

A REVIEW OF THE UNIFORM EVIDENCE ACTS

Report No 60

Queensland Law Reform Commission
September 2005

The short citation for this Report is QLRC R 60.
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ISBN: 0 7242 7749 8

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Queensland Law Reform Commission
September 2005

To: The Honourable Linda Lavarch MP
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report on *A Review of the Uniform Evidence Acts*.

The Honourable Justice R G Atkinson
Chairperson

Mr J K Bond SC
Member

Ms A Colvin
Member

Ms H A Douglas
Member

Mr B J Herd
Member

Mr G W O'Grady
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Chapter 1

Introduction

EVIDENCE LAW IN QUEENSLAND

1.1 The law of evidence governs the nature and form of evidence that be brought before a court. In Queensland, two regimes apply. In the Federal courts, the *Evidence Act 1995* (Cth) governs the reception of evidence.¹ In the State courts, the rules of evidence are contained in Queensland legislation, primarily the *Evidence Act 1977* (Qld),² court rules and the common law. By virtue of section 79 of the *Judiciary Act 1903* (Cth), State evidence laws apply in State courts exercising Federal jurisdiction.³ There are also some miscellaneous provisions in the *Evidence Act 1995* (Cth) that apply in all courts within Australia, including state courts.⁴

BACKGROUND TO UNIFORM EVIDENCE ACTS⁵

1.2 In 1979, the Australian Law Reform Commission (ALRC) received a reference from the Commonwealth Attorney-General to review the law of evidence applicable in proceedings in Federal courts and the courts of the Territories with 'a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements'.⁶ After lengthy consultations, the ALRC published an Interim Report in 1985⁷ and a Final Report in 1987, which contained draft legislation.⁸

1.3 In 1988, the New South Wales Law Reform Commission (NSWLRC) recommended the adoption of the ALRC's draft legislation in New South

1 *Evidence Act 1995* (Cth) s 4. See Part 1 of the Dictionary to the uniform Evidence Acts for the definition of 'federal court'.

2 Other relevant Queensland legislation includes the *Criminal Code*, the *Police Powers and Responsibilities Act 2000* (Qld), the *Criminal Law (Sexual Offences) Act 1978* (Qld), the *Oaths Act 1867* (Qld), and the *Evidence and Discovery Act 1867* (Qld).

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

4 *Evidence Act 1995* (Cth) s 5 Table; ss 185 (documents properly authenticated), 186 (affidavits in Australian courts exercising federal jurisdiction), 187 (abolishes the privilege against self-incrimination for bodies corporate).

5 See Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 1.1–1.11.

6 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) xi.

7 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985).

8 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987).

Wales.⁹ After further consultations and amendments to the original draft, New South Wales and the Commonwealth introduced virtually identical *Evidence Bills* in 1993. In the Commonwealth, the *Evidence Act 1995* (Cth) was passed and commenced on 18 April 1995. In New South Wales, the *Evidence Act 1995* (NSW) was passed and commenced on 1 September 1995. The Commonwealth Act applies in Federal courts and in courts in the Australian Capital Territory. The New South Wales Act applies in all Federal and State proceedings conducted before New South Wales courts and some tribunals. Subsequent amendments to the New South Wales legislation have meant that the Commonwealth and New South Wales legislation is no longer strictly uniform.¹⁰ The two Acts, however, are described as the uniform Evidence Acts.

1.4 Tasmania adopted the uniform Evidence Acts with some modifications in 2001¹¹ and Norfolk Island passed mirror legislation in 2004.¹² Other Australian jurisdictions have considered the enactment of the uniform Evidence Acts but to date have not done so.¹³

FEATURES OF THE UNIFORM EVIDENCE ACTS

Application

1.5 The uniform Evidence Acts were not intended to codify the laws of evidence, and do not deal with a number of evidence related issues, such as the burden of proof, a judge's power to call witnesses, and the order of addresses.¹⁴ Sections 8 and 9 of the uniform Evidence Acts essentially preserve applicable statute and common law where it is not inconsistent with the provisions of the uniform Evidence Acts. However, it has been noted that some chapters, such as Chapter 3 on the admissibility of evidence, effectively operate as a code.¹⁵ Where the legislature clearly intended to cover the field in

⁹ New South Wales Law Reform Commission, Report, *Evidence* (R 56, 1988) para 1.7. For a history of the Commission's publications in this area, see Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 1.3.

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

¹¹ *Evidence Act 2001* (Tas). See Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania* (No 74, 1996).

¹² *Evidence Act 2004* (NI).

¹³ Standing Committee on Uniform Legislation and Intergovernmental Agreements, Legislative Assembly of Western Australia, *Evidence Law* (R 18, 1996); Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Report 92, 1999) ch 20; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (1996).

¹⁴ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) para 46; Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.1.40]; Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 2.8–2.13.

¹⁵ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.1.40].

relation to a particular area, a court should pay little regard to pre-existing common law concepts.¹⁶

Policy framework

1.6 Both the ALRC's Interim Report and Final Report identified several key features of civil and criminal trials and policy objectives of our civil and criminal justice systems.¹⁷ The ALRC concluded that the key elements of the policy framework for the uniform Evidence Acts were:¹⁸

- *Fact-finding.* This is the pre-eminent task of the courts and recommendations were directed 'primarily to enabling the parties to produce the probative evidence that is available to them'.
- *Civil and criminal trials.* These differ in nature and purpose and this should be taken into account. In regard to the admission of evidence against an accused, a more stringent approach should be taken. The differences were also reflected in areas such as: compellability of an accused, cross-examination of an accused, and in the exercise of a court's power in matters such as the granting of leave.
- *Predictability.* The use of judicial discretions should be minimised, particularly in relation to the admission of evidence, and rules should generally be preferred over discretions.
- *Cost, time and other concerns.* Clarity and simplicity are the objectives.

Structure

1.7 The structure of the uniform Evidence Acts follows the order in which evidence issues would usually arise at trial.¹⁹ The structure can be summarised as follows:²⁰

[I]ssues concerning the adducing of evidence in relation to both witnesses and documents are dealt with in Chapter 2; Chapter 3, which is the central part of the statute, deals with the admissibility of evidence; issues of proof follow in Chapter 4. A flow chart on the admission of evidence precedes s 55 and gives guidance on whether evidence is admissible or not.

¹⁶ *Papakosmas v The Queen* (1999) 196 CLR 297; *R v Ellis* (2003) 58 NSWLR 700.

¹⁷ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Chapter 3; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 27–44.

¹⁸ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 2.26 (notes omitted), summarising these elements as set out in Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 46.

¹⁹ As recommended in Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987).

²⁰ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 2.14.

Changes to the common law rules of evidence

1.8 The uniform Evidence Acts introduced significant changes to the laws of evidence. Detailed lists are contained elsewhere²¹ but, by way of example, the ALRC notes that:²²

- The 'original document' rule has been abolished in favour of a more flexible approach;
- The hearsay rule has been substantially modified;
- The rules of admissibility of tendency and coincidence evidence have been re-stated;
- The operation of the privilege against self-incrimination has been modified;
- The court's general discretion to refuse to admit evidence has been re-stated; and
- The use of computer-generated evidence has been facilitated.

REVIEW OF THE UNIFORM EVIDENCE ACTS

1.9 On 12 July 2004, the ALRC was requested to review the operation of the *Evidence Act 1995* (Cth). The ALRC's terms of reference highlighted six areas to which the Commission was to have particular regard, namely:

- Examination of witnesses;
- The hearsay rule and its exceptions;
- The opinion rule and its exceptions;
- The coincidence rule;
- The credibility rule and its exceptions; and
- Privileges including client legal privilege.

1.10 The terms of reference also required a more general review of the relationship of the *Evidence Act 1995* (Cth) to other applicable evidentiary laws, legal developments in evidence law outside the Act, and the Act's application to pre-trial procedures.

²¹ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.1.60]; Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania* (No 74, 1996) para 4.3.

²² Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 2.15.

1.11 A similar request was made to the NSWLRC in relation to its mirror legislation.²³ In pursuance of clause two of the terms of reference, the ALRC and NSWLRC have treated the review as a joint project and have jointly published an Issues Paper²⁴ and Discussion Paper²⁵ with a view to producing a joint final report by the end of 2005.²⁶

1.12 The Victorian Law Reform Commission (VLRC) was also given a reference on the law of evidence requiring it to collaborate with the NSWLRC and the ALRC in their review and to consider, in addition, the question whether the uniform Evidence Acts should be introduced in Victoria.²⁷ The VLRC jointly published the Discussion Paper with the ALRC and the NSWLRC, and will also be producing a joint final report with those Commissions.²⁸

1.13 The Tasmania Law Reform Institute (TLRI) has not been given a reference on evidence law, but has had input into the joint project through the inclusion of one of its board members on the ALRC's Advisory Committee.

1.14 The ALRC's Discussion Paper was released publicly on 4 July 2005. It has been produced jointly by the ALRC, the VLRC and NSWLRC. The views and proposals expressed therein are on behalf of all three Commissions. It contained a detailed analysis of most of the issues raised in the Issues Paper and proposed changes to the uniform Evidence Acts as those Commissions consider appropriate. The Discussion Paper also sought further submissions on a number of specific questions.

1.15 For the purposes of this Report, the three Commissions responsible for the joint publication of the Discussion Paper will be referred to as the 'ALRC'.

QUEENSLAND'S INVOLVEMENT IN REVIEW AND TERMS OF REFERENCE

1.16 In February 2005, the ALRC conducted consultations in Queensland with stakeholders and interested parties and met with the Queensland Law Reform Commission. The ALRC strongly urged interested parties to make submissions prior to the publication of the Discussion Paper. To allow the Queensland Law Reform Commission (QLRC) to be involved in the content of the proposed ALRC Discussion Paper, the Queensland Attorney-General requested the QLRC to review the uniform Evidence Acts in accordance with the terms of reference contained in Appendix 1 to this Report.

²³ See Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 1.1.

²⁴ Ibid.

²⁵ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005).

²⁶ Ibid para 1.12–1.13.

²⁷ Victorian Law Reform Commission, Information Paper, *Review of the Laws of Evidence* (IP1/2005) 2.

²⁸ Ibid 10.

1.17 Given the limited nature of these terms of reference and the extensive and detailed reviews conducted by the ALRC, both leading to the enactment of the uniform Evidence Acts and subsequent to the Acts' introduction, the QLRC has not engaged in a section-by-section analysis of the uniform Evidence Acts.

1.18 This Report focuses on areas of particular concern to Queensland by identifying differences between Queensland evidence law and the uniform Evidence Acts, and addressing the questions raised in the ALRC's Issues Paper and proposals made in the Discussion Paper.

1.19 In its analysis of each of these areas, the QLRC has examined the advantages and disadvantages of the differing approaches to evidence law in Queensland and under the uniform Evidence Acts.

1.20 The QLRC's analysis has taken into consideration relevant views expressed by the QLRC and by other bodies, such as the Criminal Justice Commission (Qld) and the Supreme Court of Queensland, in earlier publications, including:

- the Criminal Justice Commission (Qld) Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996);
- the Supreme Court of Queensland *Equal Treatment Benchbook*;²⁹ and
- the QLRC's Reports, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (2000);³⁰ *The Abrogation of the Privilege Against Self-Incrimination* (2004);³¹ and *The Protection of Statements Made to Religiously Ordained Officials* (1991).³²

1.21 The QLRC's analysis has also included consideration of a number of recent High Court and Queensland Supreme Court and Court of Appeal cases³³ and relevant provisions contained in a range of Queensland legislation.³⁴

²⁹ <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> (accessed 30 September 2005).

³⁰ Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000).

³¹ Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-Incrimination* (R 59, 2004).

³² Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991).

³³ Including: *Nicholls v The Queen* (2005) 213 ALR 1; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217; *Goldsmith v Sandilands* (2002) 190 ALR 370; *Festa v The Queen* (2001) 208 CLR 593; *R v Dunwoody* (2004) 212 ALR 103; *Bromley Investments Pty Ltd v Elkington* (2002) 43 ACSR 584; *Glengallan Investments Pty Ltd v Andersen* [2002] 1 Qd R 233; and *R v O'Keefe* [2000] 1 Qd R 564.

³⁴ Including: *Criminal Code* (Qld); *Criminal Law (Sexual Offences) Act 1978* (Qld); *Uniform Civil Procedure Rules 1999* (Qld); *Supreme Court of Queensland Act 1991* (Qld); *Legal Profession Act 2004* (Qld); *Freedom of Information Act 1992* (Qld); *Ombudsman Act 2001* (Qld); *Police Powers and Responsibilities Act 2000* (Qld); and *Police Responsibilities Code 2000* (Qld), contained in *Police Powers and Responsibilities Regulation 2000* (Qld) Sch 10.

1.22 In addition to the issue-specific analysis contained in the following chapters of this Report, the QLRC has identified some other differences between the uniform Evidence Acts and the current position in Queensland as discussed briefly below.

1.23 In relation to the 'original document' rule, the QLRC has concluded that the approach of the uniform Evidence Acts may be preferable to the current position in Queensland. At common law, a witness cannot be questioned about the contents of a document unless the original document was produced and admitted.³⁵ This rule is an application of the 'best evidence' principle and prevents a witness from being cross-examined on a prior inconsistent statement contained in a document without first having the document shown to the witness.³⁶ In Queensland, the rule has been modified by numerous statutory exceptions and has been described as 'the enfeebled rule'.³⁷ Section 51 of the uniform Evidence Acts, however, has abolished the rule.³⁸

1.24 The QLRC also notes that the position with respect to compellability of spouses in criminal proceedings also differs under the uniform Evidence Acts and in Queensland. Under section 8(2) of the *Evidence Act 1977* (Qld), the spouse of an accused person is competent and compellable to give evidence for the prosecution or defence and without the consent of the accused.³⁹ Under the uniform Evidence Acts, however, a spouse may object to being required to give evidence.⁴⁰ Unlike the Queensland provision, the uniform Evidence Acts' provision applies in respect of de facto spouses.⁴¹

1.25 The QLRC also notes that the uniform Evidence Acts have substantially modified the common law in relation to the admissibility of

³⁵ *The Queen's Case* (1820) 2 Brod & Bing 286; 129 ER 976. This rule is discussed at para 2.74–2.80 of this Report.

³⁶ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [19.6]; Heydon JD, *Cross on Evidence* (7th ed, 2004) [17540].

³⁷ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [F.27], [Q.95]. The rule has been the subject of considerable criticism. See for example Heydon JD, *Cross on Evidence* (7th ed, 2004) [17540].

³⁸ See Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.2.5280].

³⁹ See generally Harris W, 'Farewell to Spousal Privileges in Criminal Trials' (2004) 24(1) *Proctor* 21. Section 8 of the *Evidence Act 1977* (Qld) provides:

8 Witnesses in a criminal proceeding

- (1) In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so.
- (2) The husband or wife of an accused person in a criminal proceeding is competent and compellable to give evidence in the proceeding in any court, either for the prosecution or for the defence, and without the consent of the accused.
- (3) In a criminal proceeding, a husband or wife is competent and compellable to disclose communications made between the husband and the wife during the marriage.

⁴⁰ Uniform Evidence Acts s 18.

⁴¹ Uniform Evidence Acts s 18(2).

confessions in criminal proceedings. Under the common law, as it is applied in Queensland, a confession will be admissible only if it was made voluntarily and if it is not excluded in the discretion of the court.⁴² In contrast, Part 3.4 of the uniform Evidence Acts contains a range of provisions dealing with the admissibility of ‘admissions’, including outright confessions.⁴³ That Part seeks to impose a requirement of reliability and fairness on admissions.⁴⁴ The QLRC notes that similar considerations of fairness and reliability have been suggested as being relevant at common law in *Swaffield v The Queen*,⁴⁵ decided after the enactment of the uniform Evidence Acts.

1.26 The QLRC also notes that the approach in the ALRC’s Discussion Paper to provisions dealing specifically with the evidence of children has not been entirely consistent. In some instances, the ALRC has deliberately refrained from proposing amendments to the uniform Evidence Acts for the reason that procedural rules specific to child witnesses should not be included in evidence legislation that is designed to have a general application.⁴⁶ However, in other instances, the ALRC has proposed amendments to the uniform Evidence Acts dealing specifically with child witnesses.⁴⁷

1.27 The QLRC has recommended that the ALRC review each of its proposals relating to the evidence of children to ensure a consistent approach is taken to the inclusion in the uniform Evidence Acts of provisions addressing concerns about the evidence child witnesses.⁴⁸

1.28 The QLRC has also commended to the ALRC the provisions contained in the *Evidence Act 1977 (Qld)* facilitating the receipt of evidence of children and other special witnesses.⁴⁹

1.29 In the following chapters, the Commission has drawn attention to those provisions of the uniform Evidence Acts that differ substantially from the position in Queensland, and has noted those provisions that would require further review if Queensland were to consider adopting the uniform Evidence Acts.

42 See Heydon JD, *Cross on Evidence* (7th ed, 2004) [33605], [33680].

43 See Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.4700].

44 Uniform Evidence Acts ss 85 (Criminal proceedings: reliability of admissions by defendants), 90 (Discretions to exclude admissions).

45 (1998) 192 CLR 159.

46 See Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 18.46.

47 See for example Proposal 5–2, discussed at para 2.58–2.61 of this Report.

48 See Recommendations 2–4(e), 3–16(e), 3–23(c), 4–12(c) and 4–14(c) of this Report.

49 In particular, *Evidence Act 1977 (Qld)* part 2 division 4 (Evidence of special witnesses). See Recommendations 2–5, 2–7, 3–17, 3–24 and 4–13 of this Report.

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. This has occurred in Tasmania in relation to identification evidence.⁵⁰

1.31 In fact, the ALRC has itself acknowledged that uniformity may not always be the overriding consideration. In its Discussion Paper, it recommended that the *Evidence Act 1995* (Cth) be amended to include the New South Wales provisions that create a privilege in respect of sexual assault communications.⁵¹ However, the ALRC did not see a need for Tasmania to replace its existing provision⁵² that deals with that privilege:⁵³

Whilst improved uniformity is clearly a goal of this Inquiry, it is acknowledged that states may choose a different path in the enactment of the uniform legislation for good reasons, such as consistency with previous legislation or, as in the case of s 127B, following the recommendations of law reform bodies in that state.

50 See note 1677 of this Report.

51 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.211.

52 *Evidence Act 2001* (Tas) s 127B.

53 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.212.

Chapter 2

Examination, cross-examination and re-examination of witnesses

INTRODUCTION

2.1 The rules and procedures relating to the conduct of proceedings and the examination of witnesses in Queensland are based on the common law with limited statutory modification.⁵⁴

2.2 Procedures relating to the examination of witnesses under the uniform Evidence Acts are set out in Chapter 2, Part 2.1, Divisions 3, 4 and 5. More specifically:

- Division 3 governs the manner in which witnesses may be questioned and give evidence. For example, the court has a general power to make such orders as it considers just in relation to the questioning of witnesses and the production and use of documents (section 26), and may allow evidence to be given in narrative form (section 29);
- Division 3 also sets out the order in which examination-in-chief, cross-examination and re-examination are to take place (section 28), and deals with attempts to revive memory (section 32) and evidence given by police officers (section 33);
- Division 4 is concerned with the examination-in-chief and re-examination of witnesses (sections 37–39);
- Division 5 is concerned with the cross-examination of witnesses (sections 40–46).

2.3 The guiding principles for these sections of the uniform Evidence Acts were the improvement of fact finding, fairness, and rendering the law more rational and easier to operate.⁵⁵

2.4 The provisions of the uniform Evidence Acts that govern the presentation of evidence substantially reflect the existing practices and procedures in Queensland. However, some key differences can be noted. Under the uniform Evidence Acts:

⁵⁴ See generally Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.80]–[A.100]; Harris W, 'Examination of Witnesses under the Commonwealth *Evidence Act 1995*' (1996) 26 *Queensland Law Society Journal* 269.

⁵⁵ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 598.

- police officers are permitted to give evidence by reading from a statement, provided certain conditions are satisfied;⁵⁶
- the rule in *Walker v Walker*⁵⁷ (which requires the tender of a document that has been ‘called for’) is abolished;⁵⁸ and
- cross-examination of a party’s own witness is permissible in a wider range of circumstances than at common law – for example, where the witness is merely ‘unfavourable’.⁵⁹

ISSUES FOR CONSIDERATION

2.5 In its Issues Paper, the ALRC raised a number of questions about how the uniform Evidence Acts deal with the examination of witnesses. Those questions concerned the following issues:

- the giving of evidence in narrative form;
- the cross-examination of unfavourable witnesses;
- constraints in cross-examination;
- the questioning of a complainant by an unrepresented accused;
- the use of documents in cross-examination; and
- the rule in *Browne v Dunn*.⁶⁰

2.6 In its Discussion Paper, the ALRC proposed amendments to the uniform Evidence Acts in relation to some of these matters. The ALRC also posed a number of questions on which it sought submissions. It also raised an additional issue for consideration about the form of affidavit evidence. Each of these issues will be discussed in light of the position in Queensland.

⁵⁶ Uniform Evidence Acts s 33.

⁵⁷ (1937) 57 CLR 630.

⁵⁸ Uniform Evidence Acts s 35.

⁵⁹ Uniform Evidence Acts s 43.

⁶⁰ (1893) 6 R 67.

THE GIVING OF EVIDENCE IN NARRATIVE FORM

2.7 In its Issues Paper, the ALRC posed the following question:⁶¹

How does s 29(2) of the uniform Evidence Acts operate in practice? Is this provision sufficient to address the needs of different categories of witness? Should it be a requirement that the party calling the witness apply to the court for a direction that the witness give evidence in narrative form?

2.8 Section 29 of the uniform Evidence Acts provides:

29 Manner and form of questioning witnesses and their responses

- (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
- (2) A witness may give evidence wholly or partly in narrative form if:
 - (a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and
 - (b) the court so directs.
- (3) Such a direction may include directions about the way in which evidence is to be given in that form.
- (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

2.9 The usual method by which witnesses give evidence is the question and answer format. In contrast, 'narrative form' refers to the situation 'where a witness stands in the witness box and speaks without being questioned'⁶² – that is, the witness gives evidence 'as a continuous story in their own words, uninterrupted by questions from counsel'.⁶³

2.10 In its Interim Report, the ALRC referred to psychological research that suggested that a significantly more accurate version of events is likely to be given by a witness who is permitted to give a free report of events as a narrative, as the answering of specific questions may limit and distort the witness's testimony.⁶⁴ At the same time, it noted that psychological research also confirmed the experience of many legal practitioners that a free report by a witness is usually found to be sketchy or incomplete. The ALRC noted other criticisms: namely, that evidence in narrative form or a 'free report' leads to

⁶¹ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 3–1, post para 3.7.

⁶² *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31, [7] (Barrett J).

⁶³ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.6.

⁶⁴ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 607.

witnesses, rather than lawyers, taking charge of the proceedings, which may waste court time and result in a range of irrelevant or inadmissible material being placed before the court, and that the process might operate to the disadvantage of the inarticulate, nervous or unprepossessing witness.⁶⁵

2.11 In its Interim Report, the ALRC noted (presumably as a consequence of the court's ordinary power to control proceedings, the presentation of evidence, and the questioning of witnesses) that it was possible for the parties to present evidence in narrative form and for the judge to suggest that method of giving evidence under the existing law. Nevertheless, the ALRC proposed legislative amendment to 'enable the court to encourage' the giving of evidence in narrative form in appropriate cases.⁶⁶

2.12 Section 29(2) of the uniform Evidence Acts applies only where the party calling the witness has applied to the court for such a direction.⁶⁷ The requirement that a party apply for a direction was not part of the ALRC's original recommendation.⁶⁸ In its Discussion Paper, the ALRC noted suggestions that this requirement has limited the use of section 29(2).⁶⁹

2.13 The ALRC also noted that a considerable body of research supports the claim that the giving of evidence in narrative form may be more culturally appropriate for some witnesses and may assist child witnesses in giving evidence.⁷⁰

2.14 In Queensland, some attention has already been given to these issues.

2.15 In relation to Aboriginal witnesses, the Queensland Criminal Justice Commission has recommended that the *Evidence Act 1977* (Qld) be amended to allow the court to direct a witness to give evidence wholly or partly in narrative form.⁷¹ To date, this has not occurred. However, the Supreme Court of Queensland's Equal Treatment Benchbook contains a chapter on Indigenous language and communication, based on extensive research, as a working guide for judges in dealing with Aboriginal and Torres Strait Islander witnesses and

65 Ibid para 608.

66 Ibid para 609.

67 Uniform Evidence Acts s 192(2) sets out factors that the court must take into account when considering whether to make any directions regarding how the witness is to give his or her evidence.

68 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.11.

69 Ibid.

70 Ibid para 5.34, citing Criminal Justice Commission (Qld), Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Chapter 4; New South Wales Law Reform Commission, Report, *Sentencing: Aboriginal Offenders* (R 96, 2000) para 7.5; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997) para 14.19–14.21.

71 Criminal Justice Commission (Qld), Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Chapter 4, Recommendation 4.1.

accused.⁷² The emphasis is on the judge's role in exercising the discretion to disallow questions or forms of questioning that are unfair and in giving suitable jury directions. The Benchbook examines various ways in which Aboriginal communication can be easily misinterpreted, but does not give particular consideration to narrative form evidence. Rather, the concern is about the types of questions asked and the form of questioning. Guided narrative is only one form of questioning that should be considered.⁷³ Apart from communication difficulties, other disadvantages faced by an Indigenous witness can be ameliorated by the special witness provisions of the *Evidence Act 1977* (Qld).⁷⁴

2.16 The difficulties confronting child witnesses in court proceedings were extensively examined by the QLRC in its report on the evidence of children.⁷⁵ These concerns were addressed by a range of amendments to the *Evidence Act 1977* (Qld), including the admissibility of prior statements,⁷⁶ allowing evidence to be given via closed-circuit TV or video link,⁷⁷ and the use of pre-recorded evidence.⁷⁸

2.17 Although the *Evidence Act 1977* (Qld) contains no equivalent to section 29 of the uniform Evidence Acts, Queensland courts undoubtedly retain their common law power to control proceedings (and, thereby, the power to order that evidence be given in narrative form, in appropriate cases). The power to order that evidence be given in narrative form is rarely exercised.

The ALRC's proposal

2.18 The ALRC is of the view that there is a place for narrative evidence in court rooms and that its use should be encouraged.⁷⁹ It considers that more

⁷² Supreme Court of Queensland, *Equal Treatment Benchbook*, Chapter 9 – Indigenous Language and Communication <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> (accessed 5 September 2005). Note also other chapters in the Benchbook, which include Chapter 10 – Indigenous People and the Criminal Justice System; Chapter 2 – Ethnic Diversity in Queensland; Chapter 3 – Religion in Queensland; Chapter 11 – Disability; Chapter 13 – Children; Chapter 14 – Gender; Chapter 15 – Sexuality and Gender Identity. See also Department of Justice and Attorney-General (Qld), *Aboriginal English in the Courts*, <<http://www.justice.qld.gov.au/courts/pdfs/handbook.pdf>> (accessed 5 September 2005).

⁷³ Supreme Court of Queensland, *Equal Treatment Benchbook* para 9.15 citing Mildren J, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7, 14 <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> (accessed 5 September 2005).

⁷⁴ *Evidence Act 1977* (Qld) s 21A, which is discussed at para 2.48–2.52 of this Report.

⁷⁵ Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000).

⁷⁶ *Evidence Act 1977* (Qld) s 93A.

⁷⁷ *Evidence Act 1977* (Qld) s 21A.

⁷⁸ *Evidence Act 1977* (Qld) ss 21A(2)(e) (special witness), 21AK (affected child).

⁷⁹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.34.

effective use might be made of section 29(2) if the requirement for a party to apply for a direction were removed.⁸⁰ Consequently, the ALRC proposed that:⁸¹

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

The QLRC's view

2.19 The QLRC does not consider that giving evidence in narrative form is generally superior to giving evidence according to the traditional question and answer format. However, it may be appropriate in some circumstances. If it is thought that a requirement to make an application for evidence to be given in narrative form operates as a disincentive to the use of section 29 of the uniform Evidence Acts, that concern could be addressed by amending the section so that it provides that the court can, either of its own motion or on the application of a party, direct that evidence be given in narrative form.

2.20 The QLRC accepts that there is a need for flexibility as to the methods by which evidence is adduced. It is of the view that sufficient flexibility exists in the common law, as supplemented by the legislation and guidelines in Queensland to which reference has been made.⁸² Amendments to the *Evidence Act 1977* (Qld) address concerns about the vulnerability of children and Aboriginal witnesses in the trial process.

2-1 The QLRC:

- (a) is of the view that the existing laws in Queensland provide sufficient flexibility in relation to the manner and form of giving evidence without the need for specific legislation;**
- (b) supports the ALRC's proposal to the extent that section 29(2) of the uniform Evidence Acts should provide that the court may, either of its own motion or on the application of a party, direct that evidence be given in narrative form;**
- (c) considers that this will provide further flexibility and be consistent with the position in Queensland; and**

80 Ibid para 5.36.

81 Ibid Proposal 5-1, post para 5.39.

82 See para 2.15-2.17 of this Report.

- (d) is of the view that concerns in relation to the evidence of child witnesses, Indigenous witnesses and other vulnerable witnesses (including sexual offence complainants) should be addressed by specific legislative provision.

CROSS-EXAMINATION OF UNFAVOURABLE WITNESSES

2.21 In its Issues Paper, the ALRC posed the following question:⁸³

Are concerns raised by the operation of s 38 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

2.22 In relation to permissible cross-examination of a party's own witness, the uniform Evidence Acts' provisions are considerably wider than the position at common law, as modified by statute, in Queensland.

2.23 At common law, a distinction is made between, on the one hand, a witness who is unfavourable and unable to be impeached on credit and, on the other hand, one who is hostile or adverse and who may be cross-examined and discredited.⁸⁴ At common law, a witness is 'hostile' or 'adverse' when the judge considers that he or she is deliberately withholding evidence or is unwilling to tell the truth in answer to non-leading questions.⁸⁵

2.24 Section 17 of the *Evidence Act 1977* (Qld) restates the common law and further provides that, with the leave of the court, the party may prove a prior inconsistent statement of an 'adverse' (hostile) witness. Section 17 provides:

17 How far a party may discredit the party's own witness

- (1) A party producing a witness shall not be allowed to impeach the credit of the witness by general evidence of bad character but may contradict the witness by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of the court prove that the witness has made at other times a statement inconsistent with the present testimony of the witness.
- (2) However, before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement.

⁸³ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 3-2, post para 3.20.

⁸⁴ *R v Lawrie* [1986] 2 Qd R 502, 514. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [17375].

⁸⁵ *McLellan v Bowyer* (1961) 106 CLR 95, 103-4; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [17.9].

2.25 In its Interim Report, the ALRC proposed that the law relating to 'hostile' witnesses be abrogated.⁸⁶ This was justified on the basis of criticisms of the law and the absence of any satisfactory rationale for the law. The ALRC concluded that a party should be permitted to cross-examine its own witness where the evidence being given is unfavourable to that party.⁸⁷

2.26 In three situations, section 38 of the uniform Evidence Acts allows a party who called a witness, with the leave of the court, to question the witness as though the party were cross-examining that witness.⁸⁸

- where the evidence given by the witness is unfavourable to the party;
- where the witness is not making a genuine attempt to give evidence about matters that may reasonably be supposed to be within the witness's knowledge; and
- where the witness has at any time made a prior inconsistent statement.

2.27 Where leave is given under section 38(1) of the uniform Evidence Acts, a witness may be asked leading questions,⁸⁹ questioned as to his or her credibility,⁹⁰ and have his or her prior inconsistent statement proved under section 43 of the uniform Evidence Acts. A prior inconsistent statement proved under section 43 will then be admissible, by virtue of the operation of section 60 of the uniform Evidence Acts, to prove the truth of the facts asserted.

2.28 In *Adam v The Queen*,⁹¹ the High Court confirmed that, under section 60 of the uniform Evidence Acts, prior inconsistent statements of an unfavourable witness would become admissible for the truth of their contents.

⁸⁶ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 625.

⁸⁷ Ibid.

⁸⁸ Section 38 of the uniform Evidence Acts provides:

38 Unfavourable witnesses

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
- (a) evidence given by the witness that is unfavourable to the party; or
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
 - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

⁸⁹ Uniform Evidence Acts s 42.

⁹⁰ Uniform Evidence Acts s 103.

⁹¹ (2001) 207 CLR 96.

The majority considered that it was not improper for the Crown to call a witness known to be unfavourable to the prosecution to adduce evidence of a prior inconsistent statement for the purpose of proving the truth of the facts asserted.⁹²

2.29 As noted in Chapter 3 of this Report, section 101 of the *Evidence Act 1977* (Qld) also has the effect of making prior inconsistent statements admissible as an exception to the hearsay rule, in so far as the statement ‘shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible’.⁹³

The ALRC’s proposals

2.30 In its Discussion Paper, the ALRC noted that there remain differing views about the value of the change made by section 38:⁹⁴

One is that the test to have a witness declared ‘unfavourable’ is too lenient and unfairly allows a party to call a witness solely to allow a prior inconsistent statement into evidence that would not be admitted any other way. The other view is that expressed in *Adam*—that the practice ensures all relevant evidence gets in, and that the availability of that witness for questioning by the other party overcomes any unfairness.

2.31 The ALRC concluded that the guiding principle under which section 38 was first recommended, namely, as an improvement in fact-finding, has been upheld by the operation of the section over the last ten years.⁹⁵ The ALRC did not propose any change to section 38.

The QLRC’s view

2.32 Section 38 of the uniform Evidence Acts has substantially wider operation than the law in Queensland in relation to permissible cross-examination of a party’s own witness.

2.33 Section 101 of the *Evidence Act 1977* (Qld) has the same effect as section 60 of the uniform Evidence Acts in making a prior inconsistent statement that has been proved under the respective legislation, admissible as truth of its contents.

2.34 In relation to the Queensland provisions, it has been held that it is not improper for the prosecution to call a witness with the knowledge that such

92 Ibid [18]–[19].

93 See para 3.100–3.105 of this Report.

94 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.56.

95 Ibid para 5.72.

witness is likely to be hostile for the purpose of proving a prior inconsistent statement that will ultimately be admissible for the truth of its contents.⁹⁶

2-2 The QLRC is of the view that:

- (a) **section 38 of the uniform Evidence Acts represents a different approach to the cross-examination of unfavourable witnesses from the law in Queensland; and**
- (b) **although the uniform Evidence Acts approach has some advantages, this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

2-3 The QLRC does not oppose the ALRC's proposal to make no amendment to section 38 of the uniform Evidence Acts.

CONSTRAINTS IN CROSS-EXAMINATION AND VULNERABLE WITNESSES

2.35 In its Issue Paper, the ALRC posed the following question:⁹⁷

Are concerns raised by the application (or lack of application) of s 41 of the uniform Evidence Acts, particularly in regard to the types of questions being asked of vulnerable witnesses? Should any concerns be addressed through amendment to the uniform Evidence Acts or by other means?

2.36 Although cross-examination is an important part of the adversarial trial, both common law and statute impose limitations on inappropriate questioning. Further constraints may be necessary where the witness's characteristics make the witness particularly vulnerable to the process of cross-examination.

2.37 As discussed earlier in this chapter,⁹⁸ children are a category of witness who are particularly vulnerable in the adversarial trial system.⁹⁹ Complainants in sexual assault matters have also been identified as a category of witness who may be particularly vulnerable in the trial process.¹⁰⁰ Other categories of

⁹⁶ *R v Williams* [2001] 2 Qd R 442.

⁹⁷ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 3–3, post para 3.34.

⁹⁸ See para 2.16 of this Report.

⁹⁹ See Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997); Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000).

¹⁰⁰ Victorian Law Reform Commission, Final Report, *Sexual Offences: Law and Procedure* (2004); Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (2000).

witnesses who are potentially vulnerable in cross-examination include Indigenous witnesses,¹⁰¹ witnesses with a relationship to the other party, witnesses with intellectual impairment, and witnesses with a lack of education.¹⁰²

2.38 The courts have an inherent power to control the conduct of proceedings, including the cross-examination of witnesses.¹⁰³ Key provisions in the *Evidence Act 1977* (Qld) that limit the cross-examination of witnesses include:

- section 20 – cross-examination as to credit;¹⁰⁴
- section 21 – improper questions;¹⁰⁵
- section 21A – evidence of special witnesses;¹⁰⁶
- section 21AH – limitation on cross-examination of an affected child at committal;¹⁰⁷ and
- sections 21L–21S – cross-examination of protected witnesses.¹⁰⁸

2.39 Further provisions restricting the cross-examination of complainants in sexual offence cases are contained in the *Criminal Law (Sexual Offences) Act 1978* (Qld).¹⁰⁹

Uniform Evidence Acts

2.40 Section 41 of the uniform Evidence Acts sets out the circumstances in which the court may disallow a question in cross-examination:

101 Criminal Justice Commission (Qld), Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996).

102 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.93.

103 *Wakeley v The Queen* (1990) 93 ALR 79, 86.

104 Substituted by the *Criminal Law Amendment Act 2000* (Qld) s 45.

105 Inserted by the *Criminal Law Amendment Act 2000* (Qld) s 45.

106 Inserted by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) and amended by the *Criminal Law Amendment Act 2000* (Qld) s 46; *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 59.

107 Inserted by the *Evidence (Protection of Children) Amendment Act 2003* (Qld).

108 Inserted by the *Criminal Law Amendment Act 2000* (Qld) s 47.

109 As amended by the *Criminal Law Amendment Act 2000* (Qld) and the *Evidence (Protection of Children) Amendment Act 2003* (Qld).

41 Improper questions

- (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
- (a) misleading; or
 - (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
- (a) any relevant condition or characteristic of the witness, including age, personality and education; and
 - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

2.41 In assessing the propriety of the question, the court is specifically required to take into account the witness's age, personality, education and any mental, intellectual or physical disability. This list, although not exhaustive, does not specifically refer to a number of the characteristics of vulnerability referred to earlier.¹¹⁰

2.42 The ALRC stated that '[t]he use of s 41 to control improper questions during cross-examination is patchy and inconsistent and does not provide sufficient protection to vulnerable witnesses in some types of matters'.¹¹¹ The ALRC made favourable mention of section 275A of the *Criminal Procedure Act 1986* (NSW).¹¹² Section 275A provides:

275A Improper questions

- (1) In any criminal proceedings, the court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a **disallowable question**):
- (a) is misleading or confusing, or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

¹¹⁰ See para 2.37 of this Report.

¹¹¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.108.

¹¹² Inserted by the *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) s 3, Sch 1 [4]. Section 275A commenced on 12 August 2005. Section 275A(7) provides that s 41 of the uniform Evidence Acts does not apply to the criminal proceedings to which this section applies.

- (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.
- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
 - (a) any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality, and
 - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.
- (3) A question is not a disallowable question merely because:
 - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or
 - (b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.
- (4) A party to criminal proceedings may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.
- (7) Section 41 of the *Evidence Act 1995* does not apply to criminal proceedings to which this section applies.
- (8) A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section.

Maximum penalty: 60 penalty units.

- (9) In this section:

criminal proceedings means proceedings against a person for an offence (whether summary or indictable), and includes the following:

- (a) committal proceedings,
- (b) proceedings relating to bail,
- (c) proceedings relating to sentencing,
- (d) proceedings on an appeal against conviction or sentence.

2.43 The New South Wales provision differs from section 41 of the uniform Evidence Acts in that it imposes a duty on the court to disallow an improper question, rather than merely conferring a discretion on the court.

2.44 Further, the factors that the court must take into account are extended to include the ethnic and cultural background of the witness, the language background and skills of the witness, and the level of maturity and understanding of the witness. It should be noted that section 275A(7) excludes section 41 of the uniform Evidence Acts from applying to criminal proceedings to which section 275A applies.

Queensland legislation

2.45 In Queensland, the comparable provision to section 41 of the uniform Evidence Acts is section 21 of the *Evidence Act 1977* (Qld), which provides:

21 Improper questions

- (1) The court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.
- (2) In deciding whether a question is an improper question, the court must take into account—
 - (a) any mental, intellectual or physical impairment the witness has or appears to have; and
 - (b) any other matter about the witness the court considers relevant, including, for example, age, education, level of understanding, cultural background or relationship to any party to the proceeding.
- (3) Subsection (2) does not limit the matters the court may take into account in deciding whether a question is an improper question.
- (4) In this section—

“**improper question**” means a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.

2.46 In relation to section 21, it is noted that the court has a discretion, rather than a duty, to disallow a question if the court considers that the question is improper. However, in determining whether a question is improper the court ‘must’ take into account various factors.

2.47 Section 21 attempts to address concerns relating to vulnerable witnesses by specific reference to age, intellectual impairment, education and cultural background. The factors that must be taken into account also include the witness’s relationship to the other party, which acknowledges that this may be a further basis of vulnerability.

2.48 The position of children¹¹³ is further addressed in section 21A of the *Evidence Act 1977* (Qld), which sets out procedures to address any disadvantage the child witness may suffer in the trial process, including that the court may direct that questions to the witness be kept simple or be limited by time or number of questions on a particular issue.¹¹⁴

2.49 These procedures may also apply to other ‘special witnesses’. The term ‘special witness’ is defined as follows:¹¹⁵

“special witness” means—

- (a) a child under 16 years; or
- (b) a person who, in the court’s opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court.

2.50 A ‘relevant matter’ for paragraph (b)(i) of that definition means the person’s age, education, level of understanding, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant.¹¹⁶

2.51 The court may make an order or direction relating to the giving of evidence by the special witness under section 21A either of its own motion or upon application made by a party to the proceeding.¹¹⁷

2.52 Key features of the special witness provisions are the court orders that may be made to facilitate the giving of evidence by a special witness including:¹¹⁸

113 In this context, a child is a person under the age of sixteen years. The age limit for a child was raised from 12 years by the *Evidence (Protection of Children) Amendment Act 2003* (Qld). Section 21A does not apply to a child to the extent that the ‘affected child’ provisions apply: s 21A(1A).

114 *Evidence Act 1977* (Qld) s 21A(2)(f).

115 *Evidence Act 1977* (Qld) s 21A(1).

116 *Evidence Act 1977* (Qld) s 21A(1) (definition of ‘relevant matter’).

117 *Evidence Act 1977* (Qld) s 21A(2).

118 *Evidence Act 1977* (Qld) s 21A(2)(a)–(f).

- excluding the accused from the witness's view;
- excluding other persons from the court during the witness's evidence;
- allowing the witness to give evidence from a room other than that in which the court is sitting;
- allowing a support person for the witness;
- allowing a video-taped recording to be viewed instead of direct testimony;
- constraining the nature of the questioning of the witness.

2.53 Part 2, Division 4A of the *Evidence Act 1977 (Qld)*¹¹⁹ sets out further procedures to ensure that an 'affected child's evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence'.¹²⁰

2.54 In summary, an 'affected child' means a child who is a witness in:¹²¹

- a criminal proceeding relating to an offence of a sexual nature or an offence involving violence where there is a prescribed relationship between the child and the defendant; or
- a civil proceeding arising from the commission of such an offence.

2.55 Section 21AD of the *Evidence Act 1977 (Qld)* defines a 'child' as a person under sixteen years, or a special witness who is sixteen or seventeen years, at the relevant times set out in that section.

2.56 Key features of the affected child provisions include:

- that the child's evidence, including the child's cross-examination, is to be pre-recorded in advance of the trial;¹²²
- if pre-recording is not possible, the child's evidence is to be taken by audio-visual link or with the benefit of a screen;¹²³ and

119 Inserted by the *Evidence (Protection of Children) Amendment Act 2003 (Qld)* s 60.

120 *Evidence Act 1977 (Qld)* s 21AA(b).

121 *Evidence Act 1977 (Qld)* s 21AC.

122 *Evidence Act 1977 (Qld)* ss 21AI–21AO.

123 *Evidence Act 1977 (Qld)* ss 21AQ–21AR.

- for committal proceedings, the child's evidence-in-chief is to be given by statement, and the child will be required for cross-examination only where stringent conditions are satisfied.¹²⁴

2.57 The difficulties faced by complainants in sexual offence cases are further addressed by the *Criminal Law (Sexual Offences) Act 1978* (Qld). Section 4 of that Act sets out rules that substantially limit cross-examination as to the witness's credit and, in particular, the witness's sexual history. Similar legislative provisions, commonly called 'rape shield' provisions, have been introduced in most Australian jurisdictions.¹²⁵

The ALRC's proposal

2.58 As noted above,¹²⁶ the ALRC concluded that the use of section 41 of the uniform Evidence Acts to control improper questions during cross-examination was patchy and inconsistent. Further, the ALRC considered that section 41 is too limited to provide sufficient protection to vulnerable witnesses.¹²⁷

2.59 The ALRC supported the approach taken in section 275A of the *Criminal Procedure Act 1986* (NSW).¹²⁸ The ALRC concluded, however, that such a provision should apply to both civil and criminal matters.¹²⁹ Further, the ALRC did not support imposing a duty on the court to disallow improper questions, noting the forensic aspects of the adversarial system.¹³⁰

2.60 The ALRC considered that additional protection in cross-examination was required for vulnerable witnesses and that, therefore, a duty should be imposed on the courts to disallow inappropriate questions in appropriate circumstances.¹³¹ It noted the Victorian Law Reform Commission's recommendation for a mandatory approach in relation to children under eighteen years of age.¹³²

124 *Evidence Act 1977* (Qld) ss 21AE–21AH.

125 *Bull v The Queen* (2000) 201 CLR 443. Kibble N, 'The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?' (2000) *Criminal Law Review* 274.

126 See para 2.42 of this Report.

127 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.108.

128 *Ibid* para 5.109. Section 275A of the *Criminal Procedure Act 1986* (NSW) is set out at para 2.42 of this Report.

129 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.110. Section 275A(7) of the *Criminal Procedure Act 1986* (NSW) applies only in criminal proceedings.

130 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.111.

131 *Ibid* para 5.112.

132 *Ibid* para 5.113, citing Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) Recommendations 143 and 144.

2.61 The ALRC proposed:¹³³

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

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

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

The QLRC's view

2.62 There has been extensive research conducted in Queensland in recent years on the vulnerability of particular witnesses in the court process including children, intellectually impaired persons, Indigenous witnesses and sexual offence complainants.¹³⁴

133 Ibid Proposals 5–2, 5–3 and 5–4, post para 5.114.

134 Criminal Justice Commission (Qld), Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Chapter 4; Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000); Queensland Crime and Misconduct Commission, Report, *Seeking Justice: An Inquiry into how Sexual Offences are Handled by the Queensland Criminal Justice System* (2003) <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/SeekingJustice.pdf>> (accessed 6 September 2005); Supreme Court of Queensland, *Equal Treatment Benchbook*, <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> (accessed 5 September 2005).

2.63 The *Evidence Act 1977* (Qld) and related legislation have been amended to address these concerns.¹³⁵ Section 21 of the *Evidence Act 1977* (Qld) is similar in terms to the ALRC's proposed amendments to section 41 of the uniform Evidence Acts. Both provisions are discretionary rather than mandatory, and both include a range of factors that must be taken into account by the court that would cover most circumstances of vulnerability. It is noted, however, that the proposed amendments to the uniform Evidence Acts do not include the factor of the witness's 'relationship to the other party'.

2.64 In relation to the ALRC's proposal dealing with vulnerable witnesses, including children and persons with an intellectual impairment,¹³⁶ the QLRC considers that the Queensland provision adequately protects such persons. The issue of imposing a duty rather than a discretion was not specifically addressed in the QLRC's most recent report on the evidence of children,¹³⁷ nor, it would seem, by Parliament during the readings of the relevant amendments to the *Evidence Act 1977* (Qld).¹³⁸

2.65 As discussed above,¹³⁹ further provisions in the *Evidence Act 1977* (Qld) and related legislation prescribe limitations on cross-examination of children and other potentially disadvantaged witnesses.

135

The *Evidence Act 1977* (Qld), the *Criminal Code* (Qld) and the *Criminal Law (Sexual Offences) Act 1978* (Qld) were amended by the *Criminal Law Amendment Act 2000* (Qld) and the *Evidence (Protection of Children) Amendment Act 2003* (Qld). See the Second Reading Speech and debates of the Criminal Law Amendment Bill 2000 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 3100 (Hon MJ Foley, Attorney-General and Minister for Justice):

The Bill also addresses criticisms that courts do not or cannot protect witnesses by making a number of other significant amendments to the *Evidence Act 1977*. Firstly, courts will have a discretion to disallow a question as to credit if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witness's evidence. This will prevent unnecessary and irrelevant attacks on the character of a witness, but will not prevent relevant questions being asked.

Secondly, courts will have a discretion to disallow a question if the court considers that the question uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. The court will take into account any relevant characteristics of the witness, such as any mental, intellectual or physical impairment the witness has or appears to have, age, education, level of understanding, cultural background, or relationship to any party in the proceeding. These considerations are particularly important when the witness is a child.

Thirdly, the factors that a court is to take into account in declaring a person to be a special witness have been expanded to include age, level of understanding, relationship to any party in the proceeding and the nature and subject matter of the evidence. In addition, the *Criminal Law (Sexual Offences) Act 1978* will extend the restrictions on the use of sexual history evidence to all sexual offences. The Act will acknowledge that, just because a person has engaged in consensual sexual activity on other occasions, it does not mean that the person is more likely to have consented to the conduct at issue or is less worthy of belief as a witness.

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See para 2.61 of this Report.

137

Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) Chapter 13.

138

Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 3100 (Hon MJ Foley, Attorney-General and Minister for Justice); 5 October, 3544 (Mr Springborg), 3548 (Mr Feldman), 3550 (Mrs Cunningham).

139

See para 2.38–2.39 of this Report.

2-4 The QLRC is of the view that:

- (a) the ALRC's proposals to amend section 41 of the uniform Evidence Acts to allow the court to disallow improper questions, and to require the court to disallow improper questions posed to vulnerable witnesses, during cross-examination are consistent with the position under section 21 of the *Evidence Act 1977 (Qld)*;
- (b) the provisions in the *Evidence Act 1977 (Qld)* and related legislation adequately address concerns relating to the cross-examination of vulnerable witnesses in Queensland;
- (c) the ALRC should consider including the factor of the witness's relationship to any other party to the proceeding among the factors to which the court must have regard in determining whether a question should be disallowed;
- (d) concerns in relation to the evidence of child witnesses, Indigenous witnesses and other vulnerable witnesses (including sexual offence complainants) should be addressed by specific legislative provision;
- (e) the ALRC should review all of its proposals that relate to the evidence of children and other vulnerable witnesses to ensure that a consistent approach has been taken to the inclusion of provisions in the uniform Evidence Acts that address concerns about the evidence of these witnesses.

2-5 The QLRC commends the specific provisions of the *Evidence Act 1977 (Qld)* that deal with these issues – namely, sections 21 and 21A of the *Evidence Act 1977 (Qld)*.

QUESTIONING OF A COMPLAINANT BY AN UNREPRESENTED ACCUSED

2.66 In its Issues Paper, the ALRC posed the following question:¹⁴⁰

Should the uniform Evidence Acts be amended to prohibit an unrepresented accused from personally cross-examining a complainant in a sexual offence proceeding?

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Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 3–4, post para 3.34.

2.67 In its Discussion Paper, the ALRC noted that a number of jurisdictions have recommended that an unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding.¹⁴¹

2.68 In New South Wales, section 294A was inserted into the *Criminal Procedure Act 1986* (NSW) in 2003.¹⁴² Under that section, where the accused person is not represented by counsel, the complainant cannot be examined-in-chief, cross-examined or re-examined by the accused person but may be examined, instead, by a person appointed by the court. This provision was recently held to be a valid limitation on the right to cross-examine and not, in itself, to create an unfair trial.¹⁴³

2.69 In Queensland, an unrepresented accused is prohibited from cross-examining a 'protected witness' in person.¹⁴⁴ A 'protected witness' includes not only a complainant in a sexual offence case, but also a child under 16 years, an intellectually impaired person, and an alleged victim of a 'prescribed offence'.¹⁴⁵ The purpose and effect of Division 6 has been described as follows:¹⁴⁶

Division 6 is a further response to public opinion which gave birth to s 21A (evidence of special witnesses). It arises from community concern about oppressive treatment of "protected witnesses" (particularly complainants) in certain criminal cases. It prevents an unrepresented accused from cross-examining children, persons with an intellectual disability and alleged victims of sexual or violent crimes.

If the accused accepts legal aid, for the purposes of such a cross-examination at least, the right of challenge is preserved; if the accused refuses legal aid, the right to cross-examine is abrogated.

The ALRC's proposal

2.70 The ALRC concluded that, as each jurisdiction that is part of the uniform Evidence Acts scheme has enacted different 'rape-shield' provisions, uniform rape-shield provisions would need to be developed.¹⁴⁷

¹⁴¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.115, 5.119, citing New South Wales Law Reform Commission, Report, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (R 101, 2003) Recommendation 1; Victorian Law Reform Commission, Final Report, *Sexual Offences: Law and Procedure* (2004) Recommendation 94. See also Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) Chapter 14.

¹⁴² *Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003* (NSW) Sch 1 [1], commenced 3 September 2003.

¹⁴³ *R v MSK and MAK* (2004) 61 NSWLR 204.

¹⁴⁴ *Evidence Act 1977* (Qld) s 21N.

¹⁴⁵ *Evidence Act 1977* (Qld) s 21M.

¹⁴⁶ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [21L.2].

¹⁴⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.124, 18.29.

2.71 The ALRC did not propose to include a provision prohibiting an unrepresented accused from personally cross-examining a complainant in a sexual offence proceeding.¹⁴⁸ It expressed support for a separate inquiry into the content and operation of Commonwealth, State and Territory rape-shield laws, with a view to achieving uniformity.¹⁴⁹

The QLRC's view

2.72 In Queensland, Part 2, Division 6 of the *Evidence Act 1977* (Qld) adequately protects sexual offence complainants and other vulnerable witnesses from cross-examination by an unrepresented accused.

2-6 The QLRC is of the view that:

- (a) Part 2, Division 6 of the *Evidence Act 1977* (Qld) adequately protects sexual offence complainants, children and other vulnerable witnesses from cross-examination by an unrepresented accused;**
- (b) the ALRC's consideration of the inclusion of provisions in the uniform Evidence Acts for children and other vulnerable witnesses should include consideration of provisions that prohibit an unrepresented accused from cross-examining sexual offence complainants;**
- (c) concerns in relation to the evidence of child witnesses, Indigenous witnesses and other vulnerable witnesses, including sexual offence complainants, should be addressed by specific legislative provision.**

2-7 The QLRC commends the specific provisions of the *Evidence Act 1977* (Qld) that deal with these issues – namely sections 21L–21S.

148 Ibid para 5.126.

149 Ibid para 18.38.

USE OF DOCUMENTS IN CROSS-EXAMINATION¹⁵⁰

Queensland

2.73 The law in Queensland in relation to the use of documents in cross-examination comprises the common law as modified by statute. The law in this area is complex, and has been described as 'shrouded in obscurity and complication which is exceptional even by the standards of the law of evidence'.¹⁵¹ Many of these complexities concern the rights or obligations of parties to tender a document arising out of the cross-examination of a witness.¹⁵²

2.74 At common law, the cross-examination of a witness about the contents of a document is largely governed by the rule in *The Queen's Case*¹⁵³ that 'a witness cannot be asked any question about the contents of a document unless it is first shown to the witness and put in evidence by the cross-examiner as part of his case'.¹⁵⁴

2.75 The rule in *The Queen's Case* has been modified by statute in most Australian jurisdictions in relation to a prior inconsistent statement of the witness.¹⁵⁵

2.76 Section 19 of the *Evidence Act 1977* (Qld) provides as follows:

19 Witness may be cross-examined as to written statement without being shown it

- (1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.
- (1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting the witness.

¹⁵⁰ See generally McHugh MH, 'Cross-Examination on Documents' (1985) 1 *Australian Bar Review* 51; Malcolm DK, 'Cross-Examination on Documents' (1986) 2 *Australian Bar Review* 267.

¹⁵¹ New South Wales Law Reform Commission, Working Paper, *The Course of the Trial* (WP 20, 1978) [9.1].

¹⁵² Discussed in Phillips JH, 'Cross-examination and documents' (1990) 64 *Australian Law Journal* 591. Section 35 of the uniform Evidence Acts has clarified the law in this area.

¹⁵³ (1820) 2 B & B 286; 129 ER 976.

