



Evidence Amendment Bill 2008

Mary Anne Neilsen, Monica Biddington, Kirsty Magarey
Law and Bills Digest Section

Contents

Purpose.	3
Background.	4
The law of evidence and the history of the <i>Evidence Act 1995</i> (Cth).	4
Basis of policy commitment.	5
Outline of the <i>Evidence Act 1995</i> (Cth).	6
Admissibility of evidence	7
Financial implications	9
Main provisions.	9
Schedule 1 – Uniform evidence amendments	9
Competence: Lack of capacity to give evidence	9
Compellability: Exceptions for ‘de facto partners’	10
Manner and form of questioning witnesses	13
Documents	15
Chapter 3 Admissibility of evidence.	15
The exclusion of hearsay: section 59	15
The significance of intention in section 59.	16
Exceptions to the hearsay rule	16
Exceptions to the hearsay rule: evidence relevant for a non-hearsay purpose.	17
Exceptions to the hearsay rule dependent on competency.	18
Exceptions to the hearsay rule: contemporaneous statements about a person’s health.	18

Exceptions to the hearsay rule: in criminal proceedings if the maker is not available . . .	18
Exceptions to the hearsay rule: in criminal proceedings where the maker is available . .	20
Exceptions to the hearsay rule: electronic communications	20
Exceptions to the hearsay rule: Aboriginal and Torres Strait Islander traditional laws and customs	20
The admissibility of expert evidence.	21
Admissions in criminal proceedings	23
Coincidence evidence	24
Credibility of witnesses	24
Exceptions: cross examination as to credibility	26
New exception to the credibility rule: Section 108C	27
Privilege: Client legal privilege	27
Privilege: Privilege Against Self Incrimination	28
Presumptions relating to electronic communications	29
Advance rulings on evidentiary issues	29
Miscellaneous amendments: the term ‘lawyer’	30
Schedule 2—Other evidence amendments.	31
Update cross references to ACT legislation.	31
Consequential amendments to implement the model evidence provisions	31
Implements amendments that are specific to the Commonwealth	31
Schedule 3—Printed and electronic publication of Acts	32
Concluding comments	33

Evidence Amendment Bill 2008

Date introduced: 28 May 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedules 1 and 2 commence the day after Royal Assent. Schedule 3 commences 12 months from the day of Royal Assent or earlier by Proclamation.¹

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

This Bill proposes amendments to the *Evidence Act 1995* to implement the majority of the recommendations made by the Australian Law Reform Commission, NSW Law Reform Commission, and Victorian Law Reform Commission (the Commissions) as a result of their inquiry into the uniform Evidence Acts.

Schedule 3 is unrelated to the main purpose of the Bill. It amends the *Amendments Incorporation Act 1905*, renaming it the *Acts Publication Act 1905* and providing for certain printed and electronic versions of Acts to be taken as an accurate record of those Acts.

-
1. The Senate Scrutiny of Bills Committee in its Alert Digest has commented on this delayed commencement pointing out that where the period is longer than six months the Committee expects the Explanatory Memorandum to the Bill will provide an explanation. In this case, the Explanatory Memorandum (page 3) points out that the amendments proposed in Schedule 3 provide for certain printed and electronic versions of Acts, (including compilations of Acts) to be taken to be an accurate record of those Acts, unless the contrary is proven. It goes on to observe (page 4) that the delay in commencement of up to 12 months after Assent is 'to ensure that the Office of Legislative Drafting and Publishing has sufficient time to prepare for electronic compilations of Acts to be included in the Acts database.' The Alert Digest concludes: 'In the circumstances, the Committee makes no further comment on this provision.' Senate Scrutiny of Bills Committee, *Alert Digest*, 4 June 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Background

At the outset, it should be noted that the rules of evidence are detailed and complex, and have been developed by the legal fraternity over many centuries -- both within the common law, and now within a statutory framework. Given this history and the importance of the issues, this Digest is lengthy, having had to provide a brief exegesis of various rules of evidence.

The law of evidence and the history of the *Evidence Act 1995* (Cth)

The rules of evidence applied in Australian courts serve a number of functions— they regulate what material a court may consider in determining factual issues; how that material is to be presented in the court; and how the court actually goes about the task of deciding the factual issues on the basis of evidence. They are a central part of procedural justice.²

Until the enactment of the *Evidence Act 1995* (Cth) and its New South Wales counterpart, the rules of evidence were largely part of the common law, the product of long historical development by the courts themselves, with only limited statutory modification. As a result they reflected a variety of principles and values; they lacked coherence and structure; and they were complex, technical and difficult to find. Substantial reform was long overdue.

In 1979 the federal Government gave a reference to the Australian Law Reform Commission (ALRC) to inquire into the possibility of comprehensive rationalisation and reform of the law of evidence.

The ALRC produced a series of research reports and discussion papers; an Interim Report, Evidence ([ALRC 26](#)) including draft legislation in 1985; and a final report, Evidence ([ALRC 38](#)) in 1987, which also contained draft legislation.

In 1991, the Commonwealth and New South Wales governments each introduced legislation substantially based on—but differing in some respects from—the ALRC’s draft legislation. In the same year, the Standing Committee of Attorneys-General gave in-principle support to a uniform legislative scheme throughout Australia.

The Commonwealth and New South Wales parliaments each passed an Evidence Bill in 1993 to come into effect from 1 January 1995. The Acts were in most respects identical and are often described as the ‘uniform Evidence Acts’.

2. S. Odgers, *Uniform Evidence Law*, seventh edition, Sydney, Lawbook Co., 2006, p. 1.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The *Evidence Act 1995* (Cth) applies in federal courts and, by agreement, in courts in the Australian Capital Territory. The *Evidence Act 1995* (NSW) applies in proceedings, federal or state, before New South Wales courts and some tribunals.

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

No other state has yet adopted similar legislation, although there is a strong movement towards the harmonisation of evidence laws in other states based on the uniform Evidence Act.³

Basis of policy commitment

In July 2004, the Commonwealth Attorney-General asked the ALRC to examine the operation of the *Evidence Act 1995* ([Cth](#)).

The ALRC was required to work closely with the [New South Wales Law Reform Commission \(NSWLRC\)](#) and the [Victorian Law Reform Commission \(VLRC\)](#), who were conducting similar inquiries into the operation of the uniform Evidence Act.

As part of this reference, two consultation papers were released:

- an Issues Paper, [Review of the Uniform Evidence Acts 1995 \(ALRC IP 28\)](#) was released by the ALRC in December 2004;
- a Discussion Paper, [Review of the Uniform Evidence Acts \(ALRC DP 69\)](#), was jointly produced by all three Commissions in July 2005.

The final report, [Uniform Evidence Law \(ALRC 102\)](#), completed jointly by the ALRC, NSWLRC and VLRC, was submitted to the Australian, New South Wales and Victorian Attorneys-General on 5 December 2005. It was tabled in the Commonwealth and Victorian parliaments, and released in NSW, on 8 February 2006. Throughout the Digest, this final report is referred to as the 'Report' and its various recommendations are described as 'Recommendation' followed by the relevant number.

The primary objectives of this inquiry were twofold: to identify and address any defects in the uniform Evidence Acts; and to maintain and further the harmonisation of the laws of evidence throughout Australia.

3. For further detail see ALRC et al, *Uniform evidence law: report*, ALRC 102, December 2005, paragraphs 1.11 – 1.13. In those states and territories that have not adopted the uniform legislation, the law of evidence is a mixture of statute and common law, together with applicable rules of court.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The inquiry concluded that the uniform Evidence Acts were working well, and that there were no major structural problems with the legislation, or with the underlying policy of the Acts.

