility of evidence at trial, and the provisions of this part do not apply to pre-trial evidence gathering such as discovery and subpoenas. It is, however, in these processes that most legal privilege issues arise. There has been some confusion in the Federal Court over whether the UEA did or did not apply to pre-trial processes. The High Court in *Mann v Carnell*<sup>172</sup> held that the client legal privilege provisions only apply to evidence to be introduced in court and its admissibility, not to ancillary processes such as subpoenas and discovery. The problem is in the word 'adduce', which means to bring forward for consideration. It has been read narrowly and in *GPAO*<sup>173</sup> the High Court held the UEA did not apply to the obligations of a person to whom a subpoena has been addressed.

Civil procedure rules in NSW have been amended to apply Part 3.10 regarding discovery interrogatories, subpoenas, oral examinations and notices to produce, but the common law still applies to criminal proceedings.

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<sup>171</sup> *Gardiner v The Queen* (2006) 162 A Crim R 233 @ [79]; *Kanaan v The Queen* [2006] NSWCCA 109 @ [183]

<sup>172</sup> *Mann v Carnell* (1999) 201 CLR 1 and also *Northern Territory of Australia v GPAO* [1999] HCA 8

<sup>173</sup> *Northern Territory of Australia v GPAO* [1999] HCA 8

## Division 1 CLIENT LEGAL PRIVILEGE

### Clause 117 Definitions

This clause defines, for the purposes of the Division, the terms ***client***, ***confidential communication***, ***confidential document***, ***lawyer*** and ***party***. The definition of ***client*** has a wide meaning, including, for example, government employees, and includes a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service). Under this definition there is no distinction between government and private lawyers.

Accordingly, subclause (1) defines lawyer for the purposes of client legal privilege to include 'Australian lawyers', that is, those who are admitted to practice but do not necessarily have a current practising certificate.

It is intended that the definition of lawyer for the client legal privilege provisions reflect the breadth of the concept in the case law. The policy of the privilege does not justify its restriction to those with a practising certificate, particularly since many lawyers may provide legal advice or professional legal services in various jurisdictions. It is the substance of the relationship that is important, rather than a strict requirement that the lawyer hold a practising certificate. Employees and agents of lawyers are also included.

This clause is not intended to affect the common law concept of independent legal advice.

This clause adopts the ACT Court of Appeal decision in *Commonwealth v Vance* [2005] ACTCA 35, where the ACT Court of Appeal found that a practising certificate was an important indicator, but not conclusive on the issue of whether the legal advice was sufficiently independent to constitute legal advice under the requirements of the UEA.

The broader definition in this clause includes a person who is admitted in a foreign jurisdiction and reflects the reasoning of the Full Federal Court in *Kennedy v Wallace* (2004) 142 FCR 185. The rationale of client legal privilege is to serve the public interest in the administration of justice and its status as a

substantive right means it should not be limited to advice obtained only from Australian lawyers.

### **Clause 118 Legal Advice**

Protection is provided from disclosure in court for:

- (a) confidential communications passing between the client and his or her lawyers; or
- (b) communication between the client's lawyers; or
- (c) the contents of a confidential document prepared by the client, lawyer or another person;

which are made for the dominant purpose of the lawyer (or lawyers) providing legal advice to the client.

In ALRC 102<sup>174</sup> it was concluded that 118(c) should be amended by replacing the words "client or a lawyer" with "client, lawyer or another person". This was to reflect changes in the common law, and extends the privilege to confidential documents prepared by someone other than the client or lawyer (such as an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client. This reflects developments in the common law consideration of legal advice privilege.<sup>175</sup>

Legal advice, with the dominant purpose of a lawyer providing legal advice, is privileged. This includes government as well as private lawyers and includes in house counsel. The two rationales for this rule are (i) to enhance the functioning of the adversarial system,<sup>176</sup> and (ii) the frankness allowed by the rule better enables lawyers to dissuade their clients from breaking the law.<sup>177</sup>

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<sup>174</sup> ALRC 102 para 14.102-14.122

<sup>175</sup> *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217

<sup>176</sup> *Baker v Campbell* (1983) 153 CLR 52, cited by the ALRC at ALRC 26 vol 1, para 878

<sup>177</sup> *Carter v Managing Partner, Northmore Hale Day and Leake* (1995) 183 CLR 121



This privilege extends to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice,<sup>178</sup> but not to communications with a third party.

Much, of course, depends on the definition of 'lawyer', 'confidential communication', 'party', and 'client', which are defined in clause 117, and also the further definitions in the decided cases of those terms as well as the terms 'document', 'disclosure', 'communication', 'purpose' and 'legal advice'. The court must consider 'the surrounding facts and circumstances, particularly previous dealings between the parties'.<sup>179</sup>

The more liberal 'dominant purpose' test rather than the 'sole purpose' test is applied to the provision reflecting the common law position proposed by Barwick CJ in *Grant v Downes*.<sup>180</sup> (Although this test was rejected by the majority in that case who opted for the 'sole purpose' test).

A communication or document will be confidential if either the person who made it or the person to whom it was made 'was under an express or implied obligation not to disclose its contents whether or not the obligation arises under law'. This is not to be read narrowly and can extend 'to an unspoken obligation, and to an ethical, moral or social obligation'.<sup>181</sup> The presence, however, of a third party at the communication may indicate that the communication was not intended to be confidential. This has been held under both the UEA and at common law.<sup>182</sup>

### **Clause 119 Litigation**

Clause 119 parallels clause 118, and is commonly called 'the litigation privilege'. It covers confidential communications and documents made or prepared for the dominant purpose of a lawyer providing legal services for litigation, and extends

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<sup>178</sup> ALRC 102 para 14.122

<sup>179</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 @ [77] Per McHugh J (dissenting)

<sup>180</sup> (1976) 135 CLR 674 @ 678

<sup>181</sup> *New South Wales v Jackson* [2007] NSWCA 279 @ [41]

<sup>182</sup> *R v Sharp* (2003) 143 A Crim R 344 (UEA); and *R v Braham & Mason* [1976] VR 547 @ 549 (Common Law)

to confidential communications between lawyer, client and 'another person'. Potential witnesses fall in this clause.<sup>183</sup>

### **Clause 120: Unrepresented parties**

This clause helps reduce the disadvantage the unrepresented litigant has in the adversarial system, by extending the privilege to communications with third parties prepared in anticipation of litigation by a litigant in person.

### **Clause 121 Loss of client legal privilege: generally**

This provision contains exceptions to the client legal privilege rule. These are:

- (1) the intentions and legal competency of deceased parties;
- (2) evidence that if not adduced would or could reasonably be expected to prevent the enforcement of an order in an Australian Court; and
- (3) a communication affecting the rights of a person.

It has been held that sub clause (3) applies only to communications that affect rights directly, rather than those that are merely evidentiary as to rights created or affected otherwise.<sup>184</sup>

The privilege will be lost when the client or party has died and the evidence is relevant to the question of the client's or party's intentions or competence in law. It will also be lost if the result of not admitting the evidence would be that the court would be prevented from enforcing an order of an Australian court. The clause does not prevent the adducing of evidence of a communication or document that affects a right of a person.

The burden of proof is on the party wishing to persuade the court that the privilege is lost.

### **Clause 122 Loss of Client legal privilege: Consent and related matters**

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<sup>183</sup> *Australian Competition and Consumer Commission v Australian Safeway Stores* (1998) 81 FCR 526 @ 562

<sup>184</sup> *R v P* [2001] NSWCCA 473 @ [41]

Clause 122 is designed to align the Bill more closely with the common law test for loss of privilege as set out in *Mann v Carnell*.<sup>185</sup> A client or party can consent to the (privileged) evidence in question being adduced. Disclosure may justify a conclusion that the privilege is lost. The party can be 'taken to have' acted in a way that is inconsistent with the maintenance of the privilege, by reason of knowingly disclosing the privileged material.

Clause 122 provides that client legal privilege is lost by consent or by knowing and voluntary disclosure of the substance of the evidence. However, this clause provides that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege.

Clause 122 is concerned with the *behaviour* of the holder of the privilege, as opposed to the *intention* of the holder of the privilege, as has been the case under section 122 of the UEA. The intention of this clause is that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end. The addition of the inconsistency criterion for waiver also gives the court greater flexibility to consider all the circumstances of the case.

### **Clause 123 Loss of client legal privilege - defendants**

A defendant in a criminal proceeding can adduce evidence of confidential communications and documents, except such communications between, or documents prepared by, an **associated defendant** (a defined term) or his or her lawyer.

This provision has the effect that a privilege created by clauses 118-120, is lost if the evidence of that communication is adduced by a defendant, unless the evidence derives from an associated defendant.<sup>186</sup> This is different from the common law.<sup>187</sup>

### **Clause 124 Loss of client legal privilege: joint clients**

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<sup>185</sup> *Mann v Carnell* (1999) 201 CLR 1

<sup>186</sup> See for example *R v Pearson* (unreported, NSWCCA, 5 March 1996)

<sup>187</sup> See *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121

In a civil proceeding involving joint clients of a lawyer, one of the joint clients can adduce evidence concerning the confidential communications and documents made by any of the joint clients.

This has the effect that privilege is lost where two or more parties have jointly retained a lawyer in relation to the same matter, and evidence of a communication made by any of the parties to the lawyer, or a document prepared by or for any one of the parties to the lawyer, is adduced by one of the parties.

### **Clause 125 Loss of client legal privilege: misconduct**

Client legal privilege is lost for confidential communications made and documents prepared in furtherance of a fraud, an offence, or an act that renders a person liable to a civil penalty or a deliberate abuse of statutory power.

Subclause (2) provides that, if the commission of a fraud, offence or act referred to in subclause (1) is a fact in issue in the proceeding and there are reasonable grounds for finding that it was committed and for finding that the communication or document was made or prepared in the 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 as the case may require.