¹⁵⁴ McHugh MH, 'Cross-Examination on Documents' (1985) 1 *Australian Bar Review* 51, 51. Further rules about cross-examination on documents relate to documents that are called for production, to documents that are used to refresh memory, and to the situation where a party is the witness being cross-examined: see McHugh, 56–61. These issues are dealt with in ss 32–36 of the uniform Evidence Acts.

¹⁵⁵ Uniform Evidence Acts s 43; *Evidence Act 1977* (Qld) s 19; *Evidence Act 1929* (SA) s 29; *Evidence Act 1958* (Vic) s 36; *Evidence Act 1906* (WA) s 22.

- (2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit.

2.77 For prior inconsistent statements of the witness contained in a document, there is no longer any obligation for the cross-examiner to show the statement to the witness or, for that matter, to tender the document into evidence. A prior inconsistent statement, if not admitted, can be proved under section 18 of the *Evidence Act 1977* (Qld).

2.78 *The Queen's Case* rule continues to apply to the cross-examination of a witness on a document made by a person other than the witness. Heydon in *Cross on Evidence* notes:¹⁵⁶

The former law continues to apply to these cases and consequently the witness is not compelled to answer any questions on the document until the document is shown to the witness and tendered. This means the document must be capable of being properly admitted into evidence.

2.79 A further procedure available to the cross-examining party, and the only 'proper course'¹⁵⁷ where a document is inadmissible or not being tendered, is as follows:¹⁵⁸

A document made by a person other than the witness ... may, even if inadmissible in evidence, be put into a witness's hands and that witness may be asked whether, having looked at the document, he adheres to his previous testimony. But this is the extent to which the cross-examiner may go; he may not suggest anything which might indicate the nature of the contents of the document.

2.80 The fairness and correctness in law of the procedure as it relates to third party documents that are not admissible has been questioned.¹⁵⁹

Uniform Evidence Acts

2.81 The uniform Evidence Acts' provisions relating to the use of documents in cross-examination distinguish between documents made by the witness (section 43) and documents made by a third party (section 44).

2.82 Section 43 allows cross-examination on a witness's prior inconsistent statement without full particulars being given to the witness and, where the statement is contained in a document, without the document being shown to the

¹⁵⁶ Heydon JD, *Cross on Evidence* (7th ed, 2004) [17550].

¹⁵⁷ Ibid.

¹⁵⁸ *R v Bedington* [1970] Qd R 353, 359; but cf *Southern Cross Mine Management v Ensham Resources and Ors* (Unreported, Chesterman J, Ruling on use of documents in cross-examination, 15 June 2005).

¹⁵⁹ Gyles RV, 'Commentary' in McHugh MH, 'Cross-Examination on Documents' (1985) 1 *Australian Bar Review* 51, 69–71; *R v Hawes* (1994) 35 NSWLR 294, 302–3.

witness. This is to the same effect as section 19 of the *Evidence Act 1977* (Qld), which, as noted above,¹⁶⁰ overrules this aspect of the rule in *The Queen's Case*.¹⁶¹

2.83 Section 44 of the uniform Evidence Acts deals with the cross-examination of a witness about a previous representation made by a person other than the witness. Section 44 provides:

44 Previous representations of other persons

- (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.
- (2) A cross-examiner may question a witness about the representation and its contents if:
 - (a) evidence of the representation has been admitted; or
 - (b) the court is satisfied that it will be admitted.
- (3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:
 - (a) the document must be produced to the witness;
 - (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents;
 - (c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given;
 - (d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.
- (4) A document that is so used may be marked for identification.

2.84 Section 44(2) generally reflects the common law in allowing cross-examination where the third party document will be admitted into evidence.¹⁶² However, it is wider than the common law in that it also extends to oral statements.

¹⁶⁰ See para 2.75–2.76 of this Report.

¹⁶¹ Harris W, 'The Examination of Witnesses Under the Commonwealth *Evidence Act 1995*' (1996) 26 *Queensland Law Society Journal* 269, 275.

¹⁶² See para 2.78 of this Report.

2.85 Section 44(3) reflects the common law's requirement that, where the document will not be tendered, it may be the subject of cross-examination only if the identity of the document and its contents are not disclosed.¹⁶³ In its original evidence inquiry, the ALRC noted criticisms that this procedure may be oppressive to the witness and may encourage the tribunal of fact to speculate about the content of the document.¹⁶⁴ However, the ALRC also acknowledged that the procedure can assist in establishing the facts.¹⁶⁵

2.86 The procedure in section 44(3) has been criticised on the basis that it would be almost impossible to avoid suggesting that the document asserts something contrary to the testimony of the witness.¹⁶⁶

The ALRC's proposal

2.87 In its Discussion Paper, the ALRC noted that there do not appear to be any significant concerns in relation to section 44(2).¹⁶⁷ However, in relation to section 44(3), the ALRC considered that such cross-examination may be oppressive and unfair to a witness and confusing for the judge and jury.¹⁶⁸

2.88 The ALRC doubted that permitting cross-examination of a witness on an inadmissible document was consistent with the principles underlying the uniform Evidence Acts' provisions, namely, 'the improvement of fact-finding, fairness and rendering the law more rational and easier to operate'.¹⁶⁹

2.89 However, the ALRC noted that the repeal of section 44(3) and (4) would mean that the common law would apply and that, since those provisions essentially restate the common law, their repeal would not alleviate the concerns raised by their operation.¹⁷⁰ It considered that these concerns could be addressed by the use of section 45(2) to require the production of the document if the judge considers counsel is confusing or misleading the court or

163 See para 2.79 of this Report.

164 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 636.

165 Ibid.

166 *R v Hawes* (1994) 35 NSWLR 294, 303, cited in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.2.4220].

167 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.131.

168 Ibid para 5.133.

169 Ibid.

170 Ibid.

the jury.¹⁷¹ Additionally, the ALRC considered that the court's general power under section 26 to control cross-examination could be used to address these concerns.¹⁷² Consequently, the ALRC did not propose any amendment to section 44.

The QLRC's view

2.90 The procedures under section 44 of the uniform Evidence Acts are substantially similar to the law applying in Queensland in relation to the cross-examination on a third party document.

2.91 The QLRC notes the criticisms of this procedure. However, it considers that the procedure has the potential to assist the fact finding process. The QLRC supports the ALRC's view that no amendment to section 44 of the uniform Evidence Acts is necessary.

2-8 The QLRC is of the view that the procedures under section 44 of the uniform Evidence Acts are substantially the same as the law as it applies in Queensland.

2-9 The QLRC supports the ALRC's view that no amendment to section 44 is necessary.

¹⁷¹

Ibid para 5.134. Section 45 of the uniform Evidence Acts provides:

45 Production of documents

- (1) This section applies if a party is cross-examining or has cross-examined a witness about:
 - (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
 - (b) a previous representation alleged to have been made by another person that is recorded in a document.
- (2) If the court so orders or if another party so requires, the party must produce:
 - (a) the document; or
 - (b) such evidence of the contents of the document as is available to the party;
 to the court or to that other party.
- (3) The court may:
 - (a) examine a document or evidence that has been so produced; and
 - (b) give directions as to its use; and
 - (c) admit it even if it has not been tendered by a party.
- (4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.
- (5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

¹⁷²

Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.134.

THE RULE IN *BROWNE V DUNN*

2.92 In its Issues Paper, the ALRC posed the following question:¹⁷³

Does s 46 of the uniform Evidence Acts adequately deal with the rule in *Browne v Dunn* for the purposes of evidence law? Should the consequences of a breach of the rule available at common law be included in the uniform Evidence Acts? Should the consequences of a breach of the rule be different depending on whether it is a civil or a criminal proceeding?

2.93 The common law rule in *Browne v Dunn*¹⁷⁴ is essentially a rule of fairness. It requires a party who intends to lead evidence that will contradict or challenge the evidence of the other party's witness to put that evidence to the witness in cross-examination.

2.94 A breach of the rule will occur where the cross-examining party seeks to tender such contradictory evidence in its own case without having first raised the matter in cross-examination. Where a breach occurs the court may:¹⁷⁵

- allow a party to re-open its case to answer the contradictory evidence;
- allow a party to recall its witness to address matters that should have been addressed in the cross-examination;
- make judicial comment to the jury to redress the unfairness arising from the evidence not being challenged;
- make judicial comment as to the weight of the contradicting evidence; or
- prevent the breaching party from calling the contradictory evidence in its case.

2.95 In criminal cases, there is a further need for caution in relation to giving directions as to the weight of contradictory evidence tendered in breach of the rule. The court will need to consider other possible explanations for a failure by counsel to observe the rules, some of which do not reflect on the credibility of the accused.¹⁷⁶

¹⁷³ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 3–6, post para 3.44.

¹⁷⁴ (1893) 6 R 67.

¹⁷⁵ *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, 23, 26; Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.137.

¹⁷⁶ *R v Foley* [2000] 1 Qd R 290, 292; *R v Birks* (1990) 19 NSWLR 677, 690 (Gleeson CJ).

Uniform Evidence Acts

2.96 Section 46 of the uniform Evidence Acts provides that:

46 Leave to recall witnesses

- (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:
 - (a) it contradicts evidence about the matter given by the witness in examination in chief; or
 - (b) the witness could have given evidence about the matter in examination in chief.
- (2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

2.97 In its Discussion Paper, the ALRC noted that it had not been its original intention that section 46 displace the common law in relation to possible remedies for a breach of the rule in *Browne v Dunn*.¹⁷⁷ Section 46 restates the scope of the rule in *Browne v Dunn*, but sets out only one remedy for breach – namely, that the witness whose evidence was not challenged may be recalled.

2.98 In relation to remedies for breach of the rule, the ALRC stated in its Interim Report that:¹⁷⁸

it is not possible or appropriate to address issues such as the comments that may be made or the inferences that may be drawn from a failure to comply with the rule ... The issue is best dealt with by a judicial discretion to permit parties to recall the witness who should have been cross-examined.

2.99 Odgers states that section 46 overlaps with, but does not affect, the continued operation of common law rule.¹⁷⁹ It has been held that the rule 'remains alive and well' under the regime of the evidence law introduced by the *Evidence Act 1995*.¹⁸⁰ The New South Wales Court of Appeal in *Scalise v Bezzina*¹⁸¹ stated that:¹⁸²

¹⁷⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.139.

¹⁷⁸ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 635.

¹⁷⁹ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.2.4440]. At [1.2.4480], Odgers cites examples of the application of the common law remedies in cases where the uniform Evidence Acts apply.

¹⁸⁰ *Heaton v Luczka* (Unreported, New South Wales Court of Appeal, Cole, Beazley and Stein JJA, 3 March 1998).

¹⁸¹ [2003] NSWCA 362.

¹⁸² *Ibid* [97].

if it appears during the course of the trial that the rule has been offended and that unfairness may result, the judge has a discretion as to how best to remedy the unfairness so that the trial does not miscarry.

The ALRC's view

2.100 The ALRC stated in its Discussion Paper that it did not receive many submissions that addressed this issue.¹⁸³ It concluded that '[g]iven the flexibility required to deal with the circumstance of each case, it was never intended that s 46 operate as a code to the exclusion of the common law remedies'.¹⁸⁴ It appears that the courts have also adopted this approach.¹⁸⁵

2.101 The ALRC did not propose any amendment to section 46.

The QLRC's view

2.102 There has been no statutory modification of the rule in *Browne v Dunn* in Queensland. Section 46 of the uniform Evidence Acts does not change the rule, but merely restates one aspect of it, namely, the power to recall a witness upon breach of the rule.

2-10 The QLRC is of the view that the law in relation to the rule of *Browne v Dunn* in Queensland and as applied under the uniform Evidence Acts regime is substantially the same.

2-11 The QLRC does not oppose the ALRC's proposal that there be no amendment to section 46.

AFFIDAVIT EVIDENCE

2.103 It was submitted to the ALRC that the uniform Evidence Acts should contain provisions governing the form and content of affidavits on the basis that the Acts are concerned with the presentation of evidence generally.¹⁸⁶

2.104 In response to this submission, the ALRC has sought comments to the following question:¹⁸⁷

¹⁸³ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.141.

¹⁸⁴ Ibid para 5.143.

¹⁸⁵ See para 2.99 of this Report.

¹⁸⁶ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.149, citing S Finch, *Consultation*, Sydney, 3 March 2005.

¹⁸⁷ Ibid Question 5-1, post para 5.150.

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

2-12 The QLRC is of the view that procedural rules in Queensland for affidavits adequately prescribe the form and content of affidavits.

Chapter 3

The hearsay rule and its exceptions

INTRODUCTION

3.1 The rule against hearsay is a broad exclusionary rule, which has as its aim the exclusion of potentially unreliable evidence that cannot be tested by cross-examination. More particularly, as noted in *Teper v The Queen*:¹⁸⁸

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

3.2 However, in recognition that the exclusion of all hearsay evidence would exclude obviously reliable and sometimes the only evidence, numerous exceptions to the rule have developed. In *Myers v Director of Public Prosecutions*,¹⁸⁹ Lord Reid commented that the law regarding hearsay was 'absurdly technical' such that it was 'difficult to make any general statement about the law of hearsay evidence which is entirely accurate'.¹⁹⁰ The House of Lords in that case refused to extend the categories of exceptions to the rule, which were then well established. More recent judicial pronouncements in Australia have not made an accurate statement of the hearsay rule and its exceptions any easier.¹⁹¹

STATEMENT OF THE HEARSAY RULE

Queensland

3.3 The hearsay rule in Queensland is comprised of the common law as modified by statute. The hearsay rule makes inadmissible all out-of-court statements tendered for the purpose of directly proving the facts asserted in the statement.¹⁹² The focus is on the purpose of tender. Evidence that is relevant and tendered for some purpose other than to prove the truth of its contents will be admissible as original evidence. An example is provided in *Subramaniam v Public Prosecutor*.¹⁹³ In that case, evidence of threats made to the accused

188 [1952] AC 480, 486 (Lord Normand).

189 [1965] AC 1001.

190 Ibid 1019–20.

191 *Walton v The Queen* (1989) 166 CLR 283; *Pollitt v The Queen* (1992) 174 CLR 558.

192 *Walton v The Queen* (1989) 166 CLR 283, 288 (Mason CJ).

193 [1956] 1 WLR 965, 970 (Mr LMD de Silva).

were held to be admissible as original evidence because the purpose of tender was not to prove the contents of the threats, but to prove that the accused was acting under duress.

3.4 The rule extends beyond verbal statements to cover written statements¹⁹⁴ and conduct.¹⁹⁵ The extent to which the rule applies to implied assertions, that is, those from which facts are inferred or implied and that were generally not intended to be asserted, was uncertain in Australia until the decision in *Walton v The Queen*.¹⁹⁶ In that case, the High Court held that a son's statement 'Hello Daddy' whilst talking to a person on the telephone, was an implied assertion that the identity of the caller was his father, the accused.¹⁹⁷ The High Court held that the hearsay rule applies to both express and implied assertions, although statements by Mason CJ and Deane J suggest a more flexible approach can be taken with respect to implied assertions.¹⁹⁸

Uniform Evidence Acts

3.5 The uniform Evidence Acts have introduced substantial reform to the rule against hearsay in both civil and criminal trials. In recommending these reforms, the ALRC concluded that the existing common law rules were capable of excluding probative evidence, and were overly complex, technical, artificial and replete with anomalies.¹⁹⁹

3.6 The new provisions for the hearsay rule and its exceptions are contained in Part 3.2 of the uniform Evidence Acts.²⁰⁰ Other provisions of the uniform Evidence Acts may operate as further exceptions.²⁰¹ Some of the reforms reflect the progressive views of Mason CJ in *Walton v The Queen*.²⁰²

3.7 The statement of the hearsay rule in section 59(1) of the uniform Evidence Acts reflects the common law's focus on the purpose for which the representation is being tendered. Only when the representation is being tendered to prove the existence of a fact will it fall within the rule and therefore

194 *Myers v DPP* [1965] AC 1001.

195 *Chandrasekera v The King* [1937] AC 220.

196 (1989) 166 CLR 283. This issue has been the topic of much discussion. See Weinberg M, 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *Melbourne University Law Review* 268; texts and articles cited in Heydon JD, *Cross on Evidence* (7th ed, 2004) [31035] note 50.

197 A further example of an implied assertion would be the statement 'My mother is feeling sick'. The express assertion relates to ill health but the statement also includes an implied assertion as to the relationship between the maker of the statement and the person to whom they were referring: *R v Benz* (1989) 168 CLR 110, 116 (Mason CJ), 143 (Gaudron and McHugh JJ).

198 (1989) 166 CLR 283, 295–6 (Mason CJ), 308 (Deane J).

199 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 329–340.

200 Uniform Evidence Acts ss 59–75.

201 Uniform Evidence Acts ss 79 (expert opinion), 81 (admissions).

202 (1989) 166 CLR 283.

be inadmissible. The word ‘representation’ is defined to include all matters that would be covered at common law, including implied representations.²⁰³ A key difference, however, is that hearsay in section 59(1) excludes unintended assertions. This is discussed further at paragraphs 3.60 to 3.72 of this Report.

COMMON LAW EXCEPTIONS TO THE HEARSAY RULE

Admissions

3.8 An important common law exception to the hearsay rule is evidence of admissions which, in criminal cases, includes confessions. Admissions are admitted, subject to some conditions,²⁰⁴ on the basis that, because they are adverse to the maker’s interest, they are more likely to be true and reliable. In relation to the admissibility of confessions, there is an additional requirement of voluntariness.²⁰⁵

Established categories

3.9 Other common law exceptions within the well established categories referred to in *Myers v Director of Public Prosecutions*²⁰⁶ are:

- declarations against interest;
- declarations in the course of duty;
- declarations as to public or general rights;
- declarations as to pedigree;
- dying declarations;
- post-testamentary declarations of testators concerning the contents of their wills;
- statements of testators in family provision proceedings,²⁰⁷ and
- statements in public documents.

²⁰³ Uniform Evidence Acts s 3(1), Dictionary (definition of ‘representation’).

²⁰⁴ Heydon JD, *Cross on Evidence* (7th ed, 2004) [33420]–[33590].

²⁰⁵ *McDermott v The King* (1948) 76 CLR 501; *R v Swaffield* (1998) 192 CLR 159.

²⁰⁶ [1965] AC 1001.

²⁰⁷ But see *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 149 (Gibbs J, with whom Mason and Aickin JJ agreed).

3.10 These exceptions share the features of inherent trustworthiness and being the best, if not the only, available evidence. However, the conditions of admissibility are technical and operate with fine distinctions.²⁰⁸

Res gestae²⁰⁹

3.11 The res gestae doctrine is an inclusionary doctrine that operates to include otherwise inadmissible evidence. The rule extends beyond hearsay.²¹⁰ However, for the purposes of this chapter, where the conditions of the doctrine are satisfied, hearsay statements become admissible as truth of the facts asserted in the statement.²¹¹ The doctrine is said to apply to the following types of statements:

- statements contemporaneous with and forming part of an event in issue;
- statements as to one's contemporaneous state of mind or emotion; and
- statements as to one's contemporaneous physical sensation.

3.12 The justification for this exception to the hearsay rule is that the spontaneity or contemporaneity of assertions forming part of the res gestae is said to tend to exclude the possibility of concoction or distortion.²¹²

3.13 In relation to statements forming part of the event, there has been some contention as to whether the test of admissibility is one of contemporaneity or spontaneity.

3.14 In *Vocisano v Vocisano*,²¹³ the focus was on strict contemporaneity. Barwick CJ commented that '[i]t is the contemporaneous involvement of the speaker at the time the statement is made with the occurrence which is identified as the res which founds admissibility'.²¹⁴

3.15 A less strict approach has been taken in the United Kingdom, where hearsay statements will be admitted as part of the res gestae where there are 'such conditions (always being those of approximate but not exact

²⁰⁸ For detailed conditions of admissibility see Heydon JD, *Cross on Evidence* (7th ed, 2004) [33001]–[33415].

²⁰⁹ The common law doctrine of res gestae has to some extent been incorporated into the *Evidence Act 1977* (Qld) s 93B discussed at para 3.30–3.35 of this Report.

²¹⁰ For example, to allow inadmissible character evidence: *O'Leary v The King* (1946) 73 CLR 566.

²¹¹ *Walton v The Queen* (1989) 166 CLR 283, 304 (Wilson, Dawson and Toohey JJ).

²¹² *Ibid.*

²¹³ (1974) 130 CLR 267.

²¹⁴ *Ibid* 273.

contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion'.²¹⁵

3.16 The uncertainty as to the appropriate test to be applied in Australia was not resolved in *Walton v The Queen*,²¹⁶ with Mason CJ favouring the English approach whilst Wilson, Dawson and Toohey JJ considered that the unlikelihood of concoction was not sufficient of itself to render a hearsay statement admissible.²¹⁷ Notwithstanding the apparent inconsistency in these approaches, Brennan J in *Pollitt v The Queen*²¹⁸ concluded that:²¹⁹

Walton stands as a recent decision of this Court affirming, at least by a majority, the conditions of admissibility of res gestae evidence stated by Lord Wilberforce in *Ratten*, namely, approximate if not exact contemporaneity with the res gestae and assurance of non-concoction arising from the spontaneity of the statement or the involvement of the maker in the events of the res gestae.

3.17 In relation to statements made by a person out of court concerning his or her physical sensations, the test of admissibility is one of making the statement 'at that time or soon afterwards'.²²⁰ In *Ramsay v Watson*,²²¹ the High Court noted that the doctrine would make statements as to one's present sensations admissible as evidence that those symptoms had in fact existed:²²²

This makes all statements made to an expert witness admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies; but, except they be admissible under the first rule, such statements are not evidence of the existence in fact of past sensations, experiences and symptoms of the patient.

'Reliable evidence' and telephone exception

3.18 General comments made by Mason CJ in *Walton v The Queen* suggested the development of a new exception based on a statement's reliability. This exception would apply to implied assertions, where there is less likelihood of concoction, and, in very rare cases, to express assertions.²²³ Deane J favoured a flexible approach to hearsay that would not 'confound justice or common sense or produce the consequence that the law was

215 *Ratten v The Queen* [1972] AC 378, 391 (Lord Wilberforce).

216 (1989) 166 CLR 283.

217 *Ibid* 304.

218 (1992) 174 CLR 558.

219 *Ibid* 582–3.

220 *Wills on Evidence* (3rd ed, 1938) 209, cited in *Ramsay v Watson* (1961) 108 CLR 642, 647.

221 *Ramsay v Watson* (1961) 108 CLR 642.

222 *Ibid* 649.

223 (1989) 166 CLR 283, 293–4.

unattuned to the circumstances of the society which it exists to serve'.²²⁴ This approach would allow, as an exception to hearsay, a contemporaneous statement of identification made by one party to a telephone conversation during or immediately before or after the call.²²⁵ Subsequent cases have not supported a general exception based on 'sufficient reliability',²²⁶ although a telephone identification exception seems to have general acceptance.²²⁷

QUEENSLAND STATUTORY EXCEPTIONS

Books of account²²⁸

3.19 'Document' is broadly defined in the *Evidence Act 1977* (Qld) as including not only a document in writing, but books, maps, photographs, labels, discs, tapes or other devices (not being visual images), films, negatives, tapes or other devices in which visual images are embodied, and any other record of information whatever.²²⁹

3.20 The main provisions that allow statements in documents to be admissible as an exception to the hearsay rule are:

- section 84 – books of account;
- section 92 – admissibility of documentary evidence in civil proceedings;
- section 93 – admissibility of documentary evidence in criminal proceedings; and
- section 93A – statement made before proceedings by child or intellectually impaired person.

3.21 Section 84 of the *Evidence Act 1977* (Qld) provides:

84 Entries in book of account to be evidence

Subject to this division, in all proceedings—

- (a) an entry in a book of account shall be evidence of the matters transactions and accounts therein recorded; and

224 Ibid 308.

225 Ibid.

226 It was expressly rejected by Brennan CJ in *Bannon v The Queen* (1995) 185 CLR 1, 7–8.

227 *Pollitt v The Queen* (1992) 174 CLR 558.

228 For a general discussion, see Wilson IA, 'Documentary Hearsay: The Scope of the Queensland *Evidence Act*' (1985) 1 *Queensland Institute of Technology Law Journal* 111.

229 *Evidence Act 1977* (Qld) s 3, Schedule 3, Dictionary.

- (b) a copy of an entry in a book of account shall be evidence of the entry and of the matters transactions and accounts therein recorded.

3.22 Section 84 facilitates proof by a party to proceedings or a third party of matters contained in a book of account. 'Book of account' is defined in section 83 to include:

any document used in the ordinary course of any undertaking to record the financial transactions of the undertaking or to record anything acquired or otherwise dealt with by, produced in, held for or on behalf of, or taken or lost from the undertaking and any particulars relating to such things.

Documentary evidence: civil proceedings

3.23 Section 92 of the *Evidence Act 1977* (Qld) relates to the admissibility in any proceeding other than a criminal proceeding of a statement contained in a document.²³⁰

²³⁰

Section 92 of the *Evidence Act 1977* (Qld) provides:

- 92 Admissibility of documentary evidence as to facts in issue**
- (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
- (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
- (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.
- (2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—
- (a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness; or
- (b) the maker or supplier is out of the State and it is not reasonably practicable to secure the attendance of the maker or supplier; or
- (c) the maker or supplier cannot with reasonable diligence be found or identified; or
- (d) it cannot reasonably be supposed (having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances) that the maker or supplier would have any recollection of the matters dealt with by the statement the maker made or in the information the supplier supplied; or
- (e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or
- (f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.
- (3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2)(a), (b), (c), (d) or (f).

3.24 Where the conditions of section 92 are satisfied, the statement is admissible for the truth of its contents as an exception to the hearsay rule. The two separate grounds for admissibility of statements in documents under section 92 are, first, where the maker of the statement has personal knowledge of the matters and, secondly, where the document forms part of a record relating to an undertaking and was made in the course of that undertaking from information supplied by a person who had personal knowledge of the matters.²³¹

3.25 In both cases, the person who had the personal knowledge is required to be called as a witness in the proceeding unless one of the factors set out in subsection (2) applies.

Documentary hearsay: criminal proceedings

3.26 Section 93 of the *Evidence Act 1977* (Qld) relates to the admissibility of documentary evidence in criminal proceedings, and is more restrictive than section 92.²³²

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- (4) For the purposes of this part, a statement contained in a document is made by a person if—
- (a) it was written, made, dictated or otherwise produced by the person; or
 - (b) it was recorded with the person's knowledge; or
 - (c) it was recorded in the course of and ancillary to a proceeding; or
 - (d) it was recognised by the person as the person's statement by signing, initialling or otherwise in writing.

231 *Evidence Act 1977* (Qld) s 92(1)(a), (b).

232 Section 93 of the *Evidence Act 1977* (Qld) provides:

93 Admissibility of documentary evidence as to facts in issue in criminal proceedings

- (1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
- (a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and
 - (b) the person who supplied the information recorded in the statement in question—
 - (i) is dead, or unfit by reason of the person's bodily or mental condition to attend as a witness; or
 - (ii) is out of the State and it is not reasonably practicable to secure the person's attendance; or
 - (iii) cannot with reasonable diligence be found or identified; or
 - (iv) cannot reasonably be supposed (having regard to the time which has lapsed since the person supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information the person supplied.

3.27 A statement in a document will become admissible only if it forms part of a record relating to any trade or business, and was made in the course of that trade or business from information supplied by a person who had personal knowledge of the matters. However, there is no prima facie requirement to call the person with personal knowledge. In fact, the statement is not admissible unless the person who supplied the information is not available for one of the reasons listed in section 93(1)(b). As compared with section 92, the record must relate to a trade or business rather than to an undertaking. The grounds of unavailability are also narrower than those under section 92.

Statements by child or intellectually impaired person

3.28 Section 93A of the *Evidence Act 1977* (Qld) allows a statement contained in a document to be admissible as an exception to the hearsay rule where the maker of the statement:

- is a child or an intellectually impaired person; and
- had personal knowledge of the matters in the statement; and
- is available to give evidence in the proceeding.²³³

(2) In this section—

“**business**” includes any public transport, public utility or similar undertaking carried on in Queensland or elsewhere by the Crown (in right of the State of Queensland or any other right) or a statutory body.

233

Section 93A of the *Evidence Act 1977* (Qld) provides:

93A Statement made before proceeding by child or intellectually impaired person

- (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if—
- (a) the maker of the statement was a child or an intellectually impaired person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
 - (b) the child or intellectually impaired person is available to give evidence in the proceeding.
- (2) Where a statement made by a child or intellectually impaired person is admissible as evidence of a fact pursuant to subsection (1), a statement made to the child or intellectually impaired person by any other person—
- (a) that is also contained in the document containing the statement of the child or intellectually impaired person; and
 - (b) in response to which the statement of the child or intellectually impaired person was made;
- shall, subject to this part, be admissible as evidence if that other person is available to give evidence.
- (3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.

3.29 Section 93A applies to both civil and criminal proceedings. The section was intended ‘to avoid the difficulties inherent in extracting cogent evidence from young witnesses in court’.²³⁴ A further requirement that the statement must be made soon after the occurrence of the fact to a person investigating the matter was removed in 2003.²³⁵

-
- (3A) For a committal proceeding for a relevant offence, subsections (1)(b) and (3) do not apply to the person who made the statement if the person is an affected child.
- (4) In the application of subsection (3) to a criminal proceeding—
“party” means the prosecution or the person charged in the proceeding.
- (5) In this section—
“affected child” see section 21AC.
“child” means—
- (a) a child who is under 16 years; or
 - (b) a child who is 16 or 17 years and who is a special witness.
- “relevant offence”** see section 21AC.

234 *R v Morris; Ex parte Attorney-General* [1996] 2 Qd R 68, 74 (Dowsett J).

235 *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 63.

Representations in criminal proceedings if maker is unavailable

3.30 Section 93B of the *Evidence Act 1977* (Qld) allows representations (written or oral, non-verbal, express or implied and intended or unintended) to be admitted where the maker had personal knowledge of the asserted fact and is unavailable to give evidence about the fact because he or she is dead or mentally or physically incapable of giving the evidence.²³⁶

3.31 The section applies only to prescribed criminal proceedings.²³⁷

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Section 93B of the *Evidence Act 1977* (Qld) provides:

93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable

- (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—
 - (a) made a representation about the asserted fact; and
 - (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
- (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—
 - (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or
 - (b) made in circumstances making it highly probable the representation is reliable; or
 - (c) at the time it was made, against the interests of the person who made it.
- (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—
 - (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;
 - (b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.
- (4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.
- (5) In this section—

“prescribed criminal proceeding” means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.

“representation” includes—

 - (a) an express or implied representation, whether oral or written; and
 - (b) a representation to be inferred from conduct; and
 - (c) a representation not intended by the person making it to be communicated to or seen by another person; and
 - (d) a representation that for any reason is not communicated. [note omitted]

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Criminal Code, chapters 28 (homicide, suicide, concealment of birth), 29 (offences endangering life or health), 30 (assaults), 32 (rape and sexual assaults): *Evidence Act 1977* (Qld) s 93B(5) (definition of ‘prescribed criminal proceeding’).

3.32 Such representations will be admitted as an exception to hearsay in three situations. First, a representation will be admitted if it was made either at the time, or shortly after, the asserted fact happened and in circumstances making it unlikely that the representation is a fabrication.²³⁸ This appears to reflect the broad view of the *res gestae* doctrine as expressed in *Ratten v The Queen*,²³⁹ approved by Mason CJ in *Walton v The Queen*,²⁴⁰ and which appears to be the test currently applied in Australia.²⁴¹

3.33 Secondly, a representation will be admitted under this section if it was made in circumstances making it highly probable that the representation is reliable.²⁴² Again, this appears to be consistent with Mason CJ's view in *Walton v The Queen*²⁴³ that a judge should have a discretion to admit hearsay evidence where the possibility of concoction is unlikely.

3.34 Thirdly, a representation will be admitted if it was against the interests of the maker at the time the representation was made.²⁴⁴ Declarations against interest are one of the established common law categories of exception to the hearsay rule. However, at common law, the inquiry is limited to the maker's pecuniary interest, thereby excluding, for example, third party confessions.²⁴⁵ No such limitation appears in section 93B(2)(c).

3.35 As noted by Forbes, section 93B is a significant departure from the original policy of the Act, which did not even allow oral hearsay in civil cases.²⁴⁶ It is clear from the explanatory notes to the amendment that inserted section 93B into the *Evidence Act 1977 (Qld)*²⁴⁷ that it is based 'to an extent' on section 65 of the uniform Evidence Acts.²⁴⁸

3.36 It should also be noted that section 93C requires that, where requested by a party, a judicial warning is to be given as to the dangers of relying on

238 *Evidence Act 1977 (Qld)* s 93B(2)(a).

239 [1972] AC 378.

240 (1989) 166 CLR 283.

241 *Pollitt v The Queen* (1992) 174 CLR 558, 582–3 (Brennan J). See para 3.15–3.16 of this Report.

242 *Evidence Act 1977 (Qld)* s 93B(2)(b).

243 (1989) 166 CLR 283.

244 *Evidence Act 1977 (Qld)* s 93B(2)(c).

245 *Bannon v The Queen* (1995) 185 CLR 1.

246 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [93B.1].

247 *Criminal Law Amendment Act 2000 (Qld)* s 50.

248 Explanatory notes, *Criminal Law Amendment Bill* (2000) 14–15.

hearsay evidence. No particular form of words is prescribed, although the matters in section 93C(2) should be addressed.²⁴⁹

Ancillary provisions

3.37 There are also a number of provisions in Part 6 of the *Evidence Act 1977* (Qld) that are aimed at ensuring fairness to the other party to a proceeding in which documentary evidence is sought to be tendered.

3.38 Section 94 allows both evidence going to the credit of the maker and evidence of a prior inconsistent statement of the maker, to be admitted, provided the evidence would have been admissible if the maker had been called as a witness. Matters that may be proved include those matters that could have been proved if the witness had denied the matter in cross-examination.²⁵⁰

3.39 Section 98 gives the court a discretion to reject any statement that would otherwise be admissible if, for any reason, it appears to the court to be 'inexpedient in the interests of justice' to admit the statement.²⁵¹

3.40 There are, however, no notice requirements in relation to the proposed use of documentary hearsay.

Evidence of affected children and special witnesses

3.41 The *Evidence (Protection of Children) Amendment Act 2003* introduced new procedures for the taking of evidence of affected children and special witnesses.²⁵² An 'affected child' is a child who is a witness in a civil or criminal proceeding arising out of an offence of a sexual nature or an offence involving violence where the witness is in a prescribed relationship with the defendant.²⁵³ Under the new provisions, an affected child's evidence may be pre-recorded and the recording tendered in the proceeding, in which case, the recording is admissible as if it were given orally in the proceeding.²⁵⁴

249 See *TJF v The Queen* (2001) 120 A Crim R 209. For an appropriate warning, see *Queensland Supreme and District Courts Benchbook* (Feb 2004), No 58, Caution in Using Hearsay – s 93C(2) *Evidence Act 1977* <<http://www.courts.qld.gov.au/practice/Benchbook%20pdf/60Caution%20in%20using%20hearsay%20No%2060.pdf>> (accessed 27 September 2005).

250 This is a reference to the rule that allows proof of certain collateral matters as an exception to the finality principle. See *Goldsmith v Sandilands* (2002) 190 ALR 370.

251 This discretion to exclude is in addition to the court's general discretion to reject evidence in criminal proceedings, which is contained in the *Evidence Act 1977* (Qld) s 130, and the common law discretions to exclude based on either fairness or public policy.

252 These amendments implemented many of the recommendations of the Queensland Law Reform Commission in Chapter 9 of its Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000). See the discussion in Chapter 2 of this Report.

253 *Evidence Act 1977* (Qld) s 21AC.

254 *Evidence Act 1977* (Qld) ss 21AK, 21AM.

3.42 Section 21A(1)(e) of the *Evidence Act 1977* (Qld) allows the court to order that a video-taped recording of a ‘special witness’²⁵⁵ be viewed and heard in the proceeding instead of the witness’s direct testimony. That video recording, unless the court otherwise orders, is admissible in any rehearing, retrial or appeal.²⁵⁶

3.43 In determining whether a person is a special witness, the definition of ‘relevant matter’ requires the court to consider the witness’s age, education, level of understanding, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant.²⁵⁷

3.44 Under section 21AM(1)(b), pre-recorded evidence is admissible at any retrial of the proceeding, in another proceeding arising out of the same set of circumstances, or in a civil proceeding arising from the commission of the offence, unless the court orders otherwise. This provision is clearly directed at the general principles set out in section 9E for dealing with a child witness, particularly the statement in section 9E(2)(b) that measures should be taken to limit, to the greatest possible extent, the distress or trauma suffered by the child when giving evidence.

255

The term ‘special witness’ is defined in s 21A of the *Evidence Act 1977* (Qld) as follows:

“special witness” means—

- (a) a child under 16 years; or
 - (b) a person who, in the court’s opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
- if required to give evidence in accordance with the usual rules and practice of the court

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Evidence Act 1977 (Qld) s 21A(6).

257

Evidence Act 1977 (Qld) s 21A.

Previous statements as an exception to hearsay

3.45 Section 101 of the *Evidence Act 1977* (Qld)²⁵⁸ allows a number of statements that are admissible for a non-hearsay purpose under either the Act or at common law to be admitted for a hearsay purpose.²⁵⁹ For the purposes of this Report, evidence is admitted for a 'hearsay purpose' where it is admitted as proof of the truth of the facts that it asserts. Evidence is admitted for a 'non-hearsay purpose' where it is relevant to, and is admitted for, a purpose other than proof of the truth of the facts that it asserts.

3.46 Under section 101(1)(a), a prior inconsistent statement made by a witness who has been declared hostile under section 17, or a witness being cross-examined under sections 18 or 19, is admissible for a hearsay purpose. At common law, proof of the making of a prior inconsistent statement only went to the credibility of the witness.²⁶⁰

3.47 Under section 101(1)(b), a prior consistent statement that is admitted for the purpose of rebutting a suggestion of fabrication will be admissible not only for credit,²⁶¹ but also for a hearsay purpose.

258

Section 101 of the *Evidence Act 1977* (Qld) provides:

101 Witness's previous statement, if proved, to be evidence of facts stated

(1) Where in any proceeding—

(a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or

(b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated;

that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

(2) Subsection (1) shall apply to any statement or information proved by virtue of section 94(1)(b) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in subsection (1)(a).

(3) Nothing in this part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by the person to refresh the person's memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the person's memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.
[note omitted]

259

Wilson I, 'The Admissibility of Hearsay Statements under Part VI of the *Evidence Act 1977-80* (Qld)' (1989) 5 *Queensland University of Technology Law Journal* 97; Harris W, 'Examination of Witnesses under the Commonwealth *Evidence Act 1995*' (1996) 26 *Queensland Law Society Journal* 269, 272, 273, 275.

260

Driscoll v The Queen (1977) 137 CLR 517, 535 (Gibbs J).

261

The Nominal Defendant v Clements (1960) 104 CLR 476; *Eaton v Nominal Defendant* (Qld) (Unreported, Queensland Court of Appeal, Pincus JA and Thomas and Williams JJ, 3 October 1995). See also Harris W, 'The Admissibility of Prior Consistent Statements – recent cases on recent complaint, recent invention and res gestae' (1996) 17 *Queensland Lawyer* 51, 51-2.

3.48 Under section 101(2), a prior inconsistent statement admitted under section 94 to rebut documentary hearsay tendered under sections 84, 92, 93 or 93A, is similarly admissible as evidence of the truth of its contents.

3.49 Finally, section 101(3) ensures that nothing in Part 6 of the Act affects the common law rules that enable a document that is tendered in consequence of the cross-examination of a witness who has used the document to refresh his or her memory to be tendered for a hearsay purpose. Documents used to refresh memory do not, as a matter of course, go into evidence although in certain circumstances such a document may be tendered.²⁶²

3.50 Section 102 provides guidance as to what weight should be attached to previous statements admitted as evidence of their facts under section 101.²⁶³ In criminal cases, it will usually be necessary for the trial judge to give careful instructions to a jury as to the weight to be given to that evidence.²⁶⁴

EXCEPTIONS UNDER THE UNIFORM EVIDENCE ACTS

3.51 The exceptions to the hearsay rule set out in Part 3.2 of the uniform Evidence Acts distinguish between first-hand hearsay and more remote hearsay.²⁶⁵

3.52 Division 2 deals with first-hand hearsay exceptions of four types:

- civil proceedings where the maker is unavailable (section 63);
- civil proceedings where the maker is available (section 64);
- criminal proceedings where the maker is unavailable (section 65); and
- criminal proceedings where the maker is available (section 66).

²⁶² *R v McGregor* [1984] 1 Qd R 256; *Re Foggo; Ex parte Attorney-General* [1989] 2 Qd R 49; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [101.9]–[101.11].

²⁶³ Section 102 of the *Evidence Act 1977* (Qld) provides:

102 Weight to be attached to evidence

In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

²⁶⁴ *Morris v The Queen* (1987) 163 CLR 454, 469 (Deane, Toohey and Gaudron JJ).

²⁶⁵ Division 2 deals with first-hand hearsay and Division 3 with 'other exceptions to the hearsay rule'.

3.53 The policy underlying the exceptions to hearsay in the uniform Evidence Acts is that the ‘best evidence available’ to a party should be received.²⁶⁶ To minimise wrongful convictions in criminal cases, further guarantees of trustworthiness should be required, particularly when the maker is unavailable.²⁶⁷ A party intending to produce hearsay evidence under sections 63, 64 or 65 must give reasonable notice to the other party.²⁶⁸

3.54 Division 3 provides other exceptions to the hearsay rule in relation to more remote hearsay.

3.55 The ALRC considered that ‘[t]he view should be taken that secondhand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility’.²⁶⁹ The exceptions in Division 3 reflect this approach.²⁷⁰

3.56 The exceptions contained in Part 3.2 of the uniform Evidence Acts are subject to the court’s general discretion under sections 135–138 to exclude or limit the use of evidence, and to exclude prejudicial or illegally obtained evidence. The exceptions are also subject to the requirement under section 165 that the trial judge, if requested, is to warn the jury regarding hearsay evidence.²⁷¹

ISSUES FOR CONSIDERATION

3.57 Chapter 5 of the Issues Paper raised a number of questions for discussion in relation to the hearsay rule and its exceptions in the uniform Evidence Acts. After receiving submissions on those questions, the ALRC proposed a number of amendments to the uniform Evidence Acts in its Discussion Paper. In some instances, the Discussion Paper raised further questions for discussion. In relation to some of the questions raised in the Issues Paper, the ALRC concluded that no change or further discussion was necessary.

3.58 The proposals made and questions posed in the Discussion Paper relate to:

- unintended assertions;

²⁶⁶ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 678.

²⁶⁷ *Ibid* para 679.

²⁶⁸ Uniform Evidence Acts s 67. See also *Evidence Regulations* (Cth) reg 5; *Evidence Regulation 2005* (NSW) reg 4; *Evidence Regulations 2002* (Tas) reg 4.

²⁶⁹ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 678.

²⁷⁰ See for example uniform Evidence Acts s 69 (business records).

²⁷¹ Uniform Evidence Acts s 165(1)(a), unless there are good reasons for not doing so: s 165(3).

- evidence relating to a non-hearsay purpose;
- civil proceedings where the maker of the statement is available;
- criminal proceedings where the maker of the statement is unavailable;
- representations made ‘fresh in the memory’;
- business records;
- contemporaneous statements about a person’s health etc;
- interlocutory proceedings;
- children’s evidence; and
- notice in civil proceedings when hearsay evidence is to be adduced.

3.59 Each of these proposals for change and further questions will be discussed in light of Queensland’s current position.

UNINTENDED AND IMPLIED ASSERTIONS

Previous representations containing implied assertions

3.60 The first question on hearsay raised by the ALRC in its Issues Paper related to the application of section 59 of the uniform Evidence Acts to implied assertions:²⁷²

Are concerns raised by the application of s 59 of the uniform Evidence Acts to previous representations containing implied assertions? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, to clarify the meaning of ‘intended’ in relation to implied assertions?

3.61 Section 59 of the uniform Evidence Acts provides:

59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an **asserted fact**.

²⁷²

Australian Law Reform Commission, Issues Paper, *Review of the Uniform Evidence Acts Act 1995* (IP 28, 2004) Question 5–1, post para 5.15.

- (3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect. [note omitted]

3.62 In *Walton v The Queen*,²⁷³ Mason CJ defined an implied assertion as 'one which can be inferred or implied from a statement or from conduct, and will generally not be deliberately intended by the author'.²⁷⁴

3.63 Prior to *Walton v The Queen*, the position in relation to implied assertions was unclear with many cases offering inconsistent and irreconcilable approaches.²⁷⁵ Conduct raises a particular difficulty since most actions contain an implied assertion of some sort on the part of the actor and if all conduct that involves an assertion is treated as hearsay, the available evidence in many cases would be 'seriously depleted'.²⁷⁶ However, the High Court concluded that the hearsay rule applies to both express and implied assertions.

3.64 As discussed above, Mason CJ advocated a less rigorous application of the hearsay rule to implied assertions where there is less likelihood of concoction.²⁷⁷

3.65 Section 59 of uniform Evidence Acts resolves this issue by excluding unintended assertions from the hearsay rule. In the ALRC's view:²⁷⁸

If the implied assertion is unintended, then it is unlikely that there was any deliberate attempt to mislead.

3.66 It should be noted that the definition of 'representation' in the uniform Evidence Acts includes both express and implied representations.²⁷⁹ This suggests a recognition that implied assertions may sometimes include intended assertions.

3.67 The admissibility of unintended assertions can be further controlled by the use of the general discretions contained in the uniform Evidence Acts to exclude or limit the use of evidence.²⁸⁰ For example, under section 135, the court may exclude evidence if its probative value is substantially outweighed by

273 (1989) 166 CLR 283.

274 Ibid 292.

275 Heydon JD, *Cross on Evidence* (7th ed, 2004) [31040]–[31070], where six different approaches to implied assertions are discussed.

276 *Walton v The Queen* (1989) 166 CLR 283, 304 (Wilson, Dawson, and Toohey JJ).

277 Ibid 292-5.

278 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 684

279 Uniform Evidence Acts s 3(1), Dictionary (definition of 'representation'). This definition of 'representation' is reproduced in s 93B of the *Evidence Act 1977* (Qld).

280 See for example uniform Evidence Acts ss 135–138.

the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time.

3.68 It would cause considerable practical difficulties if unintended implied assertions were not excluded from the hearsay rule. In the ALRC's view.²⁸¹

The result of including unintended implied assertions in the definition may, therefore, be that the hearsay proposal would embrace evidence of relevant acts, however detailed and complicated they may be, because it is sought to tender such evidence to prove, inter alia, the intent or state of mind of a relevant person. ... trials could be seriously disrupted and much evidence excluded.

3.69 In the United Kingdom, the concept of hearsay also relies on a person's intention in making the representation.²⁸²

The ALRC's proposal

3.70 In its Discussion Paper, the ALRC expressed the view that no case has been made for revisiting the policy basis of section 59. Accordingly, it did not propose any amendment to the policy of that section with respect to unintended assertions.²⁸³

The QLRC's view

3.71 In Queensland, there has been no further development of the distinction between intended and unintended assertions in the application of the hearsay rule. Statutory exceptions contained in the *Evidence Act 1977* (Qld), such as section 93B,²⁸⁴ assume the existence of the hearsay rule as stated at common law (and as applied in Queensland), although section 93B, through the introduction of exceptions for certain prescribed offences, reflects a more flexible approach to the hearsay rule.

281 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 684.

282 *Criminal Justice Act 2003* (UK) s 115 provides:

115 Statements and matters stated

- (1) In this Chapter references to a statement or to a matter stated are to be read as follows.
- (2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.
- (3) A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—
 - (a) to cause another person to believe the matter, or
 - (b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

283 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.49.

284 Section 93B of the *Evidence Act 1977* (Qld) is set out at note 236 of this Report.

3.72 Section 59 of the uniform Evidence Acts has clarified the status of implied assertions. However, it represents a significant change from the existing common law.

3-1 The QLRC is of the view that:

- (a) in relation to implied assertions, section 59 of the uniform Evidence Acts represents a significant change from the current operation of the hearsay rule in Queensland;
- (b) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts;
- (c) section 59 of the uniform Evidence Acts has the advantage of clarifying the status of implied assertions.

3-2 In relation to implied assertions, the QLRC supports the ALRC's view that there is no case for revisiting the policy of section 59 of the uniform Evidence Acts or for amendment.

Intention of the person who made the implied assertion

3.73 In its Issues Paper, the ALRC posed the following question in relation to implied assertions:²⁸⁵

Should the application of the uniform Evidence Acts to implied assertions be dependent upon the determination of the intention of a person who is, by definition, not before the court?

3.74 Although the ALRC did not consider that there was any case for revisiting the policy basis of section 59 and its focus on intended assertions, it did consider whether intention should be assessed subjectively or objectively.

3.75 A wide approach to the meaning of 'intended' was suggested by Spigelman CJ in *R v Hannes*.²⁸⁶

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.

²⁸⁵ Australian Law Reform Commission, Issues Paper, *Review of the Uniform Evidence Acts Act 1995* (IP 28, 2004) Question 5–2, post para 5.15.

²⁸⁶ (2000) 158 FLR 359, [357].

3.76 In his Honour's view, it was arguable that an 'intended' assertion may go beyond the fact the asserter subjectively adverted to and 'may encompass any fact which is a necessary assumption underlying the fact'.²⁸⁷

3.77 The ALRC referred in its Discussion Paper to rule 801 of the *Federal Rules of Evidence* (US),²⁸⁸ which influenced the drafting of section 59 of the uniform Evidence Acts.²⁸⁹ In the United States, it has been held that the hearsay rule does not apply to representations that are 'merely incidental and not intentional'.²⁹⁰

3.78 Odgers suggests that the concern expressed by Spigelman CJ in *R v Hannes* 'is somewhat misplaced, given that the burden of proof will be on the party arguing for admission of the evidence to satisfy the court, on the balance of probabilities, that the representation was not intended to assert the existence of a fact'.²⁹¹

3.79 In the ALRC's view, adopting a wide interpretation of 'intended' would give rise to considerable practical difficulties since there are many necessary assumptions of fact underlying any representation, whether it be oral, written or one inferred from conduct.²⁹²

The ALRC's proposal

3.80 In its Discussion Paper, the ALRC tentatively concluded that the uniform Evidence Acts should provide expressly for an objective test of intention.²⁹³ It proposed:²⁹⁴

287 Ibid [361].

288 Rule 801 of the *Federal Rules of Evidence* (US) includes the following definitions:

Rule 801 Definitions

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

289 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.28.

290 *United States v Long* 905 F 2d 1572 (DC Cir, 1990) 1580, cited in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.800].

291 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.800]

292 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.47.

293 Ibid para 7.50.

294 Ibid Proposal 7-1, post para 7.50.

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

The QLRC's view

3.81 It would be advantageous to the application of section 59 of the uniform Evidence Acts to have certainty in relation to the meaning of intention.

3.82 To adopt a wide approach to the meaning of intention would effectively remove any distinction between intended and unintended assertions. This would potentially exclude many reliable statements from the court's consideration. An objective test would appear to offer the most practical solution.

3-3 The QLRC is of the view that:

- (a) **there should be certainty as to the meaning of intention in section 59 of the uniform Evidence Acts;**
- (b) **an 'objective approach' offers the most practical solution.**

3-4 The QLRC supports the ALRC's proposal.

EVIDENCE RELATED TO A NON-HEARSAY PURPOSE

3.83 In its Issues Paper, the ALRC posed the following questions in relation to the operation of section 60 of the uniform Evidence Acts with respect to prior statements.²⁹⁵

Are concerns raised by the operation of s 60 of the uniform Evidence Acts, for example, in relation to the admissibility and use of prior inconsistent statements or the factual basis of expert opinion evidence? Is the general discretion to limit use of evidence in s 136 capable of addressing any such concerns? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Should s 60 of the uniform Evidence Acts apply to second-hand hearsay evidence admitted for a non-hearsay purpose; or should its operation be limited to first-hand hearsay, as suggested by the decision of the High Court in *Lee v The Queen*? Should the operation of s 60 in this regard be clarified or modified through amendment of the uniform Evidence Acts and, if so, how?

²⁹⁵

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 5-3 and 5-4, post para 5.33.

Purpose of section 60

3.84 Section 60 of the uniform Evidence Acts provides:

60 Exception: evidence relevant for a non-hearsay purpose

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.

3.85 Section 60 overrides the principle at common law that evidence that is admissible for a non-hearsay purpose, for example as going to credit, cannot be used by the court for inadmissible hearsay purposes. Where there is a jury, it must be instructed as to this distinction of permissible uses.

3.86 The issue of multi-purpose statements most commonly arises in three circumstances: prior consistent statements, prior inconsistent statements and evidence by experts as to the basis of their opinions.²⁹⁶ The ALRC's Interim Report cited criticism that the distinction is 'artificial', 'mere verbal ritual', 'not easily appreciated by a jury' and 'choice Gobbledegook'.²⁹⁷ Section 60 was designed to avoid this.

R v Lee

3.87 However, the full impact of this section has been thrown into doubt by the decision in *Lee v The Queen*.²⁹⁸ In that case, the defendant was charged with assault with intent to rob. The Crown sought to lead evidence of admissions made by the accused to a witness immediately after the alleged assault. The witness signed a statement to the police to this effect but, at the trial, denied the accused made the statements. The trial judge allowed the prior inconsistent statement to be proved in cross-examination.

3.88 The Court of Criminal Appeal held that, under section 60, the statement that was admitted for a non-hearsay purpose was also admissible as evidence of truth of the matters asserted – that is, that the earlier statement was evidence that the accused had made the admissions and that the admissions were true.

3.89 However, the High Court found that section 60, and its relationship with section 59, operates only to make intended assertions admissible as hearsay evidence. The Court held that section 60 does not convert evidence of what was said out-of-court into evidence of a fact that the person did not intend to assert.²⁹⁹

²⁹⁶ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) para 334.

²⁹⁷ *Ibid.*

²⁹⁸ (1998) 195 CLR 594.

²⁹⁹ *Ibid* 601.

3.90 In *Lee v The Queen*, the assertion intended to be made by the witness was that the accused had made some statements (admissions) to him, not that the admission was true. The High Court held that the statement containing the admission was not admissible to prove the facts within it under section 60; nor was it admissible as an admission under section 85. The trial judge should have rejected those parts of the statement or given clear directions to the jury as to its permissible use.

3.91 *Cross on Evidence* interprets *Lee* as confirming that:³⁰⁰

Since s 60 is an exception to s 59 and s 59(1) prevents the admission of previous representations of a fact which the representor intended to assert, s 60 operates only on evidence of such representations; it does not convert evidence of what was said, out of court, into evidence of what the person speaking out of court did not intend to assert.

3.92 The ALRC suggested that '[a]nother formulation is that *Lee* decided that s 60 excludes the hearsay rule only in respect of a representation that is relevant for a non-hearsay purpose because of the intended assertion of fact in the representation'.³⁰¹

Factual basis of expert opinion (the basis rule)³⁰²

3.93 In its Issues Paper, the ALRC specifically raised the operation of section 60 in relation to proof of the factual basis of an expert's opinion. It is commonly said that, at common law, 'the basis rule' requires that the facts upon which an expert's opinion is based must be identified and proved by admissible evidence.³⁰³ However, in its Interim Report, the ALRC expressed doubt that such a rule does in fact exist.³⁰⁴

3.94 In *Ramsay v Watson*,³⁰⁵ the High Court held that statements made to a medical expert were admissible as the foundation of the expert opinion, but were not admissible as evidence of the existence of the matters stated.³⁰⁶

Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician. And, if the man whom the physician examined refuses to confirm in the witness box what he said in the consulting room, then the physician's opinion may have little or no value, for part of the basis of it has gone.

300 Heydon JD, *Cross on Evidence* (7th ed 2004) [35440].

301 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.78.

302 See the further discussion at para 4.42–4.63 of this Report.

303 Heydon JD, *Cross on Evidence* (7th ed, 2004) [29065].

304 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 362.

305 (1961) 108 CLR 642.