While areas of concern were identified and addressed in the report, the Commissions concluded that a major overhaul of the uniform Evidence Acts was neither warranted nor desirable.

The Report contains numerous recommendations with accompanying model evidence provisions. The model evidence provisions were developed by a working group of the Standing Committee of Attorneys-General (SCAG) and endorsed by SCAG in July 2007.

The New South Wales Parliament has already passed legislation that will implement these provisions.⁴ It is understood a number of other states are preparing legislation to implement the provisions.⁵

The Explanatory Memorandum states that this Bill implements the majority of the model evidence provisions, but does not include the provisions implementing a general confidential relationships privilege or the provisions extending client legal privilege and public interest immunity to pre-trial proceedings. The rationale for the exclusion is that the Government is still considering its response to some of the Commissions' recommendations relating to client legal privilege claims in federal investigations.⁶

Outline of the *Evidence Act 1995* (Cth)

The Evidence Act is divided into five Chapters, which are themselves divided into Parts and Divisions.

- Chapter 1 – Preliminary
- Chapter 2 – Adducing Evidence
 - Part 2.1 Witnesses (containing divisions relating to competence and compellability, oaths and affirmations, examination-in-chief, cross-examination and re-examination)
 - Part 2.2 Documents
 - Part 2.3 Other Evidence
- Chapter 3 – Admissibility of Evidence (containing Parts relating to the relevance rule, various exclusionary rules and discretions to exclude evidence)

4. The *Evidence Amendment Act 2007* (NSW).

5. Explanatory Memorandum, p. 1.

6. *ibid.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- Chapter 4 – Proof
- Chapter 5 – Miscellaneous

This order is consistent with the intentions of the ALRC 1985 Report that the provisions should follow the order in which evidentiary issues ordinarily arise in a typical trial, from the moment that the first witness gets in the witness box to the determination of factual questions on the admissible evidence by the tribunal of fact (judge or jury) at the end of the trial.

The Evidence Act is not a restatement in statutory form of common law and existing statutory rules of evidence. Significant reforms have been introduced. For example the hearsay rule is substantially modified in both civil and criminal proceedings and there is reform of the rules governing the admissibility of documentary evidence including the abolition of the document rule.⁷

Admissibility of evidence

The bulk of the Evidence Act (Chapter 3) is taken up with the rules relating to the admissibility of evidence. The Act adopts the same basic structure as the common law for determining the admissibility of evidence: the test of relevance is the threshold consideration; the exclusionary rules and their exceptions are then applied and finally, the residual discretions to exclude on a policy ground are then applied.

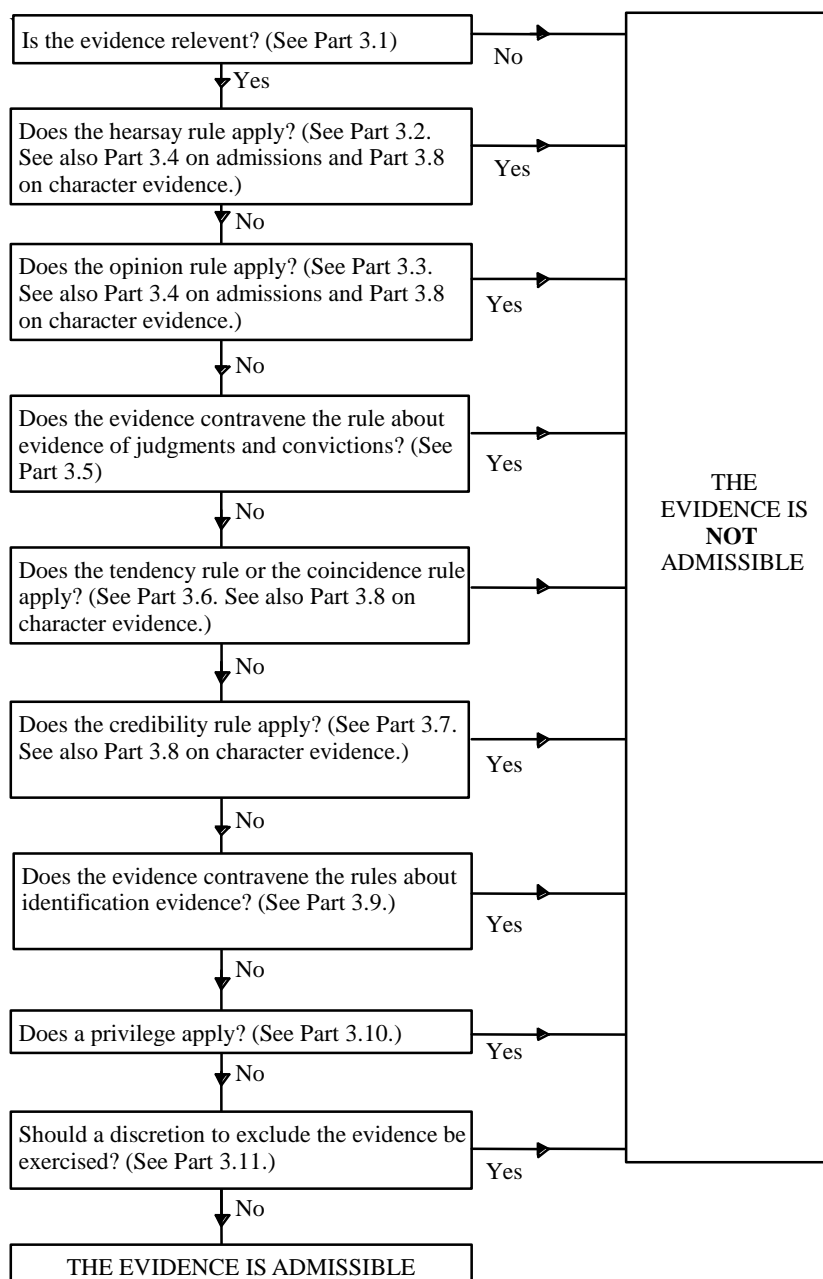
To assist in applying the rules of admissibility, the Evidence Act includes a flow chart immediately preceding section 55.

7. Further differences are set out in S. Odgers, *op. cit.*, pp. 7–8.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.



Explanation of these principles is provided where relevant under the Main Provisions section of the Digest.⁸

8. For further understanding, the reader is referred to Stephen Odgers, *op. cit.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Financial implications

The Explanatory Memorandum states that the Bill will have no significant financial impact.⁹

Main provisions

Schedule 1 – Uniform evidence amendments

Competence: Lack of capacity to give evidence

The categories of competence and compellability are important in the laws of evidence as they define who is able to give evidence (i.e. who is competent), and who can be legally required to give evidence (i.e. who is compellable). The general principle (enshrined in section 12) is that everyone is competent to give evidence and may be compelled to do so. The exceptions to this principle are set out in the subsequent sections of the Act.

Section 13 provides that certain persons lack the capacity to give sworn evidence, although they may give unsworn evidence in certain circumstances. Subsection 13(1) provides the test for giving sworn evidence is an understanding of the obligation to give truthful evidence. Subsection 13(2) provides a test for competence to give unsworn evidence, which is to be applied where a witness fails to meet the competence test for sworn evidence. One of the criteria is that the person understands the difference between a truth and a lie.