To a significant extent this is the same as the common law, and assistance has been gained from the common law cases.<sup>188</sup> The range of fraud extends to 'sharp practices' of the kind often associated with equitable fraud, 'breach of trust, fraudulent conspiracy, trickery and sham contrivances'.<sup>189</sup>

### **Clause 126 Loss of client legal privilege: related communications and documents**

Where client legal privilege does not prevent evidence being adduced of a communication or a document, it also does not prevent evidence being adduced of another communication or document reasonably necessary to enable a proper understanding of the first communication or document.

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<sup>188</sup> *Kang v Kwan* [2001] NSWSC 698 @ [37] PER Sandow J

<sup>189</sup> *Kang v Kwan* [2001] NSWSC 698 @ [37] PER Sandow J citing *Crescent Farm (Sidcup) Sports Ltd V Sperling Offices Ltd* [1972] Ch 553 @ 565

An example is included in the Bill to illustrate the intention of this clause.

The clause does not specify whose understanding is to be considered, but Sackville J in the Federal Court has said that the phrase 'reasonably necessary' implies there is an objective standard to the understanding and the court must take into account 'the forensic purpose for which it is proposed to use the document voluntarily disclosed'.<sup>190</sup>

## **Division 1A PROFESSIONAL CONFIDENTIAL RELATIONSHIP PRIVILEGE**

This Part protects a wide range of confidential communications including confidences to doctors and other health professionals, counsellors, therapists, social workers and journalists where confidentiality is an integral element. The Victorian Act does not contain this Division and the Commonwealth legislation contains a much narrower division limited to dealing with journalist's confidential communications. The NSW Act incorporated this Part in 1997.

### **Clause 126A Definitions**

A protected confidence is a communication made by a person in confidence to another person. That other person is the confidant and might include a doctor, a nurse, a psychologist or psychiatrist, a counsellor, a therapist, a social worker, a journalist or an accountant. The protected confider might include a patient or client or a journalist's source.

### **Clause 126B Exclusion of evidence of protected confidences**

The court may direct that a protected confidence not be disclosed if it is likely that harm would, or might, be caused to a protected confider, and the extent of the harm outweighs the desirability of the evidence being given. The court is to balance the potential for harm against the public interest in having all relevant evidence available to the court. The evidence must be excluded if there is a likelihood that harm would or might be caused, whether directly or indirectly, to the person who imparted the confidence and the nature and extent of that that harm outweighs the desirability of having the evidence or documents produced.

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<sup>190</sup> *Towney v Minister for Lands and Water Conservation (NSW)* (1997) 76 FCR 401 @ 412

The court must consider, among other things: the probative value and importance of the evidence; the nature and gravity of the offence; the availability of other evidence and the likely effect of adducing the evidence; and whether the party seeking to introduce the evidence is a defendant or the prosecutor.

**Clause 126C Loss of professional confidential relationship privilege: consent**

Consent results in the loss of privilege where the protected confider consents to the evidence in question being adduced.

**Clause 126D Loss of professional confidential relationship privilege: misconduct**

This clause provides for loss of privilege for communications made or documents prepared in furtherance of a fraud, an offence or an act that renders a person liable for a civil penalty.

This is substantially the same as clause 125(1)(a) and substantially reflects the common law.

Subclause (2) eases the task of establishing the fact of a fraud etc, where as is often the case the fraud (etc) is the ultimate issue in the case. The test then is whether there are reasonable grounds to find that the fraud etc occurred and the communication was in furtherance of its commission.

**Clause 126E Ancillary orders**

This clause provides for proceedings to be held in camera and for suppression orders to be made to reduce harm likely to be caused by a forced breach of confidence.

**Clause 126F Application of Division**

This clause provides that the Division does not apply to a proceeding that started before the commencement of the Division, but does apply in relation to a protected confidence whether made before or after the commencement of this division.

## **Division 2 OTHER PRIVILEGES**

### **Clause 127 Religious confessions**

Members of the clergy may refuse to divulge both the contents of religious confessions made to them in their professional capacity and the fact that they have been made. The entitlement applies even if an Act provides that the rules of evidence do not apply, that a person or body is not bound by the rules of evidence, or that a person is not excused from answering a question or producing any document or thing because of privilege or otherwise.

Subclause (2) provides that the privilege does not apply if the communication involved was made for a criminal purpose.

This privilege is based on an acknowledgment that some religions have a ritual of confessing one's sins to a member of the clergy as God's human intermediary, in circumstances where the member of the clergy is bound to keep the contents of the confession confidential. The privilege acknowledges that members of clergy, whose faith requires absolute confidentiality of a confession, would be placed in an intolerable situation if required to choose between compliance with a strict provision of their faith and an order of a court. Consequently, this privilege promotes the right to freedom of religion for the clergy of religious denominations which include the ritual of confession.

### **Clause 128 Privilege in respect of self-incrimination in other proceedings**

If a witness objects to giving evidence on the basis of self incrimination, and if the court considers that 'in the interests of justice' the evidence should be given, the witness is required to give the evidence but is given a certificate. The certificate guarantees the witness against the evidence (and any evidence, information or document, obtained as a result of that person giving evidence), being used against the person. The provision only applies to evidence given in court.

The court must determine whether there are reasonable grounds for the objection and if it finds that there are, the court is to advise the witness that they do not need to give the evidence unless required to do so by the court. In such

circumstances, where the witness gives the evidence, whether required to by the court or otherwise, the court is to give the witness a certificate.

The court can only require the witness to give the evidence if the evidence does not tend to prove the witness has committed an offence or may be liable to a civil penalty under the law of a foreign country and the interests of justice require that the witness give the evidence. A certificate makes the evidence (and evidence obtained as a consequence of its being given) inadmissible in any Australian proceeding, except a criminal proceeding in respect of the falsity of the evidence.

Subclauses (8) and (9) respond to two issues considered in the decision of the High Court of Australia in *Cornwell v The Queen*.<sup>191</sup> The issues concerned the applicability of the certificate to a retrial and the operation of a certificate in circumstances where the validity of the certificate has been called into question.

Subclause (8) provides that a certificate has effect regardless of the outcome of any challenge to its validity. This subclause has been included on the basis that the granting of a certificate under clause 128 is not the same as any other evidential ruling. To ensure that the policy of clause 128 is effective, the witness must be certain of being able to rely on that certificate in future proceedings.

Subclause (9) provides that the operation of the certificate does not apply to a proceeding which is a retrial for the same offence or a trial for an offence arising out of the same facts that gave rise to the original criminal proceeding in which the certificate was issued.

Because of the nature of the provision as a protection against self incrimination the construction of provisions said to remove the protection must be read strictly, and conversely a liberal interpretation is to be given to the protective provisions.<sup>192</sup>

The Notes to the clause, amongst other matters, make it clear that the privilege does not apply to bodies corporate.

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<sup>191</sup> *Cornwell v The Queen* (2007) 231 CLR 260

<sup>192</sup> See *Sorby v The Commonwealth* (1983) 152 CLR 281 @ 309



## **Clause 128A Privilege in respect of self-incrimination – except for certain orders etc**

This clause provides a process to deal with objections on the grounds of self-incrimination when complying with a freezing order (Mareva) or a search order (Anton Piller) in civil proceedings other than under the proceeds of crime legislation. Examples of search orders and freezing orders can be found in Orders 37A and 37B of the Supreme Court Rules.

The clause provides that the privilege against self-incrimination under the Bill applies to disclosure orders. The principal provisions are outlined below.

Where objection is taken to the provision of information required under a disclosure order, the person who is subject to the order must prepare an affidavit containing the required information to which objection is taken (called a privilege affidavit), deliver it to the court in a sealed envelope, and file and serve on each other party a separate affidavit setting out the basis of the objection.

Subclause (5) provides that if the court finds there are reasonable grounds for the objection, unless the court requires the information to be provided pursuant to subclause (6), the court must not require the disclosure of the information and must return it to the person.

Subclause (6) provides that if the court is satisfied that the information may tend to prove that the person has committed an offence or is liable to a civil penalty under Australian law, but not under the law of a foreign country, and the interests of justice require the information to be disclosed, the court may require the whole or any part of the privilege affidavit to be filed and served on the parties.

Subclause (7) provides that the court must give the person a certificate in respect of the information that is disclosed pursuant to subclause (6).

Subclause (8) provides that evidence of that information and evidence of any information, document or thing obtained as a direct result or indirect consequence of the disclosure cannot be used against the person in any proceeding, other than a criminal proceeding in relation to the falsity of the evidence concerned.

Subclause (9) clarifies that the protection conferred by clause 128A does not apply to information contained in documents annexed to a privilege affidavit that were in existence before a search or freezing order was made.

Subclause (10) provides that a certificate has effect regardless of the outcome of any challenge to its validity. As discussed in relation to clause 128(8) above, this clause is in response to the *Cornwell* decision, and serves the same function.

Clause 187 sets out the general rule that bodies corporate cannot claim this privilege.

### **Division 3 EVIDENCE EXCLUDED IN THE PUBLIC INTEREST**

#### **Clause 129 Exclusion of evidence of reasons for judicial etc decisions**

This clause prohibits (subject to some exceptions) evidence of the reasons for a decision, or of the deliberations of a judge or an arbitrator being given by the judge or arbitrator, or by a person under his or her direction or control, or by tendering a document prepared by any of these persons. The clause does not apply to published reasons for decisions.

The clause also prohibits evidence of the reasons for a decision or the deliberations of a member of a jury in a proceeding being adduced by any jury member in another proceeding.

Subclause (5) provides that the prohibitions in this clause do not apply in various types of proceedings. For example, bribery, contempt of court, or perverting the course of justice.