306 Ibid 649.

3.95 Recent cases have interpreted *Ramsay v Watson* as supporting the existence of a basis rule that makes opinion evidence not merely of ‘little or no value’, but inadmissible where the factual basis of the opinion is not proved by admissible evidence.³⁰⁷ In *Paric v John Holland (Constructions) Pty Ltd*,³⁰⁸ it was stated that ‘[i]t is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence’.³⁰⁹ The strict basis rule has also received support in Queensland.³¹⁰

3.96 In *Australian Securities and Investments Commission v Rich*,³¹¹ it was suggested that ‘the basis rule has been transposed from the common law into the Evidence Act’ through the interpretation of section 79 of the uniform Evidence Acts.³¹²

3.97 Experts may base their opinions on:

- facts observed by the expert;
- facts related to the expert; and
- facts drawn from the expert’s experience including views and assistance given by other experts in the field.

3.98 The last two-mentioned categories give rise to hearsay issues. The ALRC concluded in its Interim Report that it was an unsatisfactory application of the hearsay rule that hearsay evidence based on an expert’s accumulated knowledge was admissible, but facts related to an expert on which the opinion was based were inadmissible hearsay.³¹³ This difficult distinction was sought to be removed by the application of section 60.

3.99 It has been acknowledged that the effect of section 60 in relation to the factual basis of an expert opinion may be unfair and that section 136³¹⁴ may be

307 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 732 (Heydon JA).

308 (1985) 62 ALR 85.

309 Ibid 87 (Mason ACJ, Wilson, Brennan, Deane, and Dawson JJ).

310 *Bromley Investments Pty Ltd v Elkington* [2002] QSC 427, [50], discussed further in Chapter 4 of this Report.

311 [2005] NSWSC 149.

312 Ibid [323], discussed further at para 4.42–4.49 of this Report.

313 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 334.

314 Section 136 of the uniform Evidence Acts provides:

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

used to limit the use of the evidence.³¹⁵

Section 101 *Evidence Act 1977* (Qld)

3.100 In Queensland, section 101 of the *Evidence Act 1977* (Qld)³¹⁶ has a similar effect to section 60 of the uniform Evidence Acts. Section 101 allows facts contained in proven prior inconsistent statements, previous consistent statements and documents tendered consequent upon refreshing memory, to be admissible as proof of the truth of their contents.

3.101 This provision is narrower than section 60 of the uniform Evidence Acts. Facts on which an expert opinion is based are clearly not included in the matters that will become admissible in this way. The common law rules continue to apply.

3.102 Section 101 is also narrower than section 60 in that it effectively limits the statements that will be admissible to first-hand hearsay or exceptions to the hearsay rule under Queensland law. This is because the wording of section 101:

- requires that the person who made the statement is called as a witness in the proceeding; and
- direct oral evidence by the person of those facts would have been admissible.

3.103 In *Simon-Beecroft v The Proprietors "Top of the Mark" Building Units Plan No 3410*,³¹⁷ section 101(1)(a) was relied on to prove an admission. The admission of the plaintiff husband was contained in an oral statement made by his wife to a witness. The admission was proved as a prior inconsistent statement under section 18.

3.104 In criminal cases, there may be more cause for a cautious approach. The High Court noted in *Morris v The Queen*:³¹⁸

Where the prosecution seeks to adduce such evidence from a prosecution witness, an issue may well arise as to whether the prejudicial nature of the statement does not outweigh its probative value, such that as a matter of judicial discretion it should be excluded If however, such a statement is admitted, it will usually be necessary for the trial judge to give very careful and very precise instructions to a jury as to the weight the evidence should be given.

³¹⁵ *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 378 (Branson J).

³¹⁶ Section 101 of the *Evidence Act 1977* (Qld) is set out at note 258 of this Report.

³¹⁷ [1997] 2 Qd R 635, considering *Evidence Act 1977* (Qld) s 101(1)(a). The High Court refused special leave to appeal: *Simon-Beecroft v "Top of the Mark" Building Units Plan No 3410*, HCA Trans 26 June 1997

³¹⁸ (1987) 163 CLR 454, 469 (Deane, Toohey and Gaudron JJ).

3.105 Despite some earlier suggestions to the contrary, it is clear that it is not improper for the Crown to call a witness who is known to be hostile with a view to tendering a prior inconsistent statement as an exception to hearsay under section 101.³¹⁹

The ALRC's proposal

3.106 In its Discussion Paper, the ALRC expressed the view that the uniform Evidence Acts should be amended to confirm that, notwithstanding the decision of the High Court of Australia in *Lee v The Queen*, section 60 'applies to first-hand and more remote hearsay, subject only to the residual discretions to exclude or limit the use of evidence'.³²⁰ It proposed:³²¹

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

3.107 No specific proposal was made in relation to the relationship between the basis rule for experts and section 60. It is assumed that no change is proposed in that regard.

The QLRC's view

3.108 In Queensland, the application of section 60 of the uniform Evidence Acts to all evidence admitted for a non-hearsay purpose is an issue that would require further consideration. The extension of this principle to the factual basis of an expert's opinion, in particular, involves a significant change in theory, if not in practice.³²²

3.109 The proposal to make admissible as hearsay evidence first-hand or more remote hearsay would cover evidence admissible under section 101 of the *Evidence Act 1977* (Qld), including admissions. Potentially, it would allow hearsay that does not have the inherent trustworthiness found in the recognised exceptions to hearsay, to be admitted.

3.110 Arguably this could be addressed through the general discretions to limit the use of or exclude evidence under sections 135 to 138 of the uniform Evidence Acts or by a warning being given to the jury under section 165.

³¹⁹ *R v Williams* [2001] 2 Qd R 442. This is also the situation under the uniform Evidence Acts: *R v Adam* (1999) 47 NSWLR 267.

³²⁰ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.121.

³²¹ *Ibid* Proposal 7–2, post para 7.142.

³²² The existence and application of the 'basis rule' are discussed further in Chapter 4 of this Report.

3-5 The QLRC is of the view that:

- (a) the circumstances in which section 60 of the uniform Evidence Acts enables evidence that is admitted for a non-hearsay purpose to be admissible for a hearsay purpose are wider than the circumstances in which evidence admitted for a non-hearsay purpose will be admissible for a hearsay purpose under Queensland law;
- (b) the extended application of section 60 would require further review if Queensland were to consider adopting the uniform Evidence Acts;
- (c) the ALRC's proposal to amend section 60 to ensure it extends to more remote hearsay has the potential to allow unreliable evidence before the court, and should not simply be left to discretionary exclusion provisions;
- (d) section 60 should be amended to confirm that it applies to first hand hearsay, and to more remote hearsay only where there are circumstances rendering it reliable.

CIVIL PROCEEDINGS WHERE MAKER IS AVAILABLE

3.111 Although there was no specific question raised in the Issues Paper, in its Discussion Paper the ALRC considered the relationship between section 64(2) and (3) of the uniform Evidence Acts, and whether the 'fresh in the memory' requirement in section 64(3) should be retained.³²³

3.112 Section 64 of the uniform Evidence Acts provides in part:

64 Exception: civil proceedings if maker available

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to:
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

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Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 7-3, post para 7.150.

- (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note: Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

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

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

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

3.113 In its Discussion Paper, the ALRC noted the following ambiguity in relation to section 64.³²⁴

While not explicitly stated, s 64(2) may be interpreted as also requiring that the occurrence of the asserted fact be fresh in the memory of the person giving an affidavit. This is because it would be inconsistent to require, under s 64(3), that the occurrence be fresh in the memory when the person making the representation is being called to give evidence, but not under s 64(2), where the person is not being called.

3.114 The ALRC explained how the intention of the original hearsay proposals 'was to provide more lenient rules for adducing first-hand hearsay in civil, as compared to criminal, proceedings'.³²⁵ It was, however, intended that first-hand hearsay evidence would be limited to instances where the asserted fact was fresh in the memory of the maker of the representation.³²⁶

The ALRC's proposal

3.115 The ALRC proposed in its Discussion Paper that the 'fresh in the memory' requirement in section 64(3) be removed.³²⁷

324 Ibid para 7.145.

325 Ibid para 7.146.

326 Ibid.

327 Ibid Proposal 7-3, post para 7.150.

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

3.116 The ALRC has recommended this change because:

- the ‘fresh in the memory’ test is not required for other civil hearsay exceptions such as section 63 (civil proceedings where maker is not available) and section 69 (business records),³²⁸
- evidence may still be excluded or its use limited by the general discretions in sections 135 and 136.³²⁹

The QLRC’s view

3.117 In Queensland, there have been some in-roads into the strict application of the hearsay rule to civil proceedings. It is noted that rule 394 of the *Uniform Civil Procedure Rules 1999* (Qld) allows the court to dispense with rules of evidence if a fact in issue is not seriously in dispute or where strict proof of a fact in issue might cause unnecessary or unreasonable expense delay or inconvenience in a proceeding.³³⁰

³²⁸ Ibid para 7.147.

³²⁹ Ibid para 7.150.

³³⁰ Rule 394 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

394 Dispensing with rules of evidence

- (1) If a fact in issue is not seriously in dispute or strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience in a proceeding, the court may order that evidence of the fact may be given at the trial or at any other stage of the proceeding in any way the court directs.
- (2) Without limiting subrule (1)—
 - (a) the subrule applies to the proof of handwriting, proof of documents, proof of the identity of parties and proof of authority; and
 - (b) the court may order that evidence of a fact be given—
 - (i) by a statement on oath of information and belief; or
 - (ii) by the production of documents or entries in records; or
 - (iii) by the production of copies of documents or copies of entries in records.
- (3) The court may at any time vary or revoke an order under this rule.

3.118 Hearsay evidence is also admissible in interlocutory proceedings under rule 430(2) of the *Uniform Civil Procedure Rules 1999* (Qld).³³¹

3.119 Further, section 92 of the *Evidence Act 1977* (Qld)³³² allows documentary evidence to be admitted without the maker being called where the maker is not required for cross-examination or where undue delay or expense would be caused by calling the maker.³³³

3.120 The ALRC's proposal to remove the 'fresh in the memory' requirement for prior consistent statements would make all prior consistent statements admissible, provided the maker is to give evidence in the proceeding.

3.121 At present in Queensland, in both civil and criminal cases, prior consistent statements are admissible only in certain circumstances and for certain purposes. The principal exceptions to the admissibility of prior consistent statements are where evidence is tendered to:

- rebut allegations of recent invention;³³⁴
- establish a recent complaint by the victim of a sexual assault;³³⁵ or
- support correct identification of a person.³³⁶

3.122 The admissibility of such prior consistent statements goes to support the credibility of the maker of the statement and not to prove the truth of the facts asserted. Section 101 of the *Evidence Act 1977* (Qld) has modified this position in relation to prior consistent statements used to rebut allegations of recent invention, which now become admissible as truth of their contents.³³⁷

³³¹ Rule 430 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

430 Contents of affidavit

- (1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally.
- (2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for belief.
- (3) On assessment, all or part of the costs of an affidavit not complying with these rules or unnecessarily including copies of or extracts from documents may be disallowed. [note omitted]

³³² Section 92 of the *Evidence Act 1977* (Qld) is set out at note 230 of this Report.

³³³ *Evidence Act 1977* (Qld) s 92(2)(e)(f).

³³⁴ *The Nominal Defendant v Clements* (1960) 104 CLR 476.

³³⁵ Now extended to all 'preliminary' complaints: *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A, amended by the *Evidence (Protection of Children) Amendment Act 2003* (Qld). See also *Kilby v The Queen* (1973) 129 CLR 460.

³³⁶ *Alexander v The Queen* (1981) 145 CLR 395.

³³⁷ See para 3.47 of this Report.

3.123 Where a statement in a document is admitted under section 92 of the *Evidence Act 1977* (Qld) and the maker of that statement is called as a witness, section 92 may have the effect of admitting a prior consistent statement.³³⁸ There is no requirement for the fact to have been fresh in the maker's memory.

3.124 In civil cases, particularly where there is no jury, the uniform Evidence Acts' provision and the proposed amendment to it do not represent a significant change from current law and policy in Queensland.

3.125 Issues of fairness to the other party can be dealt with by considerations of weight, and through the general discretion to exclude or limit the use of evidence.³³⁹

3-6 The QLRC is of the view that the ALRC's proposal to remove the 'fresh in the memory' requirement from section 64(3) of the uniform Evidence Acts does not represent a significant change for current law and policy in Queensland.

3-7 The QLRC supports the ALRC's proposal.

CRIMINAL PROCEEDINGS WHERE MAKER IS UNAVAILABLE

3.126 In its Discussion Paper, the ALRC posed the following questions in relation to section 65 of the uniform Evidence Acts:³⁴⁰

Are concerns raised by the application of s 65 of the uniform Evidence Acts to previous representations made by persons who are taken to be unavailable to give evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Are concerns raised by the limited scope of the 'circumstances' that may be taken into account under ss 65(2)(b) and (c) of the uniform Evidence Acts in assessing the reliability of a previous representation? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

3.127 Section 65(1) and (2) of the uniform Evidence Acts provides:

338 *Re Hennesseys Self Service Stores Pty Ltd (in liq)* [1965] Qd R 576. This case dealt with s 42B of the former *Evidence and Discovery Acts 1867* (Qld) (Admissibility of documentary evidence as to facts in issue).

339 Uniform Evidence Acts ss 135–138; *Evidence Act 1977* (Qld) s 98.

340 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 5–5 and 5–6, post para 5.49.

65 Exception: criminal proceedings if maker not available

- (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:
 - (a) made under a duty to make that representation or to make representations of that kind; or
 - (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) made in circumstances that make it highly probable that the representation is reliable; or
 - (d) against the interests of the person who made it at the time it was made.

The definition of 'unavailability'

3.128 One of the main concerns addressed by the ALRC relates to the definition of 'unavailability' and the fact that it does not extend to a witness who is uncooperative or unwilling because of fear, such as a complainant in a sexual offence case who is reluctantly giving evidence in a retrial.³⁴¹

3.129 In this situation, it may be possible to utilise section 38 (unfavourable witnesses), in conjunction with section 60,³⁴² to make any prior inconsistent statement admissible for a hearsay purpose.

³⁴¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.153, 7.156–7.157.

³⁴² Section 60 of the uniform Evidence Acts is set out at para 3.84 of this Report.

3.130 Section 38 allows a party who has called a witness, with the leave of the court, to question the witness, as if it were a cross-examination, about such matters as whether the witness has made a prior inconsistent statement.³⁴³

3.131 This approach, however, is more likely to attract a direction to limit the use to be made of the statement or discretionary exclusion than perhaps evidence that is admissible under the express hearsay exceptions in the uniform Evidence Acts.

3.132 As previously noted, it is not improper for the Crown to call a witness, who it anticipates will be hostile, for the purpose of proving a prior inconsistent statement.

3.133 In relation to sexual offence complainants who are 'unavailable', the ALRC observed the possible reliance on section 65(3).³⁴⁴ Under that provision, a previous representation made in the course of giving evidence in a proceeding can be admitted, provided that, in the earlier proceeding, the defendant in the current proceeding cross-examined, or had a reasonable opportunity to cross-examine, the person who made the representation about it.³⁴⁵

3.134 Queensland has a number of statutory provisions that assist vulnerable witnesses generally in giving evidence.³⁴⁶

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Section 38 of the uniform Evidence Acts provides:

38 Unfavourable witnesses

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
 - (a) evidence given by the witness that is unfavourable to the party; or
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
 - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

...

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Section 65(3) of the uniform Evidence Acts provides:

The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

- (a) cross-examined the person who made the representation about it; or
- (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

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Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.158.

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This is discussed further in Chapter 2 of this Report.

3.135 In relation to the specific issue of a retrial, section 21AM of the *Evidence Act 1977* (Qld), which applies to an ‘affected child’s’ evidence, makes pre-recorded video evidence admissible in proceedings and in any re-hearing or re-trial of the proceeding, regardless of the child’s availability. Section 21A(2)(e) allows the court to order that a video-taped recording of a ‘special witness’³⁴⁷ be viewed and heard in the proceeding instead of the witness’s direct testimony. That video recording, unless the court otherwise orders, is admissible in any rehearing, retrial or appeal.³⁴⁸

The ALRC’s proposal

3.136 In its Discussion Paper, the ALRC proposed that the definition of ‘unavailable’ for both sections 63 (civil proceedings) and 64 (criminal proceedings) be extended:³⁴⁹

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

The QLRC’s view

3.137 In relation to the definition of ‘unavailable’, it is noted that, in Queensland, both sections 92 and 93 include ‘unfit by reason of the person’s bodily or mental condition’ within the grounds of unavailability.³⁵⁰ Furthermore, section 93B, which makes hearsay statements admissible in prescribed criminal proceedings where the maker is unavailable, also includes ‘mental or physical incapability’ within its meaning of unavailable.

3.138 The concern expressed by the ALRC about the evidence of sexual offence complainants on a retrial is addressed in Queensland by the ‘affected child’ and ‘special witness’ provisions.

3.139 Therefore, the ALRC’s proposal is in accordance with Queensland legislative provisions.

3-8 The QLRC is of the view that:

- (a) Queensland statutory provisions already include mental or physical incapacity as a ground of ‘unavailability’;**

³⁴⁷ See note 255 of this Report for the definition of ‘special witness’.

³⁴⁸ *Evidence Act 1977* (Qld) s 21A(6).

³⁴⁹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 7–4, post para 7.159.

³⁵⁰ *Evidence Act 1977* (Qld) ss 92(2)(a), 93(1)(b)(i).

(b) concerns in relation to the evidence of sexual offence complainants at a re-hearing are addressed in Queensland by the 'affected child' and 'special witness' provisions.

3-9 The QLRC supports the ALRC proposal in its extension of 'unavailability' to persons who are unfit due to 'bodily or mental condition'.

3-10 The QLRC has some doubt about whether the proposed amendment will achieve the ALRC's goals, and considers that a specific provision may be required.

Admissions of co-accused

3.140 In its Discussion Paper, the ALRC considered the application of section 65(2)(d) of the uniform Evidence Acts to admissions of a co-accused. Section 65 provides exceptions for first-hand hearsay in criminal proceedings where the maker of the representation is not available. Subsection (2)(d) provides an exception for a representation that is 'against the interests of the person who made it at the time it was made'.³⁵¹

3.141 This exception is wider than the established common law 'declaration against interest' exception, which is limited to the maker's pecuniary interest and to circumstances where the maker is unavailable by reason of death.³⁵² The exception in section 65(2)(d), like the other exceptions in section 65, was seen to have some guarantee of trustworthiness, which was necessary where the maker of the statement was unavailable.³⁵³ However, the trustworthiness of a declaration against interest is open to question when the statement also implicates another person.

3.142 In *R v Suteski*,³⁵⁴ an electronic recording of a police interview with an accomplice which implicated the accused was held to be admissible under section 65(2)(d). Wood CJ at CL concluded that section 65(2) should not be read down so as to include qualifications that appear in relation to other subsections.³⁵⁵ Further, in his Honour's view, the discretionary exclusions in sections 135 and 137 were adequate to deal with circumstances such as the

³⁵¹ Section 65(2) of the uniform Evidence Acts is set out at para 3.127 of this Report.

³⁵² Heydon JD, *Cross on Evidence* (7th ed, 2004) [33010].

³⁵³ Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 139.

³⁵⁴ (2002) 56 NSWLR 182.

³⁵⁵ *Ibid* 196.

other party's inability to cross-examine the maker and any unreliability arising from the fact that the maker was an accomplice.³⁵⁶

3.143 In refusing special leave to appeal in this case, Gleeson CJ noted that 'given the discretions exist as an ultimate safety net, then you do not need to torture the language of section 65'.³⁵⁷

3.144 It would seem that this situation was not envisaged by the framers of the legislation who anticipated that statements against interest would be used only against the maker. There is a good argument that issues of unreliability can be dealt with by the discretions.

The ALRC's proposal

3.145 In its Discussion Paper, the ALRC proposed that section 65(2)(d) of the uniform Evidence Acts be amended as follows:³⁵⁸

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

3.146 The ALRC commented that 'the intent of the proposal is to ensure that the hearsay rule is not lifted where a statement against interest is made in circumstances that would not suggest reliability'.³⁵⁹

The QLRC's view

3.147 Queensland has adopted a similar exception to section 65(2)(d) of the uniform Evidence Acts in section 93B(2)(c) of the *Evidence Act 1977* (Qld).³⁶⁰

3.148 Section 93B is more limited than section 65 in that it applies only in prescribed criminal proceedings and only when the maker is unavailable through death or mental or physical incapacity. However, for the same reasons as discussed above, the exception does not tend to ensure reliability where the statement is being tendered against someone other than the maker. There is some merit in imposing some further assurance of reliability.

3.149 The question whether this exception in Queensland should be extended beyond prescribed criminal proceedings in section 93B will require consideration if the issue of the adoption of the uniform Evidence Acts in Queensland is reviewed.

³⁵⁶ Ibid 199–201.

³⁵⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 5.134.

³⁵⁸ Ibid Proposal 7–5, post para 7.174.

³⁵⁹ Ibid para 7.173.

³⁶⁰ Section 93B of the *Evidence Act 1977* (Qld) is set out at note 236 of this Report.

3-11 The QLRC is of the view that:

- (a) a statement against interest by an accomplice, which implicates the accused, should not be admissible against the accused unless there are some further assurances of reliability;
- (b) section 93B(2)(c) of the *Evidence Act 1977* (Qld) is in identical terms to section 65(2)(d) of the uniform Evidence Acts, except that section 93B(2)(c) applies only in prescribed criminal cases.

3-12 The QLRC supports the ALRC's proposal.**'Circumstances' and the reliability of evidence**

3.150 Section 65(2)(b) of the uniform Evidence Acts provides an exception for a representation made at or shortly after the event and in circumstances that make it unlikely that it is a fabrication, and section 65(2)(c) provides an exception for a representation made in circumstances that make it highly probable that the representation is reliable. These two exceptions adopt views expressed by Mason CJ in *Walton v The Queen*³⁶¹ that the hearsay rule should not be applied inflexibly and, in particular, that the strict test of contemporaneity that applies to res gestae statements should be widened.

3.151 Cases that have discussed these provisions have established that the focus should be on the circumstances in which the previous representation was made, which may affect its reliability, rather than on evidence going to the actual reliability of the asserted fact.³⁶²

The ALRC's proposal

3.152 In its Discussion Paper, the ALRC did not propose any amendment to section 65(2)(b) or (c) of the uniform Evidence Acts.

The QLRC's view

3.153 The exceptions found in section 65(2)(b) and (c) of the uniform Evidence Acts have been adopted in Queensland in section 93B(2)(a) and (b) of the *Evidence Act 1977* (Qld), with the limitations noted above.

³⁶¹ (1989) 166 CLR 283.

³⁶² *Williams v The Queen* (2000) 119 A Crim Reports 490; *R v Ambrosoli* (2002) 55 NSWLR 603.

3.154 The sections have been raised in a number of cases in Queensland. A liberal approach to subsection (2)(b) was taken in *R v Raye*.³⁶³ In that case, the representation was made by the victim to police about a stabbing one week after the event. The court stated that there was ‘nothing to suggest, and nor was it submitted, that the statement eventually given was not made in circumstances making it highly probable that the representation is reliable’.³⁶⁴ Odgers cautions against this approach of ‘failing to give sufficient weight to the burden on the party seeking to have the evidence admitted to point to the “circumstances” that significantly increase the probability of reliability, rather than the absence of circumstances which indicate unreliability’.³⁶⁵

3.155 In *R v Crump*,³⁶⁶ a representation by the deceased that she had been assaulted the previous night was held inadmissible under these provisions. The evidence was sought to be tendered as circumstantial evidence in the murder trial of the deceased’s de facto partner. Davies JA commented that circumstances that would have made it unlikely the representation was a fabrication would have included bruising or other signs of injury on the deceased.³⁶⁷ This evidence, it would seem, would go to the actual reliability of her assertion rather than to the circumstances in which the representation was made, contrary to the cases decided under the uniform Evidence Acts.

3.156 It is considered that no amendments are required to section 93B(2)(a) or (b).

3.157 The wider operation of these exceptions will require consideration if the issue of the adoption of the uniform Evidence Acts in Queensland is reviewed.

3-13 The QLRC is of the view that:

- (a) section 93B(2)(a) and (b) of the *Evidence Act 1977* (Qld) are in identical terms to section 65(2)(b) and (c) of the uniform Evidence Acts, except that section 93B(2)(a) and (b) apply only in prescribed criminal cases;**
- (b) there is no need to amend these provisions.**

3-14 The QLRC supports the ALRC’s view.

³⁶³ [2003] QCA 98.

³⁶⁴ Ibid para [15] (Mackenzie J).

³⁶⁵ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.2080].

³⁶⁶ [2004] QCA 176.

³⁶⁷ Ibid [11]–[12].

Evidence qualifying or explaining a previous representation adduced by a defendant

3.158 In its Issues Paper, the ALRC posed the following question in relation to the scope of section 65(9) of the uniform Evidence Acts:³⁶⁸

Is there significant uncertainty about the scope of the term ‘the matter’ in s 65(9)? Should this be addressed through amendment of the uniform Evidence Acts and, if so, how?

3.159 Section 65(9) of the uniform Evidence Acts provides:

If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

- (a) is adduced by another party; and
- (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

3.160 Section 65(9) of the uniform Evidence Acts allows another party to adduce hearsay evidence in response to a representation adduced by a defendant under section 65(8). The uniform Evidence Acts adopt a liberal approach to hearsay evidence tendered by a defendant where the maker is unavailable, as the only requirement is that the statement is first-hand hearsay.³⁶⁹

3.161 Section 65(9) allows first-hand hearsay about ‘the matter’ that has been adduced by the defendant to be admitted. There has been some discussion as to whether ‘the matter’ should be applied narrowly or broadly.³⁷⁰ However, as noted in the Discussion Paper:³⁷¹

If it is necessary to construe the term, a broad construction should be adopted and, where that may cause unfair prejudice, the discretions should be used.

The ALRC’s proposal

3.162 In its Discussion Paper, the ALRC did not propose a change to section 65(9) of the uniform Evidence Acts.³⁷²

368 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–7, post para 5.49.

369 Uniform Evidence Acts s 65(8).

370 *R v Mankotia* [1998] NSWSC 295.

371 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.188.

372 Ibid.

3.163 Unlike other exceptions to the hearsay rule where the maker is unavailable, there is no requirement under section 65(9) that the prosecution give notice of its intention to adduce hearsay evidence. The ALRC sought comments on the following question:³⁷³

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

The QLRC's view

3.164 The exception for first hand hearsay statements adduced by defendants does not presently exist in Queensland. This exception would require consideration if the issue of the adoption of the uniform Evidence Acts in Queensland was reviewed.

3-15 The QLRC is of the view that:

- (a) **section 65(9) of the uniform Evidence Acts represents a significant change to the exceptions to hearsay that apply in Queensland;**
- (b) **the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

REPRESENTATIONS 'FRESH IN THE MEMORY'

3.165 In its Issues Paper, the ALRC posed three questions in relation to section 66 of the uniform Evidence Acts:³⁷⁴

Are concerns raised by the High Court's interpretation in *Graham v The Queen* of 'fresh in the memory' for the purposes of s 66 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Does the concept of 'fresh in the memory' need to be re-examined, for example, in the light of more recent psychological research into memory loss or change or into the prevalence of delay in complaints of child or other sexual assault? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

Are particular concerns raised by application of s 66 of the uniform Evidence Acts to evidence of identification? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

³⁷³ Ibid Question 7–4, post para 7.282.

³⁷⁴ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 5–8, 5–9 and 5–10, post para 5.62.

3.166 Section 66 of uniform Evidence Acts provides exceptions to the hearsay rule for first-hand hearsay in criminal proceedings where the maker is available. Section 66(2) allows a prior consistent statement to be admitted as an exception to hearsay when it was made whilst the occurrence of the fact was fresh in the memory of the maker. The maker of the statement is required to give evidence.

3.167 Section 66(2) of the uniform Evidence Acts provides:

66 Exception: criminal proceedings if maker available

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

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

3.168 When the ALRC originally recommended this exception in its Interim Report, it noted that psychological research suggests that memory tends to diminish rapidly at first and then more slowly.³⁷⁵ It noted that '[t]he risk of fabrication is reduced by requiring that the representation be made when the facts described were fresh in the memory'.³⁷⁶ The fresh memory exception has been relied on to admit complaints of sexual assault, although it is not limited to that type of representation.

Graham v The Queen

3.169 The first question posed in the Issues Paper related to the High Court's interpretation of section 66(2) in *Graham v The Queen*.³⁷⁷ In that case, the High Court gave a narrow meaning to 'fresh in the memory' in relation to a complaint of sexual assault, focusing on the time difference between the fact and the making of the representation.³⁷⁸

Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.

375 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 665.

376 Ibid para 693.

377 (1998) 195 CLR 606.

378 Ibid 608 (Gaudron, Gummow and Hayne JJ).

3.170 The High Court did, however, note that the expression ‘may also carry with it a connotation that also describes the quality of the memory (as being “not deteriorated or changed by lapse of time”)³⁷⁹.

3.171 The application of this strict approach to sexual complaints has led to concern, in light of more recent psychological research that suggests that delay in disclosure is a typical response of sexually abused children.³⁸⁰

3.172 Queensland has seen significant reform in recent years in relation to the evidence of sexual offence complainants and children generally.³⁸¹ The doctrine of fresh complaint in sexual offence cases has been substantially abrogated by section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld). That section allows evidence to be given of the circumstances of the making of a ‘preliminary complaint’, regardless of when it was made. The definition of ‘preliminary complaint’ in section 4A(6) removes any ‘fresh’, ‘recent’ or other temporal requirement. Further, statements made under section 93A of the *Evidence Act 1977* (Qld) are no longer required to be made soon after the events in question.³⁸²

Evidence of identification

3.173 The concept of ‘fresh in the memory’ also arises in relation to previous representations concerning identification. The cases distinguish between a representation of recognition, where the representation is that the person is recognised as someone previously known, and identification, where the representation is that the person identified was present at the relevant event. In the latter case, the event itself must be ‘fresh in the memory’ at the time when the representation of identification is made.³⁸³

3.174 The ALRC commented in its Discussion Paper that the fact that section 66 ‘applies to identification evidence provides additional reasons for favouring a more flexible interpretation’ of the section.³⁸⁴ It observed:³⁸⁵

379 Ibid.

380 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) 7.195–7.196.

381 See Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000). See the discussion in Chapter 2 of this Report.

382 See para 3.29 of this Report.

383 *R v Barbaro* (2000) 112 A Crim R 551; *R v Gee* (2000) 113 A Crim R 376; Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.2300].

384 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.202.

385 Ibid para 7.203.

if the uniform Evidence Acts were amended ... to make it clear that whether a memory is 'fresh' is to be determined, in part, by reference to the quality of memory, this would be consistent with the distinctions made between cases of recognition and of ordinary identification. That is, where the person recognised is someone previously known, it is likely that the quality of the memory will be stronger.

The ALRC's proposal

3.175 In its Discussion Paper, the ALRC concluded that the uniform Evidence Acts should be amended to make it clear that, for the purposes of section 66(2), whether the memory is 'fresh' is to be determined by reference to factors other than the temporal relationship between the occurrence of the asserted facts and the making of the representation.³⁸⁶ It proposed:³⁸⁷

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

The QLRC's view

3.176 The operation of section 66(2) of the uniform Evidence Acts in relation to sexual offence complainants and children's documentary statements is more restrictive than the existing provisions in Queensland. In so far as it relates to such matters, the ALRC's proposal to amend section 66(2) accords with current policy in Queensland.

3.177 In relation to other types of representations, the adoption of section 66 would represent a major change in the common law rules relating to prior consistent statements and would need to be further considered.

3.178 The QLRC doubts that the uniform Evidence Acts in their current form or amended form adequately deal with the evidence of sexual offence complainants and the evidence of children and other vulnerable witnesses. In those areas, the QLRC is of the view that the policy reflected in the 'special witness' provisions and 'affected child' provisions of the *Evidence Act 1977* (Qld) has much to recommend it. Consideration should be given to amending the uniform Evidence Acts to reflect that policy.

386 Ibid para 7.227.

387 Ibid Proposal 7–6, post para 7.228.

3-16 The QLRC is of the view that:

- (a) the ‘fresh in the memory’ concept has been removed in the statutory hearsay exception in Queensland for the evidence of children and for the admissibility of evidence relating to sexual offence complaints;
- (b) section 66(2) of the uniform Evidence Acts, with or without the proposed amendment, is substantially different from the law in Queensland in its application to the evidence of children, sexual offence complainants and other witnesses generally;
- (c) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts;
- (d) concerns in relation to the evidence of child witnesses, Indigenous witnesses and other vulnerable witnesses (including sexual offence complainants) should be addressed by specific legislative provision;
- (e) the ALRC should review all of its proposals that relate to the evidence of children and other vulnerable witnesses to ensure that a consistent approach has been taken to the inclusion of provisions that address concerns about the evidence of these witnesses.

3-17 The QLRC commends the specific provision in the *Evidence Act 1977 (Qld)* that deals with these issues – namely, section 93A of the *Evidence Act 1977 (Qld)*.

BUSINESS RECORDS

3.179 In its Issues Paper, the ALRC posed the following question in relation to the application of section 69 of the uniform Evidence Acts to opinion contained in business records.³⁸⁸

Are concerns raised by the application of s 69 of the uniform Evidence Acts to opinion contained in business records? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

3.180 Section 69 of the uniform Evidence Acts provides exceptions to the hearsay rule for business records. Section 69 provides:

³⁸⁸

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–11, post para 5.66.

69 Exception: business records

- (1) This section applies to a document that:
 - (a) either:
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
 - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
 - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
 - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation:
 - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
 - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- (4) If:
 - (a) the occurrence of an event of a particular kind is in question; and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

3.181 The ALRC's Discussion Paper noted that an issue for concern under section 69 is the extent to which there may be difficulties in admitting assertions

of opinion, given the requirement of personal knowledge in section 69(5).³⁸⁹ In *Ringrow Pty Ltd v BP Australia Ltd*,³⁹⁰ it was held that an opinion expressed out-of-court by an expert satisfied the requirement of personal knowledge of the asserted fact 'because the asserted fact consists of opinions which they themselves had formed and expressed'.³⁹¹ In Queensland, it has been held that a statement of 'fact' includes an opinion that the witness would be entitled to give if he or she were called as a witness.³⁹²

3.182 The exclusion in section 69(3) of the uniform Evidence Acts operates to exclude representations obtained for the purpose of conducting, or in connection with, a legal proceeding. Police records would also be excluded, otherwise 'any note of information and rumour in police or private records gathered during the investigation of a crime would be admissible'.³⁹³ Despite some suggestion that there should be a discretion to admit such records,³⁹⁴ the ALRC did not propose any change to this provision. It saw no reason 'to depart from the existing formulation, which provides an important safeguard against the admission of self-serving police records'.³⁹⁵

The ALRC's proposal

3.183 In its Discussion, the ALRC did not make any proposal in relation to section 69 of the uniform Evidence Acts, but sought further comments in relation to the following questions:

What concerns are raised by the operation of s 69(2) of the uniform Evidence Acts with respect to business records? Should these concerns be addressed through amendment of the Acts and, if so, how?³⁹⁶

Should s 69(3) of the uniform Evidence Acts be amended to provide the judge with a discretion to admit documents made in connection with an investigation relating or leading to a criminal proceeding and, if so, on what criteria?³⁹⁷

389 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.231.

390 [2003] FCA 933.

391 Ibid [19].

392 *Lenehan v Queensland Trustees Ltd* [1965] Qd R 559.

393 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 707.

394 Director of Public Prosecutions (NSW), *Submission E 17, 15 February 2005*, cited in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.238.

395 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.241.

396 Ibid Question 7–2, post para 7.236.

397 Ibid Question 7–3, post para 7.241.

The QLRC's view

3.184 Section 69 of the uniform Evidence Acts is similar to the business records exceptions contained in sections 92 and 93 of the *Evidence Act 1977* (Qld)³⁹⁸ with two major differences.

3.185 The first difference is that, in Queensland, the availability of the maker of the representation is a relevant consideration. For civil cases, there is a prima facie requirement that the maker give evidence at the proceeding, whereas for criminal proceedings, the evidence is admissible only if the maker is not available.

3.186 The second main difference arises from section 69(3) of the uniform Evidence Acts, which provides that the exception does not apply to representations obtained for the purpose of conducting legal proceedings or in connection with an investigation relating to a criminal proceeding. No such limitation exists in the Queensland provisions.

3.187 Business records may also be admissible under the 'books of accounts' provisions.³⁹⁹ Where the business records are held electronically, section 95 of the *Evidence Act 1977* (Qld) (Admissibility of statements produced by computers) may also apply. It has been noted that these categories overlap, making the scheme of the Queensland Act more complex than under the uniform Evidence Acts.⁴⁰⁰

3.188 In Queensland, police records may be admissible in civil cases given the definition of 'undertaking'. However, such records would be unlikely to be admissible in criminal proceedings under section 93 of the *Evidence Act 1977* (Qld), where the narrower definition of 'trade or business' applies.⁴⁰¹ The QLRC considers that there should be provision for the admission of police records in civil proceedings, but that the prohibition in criminal proceedings should remain.

3.189 The business records provision of the uniform Evidence Acts is less complex than the Queensland provisions, as there is 'one set of "business record" rules for criminal and civil proceedings'⁴⁰² and there is no requirement to call any person in order to tender the documents. The ALRC noted that the provision had met with a high level of satisfaction.⁴⁰³

398 Sections 92 and 93 of the *Evidence Act 1977* (Qld) are set out at notes 230 and 232 of this Report.

399 *Evidence Act 1977* (Qld) ss 83–91, which are discussed at para 3.19–3.22 of this Report.

400 Forbes JRS, *Evidence Law In Queensland* (5th ed, 2004) [83.4].

401 See *R v Eade* (1984) 14 A Crim R 186, 189.

402 Forbes JRS, *Evidence Law In Queensland* (5th ed, 2004) [83.4].

403 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.236.

3-18 The QLRC is of the view that:

- (a) **section 69 of the uniform Evidence Acts has the same underlying policy as the Queensland statutory provisions for the admissibility of business records, but provides a less complex approach;**
- (b) **this provision would need further review if Queensland were to consider adopting the uniform Evidence Acts;**
- (c) **it is desirable that the ALRC seek further comments in the form of the questions set out above;**
- (d) **police records should be admissible in civil proceedings where the representations contained in the document have some further assurance of reliability.**

CONTEMPORANEOUS STATEMENTS ABOUT A PERSON'S HEALTH ETC

3.190 In its Issues Paper, the ALRC posed the following question about the operation of section 72 of the uniform Evidence Acts:⁴⁰⁴

Are concerns raised by the operation of s 72 of the uniform Evidence Acts in providing an exception to the hearsay rule applying to certain contemporaneous statements? Should any concerns be addressed through amendment of the uniform Evidence Acts, for example, by restricting the operation of s 72 to first-hand hearsay?

3.191 Section 72 provides:

72 Exception: contemporaneous statements about a person's health etc

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.

3.192 Section 72 admits, as an exception to the hearsay rule, evidence of a representation made by a person that was a contemporaneous representation about that person's health, feelings, sensations, intention, knowledge or state of mind.

404

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–12, post para 5.72.

3.193 At common law, such statements are treated as admissible either as original evidence,⁴⁰⁵ or as within the *res gestae* exception⁴⁰⁶ as discussed above.⁴⁰⁷ Again, it is the requirement of closeness in time between the fact and the statement that ensures an inherent trustworthiness in the representation. The maker's intention, state of mind, knowledge or condition must itself be either a fact in issue or relevant to a fact in issue.⁴⁰⁸

3.194 Two concerns were raised in the Issues Paper.

3.195 The first was that a wide interpretation of section 72 may result in the admission of any contemporaneous belief that the person may have.⁴⁰⁹ However, in practice, the courts have read section 72 similarly to the common law rule so that only evidence of a state of mind that is itself directly in issue or relevant to a fact in issue will be admitted.⁴¹⁰

3.196 The second concern was that:⁴¹¹

it is not entirely clear whether s 72 avoids the operation of the hearsay rule solely in respect of proving the 'health, feelings, sensations, intention, knowledge or state of mind' of the maker or in respect of any use of the statement.

The ALRC's proposal

3.197 In its Discussion Paper, the ALRC proposed to limit the exception in section 72 of the uniform Evidence Acts to first hand hearsay:⁴¹²

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

The QLRC's view

3.198 At common law, it would seem that most cases involve first-hand hearsay. It is considered that the rationale for the admissibility of these statements would be lost if the exceptions were to apply to more remote

405 *Walton v The Queen* (1989) 166 CLR 283, 289–9 (Mason CJ).

406 The *res gestae* exception is set out at para 3.11–3.12 of this Report.

407 *Ramsay v Watson* (1961) 108 CLR 642.

408 *Walton v The Queen* (1989) 166 CLR 283, 289 (Mason CJ).

409 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 5.70.

410 *R v Hillier* (2004) 154 ACTR 46.

411 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 5.72.

412 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 7–7, post para 7.250.

hearsay. Therefore, this proposal is in accordance with the common law and the underlying policy as it applies in Queensland.

3-19 The QLRC is of the view that section 72 of the uniform Evidence Acts substantially represents the law in Queensland.

3-20 The QLRC supports the ALRC's proposal, which provides certainty as to the scope of section 72.

INTERLOCUTORY PROCEEDINGS

3.199 In its Issues Paper, the ALRC posed the following question about section 75 of the uniform Evidence Acts:⁴¹³

Should s 75 of the uniform Evidence Acts be amended to require that the evidence be based on the knowledge of the person who gives it or on information that the person has and believes?

3.200 Section 75 provides that the hearsay rule does not apply to interlocutory proceedings, provided the party seeking to adduce the evidence also adduces evidence of its source:

75 Exception: interlocutory proceedings

In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

3.201 In its Discussion Paper, the ALRC observed that the 'rules of most federal, territory and state courts include a similar provision'.⁴¹⁴

3.202 The ALRC noted that there was an issue as to whether section 75 required the person swearing the affidavit to swear to a belief in the information and the reasons for the belief,⁴¹⁵ given that section 172 of the uniform Evidence Acts provides that, 'despite Chapter 3, evidence of certain matters may include

⁴¹³ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–13, post para 5.75.

⁴¹⁴ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.251. See for example *Uniform Civil Procedure Rules 1999* (Qld) r 430(2) (affidavit evidence only).

⁴¹⁵ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.252.

evidence based on the “knowledge and belief of the person who gives it, or on information that that person has”.⁴¹⁶

3.203 It is noted that most court rules specify the form and content of affidavits in some detail.⁴¹⁷

The ALRC’s proposal

3.204 In its Discussion Paper, the ALRC did not propose that section 75 of the uniform Evidence Acts be amended.⁴¹⁸

The QLRC’s view

3.205 These matters are dealt with in existing court rules, and no further requirements should be specified.

3-21 The QLRC is of the view that Queensland procedural rules for interlocutory proceedings deal adequately with evidentiary requirements.

3-22 The QLRC supports the ALRC’s view that section 75 of the uniform Evidence Acts does not need to be amended.

⁴¹⁶ Ibid para 7.253. Section 172 of the uniform Evidence Acts provides:

172 Evidence based on knowledge, belief or information

- (1) Despite Chapter 3, the evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that that person has.
- (2) An affidavit or statement that includes evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

⁴¹⁷ *Uniform Civil Procedure Rules 1999* (Qld) rr 430, 431.

⁴¹⁸ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.256.

CHILDREN'S EVIDENCE

3.206 In its Issues Paper, the ALRC posed a question in relation to the application of the hearsay rule to the evidence of children:⁴¹⁹

Should there be an additional exception to the hearsay rule regarding children's hearsay statements about a fact in issue, making such statements admissible to prove those facts? If so, what restrictions, if any (eg, age of child, time limits), and discretions, if any, should be included? Should documents such as drawings or stories also be admissible? Must the child be available for cross-examination if the statements are admitted?

The ALRC's proposal

3.207 In its Discussion Paper, the ALRC expressed the view that evidentiary laws relating specifically to child witnesses would be more suitably dealt with by specific legislation, rather than by inclusion in the uniform Evidence Acts.⁴²⁰ The ALRC considered that the inclusion of such provisions 'would be inconsistent with the ... policy position that the uniform Acts should be of general application'.⁴²¹ Furthermore, the ALRC noted that the development of uniform provisions would be a major project 'beyond the resources and timetable of the current Inquiry'.⁴²²

The QLRC's view

3.208 The *Evidence Act 1977* (Qld) provides specific hearsay rules for children in section 93A and in the 'affected child' and 'special witness' provisions.⁴²³

3.209 The QLRC doubts that the uniform Evidence Acts deal adequately with the evidence of sexual offence complainants and the evidence of children and other vulnerable witnesses (or would do so if amended as proposed). In those areas, the QLRC is of the view that the policy reflected in the 'special witness' provisions and 'affected child' provisions has much to recommend it. Consideration should be given to amending the uniform Evidence Acts to reflect that policy. It is important that the uniform Evidence Acts adopt a consistent approach to the evidence of children, and either include or exclude provisions on a principled basis.

419 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–15, post para 5.87.

420 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 18.56.

421 Ibid para 18.57.

422 Ibid para 18.58.

423 This is discussed at para 3.28–3.29 and 2.49–2.56 of this Report.

3-23 The QLRC is of the view that:

- (a) the *Evidence Act 1977* (Qld) provides specific hearsay rules for children in section 93A and in the 'affected child' and 'special witness' provisions;
- (b) concerns in relation to the evidence of child witnesses, Indigenous witnesses and other vulnerable witnesses (including sexual offence complainants) should be addressed by specific legislative provision;
- (c) the ALRC should review all of its proposals that relate to the evidence of children and other vulnerable witnesses to ensure that a consistent approach has been taken to the inclusion of provisions that address concerns about the evidence of these witnesses.

3-24 The QLRC commends the specific provisions in the *Evidence Act 1977* (Qld) dealing with these issues – namely, sections 21A (Evidence of special witnesses), Division 4A of Part 2 (Evidence of affected children) and 93A (Statement made before proceeding by child or intellectually impaired person) of the *Evidence Act 1977* (Qld).

NOTICE WHEN HEARSAY EVIDENCE IS TO BE ADDUCED

3.210 In its Issues Paper, the ALRC posed two questions in relation to the operation of section 67 of the uniform Evidence Acts in civil proceedings:⁴²⁴

How has s 67 of the uniform Evidence Acts, requiring notice where hearsay evidence is to be adduced, operated in civil proceedings? What concerns, if any, have been raised, and how should these be addressed?

How have procedures under s 67 been affected by civil rules of court in relation to discovery and notices to admit facts and documents?

3.211 Section 67 of the uniform Evidence Acts provides that a party intending to adduce hearsay evidence under sections 63(2) or 65(2), (3) or (8) (where the maker is not available), or under section 64(2) (where the maker is available, but will not be called because it would cause undue expense or delay), must give the other party notice.

3.212 Section 67 of the uniform Evidence Acts provides:

⁴²⁴

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 5–16 and 5-17, post para 5.92.

67 Notice to be given

- (1) Subsections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.
- (2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.
- (3) The notice must state:
 - (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
 - (b) if subsection 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.
- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.
- (5) The direction:
 - (a) is subject to such conditions (if any) as the court thinks fit; and
 - (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

The ALRC's proposal

3.213 The submissions in response to the ALRC's Issues Paper expressed a range of divergent views about the extent to which parties in civil proceedings comply with the notice requirements. Some respondents suggested that compliance with the notice requirements was important, as New South Wales judges will exclude hearsay evidence where notice has not been given. However, other respondents suggested that the notice provisions are rarely used. One respondent commented that section 67 provides a simply procedure, and that use of the procedure should be encouraged.⁴²⁵

3.214 The ALRC concluded that there was no significant need to change section 67.⁴²⁶

⁴²⁵ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.279.

⁴²⁶ *Ibid* para 7.281.

The QLRC's view

3.215 The hearsay rule exceptions and associated notice requirements in the uniform Evidence Acts are substantially different from the law as applied in Queensland.

3.216 It would be more appropriate to consider the relevant notice requirements if the adoption of the uniform Evidence Acts in Queensland were being reviewed.

3.217 The QLRC considers that the operation of the notice provisions in civil proceedings has not been adequately reviewed, and that further comments should be sought.

3-25 The QLRC is of the view that:

- (a) these notice provisions relate specifically to the uniform Evidence Acts hearsay provisions, which are substantially different from the law as applied in Queensland;**
- (b) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts;**
- (c) the ALRC should seek further comments in relation to the operation of the notice provisions in civil proceedings.**

CIVIL PROCEEDINGS

3.218 In its Issues Paper, the ALRC posed a question in relation to the operation of the hearsay rule in civil proceedings:⁴²⁷

Should the hearsay provisions of the uniform Evidence Acts be amended to allow hearsay evidence to be admitted in civil proceedings, with or without the consent of the parties?

The ALRC's proposal

3.219 In its Discussion Paper,⁴²⁸ the ALRC noted that the hearsay rule has been abolished in civil proceedings in the United Kingdom, subject to the

⁴²⁷ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–18, post para 5.96.

⁴²⁸ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.284–7.285.

requirement that the party proposing to adduce hearsay evidence must give notice of that fact to the other party.⁴²⁹

3.220 In submissions to the ALRC, the abolition of the hearsay rule in civil proceedings was generally opposed. Some of the stated grounds of opposition were unfairness and the risk of prolonging trials and increasing costs.⁴³⁰

3.221 The Discussion Paper noted that section 190(1) of the uniform Evidence Acts allows the court to dispense with the application of certain rules of evidence, including hearsay, if all the parties consent. In civil cases, such an order may be made, regardless of consent, where the evidence relates to a matter not genuinely in dispute or where there would be unnecessary expense or delay to apply the provisions.⁴³¹

3.222 The ALRC did not propose to amend the uniform Evidence Acts to abolish hearsay in civil proceedings.⁴³²

The QLRC's view

3.223 There have been some inroads into the hearsay rule in civil proceedings in Queensland as discussed above.⁴³³ It is already the case that a judge can dispense with the rules of evidence if a fact in issue is not seriously in dispute or where strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience in a proceeding.⁴³⁴

3.224 Abolition of the hearsay rule in civil proceedings would effect a major change to the existing position, and the issue would require comprehensive examination and consultation.

3.225 The QLRC notes the approach taken in the United Kingdom and considers that further consideration of the situation is warranted.

429 *Civil Evidence Act 1995* (UK) ss 1, 2.

430 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.287–7.288.

431 Uniform Evidence Acts s 190(3).

432 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.288.

433 See para 3.117–3.118 of this Report.

434 *Uniform Civil Procedure Rules 1999* (Qld) r 394.

3-26 The QLRC is of the view that:

- (a) **abolition of the hearsay rule for civil proceedings would be a substantial change to the existing law in Queensland;**
- (b) **this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts;**
- (c) **the ALRC should undertake a further review of the situation in the United Kingdom, where the hearsay rule in civil cases has been substantially abolished.**

PROCEEDINGS UNDER THE *NATIVE TITLE ACT 1993* (CTH)

3.226 In the Issues Paper, the ALRC also posed a question about the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in proceedings under the *Native Title Act 1993* (Cth):⁴³⁵

Are concerns raised by the operation of the hearsay provisions of the *Evidence Act 1995* (Cth) in proceedings under the *Native Title Act 1993* (Cth)? Should any concerns be addressed through amendment of the *Evidence Act 1995* (Cth) or by other means and, if so, how?

3.227 This question and related issues were dealt with in more detail in Chapter 17 of the ALRC's Discussion Paper, which deals with issues concerning Aboriginal and Torres Strait Islander traditional laws and customs.

435

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 5–14, post para 5.81.

Chapter 4

The opinion rule and its exceptions

INTRODUCTION

4.1 In Queensland, the opinion rule and its exceptions are governed almost entirely by the common law with only some statutory modifications.⁴³⁶ The general rule is that opinion evidence is not admissible.⁴³⁷ The two generally stated exceptions to that rule are the opinion of lay persons, where this is a generally accepted means of stating observations in summary form,⁴³⁸ and the opinion of experts.⁴³⁹

4.2 The uniform Evidence Acts' provisions reflect the common law rules in relation to the opinion rule and its exceptions, with some modification.

4.3 Section 76(1) of the uniform Evidence Acts contains the general exclusionary rule (the 'opinion rule'):

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

4.4 Section 78 contains an exception to the opinion rule for lay persons' opinion evidence.⁴⁴⁰ It requires that the witness has personal knowledge of a matter of a fact, and that the opinion 'is necessary to obtain an adequate account or understanding of the person's perception of the matter'. This would include evidence of matters that are commonly admitted under the common law including the age of a person, the speed at which something was moving, a person's sobriety, and the worn, shabby, used or new condition of things.⁴⁴¹

4.5 Section 79 contains an exception to the opinion rule for expert opinion evidence.⁴⁴² It provides that the opinion rule will not apply where the witness has specialised knowledge that is based on the witness's training, study or experience, and the witness's opinion is wholly or substantially based on that specialised knowledge. At common law, the area of expertise must be 'an organised branch of knowledge'⁴⁴³ or 'of the nature of a science as to require a

436 For example, *Evidence Act 1977* (Qld) s 9C.

437 *Clark v Ryan* (1960) 103 CLR 486.

438 *Sherrard v Jacob* [1965] NI 151.

439 *Clark v Ryan* (1960) 103 CLR 486; *Weal v Bottom* (1966) 40 ALJR 436.

440 Section 78 of the uniform Evidence Acts is set out at para 4.13 of this Report.

441 *Sherrard v Jacob* [1965] NI 151.

442 Section 79 of the uniform Evidence Acts is set out at para 4.27 of this Report.

443 *Clark v Ryan* (1960) 103 CLR 486, 501–2 (Menzies J), 508 (Windeyer J).

course of previous habit, or study, in order to the attainment of a knowledge of it'.⁴⁴⁴

4.6 In *Clark v Ryan*,⁴⁴⁵ doubt was expressed about whether, at common law, such expertise could be derived from experience rather than through studies.⁴⁴⁶ Section 79 of the uniform Evidence Acts makes it clear that expertise can be obtained from experience.

4.7 The requirement in section 79 that the opinion be 'wholly or substantially based' on the person's specialised knowledge has been the subject of controversy. A related issue is the operation of section 60 of the uniform Evidence Acts,⁴⁴⁷ which has the effect of making the facts on which an opinion is based admissible as proof of the matters asserted. Both of these matters are discussed further below.⁴⁴⁸

4.8 Section 80 of the uniform Evidence Acts abolishes the operation of two common law principles: first, that an opinion cannot be given about an ultimate issue in the case and, secondly, that an opinion cannot be given about a matter of common knowledge.⁴⁴⁹

ISSUES FOR CONSIDERATION

4.9 In its Issues Paper, the ALRC raised a number of questions about how the uniform Evidence Acts deal with opinion evidence. Those questions concerned the following issues:

- lay opinion;
- opinions based on specialised knowledge;
- opinion on the ultimate issue;
- opinion on matters of common knowledge; and
- expert opinion regarding children.

4.10 In its Discussion Paper, the ALRC proposed amendments in relation to expert opinion regarding children, and posed some questions for further discussion in relation to lay opinion and expert opinion regarding other groups of witnesses.

444 Ibid 491 (Dixon CJ), quoting from Smith JW in the notes to *Carter v Boehm* 1 Smith LC (7th ed, 1876) 577.

445 (1960) 103 CLR 486.

446 Ibid; cf 'ad hoc' experts discussed in para 4.37–4.41 of this Report.

447 Section 60 of the uniform Evidence Acts is discussed at para 3.83–3.99 of this Report.

448 See para 4.37–4.41, 4.42–4.63 of this Report.

449 Section 80 of the uniform Evidence Acts is set out at para 4.74 of this Report.

4.11 Each of these matters will be discussed in light of the position in Queensland.

LAY OPINION AND IDENTIFICATION EVIDENCE

4.12 In its Issues Paper, the ALRC posed the following question in relation to lay opinion evidence.⁴⁵⁰

Do concerns exist with regard to the admission of lay opinion evidence under s 78 of the uniform Evidence Acts? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

4.13 Section 78 of the uniform Evidence Acts provides:

78 Exception: lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

4.14 The main concern in respect of lay opinion evidence addressed in the ALRC's Discussion Paper related to identification evidence.⁴⁵¹ Of particular concern, was the effect of the High Court's decision in *Smith v The Queen*.⁴⁵²

4.15 In *Smith v The Queen*,⁴⁵³ two police officers gave evidence of identification of the accused as the person pictured in bank security photographs. The officers' identification was based on familiarity with the accused attained through previous dealings. A majority of the High Court held

450 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–1, post para 6.12.

451 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.12.

452 (2001) 206 CLR 650.