The Commissions' Report states that recent law reform work and academic consideration question the formulation of the existing competence test on the basis that:

- the tests to give sworn and unsworn evidence are too restrictive, with the risk that evidence of probative value will be excluded
- the appropriateness of the requirement in the competence test to give unsworn evidence that a person 'understands the difference between the truth and a lie' are questionable
- the tests of competence to give sworn and unsworn evidence are too similar and pose difficulties for practice application.¹⁰

The Commissions favoured a more liberal approach to the laws of competence and concluded that this could be achieved by introducing a test of general competence to give

9. Explanatory Memorandum, p. 3.

10. Uniform evidence, op. cit., paragraph 4.30, pp. 101–102.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

sworn and unsworn evidence and by distinguishing better the test of competence to give sworn and unsworn evidence so that they are sufficiently different.

Item 3 repeals and replaces existing section 13 and sets out a new test for determining competence to give sworn and unsworn evidence. It implements Recommendations 4-1 and 4-2. **Proposed section 13** provides that *all witnesses* must satisfy the test of general competence in subsection 13(1). The revised test provides that a person is *not competent* to give *sworn or unsworn evidence* about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome. **Proposed subsection 13(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. This is a restatement of existing subsection 13(1). **Proposed subsection 13(5)** provides that if a person is not competent to give sworn evidence, then he or she may be able to give unsworn evidence providing the court has told the person:

- that it is important to tell the truth
- that he or she should inform the court if asked a question to which he or she does not know, or cannot remember the answer, and
- that he or she should agree to statements believed to be true and should not feel pressured into agreeing with any statements that are believed to be untrue.

Proposed subsection 13(8) provides that in informing itself of the competence of a witness, the court is entitled to draw on an expert opinion.

Items 4 and **9** are consequential resulting from the amendments to section 13.

Compellability: Exceptions for 'de facto partners'

Items 5 to **8** change the definition of de facto spouse in two sections of the Evidence Act which

- provide for certain exemptions to witnesses who could otherwise be compelled to give evidence (section 18) and
- regulate the commentary that can be made on a decision of such witnesses not to give evidence (section 20).

Currently a defendant's spouse or de facto spouse, a parent or a child of the defendant are included in the 'protected witness' category.

The changes propose that the current provision's references to a 'de facto spouse' be broadened to refer to a 'de facto partner', which is in turn defined in the Dictionary.¹¹ The

11. **New Clause 11 of Part 2** in the Dictionary.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

definition is quite broad and specifies the criteria that should be used by the court when determining whether someone qualifies as a de facto partner (with no necessary emphasis to be made on any one factor):

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (d) the ownership, use and acquisition of their property;
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children;
- (g) the reputation and public aspects of the relationship.

The definition also specifies in **proposed subclause 5** that whether someone is of the same or of opposite sex is irrelevant to the conclusion, as is the question as to whether either of the people concerned are legally married to someone else or are in another de facto relationship.

This definition is unusual in that there is no reference to exclusivity, usually a factor in establishing a de facto relationship, and there is also no reference to the factor of a sexual relationship. To some extent this may be implied in the reference to having a 'relationship as a couple' (**proposed subclause 11(2)**). In family law a reference to 'living as a couple' is usually determined by looking at a 'composite picture', usually encompassing some reference to a sexual relationship.¹² Relevant factors to be considered include:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial interdependence or support between the parties;
- the ownership, use, and acquisition of property;
- the care and support of children;
- the performance of household tasks;

12. *Lynam v Director-General of Social Security* (1983) 52 ALR 128 ; 9 Fam LR 305, quoted in the Encyclopaedic Australian Legal Dictionary (available through LexisNexisAU <http://www.lexisnexis.com/au/legalLexis-Nexis Dictionary>).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the degree of mutual commitment and support; and the
- reputation and ‘public’ aspects of the relationship.¹³

The definitions used in the Bill which allow, for example, someone to be married to one individual yet qualify as the de facto partner of a third party are thus unusual from a broader legal perspective – qualifying as a de facto spouse generally implies some exclusivity. The definition is, however, designed to regulate the compellability of a witness’ evidence and the comments that can be made when such evidence is not given. The definition does not go to the broader law – they simply stipulate the criteria to be used in the application of these rules of evidence.

The question of which witnesses may be ‘compellable’, i.e. legally required to give evidence, is subject to other exceptions. Defendants are not themselves compellable (an example of the privilege against self-incrimination). There has been a tradition in English common law that the spouse is not compellable (although a relatively recent tradition¹⁴).

The public policy issues behind the exemption are indicated by the criteria to be used by the decision maker when determining whether to treat a witness as compellable. The decision maker is required to prioritise the ‘desirability’ of the evidence being given against

a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence...¹⁵

The majority of the ALRC in its 1985 Report offered a further justification, being:

-
13. *D v McA* (1986) 11 Fam LR 214 ; DFC 95-030. Other statutory definitions also refer to the existence of a sexual relationship and the exclusive nature of the relationship, for instance the *Social Security Act 1991*, section 4 specifies that to determine whether someone is a member of a couple regard should be had to the financial aspects of the relationship, the nature of the household and the social aspects of the relationship and any sexual relationship between the people and the nature of the people’s commitment to each other. (See also the *Veteran’s Entitlements Act 1986*, section 11A.)
 14. According to the Australian Law Reform Commission (Report No. 26, *Interim Evidence*) the matter was conclusively determined by the House of Lords in *Hoskyn v Commissioner of Police* [1978] 2 All ER 36.
 15. Subsection 21(6) of the *Evidence Act*. Subsection 21(7) goes on to stipulate various considerations when resolving the question addressed by 21(6), such as the nature and gravity of the offence and the availability of other sources of evidence. It should be noted that the exemption offered to compellability by section 18 does not apply in certain criminal proceedings, particularly to do with cases involving children or domestic violence (section 19 of the *Evidence Act*).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- The undesirability that the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require.
- The undesirability that the community should make unduly harsh demands on its members by compelling them, where the general interest does not require it, to give evidence that will bring punishments upon those they love, or betray their confidences, or entail economic or social hardships.¹⁶

They also pointed out that the consequences of steadfast refusals to give evidence are difficult for a tribunal to deal with.¹⁷ Finally they argued that there were dangers in expanding the categories of those who can seek an exemption, both in terms of the procedural/court costs involved in determining such applications and because, they said, a too broadly based exemption would jeopardise an unacceptable amount of relevant evidence.

In general a prosecutor must not comment on the options taken under section 18,¹⁸ however section 20 allows various comments to be made in the case of indictable offences. In such a case the judge or any party (other than the prosecutor) may comment on a decision taken by a defendant's spouse, **de facto partner (as proposed)**, parent or child not to give evidence. The general principle remains that the comment must not suggest that the decision to not give evidence showed guilt (although another defendant to the proceeding may make such a comment¹⁹).

Manner and form of questioning witnesses

Item 10 replaces existing subsection 29(2), implementing Recommendation 5-1 of the Report. Currently, a party must apply to the court for a witness to be allowed to give evidence in narrative form. **Proposed subsection 29(2)** will allow the court on its own motion or on application, direct that a witness give evidence wholly or partly in narrative

16. ALRC 26, p. 291. Kirby J, who was the primary Commissioner working on this Report, was in dissent on this issue, advocating either that the status quo remain (an exemption only for marital relationships) or that the category be broadened out to 'intimate personal relationships', with a discretion residing in a judge to decide the matter. He argued that the gradual admission of new categories was likely to discriminate arbitrarily or unfairly against the 'other' categories not yet acknowledged.

17. ALRC 26, p. 290... who comment that while the law might be that a witness 'must' give evidence it is commonly impossible to predict what will happen if a proposed witness does not wish to give evidence 'It is uncertain how far the judge will be prepared to go in applying pressure to the witness...'

