NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON THE UNIFORM EVIDENCE ACT

'Oh, quite enough to get, Sir, as the soldier said ven they ordered him three hundred and fifty lashes,' replied Sam.

'You must not tell us what the soldier, or any other man, said, Sir,' interposed the judge; 'it's not evidence.'

("Pickwick Papers" Chapter 34)

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TERMS OF REFERENCE

The Northern Territory Law Reform Committee (NTLRC) is asked to investigate and report to the Attorney-General as to whether the Uniform Evidence Act (UEA) should be adopted in the Northern Territory. In particular the NTLRC is requested to:

1. Review the *Evidence Act* (NT) and other laws of evidence which apply in the Northern Territory and advise the Attorney-General on the action required to facilitate the introduction of the UEA into the Northern Territory, including any necessary modification of the existing provisions of the UEA.

2. Consider whether modifications of the existing provisions of the UEA are required:

   (a) to take account of case law on the operation of the UEA in jurisdictions where the Act is currently in force;

   (b) in relation to the following topics which have been identified as areas of particular concern and are currently being considered by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC):

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

3. In conducting the review the NTLRC should have regard to:

   (a) the experience gained in other jurisdictions in which the UEA has been in force for some time;

   (b) the desirability of promoting harmonisation of the laws of evidence throughout Australia, in particular by consulting with the other members of the UEA scheme;

   (c) the rights of defendants in criminal trials to receive a fair trial; and

(d) arrangements for vulnerable witnesses to provide evidence to promote their access to justice.

4. Consistent with the goal of promoting harmonisation of the laws of evidence, the Committee should collaborate with the ALRC, the NSWLRC, the Victorian Law Reform Commission (VLRC) and the Queensland Law Reform Commission (QLRC) in their respective reviews of their Evidence Laws.

INTRODUCTION

The origins of the law of evidence have been traced by writers of authority such as Holdsworth (HEL Vol 9 pp126 et seq) and Professor Julius Stone in "Evidence – Its History and Policies", as revised by Justice W.A.N. Wells in the 1991 edition.

In the briefest of summaries (which does no justice at all to the depth and particularity of research of these and other learned authors) we commence with a situation where no human rules were necessary to determine disputed allegations. That was left in the hands of the Deity by various methods of ordeal, compurgation or trial by battle.

Passing or failing the ordeal meant innocence or guilt as determined by God. The solemnity of compurgation, i.e. oath taking, meant that, in an age of faith, few would imperil their immortal soul by false swearing. Trial by battle was equally positive because victory could only be achieved with God's approval; and defeat was, accordingly, clear proof of guilt.[1]

Trial by ordeal was abolished in the 13th Century. Compurgation generally vanished with new procedures but survived in some manorial or ecclesiastical courts until its abolition in 1833. Its rather insubstantial shadow remains with us today in the form of character evidence. Trial by battle was, over many centuries, believed to have died a natural death, but, to the consternation of all, was found to be still alive (and kicking) in the famous case of Ashford v Thornton (1819) I B and ALD 405; after which hurried steps were taken to ensure it was finally and permanently engraved.[2]

The next development, namely by inquisition of those on the spot, required no rules; for those making the accusation acted as judge, jury and witnesses, and conducted such inquiries as they deemed necessary without regard to any procedures. Their reliance was entirely on local knowledge. Gradually, however, this body became the committing rather than the judicial arm, and they "presented" alleged malefactors for trial. By 1350 the accused had gained the right to challenge any member of the trial jury who had also been a member of the presenting jury; and the distinction between committal (presentment), and trial was firmly established.

At this point the rules of evidence somewhat haphazardly crept in, as the judges began delineating the boundaries within which the jury could properly inquire, and determining the

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[1] Thus Mowbray in "Richard II" accepting the duel with Bolingbroke says:-

"My body shall make good upon
this Earth,
Or my divine soul answer
It in Heaven."

[2] Yes, of course, "interred" is more accurate, but "engraved" sounds so splendidly apt.

proper weight to be given to what was within those boundaries. As Holdsworth observes "Now that the verdict of the jury was based, not on their own knowledge, but on the evidence produced to them in court, some law about this evidence became necessary" (HEL – Vol 9 – P126).

In the common law system the law of evidence was developed by numerous judicial decisions framed to meet particular evidential problems, "a wilderness of single instances". As per Holdsworth:- "the rules which flow obviously from the principles of reasoning have been overlaid by a mass of technical rules, which represent the ideas and needs of many different periods in the law of procedure".[3] Smith J of the Victorian Supreme Court makes a similar observation in an article in the University of New South Wales Law Journal, Vol 18, 1995 at p4: "The treatment of the rules of evidence by courts and commentators gives the appearance of a miscellaneous collection of rules developed case by case without any structure".[4]

Because the law of evidence was developed by a series of discrete judicial decisions designed to meet some particular evidential problem, the recourse was to earlier precedents in that specific evidential area, rather than a search for a broader underlying philosophy.

Statute law also tended to deal with specific instances where some change or reform in the law of evidence was deemed necessary, rather than undertaking the admittedly much more difficult task of a comprehensive review of the whole subject. This becomes obvious if one glances at Chitty's Statutes where the various statutes passed over the centuries, dealing with the law of evidence are set out. Any perusal of the list indicates that particularity rather than generality dictated the enactments.

Ultimately in the UK and in the Australian States many of these individual Acts were gathered together in one "Evidence" Act, but a collection of individual instances does not make the resultant statute any more comprehensive.

In effect most statutes were enacted because the common law had reached a blind alley which did not accord with contemporary thought. Perhaps the most obvious example is that group of statutes of the nineteenth century which finally allowed the parties in civil matters, and the

[3] See also Halsbury 3rd Edition Vol 15 The commentary by Professor Nokes of London University and James Wellswood of Gray's Inn:- "In English Law the principles and rules which regulate the admission or rejection of evidence are many and complex. They belong to the realm of procedure and have been formulated in a few Acts of Parliament and an enormous number of judicial decisions; and they constitute the law of evidence".
[4] The More Things Change… The Evidence Acts 1995 – An Overview

accused in criminal matters, to give evidence; which the earlier rules, adopted by the courts, prohibited, on the grounds of partiality.[5]

Australian courts in the nineteenth and twentieth centuries loyally accepted as their inheritance, the rules of evidence developed by the courts of England; and added to the process by contributing their own decisions to the body of precedent already established. Similarly, legislation was passed from time to time to initiate some new procedure or repeal or vary some old one. True to the practice accepted over the centuries, the decisions and the statutes addressed themselves to whatever immediate situation had arisen and refrained from applying any broader perspective.

In Australia this gave rise to two problems. The first was that the six colonies had each their separate Governments and jurisdictions and, transmogrified into States, retained them. This meant separate and varied legislation and separate and varied precedents relating to the laws of evidence. The Territories, as they reached Self-Government added to the list. The problem became acute in the latter half of the century with the rapid and extensive growth of Federal Courts.

The second problem, certainly not confined to Australia, came from the scattergun process of statute and precedent already referred to. The judges had been generally successful in protecting the new fact-finding jury from the devices of the old fact-knowing jury, namely local knowledge, hearsay, reputation and prejudice. But the process involved exclusionary rather than inclusionary rules. Furthermore, the judges, with commendable self-restraint, applied the same rules to themselves[6]; when it might have been more appropriate for the learned and, (by virtue of their training), uncontaminated, judges to have ventured beyond the boundaries they set for lay persons. Were the boundaries too strictly drawn? Was it time to stand back and look at the real purpose and rationale of the law of evidence?