453 Ibid.

that the evidence was inadmissible as it was not ‘relevant’ as required under section 55 of the uniform Evidence Acts.⁴⁵⁴ In their Honours’ view.⁴⁵⁵

The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury’s assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury.

4.16 The majority decision indicates that ‘relevance’ may be shown where there is a suggestion that the physical appearance of the accused has changed materially or that the police are at some advantage over and above the tribunal of fact in recognising the person in the photos.

4.17 Kirby J, in dissent on this issue, considered that decision makers ‘could properly consider that witnesses were better placed to recognise the person in the photographs than they were’.⁴⁵⁶ In his view, the police were so placed and the evidence was relevant for the purposes of the Act.⁴⁵⁷

4.18 A concern has been expressed that a narrow interpretation of section 55 or of what will constitute sufficient ‘advantage’ will deprive the court of reliable evidence of witnesses, not limited to police officers, who are familiar with the person depicted in a photograph.⁴⁵⁸

The ALRC’s view

4.19 In its Discussion Paper, the ALRC sought further comments in relation to the decision of the majority of the High Court in *Smith v The Queen*.⁴⁵⁹

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

454 Section 55 of the uniform Evidence Acts provides:

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.

455 (2001) 206 CLR 650, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

456 Ibid [43].

457 Ibid [45].

458 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.17–8.24.

459 Ibid Question 8–1, post para 8.25.

The QLRC's view

4.20 In Queensland, the admissibility of such photo identification evidence would be determined under the common law lay person exception to the opinion evidence rule. In *R v Griffith*,⁴⁶⁰ the Queensland Court of Appeal held that police identification evidence was inadmissible as there was no circumstance giving the police witness a 'substantial advantage over the court'. In the Court's view the opinion evidence was 'irrelevant'.⁴⁶¹

4.21 A generally accepted definition of 'relevance' at common law is that contained in Stephen's *Digest of the Law of Evidence*, which states that the word 'relevant' means that:⁴⁶²

Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in conjunction with other facts proves or renders probable the past, present or future existence or non-existence of the other.

4.22 It has been noted that this definition is 'not materially different' from section 55.⁴⁶³

4.23 The law in Queensland in relation to lay person identification evidence is consistent with that as stated by the High Court in *Smith v The Queen*.⁴⁶⁴ Although it may be perceived that the relevance principle was applied too strictly in *Smith v The Queen*, it is difficult to see how this could be dealt with by legislative amendment.

4.24 It should be noted that, at common law, if such evidence were admitted, a *Domican* direction in relation to the unreliability of identification evidence would usually be given in this situation.⁴⁶⁵

4-1 The QLRC considers that photo identification by lay persons has not caused any concern in Queensland, where the position is consistent with the decision in *Smith v The Queen*.⁴⁶⁶

⁴⁶⁰ [1997] 2 Qd R 524.

⁴⁶¹ Ibid 527.

⁴⁶² Cited in Heydon JD, *Cross on Evidence* (7th ed, 2004) [1490]; *Palmer v The Queen* (1998) 193 CLR 1, [55] (McHugh J).

⁴⁶³ *Goldsmith v Sandilands* (2002) 190 ALR 370, [2] (Gleeson CJ).

⁴⁶⁴ (2001) 206 CLR 650.

⁴⁶⁵ *Domican v The Queen* (1992) 173 CLR 555. The appropriate wording for such a direction is contained in the *Queensland Supreme and District Courts Benchbook* (Feb 2004), No 49 (Identification evidence).

⁴⁶⁶ (2001) 206 CLR 650.

OPINIONS BASED ON SPECIALISED KNOWLEDGE

4.25 In its Issues Paper, the ALRC raised a number of questions about the admissibility, under section 79 of the uniform Evidence Acts, of opinion evidence based on specialised knowledge. Those questions concerned the following issues:

- the admissibility of expert evidence in scientific or technical fields;
- ‘ad hoc’ experts and specialised knowledge;
- the factual basis of expert opinion; and
- expert opinion evidence in practice.

4.26 Each of these issues is discussed in this section in light of the position in Queensland.

4.27 Section 79 of the uniform Evidence Acts contains the exception to the opinion rule for expert evidence. It provides:

79 Exception: opinions based on specialised knowledge

If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

The admissibility of expert evidence in scientific or technical fields

4.28 In its Issues Paper, the ALRC posed the following questions in relation to the criteria for admissibility of expert evidence:⁴⁶⁷

Should the uniform Evidence Acts be amended to introduce additional criterion for the admissibility of expert evidence in scientific or technical fields?

Alternatively, should the uniform Evidence Acts be amended to remove threshold admissibility rules for expert opinion evidence, leaving judges to decide on the weight to be given to such evidence?

4.29 The courts are continually faced with new scientific and technical fields sought to be the subject of expert opinion. In its Interim Report, the ALRC rejected the incorporation of a ‘field of expertise’ test for admissibility under section 79.⁴⁶⁸

⁴⁶⁷ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 6–2 and 6–3, post para 6.25.

⁴⁶⁸ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 743.

4.30 A ‘field of expertise’ test would require either that the field has general acceptance and uses accepted theories and techniques (the *Frye* test),⁴⁶⁹ or that the court itself make an assessment of the reliability of the field (the *Daubert* test).⁴⁷⁰ Australian common law cases have adopted different tests at different times to determine the ambit of expert opinion.⁴⁷¹ The current approach at common law would appear to require a ‘reliable body of knowledge or experience’.⁴⁷²

4.31 The ALRC concluded in its Interim Report that, rather than being a question of admissibility, such matters should be left to:⁴⁷³

the general judicial discretion to exclude evidence when it might be more prejudicial than probative, or tend to mislead or confuse the tribunal of fact. This could be used to exclude evidence that has not sufficiently emerged from the experimental to the demonstrative.

4.32 The application of the test of ‘special knowledge’ under the uniform Evidence Acts has been discussed in a number of cases.⁴⁷⁴ After reviewing these cases, Odgers concludes that section 79 may require a standard of evidentiary reliability, so that expert opinion evidence must be derived from a reliable body of knowledge and experience.⁴⁷⁵ It has also been suggested that reliability is a useful criterion for excluding or limiting the use of novel or untested opinion evidence under the discretionary provisions of the uniform Evidence Acts.⁴⁷⁶

The ALRC’s proposal

4.33 The ALRC noted in its Discussion Paper that the uniform Evidence Acts’ current scheme allows the courts ‘a wide discretion in how they assess the evidentiary value of an expert’s specialised knowledge; whether for the purposes of s 79, or in order to determine whether the expert’s opinion evidence

469 *Frye v United States* 293 F 1012 (1923). See Australian cases cited in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.4260].

470 *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579 (US Supreme Court, 1993). See Australian cases cited in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.4260].

471 See, eg, Odgers S and Richardson J, ‘Keeping Bad Science Out of the Courtroom – Changes in American and Australian Expert Evidence Law’ (1995) 18 *University of New South Wales Law Journal* 108; Edmond G and Mercer D, ‘Keeping “Junk” History, Philosophy and Sociology of Science out of the Courtroom: Problems with the Reception of *Daubert v Merrell Dow Pharmaceuticals Inc*’ (1997) 20 *University of New South Wales Law Journal* 48.

472 *HG v The Queen* (1999) 197 CLR 414, [58] (Gaudron J).

473 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 743.

474 *HG v The Queen* (1999) 197 CLR 414; *Velevski v The Queen* (2002) 187 ALR 233; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123, [12] (Einstein J).

475 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.4260].

476 Freckelton I and Selby H, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) 88.

should be excluded under the discretionary provisions'.⁴⁷⁷ In its view, attempting to introduce additional criteria dealing with permissible fields of expertise may introduce new uncertainties, particularly since such criteria are not always practical or appropriate.⁴⁷⁸

4.34 The ALRC did not propose to introduce additional criteria for the admissibility of expert evidence in scientific or technical fields, or to remove the threshold admissibility rules for expert opinion evidence.⁴⁷⁹

The QLRC's view

4.35 As noted above,⁴⁸⁰ the current approach at common law in relation to areas of expertise is to require that the 'expert's' knowledge be in an area 'sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'.⁴⁸¹

4.36 The QLRC agrees that the courts should, as is presently the position at common law, be allowed to determine, on a case-by-case basis, whether an area of knowledge is the proper subject of expert opinion evidence. It considers that the question of admissibility should not be left to the court's discretion, and that threshold requirements should be retained to reflect the position at common law.

4-2 The QLRC considers that:

- (a) the courts should continue to determine whether an area of knowledge is the proper subject of expert opinion evidence according to the existing admissibility requirements set out in section 79 of the uniform Evidence Acts and on a case-by-case basis;**
- (b) the threshold requirements for the admissibility of expert opinion set out in section 79 of the uniform Evidence Acts should be retained.**

4-3 The QLRC agrees with the ALRC's view that section 79 of the uniform Evidence Acts should not be amended.

⁴⁷⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.52.

⁴⁷⁸ *Ibid* para 8.53–8.54.

⁴⁷⁹ *Ibid*.

⁴⁸⁰ See para 4.30 of this Report.

⁴⁸¹ *HG v The Queen* (1999) 197 CLR 414, [58] (Gaudron J).

‘Ad hoc’ experts and specialised knowledge

4.37 In its Issues Paper, the ALRC posed the following question:⁴⁸²

Do concerns exist with regard to the admission of so-called ‘ad hoc’ expert opinion evidence? Should any concerns be addressed through amendment of the uniform Evidence Acts and, if so, how?

4.38 Ad hoc experts were recognised at common law by the High Court in *Butera v DPP (Vic)*,⁴⁸³ in which it was held that a person can be an expert in a particular matter without formal training. The person’s expertise may be acquired through particular experience, for example, by listening to tape recordings which are substantially unintelligible to anybody who has not heard them repeatedly.⁴⁸⁴

4.39 Under section 79 of the uniform Evidence Acts,⁴⁸⁵ the requirement that specialised knowledge be based on a person’s training, study or experience may be wide enough to include evidence of an opinion by an ad hoc expert.⁴⁸⁶

The ALRC’s view

4.40 The ALRC noted that the phrase ‘training, study or experience’ in section 79 has not caused significant concern, and did not propose any change.⁴⁸⁷

The QLRC’s view

4.41 The opinion evidence of an ad hoc expert is admissible at common law in appropriate circumstances, and is likely to be admissible under section 79 of the uniform Evidence Acts. The QLRC agrees that no amendment to section 79 of the uniform Evidence Acts is required.

4-4 The QLRC considers that the position in relation to ‘ad hoc’ experts is substantially the same under the uniform Evidence Acts and in Queensland.

⁴⁸² Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–4, post para 6.31.

⁴⁸³ (1987) 164 CLR 180.

⁴⁸⁴ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.58, citing *R v Leung* (1999) 47 NSWLR 405.

⁴⁸⁵ Section 79 of the uniform Evidence Acts is set out at para 4.27 of this Report.

⁴⁸⁶ *R v Leung* (1999) 47 NSWLR 405.

⁴⁸⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.61, 8.63.

4-5 The QLRC agrees with the ALRC's view that no amendment to section 79 of the uniform Evidence Acts is necessary to facilitate the admissibility of the opinion evidence of ad hoc experts.

The factual basis of the expert opinion

4.42 In its Issues Paper, the ALRC posed the following question:⁴⁸⁸

Do concerns exist with regard to the extent of the requirement under the uniform Evidence Acts to show that expert opinion evidence is 'based on' the application of specialised knowledge to relevant facts or factual assumptions? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

4.43 Section 79 of the uniform Evidence Acts requires that expert opinion evidence must be 'wholly or substantially' based on the expert's specialised knowledge.⁴⁸⁹ The question arises whether this test incorporates a strict 'basis rule', that is, a requirement that the factual basis of the opinion must be proved before the opinion is admissible. This issue is complicated by the operation of section 60 of the uniform Evidence Acts, which would make the facts on which the opinion is based admissible as an exception to the rule against hearsay.

4.44 In its Interim Report, the ALRC expressed doubt as to the existence of a strict basis rule that would make an opinion that was not supported by proven admissible evidence, not merely of little or no value, but inadmissible.⁴⁹⁰ The ALRC concluded that, even if the basis rule existed, it should not be a precondition to admissibility under the uniform Evidence Acts.⁴⁹¹ It considered that concerns about the factual basis of opinions could be adequately addressed by use of the relevance discretion in section 135 of the uniform Evidence Acts.⁴⁹²

488 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–5, post para 6.43.

489 Section 79 of the uniform Evidence Acts is set out at para 4.27 of this Report.

490 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 750.

491 Ibid.

492 Ibid. Section 135 of the uniform Evidence Acts provides:

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

4.45 In *Ramsay v Watson*,⁴⁹³ the High Court held that statements made to a medical expert were admissible as the foundation of the expert opinion, but were not admissible as evidence of the existence of the matters stated therein.⁴⁹⁴

Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician. And, if the man whom the physician examined refuses to confirm in the witness box what he said in the consulting room, then the physician's opinion may have little or no value, for part of the basis of it has gone.

4.46 The decision in *Ramsay v Watson* has been interpreted as supporting the existence of the basis rule.⁴⁹⁵ In *Paric v John Holland (Constructions) Pty Ltd*,⁴⁹⁶ the High Court stated that '[i]t is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence'.⁴⁹⁷

4.47 Despite the ALRC's intention when drafting the expert opinion provision contained in section 79, Austin J commented in *Australian Securities and Investments Commission v Rich*⁴⁹⁸ that 'the basis rule has been transposed from the common law into the uniform Evidence Act'.⁴⁹⁹ His Honour referred with approval to the criteria set out by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles*, including the requirement that:⁵⁰⁰

so far as the opinion is based on the facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way.

4.48 A contrary view of the criteria set out in *Makita (Australia) Pty Ltd v Sprowles* has been taken in a line of cases in the Federal Court.⁵⁰¹ In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,⁵⁰² Branson J

493 (1961) 108 CLR 642.

494 Ibid 649.

495 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [66] (Heydon JA).

496 (1985) 62 ALR 85.

497 Ibid 87 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ). See also *Bromley Investments Pty Ltd v Elkington* [2002] QSC 427, [50].

498 [2005] NSWSC 149.

499 Ibid [323].

500 (2001) 52 NSWLR 705, 743–4.

501 *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [324].

502 [2002] FCAFC 157.

stated that the criteria should be understood as a ‘counsel of perfection’ and should be regarded as going to weight, rather than admissibility.⁵⁰³

4.49 In *Australian Securities and Investments Commission v Rich*,⁵⁰⁴ Austin J concluded that it seemed ‘unnecessary to resolve this conflict in the present case’.⁵⁰⁵ In that case, the relevant expert report was held to be inadmissible because it did not ‘identify adequately the factual basis for the opinions’.⁵⁰⁶ On appeal, the New South Wales Court of Appeal made no reference to the ‘basis rule’.⁵⁰⁷ Consequently, it is unclear whether a strict basis rule applies under section 79 of the uniform Evidence Acts.

4.50 The issue arose in Queensland in *Bromley Investments Pty Ltd v Elkington*.⁵⁰⁸ Muir J commented that:⁵⁰⁹

It is plain that the statements or assumptions of fact which form the basis of an expert’s opinion must be proved other than by the evidence of the expert unless the relevant facts are within the expert’s own knowledge.

4.51 His Honour J cited *Ramsay v Watson*⁵¹⁰ and *Makita (Australia) Pty Ltd v Sprowles*⁵¹¹ to support this proposition. This conclusion, however, was not decisive in the case, as his Honour relied on rule 394 of the *Uniform Civil Procedure Rules 1999* (Qld) to dispense with the need to adduce evidence of some facts on which the expert opinion was based.⁵¹² Muir J commented further that, ‘to the extent that it is necessary to do so, it is just to accept the

503 Ibid [7], [87].

504 [2005] NSWSC 149.

505 Ibid [325].

506 Ibid [378].

507 *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152. The Court of Appeal overturned the decision of Austin J on the basis that his Honour erred in adopting a ‘true factual basis’ approach rather than the ‘asserted factual basis’ approach (at [134]). Those terms were defined (at [92]) as follows:

that expert opinion evidence is not admissible unless it is true, as a matter of historical fact, that the opinion so expressed was based on the facts set out in the report (and no other facts) and arrived at by the process of reasoning set out in the report (and no other process). I will refer to this as “the true factual basis approach”. One way of stating an alternative approach is a requirement that the expert identify the facts and reasoning process which the expert *asserts* to be an adequate basis for his or her opinions. I will refer to this as “the asserted factual basis approach”.

508 [2002] QSC 427.

509 Ibid [50].

510 (1961) 108 CLR 642.

511 (2001) 52 NSWLR 705.

512 [2002] QSC 427, [54]–[57].

loose hearsay evidence in the Report as proof of the matters in contention'.⁵¹³ This issue did not arise in the appeal.⁵¹⁴

4.52 In *Interline Hydrocarbon Inc v Brenzil Pty Ltd*,⁵¹⁵ Douglas J commented that the careful analysis of the common law decisions by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles*⁵¹⁶ was persuasive.⁵¹⁷

4.53 Under section 60 of the uniform Evidence Acts, evidence of statements made to an expert, or other information upon which the expert's opinion is based, may be used to prove the facts contained in the statements or information, subject to discretionary limitations on the use or exclusion of that evidence. In *R v Lawson*,⁵¹⁸ Sperling J commented on the dangers of allowing medical histories to be used as evidence of the facts they contain. Sperling J expressed the concern that it is possible for unsworn and untested histories to go into evidence in criminal trials as evidence of the facts.⁵¹⁹

4.54 However, in *Quick v Stoland Pty Ltd*,⁵²⁰ Branson J considered that.⁵²¹

In cases in which there is a genuine dispute as to the relevant facts, it might be expected that a court would ordinarily limit the operation of s 60 of the Act by exercising the power vested in it by s 136 of the Act.

4.55 Her Honour noted, however, that 'the weight to be accorded to any particular evidence remains a matter for the court before which the evidence is adduced'.⁵²²

4.56 Heydon, in *Cross on Evidence*, comments that '[t]here is much to be said for a relaxation of the rule against hearsay generally in its application of the giving of opinion evidence'.⁵²³ He notes a number of examples where hearsay is received as part of opinion evidence, for example, opinion evidence as to the financial condition of a person or business expressed by a person with financial expertise or experience, proof of native title and valuation of land cases.⁵²⁴

513 Ibid [57].

514 [2003] QCA 407.

515 [2005] QSC 109.

516 (2001) 52 NSWLR 705.

517 [2005] QSC 109, [15].

518 [2000] NSWCCA 214.

519 Ibid [106].

520 (1998) 87 FCR 371.

521 Ibid 378.

522 Ibid.

523 Heydon JD, *Cross on Evidence* (7th ed, 2004) [29160].

524 Ibid [29150], [29160].

Heydon comments that ‘the strict application of the rule would mean that opinion evidence would rarely be receivable’.⁵²⁵

The rule which prohibits an opinion based on factual assumptions unless facts corresponding with the assumptions are proved by admissible evidence is made workable not only by the generosity of the litigants but more important by a substantial degree of flexibility in its application by the courts.

The ALRC’s proposal

4.57 In its Discussion Paper, the ALRC acknowledged the considerable confusion about the admissibility criteria for expert opinion evidence under the uniform Evidence Acts.⁵²⁶ In its view, the proper approach is to:⁵²⁷

follow the overall scheme of the uniform Evidence Acts, applying the relevance test, followed by the opinion rule and its exceptions and, finally, the discretionary provisions.

4.58 The ALRC concluded that section 79 of the uniform Evidence Acts does not require the factual basis of the expert opinion to be proved. It considered that:⁵²⁸

Section 79 does not, however, require the facts relied upon be proved or that it be demonstrated that they will be proved. What must be clarified is what the expert asserts as to such matters. That does not mean that, if it becomes apparent during the proceedings that important facts are not going to be the subject of admissible evidence, the opposing party will be without remedy or the court unable to control the admission of the evidence. Failure to prove the factual basis may be extensive enough to require exclusion under s 135 or, in extreme cases, under s 55. However, s 79 itself does not, and cannot by its terms, provide the mechanism for exclusion.

4.59 Provided the uniform Evidence Acts are interpreted and applied in this way, the ALRC was of the view that there was no need for any amendment.⁵²⁹

4.60 The ALRC did not propose to amend the uniform Evidence Acts in relation to the requirement to show that expert opinion evidence is ‘based on’ the application of specialised knowledge to relevant facts or factual assumptions.

525 Ibid [29150].

526 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.87–8.88.

527 Ibid para 8.91, approving, at para 8.89, the approach of Branson J in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157. This approach is set out in further detail at para 4.48 of this Report.

528 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.97.

529 Ibid para 8.98.

The QLRC's view

4.61 The QLRC is of the view that, at common law, as applied in Queensland, the 'basis rule' exists, but is not always strictly applied in practice. Strict application would mean that an expert's opinion is inadmissible unless the factual basis is established by admissible evidence that will be proved in the case. Although the existence of the basis rule was acknowledged in *Bromley Investments Pty Ltd v Elkington*,⁵³⁰ Muir J exercised his discretion not to apply the rule in that case.⁵³¹

4.62 The QLRC notes that it is unclear whether the basis rule is a requirement of admissibility under section 79 of the uniform Evidence Acts.

4.63 The QLRC has some concerns about the operation of section 60 of the uniform Evidence Acts in this area and its potential abuse by litigants. However, the QLRC considers that parties will be at a forensic disadvantage if they fail to adduce proof of the facts on which the opinion is based. Contentious issues can be dealt with by way of objection by the parties and a ruling that the facts be strictly proved or that hearsay evidence be excluded or its use limited.

4-6 The QLRC is of the view that:

- (a) the 'basis rule' is part of the common law in Queensland, but is not always strictly applied;**
- (b) the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts, particularly in relation to whether the abolition of the basis rule is appropriate in criminal trials;**
- (c) despite the ALRC's conclusion that section 79 of the uniform Evidence Acts does not incorporate the 'basis rule', it is uncertain whether the courts will interpret section 79 as incorporating the 'basis rule';**
- (d) for the purposes of clarity, if the ALRC's intention is that the basis rule should be abolished, the uniform Evidence Acts should contain an express provision to that effect.**

⁵³⁰ [2002] QSC 427, [50].

⁵³¹ See para 4.51 of this Report.

Expert opinion evidence in practice

4.64 In its Issue Paper, the ALRC posed the following question in relation to section 79 of the uniform Evidence Acts:⁵³²

Is there insufficient understanding amongst legal practitioners of the need to demonstrate under s 79 of the uniform Evidence Acts that a particular opinion is ‘based on’ the application of specialised knowledge to relevant facts or factual assumptions and, if so, how should this be remedied?

4.65 In its Discussion Paper, the ALRC noted that it had received many comments favouring stricter enforcement of the rules of evidence in relation to expert opinion.⁵³³ The ALRC considered that these concerns can best be addressed through court rules and, more generally, by greater awareness of the rules among the legal profession and expert witnesses.⁵³⁴

4.66 In that context, the ALRC referred to the Federal Court’s guidelines for expert witnesses, which prescribe the matters that are to be contained in an expert report and which promote transparency as to the basis of an expert’s opinion.⁵³⁵

4.67 To a large extent, these guidelines reflect the criteria set out in *Makita (Australia) Pty Ltd v Sprowles*.⁵³⁶ The guidelines require that the facts upon which the opinion is based be ‘clearly and fully stated’ rather than ‘identified and proved’.

4.68 The Discussion Paper also noted concerns relating to costs and delays attributable to the adducing of expert opinion evidence and undue partisanship or bias on the part of expert witnesses.⁵³⁷

4.69 The ALRC considered that these issues are primarily procedural in nature, rather than related to the operation of the uniform Evidence Acts.⁵³⁸ It noted⁵³⁹ that these issues were considered in its report, *Managing Justice: A*

532 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–6, post para 6.43.

533 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.103.

534 *Ibid* para 8.104.

535 *Ibid* para 8.106.

536 (2001) 52 NSWLR 705. These criteria are discussed at para 4.47 of this Report.

537 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.110.

538 *Ibid*.

539 *Ibid* para 8.111–8.112.

Review of the Federal Civil Justice System,⁵⁴⁰ and are currently under review by the NSWLRC.⁵⁴¹

The ALRC's view

4.70 The ALRC did not propose any changes to the uniform Evidence Acts in relation to the role of lawyers or the procedural aspects in respect of expert evidence.⁵⁴²

The QLRC's view

4.71 The concerns expressed in the ALRC's Discussion Paper have largely been addressed in Queensland through court rules and directions, including recent amendments to the *Uniform Civil Procedure Rules 1999* (Qld), which prescribe the contents of an expert's report, allow the use of court-appointed experts, and limit the number of expert witnesses that may be called in a proceeding.⁵⁴³

4.72 The QLRC agrees that there is no need for any amendment to the uniform Evidence Acts.

4-7 The QLRC is of the view that procedural matters in relation to expert evidence are adequately addressed in Queensland in the *Uniform Civil Procedure Rules 1999* (Qld).

4-8 The QLRC supports the ALRC's view that no amendment to the uniform Evidence Acts is necessary in relation to procedural issues as to expert evidence.

540 Australian Law Reform Commission, Report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000).

541 New South Wales Law Reform Commission, Issues Paper, *Expert Witnesses* (IP 25, 2004). See now New South Wales Law Reform Commission, Report, *Expert Witnesses* (R 109, 2005).

542 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.115.

543 *Uniform Civil Procedure Rules 1999* (Qld) Chapter 11, Part 5.

OPINION ON AN ULTIMATE ISSUE

4.73 In its Issues Paper, the ALRC posed the following question:⁵⁴⁴

Do concerns exist with regard to the admission of expert opinion evidence about an ultimate issue or expert opinion by way of submission or argument? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

4.74 Section 80 of the uniform Evidence Acts provides:

80 Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

4.75 In its original evidence inquiry, the ALRC noted that what constitutes an ‘ultimate issue’ had not been authoritatively ruled on.⁵⁴⁵ However, it was generally understood to be a rule ‘that prohibits a witness applying any kind of a “legal standard” to the facts, something which it is suggested is the function of the jury after instruction from the judge’.⁵⁴⁶ In *Murphy v The Queen*,⁵⁴⁷ the High Court doubted the existence of a rule that an expert may not give an opinion on an ultimate fact in issue.

4.76 Evidence that would breach the ‘ultimate issue’ rule, since it involves the application of a legal standard, includes evidence that a defendant was negligent, that a deceased lacked testamentary capacity, or that an accused was provoked.⁵⁴⁸ Despite this rule, expert evidence about an accused’s sanity is permitted even though it involves the application of a legal standard.⁵⁴⁹

4.77 The rule has been said to be justified on a number of bases, including that allowing such evidence usurps the role of the trier of fact, can be confusing and unhelpful, and distorts the fact-finding process.⁵⁵⁰

4.78 In its Interim Report, the ALRC noted that the rule has been the subject of wide-spread criticism on the ground that its operation relies on fine distinctions between ultimate and non-ultimate issues and between issues of

544 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–7, post para 6.51.

545 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 743.

546 Ibid.

547 (1989) 167 CLR 94, 110 (Mason CJ and Toohey J), 127 (Deane J).

548 *R v Palmer* [1981] 1 NSWLR 209, 214 (Glass JA).

549 *Thomas v The Queen (No 2)* [1960] WAR 129.

550 Freckelton I and Selby H, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) 166.

fact and law.⁵⁵¹ The purpose of section 80 was to abolish the ultimate issue rule.⁵⁵²

4.79 At common law, it would seem that an expert can give evidence about the existence and effect of foreign law, but not about its application to the facts at hand.⁵⁵³ A similar interpretation of section 80 was adopted in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)*.⁵⁵⁴ In that case, Lindgren J held that the section was ‘not apt to refer to expert legal opinion which impinges upon the essential curial function of applying the law, whether domestic or foreign, to facts’.⁵⁵⁵ However, in *Idoport Pty Ltd v National Australia Bank Ltd*,⁵⁵⁶ while it was not necessary to decide the correctness of Lindgren J’s position, Einstein J declined to follow that reasoning.⁵⁵⁷

4.80 It should also be noted that, even if section 80 does not prevent expert evidence being given on ultimate issues, the discretion to exclude evidence that may mislead the jury or waste the court’s time might be utilised.

The ALRC’s proposal

4.81 Although some of the submissions in response to the ALRC’s Issues Paper supported the reintroduction of the ultimate issues rule,⁵⁵⁸ the ALRC concluded that attempts to reintroduce the rule into the uniform Evidence Acts would be made more difficult by uncertainty about the existence and scope of the rule at common law. Consequently, it did not propose any change to section 80 of the uniform Evidence Acts in this regard.⁵⁵⁹

The QLRC’s view

4.82 The QLRC notes the decline in the application of the ultimate issue rule at common law and the uncertainty that surrounds its scope. The effect of section 80 of the uniform Evidence Acts is not to make such evidence admissible, but to provide that it is not inadmissible only because it goes to an ultimate issue. Consequently, if the evidence would not assist the decision

551 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 160.

552 Ibid para 743.

553 *Waung v Subbotovsky* [1968] 3 NSW 499. See Heydon JA, *Cross on Evidence* (7th ed, 2004) [41035].

554 (1996) 64 FCR 79.

555 Ibid 83.

556 (2000) 50 NSWLR 640.

557 Ibid [43], [44].

558 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.125, 8.126.

559 Ibid para 8.131.

maker and would tend to mislead, confuse, or otherwise prolong the trial unnecessarily, the evidence could still be excluded.

4.83 In its report on the evidence of children, the QLRC was not in favour of abolishing the ultimate issue rule.⁵⁶⁰ It did not consider 'it appropriate that an expert witness should generally be able to testify as to the questions in issue in the proceeding'.⁵⁶¹ This issue requires the ALRC's further consideration, particularly in relation to the abolition of the rule in jury trials.

4.84 If the ultimate issue rule is not reintroduced into the uniform Evidence Acts, the operation of section 80 in relation to expert opinion evidence on legal matters should be clarified with a view to resolving the issue referred to in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)*⁵⁶² and *Idoport Pty Ltd v National Australia Bank Ltd*.⁵⁶³

4-9 The QLRC is of the view that:

- (a) the existence and application of the 'ultimate issue' rule is unclear at common law;**
- (b) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts; and**
- (c) if, as the ALRC has proposed, the ultimate issue rule is not to be re-introduced into the uniform Evidence Acts, the operation of section 80 in relation to expert opinion on legal matters should be clarified.**

OPINION ON MATTERS OF COMMON KNOWLEDGE

4.85 In its Issue Paper, the ALRC posed the following question:⁵⁶⁴

Do concerns exist with regard to the admission of expert opinion evidence on matters of common knowledge, for example, in relation to expert identification evidence or motor vehicle accident reconstruction? Should any concerns be addressed through amendment of the uniform Evidence Acts or by other means, and if so, how?

⁵⁶⁰ Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) 316.

⁵⁶¹ Ibid.

⁵⁶² (1996) 64 FCR 79.

⁵⁶³ (2000) 50 NSWLR 640. See para 4.79 of this Report.

⁵⁶⁴ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–8, post para 6.54.

4.86 At common law, opinion evidence is not admissible if it relates to a matter of ‘common knowledge’ and would therefore be of no assistance to the court (the ‘common knowledge’ rule).⁵⁶⁵ In its Interim Report, the ALRC disapproved of this approach.⁵⁶⁶

Excluding evidence because the “ordinary man” has some knowledge about the area is entirely fallacious and ought not to be part of the evidence law ... An expert, however, may still be of assistance to the court even in an area about which most people know something. An expert purports to have “special” skill and knowledge about something over and above that of the “ordinary man”.

4.87 The ALRC recommended in its Interim Report that such opinions, if relevant, be prima facie admissible, subject to the possibility of discretionary exclusion.⁵⁶⁷

4.88 The common knowledge rule has been applied at common law to exclude expert opinion on matters such as identification,⁵⁶⁸ a child’s development,⁵⁶⁹ and the reliability of a particular witness.⁵⁷⁰

4.89 In relation to the reliability of a particular witness, the courts have allowed expert evidence about the credibility of a witness only where the witness’s capacity to give reliable evidence is impaired by ‘disease, defect or abnormality’ and is, therefore, outside the ordinary experience of a jury.⁵⁷¹

4.90 However, this distinction was rejected by the High Court in *Murphy v The Queen*,⁵⁷² where several members of the Court doubted whether there was a general principle that expert evidence was admissible only where there was evidence of ‘abnormality’.⁵⁷³

4.91 Recent cases indicate that the courts may be more willing to accept expert evidence in the area of ‘social science’. In *HG v The Queen*,⁵⁷⁴ a number of judges on the High Court accepted that the evidence of a

565 *R v Ashcroft* [1965] Qd R 81, 85 (Gibbs J); *Smith v The Queen* (1990) 64 ALJR 588; *Murphy v The Queen* (1989) 167 CLR 94, 126 (Deane J), 130 (Dawson J).

566 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 743.

567 *Ibid.*

568 *Smith v The Queen* (1990) 64 ALJR 588.

569 *HG v The Queen* (1999) 197 CLR 414.

570 *R v Turner* [1975] QB 834.

571 *Ibid.* See generally Harris W, ‘The Admissibility of Expert Evidence on the Reliability of Witnesses’ (1992) 13 *Queensland Lawyer* 3, 8–9.

572 (1989) 167 CLR 94.

573 *Ibid* 111 (Mason CJ and Toohey J), 130 (Dawson J).

574 (1999) 197 CLR 414.

psychologist about a young child's knowledge of sexual matters would be admissible under the opinion rule.⁵⁷⁵

4.92 The operation of section 80 of the uniform Evidence Acts⁵⁷⁶ was discussed by the New South Wales Court of Criminal Appeal in *R v Smith*,⁵⁷⁷ where it was accepted that expert identification evidence may now be admissible under section 79 of the uniform Evidence Acts.⁵⁷⁸ However, the Court of Criminal Appeal further noted that such evidence could be excluded under the general discretion in section 135(c) if it was likely to cause or result in undue waste of time.⁵⁷⁹

The ALRC's view

4.93 In its Discussion Paper, the ALRC reiterated that the effect of section 80 is that evidence previously challengeable under the common knowledge rule, for example, evidence from psychologists or psychiatrists about human behaviour or about a child's development is admissible, subject to the general discretions to exclude or limit the use of evidence contained elsewhere in the uniform Evidence Acts.⁵⁸⁰

4.94 In the ALRC's view, the important issue is whether the discretionary provisions of the uniform Evidence Acts are capable of addressing concerns raised about the admission of such evidence.⁵⁸¹ The ALRC considered that a 'more robust approach' to the application of the discretionary provisions would provide 'adequate latitude for courts to exclude evidence on matters of common knowledge'.⁵⁸² It did not propose any change to section 80 of the uniform Evidence Acts to reintroduce the common knowledge rule.⁵⁸³

The QLRC's view

4.95 The uniform Evidence Acts' approach to the admissibility of opinion evidence on matters of common knowledge reflects the High Court's views in *Murphy v The Queen*.⁵⁸⁴ It is also consistent with the recommendation in the

⁵⁷⁵ Ibid [58]–[65] (Gaudron J, Gummow J agreeing). However, Gaudron J would not have admitted this evidence as an exception to the credibility rule: [72]–[75].

⁵⁷⁶ Section 80 of the uniform Evidence Acts is set out at para 4.74 of this Report.

⁵⁷⁷ (2000) 116 A Crim R 1.

⁵⁷⁸ Section 79 of the uniform Evidence Acts is set out at para 4.27 of this Report.

⁵⁷⁹ (2000) 116 A Crim R 1, 13. Section 135(c) of the uniform Evidence Acts is set out at note 579 of this Report.

⁵⁸⁰ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.140.

⁵⁸¹ Ibid.

⁵⁸² Ibid para 8.142.

⁵⁸³ Ibid.

⁵⁸⁴ (1989) 167 CLR 94. These views are discussed at para 4.90 of this Report.

QLRC's report on the evidence of children that expert evidence about child witnesses should not be excluded on the basis of the 'common knowledge rule'.⁵⁸⁵

4.96 The QLRC considers that issues of weight, relevance and wasting of the court's time can be dealt with by the application of the credibility rule⁵⁸⁶ or discretionary exclusion. The QLRC agrees with the ALRC's proposal not to reintroduce the common knowledge rule into the uniform Evidence Acts.

4-10 The QLRC is of the view that:

- (a) the uniform Evidence Acts' approach to the 'common knowledge' rule differs from the law in Queensland generally;**
- (b) the 'common knowledge' rule has been abrogated to some extent in Queensland in relation to expert evidence about the evidence of children;**
- (c) the uniform Evidence Acts' approach to the 'common knowledge' rule has merit over the exclusionary approach adopted in Queensland; and**
- (d) the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

4-11 The QLRC supports the ALRC's proposal not to reintroduce the common knowledge rule.

⁵⁸⁵ Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) 316.

⁵⁸⁶ See Chapter 6 of this Report.

EXPERT OPINION REGARDING CHILDREN⁵⁸⁷

4.97 In its Issues Paper, the ALRC posed the following question:⁵⁸⁸

Should the *Evidence Act 1995* (Cth) be amended to clearly allow for the admission of expert evidence regarding the credibility or reliability of child witnesses? Does s 79A of the *Evidence Act 2001* (Tas)⁵⁸⁹ achieve this purpose, or is further clarification required? [note added]

4.98 At common law, there are a number of rules that operate generally against the admissibility of expert opinion about the credibility and reliability of witnesses, including children.⁵⁹⁰ Generally, a party cannot call a witness for the sole purpose of bolstering the credibility of another witness, including a complainant (the ‘credibility’ or ‘bolster’ rule).⁵⁹¹ Rules relating to expert evidence that require expertise in a ‘recognised body of knowledge’ and exclude ‘common knowledge’ evidence also operate against the admissibility of this evidence.⁵⁹²

4.99 Some of these issues have been ameliorated by a greater recognition by the courts of social sciences and a rejection of an approach that would allow expert evidence as to credibility only where there was evidence of ‘abnormality’.⁵⁹³ Notwithstanding this, it has been suggested that Australian courts will continue to be cautious in admitting expert evidence regarding the patterns of behaviour of child abuse victims.⁵⁹⁴

587 This topic is discussed in detail in Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) Chapter 15.

588 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 6–9, post para 6.67.

589 Section 79A of the *Evidence Act 2001* (Tas) provides:

79A Specialised knowledge of child behaviour

A person who has specialised knowledge of child behaviour based on the person’s training, study or experience (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters:

- (a) child development and behaviour generally;
- (b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

590 See Chapter 6 of this Report, which deals with credibility and character evidence.

591 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.80].

592 This is discussed at para 4.28–4.36 and 4.85–4.96 of this Report.

593 See para 4.89–4.91 of this Report.

594 Freckelton I and Selby H, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) 368–9. See Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.147.

4.100 If evidence is admitted as expert opinion evidence, it may still be excluded for breaching the credibility rule.⁵⁹⁵ However, at common law, there are some exceptions to the credibility rule that may allow expert evidence to be admitted. In *R v C*,⁵⁹⁶ it was suggested that evidence used to rehabilitate a witness's credit, which had been impugned under cross-examination, could be given by an expert.⁵⁹⁷

4.101 Comparable provisions in the uniform Evidence Acts are more restrictive. The exception contained in section 108,⁵⁹⁸ which deals with the rehabilitation of a witness whose credibility has been impugned, does not apply to expert evidence. It applies only to re-examination of the witness concerned, or to the admission of a prior consistent statement of the witness in order to counter suggestions that the witness made a prior inconsistent statement or that the evidence given by the witness has been fabricated or reconstructed or is the result of suggestion.⁵⁹⁹

4.102 A cross-examining party is also limited in the extent to which it may introduce evidence as to credibility against the witness. In limited circumstances, evidence may be led to rebut a denial made in cross-examination of matters put to a witness that are relevant only to credit.⁶⁰⁰ Two of the main exceptions to the rule against rebuttal of answers going to credit are to prove bias and to prove a prior inconsistent statement.⁶⁰¹

595 *HG v The Queen* (1999) 197 CLR 414, [71]–[74] (Gaudron J).

596 (1993) 60 SASR 467.

597 This exception is discussed at para 6.149–6.164 of this Report.

598 Section 108 of the uniform Evidence Acts provides:

108 Exception: re-establishing credibility

- (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.
- (2) The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105, if the court gives leave to adduce that evidence.
- (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
 - (a) evidence of a prior inconsistent statement of the witness has been admitted; or
 - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;
 and the court gives leave to adduce the evidence of the prior consistent statement.

599 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) 305.

600 This is an exception to the 'finality rule'. See Heydon JD, *Cross on Evidence* (7th ed, 2004) [17580]. This is discussed at para 6.106–6.118 of this Report.

601 Heydon JD, *Cross on Evidence* (7th ed, 2004) [17595].

4.103 In its Discussion Paper, the ALRC noted that evidence admitted as an exception to the credibility rule under section 106 of the uniform Evidence Acts,⁶⁰² to rebut a denial made in cross-examination, may provide an avenue for defence lawyers to introduce expert evidence attacking the credibility of a child witness.⁶⁰³

4.104 In their joint report on the evidence of children, the ALRC and the Human Rights and Equal Opportunity Commission recommended that the rules of evidence be amended to ensure appropriate evidence about a child witness's behaviour is admitted in abuse cases to assist in the assessment of the child's credibility.⁶⁰⁴

4.105 In its report on the evidence of children, the QLRC recommended that the *Evidence Act 1977* (Qld) be amended to provide that:⁶⁰⁵

If it is probative in the circumstances ... expert evidence should be admissible in relation to psychological factors which may lead to behaviour relevant to the credibility of a child witness. However, such evidence should be admissible in support of the credibility of a child witness only to rebut suggestions that the child is not a credible witness.

4.106 Section 9C of the *Evidence Act 1977* (Qld)⁶⁰⁶ generally gives effect to this recommendation.⁶⁰⁷ It provides:

602

Section 106 of the uniform Evidence Acts provides:

106 Exception: rebutting denials by other evidence

The credibility rule does not apply to evidence that tends to prove that a witness:

- (a) is biased or has a motive for being untruthful; or
- (b) has been convicted of an offence, including an offence against the law of a foreign country; or
- (c) has made a prior inconsistent statement; or
- (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

603

Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.152.

604

Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997) para 14.77, Recommendation 101.

605

Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) 320, Recommendation 15.2.

606

Inserted by the *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 57.

607

However, s 9C of the *Evidence Act 1977* (Qld) does not incorporate the qualification that the evidence is to be admissible only where the child's credit is in issue.

9C Expert evidence about witness's ability to give evidence

- (1) This section applies to a proceeding if—
- (a) under section 9A, the court is deciding whether a person is able to give an intelligible account of events which he or she has observed or experienced; or
 - (b) under section 9B, the court is deciding whether a person understands the matters mentioned in section 9B(2)(a) and (b); or
 - (c) the evidence of a child under 12 years is admitted.
- (2) Expert evidence is admissible in the proceeding about the person's or child's level of intelligence, including the person's or child's powers of perception, memory and expression, or another matter relevant to the person's or child's competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence.

4.107 This section would appear to allow expert evidence in three situations – first, on a voir dire to assess issues of competence generally; secondly, on a voir dire to determine competence to give sworn evidence; and thirdly, in the trial proper to assist the court in assessing the credit of a child under twelve years.⁶⁰⁸

4.108 In relation to the third situation, both the credibility rule and the common knowledge rule for experts would seem to be overcome. However, other expert opinion rules, such as the requirements that the witness be an expert and that the area be a recognised body of knowledge, continue to apply.

The ALRC's proposal

4.109 In the ALRC's view, expert opinion evidence about the credibility or reliability of children's evidence should be admissible under section 79.⁶⁰⁹ However, it noted that the case law confirms that Australian courts continue to demonstrate a reluctance to admit such evidence.⁶¹⁰

4.110 The ALRC further considered that the danger of such expert opinion evidence being misused can be adequately addressed by judicial comments or directions.⁶¹¹

⁶⁰⁸ Cf Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [9C.1].

⁶⁰⁹ Section 79 of the uniform Evidence Acts is set out at para 4.27 of this Report.

⁶¹⁰ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 8.162.

⁶¹¹ *Ibid* para 8.164.

4.111 The ALRC proposed the following two amendments to the uniform Evidence Acts.⁶¹²

To avoid doubt, the uniform Evidence Acts should be amended to provide an exception to the opinion and credibility rules for expert opinion evidence on the development and behaviour of children.⁶¹³

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

The QLRC's view

4.112 The ALRC's proposals are consistent with section 9C of the *Evidence Act 1977* (Qld) in so far as that section applies to the reliability and credibility of children.

4.113 The proposal is also consistent with section 9C in so far as that section applies to all offences, and is not limited to sexual offences as is section 79A of the *Evidence Act 2001* (Tas).

4.114 The QLRC considers that section 9C of the *Evidence Act 1977* (Qld) has the effect of overriding the credibility rule at common law. It is noted that the ALRC's proposal is to amend both the opinion evidence provisions and the credibility provisions of the uniform Evidence Acts⁶¹⁴ to ensure the desired outcome.

4.115 The QLRC supports the ALRC's proposal.

612 Ibid Proposal 8–1, post para 8.168; Proposal 11–6, post para 11.110.

613 The following proposed amended wording for s 79 is contained in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Appendix 1, 545:

79 Exception: opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:
- (a) the development and behaviour of children generally;
 - (b) the development or behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

614 The credibility provisions of the uniform Evidence Acts are discussed in detail in Chapter 6 of this Report.

4.116 However, the QLRC notes that the approach taken to children's evidence in relation to opinion evidence is inconsistent with the approach taken by the ALRC in relation to hearsay evidence as it relates to children's evidence.

4.117 The ALRC did not propose any amendment to the uniform Evidence Acts in relation to the hearsay provisions.⁶¹⁵ The ALRC justified non-inclusion of the provisions on the basis of the difficulty in developing uniform provisions, the close links between such provisions and complex procedural rules, and the ALRC's policy that the uniform Evidence Acts should remain Acts of general application.⁶¹⁶

4.118 In relation to the opinion rule, however, the ALRC suggested that the proposed amendment would not constitute any major departure from the existing law, and that section 79A of the *Evidence Act 2001* (Tas) provides a model.⁶¹⁷

4-12 The QLRC:

- (a) is of the view that the proposed amendment is consistent with the existing law in Queensland relating to the reliability and credibility of a child witness;**
- (b) supports the ALRC's proposal and the related amendment to the credibility provisions of the uniform Evidence Acts; and**
- (c) is of the view that the ALRC should review all of its proposals that relate to the evidence of children and other vulnerable witnesses to ensure that a consistent approach is taken to the inclusion of provisions that address concerns about the evidence of these witnesses.**

4-13 The QLRC commends the specific provision of the *Evidence Act 1977* (Qld) that deals with these issues – namely, section 9C of the *Evidence Act 1977* (Qld).

⁶¹⁵ See para 3.207 of this Report.

⁶¹⁶ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 7.271–7.263.

⁶¹⁷ Ibid para 8.166.

EXPERT OPINION IN RELATION TO THE RELIABILITY OF OTHER CATEGORIES OF WITNESS

4.119 In its Discussion Paper, the ALRC noted that it had received a submission in response to the Issues Paper to the effect that consideration should be given to recommending the enactment of an exception to the credibility rule that would permit the adducing of expert evidence in relation to complainants suffering from an intellectual disability.⁶¹⁸ This issue raises substantially the same issues discussed in relation to children,⁶¹⁹ although, in the case of persons with an intellectual disability, there is less likelihood that the ‘common knowledge’ rule would be an obstacle to admissibility.

The ALRC’s proposal

4.120 In its Discussion Paper, the ALRC sought further comment on this issue.⁶²⁰

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

4.121 The ALRC’s proposal in relation to evidence about the credibility of a child witness,⁶²¹ which would create an exception to the credibility rule for expert evidence that has ‘substantial probative value’, would also apply to evidence in respect of these other categories of witnesses.

The QLRC’s view

4.122 Section 9C of the *Evidence Act 1977* (Qld)⁶²² would seem to limit expert opinion about the credibility or reliability of specific categories of witnesses, including those with an intellectual disability, to situations where the competence of the witnesses generally, or their competence to give sworn evidence, is raised.

4.123 The wording of section 9C and its legislative history does not suggest that it extends to expert opinion about the reliability of all witnesses at trial.⁶²³

618 Ibid para 8.170, citing Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005.

619 See para 4.97–4.118 of this Report.

620 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Question 8–2, post para 8.172.

621 See para 4.111 of this Report.

622 Section 9C of the *Evidence Act 1977* (Qld) is set out at para 4.106 of this Report.

623 A contrary view would seem to be expressed in Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [9C.1].

4.124 Although the reliability of specific classes of witnesses may be the proper subject of expert opinion, in most cases, the credibility rule will restrict the admissibility of such evidence.

4-14 The QLRC is of the view that:

- (a) the common law, as applied in Queensland, provides for the admissibility of evidence about a witness's credibility or reliability, but is subject to many limitations;**
- (b) the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts; and**
- (c) the ALRC should review all of its proposals that relate to the evidence of children and other vulnerable witnesses to ensure that a consistent approach has been taken to the inclusion of provisions that address concerns about the evidence of these witnesses.**

4-15 The QLRC considers it appropriate that the ALRC seek further comments, in the form of the above question, about whether the uniform Evidence Acts should provide for the admission of expert evidence about the credibility or reliability of other categories of witness.

Chapter 5

Tendency and coincidence evidence

INTRODUCTION

5.1 At common law, evidence that discloses that an accused person has a propensity to commit crimes of the sort charged, or is the sort of person to commit such crimes, is generally excluded because it is likely to operate unfairly to the accused.⁶²⁴ Such evidence is termed ‘propensity’ evidence and includes ‘similar fact’ evidence – that is, evidence of similar conduct on other occasions.⁶²⁵ The admissibility of propensity evidence may also arise in civil cases,⁶²⁶ although the test of admissibility, as discussed below,⁶²⁷ is not as strict as that which applies in criminal cases.

Common law – criminal cases

5.2 The early case of *Makin v Attorney-General for New South Wales*⁶²⁸ held that evidence of an accused’s criminal propensity will be admissible only if it is relevant to determine ‘whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused’.⁶²⁹

5.3 Subsequent cases interpreted *Makin* as requiring propensity evidence to be relevant to some other issue, within defined categories.⁶³⁰ A series of judicial statements suggested that, in Australia, the test for admissibility of similar fact evidence was that ‘the probative force of the evidence clearly transcends the merely prejudicial effect of showing that the accused has committed other offences’.⁶³¹

624 Heydon JD, *Cross on Evidence* (7th ed, 2004) [21010].

625 The term ‘similar fact evidence’ is often used in ‘a general but inaccurate sense’: *Pfennig v The Queen* (1995) 182 CLR 461, 465 (Mason CJ, Deane and Dawson JJ).

626 *Sheldon v Sun Alliance Australia Ltd* (1989) 53 SASR 97.

627 See para 5.32–5.36 of this Report.

628 [1894] AC 57.

629 *Ibid* 65 (Lord Herschell).

630 *Perry v The Queen* (1982) 150 CLR 580, 586–7 (Gibbs CJ); *Harriman v The Queen* (1989) 167 CLR 590, 599 (Dawson J).

631 *Perry v The Queen* (1982) 150 CLR 580, 604 (Wilson J), 609 (Brennan J); *Sutton v The Queen* (1984) 152 CLR 528, 547–9 (Brennan J), 560 (Deane J); *Harriman v The Queen* (1989) 167 CLR 590, 593–4 (Brennan J), 598 (Dawson J), 610 (Toohey J), 632 (McHugh J).

5.4 In *Pfennig v The Queen*,⁶³² the High Court undertook a complete review of the law relating to the admissibility of propensity evidence. The joint majority judgment of Mason CJ and Deane and Dawson JJ contains a detailed history of the law in the United Kingdom, New Zealand, Canada and Australia and represents the current common law, as applied in non-uniform Evidence Acts jurisdictions in Australia,⁶³³ to the admissibility of propensity evidence, including similar fact evidence.⁶³⁴

5.5 Their Honours approved the decision in the English case of *Director of Public Prosecutions v Boardman*,⁶³⁵ which discarded an approach to admissibility based on identifiable categories and adopted the test of requiring the prejudice to the accused to be outweighed by the probative force of the evidence.⁶³⁶ In that case, Lord Cross of Chelsea stated that the general reason for exclusion in relation to propensity evidence is:⁶³⁷

not that the law regards such evidence as inherently irrelevant but that it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that ... its prejudicial effect would outweigh its probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense.

5.6 The High Court majority judgment, however, went further than the House of Lords, concluding that a test of admissibility based on the probative value of the evidence exceeding its prejudicial effect 'resemble[d] the exercise of a discretion rather than the application of a principle.'⁶³⁸ Their Honours approved the test as stated in *Hoch v The Queen*⁶³⁹ that propensity or similar fact evidence will be admissible only where the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.⁶⁴⁰

632 (1995) 182 CLR 461. The accused was convicted of the murder of a 10 year old boy whose body was never found. The primary issue for determination was the admissibility of evidence that the accused had been convicted of the abduction and sexual assault of another boy about a year after the disappearance of the boy of whose murder he was convicted.

633 Except Victoria, where s 398A of the *Crimes Act 1958* (Vic) governs the admissibility of propensity evidence. That provision is considered at para 5.132–5.139 of this Report.

634 See generally Franco P, 'Pfennig Re-visited: Propensity Evidence in Queensland' (1998) 18 *Queensland Lawyer* 169; Harris W, 'Propensity Evidence, Similar Facts and the High Court' (1995) 11 *Queensland University of Technology Law Journal* 97; Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) Chapter 16.

635 [1975] AC 421.

636 *Pfennig v The Queen* (1995) 182 CLR 461, 477, 483–4 (Mason CJ, Deane and Dawson JJ).

637 *DPP v Boardman* [1975] AC 421, 456.

638 *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

639 (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ).

640 *Pfennig v The Queen* (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ). Throughout the various judgments in this and subsequent cases, the terms 'no reasonable view', 'no rational view' and 'no reasonable explanation' are used interchangeably.

Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. Here “rational” must be taken to mean “reasonable and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. [notes omitted]

5.7 In relation to similar fact evidence, their Honours noted that their approach to propensity evidence means that ‘striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics’.⁶⁴¹

5.8 The application of the test still requires the judge to assess the probative value of the propensity evidence. For similar fact evidence, the probative value of the evidence is less where the similar facts are disputed than where they are not disputed.⁶⁴² Further, the probative value of disputed similar fact evidence will be less where there is a possibility of concoction between the various witnesses. In *Hoch v The Queen*,⁶⁴³ the evidence of a number of sexual assault complainants was held not to satisfy the ‘no reasonable view’ test. The close relationship between the complainants and the opportunity to concoct their accounts meant that the similar fact evidence was ‘capable of reasonable explanation on the basis of concoction’.⁶⁴⁴

5.9 McHugh J, in a separate judgment in *Pfennig*, considered that the ‘no reasonable view’ or ‘no rational explanation’ test was not the appropriate test of admissibility for all evidence that discloses the criminal propensity of the accused. In his Honour’s view:⁶⁴⁵

the standard of proof required to admit evidence disclosing a person’s criminal or discreditable propensities varies according to the reasoning process to be employed, the nature of the evidence, and the degree of potential risk to a fair trial if the evidence is admitted.

5.10 McHugh J distinguished probability reasoning, which occurs in most similar fact evidence cases,⁶⁴⁶ from propensity reasoning. In his Honour’s view, the ‘no rational explanation’ test will be appropriate where the prosecution case

641 Ibid 484.

642 Ibid 482.

643 (1988) 165 CLR 292.

644 Ibid 297 (Mason CJ, Wilson and Gaudron JJ). This approach was not followed in the United Kingdom in *R v H* [1995] 2 AC 596. In Queensland, it has been expressly abrogated by s 132A of the *Evidence Act 1977* (Qld), which is discussed at para 5.21–5.27 of this Report.

645 *Pfennig v The Queen* (1995) 182 CLR 461, 517.