18. Subsection 18(8).

19. Subsection 20(4).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

form, rather than question and answer format. The consequence of this amendment is that the court will have more flexibility in receiving the best possible evidence. Witnesses such as children and people with an intellectual disability are likely to be assisted by this increased flexibility.

Item 13 will repeal existing section 41. The **substituted section 41** will describe the types of questions that must be disallowed.

The changes that affect improper questioning implement Recommendation 5-2 of the Report and seeks to give greater protection to vulnerable witnesses where questioning can be harassing, intimidating, offensive, humiliating or repetitive. It also expands the type of prohibited questions to those which have no basis other than a stereotype. **Proposed subsection 41(1)** defines these parameters of a disallowable question.

Proposed subsection 41(2) will allow the court to take into account, for the purposes of subsection (1):

- any relevant condition or characteristic of the witness which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
- any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
- the context in which the question is put, including, the nature of the proceeding; and, in a criminal proceeding – the nature of the offence to which the proceeding relates; and, the relationship (if any) between the witness and any other party to the proceeding.

Proposed subsections 41(3) and (4) note that a question is not disallowable merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness. An objection can be made that the question is a disallowable question. However the court must consider disallowability even if no objection is raised (subsection 41(5)).

Proposed section 41 applies to both civil and criminal proceedings. **Proposed subsection 41(6)** provides that a failure by the court to disallow a question under this section will not affect the admissibility of the witness's answer. A Note at the end of the section provides a cross reference to section 195 which prohibits the publication of disallowed questions unless the express permission of the court has been obtained.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Documents

Section 50 concerns proof of voluminous or complex documents. **Item 14** repeals and replaces existing subsection 50(1) implementing Recommendation 6-1 of the Report. Its effect is that applications to rely on summary documents could be made *during* a hearing. Under the existing provision applications must be made *before* a hearing commences.

Chapter 3 Admissibility of evidence

Items 15 and **16** are technical amendments to the wording in the flow chart and headings at the beginning of Chapter 3. They implement Recommendation 16-1 and reflect that Part 3.11 contains both discretionary and mandatory exclusions of evidence.

The exclusion of hearsay: section 59

Part 3.2 of the Act establishes the ‘hearsay rule’ which excludes evidence of a ‘previous representation’ in certain circumstances, subject to exceptions created in the rest of the Part. The term ‘representation’ is defined to include both statements and conduct and can be express or implied, as well as unintended and uncommunicated. Previous representations means representations made otherwise than in the course of giving evidence in the proceedings. This means that, for example, you can not give evidence about what someone else said in a way that suggests what was said was true. If it is simply evidence that has been ‘heard’ its repetition or recounting cannot be taken to make it reliable.

The rationale for an exclusionary rule for hearsay evidence is that:

- out of court statements are usually not on oath
- there is usually an absence of testing by cross-examination
- the evidence might not be the best evidence
- there are dangers of inaccuracy in repetition
- there is a risk of fabrication
- to admit hearsay evidence can add to the time and cost of litigation and
- to admit hearsay evidence can unfairly catch the opposing party by surprise.²⁰

20. Uniform evidence, op. cit , paragraph 7.9, p. 189.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The significance of intention in section 59

Section 59 provides the general exclusionary hearsay rule:

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person *intended to assert* by the representation.

The Commissions in their Report considered in some detail the distinction between intended and unintended assertions and noted the difficulties introduced by the courts in interpreting this provision. In particular, they noted that the interpretative difficulties in *R v Hannes*²¹ with the broad reading by Spigelman CJ of the New South Wales Court of Criminal Appeal which would result in making unintended implied assertions subject to the hearsay rule— something which the ALRC 1985 Report argued against on the basis that it would require that evidence be sought to prove the state of the mind of a relevant person.²² The ALRC had argued that this would result in trials being disrupted and much evidence excluded.

Items 17 and 18 propose amendments to section 59 so as to clarify the meaning of ‘intention’ in section 59. The new provision will provide that evidence of a previous representation is not admissible to prove the existence of a fact that it can be *reasonably supposed that the person intended* to assert by the representation. In deciding whether it can be reasonably supposed the person *intended* to assert a particular fact, the court may have regard to the circumstances in which the representation was made.

The significance of this test is that it is external to the person making the representation. In other words, the court is not required to investigate into the subjective mindset of the representor — proof of a subjective state of mind is very difficult and made all the more so where the maker of the representation is not called to give evidence.

Item 21 is a consequential amendment resulting from the amendments to section 59 in items 17 and 18.

Exceptions to the hearsay rule

As stated above, the general hearsay rule is set out section 59 and then exceptions to the rule follow in the rest of the Part. Division 2 creates exceptions for first-hand hearsay, with

21. *R v Hannes* (2000) 158 FLR 359, [359].

22. Spigelman CJ reasoned that: ‘an implied assertion of a fact necessarily assumed in an intended express assertion, may be said to be contained within that intention. For much the same reasons, it is often said that a person intends the natural consequences of his or her acts.’ *R v Hannes* (2000) 158 FLR 359, [357]. For a fuller description of the meaning of intention and *Hannes* the reader is referred to Uniform evidence, *op. cit.*, pp. 191–203.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

different rules in civil and criminal proceedings and depending on whether the maker of the representation is available to testify. Other exceptions are created in other Parts of the Act (for example, Part 3.4 Admissions). Division 3 creates exceptions for second hand and more remote hearsay.

The difference between first hand and more remote hearsay

Central to an understanding of the hearsay rule and its exceptions is the distinction between first hand hearsay and more remote hearsay. Whether the evidence is first hand or more remote hearsay is often crucial in deciding whether any of the exceptions apply. First hand hearsay is where the maker has first hand knowledge of the fact, based on something that the person saw, heard or otherwise perceived.

The Act draws a distinction between first-hand and more remote hearsay for reasons to do with the quality of the evidence. The view was taken by the ALRC in its first inquiry that more remote hearsay is generally so unreliable that it should be inadmissible except where there are some guarantees of reliability. However, quality aside, it was also observed that what is the best available evidence may depend upon balancing the importance and quality of evidence against the difficulty of producing it.²³

This background is important in understanding the provisions in the Bill that amend the hearsay rule exceptions.

Exceptions to the hearsay rule: evidence relevant for a non-hearsay purpose

Section 60 provides:

The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

This provision received extensive consideration by the Commissions in the Report. The particular concern that was raised resulted from the High Court's decision in *Lee v The Queen*²⁴. The Report states that as a result of *Lee v The Queen* there is now a view that section 60 does not apply to hearsay evidence more remote than first-hand hearsay and this in turn raises serious doubt as to the application of section 60 to expert opinion evidence. The Report states:

If *Lee* is read as deciding that section 60 has no application to second-hand and more remote hearsay, it follows that evidence of accumulated knowledge, recorded data,

23. Uniform evidence, op. cit., paragraphs 7.12-7.13, p. 190.

24. *Lee v The Queen* (1998) 195 CLR 594.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

and other factual material commonly relied upon by experts will be inadmissible as evidence of the truth of the facts asserted in the material. Yet a central reason for enacting section 60 was to continue to allow such evidence to be admissible as evidence of the truth of the facts asserted, even though the evidences is hearsay.²⁵

The Commissions' view is that section 60 should be amended to confirm that section 60 applies to relevant first-hand and more remote hearsay, subject only to the mandatory and discretionary exclusions in Part 3.11. **Item 22** implements Recommendation 7-2. and inserts new subsection 60(2) and (3). **Proposed subsection 60(2)** clarifies that section 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether the evidence is first-hand or more remote hearsay. That is, whether or not the person had first hand knowledge based on something seen, heard or otherwise perceived. **New subsection 60(3)** inserts a safeguard to ensure that evidence of admissions in criminal proceedings that is not first hand is excluded from the scope of section 60.