[5] Lovers of Dickens will remember that in the famous case of Bardell vs Pickwick, neither the plaintiff, Mrs Bardell, nor the defendant, Mr Pickwick, were allowed to give evidence of the very conversation between them which Mrs Bardell alleged, and Mr Pickwick denied, constituted a proposal of marriage.

[6] Stone – Evidence – Its History and Policies – 1991 Ed – Butterworths p57. However, not all judges in non-jury trials felt bound to fetter themselves in this way. For instance, Sir Edward Woodward in his recent memoirs "One Brief interval" had this to say (at p209):- "So far as I was concerned if a piece of evidence seemed likely to assist me to decide a case it was admissible If it was not going to help me, it was inadmissible. If a technical dispute arose about a point of admissibility, I cut the argument short, reserved my decision and said that, if it became necessary I would deal with it in my final judgement, which I don't recall ever having to do. I could not have done this in a jury trial, where the jury cannot be allowed to hear inadmissible evidence" Other judges have been known to have adopted a similar procedure in non-jury trials, with similar results.

Professor Julius Stone in his book on evidence, and, presumably, Justice Wells who revised the 1991 edition, were in no doubt.

> "The overhaul of the rules in the light of changing methods of trial, as well as in the light of advances in psychological knowledge and modern technological devices may be regarded as the major task of our century in this branch of the law".[7]

It was therefore not surprising that doubts were raised by the ALRC in its 1985 report as to whether the rules of evidence were as comprehensive and as rational as they should be to allow a court to determine as accurately as possible the allegations and counter-allegations placed before it.

> "The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the unrepresented litigant baffled, frustrated and deflated. The law of evidence differs widely from state to state. The difference from jurisdiction to jurisdiction derives not only from differences in Evidence Acts but also from differences in the common law applied by the courts of the various states. There are also many areas of uncertainty in the law of evidence – areas on which definitive law is yet to be pronounced by the courts"[8].

Although these remarks follow after the "tentative" conclusion that "the Commission is of the view that the law of evidence is badly in need of reform", it is fair to say that nothing in the ALRC's later researches contains anything contrary to that view, and, indeed, that view would seem obviously borne out by all the subsequent and thorough researches of the ALRC.

[7] Stone – Evidence – p59

[8] ALRC – Evidence (Interim) Report 26 – 1985 – XXXIII. Please note that this and other ALRC reports referred to in this report can be found in electronic form at http://www.alrc.gov.au/publications/publist/reports.htm

STEPS TOWARD A UNIFORM EVIDENCE ACT

It is appropriate to record the steps whereby the law of evidence in Australia was subjected to intensive scrutiny, resulting in draft legislation, which was then adopted by Federal and some State jurisdictions, and is under consideration for adoption by other State and Territory jurisdictions.

In 1977 the Senate Standing Committee on Constitutional and Legal Affairs recommended a comprehensive review of the whole law of evidence by the ALRC.[9]

In 1979 the Commonwealth Attorney-General referred the question to the ALRC "with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements".[10]

In 1980 the ALRC published Discussion Paper No 16 entitled "Reform of Evidence Law".

In 1985 the ALRC produced their Evidence (Interim) Report 26 in two volumes. These volumes contain a detailed survey of the laws of evidence pointing out the numerous differences between jurisdictions and presenting draft uniform legislation. They were produced after extensive consultation with academic and practicing lawyers, and after a series of public hearings.[11]

In 1987 the ALRC Produced Report No 38 – Evidence. "In the light of responses received the Commission revised the interim legislation (and) put forward in this report its final proposals".[12]

Following these reports the Commonwealth enacted the *Evidence Act 1995*; which legislation was modeled substantially on that drafted by the Committee in Report No 38. New South Wales followed in the same year with similar legislation, Tasmania did likewise in 2001 and Norfolk Island in 2004. Furthermore the Commonwealth *Evidence Act 1995* itself applies "to all proceedings in a federal court or an ACT court" (s4).

All of these Acts are drafted to a basic pattern. With some minor exceptions, all chapters, parts, divisions and sections are similarly numbered, and the terminology of the sections is the same. Even if the terms of a particular section are excluded in one or other of the Acts, the section number is retained, usually with a note directing attention to the omission. The

[9] See University of New South Wales Law Journal – 1995 – Vol 18 – Remarks of Hon Duncan Kerr, New South Wales Minister for Justice – p X
[10] See Terms of Reference set out in ALRC Evidence (Interim) Report 26.
[11] See ALRC Report No 38 – Evidence (1987) – p XVI

Tasmanian Act puts the situation clearly in section 2.4 "Numbering of the Act" which states that:-

> (1) In order to maintain consistent numbering between this Act and the Evidence Act 1995 of the Commonwealth:-
>
> (a) if the Commonwealth Act contains a section that is not in this Act, that section number and heading are included in this Act despite the omission of the body of the section; and
>
> (b) if this Act contains a section that is not in the Commonwealth Act, that section is numbered so as to maintain consistency in numbering between sections to common to both Acts."

Similarly, where there is a divergence in the terms of a section numbered the same in two statutes, there will be a note to that effect in both statutes. For instance, section 9 of the Commonwealth Act preserves the operation of various State or Territory equity or common law evidential provisions; whereas section 9 of the New South Wales Act provides that such provisions are not affected, "except so far as this Act provides otherwise expressly or by necessary intendment". In both Acts attention is drawn to the differences by an appropriate note at the end of the section.

The result is that, in those States or Territories which have in effect adopted the Commonwealth Act, there is a common pattern which, with the aid of judicial decisions, can assist judges and practitioners in all such jurisdictions in interpreting and applying the legislation under a uniform regime. At the same time, practitioners are specifically directed to any local variations which themselves may ultimately merge in the generality of approach.

[12] IBID p XVI

POSITION OF OTHER JURISDICTIONS

As mentioned above, New South Wales, Tasmania and Norfolk Island have all enacted legislation based on the uniform Evidence Act, and the parent Commonwealth Act also applies to the Australian Capital Territory.

Victoria appears committed to adopting the UEA and the VLRC received Terms of Reference to that effect and worked closely with the ALRC and the NSWLRC in the review of the existing UEA.[13]

A Parliamentary Committee of Western Australia and the Law Reform Commission Western Australia (LRCWA) have both recommended the adoption of the UEA.[14]

The QLRC appears to be moving in the same direction, though, perhaps, not as clearly.[15] A review of the UEA (Report 60 - September 2005) of the QLRC takes a neutral view with the statement at paragraph 1.30:

> "It may be that following such a review, it is considered generally desirable to adopt the uniform Evidence Acts, but that the Queensland position is preferred in respect of certain specific provisions. In that case, consideration should be given to adopting the uniform Evidence Acts with the exception of the specific provisions…"

So far as known South Australia has not yet given any indication as to its stance on adoption of the UEA.

Though prophecy is a dangerous pastime, it might at least be suggested with a modest degree of confidence that present trends point to the ultimate adoption of the UEA in all States and Territories. The convenience, throughout the Commonwealth, of a common approach to the principles of evidence should favour this, as would the advantage of court rulings developing on a common front. It may be unduly optimistic to predict that the process would be swift since, understandably, there is always a reluctance to abandon the familiar for the unfamiliar. Nevertheless, if, as seems likely, more States adopt the legislation, there may be increasing encouragement on the others to do likewise lest, in their splendid isolation, they stand out like an outhouse in the desert.[16]

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[13] "Review of the Laws of Evidence – Information Paper 2004 p2. This also contains the statement that "the justice statement released by the Attorney-General in May 2004 also makes it clear that the Government wishes to implement the UEA".
[14] See ALRC – Discussion Paper – July 2005 – No 69 – at Paragraph 2.2.
[15] Ibid – Paragraph 2.4
[16] The more familiar and pungent Australian simile has here been mildly censored.