646 Ibid 520.

rests entirely on propensity reasoning, as ‘the danger is high that the tribunal [of fact] will convict simply because of the accused’s propensity’.⁶⁴⁷ However, the test will not be appropriate in relationship cases,⁶⁴⁸ where the evidence ‘may simply reinforce or explain other evidence that directly implicates the accused’ or in cases where the evidence is admissible for a reason other than propensity.⁶⁴⁹

5.11 In his Honour’s view, for similar fact cases, the risk of prejudice will vary according to whether the similar facts linking the accused are admitted or are in dispute. In the latter, only probability reasoning can occur as the propensity of the accused ‘will usually only be established by the verdict’.⁶⁵⁰ However, where the accused is clearly linked, by admission or by conviction, to a similar incident, there is a risk that the jury will rely simply on propensity reasoning rather than probability reasoning.⁶⁵¹ In conclusion, McHugh J did not agree with the joint judgment that the test of admissibility for all propensity evidence was the ‘no rational explanation test’, preferring an approach that would allow a lower standard of proof where the accused’s propensity is not the basis of any reasoning process.⁶⁵²

5.12 The extent to which the strict ‘no rational explanation’ test applies to relationship cases has not been clarified by the High Court.⁶⁵³ In *Gipp v The Queen*,⁶⁵⁴ the trial judge had admitted evidence of uncharged sexual abuse to show the nature of the relationship between the accused and the complainant, and the jury was directed as to its limited use. Different views were expressed by each of the members of the High Court, with a majority holding that the evidence was either inadmissible or that the directions to the jury were not adequate.⁶⁵⁵ In their joint dissenting judgment, McHugh and Hayne JJ held that the evidence was admissible as it was not being tendered as propensity

647 Ibid 530.

648 In the context of a prosecution of an offence of sexual assault, relationship evidence usually consists of evidence by the complainant of uncharged acts – that is, acts of a sexual nature between the complainant and the accused that are not the subject of any charge in the indictment. The basis for the admissibility of relationship evidence is said to be that it forms part of the essential background against which the complainant’s and the accused’s evidence falls to be determined.

649 *Pfennig v The Queen* (1995) 182 CLR 461, 530.

650 Ibid 530.

651 Ibid 531.

652 Ibid 531–2.

653 Smith TH and Holdenson OP, ‘Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part I’ (1999) 73 *Australian Law Journal* 432.

654 (1998) 194 CLR 106.

655 See analysis in Smith TH and Holdenson OP, ‘Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part I’ (1999) 73 *Australian Law Journal* 432, 440–1.

evidence, but as background evidence of the nature of the relationship between the parties.⁶⁵⁶

Without evidence of the background and the continuing nature of the conduct of the appellant, the evidence of the complainant may have seemed “unreal and unintelligible.”

Queensland – criminal cases

5.13 In Queensland, the common law applies, subject to certain statutory modifications.

5.14 In *R v O’Keefe*,⁶⁵⁷ the Queensland Court of Appeal sought to resolve a number of issues arising from *Pfennig*. In that case, the Crown sought to lead evidence, at the accused’s arson trial, of admitted similar facts. The Court of Appeal addressed its attention to the application of the *Pfennig* test and, in particular, to whether the whole evidence in the case was to be assessed in order to determine whether there was no rational explanation for the propensity evidence other than guilt or whether the propensity evidence was to be considered in isolation.⁶⁵⁸ Thomas JA concluded that, in applying the *Pfennig* test, the trial judge must address two questions:⁶⁵⁹

- (a) Is the propensity evidence of such calibre that there is no reasonable view of it other than supporting an inference that the accused is guilty of the offence charged? ...
- (b) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses?

5.15 Pincus JA agreed with this approach. His Honour further agreed that the test is to be applied on the assumption that the propensity evidence proffered is ‘accurate and truthful’.⁶⁶⁰ Davies JA also agreed regarding the questions to be addressed, but commented that the second question added little to the first except ‘a measure of additional care because of the risk of prejudice which the admission of propensity evidence entails’.⁶⁶¹

⁶⁵⁶ *Gipp v The Queen* (1998) 194 CLR 106, 130, cited with approval in *R v LSS* [2000] 1 Qd R 546, 556 (Thomas J) and *R v The Queen* [2003] QCA 285, [44] (Jerrard J).

⁶⁵⁷ [2000] 1 Qd R 564.

⁶⁵⁸ *Ibid* 573 (Thomas JA).

⁶⁵⁹ *Ibid*.

⁶⁶⁰ *Ibid* 565.

⁶⁶¹ *Ibid* 566.

5.16 The approach suggested in *O'Keefe* has been accepted and applied in numerous cases in Queensland.⁶⁶²

5.17 In cases where there are more than one complainant, it has been held that there should be no joinder of the charges unless the evidence of one complainant is admissible in the case involving the other complainant.⁶⁶³

5.18 For relationship evidence and, in particular, evidence of uncharged acts, Queensland has developed its own line of authority in the absence of a clear statement from the High Court.⁶⁶⁴ In *R v K*,⁶⁶⁵ Pincus JA stated that it appeared to him 'that the High Court's decision in *Gipp* does not alter what was understood to be the law, that evidence of uncharged instances of sexual abuse may be let in as showing evidence of a sexual passion or relationship'.⁶⁶⁶

5.19 This was confirmed in *R v LSS*,⁶⁶⁷ where it was held that uncharged sexual misconduct by the accused towards the complainant was admissible to show the existence of a sexual passion or relationship. Thomas JA noted that 'unparticularised evidence of continuity of a relationship ... lacks the genuine danger of specific propensity evidence'.⁶⁶⁸ Warnings as to the use of such evidence were absolutely essential where 'genuine damaging propensity evidence creeps in under another flag'.⁶⁶⁹ Pincus JA added that 'juries should ordinarily be told, by way of direction, ... that its relevance is to show the existence of a sexual passion or relationship'.⁶⁷⁰

5.20 In *R v A*,⁶⁷¹ Atkinson J discussed the relevance and admissibility of uncharged acts as follows:⁶⁷²

662 For example *R v McGrane* [2002] QCA 173; *R v Fraser* [2004] QCA 92; *R v Huebner*; *R v Maher* [2004] QCA 98; *R v BAR* [2005] QCA 80.

See *Queensland Supreme and District Courts Benchbook* (Feb 2004), No 50, Similar Fact Evidence <<http://www.courts.qld.gov.au/practice/Benchbook%20pdf/52Similar%20Fact%20Evidence%20No%2052.pdf>> (accessed 8 September 2005) for appropriate judicial directions.

663 *Hoch v The Queen* (1988) 165 CLR 292; *R v S* [2001] QCA 501.

664 Smith TH and Holdenson OP, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part I' (1999) 73 *Australian Law Journal* 432, 441. For an earlier history see Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, (R 55 Part 2, 2000) 334–7.

665 [1998] QCA 161.

666 Ibid.

667 [2000] 1 Qd R 546.

668 Ibid 556.

669 Ibid.

670 Ibid 547.

671 [2000] QCA 520.

672 Ibid [128].

Whether the evidence is relevant and admissible for more than one reason depends on the facts of each case and on the counts on the indictment. While the evidence is admissible to show whether or not there was a sexual relationship between the appellant and the complainant, the use to which that evidence could be put depends on the circumstances of the case and the different counts to which it is relevant. Evidence of uncharged acts is admitted if it tends to prove the specific crimes charged and not just a propensity to commit crimes of this nature.

5.21 In Queensland, the admissibility of propensity and similar fact evidence is also governed by statute. Sections 132A and 132B of the *Evidence Act 1977* (Qld) were inserted by the *Criminal Law Amendment Act 1997* (Qld).

5.22 Section 132A provides as follows:

132A Admissibility of similar fact evidence

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

5.23 The effect of section 132A is to override the effect of the decision in *Hoch v The Queen*.⁶⁷³ In that case, it was held that the possibility of concoction between the complainants made similar fact evidence inadmissible, as it provided a rational view of the evidence that was consistent with the innocence of the accused.⁶⁷⁴

5.24 Section 132A is consistent with the approach taken by the House of Lords in *R v H*,⁶⁷⁵ where it was held that it was the function of the jury to determine whether a witness could be believed, and that collusion was not relevant for the judge in determining the admissibility of similar fact evidence.⁶⁷⁶ The view that a judge must rule upon the admissibility of propensity evidence upon the assumption that the prosecution evidence will be accepted by the jury as truthful and accurate is also supported by both Pincus JA and Thomas JA in *R v O'Keefe*.⁶⁷⁷

5.25 It is noted that section 132A refers to the test of admissibility that was generally applied prior to *Pfennig* – that is, that the probative value of the evidence must outweigh its potentially prejudicial effect. Although collusion becomes a question for the jury, it is clear that the court will still need to

673 (1988) 165 CLR 292.

674 Ibid 296 (Mason CJ, Wilson and Gaudron JJ).

675 [1995] 2 AC 596.

676 Ibid 614 (Lord Griffiths).

677 [2000] 1 Qd R 564, 565 (Pincus JA), 573 (Thomas JA).

otherwise assess the probative value of the evidence. In *R v BAR*,⁶⁷⁸ Mackenzie J noted:⁶⁷⁹

However, the qualification that the prohibition only applies to similar fact evidence the probative value of which outweighs its prejudicial effect, means that a judgment as to the balance between probative value and prejudicial effect must still be made.

5.26 Although section 132A prevents evidence from being rendered inadmissible by reason of the possibility of collusion, ‘the judge must clearly draw the importance of collusion to the attention of the jury and leave it to them to decide whether ... they are satisfied that the evidence can be relied upon as free from collusion ...’⁶⁸⁰

5.27 The QLRC examined this provision in its Report on the evidence of children.⁶⁸¹ The QLRC also considered whether the common law test for the admissibility of propensity evidence should be modified in cases concerning sexual or other offences against children. It concluded that there was no proper basis for distinguishing between the test for the admissibility of propensity evidence that should apply where the alleged victim is a child and that which should apply where the alleged victim is an adult.⁶⁸² As the QLRC’s review was confined to the evidence of children, and was not a general review of the law in relation to the admissibility of propensity evidence, it did not consider it appropriate to recommend any modifications to section 132A of the *Evidence Act 1977* (Qld).⁶⁸³

5.28 Prior to *Pfennig*, evidence relating to the domestic relationship between the parties was admissible as circumstantial evidence.⁶⁸⁴ However, this relationship evidence may reveal misconduct on the part of the accused and hence propensity. As discussed above, the majority judgment in *Pfennig* appeared to propose a test to cover all situations where propensity evidence is sought to be admitted. McHugh J disagreed on this point stating that, in relationship cases, ‘it would be contrary to both the practice of the criminal courts and the interests of justice to use the no rational explanation test as the condition of admissibility of such evidence’.⁶⁸⁵

678 [2005] QCA 80.

679 Ibid [33].

680 *R v H* [1995] 2 AC 596, 612 (Lord Mackay).

681 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) 333, 368–71.

682 Ibid 374.

683 Ibid 375.

684 *Wilson v The Queen* (1970) 123 CLR 334.

685 (1995) 182 CLR 461, 530.

5.29 In Queensland, section 132B of the *Evidence Act 1977* (Qld) provides:

132B Evidence of domestic violence

- (1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
- (2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding. [note added]

5.30 The effect of section 132B would appear to return relationship evidence relating to domestic situations to its previous status.⁶⁸⁶ In Forbes's view:⁶⁸⁷

It is doubtful whether s 132B adds anything to the common law, which recognises that evidence of a relevant and specific "relationship" between an alleged offender and a complainant is not caught by the rule against "character" or propensity evidence'.

5.31 Where evidence is admitted 'for a reason other than reliance on propensity'.⁶⁸⁸

the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose. In some cases, the judge may need to be more specific. He or she may need to direct the jurors that they cannot use the evidence for an identified purpose.

Common law – civil cases

5.32 The admissibility of propensity and similar fact evidence may also arise in civil cases in various ways. For example, evidence that a respondent has made similar statements to other persons has been admitted to prove misrepresentations in contravention of Part 5 of the *Trade Practices Act 1974* (Cth).⁶⁸⁹

5.33 In earlier civil cases, propensity evidence was sometimes dealt with as circumstantial evidence of habit. In *Eichstead v Lahrs*,⁶⁹⁰ evidence that the plaintiff habitually wheeled his bicycle when crossing a particular intersection was admitted as circumstantial evidence that he so conducted himself on the occasion when he was struck by a motor vehicle.

686 Harris W, 'Evidence in Queensland—Recent Legislative Changes' (1998) 18 *Queensland Lawyer* 196, 198.

687 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [132B.2].

688 *BRS v The Queen* (1997) 191 CLR 275, 305 (McHugh J). See also at 294–5 (Toohey J), 301–3 (Gaudron J), 326–7 (Kirby J).

689 *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1982) 36 ALR 23; *Gates v The City Mutual Life Assurances Society Ltd* (1982) ATPR ¶40–311.

690 [1960] Qd R 487.

5.34 In *Taylor v Harvey*,⁶⁹¹ Carter J dealt with the evidence of prior driving conduct as evidence of similar fact, holding that to be admissible the evidence must be logically probative of the manner of driving on the day in question. His Honour was of the view that the criminal test (which at that time was based on the balancing of probative value and prejudicial effect) was applicable and he stated that even if he had concluded that the evidence was logically probative, he would have exercised his discretion to exclude the evidence because its prejudicial effect far outweighed its cogency.⁶⁹²

5.35 The appropriate test of admissibility for civil cases was discussed in *Sheldon v Sun Alliance Australia Ltd*.⁶⁹³ In that case, the defendant insurer was defending a claim on a fire policy on the basis of alleged arson by the owner. The insurer sought to lead evidence of earlier fires in various premises owned or occupied by the plaintiff's husband and family that had also been the subject of insurance claims. The South Australian Court of Appeal rejected the application of the criminal test for civil proceedings.⁶⁹⁴

It is circumstantial evidence. It should be admitted where it is logically probative of a fact in issue. The safeguards required in criminal proceedings are not required in civil proceedings.

5.36 Judicial statements support the view that the discretion to exclude evidence on the basis that its probative value is outweighed by its prejudicial effect, does not operate in civil trials.⁶⁹⁵ In relation to similar fact evidence in civil trials, Heydon in *Cross on Evidence* concludes that:⁶⁹⁶

The main trends in the modern cases support the view that the criminal tests do not apply; that the essential criterion for admissibility is relevance; that there is no discretion to exclude evidence on the ground that its prejudicial effect exceeds its probative value; but that there is a discretion to exclude evidence which is only remotely relevant or has small probative value compared to the additional issues which it would raise and the additional time required for their investigation, or which might tend to confuse the jury as to the real issues.

691 [1986] 2 Qd R 137.

692 Ibid 141, 142. The conclusion that the fairness discretion exists in civil trials was criticised in Forbes JRS, 'Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases' (1988) 62 *Australian Law Journal* 211. This case was not followed by McGill DCJ in *Morris v Warrian & Suncorp Metway Insurance Ltd* [2003] QDC 009.

693 (1988) 50 SASR 236.

694 *Sheldon v Sun Alliance Australia Ltd* (1989) 53 SASR 97, 145 (Bollen J). Prior J agreed on this point (at 155) and cited with approval by the Federal Court of Australia in *Jaldiver Pty Ltd v Nelumbo Pty Ltd* (1993) ATPR (Digest) ¶¶46–097, 53,400 (Heerey J).

695 *Manenti v Melbourne and Metropolitan Tramways Board* [1954] VLR 115, 118 (Sholl J).

696 Heydon JD, *Cross on Evidence* (7th ed, 2004) [21285].

Uniform Evidence Acts

5.37 Chapter 3, Part 3.6 of the uniform Evidence Acts (Tendency and coincidence) creates a regime for the admissibility of propensity evidence to prove a fact in issue. Section 94(1) provides that Part 3.6 does not apply to evidence that relates only to the credibility of a witness.⁶⁹⁷ Further, where a person's character, reputation, conduct or tendency is a fact in issue, the tests of admissibility established in Part 3.6 do not apply.⁶⁹⁸

5.38 It should be noted at the outset of this discussion that the ALRC in its original reports proposed different provisions from those contained in Part 3.6 of the uniform Evidence Acts. The ALRC's original reports⁶⁹⁹ also pre-date the High Court decisions in *Hoch v The Queen*⁷⁰⁰ and *Pfennig v The Queen*.⁷⁰¹ In its Issues Paper, the ALRC expressed the need for caution in relying on its earlier reports to explain the operation of the tendency and coincidence rules.⁷⁰²

5.39 Part 3.6 of the uniform Evidence Acts establishes three key tests of admissibility:

- the tendency rule (section 97);
- the coincidence rule (section 98); and
- tendency evidence and coincidence evidence adduced by the prosecution (section 101).

5.40 Sections 97, 98 and 101 provide.⁷⁰³

97 The tendency rule

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

⁶⁹⁷ The admissibility of evidence that relates to the credibility of a witness is dealt with in Chapter 3, Part 3.7 of the uniform Evidence Acts.

⁶⁹⁸ Uniform Evidence Acts s 94(3).

⁶⁹⁹ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987).

⁷⁰⁰ (1988) 165 CLR 292.

⁷⁰¹ (1995) 182 CLR 461.

⁷⁰² Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 8.5.

⁷⁰³ The other sections in Chapter 3, Part 3.6 of the uniform Evidence Acts deal with notice requirements (s 99) and the circumstances in which the court may dispense with the notice requirements (s 100).

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
 - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) Paragraph (1)(a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

- (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
 - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
- (a) they are substantially and relevantly similar; and
 - (b) the circumstances in which they occurred are substantially similar.
- (3) Paragraph (1)(a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

5.41 The tendency rule and the coincidence rule apply to both civil and criminal proceedings and to evidence led by both the prosecution and the defence. In common law terms, propensity evidence will be covered by the tendency rule; similar fact evidence, in its accurate sense, will be covered by the coincidence rule.⁷⁰⁴ Both rules could potentially apply where undisputed similar fact evidence establishes a tendency that the person ‘has or had’.⁷⁰⁵ Section 101 adds the further requirement for criminal cases that the prosecution cannot adduce tendency or coincidence evidence about a defendant ‘unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant’.

5.42 The terms ‘coincidence evidence’ and ‘tendency evidence’ are defined in Part 1 of the Dictionary to the uniform Evidence Acts by reference back to sections 97 and 98 respectively.⁷⁰⁶ In both cases, the evidence must be both of the nature specified and tendered for the purpose specified in the respective sections.

5.43 Tendency evidence is evidence of the ‘character, reputation or conduct of a person or a tendency that a person has or had’ that is tendered for the purpose of proving that a person ‘has or had a tendency ... to act in a particular way, or to have a particular state of mind’.⁷⁰⁷

⁷⁰⁴ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.1.

⁷⁰⁵ See analysis of *R v Straffen* [1952] 2 QB 911 in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.2–10.4.

⁷⁰⁶ Part 1 of the Dictionary to the uniform Evidence Acts includes the following definitions:

coincidence evidence means evidence of a kind referred to in subsection 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency evidence means evidence of a kind referred to in subsection 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

⁷⁰⁷ Uniform Evidence Acts s 97(1).

5.44 Coincidence evidence is evidence of the occurrence of ‘2 or more related events’ that is tendered for the purpose of proving that ‘because of the improbability of events occurring coincidentally, a person did a particular act or had a particular state of mind’.⁷⁰⁸

5.45 Sections 97 and 98 make tendency evidence and coincidence evidence inadmissible unless notice requirements⁷⁰⁹ are met and the evidence, either by itself or with the other evidence, has significant probative value.⁷¹⁰

5.46 The ‘probative value of evidence’ is defined as ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’.⁷¹¹ It has been held that the expression ‘significant probative value’, which is used in both sections 97 and 98 but is not defined in the legislation, means ‘something more than mere relevance but something less than a “substantial” degree of relevance’,⁷¹² and that the ‘use of the word “significant” in the sections mandates that the evidence must be of importance or of consequence’.⁷¹³

5.47 The cases indicate that a number of factors will be considered in assessing the probative value of the evidence, including:

- the cogency of the evidence relating to the conduct of the relevant person;
- the strength of the inference that can be drawn from that evidence as to the tendency of the person to act or think in a particular way; and
- the extent to which that tendency increases the likelihood that a fact in issue did or did not occur.⁷¹⁴

708 Uniform Evidence Acts s 98(1).

709 Uniform Evidence Acts ss 97(1)(a), 98(1)(a). Section 100 of the uniform Evidence Acts enables the court to dispense with the notice requirements.

710 Uniform Evidence Acts ss 97(1)(b), 98(1)(b).

711 Uniform Evidence Acts s 3(1), Dictionary, Part 1.

712 *R v Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ at CL); *R v Lock* (1997) 91 A Crim R 356, 361 (Hunt CJ at CL). As Hunt CJ at CL observed (at 459) in *R v Lockyer*:

If the Crown has to establish that the probative effect of the evidence “substantially” outweighs the prejudicial effect which it may have on the accused person, it could hardly be supposed that the accused – who has no equivalent obligation – has nevertheless to establish that the evidence has a substantial probative value. [note omitted]

713 *R v Martin* [2000] NSWCCA 332, [67] (Ireland AJ). See also *R v Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ at CL).

714 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; See also Downes K, ‘Similar Fact evidence: A Pitted Battlefield’ (2004) 78 *Australian Law Journal* 279–88.

5.48 The combined effect of sections 97, 98 and 101 is that, where the prosecution seeks to adduce evidence to prove:

- in the case of tendency evidence, that a person has or had a tendency to act in a particular way or to have a particular state of mind;⁷¹⁵ or
- in the case of coincidence evidence, that, because of the improbability of two or more related events occurring coincidentally, a person did a particular act or had a particular state of mind;⁷¹⁶

the tendency evidence or the coincidence evidence will be admissible for that purpose only if:

- the evidence has significant probative value (either by itself or having regard to other evidence adduced or to be adduced by the prosecution);⁷¹⁷ and
- the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.⁷¹⁸

5.49 However, where the evidence is tendered for a different purpose, its admissibility is not governed by these provisions. The evidence will be admissible, if relevant, subject to the court's power to exclude the evidence under one or more of the various exclusionary discretions contained in the Act.⁷¹⁹ Section 95 provides that evidence that is not admissible under Part 3.6 to prove a particular matter, or that under that Part cannot be used against a party to prove a particular matter, must not be used to prove that matter or used against the party even if it is relevant for another purpose. A jury would usually be given careful directions as to the use of the evidence.⁷²⁰

715 Uniform Evidence Acts s 97(1).

716 Uniform Evidence Acts s 98(1).

717 Uniform Evidence Acts ss 97(1)(b), 98(1)(b).

718 Uniform Evidence Acts s 101(2).

719 *Conway v The Queen* (2000) 98 FCR 204, 234 (Miles, von Doussa and Weinberg JJ). For example, ss 135 and 137 of the uniform Evidence Acts provide:

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

720 *R v AH* (1997) 42 NSWLR 702, 708 (Ireland J, with whom Hunt CJ at CL and Levine J agreed). See also the cases cited in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.6760] note 514.

5.50 As noted previously, section 101 of the uniform Evidence Acts restricts the use to which tendency and coincidence evidence can be put. Where tendency or coincidence evidence about a defendant is adduced by the prosecution in a criminal case, the evidence cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. The test incorporated in this restriction is different from the ‘no rational view’ test that applies at common law.⁷²¹

5.51 The ALRC’s original Reports and its proposals were made before the key High Court cases in this area. It is interesting to note that the ALRC rejected the ‘no rational view’ test, referring to it as the ‘extreme’ position.⁷²² The ALRC originally recommended a test based on ‘substantial probative value’, with specified factors to be taken into account in determining the probative value of the evidence.⁷²³

5.52 Under section 101 of the uniform Evidence Acts, the probative value of the evidence must substantially outweigh any prejudicial effect that the evidence may have on the defendant. This test had been articulated by a number of High Court judges prior to the ALRC Reports on evidence,⁷²⁴ and reflects case law developments⁷²⁵ prior to the commencement of the uniform Evidence Acts in 1995.⁷²⁶ The extent to which later common law developments should be incorporated into the application of this test under the uniform Evidence Acts has arisen in a number of cases⁷²⁷ and is discussed further at paragraphs 5.102 to 5.120 of this Report.

Relationship evidence

5.53 The uniform Evidence Acts provisions do not refer to ‘relationship evidence’ as such. Nevertheless, the courts have addressed the question of the admissibility under the uniform Evidence Acts of evidence that is adduced to explain the nature of the relationship between a complainant and an accused person, as distinct from evidence that is adduced to prove the commission of the offence charged.

⁷²¹ See para 5.6–5.7 of this Report.

⁷²² Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 165 referring to the judgment of Dawson J in *Sutton v The Queen* (1984) 58 ALJR 60, 75.

⁷²³ Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) Appendix A, Draft Evidence Bill 1987 cl 89.

⁷²⁴ *Perry v The Queen* (1982) 150 CLR 580, 604 (Wilson J), 609 (Brennan J); *Sutton v The Queen* (1984) 152 CLR 528, 547–9 (Brennan J), 560 (Deane J).

⁷²⁵ *Harriman v The Queen* (1989) 167 CLR 590, 593–4 (Brennan J), 598 (Dawson J), 610 (Toohey J), 632 (McHugh J).

⁷²⁶ The Commonwealth Act commenced 18 April 1995 and the New South Wales Act commenced 1 September 1995.

⁷²⁷ See Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.7340].

5.54 In *R v AH*,⁷²⁸ the New South Wales Court of Criminal Appeal explained how 'evidence of conduct with a sexual connotation between the complainant and the accused other than that which is the subject of the offence or offences charged is relevant in two different ways':⁷²⁹

- (a) the relationship revealed may place the evidence of the events which give rise to a particular charge into their true context as part of the essential background against which the evidence of the complainant and of the accused necessarily fall to be evaluated ... ; and
- (b) the guilty passion of the accused revealed – or, in less inflammatory terms, the sexual desire or feeling of the accused for the complainant – is directly relevant to proving that the offence charged was committed ...

5.55 In that case, the Court held that, where the Crown introduces evidence for the former purpose, it is not tendency evidence, and the requirements of sections 97 and 101 are irrelevant.⁷³⁰

5.56 The Full Court of the Federal Court has also held that the admissibility of relationship evidence does not fall within the ambit of section 97 or 98 of the uniform Evidence Acts.⁷³¹ The Court held that the admissibility of such evidence is governed 'by the relevance of that evidence, subject to the exercise by the trial judge of his discretion to exclude it under one or more of the various exclusionary discretions contained in Pt 3.11 of the Act'.⁷³²

5.57 On this basis, in *R v Lock*,⁷³³ where the accused was charged with the murder of her former de facto partner by stabbing and pleaded self-defence, the Court admitted, as relationship evidence, evidence of three previous occasions on which the accused had inflicted injuries on the deceased by stabbing him, notwithstanding that the evidence had been held to be inadmissible as tendency evidence:⁷³⁴

It was ... my view that there was a substantial danger in this case that the exclusion of this evidence would require the jury to decide very important issues in the case as if the stabbing had happened in a quite different context to that which (according to the Crown's evidence) was the truth. It was always open to

728 (1997) 42 NSWLR 702.

729 Ibid 708 (Ireland J, with whom Hunt CJ at CL and Levine J agreed).

730 Ibid. On the other hand, Ireland J (at 709) held that, where 'the Crown does wish to use the evidence of guilty passion as tending to show that the accused did do the act in question (and thus that the complainant's evidence that the accused did the act in question is more credible), it is tendency evidence and so must comply with s 97 and s 101 before it may be used for that purpose'.

731 *Conway v The Queen* (2000) 98 FCR 204, 234 (Miles, von Doussa and Weinberg JJ).

732 Ibid. The Court referred (at 234) to the requirement under s 137 of the Act that, in a criminal proceeding, a trial judge must 'refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant'. Section 137 is set out at note 719 of this Report.

733 (1997) 91 A Crim R 356.

734 Ibid 364, 365.

the accused to explain the circumstances in which these stabbings took place. The position so far as relationship evidence of this type is concerned is quite different to that which concerns tendency or coincidence evidence and the requirements of s 101.

...

... this evidence was ... relevant to rebut self-defence, which was opened to the jury by counsel for the accused as *the* significant issue in the case, one which in turn depended strongly upon the general relationship between the accused and the deceased. The *true* nature of that relationship was therefore of great importance in the case, and the probative value of this evidence upon the accused's state of mind as to the necessity to do this act in self-defence was correspondingly high. [notes omitted; original emphasis]

5.58 In *R v Chan*,⁷³⁵ it was held that evidence of previous dealings involving heroin was admissible as showing the relationship between the accused and his errand 'boy' and, although revealing criminal acts, was relevant otherwise than to prove that the appellant had a tendency to act in a particular way.⁷³⁶

5.59 What remains unclear is whether the tendency rule applies on the basis of the stated purpose of admission of the evidence or on the basis of what the evidence reveals regardless of its stated purpose or its primary relevance. Some relationship cases have focused on the purpose of tender, rather than relevance as the determining factor. In *W v The Queen*,⁷³⁷ the Full Court of the Federal Court considered whether the evidence of each complainant was admissible in relation to charges concerning each other complainant, that is, whether the evidence was 'cross-admissible'. Miles J held that evidence that 'shows tendency but which is not tendered for that purpose' will fall outside the tendency rule.⁷³⁸ His Honour concluded that the evidence was not tendency evidence as it was not tendered for that purpose.⁷³⁹ By contrast, Whitlam J focused on its relevance.⁷⁴⁰

An allegation that at some point A behaved indecently to X is, at least in circumstances such as the present, only relevant to a charge that A also behaved indecently to Y if the prosecution asserts that the evidence about X shows a tendency for A to behave indecently ...

735 (2002) 131 A Crim R 66.

736 Ibid [47] (Hodgson J).

737 [2001] FCA 1648.

738 Ibid [49].

739 Ibid [56].

740 Ibid [98].

ISSUES FOR CONSIDERATION

5.60 In Chapter 8 of the Issues Paper, the ALRC raised a number of questions about the admissibility of tendency and coincidence evidence under the uniform Evidence Acts. These questions concerned:

- the operation of the tendency rule under section 97;
- the operation of the coincidence rule under section 98;
- the suitability of notice requirements under section 99;
- the operation of section 101 for evidence adduced by the prosecution; and
- the replacement of the test in section 101 with a ‘no rational explanation’ test or an ‘interest of justice’ test.

TENDENCY EVIDENCE

5.61 In its Issues Paper, the ALRC asked the following questions:⁷⁴¹

Is this definition of ‘tendency evidence’ in the uniform Evidence Acts satisfactory and if not, how should it be defined?

Are there any concerns raised by the operation of section 97 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

5.62 The tendency rule is set out in section 97 of the uniform Evidence Acts.⁷⁴² Section 97 provides that evidence of the character, reputation or conduct of a person or a tendency that a person has or had is not admissible to prove that the person has or had a tendency to act in a particular way, or to have a particular state of mind, unless two conditions are satisfied. First, the party adducing the evidence must give reasonable notice in writing to the other party and, secondly, the evidence, either by itself or with other evidence adduced by or to be adduced by the party, must have significant probative value.

5.63 Odgers comments that the tendency rule is a ‘purpose rule’ – that is, it will apply only where evidence is adduced for the specific purpose of proving the existence of some tendency to act or think in a particular way.⁷⁴³ This is contrary to the construction placed on these provisions by the ALRC that the rules apply ‘to control the admissibility, and so the use of such evidence,

⁷⁴¹ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 8–1 and 8–2, post para 8.13.

⁷⁴² Section 97 of the uniform Evidence Acts is set out at para 5.40 of this Report.

⁷⁴³ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.6660].

according to what it discloses, and are not confined to the purpose for which the evidence is ostensibly tendered'.⁷⁴⁴

5.64 The requirements of section 97 are different from those recommended by the ALRC in its original evidence inquiry. The ALRC originally proposed that evidence of a person's past conduct or state of mind should be admitted to establish a tendency to act or think in a particular way only if it could be shown that the circumstances of the previous occasions were 'substantially and relevantly similar'.⁷⁴⁵ Instead, section 97 requires only significant probative value and reasonable notice as preconditions to 'tendency reasoning'.

5.65 The Discussion Paper noted that there have been different views as to whether certain evidence is tendency evidence.⁷⁴⁶ The ALRC referred, in particular, to the decision in *R v Cakovski*.⁷⁴⁷ In that case, the accused sought to lead evidence that he had acted in self-defence when he was threatened by the murder victim. He sought to lead evidence that he had a genuine fear of his life as the victim had previously murdered three people, had threatened another person on the night in question with a knife, and had made references to the previous murders. In the New South Wales Court of Criminal Appeal, Hodgson and Hulme JJA concluded that the evidence was not tendency evidence under section 97. In the view of Hodgson JA:⁷⁴⁸

the main relevance of the evidence is not to prove that the deceased had "a tendency ... to act in a particular way", but rather to suggest that the deceased was a person who was not subject to very strong inhibitions against killing and contemplation of killing in the same way as are the great majority of people. This is not to say that the deceased had a tendency to kill, but rather that there is less improbability in the deceased killing or making a serious threat to kill another person, than there would be for the great majority of people. On the question whether there is a reasonable possibility that the deceased made serious threats to kill the appellant in this case, in my opinion the probative value of the evidence is not substantially outweighed by its prejudicial effect, and s 135 would not justify its rejection.

5.66 In contrast, Hidden J concluded that the evidence was necessarily tendency evidence as it 'demonstrated a propensity on the part of the deceased to retaliate in an extremely violent way against anyone who crossed him'.⁷⁴⁹

744 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.66.

745 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) Appendix A, Draft Evidence Bill 1987 cl 87(b). See the discussion in Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.6660].

746 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.9.

747 (2004) 149 A Crim R 21.

748 Ibid [37].

749 Ibid [70].

The evidence however was admissible tendency evidence because it had significant probative value.⁷⁵⁰

5.67 In its Discussion Paper, the ALRC commented that:⁷⁵¹

The judgments demonstrate that views can differ as to the reasoning processes involved in determining the relevance and probative value of evidence and the characterisation of those reasoning processes.

5.68 As noted above, evidence relating to relationship evidence may give rise to the same variance of views.⁷⁵²

Notice requirements

5.69 Section 97(1)(a) of the uniform Evidence Acts requires that reasonable notice must be given in writing of a party's intention to adduce tendency evidence.⁷⁵³ If notice is not given, the tendency evidence will be inadmissible unless the court has dispensed with the notice requirements under section 100 of the uniform Evidence Acts.⁷⁵⁴

5.70 The requirements of a notice given under section 97(1)(a) are prescribed in regulations under the uniform Evidence Acts.⁷⁵⁵ A notice must state 'either in its own body or by reference to documents readily identifiable, the nature and substance of the evidence sought to be tendered'.⁷⁵⁶ In its Discussion Paper, the ALRC noted the concerns of the Director of the Public Prosecutions (NSW) that the notice requirements in relation to tendency evidence are too onerous.⁷⁵⁷

5.71 The Director of Public Prosecutions (NSW) submitted that:⁷⁵⁸

the notice provisions are interpreted such that where the Crown wishes to rely on tendency evidence in an alleged sexual assault prosecution involving a number of complainants, the Crown must nominate in the notice each paragraph of each complainant's statement which refers to the alleged offences

750 Ibid [71].

751 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.14.

752 See para 5.59 of this Report.

753 Section 98(1)(a) of the uniform Evidence Acts has the same notice requirements for coincidence evidence.

754 Further, in certain circumstances, the court may also waive the rules of evidence under s 190 of the uniform Evidence Acts.

755 *Evidence Regulations* (Cth) reg 6; *Evidence Regulation 2005* (NSW) reg 5; *Evidence Regulations 2002* (Tas) reg 5.

756 *R v AB* [2001] NSWCCA 496, [15] (Adams J).

757 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.16.

758 Ibid para 10.17, citing Director of Public Prosecutions (NSW) *Submission E17*.

against the other complainants. In our view notice by the Crown that it intends to rely upon the alleged offences committed against complainant A, B and C as set out in their statements dated x, y and z, respectively, should constitute adequate notice.

The ALRC's view

5.72 The ALRC noted that all members of the New South Wales Court of Criminal Appeal in *R v Cakovski* had agreed that the evidence should have been admitted. In its view, the scheme of the uniform Evidence Acts provides for the control of evidence that is not characterised as tendency evidence through discretionary exclusion under section 135.⁷⁵⁹

5.73 The ALRC did not propose any change to the definition of tendency evidence in section 97.⁷⁶⁰

5.74 The ALRC also considered that no change was required to the notice provisions under section 97 of the uniform Evidence Acts or the Regulations. In its view, the precise identification of the tendency evidence and its relevance was of advantage to all parties and to the trial system. These advantages outweighed the burden placed on the prosecution in complying with the notice requirements.⁷⁶¹

The QLRC's view

5.75 In Queensland, the admissibility of propensity evidence is governed by the common law, as modified by statute. In criminal cases, the admissibility of propensity evidence is governed by the 'no rational view' test. In civil cases, the evidence will be admissible if it is 'logically probative' of the fact to be proved.

5.76 Queensland has developed its own line of authority for relationship cases, which does not require the application of the 'no rational view' test.⁷⁶² For domestic relationships, section 132B preserves the common law position pre-*Pfennig*.⁷⁶³

5.77 In relation to the uniform Evidence Acts' provisions, there seems to be some confusion as to the application of the rule generally and, in particular, to relationship evidence. Of concern is whether the determining feature for the application of the relevant test is the purpose of tender or what the evidence discloses.

759 Ibid para 10.15.

760 Ibid.

761 Ibid para 10.18–10.19.

762 See para 5.18–5.20 of this Report.

763 See para 5.29–5.30 of this Report.

5.78 The prosecution in Queensland is under no specific duty to provide notice in relation to its intention to adduce propensity evidence, although such evidence is likely to be revealed in its general duty of pre-trial disclosure.⁷⁶⁴

5-1 The QLRC notes that, in Queensland:

- (a) the admissibility of propensity evidence is governed by the common law, as modified by statute;**
- (b) in criminal cases, the admissibility of propensity evidence is governed by the ‘no rational view’ test; and**
- (c) in civil cases the evidence will be admissible if it is ‘logically probative’ of the fact to be proved.**

5-2 The QLRC is of the view that:

- (a) adding specific notice requirements would be an extra burden on the prosecution;**
- (b) the approach to propensity evidence under the uniform Evidence Acts is different from that applying in Queensland in criminal cases;**
- (c) the operation of the tendency rule should be clarified, particularly in relation to background or relationship evidence; and**
- (d) the issue of the test for propensity evidence and, in particular, its application to relationship evidence would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

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Criminal Code (Qld) ss 590AA–AX.

COINCIDENCE EVIDENCE

5.79 In its Issues Paper, the ALRC asked the following question about section 98 of the uniform Evidence Acts:⁷⁶⁵

What, if any, concerns are raised by the operation of s 98 of the uniform Evidence Acts? Should any concerns be addressed by amendment to the uniform Evidence Acts and, if so, how?

5.80 Section 98 of the uniform Evidence Acts applies where it is sought to prove that, because of the improbability of two or more related events occurring coincidentally, a person did a particular act or had a particular state of mind.⁷⁶⁶ Section 98(2) provides that two or more events are taken to be related ‘if, and only if’:

- (a) they are substantially and relevantly similar; and
- (b) the circumstances in which they occurred are substantially similar.

5.81 The same pre-conditions of admissibility as set out in section 97 apply, namely, that reasonable notice in writing must be given and the coincidence evidence must have, either by itself or with other evidence adduced by or to be adduced by the party, significant probative value.⁷⁶⁷

5.82 It has been observed that section 98 differs from the ALRC’s original recommendation,⁷⁶⁸ which was to the effect that:⁷⁶⁹

where a reasoning process involves reliance on the improbability of events occurring coincidentally, it should only be permitted where it is “reasonably open to find” that “all the events, and the circumstances in which they occurred, are substantially and relevantly similar”.

5.83 Whereas the ALRC’s original recommendation sought to limit, by reference to the similarity between the events, the circumstances in which it was proper to engage in probability reasoning, section 98 limits the

⁷⁶⁵ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 8–3, post para 8.24.

⁷⁶⁶ Section 98 of the uniform Evidence Acts is set out at para 5.40 of this Report.

⁷⁶⁷ Uniform Evidence Acts s 98(1)(a), (b).

⁷⁶⁸ Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) Appendix A, Draft Evidence Bill 1987 cl 88.

⁷⁶⁹ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.6880].

circumstances in which the provision applies. It has been suggested that this produces a result not intended by the drafters of the provision.⁷⁷⁰

The apparent result of this approach is that s 98 does not apply to evidence of unrelated events, that is, evidence of events which are not substantially and relevantly similar or where the circumstances are not substantially similar. This would mean that evidence of such events, even when adduced to prove that a person did a particular act or had a particular state of mind via improbability reasoning, need not comply with the requirements of s 98. Presumably, if the evidence meets the test of relevance it may be admissible, subject to discretionary exclusion. This cannot have been the intention of the drafters of the provision. Rather, it is likely that what was intended was that evidence of events would not be treated as satisfying the requirements of the section unless it met the conditions of similarity referred to in s 98(2). [note omitted]

5.84 This unintended effect was addressed by the ALRC in its Discussion Paper. The ALRC concluded that '[p]aradoxically, therefore, there will be a high test of admissibility for "related events" (which by definition will be satisfied) but not for unrelated events'.⁷⁷¹ Other issues in relation to the drafting of section 98 were also raised in the Discussion Paper.

5.85 The ALRC noted suggestions that section 98 was ambiguous as to the issue of whether the events referred to by the expression 'two or more' events include the event in question in the proceedings.⁷⁷² The ALRC noted that it was the intention of the original ALRC proposals that the events that are the subject of the charge would be included in appropriate cases, and that this approach has been taken by the courts.⁷⁷³ The ALRC concluded that there is in fact no ambiguity.⁷⁷⁴

5.86 The ALRC also expressed concern about the use of double negatives in the section, which arises from the use of the word 'if' in the text immediately before subparagraphs (a) and (b).⁷⁷⁵ The same concerns arise in relation to section 97.

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Ibid [1.3.6900]. See also Smith TH and Holdenson OP, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions—Part II' (1999) 73 *Australian Law Journal* 494, 498 where the authors refer to the 'probable error' in the drafting of s 98 of the uniform Evidence Acts:

Paradoxically, as a result, s 98 will not apply to coincidence evidence of little or no probative value, but will apply to that which has substantial probative value and is, therefore, not excluded by the section.

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Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.21.

772

Ibid para 10.27.

773

Ibid para 10.28, citing *R v Milat* (Unreported, New South Wales Supreme Court, Hunt CJ at CL, 5 September 1996).

774

Ibid para 10.30.

775

Ibid para 10.26.

The ALRC's proposal

5.87 The ALRC accepted that there were concerns in relation to the drafting of section 98,⁷⁷⁶ and made the following proposals:⁷⁷⁷

Section 98(1) of the uniform Evidence Acts should be amended to provide that evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless the party adducing the evidence gives reasonable notice in writing to each other party of the party's intention to adduce the evidence; and the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, has significant probative value.⁷⁷⁸

Section 97 of the uniform Evidence Acts should be amended to replace the word 'if' in s 97(1) with 'unless', and to replace the word 'or' in s 97(1)(a) with 'and'.⁷⁷⁹

The QLRC's view

5.88 The admissibility of propensity evidence is governed in Queensland by the common law, as modified by statute. In criminal cases, the admissibility of propensity evidence is governed by the 'no rational view' test. In civil cases, the evidence will be admissible if it is logically 'probative' of the fact to be proved.

5-3 The QLRC notes that, in Queensland:

- (a) the admissibility of propensity evidence is governed by the common law, as modified by statute;
- (b) in criminal cases, the admissibility of propensity evidence is governed by the 'no rational view' test; and
- (c) in civil cases, propensity evidence is admissible if it is 'logically probative' of the fact to be proved.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid post para 10.26. Draft provisions are set out in Appendix 1 to the ALRC's Discussion Paper, 546–7.

⁷⁷⁸ Ibid Proposal 10–1, post para 10.26.

⁷⁷⁹ Ibid Proposal 10–2, post para 10.26.

5-4 The QLRC is of the view that:

- (a) the approach to the admissibility of propensity evidence under the uniform Evidence Acts is different from that which applies in Queensland;
- (b) adding specific notice requirements would be an extra burden on the prosecution; and
- (c) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.

5-5 The QLRC supports the ALRC's proposal to amend section 98, to the extent that the amended provision reflects the ALRC's desired intention and does not contain any drafting ambiguities.**TENDENCY AND COINCIDENCE EVIDENCE IN CIVIL PROCEEDINGS**

5.89 The tendency rule in section 97 and the coincidence rule in section 98 also apply in civil proceedings.⁷⁸⁰ Therefore, the two pre-conditions of admissibility, namely reasonable notice in writing and significant probative value, will apply.

5.90 In its Interim Report the ALRC noted that, for similar conduct evidence in civil cases, 'some courts have imposed a threshold level of probative value because of the risk that the tribunal of fact will give the evidence too much weight, and because of factors like surprise and raising collateral issues'.⁷⁸¹

5.91 However, the ALRC's proposal was different from the test that was ultimately adopted in sections 97 and 98.

5.92 In its original evidence inquiry, the ALRC proposed that:⁷⁸²

evidence of a person's specific conduct is not admissible to prove a person's tendencies that are relevant to the facts in issue unless the court is satisfied that a reasonable jury could find that the person did the conduct to which the evidence relates and the conduct and circumstances to which the evidence relates and the conduct and circumstances in issue in the proceedings are substantially and relevantly similar.

5.93 Presumably, the requirement of notice was to address any disadvantage caused by surprise.

780 Sections 97 and 98 of the uniform Evidence Acts are set out at para 5.40 of this Report.

781 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 790.

782 Ibid para 809.

5.94 In its Discussion Paper, the ALRC noted that the submission from the Law Council of Australia suggested that the admissibility of propensity evidence in civil proceedings ‘should be left to principles of “sufficient relevance”’,⁷⁸³ and that, by implication, there should be no notice requirement.⁷⁸⁴

5.95 If sections 97 and 98 did not apply to civil proceedings, the admissibility of propensity evidence would be dealt with by the relevance test in section 55 and the discretionary exclusions contained in the legislation, particularly section 135.

The ALRC’s proposal

5.96 In its Discussion Paper, the ALRC expressed the view that, if sections 97 and 98 did not apply in civil proceedings, it would create uncertainty in relation to the admissibility of tendency and coincidence evidence, and would have the potential to put the party against whom the evidence was led at a disadvantage if no notice was given.⁷⁸⁵

5.97 It therefore concluded that, at this stage, it did not consider that there would be any advantage gained in sections 97 and 98 not applying in civil proceedings. However, it noted that the ‘next phase of the Inquiry will explore the issue further with judges and practitioners to determine which approach, on balance, is the most sound in principle and practice’.⁷⁸⁶

The QLRC’s view

5.98 At common law, as applied in Queensland, propensity evidence is admissible in civil trials where the evidence is logically probative of the fact in issue.⁷⁸⁷ It is likely that propensity evidence that is logically probative at common law will in many cases also satisfy the test of significant probative value in the uniform Evidence Acts. However, clearly the latter test creates a higher threshold of admissibility.

5.99 Further, no notice of intention to adduce propensity evidence is required at common law.

5.100 The QLRC is of the view that the law and practice relating to propensity evidence, as applied in Queensland civil proceedings, adequately meets the needs of the parties and the civil justice system.

⁷⁸³ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.31.

⁷⁸⁴ *Ibid* para 10.32.

⁷⁸⁵ *Ibid* para 10.34–10.35.

⁷⁸⁶ *Ibid* para 10.36.

⁷⁸⁷ See para 5.32–5.36 of this Report.

5-6 The QLRC is of the view that:

- (a) the test that applies to the admissibility of propensity evidence in civil proceedings in Queensland is the logically probative test and there are no notice requirements;
- (b) the test of admissibility of propensity evidence in civil proceedings under the uniform Evidence Acts is substantially different from that applying in Queensland;
- (c) the approach in Queensland does not cause any legal or practical difficulties, and is preferred to the approach under the uniform Evidence Acts; and
- (d) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.

TENDENCY AND COINCIDENCE EVIDENCE ADDUCED BY THE PROSECUTION IN CRIMINAL PROCEEDINGS

5.101 In its Issues Paper, the ALRC posed a number of questions in relation to the operation of section 101 of the uniform Evidence Acts.⁷⁸⁸

Does the requirement in s 101 of the uniform Evidence Acts adequately protect a defendant from the potential prejudicial effect of tendency or coincidence evidence?

Should s 101 of the uniform Evidence Acts be amended to:

- (a) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'no rational explanation' test articulated by the majority of the High Court in *Pfennig v The Queen*; or
- (b) replace the requirement that the 'probative value of the evidence must substantially outweigh its prejudicial effect' with the 'interests of justice' test articulated by McHugh J in *Pfennig v The Queen*; or
- (c) specify matters to which a court should have regard in determining whether the probative value of the tendency or coincidence evidence in question substantially outweighs its prejudicial effect? If so, what matters might be relevant in this regard?

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Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 8–5 and 8–6, post para 8.37. Section 101 of the uniform Evidence Acts is set out at para 5.40 of this Report.

Incorporation of common law tests

5.102 The effect of section 101 is that, where the prosecution is adducing evidence of tendency or coincidence, such evidence must not only satisfy the requirements of section 97 or 98, but must also satisfy the test in section 101(2) that its probative value substantially outweighs any prejudicial effect it may have on the defendant.

5.103 As discussed previously, these provisions came into operation before the High Court decisions in *Hoch*⁷⁸⁹ and *Pfennig*.⁷⁹⁰ The test of admissibility for propensity evidence established in those cases is that ‘the evidence must possess sufficient “probative value or cogency such that, if accepted, it bears no reasonable explanation other than inculpation of the accused in the offence charged”’.⁷⁹¹

5.104 Subsequently, in those jurisdictions in which the uniform Evidence Acts operate, the courts have considered the extent to which the new common law ‘no reasonable view’ test is relevant when applying section 101 of the uniform Evidence Acts.

5.105 In its Issues Paper, the ALRC examined the approach taken by the courts in the uniform Evidence Acts jurisdictions. It concluded that the Federal Court does not rely on the common law test in determining admissibility under section 101.⁷⁹² However, the ALRC observed that, in New South Wales, a series of decisions by the Court of Criminal Appeal had, until recently, interpreted section 101 as incorporating the ‘no rational view’ test.⁷⁹³

5.106 The position in New South Wales was reviewed recently by the Court of Criminal Appeal in *R v Ellis*.⁷⁹⁴

5.107 The leading judgment in that case was delivered by Spigelman CJ, with whom the other members of the Court agreed.⁷⁹⁵ The Chief Justice held that, in relation to Part 3.6, ‘the parliaments intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously

⁷⁸⁹ (1988) 165 CLR 292.

⁷⁹⁰ (1995) 182 CLR 461.

⁷⁹¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.40.

⁷⁹² Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 8.30, citing *W v The Queen* [2001] FCA 1648.

⁷⁹³ *Ibid* para 8.31, citing *R v Locke* (1997) 91 A Crim R 356, 363; *R v AH* (1997) 42 NSWLR 702, 709; *R v Fordham* (1997) 98 A Crim R 359, 370; *R v Colby* [1999] NSWCCA 261; *R v WRC* (2002) 130 A Crim R 89; *R v Joiner* [2002] NSWCCA 354, [37], [40]–[41]; *R v Folbigg* [2003] NSWCCA 17, [24], [27].

⁷⁹⁴ (2003) 58 NSWLR 700.

⁷⁹⁵ Because of a conflict of authority, the Court convened a bench of five judges (Spigelman CJ, Sully, O’Keefe, Hidden and Buddin JJ).

applicable'.⁷⁹⁶ Therefore, in accordance with the High Court decision in *Papakosmas v The Queen*,⁷⁹⁷ it was not appropriate to construe the *Evidence Act* in the light of the pre-existing common law. His Honour concluded that:⁷⁹⁸

The words “substantially outweigh” in a statute cannot, in my opinion, be construed to have the meaning which the majority in *Pfennig* determined was the way in which the common law balancing exercise should be conducted. The “no rational explanation” test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.

...

The “no rational explanation” test focuses on one only of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process. I am unable to construe section 101(2) to that effect.

5.108 His Honour further noted that the stringency of the ‘no rational explanation’ test may still be appropriate when applying section 101:⁷⁹⁹

There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the “no rational explanation” test were satisfied.

5.109 Hidden and Buddin JJ, although agreeing with the order proposed by the Chief Justice and his Honour’s reasons, added that the admission of similar fact or propensity evidence at common law was exceptional because it was likely to be highly prejudicial, and the test for admissibility under section 101 remains one of ‘very considerable stringency’.⁸⁰⁰ Interestingly, Hidden and Buddin JJ commented that, in practical terms, in many cases the application of the common law and the statutory tests will produce the same result.⁸⁰¹

5.110 The Court of Criminal Appeal held that evidence relating to a number of instances of breaking and entering was properly admissible under the Act as coincidence evidence, and that the trial judge did not err in the exercise of his discretion in allowing the joinder of a number of charges. Although the accused was given special leave to appeal to the High Court,⁸⁰² the leave was later rescinded on the basis that there were insufficient prospects of success of an appeal to warrant a grant of special leave.⁸⁰³

796 (2003) 58 NSWLR 700, 716.

797 (1999) 196 CLR 297.

798 (2003) 58 NSWLR 700, 718.

799 Ibid.

800 Ibid 719.

801 Ibid.

802 *Ellis v The Queen* [2004] HCA Trans 311 (17 August 2004).

803 *Ellis v The Queen* [2004] HCA Trans 488 (1 December 2004).

5.111 On behalf of the High Court, Gleeson CJ commented that:⁸⁰⁴

we would add that we agree with the decision of Chief Justice Spigelman on the construction of the *Evidence Act 1995* (NSW).

5.112 Although the ‘no rational view’ test has not been incorporated into the application of the admissibility of tendency and coincidence evidence in the uniform Evidence Acts, some aspects of the decision in *Hoch*⁸⁰⁵ have been incorporated. In that case, the possibility of collusion between complainants resulted in a finding that the evidence lacked the requisite probative force necessary to render it admissible as similar fact evidence in relation to the other offences charged.⁸⁰⁶

5.113 In a series of cases in New South Wales, it has been suggested that the reasonable possibility of concoction deprives evidence of significant probative value for the purposes of sections 97(1), 98(1) and 101(2).⁸⁰⁷

5.114 This issue was further considered recently in the case of *Tasmania v S*⁸⁰⁸ where Underwood J stated that:⁸⁰⁹

Although *Colby* and *OGD [No 2]* were decided before *Ellis* it seems to me that the proper exercise of the balancing act that is demanded by the Act, s 101(2) requires that evidence of possibility of concoction be taken into account, and if there is a reasonable possibility of concoction, then the prejudicial effect will ordinarily outweigh the probative value of the tendency or coincidence evidence.

The ALRC’s proposal

5.115 In its Discussion Paper, the ALRC stated that its present view ‘is that the *Pfennig* test is too narrow and should not be the test for admission’.⁸¹⁰ It considered that ‘the reasoning of Spigelman CJ in *Ellis* is to be preferred both as a matter of construction and as a matter of policy’.⁸¹¹ The ALRC noted that this approach was supported in the majority of submissions and consultations

804 Ibid.

805 (1988) 165 CLR 292.

806 This decision is discussed at para 5.8 of this Report.

807 *R v Colby* [1999] NSWCCA 261, [107] (Mason P, with whom Grove and Dunford JJ agreed); *R v OGD (No 2)* (2000) 50 NSWLR 433, [77] (Simpson J, with whom Mason P and Dowd J agreed).

808 [2004] TASSC 84.

809 Ibid [11].

810 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.48.

811 Ibid.

addressing the issue.⁸¹² Therefore, the ALRC did not propose that any amendments be made to section 101.⁸¹³

5.116 The ALRC noted that, in its Issues Paper,⁸¹⁴ the application of section 101 of the uniform Evidence Acts to proceedings for sexual offences against children was raised.⁸¹⁵

5.117 The ALRC expressed the view that ‘the decision in *Ellis* adequately addresses this issue’.⁸¹⁶

The QLRC’s view

5.118 In Queensland, the admissibility of propensity evidence is governed by the common law, as modified by statute. In criminal cases, the admissibility of propensity evidence, including similar fact evidence, is governed by the ‘no rational view’ test.⁸¹⁷

5.119 Section 132A of the *Evidence Act 1977* (Qld) has effectively abrogated the effect of the decision in *Hoch*, and is consistent with the judicial approach taken to assessing the probative value of evidence on the assumption that it is true.⁸¹⁸

5.120 The ALRC’s view that problems associated with the incorporation of the *Hoch* principles into the uniform Evidence Acts ‘should no longer occur’ ignores judicial statements made after the decision in *Ellis* to the effect that the reasonable possibility of collusion will be relevant in assessing the probative value of the evidence for the purposes of sections 97, 98 and 101 of the uniform Evidence Acts.⁸¹⁹

812 Ibid.

813 Ibid.

814 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 8–8 and 8–9, post para 8.43.