Exceptions to the hearsay rule dependent on competency

Item 23 is a consequential amendment. Its purpose is to align the exception to the hearsay rule dependent on competency with the new test for competency set out in proposed section 13.

Exceptions to the hearsay rule: contemporaneous statements about a person's health

Section 72 provides that the hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind. This provision currently applies to both first hand and more remote hearsay. **Item 32** would re-enact this section as **new section 66A** moving it from the Division dealing with remote and second hand hearsay to the Division dealing with first hand hearsay. The effect is that the exception would only apply to first hand hearsay. This implements Recommendation 8-5.

Exceptions to the hearsay rule: in criminal proceedings if the maker is not available

Items 28-30 amend section 65. This section provides an exception to the hearsay rule in certain circumstances when a person is not available to give evidence.

The Report notes that questions have been raised about the operation of section 65 in relation to previous representations from persons who are complicit in the offence with

25. Uniform evidence, op. cit., paragraph 7.99, p. 213.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

which an accused is charged, but who refuse to give evidence at trial.²⁶ The relevant parts of section 65 read:

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

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

[...]

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

(c) made in circumstances that make it highly probable that the representation is reliable, or

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

The assumption behind (d) is that where a statement is against the interests of the party who made it, this provides an assurance of reliability. However, the Commissions argued that where the person who made the statement is an accomplice or co-accused, this may not be the case. An accomplice or co-accused may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other.

There is 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 reliability safeguard of the representation being against self-interest no longer applies.²⁷

The Report therefore recommended that paragraph 65(2)(d) be amended to require the representation to be made against the interests of the person who made it at the time it was made and in circumstances that make it likely that the representation is reliable. The intention is to ensure that the hearsay rule is not lifted where a statement against interest is made in circumstances that would not suggest reliability.²⁸

Item 30 implements this recommendation and **items 28** and **29** are consequential amendments arising from it.

26. *ibid.*, paragraphs 8.38–8.51.

27. *ibid.*, paragraph 8.46.

28. *ibid.*, paragraph 8.51.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Exceptions to the hearsay rule: in criminal proceedings where the maker is available

Section 66 provides exceptions to the hearsay rule where, in a criminal proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Such a person may give evidence where the ‘occurrence of the asserted fact was fresh in the memory of the person who made the representation’. The Report notes that the courts have had some difficulty in interpreting the meaning of ‘fresh in the memory’ following on from the High Court’s decision in *Graham v The Queen*²⁹. The Report also notes that special difficulties with the ‘fresh in the memory’ criterion often arise in sexual offence cases and cases where identification and recognition evidence is in issue. The Commissions concluded that there is strong support for amendment of section 66 to clarify that ‘freshness’ may be determined by a wide range of factors.³⁰ **Proposed subsection 66(2) (item 31)** clarifies that freshness of the memory may be determined by not only factors to do with time but also factors such as the nature of the event concerned, and the age and health of the witness.

Exceptions to the hearsay rule: electronic communications

Section 71 of the Act provides an exception to the hearsay rule for telecommunications. **Item 33** repeals and replaces the section in order to allow for a broader and more flexible definition of telecommunications. It replaces the words ‘a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex’ with ‘a document recording an electronic communication’. Electronic communication has the same meaning as it has in the *Electronic Transactions Act 1999 (item 86)*.

Exceptions to the hearsay rule: Aboriginal and Torres Strait Islander traditional laws and customs

Item 34 introduces a new provision (**proposed section 72**) which creates an exception to the hearsay rule covering representations ‘about the existence or non-existence... of the traditional laws and customs of an Aboriginal and Torres Strait Islander group’. This provision is discussed in depth in the Report, but only a short commentary is possible here.³¹

The problem of the interaction of the western legal system with traditional Aboriginal and Torres Strait Islander forms of knowledge – and the appropriate form for the transmission of this knowledge is eloquently summarised in the following excerpt:

29. *Graham v The Queen* (1998) 195 CLR 606.

30. Uniform evidence, op. cit., paragraph 7.99, p. 213.

31. Uniform evidence, op. cit., Chapter 19, pp. 647–674.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Perhaps the greatest clash between Aboriginal and Anglo-Australian systems of knowledge is in relation to the form knowledge takes. Oral traditions and history are usually the basis of Aboriginal connection with land and, accordingly, are of major importance to land claims and native title applications. As well as the dreamings, genealogies, general historical stories and land use information will be transmitted orally in most Aboriginal communities. Yet the Anglo-Australian legal system is the 'most prohibitively literate of institutions'.³²

A practical example of the problem is given in the Commissions' Report which discusses a case in which the Judge concluded that evidence was inadmissible on the grounds that it was hearsay. The evidence in question concerned the witnesses assertion that a deceased person had said to her (regarding land the subject of a native title claim) 'this is your grandmother's country'.³³ The judge concluded that it was inappropriate to admit the witness statement under the hearsay rules in the Evidence Act. The Commissions conclude that it is appropriate to amend the applications of these rules, partially in the light of amendments to the Native Title Act in 1998, which introduced what could be called a presumption that, when conducting native title proceedings the Federal Court was bound by the rules of evidence (previously there were provisions stating the Court was not bound by technicalities legal forms or rules of evidence' when dealing with native title cases. The Court had a discretion to modify the rules, and could take account of cultural and customary concerns, but 'not so as to prejudice unduly any other party to the proceedings'.³⁴

The Report documents that difficulties with the cultural differences are evident not only in native title cases but also with respect to criminal law defences, sentencing and family law (inter alia). These various issues have also motivated the amendments proposed in **items 35 and 36** which introduce an exception to the 'opinion rule' which will allow members of an Aboriginal and Torres Strait Islander group to give opinion evidence 'about the existence or non-existence, or the content of, the traditional laws and customs of the group'.

The admissibility of expert evidence

Item 38 changes the admissibility of expert evidence about child development and behaviour. The changes will allow that expert opinion can be used by a court to inform itself about the competence of a witness and will also provide a new exception to the

32. P. Gray, 'Do the Walls Have Ears?: Indigenous Title and Courts in Australia' (2000) 5(1) *Australian Indigenous Law Reporter* 1.

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

34. See generally: Uniform evidence, op. cit., p. 655.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

credibility rule where a person has specialised knowledge based on the person's training, study or experience.

The Human Rights and Equal Opportunity Commission and the ALRC, (1997 Report, *Seen and Heard: Priority for Children in the Legal Process*) have previously recommended changes to the admission of expert opinion evidence. The report said that expert opinion evidence on issues affecting the assessment of child witness capability should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. In its support of the proposed changes, the New South Wales Director of Public Prosecutions noted the need to overcome stereotypical perceptions of children and the need to rectify gaps and misunderstandings in allegedly common or general knowledge about child development and behaviour.³⁵

Section 79 currently provides an exception to the opinion rule where the opinion is based on specialised knowledge based on the person's training, study or experience.³⁶ The Commissions' Report noted that Australian courts continue to demonstrate a reluctance to admit evidence of children's development and behaviour under section 79.

The amendment to section 79 will put beyond doubt that this particular type of expert opinion evidence is admissible. The **proposed section 79** is modelled on the Tasmanian *Evidence Act 2001* to overcome any reluctance in accepting that child development and behaviour is a subject of specialised knowledge and that expert opinion evidence is admissible on the topic.