#### **Clause 130 Exclusion of matters of state**

This clause interferes as little as possible with the common law regarding public interest privilege.<sup>193</sup> What is required is a balancing of ‘the nature of the injury which the nation or public service would be likely to suffer, and the evidentiary value and importance of the (evidence) in the particular litigation’.<sup>194</sup>

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<sup>193</sup> See for example *Sankey v Whitlam* (1978) 142 CLR 1 per Stephen J @ 49 and Mason J @ 95;

<sup>194</sup> *Alister v The Queen* (1984) 50 ALR 41 @ 44-45 per Gibbs CJ

A court must prevent evidence of matters of state (for example, matters affecting international relations or law enforcement) being adduced if the public interest in admitting the evidence is outweighed by the public interest in preserving its secrecy or confidentiality.

The clause provides some guidance on the nature of evidence which relates to matters of state and lists some matters to be taken into account by the court when determining whether to direct that information or a document not be adduced as evidence.

Subclause (5) sets out matters the court is to take into account when determining whether to exclude evidence of matters of state. Such matters include—

- (a) the importance of the information or document in the proceeding;
- (b) the likely effect of adducing evidence of the information or document and the means available to limit its publication;
- (c) in a criminal proceeding, whether the party seeking to adduce evidence is a defendant or a prosecutor. Further, if a defendant is seeking to adduce the evidence, whether the direction is to be made subject to a condition that the prosecution be stayed.

#### **Clause 131 Exclusion of evidence of settlement negotiations**

Evidence is not to be adduced of communications made between, or documents prepared by, parties in dispute in connection with attempts to settle the dispute (this does not include attempts to settle criminal proceedings). This clause is to encourage settlements.

The circumstances in which this privilege does not apply are set out in the clause (for example, if the parties consent or if the communication affects the rights of a person).

### **Division 4 GENERAL**

#### **Clause 131A Application of Division to preliminary proceedings of courts**

This provision was introduced into the Commonwealth Act by the *Evidence Amendment (Journalists Privilege) Act 2007* creating a privilege in relation to confidential communications made to journalists.

This clause expands the scope of privileges in the Bill so that they apply to any process or order of a court which requires disclosure as part of preliminary proceedings.

ALRC 102 noted that the introduction of the UEA meant that two sets of laws operated in the area of privilege. The UEA govern the admissibility of evidence of privileged communications and information. Otherwise the common law rules apply unless the privilege is expressly abrogated by statute. Within a single proceeding, different laws applied at the pre-trial and trial stages. The ability to resist or obtain disclosure of the same information varied.

ALRC 102 recommended that the operation of client legal privilege, professional confidential relationship privilege, sexual assault communications privilege and matters of state privilege should be extended to apply to any compulsory pre-trial process for disclosure (recommendations 14-1, 15-3, 15-6 and 15-11 respectively).

This provision partly implements those recommendations, by extending the operation of the privileges to pre-trial court proceedings.

The clause, implementing recommendation 14-6, ensures that clause 123 remains applicable only to the adducing of evidence at trial by an accused in a criminal proceeding, despite the extension of client legal privilege to pre-trial court proceedings.

The privileges are not extended to non-curial contexts.

### **Clause 132 Court to inform of rights to make applications and objections**

A court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under this Part if it appears that the witness or party may have a ground for making an application or objection under it. If there is a jury, this is to be done in the absence of the jury.

### **Clause 133 Court may inspect etc documents**

This clause makes it clear that a court can call for and examine any document in respect of which a claim for privilege under this Part is made so that it may determine the claim.

### **Clause 134 Inadmissibility of evidence that must not be adduced or given**

Evidence that, because of this Part must not be adduced or given in a proceeding, is not admissible in the proceeding.

## **Part 3.11 DISCRETIONARY AND MANDATORY EXCLUSIONS**

The four clauses in this Part are intended to contain an exhaustive list of matters to be considered when exercising the discretion to exclude otherwise admissible evidence on policy grounds in both civil and criminal proceedings.

Clause 135 confers a discretion, in both civil and criminal proceedings, to exclude otherwise admissible evidence, where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion or waste of time.

Clause 136 confers a discretion to limit the use of particular evidence.

Clause 137 requires a court in criminal proceedings not to admit prosecution evidence if its probative value is outweighed by the danger of unfair prejudice.

Clause 138 requires a court, in both civil and criminal proceedings, to exclude unlawfully or improperly obtained evidence, unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in that particular way.

### **Clause 135 General discretion to exclude evidence**

This clause confers a discretion to exclude evidence, in both civil and criminal proceedings, when the probative value of the evidence is *substantially* outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing, or

(c) cause or result in an undue waste of time.

‘Probative value’ is defined in the Dictionary as ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact’. There are, however, variables that can influence the value. The probative value of hearsay evidence could be affected by the circumstances in which the representation was made and the opportunity to test the weight of the evidence. The value of tendency evidence could be affected by the similarity, underlying unity, and the number and patterns of incidences being relied on. The possibility of concoction could suggest contamination.

Defence evidence only has to raise a reasonable doubt so it has a less stringent test for admissibility than prosecution evidence and it is less likely the discretion would be exercised against admission.<sup>195</sup>

The dangers must *substantially* outweigh the probative value of the evidence, and there is a heavy onus on the party seeking exclusion. There is a balancing exercise required in both clauses 135 and 137, but the balancing process in clause 135, consistently with the primary objective of admitting all relevant evidence, is weighted against exclusion of the evidence unless the disadvantages *substantially* outweigh the advantages.

The phrase ‘unfair prejudice’ is used in clauses 135, 136 and 137, and is said to have the same meaning in each.<sup>196</sup>

Evidence is not unfairly prejudicial just because it tends to damage the case of the opposing party, or makes it more likely that the defendant will be convicted. It may however be unfairly prejudicial if it damages the defendant’s case in some unacceptable way, or ‘if there is a real risk that the evidence will be misused by the jury in some unfair way.’<sup>197</sup> This could be by inflaming emotions, arousing a sense of horror, mis-estimation of the weight of the evidence by the fact finder, or

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<sup>195</sup> *R v Crisologo* (1998) 99 A Crim R 178 @ 190

<sup>196</sup> *R v BD* (1997) 94 A Crim R 131 per Hunt CJ

<sup>197</sup> *R v BD* (1997) 94 A Crim R 131 per Hunt CJ @ 139; quoted with approval by McHugh J in *Papakosmas v The Queen* (1999) 196 CLR 297 @ [91]

by provoking an instinct to punish. It may be used in a manner 'logically unconnected to the issues in the case'.<sup>198</sup>

The inability to cross-examine, for example with hearsay evidence, may in certain circumstances lead to unfairness but is not necessarily decisive.<sup>199</sup> A statement of a person who died before the hearing was admitted in *Lane v Jurd (No 2)*<sup>200</sup>, even though the witness was not disinterested and (of course) was unable to be cross-examined. Justice McHugh in *Papakosmas* warned against being 'too much influenced by the common law attitude to hearsay evidence...(and) the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue'.<sup>201</sup>

'Undue waste of time' may sound tautologous but the provision is designed to ensure that only in an extreme case would evidence be denied on this basis. The common law has always excluded 'the use of evidence which, though possibly relevant would involve a waste of the courts recourses out of all proportion to the probable value of the results'.<sup>202</sup> Such evidence has been traditionally described as 'lacking sufficient relevance', 'remote', or collateral to the main enquiry.<sup>203</sup> Needless duplication may waste time, as may tangential evidence, and evidence that was not disclosed may waste time with necessary rebuttal or recalling witnesses.

Where there is a trial by judge or magistrate alone it would be unusual for a judge or magistrate to concede that they may be unfairly prejudiced by any evidence.<sup>204</sup>

### **Clause 136 General discretion to limit use of evidence**

This provision did not exist in the original UEA Bill. It confers a general discretion, in both civil and criminal trials, to limit the use of evidence to avoid the danger of prejudice or confusion. Because evidence can be used to support any rational inference once the evidence is admitted for any reason, this clause, rather than

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<sup>198</sup> *R v Lockyer* (1996) 89 A Crim R 457 per Hunt CJ

<sup>199</sup> *R v Suteski* (2002) 56 NSWLR 182; 137 A Crim R 371

<sup>200</sup> (1995) 40 NSWLR 708

<sup>201</sup> *Papakosmas v The Queen* (1999) 196 CLR 297 @ 325-326

<sup>202</sup> Julius Stone on *Evidence: Its History and Policies* (1991) pp60-62

<sup>203</sup> *Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (2000) 100 FCR 90; 177 ALR 167

<sup>204</sup> *Re GHI (a protected person)* [2005] NSWSC 466 per Campbell J @ [8]

leaving the court with the power to only admit or exclude, gives the court discretion to admit the evidence but limit its use. It often applies where evidence is relevant for more than one purpose, most often where hearsay evidence is admitted for a non-hearsay purpose.

The danger of unfair prejudice from the secondary use of the evidence can be reduced if the use of the evidence can be restricted. For example clause 60 allows evidence of a previous representation to be used for a relevant hearsay purpose if it has been admitted because it is relevant for a non-hearsay purpose. Similarly, clause 77 allows evidence of an opinion that was relevant for another purpose to be used as proof of the existence of a fact about which the opinion was expressed. The fact that the evidence would not otherwise have been admissible is not on its own enough to exclude it but, in particular circumstances there may be a case for applying clause 136. The policy behind the hearsay and opinion provisions of the UEA should not, however, be undercut by applying clause 136 as a matter of course, particularly where a judge rather than a jury is the trier of fact.<sup>205</sup> Clause 136 must not be used to re-instate ‘the common law rules and distinctions that the legislature has discarded.’<sup>206</sup>

Again, a significant consideration would be whether the proceedings were with a jury or judge alone. If proceedings were with a jury, directions would have to be given, as they would be at common law, over the permissible use of the evidence. If that were thought to be ineffective, the evidence may be excluded entirely under clause 135 or, where applicable, clause 137.