815 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.50.

816 Ibid.

817 See para 5.13–5.16 of this Report.

818 See para 5.22–5.26 of this Report.

819 See para 5.112–5.114 of this Report.

5-7 The QLRC is of the view that:

- (a) in Queensland, the admissibility of propensity evidence, including similar fact evidence, is governed by the common law, as modified by statute;
- (b) under the uniform Evidence Acts, the approach that applies to the admissibility of propensity evidence (including similar fact evidence) in criminal cases is different from the approach that applies in Queensland;
- (c) the ALRC should reconsider whether it should specifically legislate to abrogate the principles of *Hoch*,⁸²⁰ and
- (d) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.

Broadening the categories of evidence to which section 101 applies

5.121 Although the question did not arise specifically in the Issues Paper, the ALRC noted in its Discussion Paper that there is an issue ‘as to whether s 101 should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although allegedly tendered for a non-tendency or coincidence purpose’.⁸²¹

5.122 As previously discussed, the majority judgment in *Pfennig*⁸²² ‘was attempting to lay down a strict non-discretionary rule of admissibility to be applied to all evidence which reveals the commission of offences other than those with which the accused is charged’.⁸²³ A strict application of this approach would require that relationship evidence (that is, evidence showing the nature of the relationship between parties, such as a complainant and an accused) or circumstantial evidence that is admissible for a reason other than propensity, would have to satisfy the ‘no reasonable view’ test.

5.123 The ALRC noted that, although such evidence may disclose a tendency or coincidence, a party may seek to avoid the controls of Part 3.6 of the uniform Evidence Acts by limiting the purpose of the tender to a non-tendency or coincidence purpose, and arguing that an appropriate warning can

820 (1988) 165 CLR 292.

821 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.51.

822 (1995) 182 CLR 461.

823 Smith TH and Holdenson OP, ‘Comparative Evidence: Admission of Evidence of Relationship and Sexual Offence Prosecutions—Part 1’ (1999) 73 *Australian Law Journal* 432, 438.

be given that the evidence not be used for any tendency or coincidence purpose.⁸²⁴

5.124 The ALRC therefore sought submissions on the following question:⁸²⁵

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

The QLRC's view

5.125 It has been noted previously that it is not clear whether the determining feature for the admissibility of evidence under the relevant rules is the purpose of tender or what the evidence discloses. The ALRC's view is that the 'starting point' for the tendency and coincidence rules is what the evidence discloses.⁸²⁶ However, it acknowledged that much of the debate in the cases focuses on the purpose of the tender.⁸²⁷

5.126 By seeking submissions to the question set out above, the ALRC may be able to clarify this issue.

'Interests of justice' alternative

5.127 The final matter addressed in the Discussion Paper was the broad question of whether the tests of admissibility for tendency and coincidence evidence in criminal trials established in sections 97 to 101 of the uniform Evidence Acts should be replaced by a test based on the 'interests of justice'.

5.128 A test for admissibility of propensity evidence based on what is 'just' or in the 'interests of justice' has been suggested at various times in various jurisdictions.

5.129 The Discussion Paper⁸²⁸ referred to the 'interests of justice' test articulated by McHugh J in *Pfennig v The Queen*.⁸²⁹ In his Honour's view, the interests of justice would require admission where.⁸³⁰

824 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.52.

825 Ibid Question 10–1, post para 10.52.

826 Ibid para 10.94.

827 Ibid para 10.94, note 94.

828 Ibid para 10.38.

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

830 Ibid 529.

the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

5.130 In the United Kingdom, the common law test of admissibility is based on what is 'just'. In *Director of Public Prosecutions v P*,⁸³¹ the House of Lords rejected the view that striking similarity was an essential element in every case for the admissibility of propensity evidence. Instead, the test for admissibility was expressed in terms of a broader principle.⁸³²

the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.

5.131 The 'interests of justice' test from *Director of Public Prosecutions v P* formed the basis of section 398A of the *Crimes Act 1958* (Vic),⁸³³ which was inserted in 1997. It overrules the common law 'no reasonable view' test, as well as the effect of the decision in *Hoch*.

5.132 Section 398A of the *Crimes Act 1958* (Vic) provides.⁸³⁴

398A Admissibility of propensity evidence

- (1) This section applies to proceedings for an indictable or summary offence.
- (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
- (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
- (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
- (5) This section has effect despite any rule of law to the contrary.

831 [1991] 2 AC 447.

832 Ibid 460 (Lord Mackay of Clashfern LC, with whom the other Law Lords agreed).

833 *R v Best* [1998] 4 VR 603, 607 (Callaway JA); *R v Tektonopoulos* [1999] 2 VR 412, 416 (Winneke P).

834 Section 398A of the *Crimes Act 1958* (Vic) was inserted by s 14 of the *Crimes (Amendment) Act 1997* (Vic), which commenced on 1 January 1998. It applies 'to any trial, committal proceeding or hearing of a charge for an offence that commences on or after 1 January 1998, irrespective of when the offence to which the trial, committal proceeding or hearing relates is alleged to have been committed': *Crimes Act 1958* (Vic) s 588(1).

5.133 In *R v Best*,⁸³⁵ Callaway JA made a number of observations about the operation of the provision.

5.134 At the outset, his Honour considered the meaning of the expression 'propensity evidence', which is used in section 398A(2), but is not defined in the legislation. It was held that this referred to:⁸³⁶

evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged ...

5.135 Callaway JA acknowledged that this interpretation of the provision involved the adoption of the 'disclosure' approach, rather than the 'purpose' approach.⁸³⁷ On this approach, subject to two qualifications,⁸³⁸ the admissibility of all evidence that discloses the commission of an offence or other discreditable conduct will be determined by section 398A.

5.136 Under section 398A(2), relevant propensity evidence is admissible 'if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence'. In applying that test, section 398A(3) provides that the 'possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility' of the evidence.

5.137 It was argued for the appellant that it was not just to admit the propensity evidence in this case because there was 'a substantial risk of concoction or unconscious influence'.⁸³⁹ Callaway JA held that the effect of subsections (3) and (4) was that the 'possibility, even a strong possibility, of collusion or any other matter affecting the reliability of the evidence is a matter for the jury'.⁸⁴⁰

835 [1998] 4 VR 603. The main judgment was delivered by Callaway JA, with whose reasons Phillips CJ and Buchanan JA agreed.

836 *R v Best* [1998] 4 VR 603, 607.

837 *Ibid.*

838 *Ibid* 608. It was suggested that s 398A of the *Crimes Act 1958* (Vic) 'may not apply at all where evidence disclosing a relevantly uncharged act or other discreditable conduct forms part of the *res gestae*'. The Court also endorsed a qualification referred to in *Cross on Evidence* to the effect that:

The exclusionary rule is not directed to evidence of discreditable conduct per se; it is concerned with the impermissible use which may be made of it. Discreditable conduct will therefore not attract the rule unless it has features which may cause the jury to infer that a person who has been responsible for or involved in those acts is likely by reason of that fact to have committed the offence charged.

839 [1998] 4 VR 603, 609. This was said to arise from the extensive media publicity surrounding charges on which the accused had previously stood trial in relation to other former students.

840 [1998] 4 VR 603, 616. In particular, the Court held (at 610) that the references in subss (3) and (4) to 'the possibility of a reasonable explanation consistent with the innocence of the person charged' should be understood 'to refer only to explanations, like collusion and unconscious influence, that affect the truth of the propensity evidence sought to be adduced and not to extend to explanations like coincidence, because so to construe them would make the judge's task impossible in the case of similar fact evidence'.

5.138 Callaway JA further held that the test in section 398A(2) should be applied ‘on the assumption that the evidence will be accepted as true’.⁸⁴¹ His Honour expressed the view that this was the approach adopted by the House of Lords in relation to the English test of admissibility, on which section 398A(2) was based, and that this approach was supported by section 398A(2) and (3).⁸⁴²

5.139 His Honour observed that the effect of section 398A was to displace the *Pfennig* test,⁸⁴³ which he considered to be a stricter test than the English test on which section 398A was based.⁸⁴⁴ However, Callaway JA considered that, when properly applied, the test in section 398A(2) would ‘not greatly alter the conduct of criminal trials’.⁸⁴⁵ In particular, his Honour stated that similar fact evidence would ‘still be received with great caution because ... the risk of prejudice is ordinarily at its highest in such cases’.⁸⁴⁶

5.140 The ‘interests of justice’ test was the subject of review by the Law Commission of England and Wales in its Report, *Evidence of Bad Character in Criminal Proceedings*.⁸⁴⁷ The Law Commission of England and Wales criticised the ‘interests of justice’ test that was applied in *Director of Public Prosecution v P*.⁸⁴⁸ The Report suggested that this test was ‘too vague’ noting that.⁸⁴⁹

To state that the evidence is admissible when it is “just” to do so, does not settle the question of how the probative value ought to relate to the prejudicial effect in order for it to be admitted.

5.141 Further, the Report stated that.⁸⁵⁰

there is no indication of the factors that are relevant in assessing the probative value of similar fact evidence (such as the dissimilarities in the evidence), or in assessing its likely prejudicial effect. [note omitted]

5.142 The Report noted the conflicting authorities as to whether the ‘interests of justice’ test from *Director of Public Prosecutions v P* applies to background

841 [1998] 4 VR 603, 607.

842 Ibid. See *DPP v P* [1991] 2 AC 447 and *R v H* [1995] 2 AC 596.

843 *R v Best* [1998] 4 VR 603, 613.

844 Ibid 608–9.

845 Ibid 612.

846 Ibid.

847 Law Commission of England and Wales, Report, *Evidence of Bad Character in Criminal Proceedings* (R 273, 2001).

848 [1991] 2 AC 447.

849 Law Commission of England and Wales, Report, *Evidence of Bad Character in Criminal Proceedings* (R 273, 2001) para 4.3, 4.4.

850 Ibid para 4.5.

evidence.⁸⁵¹ The Report also noted that the admission of background evidence can, 'however, be used to smuggle in similar fact evidence which would otherwise be inadmissible'.⁸⁵²

5.143 The Report also criticised the Australian common law test as stated in *Pfennig*⁸⁵³ on the basis that:⁸⁵⁴

- the test was 'stricter than necessary, and likely to lead to the exclusion of the evidence which was probative and of little prejudicial effect';
- the test required 'the judge to assess the strength of the evidence' and therefore 'to apply the same test to the evidence as the jury would have to apply, if it were admitted'; and
- 'adoption of this test would lead to an increase in the need for voir dieres'.

5.144 In relation to the uniform Evidence Acts' provisions for the admissibility of propensity evidence, the Report set out three 'drawbacks' as follows:⁸⁵⁵

First, we were unsure what it might mean for the probative value of evidence to outweigh the risk of prejudice *substantially*, or for evidence to have *significant* probative value as opposed to *some* probative value. Secondly, we thought the effect of the rules was that tendency and coincidence evidence would sometimes be inadmissible even if its probative value outweighed its prejudicial effect. Thirdly, we thought the Australian statutory scheme unnecessarily complicated.

5.145 The Law Commission of England and Wales ultimately recommended that the prosecution should, with the leave of the court, be able to adduce propensity evidence if:⁸⁵⁶

- (1) the evidence has substantial probative value in relation to a matter in issue (other than whether the defendant has a propensity to be untruthful) which is itself of substantial importance in the context of the case as a whole, and
- (2) the interests of justice require it to be admissible, even taking account of its potentially prejudicial effect.

851 Ibid para 4.12. Background evidence referred to such matters as events forming part of the *res gestae*, explanatory evidence and relationship evidence: at para 4.12.

852 Ibid para 4.11.

853 (1995) 182 CLR 461.

854 Law Commission of England and Wales, Report, *Evidence of Bad Character in Criminal Proceedings* (R 273, 2001) para 11.12.

855 Ibid para 11.19.

856 Ibid para 11.46.

5.146 This recommendation was implemented by clause 8 of the draft Criminal Evidence Bill, which was included in the Law Commission's Report.⁸⁵⁷ Clause 8(4), by its reference to clause 5(2), required the court to have regard to specified factors in determining whether the two conditions for admissibility were satisfied.⁸⁵⁸ The draft Bill provided that, in assessing the probative value

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Clause 8 of the draft Criminal Evidence Bill provided:

8 Evidence going to a matter in issue

- (1) Evidence falls within this section if the following two conditions are met.
- (2) The first condition is that the evidence has substantial probative value in relation to a matter which—
 - (a) is a matter in issue in the proceedings, and
 - (b) is of substantial importance in the context of the case as a whole.
- (3) The second condition is that the court is satisfied—
 - (a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or
 - (b) that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible in view of—
 - (i) how much probative value it has in relation to the matter in issue,
 - (ii) what other evidence has been, or can be, given on that matter, and
 - (iii) how important that matter is in the context of the case as a whole.
- (4) In determining whether the two conditions are met the court must have regard to the factors listed in section 5(2) (and to any others it considers relevant).
- (5) For the purposes of this section, whether the defendant has a propensity to be untruthful is not to be regarded as a matter in issue in the proceedings.
- (6) Only prosecution evidence can fall within this section.

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Clause 5 of the draft Criminal Evidence Bill provided:

5 Evidence going to a matter in issue

...

- (2) In assessing the probative value of evidence for the purposes of this section the court must have regard to the following factors (and to any others it considers relevant)—
 - (a) the nature and number of the events, or other things, to which the evidence relates;
 - (b) when those events or things are alleged to have happened or existed;
 - (c) where—
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
 - (d) where—
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

...

of evidence, the court must assume that the evidence is true.⁸⁵⁹ However, this requirement did not apply if it appeared, ‘on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true’.⁸⁶⁰

5.147 The draft Bill provided that, in assessing the probative value of the evidence, the court must assume that the evidence is true unless it appears that no court or jury could easily find it to be true in accordance with clause 14.

5.148 The Law Commission separately addressed the admissibility of evidence with ‘explanatory value’ (referred to in the Report as ‘background evidence’) in clause 7 of the draft Bill, which also provided that the court must be satisfied that the interests of justice require the admission of the evidence.⁸⁶¹

The ALRC’s proposal

5.149 In its Discussion Paper, the ALRC stated that it did not see any benefit in adopting the approach recommended by the Law Commission of England and Wales in preference to the approach taken in the uniform Evidence Acts. It noted that, ‘[w]hatever its failings, the uniform Evidence Acts test gives trial judges a defined task and a two-stage test’.⁸⁶²

5.150 The ALRC noted that guidelines were needed under the ‘interests of justice’ test proposed by the Law Commission of England and Wales. It was critical of the guidelines proposed by that Commission on the ground that they ‘focus on the issue of probative value and do not attempt to address the issue of prejudice’.⁸⁶³

859 Draft Criminal Evidence Bill cl 14(1).

860 Draft Criminal Evidence Bill cl 14(2).

861 Clause 7 of the draft Criminal Evidence Bill provided:

7 Evidence with explanatory value

- (1) Evidence falls within this section if the following three conditions are met.
- (2) The first condition is that, without the evidence, the court or jury would find it impossible or difficult properly to understand other evidence in the case.
- (3) The second condition is that the value of the evidence for understanding the case as a whole is substantial.
- (4) The third condition is that the court is satisfied—
 - (a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or
 - (b) that the value of the evidence for understanding the case as a whole is such that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible.

862 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.92.

863 *Ibid.*

5.151 The ALRC undertook an extensive comparison of the test for admissibility of propensity evidence established under section 398A of the *Crimes Act 1958* (Vic) and the test that applies under the relevant provisions of the uniform Evidence Acts. Both the operation of the provisions⁸⁶⁴ and the underlying policies⁸⁶⁵ were examined.

5.152 The ALRC concluded that the decisions under the two schemes ‘do not reveal that the application of the different tests has produced, or is likely to produce, different outcomes’.⁸⁶⁶

5.153 The ALRC stated that, under both legislative approaches, relationship evidence⁸⁶⁷ and evidence included in the *res gestae*⁸⁶⁸ would have to comply with statutory provisions before it could be admitted to prove such a propensity or tendency.

5.154 However, in the Victorian Court of Appeal decision in *R v FJB*,⁸⁶⁹ a distinction between the two approaches to relationship evidence was noted.

5.155 In that case, Charles JA referred to the approach adopted by the New South Wales Court of Criminal Appeal in *R v AH*,⁸⁷⁰ where ‘it has been said that where the Crown introduces evidence for the purpose of establishing the relationship between the complainant and the accused, it is not tendency evidence; and that, once admitted for that purpose, the evidence cannot be used as tendency evidence’.⁸⁷¹ Although Charles JA acknowledged that the New South Wales approach may well be explained by the differences in wording between sections 97 and 101 of the *Evidence Act 1995* (NSW) and section 398A of the *Crimes Act 1958* (Vic),⁸⁷² the New South Wales approach did not find favour with him.⁸⁷³

864 Ibid para 10.95–10.107.

865 Ibid para 10.108–10.116.

866 Ibid para 10.98.

867 Ibid para 10.103.

868 Ibid para 10.105. The reference to the *res gestae* is a reference to evidence of conduct forming part of the transaction giving rise to the crime charged. See para 3.11–3.17 of this Report.

869 [1999] 2 VR 425.

870 (1997) 42 NSWLR 702, 708–9.

871 [1999] 2 VR 425, 428.

872 Ibid 429.

873 Ibid 428–9.

It is not necessary to decide the point in this case, but I would need to be persuaded that evidence which, objectively, tends to show a propensity may nevertheless avoid or lose that quality simply because the Crown asserts that the evidence is introduced for a different purpose. If the evidence tends to establish that propensity, the jury is likely to use it for that purpose regardless of any direction they may be given.

5.156 Subsequent cases have held that the admissibility of relationship evidence is to be determined by the application of section 398A of the *Crimes Act 1958* (Vic).⁸⁷⁴

5.157 In comparing the policy considerations underlying the respective provisions, the ALRC concluded that ‘the impact of the two approaches on the fact-finding process is difficult to assess on the current authorities and ... it cannot be said that the two approaches have produced significantly different outcomes’.⁸⁷⁵ However, in its view, the uniform Evidence Acts ‘better serve a number of other policy objectives, notably: a fair trial; minimising the risk of wrongful conviction; accessibility; predictability; cost and time and uniformity’.⁸⁷⁶

The QLRC’s view

5.158 In Queensland, the test of admissibility for propensity evidence, including similar fact evidence, is the ‘no reasonable view’ or ‘no rational explanation’ test. However, due to the difficulty in its application, the Queensland courts have established their own two-stage approach as exemplified by *O’Keefe*.⁸⁷⁷

5.159 Further, Queensland has developed its own line of authority in relation to relationship evidence, and has introduced legislation in terms of sections 132A and 132B of the *Evidence Act 1977* (Qld).⁸⁷⁸

5.160 It is apparent that the common law test does not successfully deal with the admissibility of all propensity evidence as it purports to do, but is most apposite to genuine similar fact evidence cases.

5.161 The approach of the uniform Evidence Acts overall has much to commend it in terms of providing a test for all propensity evidence that better reflects the interests of justice and existing practice. However, the extent of its application to relationship and background evidence is not clear, and the overlap between tendency and coincidence evidence is confusing.

874 See *R v Williamson* [1999] VSC 108, [12], [16] (Teague J); *R v GAE* (2000) 109 A Crim R 419, 425–6 (Callaway JA), 437 (Chernov JA); *R v Loguancio* (2000) 110 A Crim R 406, 414 (Callaway JA, with whom Tadgell and Buchanan JJA agreed).

875 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 10.118.

876 Ibid.

877 See para 5.14–5.16 of this Report.

878 See para 5.18–5.31 of this Report.

5.162 The QLRC questions whether a test, other than relevance, is necessary for the admissibility of propensity evidence in civil cases or where an accused adduces propensity evidence. In the QLRC's view, a two-step approach across a number of sections unnecessarily complicates the admissibility of propensity evidence adduced by the prosecution.

5.163 The QLRC notes that there may be little difference in outcome between the uniform Evidence Acts approach and the 'interests of justice' test in section 398A of the *Crimes Act 1958* (Vic) as it is applied to propensity evidence adduced by the prosecution.

5.164 However, if the uniform Evidence Acts were to be introduced in Queensland, consideration should be given to whether the approach adopted under that legislation is to be preferred to the statutory provisions currently applicable in Queensland or Victoria, or the approach recommended by the Law Commission of England and Wales.

5-8 The QLRC is of the view that:

- (a) the test applicable in Queensland to propensity evidence adduced by the Crown is the 'no reasonable explanation' test as qualified by case law and modified by statute;
- (b) the common law test of 'no reasonable explanation' is too strict for all evidence that may disclose propensity, and is most appropriate for similar fact evidence cases;
- (c) the test under the uniform Evidence Acts (namely, that the probative value of the evidence substantially outweighs any prejudicial effect) as applied to evidence adduced by the prosecution in criminal trials, reflects the interests of justice and existing criminal trial practice, except to the extent that that test applies to relationship or background evidence;
- (d) the 'interests of justice' test, as applied to evidence adduced by the prosecution in criminal trials, also reflects the interests of justice and existing criminal trial practice;
- (e) the tendency evidence rule and the coincidence evidence rule in the uniform Evidence Acts are not appropriate in civil cases or when the accused is adducing propensity evidence;
- (f) the ALRC should consider amending its provisions to make them less complicated in terms of requiring a number of steps to be taken and a number of provision to be applied;

- (g) the ALRC should reconsider whether it should specifically legislate to abrogate the principles of *Hoch* as has occurred in Queensland and Victoria; and**
- (h) this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

Chapter 6

Credibility and character

INTRODUCTION

6.1 At common law, evidence that relates only to the credibility of a witness or of a witness's testimony has long been the subject of specific rules. Collateral evidence,⁸⁷⁹ including evidence as to credit, is generally not admissible,⁸⁸⁰ although there are exceptions to this proposition. Additional rules, based on considerations of fairness, apply where the witness in question is the accused.⁸⁸¹

6.2 It is sometimes difficult to determine whether particular evidence is relevant only to credit or is relevant to a fact in issue. In *Palmer v The Queen*,⁸⁸² McHugh J noted that:⁸⁸³

The line between evidence relevant to credit and evidence relevant to a fact-in-issue is often indistinct and unhelpful. The probability of testimonial evidence being true cannot be isolated from the credibility of the witness who gives that evidence except in those cases where other evidence confirms its truth wholly or partly.

6.3 The difficulty in determining whether evidence goes only to credit, and is collateral, or relates to a fact in issue is illustrated by the High Court decision in *Piddington v Bennett & Wood Pty Ltd*.⁸⁸⁴ In that case, a witness for the plaintiff who claimed to have seen the event in issue gave evidence in cross-examination as to why he had been at the scene. Evidence was adduced by the defendant which cast some doubt on the witness's explanation.⁸⁸⁵ The question for the Court was whether the rebuttal evidence was relevant to a fact

879 'Collateral' matters are 'facts not constituting the matters directly in dispute between the parties': *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533, 546 (Latham CJ).

880 Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.2], [14.2.2]. For example, evidence as to credit, unless relevant to a fact in issue, should not be led in evidence-in-chief: Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.80], citing *R v Connolly* [1991] 2 Qd R 171. While a witness's credit may be explored in cross-examination, a witness's answer on a collateral issue cannot be rebutted by extrinsic evidence: Heydon JD, *Cross on Evidence* (7th ed, 2004) [17580]: see para 6.106 of this Report.

881 See for example the discussion of the strict rules of admissibility of 'propensity' or 'similar fact' evidence in Chapter 5 of this Report. See also para 6.61–6.78 of this Report.

882 (1998) 193 CLR 1.

883 Ibid [51]. See also his Honour's comments in *Goldsmith v Sandilands* (2002) 190 ALR 370, [40]–[41] and *Nicholls v The Queen* (2005) 213 ALR 1, [46].

884 (1940) 63 CLR 533.

885 The plaintiff witness gave evidence that he had been to the nearby bank, either to pay in or draw out money of a particular account, and was on his way home. The defendant adduced evidence from the bank manager that no money had been paid in or drawn out of that account on the day in question. See (1940) 63 CLR 533, 544–5 (Latham CJ).

in issue, to a fact relevant to a fact in issue,⁸⁸⁶ or only to credit. The witness's presence, or absence, from the scene of the accident, and his capacity to observe those events to which he testified, was a fact in issue.⁸⁸⁷ Two members of the Court considered that evidence that tended to disprove the witness's explanation as to his presence, even if it was of little weight, was a fact relevant to the fact in issue.⁸⁸⁸ The majority of the Court held, however, that the rebuttal evidence did no more than discredit the witness's account of his movements prior to the event and did not, therefore, relate to a fact in issue or to a fact relevant to a fact in issue.⁸⁸⁹

6.4 That case was considered more recently in *Goldsmith v Sandilands*,⁸⁹⁰ in which the members of the High Court were again divided in their view as to whether the evidence sought to be led in rebuttal of a fact in issue was relevant to a fact in issue or was merely collateral.⁸⁹¹

6.5 In *Palmer v The Queen*,⁸⁹² McHugh J observed that the evidentiary rules based on the distinction between issues of credit and facts in issue were 'based primarily upon the need to confine the trial process and secondarily upon notions of fairness to the witness'.⁸⁹³ The evidentiary rules relating to credit to which his Honour referred include:

- the 'collateral evidence' or 'finality' rule, which requires that answers given by a witness to questions in cross-examination concerning matters relating to credit are final, and cannot generally be contradicted or rebutted by other evidence;⁸⁹⁴
- the rule that prior consistent statements are not generally admissible to bolster the credit of a witness;⁸⁹⁵

886 'A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact': *Goldsmith v Sandilands* (2002) 190 ALR 370, [31] (McHugh J).

887 (1940) 63 CLR 533, 545 (Latham CJ), 551–2 (Starke J), 553 (Dixon J), 557–8 (Evatt J), 567 (McTiernan J).

888 Ibid 547 (Latham CJ), 551–2 (Starke J).

889 Ibid 553–4 (Dixon J), 560 (Evatt J), 567 (McTiernan J).

890 (2002) 190 ALR 370.

891 Ibid [13] (Gleeson CJ), [42] (McHugh J), [73] (Hayne J), (Kirby J dissenting at [80]) holding that evidence that the witness wrongly described the location at which he claimed the appellant made an admission to him, which was relevant to a fact in issue, did not prove the admission had been made and was merely collateral: [81].

892 (1998) 193 CLR 1.

893 Ibid [52], citing *Natta v Canham* (1991) 32 FCR 282, 298.

894 Heydon JD, *Cross on Evidence* (7th ed, 2004) [17580]. See para 6.106–6.111 of this Report.

895 *The Nominal Defendant v Clements* (1960) 104 CLR 476. See para 6.131 of this Report.

- the rule permitting cross-examination of a witness, other than an accused, as to credit, where the evidence is of such a nature as to tend to weaken confidence in the witness's character or trustworthiness,⁸⁹⁶ and
- the rule that an accused may adduce evidence that he or she is of good character, such evidence being open to rebuttal evidence by the Crown.⁸⁹⁷

6.6 Some of these common law rules are subject to statutory modification in Queensland.

Uniform Evidence Acts

6.7 Chapter 3, Part 3.7 of the uniform Evidence Acts deals with the admissibility of evidence relevant to credit. The prima facie common law rule that evidence relevant only to a witness's credibility is not admissible is reflected in section 102 of the uniform Evidence Acts, which establishes the 'credibility rule':

102 The credibility rule

Evidence that is relevant only to a witness's credibility is not admissible.

6.8 The term 'credibility', in relation to a witness, is defined in the uniform Evidence Acts as follows:⁸⁹⁸

credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

6.9 This is a broad definition, which extends beyond conscious dishonesty to include a witness's physical and mental powers of observation and memory.⁸⁹⁹

6.10 The uniform Evidence Acts also provide a number of exceptions to the credibility rule, including:

- evidence in cross-examination that has substantial probative value (sections 103 and 104),⁹⁰⁰

⁸⁹⁶ *Bugg v Day* (1949) 79 CLR 442, 467 (Dixon J). See para 6.31, 6.37 of this Report.

⁸⁹⁷ *Crabbe v The Queen* (1984) 56 ALR 733; *R v Butterwasser* [1948] 1 KB 4. See para 6.63–6.67 of this Report.

⁸⁹⁸ Uniform Evidence Acts s 3(1), Dictionary, Part 1 (definition of 'credibility of a witness').

⁸⁹⁹ *Toohy v Metropolitan Police Commissioner* [1965] AC 595.

⁹⁰⁰ See para 6.42–6.49, 6.75–6.76 of this Report.

- evidence rebutting a witness's denial made in cross-examination (section 106);⁹⁰¹
- evidence re-establishing a witness's credibility (section 108);⁹⁰²
- evidence that is relevant only to the credibility of a person, who is not a witness, who has made a previous representation (section 108A);⁹⁰³ and
- character evidence of an accused person (section 110).⁹⁰⁴

6.11 These provisions are discussed in further detail below.

Issues for consideration

6.12 In its Issues Paper, the ALRC raised a number of questions about how the uniform Evidence Acts deal with the admissibility of evidence relevant to a witness's credibility and character. Those questions concerned the following issues:

- the interpretation of the words 'evidence that is relevant only to a witness's credibility' under sections 102, 103 and 104;
- the meaning of the term 'substantial probative value' used in section 103;
- the limitation on cross-examination as to the credibility or character of an accused;
- the scope of the provision in section 106, which allows denials made in cross-examination to be rebutted by other evidence;
- the operation of section 108, which allows evidence to be adduced to re-establish a witness's credibility; and
- credibility issues in sexual offence cases.

6.13 The ALRC also considered the admissibility of expert evidence as to credit. In its Discussion Paper, the ALRC proposed a number of amendments to the uniform Evidence Acts in relation to those matters. Each of these proposals will be discussed in light of the position in Queensland.

901 See para 6.114–6.118 of this Report.

902 See para 6.134–6.138 of this Report.

903 Section 108A of the uniform Evidence Acts was not the subject of detailed discussion or of any proposal in the ALRC's Discussion Paper. See Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.97–11.99.

904 See para 6.74, 6.77–6.78 of this Report.

INTERPRETATION OF THE CREDIBILITY RULE

6.14 In its Issues Paper, the ALRC sought submissions on the following question:⁹⁰⁵

Do any concerns arise as a result of the High Court's interpretation of s 102 of the uniform Evidence Acts in *Adam v The Queen*? Should s 102 be amended to address any concerns and, if so, how?

6.15 The interpretation of the credibility rule in section 102 affects the operation of the subsequent provisions, which set out the exceptions to that rule.

6.16 In *Adam v The Queen*,⁹⁰⁶ the High Court adopted a narrow, literal interpretation of section 102.

6.17 In that case, a prosecution witness was cross-examined at trial as to his prior inconsistent statement as an 'unfavourable witness' under section 38 of the uniform Evidence Acts.⁹⁰⁷ The trial judge instructed the jury that evidence of his prior inconsistent statement was evidence of the truth of its contents in accordance with section 60 of the uniform Evidence Acts.⁹⁰⁸

6.18 On appeal to the High Court, the appellant argued that, because the purpose of the cross-examination was to attack the witness's credibility, evidence of the prior inconsistent statement should have been excluded under the credibility rule in section 102. The appellant also argued that the exception to the rule in section 103(a) did not apply because the evidence did not have substantial probative value.⁹⁰⁹ The appellant argued that section 60 would apply to the evidence only if it were admissible as an exception to the credibility rule.

6.19 The High Court rejected the appellant's arguments. The majority judgment stated:⁹¹⁰

The appellant submitted that s 102 should not be read literally. That is, the appellant submitted that s 102 should not be understood as dealing only with evidence the sole *relevance* of which is its bearing upon the credibility of a witness. Rather, so it was submitted, it should be read as applying to evidence which is not *admissible* on any basis other than the credibility of a witness.

905 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Question 9–1, post para 9.14.

906 (2001) 207 CLR 96.

907 Section 38 of the uniform Evidence Acts is discussed at para 2.26–2.28 of this Report.

908 This is discussed at para 2.28 of this Report.

909 The appellant's arguments are set out in *Adam v The Queen* (2001) 207 CLR 96, [31]–[32]. Section 103 of the uniform Evidence Acts provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value. Section 103 is set out at para 6.42 of this Report.

910 *Adam v The Queen* (2001) 207 CLR 96, [34]–[35] (Gleeson CJ, McHugh, Kirby and Hayne JJ).

These contentions should be rejected. The criterion of operation of s 102 is the *relevance* of the evidence, not any question of its *admissibility* ... Rather than adopt this rewritten version of the statutory rule, effect should be given to s 102 according to its terms. Thus attention must be directed to how the evidence in question is relevant. Is it relevant *only* to a witness's credibility?

6.20 Their Honours concluded that:⁹¹¹

- the evidence of the witness's previous inconsistent statement related not only to the witness's credibility, but also to facts in issue in the trial;
- because the evidence was relevant not just to the witness's credibility, but also to other matters, the credibility rule in section 102 was not enlivened;
- it was, therefore, unnecessary to consider the operation of the exception to the credibility rule provided by section 103; and
- because evidence of the previous representation was relevant not just to the witness's credibility but to the facts in issue, it fell within the exception to the hearsay rule in section 60, and was admissible as evidence of the truth of the contents of the statement.⁹¹²

6.21 The ALRC noted in its Discussion Paper that '[t]he result of the decision in *Adam* is that control of evidence, relevant for more than one purpose including credibility, will depend entirely upon the exercise of the discretions and exclusionary rules contained in ss 135 to 137'.⁹¹³ The ALRC considered this 'unsatisfactory'.⁹¹⁴

6.22 The ALRC noted Odgers' conclusion that the decision in *Adam v The Queen* would, in some cases, effectively allow the controls contained in the credibility provisions of the uniform Evidence Acts to be circumvented.⁹¹⁵ Odgers has identified two cases where this might happen. The first relates to evidence of a witness's prior statement that is relevant both to a fact in issue and to the witness's credibility.⁹¹⁶ Unless the evidence falls within one of the exceptions to the hearsay rule, it would not ordinarily be admissible as evidence of the truth of its contents. Given the decision in *Adam v The Queen*, the credibility rule would not apply to the evidence because of its relevance to a fact

911 Ibid [39] (Gleeson CJ, McHugh, Kirby and Hayne JJ).

912 Their Honours noted that the result, namely, that evidence of the prior statement was admitted as evidence of the truth of its contents, reflected an alteration in the common law rules of evidence that s 60 was intended to effect: *ibid* [39] (Gleeson CJ, McHugh, Kirby and Hayne JJ), citing Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 334, 685; [57] (Gaudron J).

913 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.12.

914 *Ibid*.

915 *Ibid* para 11.9.

916 *Ibid* para 11.10.

in issue as well as to credit. Being admissible for credibility purposes, however, it would then be admissible as truth of its contents pursuant to section 60.⁹¹⁷

6.23 The second situation identified by Odgers is where evidence is given by an accused person.⁹¹⁸ Evidence of the accused's prior convictions may be relevant to show a tendency to commit such offences, and so may be relevant to both an issue in the case and the accused's credibility. If such evidence is inadmissible under the tendency or coincidence rules, its 'dual relevance' would render the protections afforded to the accused pursuant to sections 102, 103 and 104 inapplicable.⁹¹⁹

6.24 Other commentators have said that the High Court's interpretation of the operation of section 102 represents a departure from the common law position.⁹²⁰ In general, the common law approach to evidence that is relevant for more than one purpose is to consider the admissibility of the evidence for each purpose separately.⁹²¹ On this basis, notwithstanding that evidence is admissible for more than one purpose, its use in assessing credibility would be determined by the operation of the credibility rules.

6.25 The ALRC received varying submissions on the need to amend section 102 in light of the High Court decision in *Adam v The Queen*.⁹²² The Law Council of Australia stated that the decision 'seriously undermines the entire structure of the credibility rule and its exceptions'.⁹²³ The New South Wales Director of Public Prosecutions and the Public Defenders Office of New South Wales both considered the decision in *Adam v The Queen* did not justify any amendment to the credibility rule provisions.⁹²⁴ The Public Defenders Office of New South Wales criticised as 'alarmist' the view that *Adam v The Queen* renders otherwise inadmissible evidence admissible so long as it is relevant.⁹²⁵

917 Ibid.

918 Ibid para 11.11.

919 Ibid.

920 See for example Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.2.2].

921 Ibid.

922 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.14, 11.16.

923 Ibid para 11.14, citing Law Council of Australia, *Submission E 32*, 4 March 2005.

924 Ibid para 11.16, citing Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005; New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

925 Ibid para 11.16, citing New South Wales Public Defenders, *Submission E 50*, 21 April 2005.

The ALRC's proposal

6.26 The ALRC considered that section 102 should be amended to enable it to operate as it was originally intended.⁹²⁶ The ALRC noted that the narrow interpretation in *Adam v The Queen* also directly impacts upon the protections provided in section 104 to accused persons when cross-examined.⁹²⁷ Section 104(2) adopts similar wording to that used in section 102 by providing that '[a] defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave'.

6.27 The ALRC proposed that the uniform Evidence Acts be amended to ensure that the credibility provisions apply to evidence that is:⁹²⁸

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

The QLRC's view

6.28 The result of the decision in *Adam v The Queen* is consistent with the law in Queensland. As discussed in Chapter 2 of this Report, evidence of a prior inconsistent statement of a hostile witness that is proved under section 17 of the *Evidence Act 1977* (Qld) becomes evidence of the truth of its contents under section 101 *Evidence Act 1977* (Qld).⁹²⁹

6.29 The QLRC also considers that, in *Adam v The Queen*, the evidence may have been admissible even if a broader interpretation of section 102 had been adopted by the Court. Even if the credibility rule in section 102 applied to the evidence, it may have satisfied the exception in section 103 given that a prior inconsistent statement proved against a hostile witness is likely to have 'substantial probative value'. In that case, the evidence would have been admissible for a non-hearsay purpose so that section 60 would apply.

6.30 However, the ALRC's concern in relation to the cross-examination of an accused on tendency and coincidence evidence that would otherwise be inadmissible should be addressed. The ALRC's proposed amendment would address this issue.

926 Ibid para 11.17.

927 Ibid para 11.18.

928 Ibid Proposal 11-1, post para 11.20.

929 See para 2.24, 3.100-3.105 of this Report.

6-1 The QLRC:

- (a) is of the view that the outcome of the decision in *Adam v The Queen*, that evidence of a prior inconsistent statement of a hostile witness was admissible as the truth of the matters asserted therein, is consistent with the position in Queensland under section 101 of the *Evidence Act 1977* (Qld);
- (b) considers that the ALRC's proposal to amend section 102 of the uniform Evidence Acts would also be consistent with the approach at common law, as it is applied in Queensland, to the admissibility of evidence as to credit; and
- (c) is of the view that the ALRC's proposal to amend section 102 of the uniform Evidence Acts will ensure that protections available under the credibility provisions to an accused during cross-examination cannot be circumvented.

6-2 The QLRC supports the ALRC's proposal to amend section 102 of the uniform Evidence Acts so that it applies to evidence that is:

- (a) relevant only to the credibility of a witness; and
- (b) relevant to a fact in issue, but not admissible for that purpose, and that is also relevant to the credibility of a witness.

CROSS-EXAMINATION AS TO CREDIBILITY**Queensland*****Cross-examination generally***

6.31 At common law, the cross-examination of witnesses is an important feature of the adversarial system, which allows the veracity of the witness and the accuracy and completeness of his or her testimony to be tested.⁹³⁰ In general, a witness may be cross-examined on matters that did not arise in the examination-in-chief, and may be cross-examined on matters going to credit.⁹³¹

⁹³⁰ *Mechanical & General Inventions Co, Ltd, and Lehwiss v Austin & The Austin Motor Co Ltd* [1935] AC 346, 359.

⁹³¹ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.90].

6.32 While the precise limits of cross-examination are not capable of definition by reference to any general test of relevance, counsel must not extend cross-examination unduly nor pursue irrelevant lines of enquiry.⁹³² Counsel should be given leeway in cross-examination and the court should intervene only when it is clear that counsel's discretion is not being properly exercised.⁹³³

6.33 In Queensland, section 20 of the *Evidence Act 1977* (Qld) sets out the circumstances in which the court may intervene in relation to cross-examination as to credit.

6.34 Section 20 provides:⁹³⁴

20 Cross-examination as to credit

(1) The court may disallow a question as to credit put to a witness in cross-examination, or inform the witness the question need not be answered, if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witness's evidence.

(2) In this section—

“**question as to credit**”, for a witness, means a question that is not relevant to the proceeding except that an admission of the question's truth may affect the witness's credit by injuring the witness's character.

6.35 Forbes notes that section 20 ‘probably adds nothing to a judge's common law powers’.⁹³⁵

Every court is in charge of its own procedure and it is hardly radical to exclude material that “would not [even] affect the credibility of the witness”. ... “Credit” evidence, as well as evidence on the issues, is subject to the over-arching principle of relevance. [note omitted]

6.36 Under section 20(2), ‘credit’ is limited to a witness's character, and therefore, truthfulness. It does not appear to extend to the witness's capacity of observation or recollection as does the credibility rule in section 102 of the uniform Evidence Acts.

⁹³² *Wakeley v The Queen* (1990) ALR 79, 86 (Mason CJ, Brennan, Deane, Toohey and McHugh JJ).

⁹³³ That is, ‘to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached – and it is for the judge to ensure that the stage is not passed – the court is, to an extent, in the hands of cross-examining counsel’: *ibid.*

⁹³⁴ Section 20 of the *Evidence Act 1977* (Qld) was inserted by the *Criminal Law Amendment Act 2000* (Qld) s 45.

⁹³⁵ Forbes JRS, *Evidence Law In Queensland* (5th ed, 2004) [20.1].

Cross-examination on prior convictions

6.37 Prior convictions have always been treated as an exception to the general rule that credibility issues cannot be rebutted,⁹³⁶ and this has been confirmed in section 16 of the *Evidence Act 1977* (Qld).⁹³⁷ Under section 16, a witness may be cross-examined about previous convictions. If the witness either denies the fact or refuses to answer, the prior conviction may be proved.

6.38 Section 16 provides that cross-examination as to previous convictions is subject to other provisions of the *Evidence Act 1977* (Qld). For example, the requirement of relevance under section 20 of the Act (and at common law) may operate to disallow cross-examination under section 16 in respect of a particular conviction.⁹³⁸

[A] conviction of a witness ... could not be used for the purpose of discrediting him if the offence was not of such a nature as to tend to weaken confidence in the credit of the witness, that is to say in his character or trustworthiness as a witness of truth.

6.39 Other provisions that will override the right of cross-examination as to previous convictions under section 16 include:

- section 15A, which prohibits questions relating to convictions that have the protection of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld),⁹³⁹
- section 15, which deals with cross-examination of an accused;⁹⁴⁰ and
- the provisions of the *Criminal Law (Sexual Offences) Act 1978* (Qld), which limit cross-examination of a complainant in a sexual offence case.⁹⁴¹

936 That is, the 'finality' or 'collateral facts' rule. This is discussed at para 6.106–6.111 of this Report.

937 Section 16 of the *Evidence Act 1977* (Qld) provides:

16 Witness may be questioned as to previous conviction

Subject to this Act, a witness may be questioned as to whether the witness has been convicted of any indictable or other offence and upon being so questioned, if the witness either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.

938 *Bugg v Day* (1949) 79 CLR 442, 467 (Dixon J).

939 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5 provides that a person cannot be required to disclose a 'spent' conviction (not part of the person's criminal history) unless it is relevant to an issue in the court proceeding. *Evidence Act 1977* (Qld) s 15A provides that cross-examination as to such previous convictions may be conducted only with the leave of the court. In *R v Millar* [2000] 1 Qd R 437, the Court of Appeal held that, in determining whether leave should be given to cross-examine on such prior convictions, the court should ask itself whether the conviction in question is now likely to weaken confidence in the present evidence of the witness.

940 This is discussed at para 6.68–6.73 of this Report.

941 This is discussed at para 2.57 of this Report.

Cross-examination on prior inconsistent statements

6.40 In Queensland, a witness's credit may also be challenged by cross-examination on a prior inconsistent statement made by the witness. Section 18 allows such cross-examination where the witness is the opposing party's witness. Section 17 allows cross-examination of a party's own witness on a prior inconsistent statement, with the leave of the court, where the witness is adverse.⁹⁴²

6.41 At common law, proof of a prior inconsistent statement goes to credit only.⁹⁴³ However, the effect of section 101 of the *Evidence Act 1977* (Qld) is to make such statements admissible also as evidence of any facts stated therein of which direct oral evidence would have been admissible.⁹⁴⁴

Uniform Evidence Acts

Cross-examination generally

6.42 The circumstances in which a witness may be cross-examined as to credit are set out in section 103 of the uniform Evidence Acts. It provides that a witness may be cross-examined as to credit if the evidence has 'substantial probative value':

103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.
- (2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

6.43 In its Interim Report, the ALRC proposed that a witness 'should no longer be open to cross-examination on any negative aspect of character or misconduct on the basis that it is relevant to credibility'.⁹⁴⁵ It noted that '[e]vidence relevant to credibility will have minimal probative value unless it

⁹⁴² This is discussed at para 2.24 of this Report.

⁹⁴³ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.98]; Heydon JD, *Cross on Evidence* (7th ed, 2004) [17535], citing *Hammer v S Hoffnung & Co Ltd* (1928) SR (NSW) 280; *R v Askew* [1981] Crim LR 398.

⁹⁴⁴ Section 101 of the *Evidence Act 1977* (Qld) is set out at note 258 of this Report.

⁹⁴⁵ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 819.

relates to specific conduct in substantially similar situations', such as telling lies in court.⁹⁴⁶ It considered that cross-examination as to credit should be limited to such specific evidence. It expressed the concern that, despite judicial powers of control, cross-examination was not adequately limited in practice. It proposed:⁹⁴⁷

to include a general rule having the effect of prohibiting cross-examination as to credibility unless it has substantial probative value on the question of credibility. To assist in the use of the clause, a further clause is included which refers to matters relevant to the probative value of such evidence. It will be permissible to cross-examine a witness with respect to bias, or motive to be untruthful, with respect to mental and physical capacity, about his ability to perceive the relevant events and about prior inconsistent statements. [note omitted]

6.44 The significance attached in the Interim Report to evidence of a witness's untruthfulness under oath is reflected in section 103. One of the factors to which the court must have regard in deciding whether the evidence has substantial probative value is whether the evidence tends to prove that the witness 'knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth'.⁹⁴⁸

6.45 In its Issues Paper, the ALRC noted that there has been some debate as to the interpretation of the expression 'substantial probative value' that is used in section 103.⁹⁴⁹ The ALRC sought submissions on the following question:⁹⁵⁰

Are there any concerns with the interpretation of 'substantial probative value' in s 103 of the uniform Evidence Acts and, if so, how should any concerns be addressed?

6.46 The expression 'probative value' is defined in the uniform Evidence Acts as meaning 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.⁹⁵¹ In *R v RPS*,⁹⁵² the New South Wales Court of Criminal Appeal held that, for the purposes of section 103, this definition does not apply, holding instead that:⁹⁵³

Evidence adduced in cross-examination must ... have substantial probative value in the sense that it could rationally affect the assessment of the credit of a witness.

946 Ibid para 817–819.

947 Ibid para 819.

948 Uniform Evidence Acts s 103(2)(a).

949 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 9.18.

950 Ibid, Question 9–2, post para 9.22.

951 Uniform Evidence Acts s 3(1), Dictionary, Part 1 (definition of 'probative value').

952 Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL, and Hidden J, 13 August 1997.

953 Ibid 29.

6.47 The ALRC also noted the distinction between the standard of ‘substantial probative value’ used in section 103 of the uniform Evidence Acts and that of ‘significant probative value’, which applies, under sections 97 and 98 of the uniform Evidence Acts, in the context of tendency and coincidence evidence.⁹⁵⁴

6.48 In *R v Lockyer*,⁹⁵⁵ Hunt CJ at CL considered that the words ‘substantial probative value’ seem to impose a higher standard of relevance than ‘significant probative value’, which requires the evidence in question to be ‘important’ or ‘of consequence’.⁹⁵⁶

6.49 The ALRC noted in its Discussion Paper that section 103 lists only two factors to which the court must have regard in determining whether the evidence is of substantial probative value.⁹⁵⁷ It considered that many other types of evidence may have substantial probative value as required by section 103(1) including evidence of bias, opportunity of observation, powers of perception and memory, special circumstances affecting incompetency and prior statements inconsistent with testimony.⁹⁵⁸

Cross-examination on prior convictions and previous inconsistent statements

6.50 The credibility provisions of the uniform Evidence Acts do not include specific provisions about the cross-examination of witnesses on prior convictions⁹⁵⁹ or prior inconsistent statements.

6.51 Additional rules as to cross-examination on the credit of an accused are set out in section 104, and are the subject of specific proposals that are discussed below.⁹⁶⁰

⁹⁵⁴ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 9.20. Sections 97 and 98 are discussed at para 5.40–5.59 of this Report.

⁹⁵⁵ (1996) 89 A Crim R 457.

⁹⁵⁶ Ibid 459.

⁹⁵⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.30. See para 6.42 of this Report.

⁹⁵⁸ Ibid para 11.31, citing Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.7760]. See also Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 8.19; Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 9.21.

⁹⁵⁹ Odgers considers that evidence of specific conduct showing ‘bad character’, such as evidence of prior convictions, is unlikely to fall within s 103 ‘unless the conduct involves false representations and took place in circumstances where there was some (moral or legal) obligation to tell the truth’: Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.7760]. See also *R v Lumsden* [2003] NSWCCA 83.

⁹⁶⁰ See para 6.75–6.94 of this Report.

ALRC's proposal

6.52 The ALRC considered that the standard of 'substantial probative value' is appropriate.⁹⁶¹ It considered that the interpretation of 'substantial probative value' in *R v RPS*⁹⁶² was 'practical and simple' and did not appear to have given rise to any difficulty.⁹⁶³ It concluded that section 103 should be amended to reflect this interpretation.⁹⁶⁴

6.53 In considering the matters that are listed in section 103(2) to which the court must have regard in determining whether the evidence has substantial probative value, the ALRC noted that the same formulation appears in section 108A(2).⁹⁶⁵

6.54 The ALRC noted that the reference to whether the evidence tends to prove that the person knowingly or recklessly made a false representation when under an obligation to tell the truth was included in sections 103(2) and 108A(2) 'to emphasise the importance of the circumstances in which prior alleged dishonest behaviour occurred'.⁹⁶⁶

6.55 The ALRC considered that there is no evidence that the lack of other matters being listed in sections 103(2) and 108A(2) has caused any significant problems.⁹⁶⁷ It expressed the view that to list other matters may undermine the purpose of the sections in limiting the circumstances in which evidence as to credit can be admitted.⁹⁶⁸ The ALRC did not propose that any further matters be listed in sections 103(2) and 108A(2).

6.56 The ALRC made the following proposal:⁹⁶⁹

961 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.28–11.29.

962 Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Hunt CJ at CL and Hidden J, 13 August 1997.

963 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.26.

964 *Ibid.* See the ALRC's proposed amended wording of s 103(1), which is set out at para 6.56 of this Report.

965 *Ibid* para 11.30. Section 108A of the uniform Evidence Acts (Admissibility of evidence of credibility of person who has made a previous representation) sets out the circumstances in which evidence can be admitted as to the credit of a person, who is not a witness, who made a previous representation that has been admitted as an exception to the hearsay rule.

966 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.32.

967 *Ibid* para 11.33.

968 *Ibid.*

969 *Ibid* Proposal 11–2, post para 11.29. The proposed amended wording of s 103(1) is reflected in the ALRC's proposed draft provisions: *ibid*, Appendix 1, 548.

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

The QLRC's view

6.57 Section 103 of the uniform Evidence Acts and section 20 of the *Evidence Act 1977* (Qld) both impose particular restrictions on the circumstances in which a witness may be cross-examined as to credit. To the extent that section 20 of the *Evidence Act 1977* (Qld) does not apply, the court's ability to intervene to prevent unduly prolonged or irrelevant cross-examination would apply.⁹⁷⁰

6.58 In the QLRC's view, the proposed re-statement of the standard in section 103 (that the evidence must substantially affect the assessment of the credibility of the witness) accords with the test used in section 20 of the *Evidence Act 1977* (Qld), which requires the court to consider whether the evidence will materially impair confidence in the reliability of the witness's evidence.

6.59 The QLRC also notes that the two factors to which the court must have regard under section 103(2) of the uniform Evidence Acts are almost identical to those matters to be taken into account under 102 of the *Evidence Act 1977* (Qld) in relation to a prior inconsistent statement.⁹⁷¹ Rather than going to the admissibility of the evidence, however, the matters listed in section 102 are to be considered when assessing the weight to be given to the admitted statement.

6.60 There is no specific provision in the uniform Evidence Acts to the effect that a witness can be cross-examined on prior convictions.⁹⁷² However, under section 106, if the witness has denied a prior conviction, evidence may be adduced (otherwise than from the witness) that the witness has been convicted

970 See para 6.32 of this Report.

971 *Evidence Act 1977* (Qld) s 102 provides:

102 Weight to be attached to evidence

In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

972 See para 6.50 of this Report.

of an offence.⁹⁷³ It would appear, therefore, that cross-examination on prior convictions would be permitted, provided the evidence met the standard required by section 103.⁹⁷⁴ This is consistent with the approach in Queensland, where questioning on previous convictions is subject to the general limitations imposed by section 20 of the *Evidence Act 1977* (Qld).⁹⁷⁵

6-3 The QLRC considers that:

- (a) in relation to the general limitations imposed on cross-examination of witnesses as to credit, section 103 of the uniform Evidence Acts, as it is proposed to be amended, is consistent with the position in Queensland; and
- (b) the approach to cross-examination as to a witness's prior convictions under the uniform Evidence Acts appears consistent with the position in Queensland.

6-4 The QLRC supports the ALRC's proposal to amend section 103(1) of the uniform Evidence Acts to provide that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

CROSS-EXAMINATION OF ACCUSED

Common law

6.61 At common law, additional restrictions are imposed on cross-examination as to the credit of an accused. In discussing cross-examination rules, it is necessary to consider the rules relating to the admissibility of evidence of the character of the accused.

6.62 As a general rule, evidence relating to credit, including character evidence, is inadmissible.⁹⁷⁶ In addition, evidence that reveals prior misconduct

⁹⁷³ Uniform Evidence Acts s 106(b) provides that the credibility rule does not apply to evidence that tends to prove that a witness has been convicted of an offence, if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence. Section 106 is the subject of specific proposals and is discussed at para 6.114–6.130 of this Report.

⁹⁷⁴ See note 959 of this Report.

⁹⁷⁵ See para 6.38 of this Report.

⁹⁷⁶ See para 6.1 of this Report. See also Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.134].

on the part of the accused will be excluded unless it satisfies a strict test of admissibility.⁹⁷⁷

6.63 An accused is, however, entitled to lead evidence of his or her good character in the form of statements of general reputation.⁹⁷⁸ It has been noted, however, that the rule that good character evidence must be confined to statements of general reputation is 'difficult to apply and widely ignored'.⁹⁷⁹ Such evidence is admissible as tending to show that the accused is unlikely to have committed the offence in question and, where relevant, as tending to prove the credibility of the accused.⁹⁸⁰

6.64 Good character evidence may be adduced by the accused by calling his or her own witnesses, by cross-examination of a prosecution witness, or by giving evidence on his or her own behalf.⁹⁸¹ Whenever evidence of good character is led by the accused, the court has a discretion whether to direct the jury as to how the evidence might be used, having consideration to the probative significance of the evidence.⁹⁸²

6.65 When the accused has put his or her character in issue, evidence of bad character can be led in rebuttal.⁹⁸³ At common law, an attack on the character of a prosecution witness is not sufficient to put the character of the accused in issue.⁹⁸⁴

6.66 Evidence of bad character led in rebuttal may be adduced through cross-examination of the accused, by cross-examination of the accused's character witness, or by leading extrinsic evidence.⁹⁸⁵

6.67 Despite the general requirement that character evidence must be confined to evidence as to general reputation, bad character evidence led in rebuttal may, in practice, include evidence of specific acts, and need not necessarily be limited to the type of character raised by the accused.⁹⁸⁶ Bad

977 That is, 'propensity', 'tendency' or 'similar fact' evidence. See Chapter 5 of this Report.

978 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19105], [19110], citing *R v Rowton* (1865) Le & Ca 520; 169 ER 1497.

979 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19110], citing *R v Hanrahan* [1967] 2 NSW 717.