The Commissions noted that there is a risk of admitting this category of evidence.³⁷ If a jury is told that the children who are abused behave in a particular way and the complainant has behaved in this way, then the likely conclusion for the jury is that the complainant is telling the truth about being the victim of sexual abuse. The report concluded that potential misuse of this sort of expert opinion can be adequately dealt with by provisions in Part 3.11 which allow judicial discretion to exclude certain evidence.

Item 38 adds, at the end of section 79, **proposed subsection 79(2)**, to avoid doubt and without limitation to subsection (1), a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse).

35 Uniform evidence, op. cit., paragraph 9.151, p. 318.

36 The opinion rule is established in section 76 of the *Evidence Act 1995*. For a detailed explanation on the operation of the opinion rule in section 76, see S. Odgers, op. cit., pp. 273–316.

37 Uniform evidence, op. cit., paragraph 9.157, p. 320.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed subsection (2)(b) addresses the status of opinion evidence of the person with specialised knowledge, providing that the opinion is admissible if it relates to the development and behaviour of children generally; or, the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

These amendments will have an impact on the use of the credibility rule as well as the opinion rule. **Proposed section 108C** provides a new exception to the credibility rule, mirroring the amendment of **proposed section 79(2)** relating to the opinion rule.

Admissions in criminal proceedings

The purpose of subsection 85(2) is to ensure that only reliable admissions are allowed into evidence, by requiring the prosecution to demonstrate that the particular admission was made in circumstances which make it unlikely that its truth was adversely affected.

Subsection 85(1) is intended to limit the scope of the section without creating an overly high hurdle to the application of section 85(2).³⁸ **Item 40** amends subsection 85(1) of the Act to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the ambit of section 60.³⁹ The item will repeal and **replace existing subsection 85(1)**. The words ‘in the course of official questioning’ in paragraph 85(1)(a) are replaced with ‘to or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence’. This clarification will enhance the reliability of evidence by broadening the period where the questioning might take place. The change implements Recommendation 10-1 of the Report and developments in case law, where the High Court held that the existing provision ‘in the course of official questioning’ ... marks out a period of time running from when questioning commenced to when it ceased.’⁴⁰

The amendment will also require that the reliability of an admission made by a defendant is tested where that admission is made to or in the presence of an investigating official performing functions in connection with the investigation or as a result of an act of another person capable of influencing the decision whether to prosecute.

38 *ibid.*, paragraph 10.55, p. 337.

39 Section 60 is an exception to the hearsay rule. The hearsay rule (section 59) does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. For further explanation of the operation of the hearsay rule, see S. Odgers, *op. cit.*, pp. 195–272.

40 Uniform evidence, *op. cit.*, paragraph 10.18, p. 328.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed subsection 85(1) varies slightly to the Commissions' recommendation.⁴¹ Following a decision in the Victorian Supreme Court in 2006 that suggested covert operatives may be included in the scope of section 85, the words '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 to prosecute' have been added to paragraph **85(1)(b)**.⁴²

Further, to avoid doubt, the term 'official questioning' has been removed from other parts of the Act. **Items 41, 65, 70 and 89** remove the term.

Coincidence evidence

Items 42 and 43 of the Bill propose changes to the tendency and coincidence rules. **Item 42** will make minor changes to section 97(1), to implement Recommendation 11-3 that highlights a drafting issue.

Item 43 will reduce the threshold for admitting coincidence evidence to require consideration of similarities in events or circumstances, rather than the existing threshold that there *are* similarities in events or circumstances. **Section 98** is to be repealed and replaced with a general test for the coincidence rule. The Commissions considered that the existing test raises a high threshold and could exclude highly probative evidence from the ambit of the provision. The new provision will apply where the party adducing the evidence relies on any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and circumstances in which they occurred.

The requirement to give reasonable notice in writing to other parties is retained. Also, the requirement for the court to be satisfied that the evidence will have significant probative value is retained in **paragraph 98(1)(b)**.

Credibility of witnesses

Item 45 proposes to amend the credibility rule in order to clarify its interpretation. **Item 45** proposes to amend the credibility rule to ensure that evidence which is relevant both to credibility and a fact in issue, but not admissible for the latter purpose, is subject to the same rules as other credibility evidence. **Item 45** inserts new Divisions 1 and 2. **Proposed subsection 101A** will provide a definition of credibility evidence and **proposed section 102** will restate the credibility rule.

41 *ibid.*, paragraph 10.66, p340.

42 *R v Tofilau* [2006] VSCA 40.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The need to amend the section follows the High Court's decision in *Adam v The Queen* (2001), which Odgers summarises as:

In *Adam v The Queen* (2001) 207 CLR 96 at [34-35] the majority of the High Court held that s102 should be interpreted literally, so that if evidence is relevant in a proceeding in some way other than to a witness's credibility, it is not caught by s102. It will not be caught even if the evidence is inadmissible for that other use. If section 102 does not apply, the evidence will be admissible as bearing on the witness's credibility (pursuant to s 56), subject to the court's general discretion to exclude evidence. The joint judgement rejected an argument that 's 102 should not be read as dealing only with evidence the sole *relevance* of which is its bearing upon the credibility of a witness [and] should be read as applying to evidence which is not *admissible* on any basis other than the credibility of a witness'.⁴³

...It is quite unsatisfactory to leave these issues to judicial discretion. There will be greater uncertainty in the preparation of cases, greater debate and uncertainty in the conduct of trials, greater variation in outcome and the likelihood of many appeals against conviction. To overcome the decision in *Adam*, s 102 should be amended.⁴⁴

The Commissions recommended that amendments be made to ensure that the provisions of Part 3.7 (Credibility) of the Act apply to evidence relevant only to credibility; and relevant to credibility and relevant for some other purpose, but not admissible or capable of being used for that other purpose because of a provision of Parts 3.2 to 3.6 inclusive (Hearsay, Opinion, Admissions, Evidence of judgments and convictions, Tendency and coincidence). The **new section 102** restates the credibility rule in a more simple form to enable the section to operate as it was originally intended. **Item 45** also adds a note to section 101A to clarify that section 60 (exception to the hearsay rule) and 77 (exception to the opinion rule) are not relevant in the determination of admissibility for another purposes under section 101A because they cannot apply to evidence which has not yet been admitted.

This is a fairly significant change to the credibility rule but it is unlikely to be especially controversial or problematic. The Commissions' Report notes:

The concept of when the credibility rules should apply is well understood by practitioners, but difficult to express in legislation. While ideally the wording of the amended provisions would be simpler, the somewhat cumbersome drafting is necessary to meet the scrutiny of literal interpretation which it will inevitably meet. In day-to-day practice, however, once understood, it should not require laboured consideration. In practice, it will be clear that certain evidence is either solely relevant

43 S. Odgers, *op. cit.*, pp. 426–427.

44 *ibid.*, p. 427.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

to credibility or is relevant to credibility because it has been determined or ceded not to be admissible for another purpose under the preceding provisions of the Act.⁴⁵

Item 48–51 are consequential amendments arising out of the amendments in item 45.

Exceptions: cross examination as to credibility

Subsection 103(1) provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value. Probative value is defined to mean:

The extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Item 46 amends this provision by replacing the words ‘has substantial probative value’ with ‘could substantially affect the assessment of the credibility of the witness’. It implements Recommendation 12-2. The rationale for the change is that the proposed wording is more accurate and draws on the construction adopted by the Court of Criminal Appeal in *R v RPS* which has allowed the courts to give meaning to the section.⁴⁶ **Item 47** is consequential flowing from the amendment to section 103.