One could not, of course, make such a prediction if the jurisdictions in which the UEA had already been enacted had found it unsatisfactory. That does not appear to be so and the legislation has now been in force in the Commonwealth and New South Wales for over a decade. Indeed the recent task of the ALRC, together with the NSWLRC and the VLRC, was to review the Act with the express purpose of increasing its efficiency.

It is of considerable significance that the present, apparently successful, operation of the UEA was achieved only after a most thorough investigation by the ALRC and, subsequently, the NSWLRC. Although consultation with experienced judges, practitioners and academics does not necessarily guarantee a successful outcome, it should at least give one pause before condemnation. The names of the members of the ALRC and the consultants to the Commission for the Reports and Discussion papers of 1980, 1985 and 1987 are set out in those papers and it is fair to say that they represent a great many persons of experience and significance in the law. Furthermore, no-one can read those reports and discussion papers without being impressed by the vast investigation carried out and the careful and detailed case put forward.

It is also worth noting here that one of the strengths of the UEA is the on-going review process. The combined Law Reform Commission report (discussed in further detail below) is the first review of the UEA following its first ten years of operation. One of the first recommendations of that review is that there be a similar process undertaken within ten years of the tabling of the most recent UEA review.[17]

[17] ALRC 102 recommendation 2-3

THE AUSTRALIAN LAW REFORM COMMISSION REPORT

The Terms of Reference given to the ALRC in July 2004 directed the ALRC to have regard to:-

- The importance of maintaining an efficient and effective justice system in which clear and comprehensive laws of evidence play a fundamental role;
- The experience gained from almost a decade of operation of the Uniform Evidence Act scheme; and
- The desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia[18]

Both the NSWLRC and the VLRC received similar references from their respective Attorneys-General and the enquiry was conducted by the joint Commissions.

Following the eighteen month inquiry into the operation of the UEA, the combined Law Reform Commissions submitted their report to their respective Attorney-Generals in December 2005. The report was released to the public in February this year and contains 63 recommendations for reform of the existing UEA.[19] The areas of concern specified in our Terms of Reference were also examined in detail by the Commissions and there are a number of suggestions relating directly to them.

The recommendations in that report are currently being considered in the context of the Standing Committee for Attorneys-General ("SCAG").

[18] See ALRC Discussion Paper 69 - July 2005

[19] The final report of the combined Commissions being ALRC 102, NSWLRC 112, VLRC FR (for convenience hereafter referred to as ALRC report) can be found at:
http://www.austlii.edu.au/au/other/alrc/publications/reports/102/

NORTHERN TERRITORY DISCUSSION AND COMMENT

It is noted that the ALRC, in preparation of its comprehensive report on the UEA, has consulted with a number of practitioners in the Northern Territory.[20]

At the invitation of the ALRC two members of the NTLRC also represented the Northern Territory in discussions leading to preparation of the final ALRC report on the UEA. Representatives from NSWLRC and the VLRC also participated in these discussions and the exercise was an extremely valuable one for our representatives.

The NTLRC informed the Northern Territory legal profession of the Attorney-General's reference via the Law Society publications and individual correspondence, and in March 2006 a Discussion Paper on the issues was circulated. As little response was received it is assumed that the profession is generally in favour, or at least not in such opposition as to inspire submissions to the contrary.

It is noted that the UEA is not something completely unknown to Northern Territory practitioners as it has been in use in the Federal and Family Courts for many years, as well as in a number of federal tribunals. Should the UEA be adopted in the Northern Territory it is hoped that these individuals will be able to pass on some of this practical experience to others in the legal profession.

If the UEA is to be adopted in the Northern Territory, then, the sooner the better.[21] Practitioners should not have to change gears continually, changing depending upon whether they were appearing in a Territory or a Federal Court.

[20] see ALRC Discussion Paper 69, Appendix 4 "List of Consultations"
21 MACBETH – Act 1, Se VII, LL1-2

COMPARISON: UEA AND NT EVIDENCE LAWS

It should be noted that this section is not an attempt to explore or explain all of the differences that exist as between the UEA and the current Northern Territory *Evidence Act* (NTEA). That task would be a massive one, and given that the debate is not about what elements of the UEA should be adopted but rather whether a uniform Act should be adopted, it would not serve a great purpose. This section and the annexures aim therefore only to identify some of the more important differences between the two schemes, with a focus on the provisions that we currently have here and the way in which they would be altered, or other ways in which they could be accommodated under the UEA.

Perhaps the major difference between the NTEA and the UEA is the very assumptions or bases of the respective Acts.

As previously pointed out, the NTEA is the product of several hundred years of sporadic reactions to individual instances. If there is a basic philosophy it is difficult to ascertain.

The starting point for the UEA is the relevance of evidence, with a general inclusionary rule that states that relevant evidence is admissible. According to section 55 evidence that is relevant is evidence that, if accepted, "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

If the evidence passes this first threshold the court progresses to consider other questions and rules. The questions that are then asked in respect of relevant evidence are set out clearly and simply in the flow chart extracted from the UEA and annexed to this report (Annexure "A").

The relevant evidence will be considered against the hearsay and opinion rules, tendency and coincidence, credibility and so on, until it is finally deemed to be admissible or inadmissible.

The UEA is concerned to ensure that the best available evidence is available to the fact-finding tribunal.

Some of the finer points of a number of these rules are considered below, along with the ALRC recommendations for change.

Large parts of both the UEA and NTEA are similar in effect if not always in content. This is because they follow rules developed over many years, and generally accepted in common law jurisdictions. Thus Part II of the NTEA headed "Witnesses" is very similar in its practical

operation to Part 2.1 of the UEA, also headed "Witnesses"; but the UEA provisions often go into greater detail and give greater scope for testing admissibility.[22]

Similarly the provisions of Part IV of the NTEA headed "Public Acts and Documents" can be contained within Part 2.2 of the UEA which, however, has a much wider operation.

The UEA includes various provisions which do not appear in the NTEA e.g. "Client Legal Privilege" and "Standard of Proof". That is not to say that these and various other matters do not exist in the Northern Territory, but rather that they can be found in other statutory provisions or in the common law. In these cases, either the broad similarity in both Acts, or the inclusion of various matters in the UEA which are not included in the NTEA, is a strong argument for the adoption of the UEA. In the former case the similar provisions appear in a more comprehensive form in the UEA and in the latter case, the greater scope given to the UEA by the inclusion of matters not in the NTEA makes the UEA easier to reference and gives a more complete picture. Both cases then have the advantage that the UEA provisions are the result of recent and extensive studies which will be enhanced by the present on-going review for further improvement.

[22] c.f s9 (5) and 9 (6) of the NTEA - competency and compellability of "spouses" in criminal proceedings with s18 of the UEA which gives spouses, de facto spouses, parents or children of the defendant the right to object to give evidence as a witness for the prosecution; but subject to the court permitting or refusing the application upon certain tests.

KEY ASPECTS OF OPERATION OF THE UEA

HEARSAY

Section 59 of the UEA excludes hearsay generally. The UEA then provides exceptions to this rule. The results of the operation of these exceptions will usually coincide with the operation of the common law although in some instances more material will be admissible under the UEA than previously.

The additional categories of hearsay evidence that the UEA makes admissible include, firstly, evidence admitted for a non-hearsay purpose may be admissible for a hearsay purpose; secondly, first hand hearsay (where the maker has personal knowledge of the asserted fact) evidence will often be admissible. Safeguards that apply to the admissibility of all evidence, including hearsay, are built into the UEA in Sections 135 to 137.

The UEA also allows hearsay evidence in relation to Aboriginal and Torres Strait Islander traditional laws and customs and in family law proceedings.