980 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.135]; Heydon JD, *Cross on Evidence* (7th ed, 2004) [19120]. See *Attwood v The Queen* (1960) 102 CLR 353, 359; *R v Trimboli* (1979) 21 SASR 577.

981 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19110], [19140].

982 *Melbourne v The Queen* (1999) 198 CLR 1 (McHugh, Gummow and Hayne JJ). This is in contrast to the rule in England and New Zealand that the court must give a direction when evidence of good character is admitted.

983 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19140].

984 Ibid. See also *R v Butterwasser* [1948] 1 KB 4, 6.

985 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19145], [17690].

986 Ibid para [19145], citing *R v Hamilton* (1993) 68 A Crim R 298, 299.

character evidence will be relevant only to showing the accused's true character, and not to the accused's guilt or innocence.⁹⁸⁷

This restriction limits the operative significance of the evidence of bad character to a negation of whatever significance the accused might have gained from the evidence of good character. The evidence of bad character does not cross the line and become available in a positive sense as a pointer towards the likelihood of guilt.

Queensland

6.68 In Queensland, the common law rules about cross-examination of the accused have been modified by statute. Section 15 of the *Evidence Act 1977* (Qld) sets out the circumstances in which an accused, who gives evidence, may be cross-examined as to his or her character:

15 Questioning a person charged in a criminal proceeding

- (1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.
- (2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless—
 - (a) the question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged;
 - (b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;
 - (c) the person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding;
 - (d) the person has given evidence against any other person charged in that criminal proceeding.
- (3) A question of a kind mentioned in subsection (2)(a), (b) or (c) may be asked only with the court's permission.

987

Ibid, citing *R v Stalder* [1981] 2 NSWLR 9, 18 (Street CJ).

- (4) If the proceeding is a trial by jury, an application for the court's permission under subsection (3) must be made in the absence of the jury.

6.69 Section 15(1) abrogates the privilege against self-incrimination where the accused gives evidence in a criminal proceeding.⁹⁸⁸

6.70 Section 15(2) sets out the circumstances in which the accused can be cross-examined as to previous offences or bad character generally. The opening words of section 15(2) indicate that cross-examination may relate to specific acts, and need not be limited to the accused's general reputation.

6.71 In summary, cross-examination as to bad character will be permitted where:⁹⁸⁹

- the evidence is admissible at common law because it is relevant to a fact in issue (such as admissible propensity evidence) and the court gives leave to adduce the evidence;
- the accused leads evidence of his or her good character, provided the court gives leave;
- the nature or conduct of the accused's defence involves an imputation on the character of the prosecutor, of a prosecution witness, or of any other person charged in the criminal proceeding, provided the court gives leave;
- a co-accused cross-examines another co-accused, with the leave of the court, with a view to establishing his or her own innocence;⁹⁹⁰ or
- a co-accused cross-examines another co-accused who has testified against him or her.

6.72 Section 15(2)(c) represents a change to the common law in relation to the raising of good character by an attack on a prosecution witness. That section allows cross-examination as to character where the conduct of the defence involves imputations on the character of the prosecutor or of a prosecution witness. 'Imputation' has been interpreted narrowly as not extending to a denial of the charge, even though it is implicit in such a denial that the prosecution witness was lying or mistaken. It has been said that:⁹⁹¹

988 See also para 7.12, 7.228 of this Report.

989 See generally Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [15.12]–[15.75].

990 Ibid [15.25].

991 *Curwood v The King* (1944) 69 CLR 561, 587 (Dixon J).

[I]t is not every assertion ... reflecting upon ... witnesses that fulfils the conditions giving rise to the trial judge's discretion to allow cross-examination ... concerning ... character ... the injurious reflections must really form part of the nature or conduct of his defence.

6.73 A trial judge's discretion in deciding whether to grant leave to cross-examine a defendant on bad character is unfettered, and governed solely by a consideration of what the interests of justice require in the particular case.⁹⁹² The exercise of discretion will usually require the judge to weigh the prejudicial effect on the defence of the admission of the evidence of that character against the potential damage to the prosecution case of the imputations.⁹⁹³

Uniform Evidence Acts

6.74 Sections 104 and 110 of the uniform Evidence Acts deal with the cross-examination of a defendant and the admissibility of character evidence relating to the defendant. In its Issues Paper, the ALRC sought submissions on the following questions:⁹⁹⁴

What concerns, if any, arise from the interaction between ss 104 and 110 of the uniform Evidence Acts? How should any concerns be addressed?

Should s 104 of the *Evidence Act 1995* (Cth) be amended to mirror s 104 of the *Evidence Act 2001* (Tas)? What benefits, if any, might be achieved by adopting the formulation of s 104 set out in the *Evidence Act 2001* (Tas)?

6.75 Section 104 of the uniform Evidence Acts provides:

104 Further protections: cross-examination of accused

- (1) This section applies only in a criminal proceeding and so applies in addition to section 103.
- (2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
 - (a) is biased or has a motive to be untruthful; or
 - (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or
 - (c) has made a prior inconsistent statement.

⁹⁹² *Phillips v The Queen* (1985) 159 CLR 45, 52, 58 (Mason, Wilson, Brennan and Dawson JJ).

⁹⁹³ *Ibid* 59.

⁹⁹⁴ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 9–3 and 9–4, post para 9.37.

- (4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:
 - (a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or
 - (b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.
- (5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:
 - (a) the events in relation to which the defendant is being prosecuted; or
 - (b) the investigation of the offence for which the defendant is being prosecuted.
- (6) Leave is not to be given for cross-examination by another defendant unless:
 - (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and
 - (b) that evidence has been admitted.

6.76 Section 104 provides that, except in certain limited circumstances,⁹⁹⁵ a defendant may be cross-examined as to his or her credibility only with the leave of the court. Where there are co-defendants, section 104(6) provides that a co-defendant who has given evidence 'adverse to the defendant seeking leave to cross-examine' may be cross-examined, provided the court gives leave. This is consistent with the position in Queensland under section 15(2)(d) of the *Evidence Act 1977* (Qld).⁹⁹⁶

6.77 Section 110 of the uniform Evidence Acts provides:

110 Evidence about character of accused persons

- (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

995

Section 104(3) of the uniform Evidence Acts provides that 'leave is not required for cross-examination by the prosecutor about whether the defendant: (a) is biased or has a motive to be untruthful; or (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or (c) has made a prior inconsistent statement'.

996

Section 15(2)(d) of the *Evidence Act 1977* (Qld) is set out at para 6.68 of this Report.

- (2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.
- (3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.
- (4) A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.

6.78 In general, section 110 reflects the common law right of an accused to lead evidence of his or her good character and the consequent right of the prosecution to lead evidence in rebuttal.⁹⁹⁷ However, it is noted that the rule in *R v Rowton*,⁹⁹⁸ which limits such evidence to general reputation, has been abrogated. An accused can lead evidence of good character ‘either generally or in a particular respect’.⁹⁹⁹ The type of evidence the prosecution may adduce in rebuttal is limited by the type of evidence adduced by the defendant.¹⁰⁰⁰

Interaction between credibility and character provisions

6.79 Section 112 of the uniform Evidence Acts requires that any cross-examination as to character may be conducted only with the leave of the court.¹⁰⁰¹ In addition, cross-examination of the accused as to credit is subject to the limitations imposed by section 104.¹⁰⁰²

6.80 In its Discussion Paper, the ALRC noted that there is a potentially problematic overlap between section 112 and section 104(4)(a), both of which deal with cross-examination as to character.¹⁰⁰³

997 It is implicit in the wording of s 110(2), (3) that the prosecution may lead rebuttal evidence in cross-examination of the defendant.

998 (1865) Le & Ca 520; 169 ER 1497.

999 Uniform Evidence Acts s 110(1).

1000 That is, if the accused leads evidence of good character generally, the prosecution may lead evidence that tends to prove the accused is a person of bad character generally. If the accused leads evidence of good character in a particular respect, the prosecution may lead evidence of bad character in that particular respect: Uniform Evidence Acts s 111(2), (3).

1001 Section 112 of the uniform Evidence Acts provides that ‘[a] defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave’.

1002 See para 6.75–6.76 of this Report.

1003 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.37, 11.42.

6.81 Under section 104(2), a defendant in a criminal proceeding must not be cross-examined about matters relevant only to his or her credibility unless the court gives leave. Section 104(4)(a) provides that leave may be given if the defendant has adduced evidence of his or her good character. Section 112, which relates to the admissibility of character evidence, provides that a defendant in a criminal proceeding can be cross-examined as to his or her character only with the leave of the court.¹⁰⁰⁴

6.82 The ALRC noted that, although leave must be sought under both provisions to cross-examine a defendant, the conditions to be satisfied are different.¹⁰⁰⁵ Unlike section 112, there is no requirement in section 104(4)(a) that the type of evidence led in cross-examination be limited to that of the evidence led by the defendant (that is, whether the evidence relates to character generally or to character in a particular respect). In addition, section 104 requires that the evidence led in cross-examination must be of 'substantial probative value'.¹⁰⁰⁶ There is no such requirement in section 112:¹⁰⁰⁷

The principal reason for these differences between the credibility and character provisions is that ss 110 to 112 deal with a situation where the accused has deliberately led evidence intending to prove that he or she is of good character, which evidence is relevant both to the issues of fact and to credibility. That is, the defendant has deliberately chosen to open the issue of his or her good character. By contrast, ss 103 and 104 deal with cross-examination relevant only to credibility.

6.83 The ALRC noted that '[i]n practice, the interaction of these provisions is a source of confusion and uncertainty'.¹⁰⁰⁸ It concluded that the potential overlap is undesirable.¹⁰⁰⁹

Cross-examination where the character of the prosecution or of a prosecution witness is attacked

6.84 Section 104(4)(b) of the uniform Evidence Acts provides that leave to cross-examine the defendant as to his or her credibility must not be given unless evidence adduced by the defendant:

- has been admitted;
- tends to prove that a prosecution witness has a tendency to be untruthful; and

1004 See note 1001 of this Report.

1005 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.38–11.39.

1006 This test is the subject of a proposal for amendment. See para 6.52, 6.56 of this Report.

1007 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.40.

1008 Ibid para 11.42, citing Legal Aid Office (ACT), *Consultation*, Canberra, 8 March 2005.

1009 Ibid.

- is relevant solely or mainly to the witness's credibility.

6.85 The *Evidence Act 2001* (Tas) has not adopted this formulation. Instead, sections 104(4)(b) and (c) of the Tasmanian legislation provide that leave to cross-examine must not be given unless:

- (b) the defendant or the person representing the defendant has questioned the witnesses for the prosecution to prove that the defendant is, either generally or in a particular respect, a person of good character; or
- (c) the nature or conduct of the defence involves imputations on the character of the prosecutor or any witness from the prosecution.

6.86 Section 104(4)(b) of the *Evidence Act 2001* (Tas) reflects the common law position, and is consistent with section 15(2)(c) of the *Evidence Act 1977* (Qld). Section 104(4)(c) of the *Evidence Act 2001* (Tas) is also consistent with section 15(2)(c) of the *Evidence Act 1977* (Qld).¹⁰¹⁰

6.87 The Tasmanian provisions are partly based on provisions contained in the former *Evidence Act 1910* (Tas).¹⁰¹¹ The Law Reform Commissioner of Tasmania explained the different approach as follows:¹⁰¹²

[U]nder the UEA, the accused can cross-examine Crown witnesses up hill and down dale with respect to their bad character or his own good character but so long as their answers consist of denials the accused will not be exposed to loss of the character shield. This seems inherently unfair, particularly where the cross-examination relates to the witnesses' possible bad character. The process is equally harrowing, demeaning and potentially damaging for the witness in terms of the jury's perceptions where the witness simply denies the accused's suggestions as where the evidence is actually adduced.

6.88 In its Interim Report, the ALRC noted criticisms of provisions that permitted the character of a defendant to be attacked in cross-examination when the defendant has impugned the character of a prosecution witness.¹⁰¹³ In particular, it noted the arguments against such provisions summarised by the Criminal Law Revision Committee of England and Wales as follows:¹⁰¹⁴

- it discourages an accused with a criminal record from attacking the credibility of Crown witnesses. If the Crown witnesses' credibility is properly open to attack, then the jury should know about it;

¹⁰¹⁰ Section 15(2)(c) of the *Evidence Act 1977* (Qld) is set out at para 6.68 of this Report.

¹⁰¹¹ *Evidence Act 1910* (Tas) s 85(1)(e). The *Evidence Act 1910* (Tas) was repealed by s 199(1) of the *Evidence Act 2001* (Tas) s 199(1).

¹⁰¹² Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and Its Introduction to Tasmania* (Report No 74, 1996) 24, note 35.

¹⁰¹³ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 820.

¹⁰¹⁴ Criminal Law Revision Committee, Eleventh Report, *Evidence (General)* (1972), quoted in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.64.

- the admissibility of evidence adverse to the accused will depend on the tactics of the defence. This is wrong. The legal advisers are placed in the invidious position of having to choose between leaving the tribunal of fact in ignorance of the facts behind the evidence given by the prosecution witnesses and revealing such facts, but allowing the prosecution as a result to introduce prejudicial evidence against the accused including evidence of prior convictions. Whether the accused is convicted or not may depend on the way in which this choice is made, but it is not one that legal advisers should be called on to make. A Rule that operates in this way turns a criminal trial into a kind of game;
- the sanction will apply whether the attack made is necessary for the accused's defence or not and whether the attacks made on the prosecution witness are true or not;
- if a sanction is required for false attacks on prosecution witnesses, the sanction should not be one which will make it more likely that the accused will be convicted because of prejudice that may be raised against him because of the allegations made in cross-examination to demonstrate his bad character;
- if cross-examination of an accused as to his bad character is not permitted because it would be prejudicial, it does not become any less prejudicial because the accused makes an attack on the character of prosecution witnesses;
- the law allows an attack on the accused's credibility where he does not in his evidence attack the character of a prosecution witness, but his complete defence involves such an attack. If 'tit for tat' is the justification, the law goes further than is warranted ...

6.89 In its Interim Report, the ALRC doubted the validity of the rationales traditionally cited for such a rule, namely that it is justified on a 'tit-for-tat' basis and as a disincentive to unjustifiable attacks on prosecution witnesses.¹⁰¹⁵ The ALRC recommended more restrictive limitations than those now contained in section 104(4)(b).¹⁰¹⁶

1015 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 821.

1016 *Ibid* para 822:

... cross-examination of the accused will only be permitted where:

- the purpose of attacking the prosecution witness was solely or mainly to impugn the credibility of that witness; and
- the evidence relating to the prosecution witness did not concern his conduct during the criminal investigation or the circumstances giving rise to the prosecution.

... further limitations proposed are:

- the attack on the prosecution witness must be made by the accused himself giving evidence;
- leave of the trial judge must be sought before the accused may be cross-examined and may only be granted in exceptional circumstances. [notes omitted]

6.90 The Law Commission of England and Wales reconsidered the issue in its Report, *Evidence of Bad Character in Criminal Proceedings*,¹⁰¹⁷ and confirmed the earlier criticisms made by the Criminal Law Revision Committee.¹⁰¹⁸ It noted that it is unclear as to what constitutes an ‘imputation’, how the attack on the prosecution witness must be made in order to be considered an ‘imputation’, and in what circumstances the judicial discretion to exclude the cross-examination can or will be exercised.¹⁰¹⁹

6.91 The ALRC noted in its Discussion Paper that the Tasmanian provisions received support from the New South Wales Director of Public Prosecutions, who considered that, in contrast, the uniform Evidence Acts’ provisions were ‘too onerous and illogical’ and unfair to the Crown.¹⁰²⁰

The ALRC’s view

Interaction between credibility and character provisions

6.92 To address the undesirable overlap and differences between sections 104(4)(a) and 112 of the uniform Evidence Acts, the ALRC proposed that section 104(4)(a) should be deleted ‘so removing the reference to evidence adduced by the defendant that tends to prove that the defendant is a person of good character’.¹⁰²¹ It also proposed a minor drafting amendment to address the inconsistency of language used in sections 104(2) and 112.¹⁰²² The ALRC proposed:¹⁰²³

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

Section 112 of the uniform Evidence Acts should be amended by substituting ‘A defendant must not be cross-examined’ for ‘A defendant is not to be cross-examined’.

¹⁰¹⁷ Law Commission (England and Wales), Report, *Evidence of Bad Character in Criminal Proceedings* (Report No 273, 2001).

¹⁰¹⁸ Ibid para [4.33]–[4.69], cited in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.65.

¹⁰¹⁹ Ibid.

¹⁰²⁰ Director of Public Prosecutions (NSW), *Submission E 17*, 15 February 2005, cited in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.57–11.58.

¹⁰²¹ Ibid para 11.48.

¹⁰²² Ibid para 11.49, citing McNicol SB, ‘Credit, Credibility and Character under the *Evidence Acts 1995* (NSW) and (Cth)’ (1999) 23 *Criminal Law Journal* 339, 348.

¹⁰²³ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005), Proposals 11–3 and 11–4, post para 11.49.

Cross-examination where the character of a prosecution witness is attacked

6.93 The ALRC concluded that the arguments in support of the Tasmanian provisions ‘are significantly overstated and the relevant policy concerns support the narrower approach of the other uniform Evidence Acts’.¹⁰²⁴ It made the following comments about the concerns expressed by the Tasmanian Law Reform Commissioner:¹⁰²⁵

- Cross-examination of Crown witnesses ‘uphill and down dale’ should not happen having regard to the sections in the uniform Evidence Acts that limit cross-examination.
- Although it is suggested that ‘it is unfair that the defendant can put allegations and not lose the character shield when those allegations are denied’, in that situation ‘there is no evidence before the jury of any blemish on the witness’s character—only an allegation’. The ALRC also noted that ‘the jury will be told that allegations in questions are not evidence and it is the answers that are the evidence’.
- Ethical rules for counsel are such that allegations would not be put to witnesses without reasonable foundation, which should address the harrowing, demeaning and potentially damaging process for the Crown witness.

6.94 The ALRC did not propose any change to section 104 of the uniform Evidence Acts in accordance with section 104 of the *Evidence Act 2001* (Tas).¹⁰²⁶

6.95 The ALRC considered that the reasons enunciated by the United Kingdom law reform bodies for ‘rejecting a more permissive approach towards allowing cross-examination of defendants remain applicable’.¹⁰²⁷

The QLRC’s view

6.96 At common law, the right to cross-examine an accused is more limited than the right to cross-examine a witness generally. In Queensland, section 15 of the *Evidence Act 1977* (Qld) applies.¹⁰²⁸

6.97 Under section 15(1) of the *Evidence Act 1977* (Qld), a witness may be cross-examined and must answer a question that would tend to prove the commission of the offence with which the person is there charged. The

1024 Ibid para 11.75.

1025 Ibid para 11.71 – 11.73.

1026 Ibid para 11.75.

1027 Ibid para 11.68.

1028 Section 15 of the *Evidence Act 1977* (Qld) is discussed at para 6.68–6.73 of this Report.

accused can be cross-examined in relation to prior convictions or bad character only if one of the exceptions set out in section 15(2) applies. In particular, section 15(2)(c) provides that the accused may be cross-examined when the conduct of the defence is such as to involve an imputation on the character of the prosecutor or of any prosecution witness.

6.98 While the common law requires that evidence of good character and evidence rebutting good character be given in general terms without reference to specific experiences or events, this principle is not strictly enforced.¹⁰²⁹

6.99 Under the uniform Evidence Acts, the common law rule that character evidence must be limited to evidence of general reputation is abrogated. Section 110 of the uniform Evidence Acts provides that the accused may adduce evidence of good character either generally or in a particular respect, although evidence in rebuttal adduced by the prosecution must be of the same nature as the evidence adduced by the accused, that is, general or specific.¹⁰³⁰

6.100 Both sections 112 and 104(4)(a) of the uniform Evidence Acts set out the conditions in which an accused can be cross-examined with the leave of the court.¹⁰³¹ To the extent that these sections are inconsistent, there is need for an amendment.

6.101 The uniform Evidence Acts' provisions are generally more prescriptive than the common law in relation to the circumstances in which an accused can be cross-examined as to his or her credit or character. The uniform Evidence Acts require that the evidence first satisfy a test of relevance and that, with some exceptions, the leave of the court must be obtained.

6.102 In Queensland, except for evidence relating to prior convictions or bad character, questions as to credit would be governed by counsel's discretion and the court's ability to control questioning, both generally and under section 20 of the *Evidence Act 1977* (Qld).

6.103 Both sections 15(2)(c) of the *Evidence Act 1977* (Qld) and sections 104(4)(a), 110 and 112 of the uniform Evidence Acts provide a right to cross-examine an accused where the accused has put his or her character in issue.¹⁰³² The QLRC considers that the words 'adduced by the defendant', which are used in sections 104(4)(a) and 110, are wide enough to include evidence that has been given by the accused either personally or through

¹⁰²⁹ See para 6.63, 6.67 of this Report.

¹⁰³⁰ See para 6.78 of this Report.

¹⁰³¹ See para 6.79–6.83 of this Report.

¹⁰³² Note the ALRC's proposal to repeal s 104(4)(a) due to the overlap with ss 110–112. See para 6.92 of this Report.

witnesses and in cross-examination of prosecution witnesses. This is consistent with the provisions in Queensland.¹⁰³³

6.104 However, the scope of the right to cross-examine an accused where the character or credit of the prosecution or of a prosecution witness has been attacked is narrower under the uniform Evidence Acts than under the Queensland and Tasmanian provisions. Under section 104(4)(b) of the uniform Evidence Acts:

- evidence must be adduced and admitted and must tend to prove that a witness 'has a tendency to be untruthful', rather than involve a mere imputation of the witness's character; and
- evidence relating to the offence for which the defendant is being prosecuted, or its investigation, will not enliven the right to cross-examine.¹⁰³⁴

6.105 The QLRC considers that the arguments of the United Kingdom law reform bodies against a broad rule, such as that contained in section 104(c) of the *Evidence Act 2001* (Tas) and in section 15(2)(c) of the *Evidence Act 1977* (Qld), have some merit.¹⁰³⁵ However, it considers that the rule operates as an effective disincentive to unnecessary and unjustified attacks on prosecution witnesses. The QLRC is not persuaded that a change to the rule, as it applies in Queensland, is necessary.

6-5 The QLRC is of the view that:

- (a) the uniform Evidence Acts' provisions in relation to the character of the accused are generally consistent with the practice at common law, as modified by statute, that applies in Queensland;
- (b) the uniform Evidence Acts' provisions in relation to the cross-examination of an accused are more prescriptive and impose greater restrictions than the common law rules, as modified by statute, that apply in Queensland;

1033 *Evidence Act 1977* (Qld) s 15(2)(c) applies to these situations.

1034 Uniform Evidence Acts s 104(5).

1035 A summary of these arguments is set out at para 6.88 of this Report.

- (c) the exception based on an attack of a Crown witness under section 104(4)(b) of the uniform Evidence Acts is substantially more limited than the exceptions under section 15(2)(c) of the *Evidence Act 1977* (Qld) and section 104(4)(c) of the *Evidence Act 2001* (Tas), and would require further review, including careful consultation with experienced criminal law practitioners, if Queensland were to consider adopting the uniform Evidence Acts;
- (d) if Queensland were to consider adopting the uniform Evidence Acts, consideration should be given to adopting only those provisions in relation to the cross-examination of an accused that are consistent with, or are preferable to, the current position in Queensland; and
- (e) the operation of the uniform Evidence Acts would be better served by the removal of overlapping, inconsistent provisions and, therefore, that the ALRC's proposal that section 104(4)(a) be deleted should be supported.

REBUTTING DENIALS MADE IN CROSS-EXAMINATION – THE FINALITY RULE

Common law

6.106 At common law, a witness's answer to a question in cross-examination concerning a collateral issue, such as credibility,¹⁰³⁶ must be treated as final and cannot be rebutted by other evidence (the 'collateral facts' or 'finality' rule).¹⁰³⁷

6.107 The common law recognises the following main exceptions to the rule:¹⁰³⁸

- the fact a witness has been convicted of a crime;
- the fact a witness is biased in favour of the party calling him or her;
- the fact a witness has made a prior inconsistent statement; and

¹⁰³⁶ *Goldsmith v Sandilands* (2002) 199 ALR 370, [32] (McHugh J).

¹⁰³⁷ Heydon JD, *Cross on Evidence* (7th ed, 2004) [17580].

¹⁰³⁸ *Ibid* para [17595]; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.96]. Historically, the common law also recognised as an exception to the finality rule evidence that the witness has a reputation for lack of veracity. However this is now rarely used: Heydon JD, *Cross on Evidence* (7th ed, 2004) [19045]. See *Toohy v Metropolitan Police Commissioner* [1965] AC 595.

- the fact a witness has a medical or physical condition that militates against telling the truth.

6.108 There have been a number of judicial statements that have suggested that, rather than being a rule with defined exceptions, the finality rule should be seen 'as a well-established guide to the exercise of judicial regulation of the litigation process'.¹⁰³⁹ In *Palmer v The Queen*,¹⁰⁴⁰ McHugh J stated:¹⁰⁴¹

For reasons of convenience, it is necessary to maintain the rule that independent evidence rebutting the witness's denials on matters going to credibility is not ordinarily admissible ... If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light it throws on the facts in issue.

6.109 These comments were approved by McPherson JA in *R v Lawrence*¹⁰⁴² as accurately reflecting the state of the law as it now is in Australia.¹⁰⁴³ In the same case, White J concluded that the finality rule is a case management rule so that it is for the trial judge to determine the sufficiency of the relevance of the evidence proposed to be adduced to test the witness's credit.¹⁰⁴⁴

6.110 The nature of the rule and its exceptions were recently examined by the High Court in *Nicholls v The Queen*.¹⁰⁴⁵ McHugh J again advocated a flexible approach to the finality rule, stating that:¹⁰⁴⁶

The collateral evidence rule should therefore be seen as a case management rule that is not confined by categories. Because that is so, evidence disproving a witness's denials concerning matters of credibility should be regarded as generally admissible if the witness's credit is inextricably involved with a fact in issue. Consistently with the case management rationale of the finality rule, however, a judge may still reject rebutting evidence where, although inextricably connected with a fact in issue, the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. In such cases, the interests of justice do not require relaxation of the general rule that answers given to collateral matters such as credit are final.

1039 *Natta v Canham* (1991) 32 FCR 282, 298.

1040 (1998) 193 CLR 1.

1041 Ibid [23]–[24]. In McHugh J's view, 'where the proposed evidence is so closely connected with the facts in issue that its admission will fairly influence the conclusion of the trier of fact as to those facts then it ought to be admitted': *ibid* [54].

1042 [2002] 2 Qd R 500.

1043 Ibid [14].

1044 Ibid [54].

1045 (2005) 213 ALR 1.

1046 Ibid [56].

6.111 The other High Court judges in *Nicholls v The Queen* declined the opportunity to redefine the collateral evidence rule.¹⁰⁴⁷ Kirby J commented that he was ‘not convinced that this court should engage in a significant task of law reform when some, at least, of the problems addressed in the appeal would be solved by the adoption of the uniform Evidence Acts that is presumably still under consideration in those Australian jurisdictions that have not yet adopted it.’¹⁰⁴⁸

Uniform Evidence Acts

6.112 The finality rule and its exceptions are reflected in section 102 of the uniform Evidence Acts, which sets out the credibility rule, and in section 106, which sets out some of the exceptions to the credibility rule.

6.113 In its Issues Paper, the ALRC raised two questions in relation to the operation of section 106 of the uniform Evidence Acts:¹⁰⁴⁹

Should s 106 of the uniform Evidence Acts be amended to allow rebuttal evidence in respect of the credibility of a witness to be adduced if the witness has ‘not admitted’, rather than denied, the substance of particular evidence put to the witness on cross-examination?

Should s 106 of the uniform Evidence Acts be amended to expand the categories of rebuttal evidence relevant to a witness’s credibility that are admissible and, if so, could this be achieved by amending s 106 of the Acts to: (i) indicate that the existing list of categories is not intended to be exhaustive; or (ii) expressly allow other types of rebuttal evidence relevant to a witness’s credibility to be admitted where a court is satisfied that it is in the interests of justice for it to be admissible?

6.114 Section 106 of the uniform Evidence Acts replaces the common law finality rule. It provides:

106 Exception: rebutting denials by other evidence

The credibility rule does not apply to evidence that tends to prove that a witness:

- (a) is biased or has a motive for being untruthful; or
- (b) has been convicted of an offence, including an offence against the law of a foreign country; or

1047

Gleeson CJ (at [2]) stated that ‘we were invited by counsel to re-define the collateral evidence rule, characterising it, not as a rule of law, but as a guide to discretionary case management. That invitation has been declined by six members of the court. Alternatively, it was argued that the excluded evidence fell within one or more of the exceptions to the collateral evidence rule, specifically those relating to bias, interest or corruption. That submission took a number of forms, and has met with somewhat different responses, but, in the view of all members of the court, it must fail in any event because, in the cross-examination of the critical witness, no proper foundation was laid for the tender of the evidence in question’.

1048

Ibid [204].

1049

Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Questions 9–5 and 9–6, post para 9.49.

- (c) has made a prior inconsistent statement; or
- (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

6.115 The exceptions to the credibility rule that are contained in section 106 apply where:

- the evidence falls within one of the categories listed in paragraphs (a) to (e);
- the witness has denied the substance of the evidence in cross-examination; and
- the rebuttal evidence is adduced otherwise than from the witness.

6.116 Paragraphs (a) to (d) of section 106 are, subject to some qualifications, consistent with the established common law exceptions to the finality rule.¹⁰⁵⁰ Paragraph (d) was intended, and would appear, to incorporate the common law exception of physical or mental unreliability.¹⁰⁵¹ It may also apply to the situation where the opportunity to observe a relevant fact, for example because of a witness's absence from the scene, is in issue.¹⁰⁵²

6.117 Paragraph (e) of section 106 is not an exception at common law. It is consistent with the policy of the ALRC, reflected in its Interim Report, that the most probative evidence relating to credibility is evidence of specific conduct in substantially similar situations, in this case, telling lies in court.¹⁰⁵³

6.118 As noted above,¹⁰⁵⁴ the exceptions in section 106 will apply only where the witness has denied the substance of the evidence in cross-examination. The ALRC noted in its Issues Paper that the requirement of a 'denial' may be too excessive.¹⁰⁵⁵ A strict interpretation of the reference to a witness's 'denial' would preclude the application of section 106 to circumstances in which a

¹⁰⁵⁰ The common law exception that applies where the witness lacks veracity does not exist under the uniform Evidence Acts. See note 1038 of this Report.

¹⁰⁵¹ Heydon JD, *Cross on Evidence* (7th ed, 2004) [17595].

¹⁰⁵² Ibid. See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.8200].

¹⁰⁵³ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 818.

¹⁰⁵⁴ See para 6.115 of this Report.

¹⁰⁵⁵ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 9.43, citing Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.8120].

witness neither admits nor denies the substance of evidence or claims to have forgotten the matter or statement in issue.¹⁰⁵⁶ The ALRC also referred to the view that the Act may have fallen behind the developments achieved at common law in this area,¹⁰⁵⁷ suggesting that section 106 could be amended to 'include a general discretion to allow proof of collateral matters where the probative value outweighs the disadvantages of time, cost and efficiency.'¹⁰⁵⁸

The ALRC's proposal

6.119 In relation to developments at common law and the expansion of categories of rebuttal evidence, the ALRC acknowledged that there was a need for more flexibility.¹⁰⁵⁹ It noted that the issue was one of case management, and that the leave requirements in section 192 were directed precisely to that issue.¹⁰⁶⁰

6.120 The ALRC concluded that the best approach would be to combine a leave requirement with the current provision, 'so that the trial judge and parties have the predictability and trial management advantage of a list of categories to which regard can be had while, at the same time, having the opportunity in appropriate cases to have evidence admitted that is not within those categories'.¹⁰⁶¹ However, the ALRC did not make a specific proposal in that regard.

¹⁰⁵⁶ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.8120].

¹⁰⁵⁷ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 9.44, citing Hunt CJ at CL in *R v Milat* (Unreported, Supreme Court of New South Wales, 9 April 1996) [6].

¹⁰⁵⁸ Ibid para 9.45, citing McNicol SB, 'Credit, Credibility and Character under the *Evidence Acts 1995* (NSW) and (Cwth)' (1999) 23 *Criminal Law Journal* 339, 351.

¹⁰⁵⁹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.90.

¹⁰⁶⁰ Ibid para 11.91. Section 192 of the uniform Evidence Acts provides:

192 Leave, permission or direction may be given on terms

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
 - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
 - (b) the extent to which to do so would be unfair to a party or to a witness; and
 - (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
 - (d) the nature of the proceeding; and
 - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence

¹⁰⁶¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.91.

6.121 In relation to the reference in section 106 to a witness's 'denial', the ALRC proposed that:¹⁰⁶²

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

6.122 The ALRC did not propose to amend section 106(e) to address concern about its breadth. In the ALRC's view, paragraph (e) of section 106 plainly refers to previous legal proceedings, and the principles of statutory construction would not lead to the broader construction.¹⁰⁶³

The QLRC's view

6.123 In Queensland, the common law finality rule applies to render independent evidence rebutting the witness's denials on matters going to credibility ordinarily inadmissible.¹⁰⁶⁴

6.124 However, the finality rule is understood as a case management rule so that it is for the court to determine the sufficiency of the relevance of the evidence proposed to be adduced to test the witness's credit.¹⁰⁶⁵

6.125 The ALRC's suggested approach of including a requirement for leave of the court to be given seems consistent with the advocated common law approach. The QLRC notes, however, that the ALRC did not make a specific proposal to that effect.

6.126 It is not readily apparent whether the ALRC's suggested approach is to redefine the finality rule, create a new, broader exception to the rule, or create a new inclusionary discretion.

6.127 The ALRC's suggested approach may result in some unpredictability given the difficulty that presently exists in distinguishing issues that go to credit from those that go to the facts in issue.¹⁰⁶⁶

6.128 However, there are a number of well established common law exceptions to the general rule, some of which are included in the *Evidence Act 1977* (Qld), including evidence of:¹⁰⁶⁷

¹⁰⁶² Ibid, Proposal 11–5, post para 11.95.

¹⁰⁶³ Ibid para 11.94–11.95.

¹⁰⁶⁴ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.96].

¹⁰⁶⁵ See *R v Lawrence* [2002] 2 Qd R 400, where McPherson JA and White J approved the statement of McHugh J in *Palmer v The Queen* (1998) 193 CLR 1.

¹⁰⁶⁶ See *Palmer v The Queen* (1998) 193 CLR 1, discussed at para 6.2 of this Report.

¹⁰⁶⁷ Heydon JD, *Cross on Evidence* (7th ed, 2004) [17595]. Note also the rarely used exception for evidence concerning the witness's lack of veracity. See note 1038 of this Report.

- prior convictions of the witness;¹⁰⁶⁸
- bias or corruption of the witness;¹⁰⁶⁹
- prior inconsistent statements of the witness;¹⁰⁷⁰ and
- the physical or mental unreliability of the witness.¹⁰⁷¹

6.129 The QLRC notes that the reasons for the rule are the avoidance of a multiplicity of issues affecting the efficiency of the trial process by preventing the parties from pursuing matters of marginal relevance and the need to be fair to the witness.¹⁰⁷²

6.130 The QLRC also considers that the provision should not be limited to 'denials', but should also include the situation where a witness 'does not admit' the substance of the evidence. The QLRC notes that section 18 of the *Evidence Act 1977* (Qld) permits the proof of a prior inconsistent statement where the witness does not admit making the statement.

6-6 The QLRC is of the view that:

- the uniform Evidence Acts' provisions relating to the finality rule and its exceptions substantially reflect the traditional common law approach; and**
- the ALRC's view that the court should be given a discretion to admit evidence under section 106 of the uniform Evidence Acts would be consistent with the 'case management' approach to the finality rule adopted by the courts in Queensland.**

6-7 The QLRC supports the ALRC's proposal to amend section 106 to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions made in cross-examination.

¹⁰⁶⁸ *Evidence Act 1977* (Qld) s 16. See para 6.37–6.38 of this Report.

¹⁰⁶⁹ *R v Umanski* [1961] VR 242–4; *Nicholls v The Queen* (2005) 213 ALR 1, [261]–[271] (Hayne and Heydon JJ).

¹⁰⁷⁰ *Evidence Act 1977* (Qld) s 18. See para 2.77 of this Report.

¹⁰⁷¹ *Toohy v Metropolitan Police Commissioner* [1965] AC 595.

¹⁰⁷² *Nicholls v The Queen* (2005) 213 ALR 1, [39] (McHugh J); *R v Lawrence* [2002] 2 Qd R 400, [416] (McPherson JA).

RE-ESTABLISHING CREDIBILITY

Queensland

6.131 As a general rule, evidence may not be led in examination-in-chief or in cross-examination of another witness merely to bolster the witness's credibility.¹⁰⁷³ This is referred to as the 'bolster rule' or the 'rule against accreditation of one's own witness'.¹⁰⁷⁴ As a corollary, evidence of a prior statement that is consistent with the witness's testimony may not generally be given (sometimes referred to as the 'rule against self-corroboration').¹⁰⁷⁵

6.132 However, where the witness's credit is raised as an issue in cross-examination,¹⁰⁷⁶ 'the witness will be given wide scope in re-examination to explain any answers damaging to credit or to proffer reasons for the answers':¹⁰⁷⁷

If a cross-examination, either explicitly or by implication, substantially affects the credit of a witness in respect of his present testimony, then it will ordinarily be legitimate to seek to restore that credit by relevant re-examination of the witness's reason for an attitude revealed or his motive for having acted in a certain way or having made a certain prior statement in the past when such matters elicited in cross-examination have, if unexplained, a tendency to damage the witness's credit.¹⁰⁷⁸

¹⁰⁷³ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.80], citing *R v Livingstone* [1987] 1 Qd R 38; *R v Roberts* (2004) 9 VR 295. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [19170]: '... it is generally impermissible to support the credibility of a witness in advance of an attack, even when one is reasonably anticipated'. Note, however, the ability of the accused in a criminal proceeding to lead evidence of his or her good character: Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.2.2]. See para 6.63 of this Report.

¹⁰⁷⁴ See for example Aronson M and Hunter J, *Litigation Evidence and Procedure* (6th ed, 1998) [20.84]; Heydon JD, *Cross on Evidence* (7th ed, 2004) [19005].

¹⁰⁷⁵ Heydon JD, *Cross on Evidence* (7th ed, 2004) [17250]. Note that one of the exceptions to this aspect of the rule is evidence of 'fresh complaint': *R v Robertson; Ex parte Attorney-General* [1991] 1 Qd R 262, applying *Kilby v The Queen* (1973) 129 CLR 460, 472. Representations made 'fresh in the memory' are discussed at para 3.165–3.174 of this Report. See also Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.6.1].

¹⁰⁷⁶ Note that, at common law, a question as to credit may be put in cross-examination only if an acceptance of the truth of the matter suggested would in fact affect the witness's credibility: *Hally v Starkey* [1962] Qd R 474. This is confirmed in Queensland by s 20 of the *Evidence Act 1977* (Qld).

¹⁰⁷⁷ Heydon JD, *Cross on Evidence* (7th ed, 2004) [19170], citing *R v Clune (No 1)* [1975] VR 723, 734; *R v Singleton* [1986] 2 Qd R 535; *Wojcic v Incorporated Nominal Defendant* [1969] VR 323; *R v Phair* [1986] 1 Qd R 136.

¹⁰⁷⁸ *R v Singleton* [1986] 2 Qd R 535, 539 (Macrossan J, with whom Carter J agreed). In a separate judgment de Jersey J also held (at 546) that evidence as to why the witness had given a false statement to his solicitors as established in cross-examination was able to be adduced in re-examination. See also *R v Connolly* [1991] 2 Qd R 171, 173 (Thomas J); *R v Callaghan* [1994] 2 Qd R 300, 303.

6.133 If the attack on the witness's credit amounts to an imputation of 'recent invention',¹⁰⁷⁹ the witness may, in re-examination, answer the imputation by giving evidence of a prior consistent statement.¹⁰⁸⁰ In Queensland, section 101(1)(b) of the *Evidence Act 1977* (Qld) provides that a prior consistent statement used to rebut an allegation of recent invention is also admissible as truth of its contents.¹⁰⁸¹

Uniform Evidence Acts

6.134 The admissibility of evidence in re-examination to restore the witness's credibility is dealt with by section 108 of the uniform Evidence Acts. Section 108 provides that, subject to certain exceptions, credit evidence, including evidence of a prior consistent statement, may be adduced to rebut an attack on the witness's credibility. Section 108 provides:

¹⁰⁷⁹ That is, an invention or reconstruction of the witness's story at some time between the event in question and the trial: *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398, 401. However, not every attack on the witness's credit will amount to a charge of recent invention. More is required than an imputation that the witness's answers are fabricated. See *R v Kendrick* [1997] 2 VR 699, 710–11 (Winneke P); *G J Coles & Co Ltd v McDonald* [1998] 2 VR 218, 223; *The Nominal Defendant v Clements* (1960) 104 CLR 476, 480–81 (Dixon CJ); *R v Warr* (Unreported, Queensland Court of Appeal, McPherson JA, Moynihan and Fryberg JJ, 3 October 1995).

¹⁰⁸⁰ *The Nominal Defendant v Clements* (1960) 104 CLR 476; *R v Boland* [1974] VR 849; *Eaton v Nominal Defendant (Queensland)* (1995) 21 MVR 357; *R v Kendrick* [1997] 2 VR 699; *G J Coles & Co Ltd v McDonald* [1998] 2 VR 218. See also Aronson M and Hunter J, *Litigation Evidence and Procedure* (6th ed, 1998) [20.88]: 'Where it is suggested (typically in cross-examination) that the witness's evidence has been concocted, the party calling the witness can rebut that suggestion by proving (typically in re-examination) that the witness made an earlier statement consistent with his or her testimony'.

An imputation of recent invention is one of a number of exceptions to the rule that evidence of a prior consistent statement is inadmissible. Other exceptions include evidence of recent complaint in sexual offence cases, statements made as part of the *res gestae* and *Evidence Act 1977* (Qld) s 92(1)(a), which provides that a statement in a document is admissible if the witness has personal knowledge of the facts contained in the statement. These exceptions are discussed in Chapter 3 of this Report. See also Harris W, 'The Admissibility of Prior Consistent Statements – Recent Cases on Recent Complaint, Recent Invention and *Res Gestae*' (1996) 17 *Queensland Lawyer* 51.

¹⁰⁸¹ See para 3.47 of this Report.

108 Exception: re-establishing credibility

- (1) The credibility rule¹⁰⁸² does not apply to evidence adduced in re-examination of a witness.¹⁰⁸³
- (2) The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105, if the court gives leave to adduce that evidence.¹⁰⁸⁴
- (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
 - (a) evidence of a prior inconsistent statement of the witness has been admitted; or
 - (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or reconstructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement. [notes added]

6.135 Section 108 is generally reflective of the common law.¹⁰⁸⁵ However, it may have a wider application than the common law in that evidence of a prior consistent statement can be adduced in anticipation of an imputation being made in cross-examination of fabrication or reconstruction, provided the court gives leave.¹⁰⁸⁶ Further, at common law, unless there is a clear suggestion of recent fabrication, proof of a prior inconsistent statement does not give rise to an automatic right to adduce evidence of a prior consistent statement.¹⁰⁸⁷

1082 Uniform Evidence Acts s 102. Section 102 provides that, with exceptions, evidence that is relevant only to a witness's credibility is not admissible. See para 6.7 of this Report.

1083 Uniform Evidence Acts s 39 provides that re-examination is limited to 'matters arising out of evidence given by the witness in cross-examination' unless the court otherwise gives leave.

1084 Uniform Evidence Acts s 105 deals with the making of unsworn statements by defendants. The *Evidence Act 1995* (NSW) does not contain s 108(2). The ALRC has recommended that s 105 of the *Evidence Act 1995* (Cth) be repealed. Section 105 was retained by the *Evidence Act 1995* (Cth) because the right of a defendant to give an unsworn statement continued to exist in criminal proceedings on Norfolk Island. That right has since been abolished by the *Evidence Act 2004* (NI) s 25(1), and there is no longer any need for s 105: Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.111–11.112, Proposal 11–7.

1085 Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.5.1].

1086 Aronson M and Hunter J, *Litigation Evidence and Procedure* (6th ed, 1998) [20.88], citing *R v BD* (1997) 94 A Crim R 131. See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.8440] where it is noted that there are competing judicial views about when the suggestion of fabrication must be made in order that s 108(3)(b) will apply.

1087 *The Nominal Defendant v Clements* (1960) 104 CLR 476, 479–80 (Dixon CJ).

6.136 While section 108 of the uniform Evidence Acts does not specifically refer to evidence of recent complaint in sexual assault cases, such evidence is likely to be caught by section 108(3)(b).¹⁰⁸⁸

6.137 By reason of section 60, a prior consistent statement admitted under section 108(3)(b) becomes admissible to prove the facts asserted in it.¹⁰⁸⁹

6.138 The circumstances in which leave should be granted under section 108(3)(b) were considered by the High Court in *Graham v The Queen*.¹⁰⁹⁰ The Court held that leave would not automatically be granted where a suggestion is made, in the course of cross-examination, that the witness fabricated his or her evidence.¹⁰⁹¹ In exercising the discretion to give leave, the court must bear two matters in mind:¹⁰⁹² first, that section 108(3)(b) is an exception to the credibility rule; and second, that the exercise of the discretion depends on the effect of the evidence on the witness's credibility. In this case, the Court held that evidence of the appellant's complaint, made six years after the events in question, would not have assisted the jury in deciding whether she had fabricated her story so that, if leave had been sought at the trial, it ought not to have been granted.¹⁰⁹³

The ALRC's view

6.139 In its Issues Paper, the ALRC sought submissions on the following question about section 108 of the uniform Evidence Acts:¹⁰⁹⁴

Is the formulation of s 108(2) of the uniform Evidence Acts satisfactory? Does s 108 cover all situations of fabrication and reconstruction and, if not, how should this matter be addressed?

6.140 This question was not specifically addressed in the ALRC's Discussion Paper. However, the scope of section 108 was raised in the context of the ALRC's discussion of section 106 of the uniform Evidence Acts.¹⁰⁹⁵

1088 Alternatively, such evidence may be admissible as an exception to the rule against hearsay evidence under s 66 of the uniform Evidence Acts. See para 3.165–3.175 of this Report.

1089 Uniform Evidence Acts s 60 is discussed at para 3.83–3.99 of this Report.

1090 (1998) 195 CLR 606, 614. This case is also discussed at para 3.169–3.170 of this Report in the context of representations made 'fresh in the memory'.

1091 *Ibid* 609 (Gaudron, Gummow and Hayne JJ), 614 (Callinan J, with whom Gleeson CJ agreed).

1092 *Ibid*, 609 (Gaudron, Gummow and Hayne JJ).

1093 *Ibid* 609–10 (Gaudron, Gummow and Hayne JJ).

1094 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 9–7, post para 9.54.

1095 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.96.

6.141 As discussed above, section 106 provides that the credibility rule does not apply to evidence in rebuttal of a denial of a matter put to a witness in cross-examination that is relevant only to credit.¹⁰⁹⁶

6.142 The ALRC noted that the question had been raised whether a provision is required to permit the calling of evidence relevant to meet rebuttal evidence that is adduced under section 106.¹⁰⁹⁷

6.143 Evidence rebutting a denial by the witness is admissible under section 106 only if it is adduced from another witness and after the witness's denial.

6.144 The ALRC considered that '[t]he need for widening the scope of s 108 needs to be investigated and, if necessary, the appropriate changes identified'.¹⁰⁹⁸ It posed the following question:¹⁰⁹⁹

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

The QLRC's view

6.145 Section 108 of the uniform Evidence Acts confirms and extends the position at common law, as it is applied in Queensland. If the witness's credit is attacked during the course of cross-examination, evidence to re-establish the witness's credit can be adduced during re-examination.¹¹⁰⁰ Unlike the common law, where evidence of a prior inconsistent statement has been admitted, evidence of a prior consistent statement can be adduced even where there has been no clear suggestion of recent invention or fabrication.¹¹⁰¹ Evidence of a prior consistent statement can also be adduced in anticipation of a suggestion of recent fabrication or reconstruction.¹¹⁰²

6.146 Heydon, in *Cross on Evidence*, comments that:¹¹⁰³

It can certainly be argued that the same need to conduct a trial expeditiously which dictates the general rule that denials should not be rebutted by extrinsic evidence should be applied to evidence in support of them.

1096 See para 6.113–6.118 of this Report.

1097 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.96.

1098 Ibid.

1099 Ibid, Question 11–1, post para 11.96.

1100 Uniform Evidence Acts s 108(1).

1101 Uniform Evidence Acts s 108(3)(a).

1102 Uniform Evidence Acts s 108(3)(b).

1103 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19170].

6.147 Section 108(3)(b) is already wider than the common law position. An extension of section 108 as suggested by the ALRC would further remove the uniform Evidence Acts from the common law position.

6.148 Given the decision in *Adam v The Queen*,¹¹⁰⁴ the QLRC also notes that, if evidence restoring the witness's credibility were relevant to any other matter in addition to the witness's credit, the credibility rule in section 102 would not apply. As such, the evidence would be admissible even if it did not meet the requirements of section 108.¹¹⁰⁵

6-8 The QLRC is of the view that:

- (a) section 108 of the uniform Evidence Acts is generally consistent with the position at common law, as applied in Queensland;**
- (b) section 108(3)(b), however, is considerably wider than the position at common law as applied in Queensland in allowing evidence of a prior consistent statement to be led in any case where a prior inconsistent statement has been admitted and in anticipation of a suggestion of recent fabrication;**
- (c) a further extension of section 108 to allow evidence re-establishing credit to be led in answer to evidence adduced in rebuttal of a witness's denial would be inconsistent with the common law, as it is applied in Queensland; and**
- (d) section 108 should not be extended to refer to evidence relevant to rebuttal evidence that is adduced under section 106.**

EXPERT EVIDENCE AS TO CREDIBILITY

Common law

6.149 As discussed above, the 'bolster rule' prevents evidence from being led merely to buttress the credibility of another witness.¹¹⁰⁶ The common law also prevents opinion evidence on matters of common knowledge from being

¹¹⁰⁴ (2001) 207 CLR 96. This is discussed at para 6.16–6.25 of this Report.

¹¹⁰⁵ Note, however, the Australian Law Reform Commission's proposed amendment to s 102 of the uniform Evidence Acts to avoid the effect of the decision in *Adam v The Queen*: see para 6.27 of this Report.

¹¹⁰⁶ See para 6.131 of this Report.

adduced¹¹⁰⁷ so that, for example, ‘it is not permissible to invite one witness to comment on the truthfulness of another; that is for the court to decide’.¹¹⁰⁸

6.150 There is, however, an exception to the bolster rule that allows expert evidence on credit to be adduced. As discussed above, evidence as to credit can be led in answer to an attack on the witness’s credibility that is made in cross-examination.¹¹⁰⁹ Evidence to restore the witness’s credibility can be led in re-examination, or from a third party, including an expert witness,¹¹¹⁰ provided the requirements for opinion evidence are met.¹¹¹¹

6.151 Historically, the common law permitted expert evidence as to a witness’s reliability only if it tended to show that the witness’s capacity to give reliable evidence was impaired by a disease, defect or abnormality and was, therefore, a matter outside the ordinary experience of a jury.¹¹¹²

6.152 That narrow view was criticised by the High Court in *Murphy v The Queen*,¹¹¹³ where the Court expressed a preference for the simpler test of whether the evidence is outside the knowledge or experience of the jury.¹¹¹⁴ It is now clear that expert psychiatric evidence, for example, may be admitted in answer to a suggestion that the witness’s behaviour is inconsistent with his or her testimony.¹¹¹⁵

1107 The ‘common knowledge rule’ is discussed at para 4.85–4.96 of this Report. Note the Australian Law Reform Commission’s proposal, with which this Commission agrees, that the common knowledge rule not be reintroduced under the uniform Evidence Acts.

1108 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.76], [A.90], citing *R v Foley* [2000] 1 Qd R 290; *R v Leak* [1969] SASR 172, 173. See *North Australian Territory Co v Goldsborough, Mort & Co* [1893] 2 Ch 381, 385–6 (Lord Esher MR).

1109 See para 6.132 of this Report.

1110 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19175], citing *R v Runjanjic* (1991) 56 SASR 114; *R v C* (1993) 60 SASR 467; *R v J* (1994) 75 A Crim R 522, 534–5; *F v The Queen* (1995) 83 A Crim R 502, 509.

1111 That is, that the opinion is expressed by a person who is an expert, by means of training, study or experience, in a field of specialised knowledge and that the opinion is based wholly or substantially on the expert’s knowledge in that field: Heydon JD, *Cross on Evidence* (7th ed, 2004) [29050]. These requirements are discussed in Chapter 4 of this Report.

1112 *Toohey v Metropolitan Police Commissioner* [1965] AC 595; *R v Turner* [1975] QB 834. See para 4.88–4.89 of this Report.

1113 (1989) 167 CLR 94. Note, the question in this case was whether evidence as to the accused’s low level of intellectual function was admissible as tending to show that the accused’s alleged confession was unreliable.

1114 *Ibid* 111 (Mason CJ, Toohey J), 130 (Dawson J), 127 (Deane J), Brennan J dissenting on the ground that the witness did not have the relevant expertise.

1115 Heydon JD, *Cross on Evidence* (7th ed, 2004) [19175]; Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.5.3]. See *HG v The Queen* (1999) 197 CLR 414; *R v C* (1993) 70 A Crim R 378; *R v J* (1994) 75 A Crim R 522, 534–5; *F v The Queen* (1995) 83 A Crim R 502, 509.

6.153 It has been observed, however, that the courts will remain cautious in admitting such evidence, particularly in criminal cases, ‘lest the accused be subjected to a trial by experts rather than a trial by jury’.¹¹¹⁶

Queensland

6.154 In Queensland, the common law rules are modified by section 9C of the *Evidence Act 1977* (Qld). Section 9C provides that expert evidence is admissible to assist the court in assessing the credit of a child under 12 years or of a person whose competence to give evidence or to give evidence under oath has been raised.¹¹¹⁷

¹¹¹⁶ Heydon JD, *Cross on Evidence* (7th ed, 2004) [19175]. See para 4.99 of this Report. Note also the reluctance of the courts to admit evidence of the use of lie detectors and truth drugs to validate a witness’s testimony: Heydon JD, *Cross on Evidence* (7th ed, 2004) [17350].

¹¹¹⁷ Sections 9A, 9B and 9C of the *Evidence Act 1977* (Qld) provide:

9A Competency to give evidence

- (1) This section applies if, in a particular case, an issue is raised, by a party to the proceeding or the court, about the competency of a person called as a witness in the proceeding to give evidence.
- (2) The person is competent to give evidence in the proceeding if, in the court’s opinion, the person is able to give an intelligible account of events which he or she has observed or experienced.
- (3) Subsection (2) applies even though the evidence is not given on oath.

9B Competency to give sworn evidence

- (1) This section applies if, in a particular case, an issue is raised, by a party to the proceeding or the court, about the competency of a person called as a witness in the proceeding to give evidence on oath.
- (2) The person is competent to give evidence in the proceeding on oath if, in the court’s opinion, the person understands that—
 - (a) the giving of evidence is a serious matter; and
 - (b) in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.
- (3) If the person is competent to give evidence in the proceeding but is not competent to give the evidence on oath, the court must explain to the person the duty of speaking the truth.

9C Expert evidence about witness’s ability to give evidence

- (1) This section applies to a proceeding if—
 - (a) under section 9A, the court is deciding whether a person is able to give an intelligible account of events which he or she has observed or experienced; or
 - (b) under section 9B, the court is deciding whether a person understands the matters mentioned in section 9B(2)(a) and (b); or
 - (c) the evidence of a child under 12 years is admitted.
- (2) Expert evidence is admissible in the proceeding about the person’s or child’s level of intelligence, including the person’s or child’s powers of perception, memory and expression, or another matter relevant to the person’s or child’s competence to give evidence, competence to give evidence on oath or ability to give reliable evidence.