### **Clause 137 Exclusion of prejudicial evidence in criminal proceedings**

This clause provides that a criminal court *must* refuse to admit prosecution evidence ‘if its probative value is outweighed by the danger of unfair prejudice to the defendant’.<sup>207</sup> This is similar to the common law *Christie*<sup>208</sup> discretion, although some judges have rejected the provision’s description as a ‘discretion’, rather saying it is ‘a connected series of findings of law and fact upon which

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<sup>205</sup> *Seven Network Ltd v News Ltd (No 8)* [2005] FCA 1348

<sup>206</sup> *Papakosmas v The Queen* (1999) 196 CLR 297 per Gleeson CJ and Hayne J @ [39]

<sup>207</sup> Justice Scalia said this is like asking “whether a particular line is longer than a particular rock is heavy”.

(*Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888 (1988) at 897

<sup>208</sup> [1914] AC 545



clause 137 will operate without any further discretionary input of the judge'.<sup>209</sup> It engages no discretionary judgement or intuitive response and 'depends on the reaching of a rational conclusion drawn from facts admitted or proved'.<sup>210</sup>

Again, there is a balancing exercise, although in clause 137 (as opposed to clause 135) there is no requirement that the danger must 'substantially' outweigh the probative value of the evidence. The use of the word 'must' mandates the exclusion if the probative value is outweighed by 'the danger of unfair prejudice to the defendant'. The fact that a subject matter is complex, unattractive or gruesome is not necessarily sufficient to warrant exclusion.<sup>211</sup> Editing evidence, limiting the way it can be used, or giving directions can remove or ameliorate the danger of unfair prejudice.

The balancing exercise requires the probative value of the evidence to be ascertained. The 'probative value' of evidence means its degree of relevance. The definition of 'relevance' refers to evidence that 'if it were accepted, could rationally affect the probability of a fact in issue'. The definition of 'probative value', however, does not import the qualification 'if it were accepted'. It is not yet clear whether that means that the probative value is to be determined taking the evidence at its highest on the assumption that the evidence is accepted as credible and reliable, or whether the court is not required to assume it is reliable and, if it feels the evidence is unreliable or doubtful, assess its probative value accordingly.<sup>212</sup> The second option could place the judge in a position of usurping the jury's role in determining the weight of evidence when applying clause 137.<sup>213</sup> The NSWCCA said in *R v Suman Sood* [2007]<sup>214</sup> 'questions of credibility and reliability ... play no part in the assessment of the probative value of evidence sought to be admitted in the Crown case'.

The common law discretion to exclude unfairly prejudicial evidence in criminal trials is retained in the provision. The mere fact that the evidence is unfairly

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<sup>209</sup> *R v GK* [2001] NSWCCA 413 @ [74] per Sully J

<sup>210</sup> *R v GK* [2001] NSWCCA 413 @ [74] per Sully J

<sup>211</sup> *R v Dann* [2000] NSWCCA 185

<sup>212</sup> Compare *Adam v The Queen* (2001) 207 CLR 96 @ [60] per Gaudron, with *R v Carusi* (1997) 92 A Crim R 52 @ 56 per Hunt CJ

<sup>213</sup> *R v Shamouil* [2006] NSWCCA 122 @ [64] per Spigelman CJ (with whom Simpson J and Adams J. agreed)

<sup>214</sup> *R v Suman Sood* [2007] NSWCCA 214 @ [36] per Latham J

prejudicial does not mean that the balancing exercise will lead to its exclusion.<sup>215</sup> There would, however, have to be a very strong degree of probative value that outweighs the prejudice.<sup>216</sup> Evidence led as relationship evidence that is used as impermissible tendency evidence, is highly prejudicial. In *Haoui v The Queen*,<sup>217</sup> late disclosure of prosecution expert evidence led to an allowed appeal on the basis of the forensic difficulties that faced the defence in dealing or responding to the evidence.

There is no reference in this clause, as there is in clauses 135 and 136, to the evidence being confusing or misleading or even a waste of time. Even though the common law discretion upon which this clause is based has been applied to exclude evidence that might be misleading,<sup>218</sup> under the UEA it is only the danger of unfair prejudice that the court is to balance against the probative value of the evidence.

### **Clause 138 Exclusion of improperly or illegally obtained evidence**

This clause provides that, in both civil and criminal proceedings, where evidence has been obtained unlawfully or improperly, the court *must* exclude it unless 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'.

Both the policy and the language have been derived to a great extent from the joint judgements of Stephen and Aitkin JJ in *Bunning v Cross*,<sup>219</sup> and the clause is the statutory approximation and extension of the *Bunning v Cross* discretion and the related *Ridgeway*<sup>220</sup> principle.

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<sup>215</sup> McHugh J in *Festa v The Queen* (2001) 208 CLR 593 @ said at [51]:

"It is only when the probative value of the evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or contents of the evidence may influence the jury or divert the jurors from their task."

(See also *R v Lisoff* [1999] NSWCCA 364 and *R v Yates* [2002] NSWCCA 520 at [252].)

<sup>216</sup> *Seymour v The Queen* (2006) 162 A Crim R 576

<sup>217</sup> *Haoui v The Queen* [2008] NSWCCA 209

<sup>218</sup> See for example *Driscoll v The Queen* (1977) 137 CLR 517 @ 541-542

<sup>219</sup> *Bunning v Cross* (1978) 141 CLR 54

<sup>220</sup> *Ridgeway v R* (1995) 184 CLR 19

The common law discretion is altered, however, in a number of ways. The discretion applies to civil as well as criminal hearings, and the onus of proof has changed by requiring the party tendering the tainted evidence to persuade the judge the evidence should be admitted, but only after the opposing party has, on the balance of probabilities, persuaded the court that the evidence is tainted by illegality or impropriety. The discretion is extended to evidence gathered by anyone, not just police officers,<sup>221</sup> and it extends to confessional material (subclause (2)).

There is a fundamental dilemma in the conflict between the two competing requirements of public policy. These are, on the one hand, the public interest in admitting reliable evidence (and thereby convicting the guilty), and on the other, the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the judicial system.<sup>222</sup>

There is a fine line, however, between improper behaviour and an acceptable degree of deception and trickery.<sup>223</sup> 'Subterfuge ruses and tricks may be lawfully employed by police, acting in the public interest.'<sup>224</sup>

Subclause 138(2) ensures that admissions, and evidence obtained in consequence of admissions, is taken to have been obtained improperly in certain circumstances. The admissibility of admissions may require consideration of clauses 84, 85, and 90 as well as clause 138. This is consistent with the common law interrelationship and overlapping of voluntariness, reliability, fairness, and considerations of public policy.<sup>225</sup>

In deciding the question of admissibility clause 138(3) gives a non-exclusive<sup>226</sup> list of matters the court may take into account. These are:

(a) the probative value of the evidence;

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<sup>221</sup> *R v Malloy* [1999] ACTSC 118

<sup>222</sup> ALRC 26, vol 1, para 964

<sup>223</sup> *R v Sotheren* [2001] NSWSC 204; *R v Swaffield; Pavic v R* (1998) 192 CLR 159

<sup>224</sup> *R v Swaffield; Pavic v R* (1998) 192 CLR 159 citing *Ridgeway v R* (1995) 184 CLR 19 @ 37

<sup>225</sup> *R v Swaffield; Pavic v R* (1998) 192 CLR 159; *Cleland v R* (1982) 151 CLR 1; *Foster v R* (1993) 113

ALR 1

<sup>226</sup> *R v Truong* (1996) 86 A Crim R 188

Excluding probative evidence is more likely to endanger accurate fact finding. The greater the probative value, the greater the public interest is in having the evidence admitted. '(T)he fact that the evidence is of high probative value will weigh in favour of its admission'.<sup>227</sup>

(b) The importance of the evidence in the proceeding;

Other cogent and untainted evidence will reduce the public interest in admitting improperly obtained evidence.

(c) The nature of the relevant offence;

The ALRC considered 'there is ...a greater public interest that a murderer be convicted ...than someone guilty of a victimless crime'.<sup>228</sup>

(d) The gravity of the impropriety or contravention;

If the impropriety or contravention was not deliberate or reckless it would point to the admission of the evidence.<sup>229</sup>

(e) Whether the impropriety or contravention was deliberate or reckless;

Wilful or reckless disregard of an individual's civil rights is likely to be a strong factor against the exercise of the discretion to admit the evidence.<sup>230</sup> Conversely, if police officers in breach of their statutory obligations 'were neither reckless nor dishonest' but were instead inexperienced or inadequately trained (e.g. in new statutory provisions), then it would point towards admission of the evidence.<sup>231</sup> Where 'the breach of the law is innocent, and the alleged offence serious there must be powerful countervailing considerations before the evidence should be rejected'.<sup>232</sup>

(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;

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<sup>227</sup> *R v Camilleri* (2007) 169 A Crim R 197; [2007] NSWCCA 36 @ [35]

<sup>228</sup> ALRC 26, vol 1, para 964

<sup>229</sup> *R v Camilleri* (2007) 169 A Crim R 197; [2007] NSWCCA 36

<sup>230</sup> *Parker v Comptroller-General of Customs* (2007) 243 ALR 574; NSWCA 348 @ [65]

<sup>231</sup> *R v Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284 @ [93] per Simpson J.

<sup>232</sup> *R v Camilleri* (2007) 169 A Crim R 197; [2007] NSWCCA 36 @ [35]

This is self explanatory.

- (g) Whether any other proceeding (whether or not in court) has been or is likely to be taken in relation to the impropriety or contravention;

The ALRC<sup>233</sup> considered that an important factor in the decision to exclude evidence was the availability of alternative sanctions, such as criminal or disciplinary proceedings, or civil actions. If appropriate action is taken by those in higher authority the case for exclusion is weaker.