Of the safeguards, Sections 135 to 137 of the UEA provide that in both civil and criminal proceedings the court has a wide discretion to reject or limit the use of any evidence if it is unfairly prejudicial to a party, is misleading or confusing, or will cause or result in a waste of time.

As to the first exception mentioned above, section 60 of the UEA applies where evidence is relevant for both a non-hearsay and a hearsay purpose. The intention of section 60 was to enable evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, and to do so whether or not the evidence is first-hand or more remote hearsay, subject to the controls provided by sections 135-137.

The operation of this potentially wide ranging provision has been significantly restricted by the High Court in *Lee v The Queen* (1998) 195 CLR 594. Now evidence tendered for a non-hearsay purpose is treated as other hearsay evidence when considering what evidential value the evidence can have. It should be noted that the 2005 ALRC UEA Report recommended that the decision in Lee be reversed by statute. This dispute has yet to be resolved.

As to the second exception mentioned above, sections 62 to 66 make first hand hearsay admissible in certain circumstances. The rules differ as between civil and criminal proceedings but broadly:

- the hearsay must have been made by a person with reliable personal knowledge of the facts;
- if the maker is not available detailed provisions govern the admissibility;
- reasonable notice in writing to the opposing party must be given by the party seeking to use the hearsay evidence;
- the admissibility safeguards in sections 135-137 apply to this category of evidence.

The provisions allowing for the admission of a previous representation where the maker is unavailable has the potential to be an effective tool in many proceedings, especially criminal matters in the Northern Territory.[23] It is interesting to note a recent exception to the hearsay rule enacted by the Northern Territory *Evidence Reform (Children and Sexual Offences) Act 2004*.[24]

TENDENCY AND COINCIDENCE EVIDENCE

The tendency rule, set out in section 97 of the UEA, generally excludes evidence of character, reputation or conduct for use as proof of a tendency to act in a particular way, or have a particular state of mind. The coincidence rule, established in section 98 means that evidence that two or more related events occurred can not be admitted 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.

Two or more events are taken to be related (for the purposes of consideration under the coincidence rule), "if and only if… they are substantially and significantly similar; and the circumstances in which they occurred are substantially similar."

Both the tendency and coincidence rules in the UEA have exceptions, so that such evidence may be admitted if the requirement of reasonable notice of intention to adduce such evidence is met (although there is provision for dispensing with this requirement), or the evidence has, in the opinion of the court, significant probative value.

[23] it is also worth noting that the ALRC report 102 recommends some changes to this rule, including a broadening of the definition of unavailable. See recommendation 8-2

[24] See discussion of the NTEA by Martin C.J in CPD 20/06/06.

Section 101 of the UEA applies further restrictions to the use of tendency and coincidence evidence in criminal matters. Under this section tendency and coincidence evidence can only be used by the prosecution if, in addition to meeting the requirements under sections 97 or 98 the "probative value of the evidence substantially outweighs any prejudicial effect it may have on the (defendant)".

The application of this section has been the subject of much court room debate in recent times. The argument has centred around whether the common law tests in *Hoch v The Queen* (1988)165 CLR 292 and *Pfennig v The Queen* (1995) 182 CLR 461 should be applied in considering the operation of section 101. The test in *Hoch* and *Pfennig* is that the evidence must be of such probative value that if it is accepted "it bears no reasonable explanation other than the inculpation of the accused in the offence charged".[25]

The New South Wales Court of Criminal Appeal in *R v Ellis* (2003) 58 NSWLR 700 took the view that the common law tests do not apply to the UEA provision.[26] The New South Wales Court of Criminal Appeal interpretation is supported by the fact that the High Court reversed its decision to grant leave to appeal in the matter, indicating that it agreed with the New South Wales Court of Criminal Appeal position.

CREDIBILITY

By Part 3.7, section 102 of the UEA "(e)vidence that is relevant only to a witness's credibility is not admissible." Subsequent sections of Part 3.7 specify exceptions to the general rule. The exceptions echo, but are not the same as, the common law position in respect of evidence going purely to credit.

The recent ALRC UEA Report has proposed refinements/additions to the UEA affecting: evidence relevant to credit adduced in cross examination; cross examination of an accused as to character; the operation of the UEA's equivalent of the 'finality' rule; and adducing expert evidence affecting credibility.

PRIVILEGE

Under the UEA several privileges, generally reflecting ones that exist at common law, are recognised.

Presently the privileges under the UEA apply only to the adducing of evidence and as such their operation is almost exclusively in the context of trials. This means that privilege issues

[25] At 481, as quoted in ALRC Discussion Ppr 69 at p 303

affecting processes such as discovery and forensic devices such as subpoenas for the production of documents (where returned prior to trial) continue to be determined according to the common law.

The ALRC Report has recommended that most of the privilege rules under the UEA should be extended in their application to the pre-trial stages of a proceeding.

The ALRC Report recommends certain alterations and additions to the Uniform Acts that will bring their provisions into line with the common law as it is currently applied. The proposed changes will make clear that 'client legal privilege' (as it is described in the UEA) will extend to advice provided by lawyers without a practising certificate and to 'third party communications'. In addition, the provisions concerning waiver of privilege - presently confined to circumstances where the substance of the subject communication is "knowingly and voluntarily" disclosed - are proposed to be extended so as to include circumstances where the holder of the privilege has "otherwise acted in a manner inconsistent with the maintenance of the privilege".

The ALRC Report proposes the recognition, both in civil and criminal proceedings, of a 'sexual assault communication privilege' and a 'professional confidential relationship privilege'.[27] The proposed privileges, which would apply both before and at trial in civil and criminal proceedings, would operate subject to an overriding discretion of the Court.

The UEA presently contains provisions that define and qualify the operation of a privilege against self incrimination. The present system (involving the Court issuing certificates to witnesses who choose or are compelled to give evidence that would attract the privilege) has proven unwieldy and is the subject of several recommendations in the ALRC Report.

Legal professional privilege and the way in which it is defined is not only a matter of concern in relation to evidence in court proceedings. It has been pointed out in submissions to the Committee that if the common law definitions were to be replaced by the UEA consideration should be given to the way in which the privilege was defined in other statutory schemes such as the *Information Act*.[28]

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[26] citing in part from *Papakosmas v The Queen*, and referring to inconsistencies in requirements between UEA and common law – see discussion paper at p304

[27] A professional confidential relationship privilege would affect communications that are presently protected by the Evidence Act (NT) - cf s12. see also discussion below on existing provisions of the NTEA.

[28] Submission from Information Commissioner dated 04 May 2006

COMPETENCE AND COMPELLABILITY

The UEA differs in its approach from the NTEA on a number of issues concerning competence and compellability of certain classes of witness. The UEA provides that a defendant in criminal proceedings is not competent to give evidence as a witness for the prosecution, whereas the NTEA (section 9) provides that a Defendant is not liable to be called where the defendant is charged with an indictable offence. Whether an indictable or summary prosecution, the question of a defendant giving evidence for the prosecution practically arises only when there is more than one defendant. The UEA provides specifically that an associated defendant is not compellable to give evidence against a defendant unless tried separately.

The UEA sets out a procedure for a spouse, de facto spouse, parent or child of a defendant who is called to give evidence for the prosecution and objects to giving evidence. If the court finds that harm might be caused to the person or the relationship and that harm outweighs the desirability of the evidence being given, the court may direct that the person is not required to give the evidence. A number of UEA jurisdictions have specified offences that are excluded from this provision, for example, domestic violence offences and offences against children. The court is required to have regard to specified criteria before making the decision. The NTEA has no comparable provision; spouses are currently competent and compellable witnesses in all circumstances. There has never been any specific cover of witnesses who may be parents or children of a defendant.