Section 106 provides that the credibility rule does not apply to rebutting a witness’s denials by other evidence in specific circumstances (for example where evidence tends to prove the witness’ bias or motive to be untruthful). The Report notes that these specific circumstances or exceptions may be too limiting and may prevent the admission of important evidence. It recommended (12.5) that section 106 be amended to create a broader basis on which to admit evidence. **Item 52** implements this recommendation. It repeals and **replaces section 106** making two key changes. Firstly the court may grant leave to adduce evidence relevant to credibility outside the current categories. Secondly evidence relevant to credibility may be led not only where the witness has denied the substance of the evidence in cross-examination, but also where he or she did not agree to it.

Items 53–56 make amendments restructuring the provisions in a **new Division 3** that relates to credibility of persons who are not witnesses. They implement Recommendations 12-1, 12-3, 12-6. **Item 54** repeals and replaces **subsection 108A(1)** to reflect the new definition of credibility and the changes to section 102 at item 45.

45 ALRC, op. cit., paragraph 12.19, p. 398.

46. Uniform evidence, op. cit., pp. 398–399.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

New exception to the credibility rule: Section 108C

The Report did note that there are some concerns about the proposed exception to the credibility rule. However, the Commissions believe that the uniform Evidence Acts should provide an exception for expert testimony to prevent injustice to the parties and ensure a proper factual basis for the evaluation of the credibility of witnesses. The Report notes that the clarification of the admissibility of expert evidence relating to the behaviour and development of children is justified on the basis of a demonstrated reluctance of some judicial officers to accept that this is a relevant field of expertise and a matter beyond the ‘common knowledge’ of the tribunal of fact. **Proposed section 108C** does not connote that undue prominence should be given to this evidence, and should not be seen as taking away from the generality of the provision.

The amendments will also enable evidence to be adduced with the leave of the court to rebut denials (**proposed section 106**) and non-admissions in cross-examination (**proposed subsection 104(4)**).

Privilege: Client legal privilege

The principles which apply to privilege can apply both within and outside of particular court proceedings. Privileges offer certain exemptions from giving evidence and they attach to certain forms of evidence (by analogy a privilege is similar in form to the non-compellability offered to individuals, e.g. spouses, but privileges are limited to more specific evidence).

The ‘client legal privilege’ allows a lawyer’s client to refuse giving evidence on the grounds that it is information falling within that client/lawyer relationship. The Report explains that this privilege is ‘premised on the principle that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive fully informed legal advice.’⁴⁷

The changes proposed by **item 62** would introduce new provisions which restrict the operation of the client legal privilege where the privilege has already been expressly or impliedly waived.

Proposed subsections (2) and (3) are designed to exclude information from the ‘client legal privilege’ when the behaviour of the client or party has rendered the protection redundant or irrelevant. So, for instance, if a client or party, expressly or by implication, consents to the disclosure of the ‘substance of the evidence’ then the privilege is not available (unless the disclosure was to another lawyer or, effectively, to public officials within the Australian legal system – (**proposed subsection 4**)).

47. op. cit., p. 455.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Privilege: Privilege Against Self Incrimination

This is one of the well established privileges and the provisions are found in section 128 of the Evidence Act. The privilege allows a witness to object to giving evidence if it would go to establishing that they have committed an offence or are liable to a civil penalty. The court must decide whether there are reasonable grounds for the objection. If the court decides there are reasonable grounds for the objection it must tell the witness they can refrain from giving evidence. The court is, however, able to insist that the witness give the evidence if the 'interests of justice' require it (although only if the evidence doesn't go to show guilt of an offence or liability for a civil penalty in a foreign country). The court can also offer the witness a choice about whether to give the evidence and can explain that it can provide a certificate regarding that evidence which would ensure that in further proceedings the certified evidence cannot be used against the witness.

The changes being made to this part of the legislation are largely technical – so, for instance, the evidence to which the objections can be made would be not only 'particular evidence' but also 'evidence on a particular matter' (**proposed sub-section 128(1)**). This change may allow for a claim of privilege to be dealt with more systematically. Also the use for which a certificate applies has been clarified (in a more recent case which had to be re-heard there was a dispute about whether the certificate should apply because the first case was not legally effective⁴⁸). **Proposed subsections 128(7) and 128(8)** apply to protect the evidence, even when challenged, however **proposed subsection 128(9)** stipulates that a retrial or a trial 'arising out of the same facts' does not provide the same level of protection.

Item 63 also introduces a **new section 128A** which extends the privilege to certain forms of search or 'freezing' orders. The Report recommended that the privilege against self-incrimination should not apply to these orders, however the Bill proposes to adopt an alternative approach recommended by the VLRC. This approach involves providing the evidence to the court in a sealed envelope so that the court can make a determination whether there are 'reasonable grounds for the objection' (**proposed subsection 128A(4)**). Once again there are provision for the court to determine whether 'the interest of justice require the information to be disclosed' (**proposed subsection 128A(6)**) and an order that the information must be disclosed can only be made if it doesn't tend to prove that an offence has been committed under a law of a foreign country (**proposed subsection 128A(6)(b)**).

48. *Cornwell v The Queen* [2007] HCA 12, which is referred to in the Explanatory Memorandum, p. 28.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Presumptions relating to electronic communications

Item 68 deals with electronic communications. Existing sections 160-163 apply presumptions relating to the sending (or transmission) and receiving of postal articles, telexes, lettergrams, telegrams and letters sent by Commonwealth agencies. **Item 68** repeals and **replaces section 161** in order to also provide a presumption in relation to electronic communications. It includes presumptions as to the source and destination of the communications. This implements Recommendation 6-3.

Advance rulings on evidentiary issues

Item 78 will insert a **new section 192A** to make it clear that the court has the power to make an advance ruling or make an advance finding in relation to any evidentiary issue. **Proposed section 192A** will allow the court to give a ruling make a finding in relation to the question before the evidence is adduced in the proceedings where a question is about the admissibility or use of evidence proposed to be adduced; or the operation of a provision of the Act or another law in relation to evidence proposed to be adduced; or the giving of leave, permission or direction under section 192.

The Evidence Act is currently silent on the issue of advance rulings. The High Court has held that it may be appropriate to give an advance ruling on a matter in respect of which the uniform Evidence Acts requires leave, permission or direction to be sought, as section 192 gives the court the discretion to give such leave, permission or direction ‘on such terms as the court thinks fit’. However, it held that such a power is limited. Gaudron J said:

Although it may be appropriate in some cases to give an ‘advance ruling’ as to a matter in respect of which the *Evidence Act* requires leave, permission or direction, it is to be remembered that counsel ultimately bears the responsibility of deciding how the prosecution and defence cases will be run. Thus, it is that ‘advance rulings’, even if permitted ... may give rise to a risk that the trial judge will be seen as other than impartial. Particularly is that so in the case of advance rulings that serve only to enable prosecuting or defence counsel to make tactical decisions. If there is a risk that an ‘advance ruling’ will give rise to the appearance that the trial judge is other than impartial, it should not be given.⁴⁹

Advance rulings may serve the interests of justice by adding to the overall efficiency of the trial.⁵⁰ Crispin J articulated the benefits of advance rulings as follows:

49 *TKWJ v The Queen* (2002) 212 CLR 124 per Gaudron J at 43.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/46.html?query=^TKWJ#fn23>, accessed 12 June 2008.