- (h) The difficulty of obtaining the evidence without impropriety or contravention of an Australian law;

There might be circumstances of urgency, for example of the evidence disappearing if there were any delay, which may excuse the impropriety.

Often the unlawful conduct will involve collection of evidence in contravention of legislated restraints imposed to protect human rights and freedoms. The primary consideration identified in *Bunning v Cross* was whether the police officers had acted in deliberate disregard of the law or rather as a result of an honest but mistaken belief. The real evil is 'a deliberate or reckless disregard of the law by those whose duty it is to enforce it'.<sup>234</sup> This is reflected in paragraphs (d), (e) and (f) of subclause 138(3). Accordingly, a deliberate or reckless disregard of legal constraints, involving a contravention of an internationally recognised human right or fundamental freedom, will undoubtedly weigh against admission. On the other hand, if the contravention were accidental or inadvertent and involved no serious contravention of an internationally recognised right, that would tend to favour admission.<sup>235</sup>

The impugned information need not be obtained improperly or in contravention of a law. It is sufficient if it is obtained 'in consequence of' such impropriety or breach of law. The party seeking the exclusion bears the onus of showing the chain of causation. Particular difficulty rests with evidence of an offence 'caused'

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<sup>233</sup> ALRC 26, vol 1 para 964

<sup>234</sup> *Bunning v Cross* (1978) 141 CLR 54 @ 78

<sup>235</sup> *Parker v Comptroller-General of Customs* (2007) 243 ALR 574; [2007] NSWCA 348 @ [60]

by the impugned conduct as in, for example, a *Ridgeway*<sup>236</sup> style ‘entrapment’ case, or an ‘ill-advised arrest’ leading to resisting and assaulting police.<sup>237</sup>

There are public interest considerations in assessing the ‘desirability of admitting the evidence’. Accurate fact determination or ‘rectitude of decision’ as Bentham expressed it, is important in giving the legal system legitimacy. There is a public interest in crime control and punishing criminals which says the legal system should effectively and efficiently apprehend, convict and punish the guilty, while screening out the innocent as early as possible.<sup>238</sup> If relevant evidence is excluded this interest is sacrificed.

In this clause, the onus first lies on the defendant seeking to have the evidence excluded, to show that it was illegally or improperly obtained, and once that onus is met, then the prosecution, wishing the evidence to be admitted, must satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, given the way it was obtained.<sup>239</sup>

The higher the probative value of the evidence the greater is the public interest in its admission,<sup>240</sup> and the more serious the crime the greater is the public interest also.<sup>241</sup> Consequently the probative value of the evidence and its importance in the proceeding (subclauses 138(3)(a) and (b)), if both high, combined with a serious criminal case (subclause (c)) may militate strongly in favour of admission, particularly if it is difficult to obtain the evidence without impropriety or contravention of the law (subclause 138(3)(h)).

Clause 138 does not refer to ‘unfairness’ to the defendant, and although clause 90 does create a ‘fairness discretion’ to exclude evidence, the discretion is restricted to admissions. It is debateable how much ‘fairness’ is taken into account in exercising the discretion in clause 138, although there is an obvious public interest in a defendant having ‘a fair trial’.

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<sup>236</sup> *Ridgeway v The Queen* (1995) 184 CLR 19

<sup>237</sup> *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194 @ [67]-[70]

<sup>238</sup> ALRC 26, vol1, para 958

<sup>239</sup> *R v Eade* [2000] NSWCCA 369 @ [60].

<sup>240</sup> *Parker v Comptroller-General of Customs* (2007) 243 ALR 574; [2007] NSWCA 348 @ [62]

<sup>241</sup> “In the case of criminal proceedings, in my opinion, the public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.” *R v Dalley* [2002] NSWCCA 284; (2002) 132 A Crim R 169 per Spigelman

The clause requires a balancing exercise, conducted in the particular circumstances of the case. This balancing exercise is the discretionary aspect of the provision. At common law the onus is on the defendant to persuade the court to exercise its discretion to exclude improperly obtained evidence, but under the UEA once the evidence is shown to have been obtained improperly the onus is reversed and the prosecution must persuade the court to allow it.

### **Clause 139 Cautioning of Persons**

This clause applies to cautioning of suspects for the purposes of clause 138(1)(a) (evidence obtained unlawfully or improperly), and reflects the high value given to the right to silence. The effect of the provision is that if a statement is improperly obtained, (by, for example, no proper caution being administered) the discretion under clause 138 may result in its exclusion. Once the statement is deemed improperly obtained, the onus shifts to the prosecution seeking to have the evidence admitted. This is a significant change from the common law.<sup>242</sup>

There is nothing that stops a court from ruling a statement was obtained improperly, notwithstanding that the provision does not mandate its exclusion, say, for example, in a situation regarding non-observance of the Anunga<sup>243</sup> rules or where the provisions of the *Police Administration Act* were not complied with, or where a suspect was misled. Equally a failure to caution may mean it would be unfair to admit the admission pursuant to clause 90, notwithstanding that the terms of clause 139 did not mandate the exclusion.<sup>244</sup>

The clause refers to events arising under 'questioning' by 'investigating officials' and does not (now) refer to 'official questioning'. This broadens the provision to include the time in between questioning periods.<sup>245</sup> The definition of 'investigating official' does not include an undercover police officer, and a broad interpretation is given to the term 'under arrest'.

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<sup>242</sup> *Downes v DPP* [2000] NSWSC 1054 @ [24]

<sup>243</sup> *R v Anunga* (1976) 11 ALR 412

<sup>244</sup> *R v Ahmadi* [1999] NSWCCA 161

<sup>245</sup> Cf *Kelly v The Queen* (2004) 218 CLR 216

The clause has been held to be 'purposive', and the issue is whether the caution was delivered in such a way as to ensure the person arrested understood the caution.<sup>246</sup>

## **CHAPTER 4 PROOF**

### **Part 4.1 STANDARD OF PROOF**

#### **Clause 140 Civil proceedings - standard of proof**

The standard of proof for civil proceedings is on the balance of probabilities. Clause 140(2) retains the common law doctrine in *Briginshaw v Briginshaw*.<sup>247</sup> This principle is that the strength of the evidence necessary to satisfy the standard of the balance of probabilities varies according to the gravity of the consequences especially if the fact in issue is the occurrence of criminal conduct.

#### **Clause 141 Criminal proceedings - standard of proof**

This adopts the common law position that the prosecution standard of proof is beyond reasonable doubt and, where a defendant bears a legal burden, it is on the balance of probabilities. A defendant may on occasion bear a burden of proof, for example in drug legislation, where possession of a certain amount is deemed supply. This burden is on the balance of probabilities.

This is different from an evidential burden raising a defence, such as self defence. Evidence of slight probative value can satisfy an evidential burden and the prosecution then bears the legal burden to rebut the defence, and prove the defendant guilty beyond reasonable doubt.<sup>248</sup>

#### **Clause 142 Admissibility of evidence - standard of proof**

This clause provides that the standard of proof for a finding of fact necessary for deciding a question whether evidence should or should not be admitted in a proceeding, or any other question arising under the Bill (if the Bill does not otherwise provide) is proof on the balance of probabilities. The court must take

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<sup>246</sup> *R v Deng* [2001] NSWCCA 153 @ [17]; *R v Taylor* [1999] ACTSC 47 (suspect drunk)

<sup>247</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 @ 361-362

<sup>248</sup> *Lockyer* (1996) 89 A Crim R 457



into account the importance of the matter in the proceeding and the gravity of the matters alleged in relation to the question.

There are other provisions that do expressly 'otherwise provide' for a different standard of proof, for example clauses 57(1), 87, 88, 125(2) and 146(2).

## **Part 4.2 JUDICIAL NOTICE**

### **Clause 143 Matters of law**

This clause allows a court to take judicial notice of matters of law without the need for formal proof by evidence. This includes the provisions and coming into operation of Acts and statutory rules.

### **Clause 144 Matters of common knowledge**

This clause allows judicial notice of facts which are 'not reasonably open to question', and are matters of local 'common knowledge' in the locality, or can be verified by consulting authoritative sources, or are capable of documentary verification. Judges can inform themselves of this.

Examples of general common knowledge include: the nature of the internet and world wide web<sup>249</sup>; that clocks can show different times<sup>250</sup>; and that asbestos is dangerous.<sup>251</sup>

The term 'knowledge' is used in the Bill to limit the facts to those which are certain and not merely beliefs or opinions. Subclause (2) permits a judge to acquire this knowledge in any way that he or she thinks fit, which probably expands the scope of permissible judicial notice beyond the common law.

### **Clause 145 Certain Crown certificates**

This clause preserves the rules of the common law and equity relating to the effect of a conclusive certificate relating to a matter of international affairs.

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<sup>249</sup> *Jones v Toben* [2002] FCA 1150

<sup>250</sup> *R v Magoulias* [2003] NSWCCA 143

<sup>251</sup> *Kent v Wotton & Byrne Pty Ltd* [2006] TASSC 8

## **Part 4.3 FACILITATION OF PROOF**

This Part creates rebuttable presumptions regarding signatures, documents, seals, processes and devices, and official documents. It also creates presumptions regarding post and communications.

This Part coupled with the hearsay exceptions of clause 69, 70 and 71, and inferences allowed by clause 183, provide a comprehensive scheme for the admissibility of business documents and records and obviate the necessity for the *Evidence (Business Records) Interim Arrangements Act*.

### Division 1 GENERAL

#### **Clause 146 Evidence produced by processes, machines and other devices**

This clause makes provision in relation to evidence produced wholly or partly by machines. It may be presumed that a machine was working properly on the day in question. The provision creates a rebuttable presumption placing the legal burden of disproof on the party disputing the presumed fact, but provides that the prima facie presumption disappears once a real doubt is raised.