IDENTIFICATION EVIDENCE

Part 3.9 of the UEA sets out the rules governing the admissibility of identification evidence. The UEA provisions are limited to criminal proceedings.

The rules in the UEA reflect, but strengthen and consolidate, the common law, in effect making the holding of an identification parade a precondition to the admission of all other forms of identification evidence unless an exception applies. Such exceptions include the reasonableness of holding an identification parade and whether the accused refused to take part in an identification parade.

Picture identification evidence is admissible but only where it would have been unreasonable to hold an identification parade. The UEA regulates such issues as old photographs and mandatory warnings by the trial judge at the request of the defence.

FURTHER DIFFERENCES BETWEEN THE UEA AND NT EVIDENCE LAWS

For convenience a comparison of substantive provisions of the UEA and the NTEA is set out in Appendix B, along with a comparison of definitions in Appendix C.

One of the main differences between the two schemes is the fact that the NTEA does of course have numerous provisions that deal with the evidence of children. These include, in section 26E, the exception to the rule against hearsay evidence in proceedings related to sexual offences. The ALRC Report considered the positions in the various jurisdictions as they relate to children's evidence and concluded that not only was it unnecessary for all provisions relating specifically to children's evidence to be included in the UEA, but it did not make any recommendations as to the content of the relevant provisions. Instead the ALRC recommended that the status quo continue and further work be undertaken in this area, with a view to harmonisation of provisions throughout the country.[29]

In the area of the evidence of vulnerable witnesses more generally the Northern Territory has a separate part in the NTEA that deals with these persons (Part IIA). It must be noted however that these provisions are in the main procedural and could (and should) therefore be accommodated elsewhere should the UEA be adopted.

The NTEA also contains Part VIA which deals with Confidential Communications, specifically communications between an alleged victim of a sexual assault and his/her counsellor, or by other parties in relation to the victim. There is currently no equivalent to these Northern Territory provisions in the UEA. That said, there are a number of recommendations in the ALRC Report that deal with this type of communication and recommend change to the UEA. It is not yet known whether these recommendations will be taken up by those jurisdictions that currently operate under the UEA, however if they are not it would be possible for our current provisions to be retained, albeit in another Act.

Other examples of topics contained in the current NTEA that are not included in the UEA are ADIS' Books (part V) and Use of Communication Links (Part VI). Again, no problem would arise if these sections were to be re-enacted in separate statutes. Indeed purists might maintain that these, and other provisions mentioned above, are matters of procedure rather than evidence. Nothing in the UEA suggests that such individual statutes would in any way conflict with the UEA itself. Again, the UEA is not a code.

[29] See ALRC recommendation 2-2, and discussion at pages 690 -691

There is precedent for this course. New South Wales for instance, has separate statutes dealing with evidence such as the *Evidence on Commission Act 1995* and *Evidence (Children) Act 1997*. As well, the New South Wales *Criminal Procedure Act 1986* includes provisions for evidence in sexual assault proceedings and the *Evidence (Audio-Visual and Audio-Visual Links) Act 1998* deals with more advanced means of communication.[30] Examples from Tasmania are *Evidence of Children and Special Witness Act 2001*, and *Evidence on Commission Act 2001*.

Insofar as the Northern Territory has any local common law the most obvious example would be the "ANUNGA" Rules propounded by Forster CJ and Muirhead J of NTSC. It has never been deemed necessary to include the rules in the NTEA, presumably because they have always been accepted by Northern Territory courts since their inception.[31] Again, bearing in mind that the UEA is not a code, there is no reason to interfere with these rules in any way and no reason to suppose that they will be any less effective under the UEA regime.

Some areas in which the UEA arguably improves on the common law in the Northern Territory and NTEA are in the areas of unavailable witnesses and the old-style "hostile witness" provisions.

[30] Odgers – Uniform Evidence Law sets out the separate New South Wales Acts in this category.
[31] It is true that one magistrate announced that these Rules were against the common law and not practicable, but he was politely but firmly brought into line by Muirhead J in Coulthard v Steer 1981 – Unrep. Judgements SC – p170

DISCUSSION OF DIFFERENCES

The real and significant difference between the UEA and the Acts of other States and Territories is the broader approach of the UEA to the whole subject of evidence based on an analysis of its underlying philosophy and its application to the court process. The examination is concerned with how far this general concept of evidence can be translated into its statutory form based on sound principles, and within appropriate boundaries, to assist the court in arriving at the truth according to law.

It does not need "Jesting Pilate" to ask the obvious question; but insofar as the law of evidence is concerned and insofar as an answer can be given, it may appear in the remarks of Professor Julius Stone:-

> "The ultimate purpose of the law of evidence today is to ensure that the facts or facts found to which the court is to apply the rules of substantive evidence, are more likely to be true rather than false. It seeks approximate rather than absolute truth, for it recognises that the latter is unattainable in the time, and with the investigators, informants and methods available. Unless this distinction between absolute truth and judicially obtainable truth is made, the entire law of evidence makes nonsense."[32]

These remarks point to the limits within which the law of evidence can operate, and it is the achievement of the UEA that these limits are more clearly defined; though bearing in mind these further observations of the learned Professor:

> "One view is that the truth should be sought along any path where a perfect human reason might find it. The other, that, at certain points the human reason generally becomes imperfect, and that, at such points it is prepared to stop the search rather than risk the errors produced by such imperfections."[33]

[32] Stone – Evidence – Its History and Policies – 1991 Ed – Butterworths – p59
[33] Ibid P59

CONCLUSION

No system of evidence can be regarded as perfect, because the boundaries blur and borderline cases will always occur. Nevertheless, it seems accepted that the UEA, springing from intensive research and inquiry, has moved much further and with greater rationale from the pre-1995 situation. Various commentators have recognised that the way now can only be forward.

> "Imperfect though they undoubtedly are, the Acts (UEA) and the case law they have generated now constitute a new law of evidence from which there cannot realistically, be a retreat. The Acts are here to stay, albeit with modification, and their eventual adoption by other States and Territories may be inevitable, although it is not imminent."[34]

> "As well as promoting uniformity, the (UEA) Acts were intended to widen the scope of admissibility of evidence. Most legislative change in the area of evidence in recent years has been designed to achieve this end; to limit the scope and operation of one or more of the various rules of exclusion. Irrespective of whether the Commonwealth and New South Wales Acts are adopted in other jurisdictions, it is likely that this broad trend will continue, and that the law of evidence may move closer to its ideal of a wholly rational body of rules and principles designed to aid the courts in their discovery of the truth".[35]

> "The (UEAs) attempt to simplify the law and to organise it in a rational and coherent way".[36]

[34] Jill Anderson, Jill Hunter and Neil Williams SC – "The New Evidence Law" - Butterworths – 2002 – Introduction p XIX
[35] Wright and Williams – "Evidence – Commentary and Materials" – 6th Edition – Law Book Company p2
[36] Smith, J – More Things Change" – p4

RECOMMENDATIONS

After taking account of the current situation in relation to evidence law in the Northern Territory, considering material supplied by the ALRC, the NSWLRC and the VLRC in their impressive and comprehensive combined reports, and report of the QLRC, and making available to the legal profession of the Northern Territory and certain other interested parties the Discussion Paper of March 2006, the Northern Territory Law Reform Committee recommends:

1. that the UEA be adopted in the Northern Territory;