50 Explanatory Memorandum, paragraph 242, p. 35.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

There are some cases in which substantial inconvenience, expense and perhaps even unfairness might ensue if there were to be no indication as to the likely exercise of discretion. Such an approach may require counsel to prepare for trial and make tactical decisions without knowing whether a substantial body of evidence is likely to be admitted, the Crown may be unable to make any sensible assessment as to the prospects of obtaining a conviction, counsel for the accused may be unable to offer any sensible advice as to the appropriate plea and the opening addresses may have to omit any explanation of the relevance of evidence subsequently admitted. Furthermore, if the trial judge subsequently rules that the evidence should be excluded in the case of one accused but not the other, it may be necessary to then discharge the jury and order that the accused be tried separately. That would involve a substantial waste of time and money, create unnecessary risks of prejudice to both the Crown and the accused and leave jurors with the feeling that their time had been wasted.⁵¹

Proposed section 192A provides that

Where a question arises in any proceeding, being a question about:

- (a) the admissibility or use of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or
- (c) the giving of leave, permission or direction under section 192;

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

Miscellaneous amendments: the term 'lawyer'

The amendments proposed at **items 11, 12, 58, 66, 67, 76 and 77** replace the terms 'lawyer' with 'Australian legal practitioner or legal counsel' in various sections of the Act. 'Lawyer' is defined in the Dictionary as a barrister or solicitor. **Items 80 and 88** would insert definitions of the terms 'Australian legal practitioner' and 'legal counsel' into the Dictionary. The Explanatory Memorandum states that these more specific definitions are consistent with model National Legal Profession laws. The effect of the amendments is to ensure that the sections will refer to lawyers with a valid practising certificate, as well as 'legal counsel', that is lawyers who do not have a current practising certificate but are otherwise permitted to practise in that jurisdiction.⁵² **Items 12 and 77** are similar amendments — replacing the term 'lawyer' with 'Australian legal practitioner or legal

51 *R v TR and VG* (2004) 180 FLR 424, [6].

52. Explanatory Memorandum, p. 8.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

counsel or prosecutor. **Item 91** incorporates a new definition of ‘prosecutor’ into the Dictionary.

Schedule 2—Other evidence amendments

Other amendments to the *Evidence Act 1995* are required to ensure consistency following the amendments made by Schedule 1. Many of these changes are technical and minor.

Items 1 and 2 of Schedule 2 amend subsection 4(5), 5, (5A) and (6) of the Act by removing the words ‘in relation’. This change implements Recommendation 2-4 of the Report.

Update cross references to ACT legislation

Items 3 - 5 make necessary changes to sections of the *Evidence Act* that are now outdated. **Item 3** updates references to Part III, Part IIIA of the *Crimes Act 1900* (ACT) in paragraph 19(a) of the *Evidence Act*. **Item 4** updates the references in paragraph 19(b) of the Act to the *Children’s Services Act 1986* (ACT) which has been repealed and replaced by the *Children and Young People Act 1999* (ACT). **Item 5** updates the reference to the *Domestic Violence Act 1986* (ACT). Paragraph 19(c) will be amended to refer to the *Domestic Violence and Protection Orders Act 2001* (ACT).

Items 6-9 repeal sections 25, 105, subsections 108(2) and 110(4) of the Act respectively. Those sections are now obsolete as the right of a defendant to make an unsworn statement in a criminal trial no longer exists under Australian law. These provisions were originally included in the *Evidence Act* because the right to adduce evidence in these circumstances continued to exist in Norfolk Island. They have now been abolished by the *Evidence Act 2004* (NI) and consequently can be repealed in the *Evidence Act*.

Consequential amendments to implement the model evidence provisions

Items 10 and 11 are consequential amendments arising out of item 86 of Schedule 1 which introduces the broader concept of ‘electronic communications’ rather than ‘telecommunications’. This relates to Recommendations 6-2 and 6-3 of the Report.

Implements amendments that are specific to the Commonwealth

Item 12 For consistency, amendments made under items 11,12,58,61 and 76 in Schedule 1, this amendment will replace the term ‘lawyer’ with the phrase ‘Australian lawyer’ in subsection 186(1).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 13 is a transitional provision. It provides that the amendments in Schedule 2 do not apply in relation to proceedings which have commenced prior to these amendments coming into force.

Schedule 3—Printed and electronic publication of Acts

Schedule 3 amends the *Amendments Incorporation Act 1905*, its main purpose being to set up an authorised database of Commonwealth legislation and to allow courts to rely on the electronic versions of Commonwealth legislation. As noted earlier, this Schedule is unrelated to the main purpose of the Bill and it could be asked why it has been appended to a Bill relating to evidence law. Neither the Explanatory Memorandum nor the Second Reading Speech provide any explanation for this.

Item 1 repeals the long title of the Act and renames it ‘An Act relating to the publication of Acts in printed and electronic form’. **Item 2** repeals section 1 and substitutes two new Parts which provide for a new short title and define a number of new terms. The new title of the Act is to be the *Acts Publication Act 1905* (**proposed section 1**).

Items 3 and **4** would make amendments to sections 2 and 3 that deal with the publishing of reprints of Act. They add a requirement that reprints must record amendments made by legislative instruments.

Item 5 proposes two new Parts. Part 3 sets out a new regime for the electronic publication of Acts. **Proposed section 4** provides for the establishment of an electronic database that is to be available to the public. **Proposed section 5** provides that Acts in the database are authoritative and complete and accurate. Unless the contrary is proven, they can therefore be relied on as a correct statement of the law, including by the courts, Part 4 provides a regulation making power.

The long delay in commencement of Schedule 3 was noted at the beginning of the Digest. As discussed above, the reasons given for the delay is the time needed to develop the database. Concerns have been expressed as to the adequacy of the existing database arrangements.⁵³ It is to be hoped these concerns are addressed within the twelve months.

53. See for example the submission of the Australian Law Librarians’ Group to the Attorney-General’s Department on the proposal for authorised electronic versions of Commonwealth Acts. Available at:

<http://www.ala.asn.au/nat/docs/pl/Comlaw%20Submission.pdf> accessed on 17 June 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Concluding comments

The bulk of the changes made in this Bill are technical. They predominantly broaden the scope of admissible evidence and are designed to allow the flow of evidence to operate with greater freedom. There is also a focus on witness protection.

Provisions which could cause some controversy concern the definition of ‘de facto partner’ with its broad inclusions. While the inclusion of same-sex partners may not be controversial, given that most of the parties represented in Parliament support an anti-discrimination policy, the departure from the standard definitions of a de facto couple may be. In particular the inclusion of possibly multiple de facto couples and married partners within the one umbrella is unusual. In a sense this is largely a matter of drafting, the provisions simply defining who is covered by the exemption to the principle of compellability. But in another sense this broadening of the more standard reference may be seen as raising further issues.

As discussed above, Justice Kirby had advocated that either the exception should be confined to those in a married relationship, or, if an expansion of the exemptions to compellability was to be made, it should be made to cover ‘intimate personal relationships’ as a generic criteria.⁵⁴ The decision to avoid the approach advocated by Justice Kirby may have more to do with restricting the categories of people exempted than the suitability of the wording needed to cover multiple relationships. This might have been done more clearly by referring to ‘intimate personal relationships’ or even to an ‘interdependent relationship’ or some other phrase not so connected to the traditional concept of the de facto couple.

Finally it is to be noted that reforms in the field of evidence law seem to take some time to move into legislative form. This is due, in part, to the desirability of promoting uniform evidence law which necessitates consultations with different jurisdictions. Some of the changes address issues raised by case law from some time ago,⁵⁵ but, having cleared the hurdle of a tripartite Report and clearance by SCAG, it is not to be wondered at that the reforms have taken some time to be presented to the Parliament.

54. See generally the discussion in ALRC 26, op. cit., http://www.austlii.edu.au/au/other/alc/publications/reports/26/Ch_27.html#Heading140 accessed on 17 June 2008.

55. See for instance **item 18**, which addresses issues raised in *R v Hannes* (2000) 158 FLR 339.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2438.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.