#### **Clause 147 Documents produced by processes, machines and other devices in the course of business**

This clause creates a similar presumption to clause 146, for documents produced by machines in the course of business. The presumption applies specifically to business records and does not apply to documents that were prepared in connection with a possible proceeding or made in connection with a criminal investigation.

#### **Clause 148 Evidence of certain acts of justices, lawyers and notaries public**

It is presumed (unless the contrary is proved) that documents were attested, verified, signed or acknowledged by a justice of the peace, an ***Australian lawyer*** (a defined term) or a notary public if they purport to be so attested, verified, signed or acknowledged.

#### **Clause 149 Attestation of documents**

This clause dispenses with the need to call a witness who attested to the execution of a document (other than a will or other testamentary document) to give evidence about the execution of the document. However, it will still be necessary to prove the signature of the maker of the document concerned.

#### **Clause 150 Seals and signatures**

It is presumed (unless the contrary is proved) that seals (including Royal seals, government seals, seals of bodies corporate and seals of persons acting in an official capacity) are authentic and valid. A similar presumption is made with respect to the signature of persons acting in an official capacity.

#### **Clause 151 Seals of bodies established under State law**

This clause contains no substantive provision. Its inclusion ensures parity with the Commonwealth Act.

#### **Clause 152 Documents produced from proper custody**

It is presumed (unless the contrary is proved) that a document that is more than 20 years old, which is produced from proper custody, is what it purports to be and was duly executed or attested.

### **Division 2 MATTERS OF OFFICIAL RECORD**

#### **Clause 153 Gazettes and other official documents**

Unless the contrary is proved, documents, such as the Government Gazette and other documents printed with the authority of the government, are presumed to be what they purport to be and were published on the day on which they purport to have been published. The clause also provides that if such a document contains or notifies the doing of an official act, it will be presumed that the act was validly done and, if the date on which it was done is indicated in the document, the act was done on that date.

#### **Clause 154 Documents published by authority of Parliaments etc**

Unless the contrary is proved, documents purporting to have been printed by authority of an Australian Parliament, or a House or Committee of such a

Parliament, are presumed to be published on the day they purport to have been published.

### **Clause 155 Evidence of official records**

Evidence of a document that is a Commonwealth record or a state or territory public document may be given by production of a document that purports to be such a record or document or that purports to be a copy of or extract from that record that is certified by a Minister.

Evidence is also able to be given if such a record or document is signed or sealed or certified to be a copy or extract by a person who might reasonably be supposed to have custody of it.

### **Clause 155A Evidence of Commonwealth documents**

This clause contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth, Victorian and NSW Acts.

### **Clause 156 Public documents**

It is presumed, unless the contrary is proved, that a copy of, or an extract from or summary of, a public document purporting to be sealed or certified as such by a person who might reasonably be supposed to have custody of the document is a copy, extract or summary of the document.

The clause also lists the circumstances in which an order from a court to produce a public document will be taken to have been complied with by an officer entrusted with the custody of a public document.

### **Clause 157 Public documents relating to court processes**

This clause makes a similar presumption to that in clause 156 in relation to evidence of public documents relating to court processes that are examined copies and have been sealed by a court or signed by a judge, magistrate, registrar or other proper officer.

### **Clause 158 Evidence of certain public documents**

This clause provides for the admission in Territory courts of a public document that is a public record of another state or territory to the same extent and for the same purpose for which it is admissible under a law of that state or territory.

#### **Clause 159 Official statistics**

A document containing statistics purporting to be produced by the Australian Statistician is evidence that those statistics are authentic.

### **Division 3 MATTERS RELATING TO POST AND COMMUNICATIONS**

#### **Clause 160 Postal articles**

Unless evidence sufficient to raise doubt is adduced, it is presumed a postal article sent by pre-paid post addressed to a person at a specified address was received at that address on the fourth working day (as defined) after posting.

This presumption does not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

#### **Clause 161 Electronic communications**

Unless evidence sufficient to raise a doubt is adduced, a range of presumptions apply to records of electronic communications. The presumptions relate to the mode of communication, the sender, the time and place of sending and receipt. ***Electronic communication*** is a defined term and embraces all modern electronic technologies, including telecommunications, as well as facsimile and telex methods of communication.

The presumptions do not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

#### **Clause 162 Lettergrams and telegrams**

Unless evidence sufficient to raise doubt is adduced, it is presumed that a document purporting to contain a record of a message transmitted by lettergram

or telegram was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission.

This presumption does not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

### **Clause 163 Proof of letters having been sent by Commonwealth agencies**

This clause contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth, Victorian and New South Wales Acts.

## **Part 4.4 CORROBORATION**

Clauses 164 and 165 comprise an attempt at a fresh start at the law of corroboration.<sup>252</sup>

### **Clause 164 Corroboration requirements abolished**

All common law requirements regarding corroboration of evidence are now abolished with the exception of the rules relating to perjury. This clause also abolishes the common law rules of law or practice requiring a judge to warn a jury as to dangers of certain categories of uncorroborated evidence. A judge's general obligations to give appropriate jury directions and warnings largely remain, except where they have been otherwise limited as with, for example, the evidence of children in clause 165A.

## **Part 4.5 WARNINGS AND INFORMATION**

### **Clause 165 Unreliable evidence**

Evidence coming from a broad category which may be unreliable, including hearsay, unrecorded admissions, identification evidence, evidence from accomplices or co-offenders and prison informers, evidence affected by the age or ill-health of the witness, or evidence from deceased persons, may require a warning from the judge. Even though evidence may fall into one of the listed

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<sup>252</sup> Cross on Evidence [15260]

categories however, it does not necessarily follow that a warning is required. The evidence must also 'be of a kind that may be unreliable'.<sup>253</sup> On the other hand, if it fell into one of the categories, and a warning was requested, there would have to be 'good reasons' for not giving one.<sup>254</sup>

Stephen Odgers<sup>255</sup> considers that there is considerable overlap between the common law obligation to give a jury warning and the clause 165 obligation to give a warning in relation to evidence that 'may be unreliable'. Differences to be noted, however, are:

- (a) a warning is only required under clause 165 if it is requested, whereas at common law a duty to warn may arise even if not requested;
- (b) a warning may be required if requested by the prosecution whereas at common law the focus was on the defendants; and
- (c) clause 165 may require a warning where the common law may have permitted only a 'comment'.

There may be situations where a warning is required under the common law to avoid a miscarriage of justice, for example, where the prosecution case depends on one witness,<sup>256</sup> where there has been substantial delay in the complaint, evidence has not been made available for defence for testing,<sup>257</sup> the prosecution is relying on conduct of the defendant such as lies told as consciousness of guilt,<sup>258</sup> the 'prosecutor's fallacy' in relation to DNA evidence<sup>259</sup>, and other situations too numerous to mention.

The clause prohibits a judge from warning or informing the jury about the reliability of a child's evidence. It stipulates that any warning about a child's evidence must be given in accordance with clause 165A.

This Bill will override the rules of evidence in relation to sexual offences in section 4(5) of the *Sexual Offences (Evidence and Procedure) Act*. Section 4(5)(a)

<sup>253</sup> *Derbas v The Queen* [2007] NSWCCA 118 @ [28]

<sup>254</sup> *R v Flood* [1999] NSWCCA 198; *R v Fernando* [1999] NSWCCA 66

<sup>255</sup> Stephen Odgers, *Uniform Evidence Law* (8<sup>th</sup> Ed) Lawbook Co. Sydney (2009).

<sup>256</sup> *R v Connors* [2000] NSWCCA 470; *R v Davis* [1999] NSWCCA 15

<sup>257</sup> *R v Slattery* [2002] NSWCCA 367

<sup>258</sup> *Edwards v The Queen* (1993) 178 CLR 258

<sup>259</sup> *R v JG* (2001) 127 A Crim R 493; [2001] NSWCCA 504 @ [89]-[97]

provides that a judge must not warn it is unsafe to convict on uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness and, section 4(5)(b) provides that where there is delay in the making of a complaint, the judge must warn the jury that the delay does not necessarily indicate the allegation is false, and that there may be good reasons for the delay. The Bill, however, provides that in any proceeding, instead of *complainants* as a class, provides for *children* as a class, and provides that the judge must not warn the jury that *children* as a class are unreliable witnesses or that it is dangerous to convict on the uncorroborated evidence of a witness who is a child. Thus the Bill is both broader by including all proceedings rather than just sexual offences, but narrower in providing only for children rather than complainants generally.

Other more procedural provisions in the *Sexual Offences (Evidence and Procedure) Act* dealing with, for example:

- (1) unrepresented defendants not being allowed to cross-examine complainants;
- (2) evidence relating to a complainant's sexual activities (s.4(1) &(2));
- (3) publication of complainant's identity (s. 6) and defendant's identity (s.7);
- (4) time limits on prosecutions (s.3A); and
- (5) the liability of directors and bodies corporate (s.13);

will be re-enacted in another form.

Importantly, the general power to warn, when the evidence, though not of a kind that may be unreliable, may be unreliable in the particular circumstances, is preserved by clause 165(5).<sup>260</sup>

### **Clause 165A Warnings in relation to children's evidence.**

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<sup>260</sup> *R v Stewart* [2001] NSWCCA 260, where the evidence was said to be unreliable because of the witnesses deal on sentence which would have been at risk if he did not give the evidence.: *R v Rose* (2002) 55 NSWLR 701 "s165(5) makes it clear that the trial judge has a residual power to give a warning to a jury, or to inform them about some matter where the judge believes it is necessary to do so in the interests of justice."



A judge may warn of about particular factors that may influence the reliability of children's evidence, but not about any inherent unreliability.