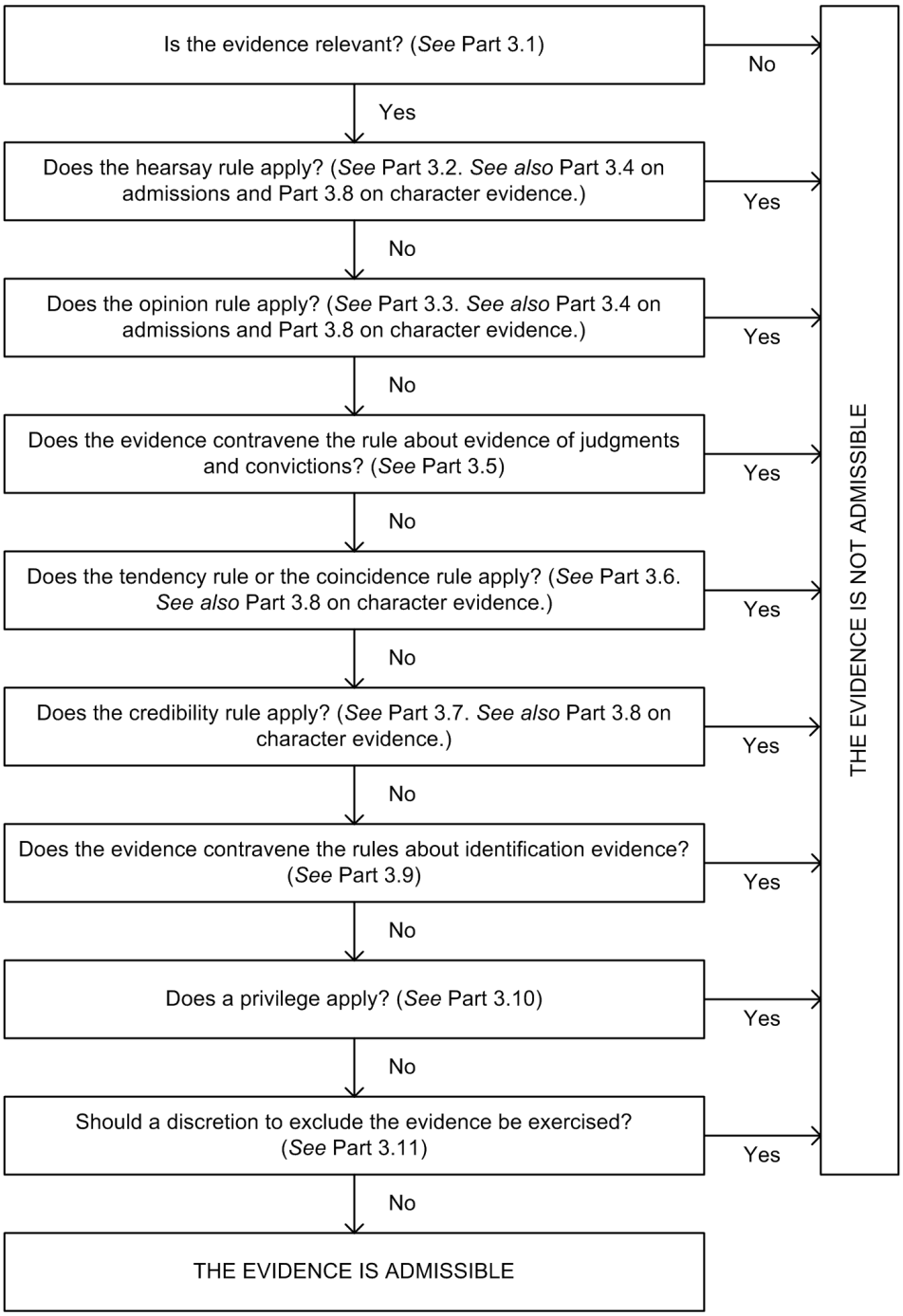
2. that, if considered necessary, elements that currently exist in the NTEA which do not fit within the UEA as being more properly procedural be excised from the NTEA and reproduced as separate statutes (this procedure has already been adopted in New South Wales and Tasmania as discussed);

3. that if the UEA is adopted into Northern Territory legislation there be a period of one year from the date of the passing of the Act and associated reforms by parliament and the commencing date of operation;

4. that co-operation be fostered between the legal profession of the Northern Territory and the Northern Territory Department of Justice to facilitate progress towards acceptance and understanding of the UEA;

5. that recognising that a representative of the Northern Territory Department of Justice is working with the SCAG working group to consider the amendments to the UEA arising from the ALRC report 102, that such work continue and be considered along with this Report in the adoption of the UEA.

APPENDIX A


Is the evidence relevant? (See Part 3.1)
No
Yes
Does the hearsay rule apply? (See Part 3.2. See also Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the opinion rule apply? (See Part 3.3. See also Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rule about evidence of judgments and convictions? (See Part 3.5)
Yes
No
Does the tendency rule or the coincidence rule apply? (See Part 3.6. See also Part 3.8 on character evidence.)
Yes
No
Does the credibility rule apply? (See Part 3.7. See also Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rules about identification evidence? (See Part 3.9)
Yes
No
Does a privilege apply? (See Part 3.10)
Yes
No
Should a discretion to exclude the evidence be exercised? (See Part 3.11)
Yes
No
THE EVIDENCE IS ADMISSIBLE
THE EVIDENCE IS NOT ADMISSIBLE

APPENDIX B

Comparisons between the *Northern Territory Evidence Act* and *Uniform Evidence Act*

Substantive Sections Compared

Northern Territory Evidence Act (NTEA)	***Uniform Evidence Act (UEA)***
S.5 – Application of Act	Part 1.2 - Application of this Act (sections 4 - 11)
S.6 – Witness not disqualified by interest or crime	S.12 – Competence and compellability
S.7 – Parties, their wives and husbands compellable as witnesses in civil proceedings	S.12 – Competence and compellability S.18 – Compellability of spouses and others in Criminal proceedings generally S.19 – Compellability of spouses and other in certain criminal proceedings
S.8 – Evidence as to adultery	Not included, but see S.12 – Competence and compellability
S.9 – Competence and compellability to give evidence in criminal proceedings	S.17 – Competence and compellability: defendants in criminal proceedings S.18 – Compellability of spouses and others in criminal proceedings generally
S.9C – Particular form of corroboration warning not to be given (children)	S.164 – Corroboration requirements abolished
S.10 Incriminating questions	S.128 – Privilege in respect of self – incrimination in other proceedings (not absolute – see S128(5))
S.12 – Communications to clergymen and medical men	S.127 – Religious confessions (privileged: but no provision for medical practitioners)
S.13 Vexations and irrelevant questions in cross-examination may be disallowed	S.41 – Improper questions S.56 – Relevant evidence to be admissible
S.14 – Disallowance of certain questions in cross-examination	Part 3.1 – Relevance Sections 55 - 58

S.15 – Relevance in relation to the credibility of witnesses	Part 3.7 – Credibility Sections 102 - 108A
S.16 – Disallowance of scandalous and insulting questions	S.26 – Courts control over questioning of witnesses S.41 – Improper questions
S.17 – Disallowed etc questions not to be published	S.195 – Prohibited questions not to be published
S.18 – How far a party may discredit his own witness	S.368 – Unfavourable witnesses
S.19 – Proof of contradictory statements of witnesses	S.43 – Prior inconsistent statements of witnesses
S.20 – Cross-examination as to previous statements in writing	S.45 – Production of documents, (particularly S45(1)(A))
S.21 – Non-appearance of witnesses	S.194 – "Witnesses failing to attend proceedings". (This is the headline to a section which contains no further provisions. It merely notes that the NSW Act does contain provisions about witnesses failing to appear.)
S.21A – Evidence of vulnerable witnesses. (This section sets out various arrangements by which a "Vulnerable witness" defined in S.21A(1) and including a witness under 16 years of age, can give evidence outside a courtroom)	There is no equivalent section in the Commonwealth Evidence Act. Possibly the court could make similar arrangements pursuant to S.26(a) Sed Dubitante, and the court has control over "improper questions" (see particularly S.41(2)). Note, however, Part 1AD of Commonwealth Crimes Act providing for protection of child witnesses in certain sexual offence cases. The NT section seems wider and more satisfactory.
S.22 – Comparison of disputed writing or signature	No specific section. May be assumed as a rule of common law. c.f. Goward v Gee (1943) QWN7
S.23 – Attesting witness need not be called in certain cases	S.48 – Proof of contents of documents

S.25 – Discovery in defamation action (tendency to criminate)	S.187 – Abolition of the privilege against self-incrimination for bodies corporate.
S.26A – Proof of commission of offence S.26C – Evidence of rape etc.	S.178 – Convictions, acquittals and other judicial proceedings
S.26D – Admissibility of documentary evidenceas to facts in issue	S.63 – Exceptions (to the hearsay rule): in civil proceedings if maker not available S.64 – Exceptions (to the hearsay rule) if maker not available
S.26F – Weight to be attached to evidence	Part 3.11 – Discretion exclude evidence Sections: 135,136,137, 138
S.26G – Proof of instrument to validity of which attestation is necessary	S.149 – Attestation of documents S.150 – Seals and signatures S.151 – Seals of bodies established under State law
S.26H – Presumptions as to documents 20 years old	S.152 – Documents produced from proper custody (20 Years old)
S.26L – Determination of admissability before jury impanelled.	No general rule laid down. S.18 and S.132 do provide for absence of a jury in determining matters under those sections. Otherwise seems to be left to general powers of the court under S.11
S.27 – Acts of state	Dictionary - ”public documents” and see also “Matters of official record” Sections 153 – 158
S.27A – Proof of certain statutes	“Maters of official record” Sections 153,154,155
S.28 – Judgements etc of British, Colonial and Foreign Courts	S.157 – Public documents relating to court processes
S.28A – Proof of instruments and executive acts	“Matters of official record” Particularly Sections 153, 155,155A and 156
S.28C – Proof of Gazette	S.153 – Gazettes and other official documents

S.28D – Proof of printing by Government Printer	S.153 – Gazettes and other official documents. In particular - S153 (1) (b)
S.29 – Public Documents	S.156 – Public Documents
S.30 – Non-Territory documents	c.f. – S.158 – Evidence of certain public documents
S.32 – Findings of guilt acquittals and other criminal proceedings	S.157 – Public documents relating to court processes
S.33 – Proof of identity in cases of previous findings of guilt in Courts of Summary Jurisdiction	No specific reference to courts of Summary Jurisdiction but general proof of identity provided by S.179 – Proof of Identity of convicted persons – affidavits by members of State or Territory police forces, and S.180 – Proof of identity of convicted persons – affidavits by AFP employees or special members of the Australian Federal Police.
S.33A – Proof of identity of person found guilty in a state or in any other Territory.	See above – Sections 179 and 180
S.34 – Ships articles and registers of Ships	No specific reference and the definition of ”public documents” does not cover the case. Possibly S.147 – documents produced by processes, machines or other devices in the course of business, particularly S.147 (Z). Sed quaere. Otherwise c.f. S.48
S.35 – Bills of lading	See above
S.36 – Judicial notice of certain signatures	S.150 – Seals and signatures (scope is wider than the NT Act)
S.39 – Probate and letters of administration	Possibly comes with the definition of “Public document” – see subparagraph (C) of the definition. If so, then S.158 – Evidence of certain public documents.
S.42 – Impounding of documents	No specific section. Probably implied under general power of the court eg S.11

S.42A – Statement of wages to be evidence	No specific section but probably covered by S.69 – business records
S.42B – Conditions under which print from photographic film admissible in evidence	c.f. S.48 – Proof of contents in documents eg. S.48(1)(b), (c), and (d). See also S.146 – evidence produced by processes machines and other devices, and S.147 – Documents produced by processed, machines and other devices in the course of …….
<u>Part IV – Crown Privilege</u> S.42C – Definitions of "disclosure" S.42D – Certificate of Attorney-General. Such a certificate creates an absolute privilege of the A-G that the document is not to be diclosed in evidence and court <u>cannot</u> exercise its own discretion. See particularly S.42D (2), and see also S.42F (3) S.42E – Attorney-General to be given opportunity to give certificate (under S.42D (1))	 No similar section S.130 – Exclusion of evidence of matters of state. Court <u>has</u> discretion to allow or disallow such evidence See above
S.42F – Certain oral evidence not to be given. (This relates to S.42D and note S.42F(3)	See above
S.42G – This Part not to limit other laws	See above
S.43 – Evidential effects of entries in ADIs books and copies thereof	No specific reference to ADIs books but probably subsumed into S.47 and S.48 and c.f. S.69 – business records.
S.44 – Proof that book is a ADIs book	See above
S.45 – Verification of copy (of entry in an ADIs book)	See above
S.45A – Proof that person has no ADI account	See above
S.45B – Application of last 4 preceding sections	See above

S.46 – ADI may not be compelled to produce books unless under order	See above
S.47 – Inspection of ADIs books	See above
S.48 – Costs (under this Part ie Part V – ADIs books)	See above
Part VA – Use of Communication Links S.49 – INTERPRETATION	
"audio link"	Not defined
"audio visual link"	Not defined
"communication link"	Not defined
"participating state"	Not defined
"recognised court"	Not defined but c.f. definition of "Australian Court" in the dictionary
"state" includes territory	Not defined but c.f. definition of "Australian Law" and "Australian Parliament" in the dictionary
"Territory court"	Not defined in the detail set out in NTEA but c.f. definition of "Australian Court" in the dictionary
S.49A – Transitional	SD.2 – Commencement

S.49B – Application of Part (VA)	Not included
S.49C – Rules of Court	S197 – Regulations
S.49D – Application of (this) division	Not included
S.49E – Territory courts may take evidence etc from outside courtroom or place where court is sitting	Not included
S.49F – Appearance, giving evidence or making submissions by audio visual link	Not included
S.49G – Appearance, giving evidence or making submissions by audio link	Not included
S.49H – Appearance, giving evidence or making submissions by visual link	Not included
S.49I – Premises to be considered part of Court	Not included
S.49J – Expenses	Not included
S.49K – Administration of Oaths or affirmations (by communication link)	Not included
S.49L – Putting documents to remote person	Not included

S.49M – Putting objects to remote person	Not included
S.49N – Application of (this) division	Not included
S.49P – Territory Courts may take evidence and submissions from outside Territory	Not included
S.49Q – Giving evidence or making submissions by audio visual link	Not included
S.49R – Giving evidence or making submissions by audio link	Not included
S.49S – Expenses	Not included
S.49T – Counsel entitled to practise	Not included
S.49U – Application of (this) decision	Not included
S.49V – Recognised courts may take evidence or receive submissions from persons in Territory (by audio visual link)	Not included
S.49W – Powers of recognised courts	Not included
S.49X – Orders made by recognised courts	Not included

S.49Y – Enforcement of order	Not included
S.49Z – Privileges, protection and immunity of participants in proceedings in courts of recognised states	Not included
S.49ZA – Recognised court may administer that in Territory	Not included
S.49ZB – Assistance to recognised court	Not included
S.49ZC – Contempt of recognised courts	Not included
Part VI – Evidence on Commission	No included (but c.f. NSW – *Evidence on Commission Act 1995*)
S.50 – Order for taking of evidence	See above
S.51 – Admissiblity of evidence	See above
S.52 – Application to SC for order to obtain evidence	See above
S.53 – Power of SC to give effect to application	See above
S.54 – Privilege of witnesses	See above