The clause is included as a result of ALRC 102 (recommendation 18-2), which refers to research that demonstrates that children's cognitive and recall skills are not inherently less reliable than adults. However, the credibility of children's evidence may be underestimated by juries. This perception of unreliability is enhanced if a judge gives a general warning about the unreliability of child witnesses. This clause addresses these misconceptions and reinforces the policy underpinning clause 165 that warnings should only be given where the circumstances of the case indicate they are warranted.

Subclause (1) provides that in any proceeding in which evidence is given by a child before a jury, a judge is prohibited from warning or suggesting to the jury:

- (a) that children as a class are unreliable witnesses;
- (b) that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
- (c) that a particular child's evidence is unreliable solely on account of the age of the child;
- (d) in criminal proceedings, that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

Under subclause (2) a party can request a warning (or information) to be made in relation to a particular child. If such a request is made, the court must be satisfied that there are circumstances particular to that child (other than age) that affect the reliability of the child's evidence and warrant the giving of a warning or information to the jury. If the court so finds, it can:

- (a) inform the jury that the evidence of a particular child may be unreliable and the reasons for which it may be unreliable; or
- (b) warn or inform the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.

Subclause (3) provides that this clause does not affect any other power of a judge to give a warning to, or inform, the jury.

### **Clause 165B Delay in prosecution**

This clause regulates warnings to juries in criminal proceedings where a delay has been found by the court to have resulted in a significant forensic disadvantage to the defendant.

The defendant must apply to the judge for a warning to be given. The court can only give a warning if satisfied that the defendant has in fact suffered a significant forensic disadvantage and that this is a result of delay. When giving such a warning, the court must tell the jury about the nature of the disadvantage and the need to take this into account when considering the evidence. While no specific words are required to be used in the warning, subclause (4) makes it clear that the judge is prohibited from suggesting in any way that it would be dangerous or unsafe to convict the defendant solely because of the delay or significant forensic disadvantage.

A relevant delay for the purposes of this clause is a lapse in time between the alleged offence and its being reported. Delay alone will not be sufficient to constitute significant forensic disadvantage.

Subclause (3) provides that the judge need not give a warning if there are good reasons for not doing so. This situation would be rare, as jurors are unlikely to understand forensic disadvantage without assistance.

Clause 165B is intended to replace the common law position on such warnings enunciated in *Longman v The Queen*.<sup>261</sup> Warnings on delay can only be given in accordance with this clause.

Clause 165B(7) specifies some examples of forensic disadvantages that can be suffered, but it is not a closed list. The Commonwealth and Victorian Acts do not have this subsection, with the Explanatory Memorandum to the Commonwealth Act stating that the significant forensic disadvantage arises not because of the delay itself, but because of the consequences of delay.

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<sup>261</sup> *Longman v The Queen* (1989) 168 CLR 79

## **Part 4.6 ANCILLARY PROVISIONS**

### **Division 1 REQUESTS TO PRODUCE DOCUMENTS OR CALL WITNESSES**

This Division sets up a request procedure designed to give protection to parties against whom hearsay, documentary evidence or evidence of a conviction may be given.

It provides for a party to make certain requests to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing. The party may make such requests only within the specified time limits (unless the court gives leave to make them outside those limits).

#### **Clause 166 Definition of request**

This clause defines *request* and includes a request made by a party to another party for the production, examination, testing, copying of documents or things; or the calling of witnesses, including a witness who made a previous representation.

#### **Clause 167 Requests may be made about certain matters**

A party may make a reasonable request to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing.

#### **Clause 168 Time limits for making certain requests**

A party has 21 days to make a request, after receiving notice of another party's intention to adduce evidence of a previous representation or of a conviction in order to prove a fact in issue, or to tender a document in evidence or to prove the contents of another document. The court may give leave to make such a request after 21 days if there is good reason to do so.

#### **Clause 169 Failure or refusal to comply with requests**

If a party, without reasonable cause<sup>262</sup>, fails or refuses to comply with a request, the court may order that the party comply with the request, produce a specified document or thing, or call a specified witness, or that the evidence in relation to which the request was made not be admitted in evidence.

If a party fails to comply with such an order to produce a specified document or thing or to call a witness, the court may direct that evidence in relation to which the request was made is not to be admitted into evidence. The court may also make orders as to adjournments or costs.

The clause provides examples of circumstances which constitute reasonable cause for a party to fail to comply with a request and an inclusive list of matters that the court must take into account in exercising its power to make orders under the clause. The court may take additional matters into account.

The Note to the clause refers to clauses 4 and 5 of Part 2 of the Dictionary which provides definitions about the availability of persons, documents and things.

## **Division 2 PROOF OF CERTAIN MATTERS BY AFFIDAVITS OR WRITTEN STATEMENTS**

### **Clause 170 Evidence relating to certain matters**

Evidence relevant to the admissibility of evidence to which specified provisions of the Bill apply (for example, Part 4.3 relating to facilitation of proof) may be given by affidavit or, if it relates to a public document, by a written statement.

### **Clause 171 Persons who may give such evidence**

Such evidence (as specified in clause 170) may be given by a person with responsibility for making or keeping the relevant document or thing. It may be given by an authorised person (for example, a person before whom an oath can be taken outside the state or territory) if it would not be reasonably practicable or would cause undue expense for the responsible person to give the evidence.

### **Clause 172 Evidence based on knowledge belief or information**

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<sup>262</sup> For discussion on “reasonable cause” see *Deputy Commissioner of Taxation v Trimcoll Pty Ltd* [2005] NSWSC 1324 @ [55]

Evidence of a fact in relation to a document or thing may be given based on information or on knowledge or belief. An affidavit or statement containing evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

#### **Clause 173 Notification of other parties**

A copy of any affidavit or statement must be served on each other party a reasonable time before the hearing. The deponent of the affidavit or maker of the statement must be called to give evidence if another party so requests.

### **Division 3 FOREIGN LAW**

This Division facilitates proof of foreign law.

#### **Clause 174 Evidence of Foreign law**

This clause provides for the proof of the statutory law, treaties or acts of state of foreign countries.

#### **Clause 175 Evidence of law reports of foreign countries**

This clause provides for the proof of the case law of foreign countries. The operation of clauses 174 and 175 was considered in *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171.

#### **Clause 176 Questions of foreign law to be decided by judge**

Questions as to the effect of foreign law are to be decided by the judge.

### **Division 4 PROCEDURES FOR PROVING OTHER MATTERS**

#### **Clause 177 Certificates of expert evidence**

This clause provides a procedure for adducing expert evidence without having to produce the expert. This can be for both civil and criminal proceedings.

The expert's opinion may be given by certificate. The party tendering an expert certificate must serve notice of it and a copy of the certificate on each other party 21 days before the hearing, or such other period determined by the court on

application by a party. A party so served can require the expert to be called as a witness.

#### **Clause 178 Convictions, acquittals and other judicial proceedings**

Evidence can be adduced by certificate of convictions, acquittals, sentence, court order or the pendency or existence of a civil or criminal proceeding.

#### **Clause 179 Proof of identity of convicted persons – affidavits by members of State or Territory police forces**

This clause provides for proof of the identity of a person alleged to have been convicted of an offence to be adduced by an affidavit of a fingerprint expert of the police force of the relevant state or territory.

#### **Clause 180 Proof of identity of convicted persons – affidavits by members of Australian Federal Police**

Proof of the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth may be adduced by an affidavit of a fingerprint expert of the Australian Federal Police.

#### **Clause 181 Proof of service of statutory notifications, notices, orders and directions**

Proof of the service, giving or sending under an Australian law, of written notification, notices, orders and direction may be proved by affidavit of the person who served, gave or sent it.

### **CHAPTER 5 MISCELLANEOUS**

#### **Clause 182 Application of certain sections in relation to Commonwealth records**

This clause contains no substantive provision. Its inclusion ensures parity in numbering with the Commonwealth, NSW and Victorian Acts.

#### **Clause 183 Inferences**

A court may examine a document or thing in respect of which a question has arisen in relation to the application of the Bill and to draw reasonable inferences from the document or thing.

#### **Clause 184 Accused may admit matters and give consents**

A defendant in or before a criminal proceeding may make any admissions and give any consent that a party to a civil proceeding can make. A defendant's consent will not be effective in criminal proceedings unless he or she has been advised to consent by his or her lawyer, or if the court is satisfied that the defendant appreciates the consequences of doing so.

Formal admission of a fact does not, however, preclude evidence being adduced of the fact.<sup>263</sup>

#### **Clause 185 Full faith and credit to be given to documents properly authenticated**

This clause contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth, NSW and Victorian Acts.

#### **Clause 186 Swearing of affidavits**

This clause contains no substantive provision, however a Note to the clause refers to the Commonwealth Act including a provision about swearing of affidavits before justices of the peace, notaries public and lawyers for use in court proceedings involving the exercise of federal jurisdiction and in courts of a territory.

#### **Clause 187 No privilege against self incrimination for bodies corporate**

For the purposes of a law of the Territory a body corporate does not have a privilege against self incrimination. As in the common law however, an officer of a corporation, if called as a witness, may claim a personal privilege but not claim the privilege on behalf of the corporation, on the basis that the answer would tend to incriminate the corporation.

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<sup>263</sup> *R v JGW* [1999] NSWCCA 116 @ [42]-[44] per Wood CJ

### **Clause 188 Impounding documents**

A court may impound documents tendered or produced before the court.

### **Clause 189 The voir dire**

This clause applies to both civil and criminal proceedings, and sets out the circumstances in which a voir dire is to be held. These include questions as to whether evidence should be admitted or can be used against a person and as to whether a witness is competent or compellable.

There is no right to a voir dire and the court must be satisfied that there is an issue requiring the proceeding. Whether a voir dire should occur is a matter for the common law.<sup>264</sup>

Clause 189(6) ensures a defendant testifying in a voir dire may rely on the privilege against self incrimination.