S.55 – Offence of giving false evidence (under this part)	See above
Part VI A – Confidential Communications (to or by counsellors)	Not included, but c.f. the definition of "confidential communication" in S.117 and S.120
S.56 – Definitions	
(S.56) "Committal Proceedings"	Not defined
(S.56) "Confidential communication" (to or by counsellors)	S.117 – "confidential communication"
(S.56) "counsellor"	Not defined
(S.56) "harm"	Not defined
(S.56) "party to a confidential communication"	Not defined, but see definition of "party" in S.117
(S.56) "victim"	Not defined
S.56A – Application of (this) part	Not applicable
S.56B – Protection of confidential communication	Not applicable, but c.f. Part 3.10 – Division 1 – Client legal privilege

S.56C – Notice of intention to apply for leave to ……or produce evidence	Not applicable
S.56D – Procedural matters relating to application for leave	Not applicable
S.56E – Giving leave to adduce or produce evidence of confidential communication	Not applicable
S.56F – Limitation on privilege under this part	Not applicable
S.56G – Ancillary orders where evidence of confidential communication to be adduced or produced	Not applicable
S.57 – Prohibition of the publication of evidence and of names of parties and witnesses	Not specifically included but c.f. S.195 – Prohibited questions not to be published – and presumably also under S.11 – General Powers of a court.
S.58 – Temporary prohibition of the publication of evidence where witnesses ordered out of court.	Not specifically included but c.f. S.11 – General powers of a court.
S.59 – Penalty for breach of order under S.57 or S.58	c.f. S.196 – Headed ”proceedings for offences”, but with no accompanying words.
S.62 – Proof of “public place” in certain cases	Mot included – but c.f. Chapter 4 – Division 2 – Matters of official record
S.62A – Proof of being within municipality etc.	Not included – but see above
S.63 – Foreign Law	S.174 – Evidence of foreign law

S.64 – Reference by Court to books etc. or official certificates in certain matters relating to posts and telegraph, locality and distance	c.f. S.182 – Application of certain sections in relation to Commonwealth records, postal articles sent by Commonwealth agencies and certain Commonwealth documents
S.65 - Regulations	S.197 - Regulations

APPENDIX C

Comparisons between the *Northern Territory Evidence Act* and *Uniform Evidence Act*

Definitions

Northern Territory Evidence Act (NTEA)	***Uniform Evidence Act (UEA)***
S.4 – ADI's Book	Not defined
S.4 "Court" "includes any Court, Judge or Magistrate or Justice, and any arbitrator or person having authority by law or by consent of parties to hear, receive or examine evidence"	Dictionary – Part 1 – Definitions S.3 "federal court means (a) the High Court; or (b) any other court created by the Parliament (other than the Supreme Court of a Territory); and includes a person or body) other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence. Note: The NSW Act does not include this definition."
	"Australian Court" means (a) The High Court; or (b) A court exercising federal jurisdictions; or (c) A court of a State or Territory; or (d) A judge, justice or arbitrator under Australian law (e) A person or body authorised by an Australian law or by consent of the parties, to hear, receive and examine evidence; or (f) A person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence See also: "ACT Court": "Foreign court".

S.4 ”Document” means Any record of information and includes, in addition to a document in writing – (a) any book, map, plan, graph or drawing; (b) any photograph; (c) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other devices) of being reproduced therefrom; and (d) any film, negative, disc, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom;	S.3 Dictionary “document” , means any record of information, and includes: (a) anything on which there is writing; or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or (d) a map, plan, drawing or photograph. (See also clause 8 of part 2 of this dictionary the meaning of “document”) Clause 8 of part 2 is headed <u>“Reference to documents”</u> A reference in this Act to a document includes a reference to: (a) any part of the document; or (b) any copy, reproduction or duplicate of the document or of any part of the document; or (c) any part of such a copy, reproduction or duplicate See also Part 2.2 S.47 – Definitions A reference in this part to a “document in question……”
S.4 “examined copy”	Not defined
S.4 “judge” – includes the members of any court	Dictionary – “judge” In relation to a proceeding means the judge, magistrate or other person before whom the proceeding is held.
S.4 “legal proceeding” or “proceeding”	Not defined
S.4 “person acting judicially”	Not defined

S.4 “sexual offence”	Not defined
S.4 “statement”	Not defined
S.49 “in this part”	
S.49 “audio link”	Not defined
S.49 “audio visual link”	Not defined
S.49 “communication link”	Not defined
S.49 “participating state”	Not defined
S.49 “recognised court”	Not defined
S.49 “State” – includes Territory	Not defined
S.49 “Territory court”	Not defined, but c.f. in dictionary: (a) “Australian court” (b) “federal court” (c) “ACT court” (d) “foreign court”
S.49 “Tribunal”	Not defined
S.49 “visual link”	Not defined
S.56 “In this part”	
S.56 “committal proceedings”	Not defined
S.56 “confidential communication”	Dictionary – “confidential communication” - S.117
S.56 “counsellor”	Not defined
S.56 “harm”	Not defined
S.56 “party to a confidential communication”	c.f. S.117
S.56 “victim”	Not defined
Evidence Amendment Act 2003	

S.4 – inserts in the original Act – S.24 S.24 (11) "in this section"	
S.24 (11) "business day"	Not defined
S.24 (11) "criminal proceeding"	Not defined
S.24 (11) "DNA profile"	Not defined
S.24 (11) "hearing day"	Not defined
S.24 (11) "laboratory"	Not defined
S.24 (11) "records of a laboratory"	Not defined
S.24 (11) "Reporting scientist"	Not defined
Not defined	"ACT court"
Not defined	"admission"
Not defined	"asserted fact"
Not defined	"associated defendant"
Not defined	"Australia" – includes the external territories
Not defined	"Australian court"
Not defined	"Australian law"
Not defined	"Australian or overseas proceeding"
Not defined	"Australian parliament"
Not defined	"Australian statistician"
Not defined	"business"
Not defined	"case of a party"
Not defined but c.f S.21a "vulnerable witness" includes: (a) a witness who is under 16 c.f. S.21B – child witness	"child"
Not defined	"civil proceeding"

Not defined	“client”
Not defined	“coincidence evidence”
Not defined	“coincidence rule”
Not defined	“Commonwealth agency”
Not defined	“Commonwealth document”
Not defined	“Commonwealth owned body corporate”
Not defined	“Commonwealth record”
S.56 “confidential communication”	“confidential communication” S.117
Not defined	“confidential document”
Not defined	“credibility of a person who has made a representation…”
Not defined	“credibility of a witness”
Not defined	“credibility rule”
Not defined	“criminal proceeding”
Not defined	“cross-examination”
Not defined	“cross examiner”
Not defined	“de-facto spouse”
Not defined	“examination-in-chief”
Not defined	“exercise of a function”
Not defined	“fax”
Not defined	“federal court”
c.f. S.4 “court”	“foreign court”
Not defined	“function”
c.f. S28C “proof of gazette”	“government or official gazette”
Not defined	“hearsay rule”
Not defined	“identification evidence”

Not defined	”investigating official”
Not defined	“joint sitting”
S.4 “judge	“judge”
Not defined	“law”
Not defined	“lawyer”
Not defined	“leading question”
Not defined	Legislative Assembly”
Not defined	“offence”
Not defined	“official questioning”
Not defined	“opinion rule”
Not defined	“parent”
Not defined	“picture identification evidence”
Not defined	“police officer”
Not defined	“postal article”
Not defined	“previous representation”
Not defined	“prior consistent statement”
Not defined	“prior inconsistent statement”
Not defined	“probative value”
Not defined but c.f. “document” S.4	“public document”
Not defined	“re-examination”
Not defined	“representation”
Not defined	“seal”
Not defined	“tendency evidence”
Not defined	“tendency rule”
Not defined	“visual identification evidence”

Not defined	“witness”