### **Clause 190 Waiver of rules of evidence**

The court, with the consent of the parties, may waive the rules relating to the manner of giving evidence, the exclusionary rules and the rules relating to the method of proof of documents. It may reasonably be inferred that other provisions of the Bill may not be waived and must be applied.

A defendant's consent will not be effective in a criminal proceeding unless he or she has been advised to consent by his or her lawyer, or the court is satisfied that the defendant understands the consequences of the consent. The clause also enables a court to make such orders in civil proceedings without the consent of the parties if the matter to which the evidence relates is not genuinely in dispute<sup>265</sup>, or if the application of those rules would cause unnecessary expense or delay.<sup>266</sup>

### **Clause 191 Agreements as to facts**

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<sup>264</sup> *R v Lee* (unreported NSW CCA, Cole JA, Dowd, Sperling JJ, 5 May 1997)

<sup>265</sup> See for example, *Rataplan Pty Ltd v Commissioner of Taxation* [2004] FCA 674

<sup>266</sup> See for example, *Romer v HJ & J Wilson Carriers Pty Ltd* (unreported, NSW SC, Sperling J, 9 August 1996)



This clause applies where the parties to a proceeding have agreed that, for the purposes of the proceeding, a fact is not to be disputed in the proceeding. If the agreement is in writing, signed by or for all the parties or, by leave of the court, stated before the court with the agreement of all parties, evidence may not be adduced to prove, rebut or qualify an agreed fact, unless the court gives leave.

Evidence that supplements or elaborates on agreed facts does not ‘contradict or qualify’ an agreed fact.<sup>267</sup>

### **Clause 192 Leave, permission or directions may be given on terms**

This clause complements clauses of the Bill enabling a court to give any leave, permission or direction on such terms as it thinks. The clause sets out some of the matters the court must take into account (for example, the extent to which to do so would unduly lengthen the hearing, and the importance of the evidence that is to be led). The court may take additional matters into account.

This discretion to grant leave overlaps with the general discretion to exclude evidence in clauses 135 and 137.<sup>268</sup>

### **Clause 192A Advance rulings and findings**

This clause addresses the finding of the High Court in *TKWJ v The Queen* (2002) 212 CLR 124 that the UEA only permit an advance ruling to be made in cases where the UEA requires leave, permission or direction to be sought, but not to be made in relation to the exercise of ‘discretions’.

ALRC 102 concluded that a broader power to make advance warnings was important as it carries significant benefits in promoting the efficiency of trials. This clause provides that the court may, if it considers it appropriate, give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary questions.

Paragraph (c) makes clear that the court may also make an advance ruling or finding in relation to the giving of leave, permission or directions under clause 192.

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<sup>267</sup> *FV v The Queen* [2006] NSWCCA 237 @ [42]-[44]

<sup>268</sup> *Stanoevski v The Queen* (2001) 202 CLR 115

### **Clause 193 Additional powers**

A court may make orders to ensure that a party can adequately inspect documents that require interpretation by a qualified person or from which sounds, images or writing can be reproduced. The clause also extends the power of a person or body to make rules of court in relation to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called to give evidence. It is designed to extend the discovery rules to “tapes, discs, microfilms and other media”.<sup>269</sup>

### **Clause 194 Witnesses failing to attend proceedings**

The clause provides powers for the court to issue a warrant to bring a witness before the court who has failed to attend court, including circumstances where the court is satisfied that the witness is avoiding service or is unlikely to attend.

A Note to the clause provides that this clause differs from the New South Wales Act and that the Commonwealth Act does not include such a provision.

The onus is on the party seeking the issue of a warrant to satisfy the court that the witness has no just cause or reasonable excuse.<sup>270</sup>

### **Clause 195 Prohibited questions not to be published**

It is an offence to print or publish (without express court permission) an improper question (see clause 41), or any question disallowed by the court because the answer would contravene the credibility rule (Part 3.7) or any question in respect of which leave has been refused under Part 3.7. The maximum penalty for the offence is a fine of 60 penalty units and it is a strict liability offence.

### **Clause 196 Proceedings for offences**

Proceedings for an offence against the Act or the regulations are to be dealt with summarily.

### **Clause 197 Regulations**

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<sup>269</sup> ALRC 26 para716

<sup>270</sup> *Harris/D-E Pty Ltd v McClelands Coffee & Tea Pty Ltd* (1999) 149 FLR 204

The Administrator may make regulations under the Act.

## DICTIONARY

### PART 1 Definitions

An 'Australian Court' has been held to include the Refugee Review Tribunal as it is 'a body that is authorised by an Australian law, the *Migration Act 1958*, to hear, receive and examine evidence' even though the proceedings were not adversarial and, in fact, could best be described as inquisitorial.<sup>271</sup> The Tribunal is, however, required to provide a review mechanism that is among other things 'fair'.

In *Ryan v Watkins* [2005] NSWCA 426 Campbell AJA decided that 'the person or body would not be one whose role was purely investigatory' and the procedures followed by a Medical Assessor were held not to be 'proceedings in an Australian Court'. The person or body that is an 'Australian Court' must be independent of executive or administrative oversight in decision making and must be bound by the rules of procedural fairness.<sup>272</sup>

### Part 2 Other expressions

Clauses 4 and 5 of Part 2, 'the unavailability of persons' and 'the unavailability of documents and things', are of great interest when considered with the exceptions to the hearsay rule. Clause 65 allows evidence of a previous representation to be given where the person who made the representation is not available to give evidence.

Being dead is being unavailable<sup>273</sup> but mere lack of memory about a fact would not mean that a person was not competent to give evidence about the fact.<sup>274</sup>

Clause 4(e) demands all reasonable steps to have been taken to secure the person's attendance. In *R v Kazzi* (2003) 140 A Crim R 545; 2003 [NSWCCA

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<sup>271</sup> *Epeabaka v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 397 at 408 per Finkelstein J

<sup>272</sup> See *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 par Isaacs J at 93; cited in *Ryan v Watkins* [2005] NSWCA 426

<sup>273</sup> *Regina v Clark* [2001] NSWCCA 494

<sup>274</sup> *Brown v The Queen* [2006] NSWCCA 69 at [26]

241, the prosecution witness in question was believed to be residing in India. While the police may well be required to ascertain the whereabouts of a witness when that witness was found to be in another country, where 'information as to [the person's] whereabouts in India is non-existent', and it was not even known in what city he resides, it was understandable, in the circumstances, that the police did no more to find him. Similarly, where an experienced private investigator was hired to carry out enquiries in an effort to locate a witness, it was held that 'all reasonable steps' had been undertaken.<sup>275</sup>

Other examples where it has been concluded that all reasonable steps have been taken to secure attendance are:

- (1) the person did not wish to give evidence and left the country after being served with a subpoena<sup>276</sup>,
- (2) the person, while residing in another country stated that the person had no intention of giving evidence either in person or by video link<sup>277</sup>, and
- (3) the person had been called and refused to testify in spite of the threat of contempt proceedings<sup>278</sup>.

The fact that the defendant cannot cross-examine the absent witness is relevant to the discretion in clauses 135 and 137 but not relevant to clause 65.<sup>279</sup>

In the Victorian Act another clause is added (clause 4(g)), which is not in the NT Bill, providing for where a person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability. This

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<sup>275</sup> *AJW v New South Wales* [2003] NSWSC 803 at [15]. Cases where 'all reasonable steps' were not taken include *Caterpillar Inc v John Deere Ltd* (No 2) (2000) 181 ALR 108, where a witness in the US was given an 'unappealing invitation' and was not promised his expenses would be paid.

<sup>276</sup> *Puchalski v The Queen* [2007] NSWCCA 220, the witness left for Iraq shortly before the trial. The evidence given at the committal proceeding was correctly admitted.

<sup>277</sup> *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2009) 258 ALR 598; [2009] NSWSC 769

<sup>278</sup> *R v Suteski* (2002) 128 A Crim R 275; [2002] NSWSC 218 at 277-278. An edited ERISP (record of interview) was introduced in evidence.

<sup>279</sup> *R v Suteski* (2002) 128 A Crim R 275; [2002] NSWSC 218 at [126]; see also the remarks of Heydon JA in *Regina v Clark* [2001] NSWCCA 494 at [164]

clause was anticipated by ALRC 102 to provide for cases where ‘such emotional or psychological harm’ may be caused that the witness could properly be regarded as ‘unable’ to give the evidence.<sup>280</sup>

Prior to the amendments of the UEA following ALRC 102, the Act used the term ‘de facto spouse’. This has been amended to the gender neutral term ‘de facto partner’. It is not necessary that the relationship is between ‘adult’ persons<sup>281</sup>.

### **Note Regarding Penalties**

This discussion draft adopts the penalties in the UEA. However, the penalty levels will be re-assessed as part of the consultation processes concerning the development of the legislation.

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<sup>280</sup> ALRC 102 paras 8.34-8.37

<sup>281</sup> ALRC 102 para 4.115

## **COMMENTS**

Comments are sought by 31 March 2011. These should be directed to:

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### **Acknowledgement**

This document has made extensive use of, and borrowed heavily from, the eighth and ninth editions of Stephen Odgers excellent text 'Uniform Evidence Law' published by Thomson Reuters. Stephen Odgers SC was involved in the ALRC committee which wrote the original version of the Uniform Evidence Act, and has been involved in its evolution ever since. Jill Anderson, Jill Hunter and Neil Williams SC wrote 'The New Evidence Law' published by LexisNexis Butterworths, which is also an excellent resource and has been borrowed heavily from. The Northern Territory Law Reform Committee's "Report on the Uniform Evidence Act" was also of great help in writing this discussion paper. Some of the more straightforward information in the paper has been lifted directly from the Victorian Explanatory Statement.