6.155 Section 9C adopts the recommendation made by the QLRC in its report on the evidence of children that expert evidence should be admissible in relation to the reliability of the evidence of a child witness.¹¹¹⁸

Uniform Evidence Acts

6.156 The admissibility of expert evidence as to a witness's credibility is not specifically dealt with under the uniform Evidence Acts. Such evidence would be governed by both the opinion rule in section 76¹¹¹⁹ and the credibility rule in section 102.¹¹²⁰

6.157 If the evidence satisfies the requirements of section 79, it will be admissible as 'expert' opinion.¹¹²¹ However, if it is relevant only to credibility (as it will be in most cases),¹¹²² it will be excluded by the credibility rule in section 102.¹¹²³ The exception to the credibility rule in section 108 in relation to evidence that re-establishes credibility does not include expert evidence.¹¹²⁴ Section 108 is limited to evidence led in re-examination and to evidence of a prior consistent statement.

6.158 It does not appear that expert opinion evidence, for example of a psychiatric, neurological or similar condition of the witness that may have given a jury a distorted view of a witness's testimony, could be admitted under the uniform Evidence Acts to bolster the witness's credibility.¹¹²⁵

1118 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2, 2000) Recommendation 15–4. See also para 4.105–4.106 of this Report.

1119 Section 76 of the uniform Evidence Acts is discussed in Chapter 4 of this Report. Section 76(1) provides:

76 The opinion rule

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

1120 Section 102 of the uniform Evidence Acts is set out at para 6.7 of this Report.

1121 Section 79 of the uniform Evidence Acts is discussed in Chapter 4 of this Report. Section 79 provides:

79 Exception: opinions based on specialised knowledge

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

1122 But see *Lowery v The Queen* [1973] 3 All ER 662 where a psychologist's evidence that the personality of the accused was such that one of the co-accused was more likely than the other to have committed the crime was held to be relevant to a fact in issue.

1123 Note, however, the ALRC's proposed amendment to s 102 of the uniform Evidence Acts to avoid the effect of the decision in *Adam v The Queen* (2001) 207 CLR 96 that s 102 does not apply to evidence that is relevant to any other matter in addition to the witness's credit. See para 6.27 of this Report.

1124 Section 108 of the uniform Evidence Acts is set out at para 6.134 of this Report.

1125 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.8360], referring to *R v Rivkin* (2004) 59 NSWLR 28, [344]; Gans J and Palmer A, *Australian Principles of Evidence* (2nd ed, 2004) [14.5.3]: '... under the uniform evidence legislation, the only way in which expert evidence can be used to restore the credibility of a witness is to claim that it is actually relevant to the facts in issue'.

6.159 The ALRC noted that in limited circumstances such evidence may be admissible under section 106.¹¹²⁶ As discussed above, section 106 permits extrinsic evidence to be led in rebuttal of a witness's denial in cross-examination.¹¹²⁷

The ALRC's proposal

6.160 The ALRC considered that the gap in the uniform Evidence Acts in not permitting expert evidence to be admitted to re-establish the credibility of a witness should be addressed.¹¹²⁸ It acknowledged that it is now established at common law that expert evidence relevant to the assessment of a witness's credibility may be admissible.¹¹²⁹ It considered that an exception should be provided in the uniform Evidence Acts to allow such evidence to be admitted.¹¹³⁰

6.161 The ALRC considered that, in providing an exception, safeguards would be needed to avoid adding to the time and cost of trials.¹¹³¹ It concluded that a requirement that the evidence must be 'capable of substantially affecting the assessment of the credibility of the witness' and that the leave of the court be given would be a sufficient safeguard.¹¹³²

6.162 The ALRC proposed that:¹¹³³

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

¹¹²⁶ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.104, also para 8.152 (expert opinion regarding children's evidence).

¹¹²⁷ See para 6.114 of this Report.

¹¹²⁸ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 11.108.

¹¹²⁹ *Ibid* para 11.103, citing *Farrell v The Queen* (1998) 194 CLR 286.

¹¹³⁰ *Ibid* para 11.109.

¹¹³¹ *Ibid* para 11.108.

¹¹³² *Ibid*.

¹¹³³ *Ibid*, Proposal 11–6, post para 11.110. Note that in relation to specific categories of witnesses, the ALRC has also recommended that the uniform Evidence Acts be amended to provide an exception to the opinion and credibility rules for expert evidence on the credibility or reliability of the evidence of a child witness. It also posed the question whether a similar exception should be included in respect of other categories of witness, such as victims of family violence or people with an intellectual disability: *ibid* Proposal 8–1, post para 8.168; Question 8–2, post para 8.172. See para 4.109–4.111, 4.119–4.121 of this Report.

The QLRC's view

6.163 The ALRC's proposal to include in the uniform Evidence Acts an exception to the credibility rule for expert evidence that 'could substantially affect the credibility of a witness' is consistent with the position in Queensland at common law and under section 9C of the *Evidence Act 1997* (Qld), as it applies to children under 12 years of age.

6.164 The QLRC notes that the ALRC's intended amendment appears to override only the credibility rule so that opinion evidence would still need to satisfy the requirements imposed by section 76 to be admissible 'expert' evidence. This is consistent with the position in Queensland.

6-9 The QLRC considers that the ALRC's proposal to amend the uniform Evidence Acts to provide that the credibility rule does not apply to expert evidence that could substantially affect the credibility of a witness is consistent with the position in Queensland at common law and under section 9C of the *Evidence Act 1977* (Qld), as it applies to children under 12 years of age.

6-10 The QLRC agrees with the ALRC's proposal to amend the uniform Evidence Acts to provide that the credibility rule does not apply to expert evidence that could substantially affect the credibility of a witness, provided the court gives leave.

Chapter 7

Privilege including client legal privilege

INTRODUCTION

7.1 In the context of evidence law, a privilege operates as an exemption from the usual duty of a witness to provide information or documents to a judicial body that would otherwise be required for the determination of litigation.¹¹³⁴ A witness may, therefore, object to answering a specific question by claiming a privilege. Claims of privilege, which attach to particular pieces of information, are to be distinguished from claims of incompetence or non-compellability, which attach to particular persons.¹¹³⁵

7.2 While a successful claim of privilege may mean that relevant information is withheld from a court at the expense of the administration of justice,¹¹³⁶ the protection of certain information by privilege is said to be in the public interest. For example, one of the rationales for legal professional privilege and the privilege against self-incrimination is that they are fundamental to the effective operation of the accusatorial and adversarial systems.¹¹³⁷

7.3 Privileges also operate outside the law of evidence. The common law recognises the following broad areas of privilege,¹¹³⁸ which apply to all forms of compulsory disclosure, including disclosures to administrative agencies and in relation to pre-trial proceedings:¹¹³⁹

- legal professional privilege;¹¹⁴⁰

1134 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25005].

1135 McNicol SB, *Law of Privilege* (1992) 10–11; Heydon JD, *Cross on Evidence* (7th ed, 2004) [25005].

1136 McNicol SB, *Law of Privilege* (1992) 1.

1137 Ibid 2.

1138 In addition to the separate doctrine of public interest immunity, which is discussed at para 7.7–7.9 of this Report.

1139 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.1, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Comptroller General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466.

1140 McNicol SB, *Law of Privilege* (1992) 44, citing *A-G (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J); and *Baker v Campbell* (1983) 153 CLR 52.

- the privileges against self-incrimination¹¹⁴¹ and self-exposure to a penalty;¹¹⁴² and
- the privilege attaching to communications made in aid of settlement.¹¹⁴³

7.4 Additionally, the common law has historically recognised a range of miscellaneous privileges including the privilege attaching to title deeds,¹¹⁴⁴ the 'own case' privilege attaching to documents relating solely to a party's own case in pre-trial civil proceedings, the 'mediator's privilege' in respect of communications made in aid of reconciliation between spouses, the privileges against answering questions tending to prove adultery or illegitimacy of children, and the privilege protecting the identity of a police informant.¹¹⁴⁵

7.5 The common law has been reluctant, however, to recognise a marital privilege¹¹⁴⁶ and does not recognise a privilege attaching to confidential communications between priest and penitent,¹¹⁴⁷ doctor and patient or in relation to any other confidential relationship.¹¹⁴⁸ The existence of these privileges in some states and territories is purely statutory.

1141 McNicol SB, *Law of Privilege* (1992) 136, citing *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, 257 (Goddard LJ); and *Redfern v Redfern* [1891] P 139, 147 (Bowen LJ). For a more recent discussion of the principles of the privilege see *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412.

1142 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 336 (Mason ACJ, Wilson and Dawson JJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [13] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

1143 Also referred to as the 'without prejudice' privilege. McNicol SB, *Law of Privilege* (1992) 435, citing *Rush and Tompkins Ltd v Greater London Council* [1988] 3 All ER 737, 740 (Lord Griffiths, with whom Lord Bridge and Lord Brandon agreed).

1144 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25345], citing *Pickering v Noyes* (1823) 1 B & C 262; 107 ER 98.

1145 McNicol SB, *Law of Privilege* (1992) 7–10.

1146 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25200]. But note *Callanan v B* [2004] QCA 478 in which the Queensland Court of Appeal held that the common law does, in fact, recognise a privilege against spouse incrimination. See at [6]–[8] (McPherson JA) citing Lusty D, 'Is there a Common Law Privilege against Spouse Incrimination?' (2004) 27 *University of New South Wales Law Journal* 1. See also *S v Boulton* [2005] FCA 821 in which Kiefel J disagreed with McPherson JA's finding in *Callanan v B* of a spousal privilege, but was bound to apply that decision: at [25], [30]–[32]; and *Stoten v Sage* [2005] FCA 935 in which Dowsett J at [14] similarly accepted the conclusion in *Callanan v B*:

In *S v Boulton*, Kiefel J concluded that for reasons of comity, she should follow the decision in *Callanan*, notwithstanding her reservations concerning Mr Lusty's arguments. I should similarly accept the decision in *Callanan* as authority for the proposition that there is spousal privilege of the kind discussed in Mr Lusty's article. Given the uncertain nature of the authorities, the ultimate decision to recognize or reject spousal privilege is very much a matter of policy. In the absence of statutory intervention, the High Court will eventually consider the matter.

In *S v Boulton*, Kiefel J held that the privilege could not be claimed by a de facto spouse: at [42]–[43]. In *Stoten v Sage*, Dowsett J held that s 30 of the *Australian Crime Commission Act 2002* (Cth) (Failure of witnesses to attend and answer questions) abrogated the privilege.

1147 But see McNicol SB, *Law of Privilege* (1992) 324.

1148 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25315], [25325], [25340].

7.6 A privilege may be abrogated by statute, either by express words or by necessary implication.¹¹⁴⁹

7.7 There is also a rule of evidence at common law about the exclusion of evidence about state matters that is referred to as public interest immunity. This doctrine has been inaccurately described as Crown privilege.¹¹⁵⁰ While the doctrine prevents the compulsory disclosure of relevant evidence in court and other proceedings, it is not a privilege but an immunity that operates independently of any claim or waiver by a party.¹¹⁵¹

7.8 The public interest immunity rule is that '[r]elevant evidence must be excluded from a court or other body having the power to coerce the giving of evidence if its disclosure would be prejudicial or injurious to public or state interest'.¹¹⁵² The rule applies not just to the adducing of evidence at trial, but also in respect of pre-trial proceedings such as discovery and interrogatories and seizure of documents pursuant to search warrants¹¹⁵³ and applies to both documentary and real evidence.¹¹⁵⁴

7.9 The predominant rationale for the rule is that it is in the public interest to suppress certain information or documents from the public in order to prevent harm to national security or some other national interest.¹¹⁵⁵

Queensland

7.10 In Queensland, the doctrines of privilege are governed almost entirely by the common law with some statutory modification.¹¹⁵⁶ The following privileges are recognised:

- legal professional privilege;
- the privileges against self-incrimination and against self-exposure to a penalty,¹¹⁵⁷ and

¹¹⁴⁹ McNicol SB, *Law of Privilege* (1992) 113, 227.

¹¹⁵⁰ Ibid 13, 374.

¹¹⁵¹ Ibid 374–5; McNicol also lists other key differences between the immunity and privilege doctrines. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [27001].

¹¹⁵² McNicol SB, *Law of Privilege* (1992) 375.

¹¹⁵³ Heydon JD, *Cross on Evidence* (7th ed, 2004) [27035].

¹¹⁵⁴ Ibid [27040].

¹¹⁵⁵ Ibid [27055]. See *Sankey v Whitlam* (1978) 142 CLR 1, 38–9 (Gibbs ACJ).

¹¹⁵⁶ For example, *Evidence Act 1977* (Qld) ss 10 (Privilege against self incrimination), 15 (Questioning a person charged in a criminal proceeding); *Uniform Civil Procedure Rules 1999* (Qld) r 555 (Privilege).

¹¹⁵⁷ The privilege against self-incrimination and the closely related penalty privilege were examined in detail in Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

- the privilege attaching to communications made in aid of settlement.

7.11 Rule 212(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld) expressly preserves privilege in respect of documents that must otherwise be disclosed.¹¹⁵⁸ Rule 221(2), however, provides that experts' reports and statements are not privileged from disclosure. Rule 555 also provides that certain documents must be identified in plaintiffs' and defendants' statements in personal injury claims.¹¹⁵⁹

7.12 The privilege against self-incrimination is preserved by section 10 of the *Evidence Act 1977* (Qld)¹¹⁶⁰ but is abrogated, in part, by section 15 of the Act, which provides that an accused who gives testimony in a criminal proceeding cannot refuse to answer a question on the ground that to do so would tend to prove the commission of the offence with which he or she is charged.¹¹⁶¹

7.13 The privilege against self-incrimination has also been removed in a number of other situations such as coronial inquests,¹¹⁶² before a commission of inquiry¹¹⁶³ and in the course of various non-judicial investigations.¹¹⁶⁴ In

¹¹⁵⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 212 provides:

212 Documents to which disclosure does not apply

(1) The duty of disclosure does not apply to the following documents—

- (a) a document in relation to which there is a valid claim to privilege from disclosure;
- (b) a document relevant only to credit;
- (c) an additional copy of a document already disclosed, if it is reasonable to suppose the additional copy contains no change, obliteration or other mark or feature likely to affect the outcome of the proceedings.

(2) A document consisting of a statement or report of an expert is not privileged from disclosure.

¹¹⁵⁹ *Uniform Civil Procedure Rules 1999* (Qld) rr 555 (Privilege), 548 (Plaintiff's statement must identify particular documents), 551 (Defendant's statement must identify particular documents). See *Mahoney v Noosa District Community Hospital Ltd* [2003] 1 Qd R 168.

¹¹⁶⁰ *Evidence Act 1977* (Qld) s 10 provides:

10 Privilege against self incrimination

(1) Nothing in this Act shall render any person compellable to answer any question tending to criminate the person.

(2) However, in a criminal proceeding where a person charged gives evidence, the person's liability to answer any such question shall be governed by section 15.

¹¹⁶¹ *Evidence Act 1977* (Qld) s 15(1) provides:

15 Questioning a person charged in a criminal proceeding

(1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.

¹¹⁶² *Coroners Act 2003* (Qld) s 39.

¹¹⁶³ *Commissions of Inquiry Act 1950* (Qld) s 14(1A).

¹¹⁶⁴ For example, *Fire and Rescue Service Act 1990* (Qld) s 58; *Financial Administration and Audit Act 1977* (Qld) s 87.

many instances where the privilege has been removed, provision is made to limit the use of the disclosed information in other situations.¹¹⁶⁵

7.14 The privilege attaching to communications made in aid of settlement is governed by the common law. The *Supreme Court of Queensland Act 1991* (Qld) additionally provides that any thing said and done in the course of alternative dispute resolution, including an admission, is admissible in a civil proceeding only if all the parties agree.¹¹⁶⁶

7.15 The *Evidence Act 1977* (Qld) has expressly abrogated the privilege attaching to title deeds and other title documents in civil proceedings,¹¹⁶⁷ and reflects the abolition of the marital communications privilege in respect of criminal proceedings,¹¹⁶⁸ which had previously been included in the Act.¹¹⁶⁹

7.16 Legislation in Queensland does not create a privilege in respect of religious confessions, doctor and patient communications or communications made in the context of any other confidential relationship and such privileges are not recognised at common law.

7.17 Public interest immunity is also recognised in Queensland through the application of the common law. While at common law, the exclusion of evidence based on public interest immunity is a matter of judicial discretion, there are some legislative provisions in Queensland that make the immunity absolute.¹¹⁷⁰

Uniform Evidence Acts

7.18 Chapter 3, Part 3.10 of the uniform Evidence Acts deals with privileges that apply when evidence is adduced. As a result, in those jurisdictions where the uniform Evidence Acts operate, the common law rules apply to pre-trial processes and the uniform Evidence Acts apply at trial.¹¹⁷¹

1165 For a detailed discussion of the abrogation of the privilege of against self-incrimination and self-exposure to a penalty, including immunities, see Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

1166 *Supreme Court of Queensland Act 1991* (Qld) s 114(1).

1167 *Evidence Act 1977* (Qld) s 14(1)(b).

1168 *Evidence Act 1977* (Qld) s 8(3), inserted by the *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 56.

1169 *Evidence Act 1977* (Qld), former s 11 (Communications to husband or wife), repealed by the *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 58.

1170 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [Q.94]. See for example *Drugs Misuse Act 1986* (Qld) s 120 (Source of information not to be disclosed).

1171 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.6.

7.19 There are some differences between the Commonwealth, New South Wales and Tasmanian legislation.

7.20 The *Evidence Act 1995* (Cth) includes the following privileges:

- client legal privilege;¹¹⁷²
- privilege in respect of religious confessions;¹¹⁷³ and
- privilege in respect of self-incrimination in other proceedings.¹¹⁷⁴

7.21 The *Evidence Act 1995* (NSW) contains two additional privileges:

- a professional confidential relationship privilege;¹¹⁷⁵ and
- a sexual assault communications privilege.¹¹⁷⁶

7.22 The *Evidence Act 2001* (Tas) also contains additional privileges:

- a privilege attaching to medical communications;¹¹⁷⁷ and
- a privilege attaching to communications with a counsellor by a victim of a sexual offence.¹¹⁷⁸

7.23 The uniform Evidence Acts also contain the following public interest exclusionary rules¹¹⁷⁹ based on:

- exclusion of evidence of reasons for judicial decisions (section 129);
- exclusion of evidence of matters of state (section 130); and
- exclusion of evidence of settlement negotiations (section 131).

1172 *Evidence Act 1995* (Cth) Chapter 3, Part 3.10, Division 1.

1173 *Evidence Act 1995* (Cth) s 127.

1174 *Evidence Act 1995* (Cth) s 128.

1175 *Evidence Act 1995* (NSW) Chapter 3, Part 3.10, Division 1A.

1176 *Evidence Act 1995* (NSW) Chapter 3, Part 3.10, Division 1B.

1177 *Evidence Act 2001* (Tas) s 127A.

1178 *Evidence Act 2001* (Tas) s 127B.

1179 It appears that the Australian Law Reform Commission preferred to cast these matters as exclusionary rules rather than as privileges because it considered that, as a general rule, the court ought to be under an obligation to ensure non-disclosure, while maintaining the discretion to allow disclosure where appropriate: Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 863–866, 873–876, 890–892; Summary of Recommendations, Recommendations 21(a), (b), (c).

7.24 Section 132 of the uniform Evidence Acts also provides that the court must be satisfied that witnesses are aware of their rights in relation to privileges.¹¹⁸⁰

ISSUES FOR CONSIDERATION

7.25 Chapter 11 of the Issues Paper raised a number of questions in relation to privileges as they are dealt with under the uniform Evidence Acts. Those questions concerned the following issues:

- client legal privilege;
- confidential communications privilege;
- sexual assault communications privilege;
- privilege in respect of self-incrimination in other proceedings;
- religious confessions; and
- evidence excluded in the public interest.

7.26 In its Discussion Paper, the ALRC proposed a number of amendments in relation to those matters. Each of these proposals will be discussed in light of the position in Queensland.

CLIENT LEGAL PRIVILEGE

Common law

7.27 In Queensland, legal professional privilege is governed entirely by the common law.¹¹⁸¹

7.28 Legal professional privilege is 'a fundamental and general principle of the common law'¹¹⁸² that is applicable to all forms of compulsory disclosure of evidence such as in interlocutory civil proceedings and in administrative and investigative proceedings.¹¹⁸³ Legal professional privilege comprises legal advice privilege and litigation privilege. The general rule is that, in civil and criminal proceedings, confidential communications made for the purpose of seeking or receiving legal advice, or for preparing for existing or contemplated

¹¹⁸⁰ See Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Summary of Recommendations, Recommendation 21.

¹¹⁸¹ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.39]. See para 7.10 of this Report.

¹¹⁸² *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

¹¹⁸³ *Ibid.* See also McNicol SB, *Law of Privilege* (1992) 52, 53; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.162].

litigation, need not be disclosed.¹¹⁸⁴ The rule applies to communications between:¹¹⁸⁵

- the client, or the client's agent, and the lawyer, or the lawyer's agent; and
- the client or lawyer and a third party, if made in contemplation of and for use in actual or contemplated litigation.

7.29 The privilege was originally formulated to preserve the obligation of lawyers to respect their clients' confidences.¹¹⁸⁶ It is now understood as the privilege of the client and may be waived only by the client or with the client's consent.¹¹⁸⁷

7.30 The rationale cited for the privilege is that it is in the public interest that claims and disputes be justly and expeditiously dealt with by lawyers who are fully and frankly apprised of the facts by their clients.¹¹⁸⁸ The client will be more likely to speak candidly to the lawyer if the confidentiality of their communications is maintained.¹¹⁸⁹

7.31 In *Grant v Downs*,¹¹⁹⁰ a majority of the High Court held that a communication would attract the protection of the privilege if it was made for the sole purpose of obtaining or giving legal advice or of actual or contemplated litigation.¹¹⁹¹ Barwick CJ, however, dissented, proposing instead that the test should focus on the dominant purpose of the communication.¹¹⁹² Later, in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia*,¹¹⁹³ the High Court overruled *Grant v Downs*, and held that the

1184 McNicol SB, *Law of Privilege* (1992) 44.

1185 Ibid. See also Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 23–4; Heydon JD, *Cross on Evidence* (7th ed, 2004) [25230], [25235]. There is a well-recognised controversy about whether these are two distinct species of the privilege with differing rationales, or are two applications of the one, unified doctrine with a single rationale: see *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [9] (Finn J).

1186 Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 11; Heydon JD, *Cross on Evidence* (7th ed, 2004) [25215]; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.16].

1187 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25210], [25010].

1188 Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 60.

1189 *R v Dunwoody* (2004) 212 ALR 103, [16] (McMurdo P). See also *A-G (NT) v Maurice* (1986) 161 CLR 475, 487 (Mason and Brennan JJ).

1190 (1976) 135 CLR 674.

1191 Ibid 688 (Stephen, Mason and Murphy JJ), 694 (Jacobs J), Barwick CJ dissenting. Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.23.

1192 Ibid 677.

1193 (1999) 201 CLR 49.

common law test for legal professional privilege is the dominant purpose test.¹¹⁹⁴

7.32 Because the privilege is a substantive right and not just a rule of evidence, its application is not confined to pre-trial and trial proceedings, being also available in the context of non-judicial investigatory procedures.¹¹⁹⁵

7.33 In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*,¹¹⁹⁶ the High Court held that legal professional privilege is a right that will not be taken to have been abolished by legislative provisions except by express language or clear and unmistakable implication.¹¹⁹⁷

Uniform Evidence Acts

7.34 Chapter 3, Part 3.10, Division 1 (Client legal privilege) of the uniform Evidence Acts deals with legal professional privilege. 'Client legal privilege' comprises a privilege for legal advice (section 118),¹¹⁹⁸ a litigation privilege (section 119)¹¹⁹⁹ and a privilege conferred on unrepresented litigants (section 120).¹²⁰⁰

1194 Ibid 73 (Gleeson CJ, Gaudron and Gummow JJ), 107 (Callinan J), McHugh and Kirby JJ dissenting. Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.23.

1195 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [10] (Gleeson CJ Gaudron, Gummow and Hayne JJ), citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [25250]; Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 22–3, 215.

1196 (2002) 213 CLR 543.

1197 Ibid [11] (Gleeson CJ Gaudron, Gummow and Hayne JJ), [43] (McHugh J), [88] (Kirby J), [132] (Callinan J).

1198 Section 118 of the uniform Evidence Acts provides:

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

1199 Section 119 of the uniform Evidence Acts provides:

7.35 Generally, there are few major distinctions to be drawn between client legal privilege under the uniform Evidence Acts and legal professional privilege at common law.¹²⁰¹ The uniform Evidence Acts' provisions incorporate a dominant purpose test, which the common law has now also adopted. Perhaps the most significant difference is that, at common law, legal professional privilege is available in both judicial and non-judicial forums while client legal privilege under the uniform Evidence Acts applies only in respect of the adducing of evidence at trial.

7.36 Some other differences have also been noted,¹²⁰² including that:

- the uniform Evidence Acts exclude from the definition of 'client' an employer of a lawyer who is also a lawyer;¹²⁰³
- the tests as to whether the privilege has been waived are different under the uniform Evidence Acts and at common law;¹²⁰⁴

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

1200 Section 120 of the uniform Evidence Acts provides:

120 Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the party and another person; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party;

for the dominant purpose of preparing for or conducting the proceeding.

1201 Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 198.

1202 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.28. See also McNicol SB, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189; Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 201–14.

1203 This issue is considered at para 7.47–7.59 of this Report.

1204 This issue is discussed at para 7.107–7.122 of this Report.

- the circumstances in which the privilege may be waived are wider under the uniform Evidence Acts than at common law;¹²⁰⁵
- the uniform Evidence Acts' exception to privilege in respect of communications made in furtherance of an unlawful purpose appears wider than the equivalent exception at common law;¹²⁰⁶ and
- the uniform Evidence Acts incorporate a novel exception to the privilege in respect of a communication or document that 'affects a right of a person'¹²⁰⁷ and a novel privilege conferred on unrepresented litigants.¹²⁰⁸

7.37 Many of these differences are considered in later parts of this chapter.

7-1 The QLRC is of the view that:

- (a) while the general approach of the uniform Evidence Acts to legal professional privilege is broadly consistent with the common law, as it is applied in Queensland, there are some potentially significant differences; and**
- (b) the issue of legal professional privilege would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

7.38 In relation to the operation of client legal privilege under the uniform Evidence Acts, the ALRC considered a number of questions and proposed a number of amendments in its Discussion Paper in relation to the following issues:

- application of the client legal privilege provisions to pre-trial proceedings;
- the definitions of 'client' and 'lawyer';
- availability of client legal privilege to corporations;

1205

For example, s 123 curtails the privilege by conferring on a defendant the right to adduce evidence of documents or communications that would otherwise be privileged; s 124 removes the common law requirement that where the lawyer is jointly engaged by two or more clients the privilege must be waived by the clients jointly; and s 126, which provides that evidence of an otherwise privileged communication or document may be adduced if it is 'reasonably necessary to enable a proper understanding' of another communication or document in respect of which the privilege has been lost. See Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 201–3.

1206

This issue is discussed at para 7.135–7.142 of this Report.

1207

Uniform Evidence Acts s 121(3). See Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 210–13.

1208

Uniform Evidence Acts s 120. See Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 213–14.

- protection of copies of documents;
- communications with third parties;
- loss of client legal privilege; and
- client legal privilege and government agencies.

7.39 Each of these will be considered in turn.

Application to pre-trial proceedings

7.40 In its Issues Paper, the ALRC posed the following question in relation to the application of client legal privilege to pre-trial proceedings:¹²⁰⁹

Should the uniform Evidence Acts make express provision for client legal privilege to apply in contexts such as pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and s 264 notices under the *Income Tax Assessment Act 1936* (Cth)?

7.41 The ALRC's consideration of privileges in its original evidence inquiry was confined to their operation in trial proceedings.¹²¹⁰ The subsequent adoption of Chapter 3, Part 3.10 of the uniform Evidence Acts has meant that one set of rules applies to proceedings at trial while another applies to pre-trial evidence gathering processes.¹²¹¹

7.42 The High Court has held that the privilege provisions of the uniform Evidence Acts do not apply to the discovery, production and inspection of documents in situations other than the adducing of evidence.¹²¹²

7.43 The Supreme and District Courts of New South Wales have amended their rules to incorporate the principles of the uniform Evidence Acts to certain pre-trial civil proceedings.¹²¹³ The ALRC noted that this extension to pre-trial civil proceedings has apparently not caused any difficulty and that it has been

1209 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11-1, post para 11.15.

1210 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.9.

1211 Ibid para 13.6.

1212 Ibid para 13.11, citing *Mann v Carnell* (1999) 201 CLR 1; and *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49. See Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 196-7.

1213 *Uniform Civil Procedure Rules 2005* (NSW). See rr 1.9 (Objections to production of documents and answering of questions founded on privilege), 5.7 (Preliminary discovery and inspection – Privilege), 22.2 (Objections to specific interrogatories) and Dictionary definition of 'privileged document' and 'privileged information', which incorporate the concept of privilege as it applies under the uniform Evidence Acts to subpoenas, notices to produce, oral examinations, discovery and inspection of documents and interrogatories in civil proceedings. See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.10360].

suggested that there is no reason why the privilege provisions could not be extended further, to apply to pre-trial criminal proceedings.¹²¹⁴

The ALRC's proposal

7.44 The ALRC is of the view that a dual system of client legal privilege operating in any one jurisdiction is undesirable. The present position is not only confusing but, if continued, may lead to increasing disparity between the rules at common law and those that apply under the uniform Evidence Acts.¹²¹⁵

7.45 The ALRC proposed that the client legal privilege provisions of the uniform Evidence Acts should, therefore, be extended:¹²¹⁶

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

The QLRC's view

7.46 In Queensland, legal professional privilege is governed by the common law. At common law, the application of the privilege is not confined to trial proceedings, being available pre-trial and in the context of non-judicial investigatory procedures.¹²¹⁷

7-2 The QLRC:

- (a) notes that, in Queensland, legal professional privilege applies in pre-trial and non-judicial investigatory procedures; and**
- (b) considers that, the ALRC's proposal to extend the client legal privilege provisions of the uniform Evidence Acts to pre-trial proceedings and other situations in which documents can be compulsorily disclosed may lessen the confusion in having a 'dual system' of privileges operating in those jurisdictions where the uniform Evidence Acts apply.**

¹²¹⁴ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.44.

¹²¹⁵ *Ibid* para 13.43.

¹²¹⁶ *Ibid* Proposal 13–1, post para 13.49.

¹²¹⁷ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [10] (Gleeson CJ Gaudron, Gummow and Hayne JJ), citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [25250].

Definition of 'client'

7.47 In its Issues Paper, the ALRC posed the following question in relation to the definitions of 'client' and 'lawyer' that apply to the client legal privilege provisions of the uniform Evidence Acts:¹²¹⁸

Do the definitions of 'client', 'lawyer' and 'party' in s 117 of the uniform Evidence Acts require reconsideration or redrafting?

7.48 Section 117 of the uniform Evidence Acts sets out a number of definitions that apply to the provisions dealing with client legal privilege. Section 117(1) provides that the term 'client' includes:

- (a) an employer (not being a lawyer) of a lawyer;
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is:
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

7.49 The concern about this definition is the provision in paragraph (a) of the definition that a lawyer who employs another lawyer does not qualify as a client, while paragraph (c) of the definition does not similarly restrict government employers.¹²¹⁹

7.50 In its Discussion Paper, the ALRC noted that:¹²²⁰

¹²¹⁸ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–3, post para 11.28.

¹²¹⁹ Ibid para 11.25; Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.52.

¹²²⁰ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.55. The Australian Law Reform Commission suggested that this may have been included in the definition as a result of the distinction drawn between employees of government and non-government agencies by Brennan J in *Waterford v Commonwealth* (1987) 163 CLR 54.

The original ALRC evidence inquiry did not make specific reference to this issue and, in the drafting of the Bill, the proviso that a private employer of a lawyer not be a lawyer was added.

7.51 Submissions in response to this issue supported a wider definition of 'client' to include an employer of a lawyer who is also a lawyer, provided there is a sufficient degree of independence between the employer and employee.¹²²¹

7.52 In *Waterford v Commonwealth*,¹²²² a majority of the High Court held that legal professional privilege could apply to evidence of confidential communications pertaining to legal advice between a federal government agency and its own salaried legal officers.¹²²³ Three members of the High Court also considered the position of an employed legal adviser more generally. Deane J¹²²⁴ and Dawson J¹²²⁵ considered that legal professional privilege could apply where the person providing the legal advice is a salaried employee provided the employee is both competent and independent. Brennan J disagreed, however, considering that the position of a salaried lawyer could not be assimilated with that of an independent lawyer.¹²²⁶ The question of independence is one of fact to be determined in each case.¹²²⁷

7.53 In a recent New South Wales Court of Appeal decision,¹²²⁸ Spigelman CJ commented that is now well established at common law that an in-house lawyer is entitled to claim legal professional privilege on behalf of his or her employer as a client. Spigelman CJ considered that this position is confirmed in the uniform Evidence Acts by virtue of the definition in section 117 of 'client' to include 'an employer (not being a lawyer) of a lawyer'.¹²²⁹

1221 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.53, 13.54.

1222 (1987) 163 CLR 54.

1223 Note the view of McNicol that this case has not firmly established that 'client' includes private employers of a lawyer: McNicol SB, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 193.

1224 (1987) 163 CLR 54, 81–2. Note that Deane J thought that, to attract the privilege, salaried lawyers should hold minimum academic or practical qualifications, be listed on a roll of current practitioners, and hold a current practising certificate or work under the supervision of a person who meets those requirements.

1225 *Ibid* 101.

1226 *Ibid* 72.

1227 *Australian Securities and Investments Commission v Rich* [2004] NSWSC 1089, [41] (Austin J), citing *Southern Equities Corporation Ltd (in liq) v Arthur Andersen & Co (No 6)* [2001] SASC 398, [11] (Debelle J).

1228 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47, [18].

1229 *Ibid* [18], citing *A-G (NT) v Kearney* (1985) 158 CLR 510, 530–1; *Waterford v Commonwealth* (1987) 163 CLR 54, 61–2, 79–82, 95; and *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100, 102.

The ALRC's proposal

7.54 The ALRC was 'persuaded' that the privilege should apply to relevant communications between an employed lawyer and the employer as client, provided the requisite degree of independence exists between them. The ALRC proposed in its Discussion Paper that:¹²³⁰

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

7.55 However, the ALRC did not include a specific proposal that, for the privilege to apply, the lawyer must be acting independently.

The QLRC's view

7.56 The decision and reasoning in *Waterford v Commonwealth*¹²³¹ has been applied with approval in Queensland.¹²³² In *Re Citibank Ltd*,¹²³³ Williams J held that legal professional privilege may attach to communications between an in-house solicitor and his or her employer.

7.57 In that case, Williams J referred to the statement of principle by Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*,¹²³⁴ that barristers and solicitors employed as legal advisers by a single employer are regarded by the law as in every respect in the same position as those who practise on their own account, are subject to the same duties to their client and to the court, must respect the same confidence and have the same privileges. Williams J considered that the correctness of this passage was accepted by Mason and Wilson JJ in *Waterford v Commonwealth*.¹²³⁵

7.58 It has been held at common law that the privilege will apply to in-house lawyers. Although the QLRC is not aware of any case dealing specifically with the question, it is of the view that there is no reason in principle why the privilege should not apply to an employer of a lawyer, who is also a lawyer. The QLRC does not see any justification for the existing exclusion in section 117(1) of the uniform Evidence Acts.

7.59 The QLRC considers that the requirement of independence is necessary to attract the privilege, and assumes that the ALRC's proposals in

1230 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 13–2, post para 13.59.

1231 (1987) 163 CLR 54.

1232 See for example *Re Fritz* [1995] 2 Qd R 580, 585 (McPherson JA).

1233 [1989] 1 Qd R 516, 519.

1234 [1972] 2 QB 102, 129.

1235 (1987) 163 CLR 54, 61 (Mason and Wilson JJ).

relation to the definitions of 'client' and 'lawyer' will expressly include this requirement.

7-3 The QLRC:

- (a) notes that legal professional privilege appears to be available at common law, as it is applied in Queensland, to an employer of a lawyer, who is also a lawyer;
- (b) considers that the ALRC's proposal to allow that client legal privilege is available to an employer of a lawyer who is also a lawyer is consistent with the common law, provided that there is an express requirement of independence.

7-4 The QLRC does not object to the ALRC's proposal to amend the definition of 'client' in section 117(1) of the uniform Evidence Acts to allow that a 'client' may include an employer of a lawyer, provided that there is an express requirement of independence.

Definition of 'lawyer'

7.60 Section 117(1) of the uniform Evidence Acts provides:

lawyer includes an employee or agent of a lawyer.

7.61 'Lawyer' is further defined to mean a barrister or solicitor.¹²³⁶

7.62 The concern about this definition was whether the lawyer must hold a current practising certificate or whether it is sufficient that the lawyer be admitted as a legal practitioner on the roll of the relevant court, particularly in the context of 'in-house' lawyers.¹²³⁷

7.63 The question whether a lawyer must hold a current practising certificate for a valid claim of privilege has not been settled at common law. While Deane J commented in *Waterford v Commonwealth*¹²³⁸ that a practising certificate would be required in the case of salaried lawyers,¹²³⁹ this requirement was not referred to in the judgments of either Mason, Wilson, Brennan or Dawson JJ.

¹²³⁶ Uniform Evidence Acts s 3(1), Dictionary, Part 1 (definition of 'lawyer').

¹²³⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.60–13.61.

¹²³⁸ (1987) 163 CLR 54.

¹²³⁹ *Ibid* 81–2.

7.64 The question was most recently considered by Lee J of the Federal Court in *Candacal Pty Ltd v Industry Research & Development Board*.¹²⁴⁰ In that case, a statutory body established to perform functions of the Department of Taxation sought and obtained advice from a sub-branch of the Department. The officers of that sub-branch did not hold practising certificates, but were admitted to a roll of practitioners.

7.65 On the facts of the case, Lee J considered that, by virtue of section 55 of the *Judiciary Act 1903* (Cth), the legal officers in question were entitled to practise as solicitors or barristers in the Australian Capital Territory without a practising certificate.¹²⁴¹ However, in relation to the argument that client legal privilege could not attach to communications between a client and a practitioner who did not hold a practising certificate, Lee J commented generally that:¹²⁴²

In the end the question is one of fact, namely, whether the client and the practitioner expected and accepted that the obligations of an independent legal practitioner were to be met by the practitioner. If a practitioner employed as an officer of a government department or entity was regarded as, and accepted the responsibilities of, a legal advisor, then the fact that he or she was not practising his or her professional skill on his or her own account, or as an employee of a firm of practitioners, would not result in the denial of client legal privilege for communications with that practitioner regarding the seeking and providing of such legal advice.

7.66 Lee J held that the officers had been treated as legal practitioners able to provide independent and competent advice notwithstanding their employment within the department and that, accordingly, the claims of legal professional privilege were validly made.¹²⁴³

7.67 The ALRC referred in its Discussion Paper¹²⁴⁴ to the judgment of the Australian Capital Territory Supreme Court in *Vance v McCormack*,¹²⁴⁵ in which Crispin J held that the privilege will attach only if the lawyer holds a current practising certificate. The ALRC also noted,¹²⁴⁶ however, the judgment of the Administrative Appeals Tribunal in *McKinnon and Secretary, Department of Foreign Affairs and Trade*.¹²⁴⁷ In that case, Downes J held that the relevant test

1240 [2005] FCA 649.

1241 Ibid [98].

1242 Ibid [99].

1243 Ibid [107]–[108].

1244 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.62.

1245 [2004] ACTSC 78.

1246 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.64.

1247 [2004] AATA 1365.

is not whether the lawyer has a practising certificate but ‘whether the advice had the necessary quality of being independent advice’.¹²⁴⁸

7.68 In another recent case, the New South Wales Court of Appeal held that the status of an in-house lawyer may well be a relevant consideration in determining whether a document was brought into existence for a purpose that was both privileged and dominant, given that an in-house lawyer is ‘more likely to act for purposes unrelated to legal proceedings than an external solicitor’.¹²⁴⁹

7.69 Heydon notes in *Cross on Evidence* that, in respect of in-house lawyers, ‘it will be necessary to analyse precisely in what capacity that lawyer deals with the communication for it is only a communication which is sent or received by a lawyer, *qua* lawyer, that is entitled to protection’.¹²⁵⁰

The ALRC’s proposal

7.70 The ALRC considered that the application of the ‘dominant purpose test’ to the relevant communications or documents satisfactorily limits the operation of the privilege, and addresses the concern that lawyers who provide general policy or risk management advice might have the entirety of their work, and not just that which related to legal advice, protected by the privilege.¹²⁵¹

7.71 The ALRC also questioned whether client legal privilege should be available in respect of advice by an overseas lawyer.¹²⁵² It referred¹²⁵³ to the judgment of Allsop J in the Full Court of the Federal Court in *Kennedy v Wallace*.¹²⁵⁴ Allsop J held that the privilege should apply equally to advice obtained from overseas lawyers on the basis that the public interest in the administration of justice, on which the privilege is based, is not confined to that of Australia.¹²⁵⁵ Black CJ and Emmet J agreed.¹²⁵⁶

7.72 Accordingly, the ALRC proposed that the definition of ‘lawyer’ in the Dictionary of the uniform Evidence Acts be amended to provide that the lawyer

1248 Ibid [51], citing *Australian Hospital Care Pty Ltd v Duggan (No 2)* [1999] VSC 131. Note also that in *Candacal Pty Ltd v Industry Research & Development Board* [2005] FCA 649, discussed at para 7.64–7.66 of this Report, Lee J rejected the applicant’s submission, based on the decision in *Vance v McCormack*, that client legal privilege could not attach where the practitioner did not hold a practising certificate.

1249 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47, [24] (Spigelman CJ).

1250 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25245].

1251 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.68.

1252 Ibid para 13.69.

1253 Ibid.

1254 (2004) 213 ALR 108.

1255 Ibid [198]–[199].

1256 Ibid [62].

must be admitted (but not required to hold a practising certificate) and that the lawyer may be an overseas lawyer:¹²⁵⁷

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

The QLRC's view

7.73 In Queensland, the Court of Appeal has held that legal professional privilege will apply only where the legal adviser is admitted to practice, though it has not gone so far as to stipulate that the lawyer must hold a current practising certificate.¹²⁵⁸

7.74 The ALRC has not addressed the situation where a lawyer has been suspended or is otherwise not entitled to practise.

7-5 The QLRC:

- (a) notes that the question whether a current practising certificate must be held by the lawyer for legal professional privilege to arise is not settled at common law, as it is applied in Queensland;**
- (b) considers that the ALRC's proposal has not addressed the situation where a lawyer is suspended or otherwise not entitled to practise;**
- (c) considers that the ALRC's proposed amendment to the definition of 'lawyer' is consistent with the common law, as it is applied in Queensland, provided that there is an express requirement of independence;**
- (d) considers that, although there is some advantage in the proposed amendment's clarification of the meaning of 'lawyer', the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts; and**

¹²⁵⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 13–3, post para 13.71.

¹²⁵⁸ *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233, [21] (Williams JA, with whom McPherson JA and Ambrose J agreed), cited in *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 Qd R 146, [17] (Holmes J). Note that the requirements relating to practising certificates are contained in the *Legal Profession Act 2004* (Qld).

(e) agrees with the ALRC's proposed amendment to the definition of 'lawyer' in the uniform Evidence Acts, provided that there is an express requirement of independence.

Availability of client legal privilege to corporations

7.75 In a submission to the ALRC, the Australian Securities and Investments Commission (ASIC) raised a concern about the availability of client legal privilege to corporations.¹²⁵⁹ ASIC noted that the decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹²⁶⁰ effectively ended debate about whether corporations could validly claim the privilege,¹²⁶¹ but thought that the question warranted further consideration.

7.76 ASIC considered that the same policy arguments upon which the privilege against self-incrimination is denied to corporations¹²⁶² could be applied to deny corporations client legal privilege.¹²⁶³

7.77 In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, however, Kirby J drew a distinction between legal professional privilege and the privilege against self-incrimination, referring to the 'different historical, legal and policy considerations almost all related to individual human beings' upon which the privilege against self-incrimination rests.¹²⁶⁴ Kirby J considered that, in contrast, legal professional privilege is 'a fundamental civil right belonging also to artificial persons such as corporations'.¹²⁶⁵

1259 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.75.

1260 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

1261 For a discussion, prior to the decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, of whether or not the privilege should be available to corporations, see Waye V, 'The Corporation and Legal Professional Privilege' (1997) 8 *Australian Journal of Corporate Law* 25.

1262 *Environmental Protection Authority v Caltex* (1993) 178 CLR 477.

1263 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.76.

1264 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [103] (Kirby J).

1265 *Ibid.*

7.78 The ALRC considered this issue in an earlier Report, in which it recommended that, in the absence of express legislative abrogation, the privilege should be available to both individuals and corporations.¹²⁶⁶

The ALRC's view

7.79 In its Discussion Paper, the ALRC maintained the position it took in its earlier Report, and did not propose any amendment to the definition in section 117(1) of 'client' to exclude corporations.¹²⁶⁷

The QLRC's view

7.80 The decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* that legal professional privilege is available to corporations¹²⁶⁸ applies in Queensland.

7-6 The QLRC:

- (a) notes that, in Queensland, corporations are entitled to claim legal professional privilege;**
- (b) considers that the definition of 'client' in section 117(1) of the uniform Evidence Acts is consistent with the position in Queensland in that it is wide enough to include corporations; and**
- (c) agrees with the ALRC that no amendment to the definition of 'client' in section 117(1) is necessary in order to clarify that it applies to corporations.**

Copies of documents

7.81 In its Issues Paper, the ALRC posed the following question in relation to copies of documents:¹²⁶⁹

Is there a need to amend the uniform Evidence Acts to address the issue of whether a copy of a document can be privileged where the original document is not privileged?

¹²⁶⁶ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (ALRC 95, 2002) para 19.47.

¹²⁶⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.80–13.81.

¹²⁶⁸ See para 7.77 of this Report.

¹²⁶⁹ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–4, post para 11.32.

7.82 At common law, a copy of a privileged original document will also be privileged, even if it is made for a non-privileged purpose such as record keeping or administration.¹²⁷⁰

7.83 It is also clear that, at common law, copies or collections of non-privileged documents may attract privilege if the copy was brought into existence for the purpose of seeking advice or for use in actual or contemplated litigation.¹²⁷¹

7.84 This question was considered by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd.*¹²⁷² In that case, a majority of the High Court held that a copy of a document made solely for a privileged purpose would be privileged even if the original document was not privileged.¹²⁷³ This is based on the reasoning that it is the communication between the client and lawyer or between the lawyer and third party on behalf of the client that is relevant and not the document itself.¹²⁷⁴

No doubt it seems contrary to common sense that the law should give privilege to the copy of a document when it does not give it to the original. But ... legal professional privilege turns on purpose, and no argument is needed to show that the purpose of a client or lawyer in making a copy document may be very different from the purpose of the person who created the original.

... The privilege attaches whenever the communication or material is made or recorded for the purpose of confidential use in litigation or the obtaining of confidential legal advice. ... As long as the communication was made or the material recorded for the sole purpose of legal advice or pending litigation and was intended to be confidential, the actual form of the communication or the recording is irrelevant.

7.85 Since this decision, the 'sole purpose' test, for which *Grant v Downs*¹²⁷⁵ was the authority, has been replaced with the 'dominant purpose' test.¹²⁷⁶

¹²⁷⁰ Heydon JD, *Cross on Evidence* (7th ed, 2004) [25275], citing *Brambles Holdings Ltd v Trade Practices Commission (No 3)* (1981) 58 FLR 452, 458 in which Frank J agreed with the statement in *Komacha v Orange City Council* (Unreported, Supreme Court of New South Wales, Rath J, 30 August 1979) that copies of a privileged document will themselves be accorded the privilege; and *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652, 656 (Clarke J) in which it was held that a copy of a privileged document is also privileged even if it cannot be shown that the sole purpose of copying the document was a privileged purpose. See also McNicol SB, *Law of Privilege* (1992) 94–5.

¹²⁷¹ Heydon JD, *Cross on Evidence* (7th ed, 2004) [25275], citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 543–4, 553–4, 571–2. See also Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 44–7; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.174].

¹²⁷² (1997) 188 CLR 501.

¹²⁷³ *Ibid* 507–9 (Brennan CJ), 544–5 (Gaudron J), 554 (McHugh J), 572 (Gummow J), 590 (Kirby J), Dawson and Toohey JJ dissenting.

¹²⁷⁴ *Ibid* 552–3 (McHugh J).

¹²⁷⁵ (1976) 135 CLR 674.

¹²⁷⁶ See para 7.31 of this Report.

7.86 The majority of the High Court in *Commissioner of Australian Federal Police v Propond Finance Pty Ltd* also held that there was no requirement for the exercise or application of any knowledge, skill or research on the part of the lawyer in respect of selecting the part to be copied, making the copy or compiling or arranging the copies of the original documents.¹²⁷⁷

7.87 Brennan CJ did, however, consider that there was an important qualification to the proposition that copies of unprivileged documents may become privileged. His Honour noted that, when legal professional privilege is invoked in response to a search warrant, the absence of the discovery procedure has the potential to frustrate the statute under which the search is made.¹²⁷⁸ Brennan CJ held that, in this situation, modification of the general rule is required:¹²⁷⁹

where privileged copies of original documents are seized under a search warrant, some qualification of the privilege is required to ensure that the person executing the warrant should have access to the contents of an unprivileged original to the same extent at least as a party to litigation can obtain access to the contents of an unprivileged original against a party who has or has had the unprivileged original in his or her possession or power. I would state the qualification in this way: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the person seeking to execute the warrant and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the privileged copy loses the privilege.

7.88 Section 118 of the uniform Evidence Acts provides:

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

¹²⁷⁷ (1997) 188 CLR 501, 507–9 (Brennan CJ), 542–4 (Gaudron J), 552–5 (McHugh J), 571–2 (Gummow J), 587–90 (Kirby J).

¹²⁷⁸ Ibid 511.

¹²⁷⁹ Ibid 512.

7.89 There had been some debate as to whether section 118 would protect copies of otherwise non-privileged documents.¹²⁸⁰ However, the question has been recently considered by the New South Wales Supreme Court in *Green v AMP Life Ltd.*¹²⁸¹

7.90 In that case, Campbell J considered that disclosure of material, such as copies of unprivileged documents provided to solicitors to assist them in carrying out their instructions, would disclose confidential communications between the solicitors and the clients.¹²⁸² Campbell J held that, in this case, the copies were made for the dominant purpose of the lawyer providing legal advice to the client, as required by section 118 and, therefore, attracted client legal privilege under that section.¹²⁸³ The test is whether the adducing of the evidence, that is, the copy, would disclose a confidential communication or the contents of a confidential document and whether the dominant purpose test is satisfied.¹²⁸⁴

7.91 This accords with the position at common law that a copy of an unprivileged document will become privileged if it was made for a privileged purpose.

7.92 The ALRC noted in its Discussion Paper that there was some support in the submissions for the uniform Evidence Acts to reflect the common law as stated in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd.*¹²⁸⁵ Other submissions considered, however, that express reference to the position at common law is not necessary, and that each matter needs to be considered on its own facts.¹²⁸⁶

The ALRC's view

7.93 In its Discussion Paper, the ALRC commented that sections 118 and 119 of the uniform Evidence Acts already contemplate the situation where a copy is made for the dominant purpose of providing legal advice or of preparing for litigation. Consequently, it did not propose any amendment to sections 118 or 119 of the uniform Evidence Acts to reflect the common law rule in relation to copies of unprivileged documents.¹²⁸⁷

1280 McNicol SB, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 194; Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.10420].

1281 [2005] NSWSC 95.

1282 Ibid [18].

1283 Ibid [21]. Given the similar wording of s 119 of the uniform Evidence Acts, it is likely the same approach would be taken under that section.

1284 Ibid [17]–[19].

1285 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.86–13.87.

1286 Ibid para 13.88–13.89.

1287 Ibid para 13.90.

The QLRC's view

7.94 In Queensland, the question whether copies of unprivileged documents will attract privilege is governed by the common law. The test decided in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*¹²⁸⁸ was recently applied by the Queensland Supreme Court.¹²⁸⁹ Holmes J held that copies of unprivileged documents communicated to the solicitors at the client's direction for the dominant purpose of obtaining legal advice were privileged.¹²⁹⁰

7-7 The QLRC:

- (a) notes that, at common law, as it is applied in Queensland, a copy of an unprivileged document may become privileged if the copy was made for the dominant purpose of obtaining legal advice or of preparing for litigation; and
- (b) considers that sections 118 and 119 of the uniform Evidence Acts are consistent with the position at common law, as it is applied in Queensland, to the extent that the wording of those sections is wide enough to allow copies of unprivileged documents made for the purpose of obtaining legal advice or of preparing for litigation to be protected.

7-8 The QLRC agrees with the ALRC that no amendment to sections 118 and 119 of the uniform Evidence Acts is necessary in order to clarify that copies of unprivileged documents made for the purpose of obtaining legal advice or of preparing for litigation will attract the privilege.

Communications with third parties

7.95 At common law, legal professional privilege comprises legal advice privilege and litigation privilege. Historically, the common law has distinguished between documents prepared by an agent or employee of the client or the lawyer and those prepared by independent third parties. Legal professional privilege attached to documents prepared by an agent or employee of a client

¹²⁸⁸ (1997) 188 CLR 501.

¹²⁸⁹ *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] QSC 120.

¹²⁹⁰ Ibid [17]–[18]. Note that Holmes J made this finding subject to any abrogation by r 212(2) of the *Uniform Civil Procedure Rules 1999* (Qld) but found that, in this case, r 212 did not apply: at [19]–[20].

Note, however, that in *Criminal Justice Commission v Connolly* [1997] 2 Qd R 586 Thomas J (at 595) held that extracts of newspaper articles and transcripts of court proceedings, 'which are of public and unprotected origin', were capable of attracting legal professional privilege where they were put together in such a way as to make apparent a certain line of defence or forensic approach. That test differs from the test articulated by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, which had already been decided.

and communicated to the lawyer ‘for the purpose of obtaining legal advice or for the purpose of obtaining information necessary for use in existing or anticipated litigation’.¹²⁹¹ However, documents prepared by third parties have been protected only when communicated for the purpose of actual or contemplated litigation.¹²⁹²

7.96 However, in *Pratt Holdings v Commissioner of Taxation*,¹²⁹³ the Full Federal Court recently extended the privilege in respect of third party communications to situations where the communication was made for the dominant purpose of obtaining legal advice. In that case, it was held that a document prepared by a third party on the client’s instruction and communicated to the lawyer, by the client, for the dominant purpose of obtaining legal advice is capable of attracting legal professional privilege.¹²⁹⁴

7.97 In that case, the client requested a firm of accountants to prepare a valuation of assets, on the advice of its lawyers who had been retained to advise the client. The accountants’ valuation, contained in a briefing paper, was sent to the client who then conveyed it to the lawyers. The Commissioner of Taxation sought access to documents held by the firm of accountants, including the briefing paper. The accountants claimed that the briefing paper was subject to legal professional privilege and refused to grant access to it.

7.98 The Full Court considered that, ‘[n]otwithstanding the growing elasticity of the meaning of the term “agent”’ the accountant in this case could not be found to be the client’s agent.¹²⁹⁵ The accountant was not engaged as the client’s agent in communicating with the lawyer.¹²⁹⁶ Failing to find an agency relationship, however, did not preclude the third party communication from attracting privilege.

7.99 The Court rejected the artificial distinction between documents prepared by an agent, where the document is provided direct to the lawyer, and those prepared by a third party and conveyed to the lawyer through the client. The Court held that, as long as the dominant purpose test is satisfied, such documents can attract the privilege.¹²⁹⁷ Finn J stated:¹²⁹⁸

1291 McNicol SB, *Law of Privilege* (1992) 44–5.

1292 *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44, 52–5, following *Wheeler v Le Marchant* (1881) 17 Ch D 675.

1293 *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217.

1294 The privilege may not apply where the lawyer is requested by the client, *carte blanche*, to communicate directly with the third party: *789TEN Pty Ltd v Westpac Banking Corporation Ltd* (2005) 215 ALR 131, [72]–[73] (Bergin J). See also *Re Southland Coal Pty Ltd* [2005] NSWSC 259, [77] (Young CJ in Eq).

1295 (2004) 207 ALR 217, [40] (Finn J).

1296 *Ibid.*

1297 *Ibid* [3], [39] (Finn J), [105] (Stone J).

1298 *Ibid* [41].

The important consideration in my view is not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party. If that function was to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege.

7.100 The Court cautioned, however, that it must clearly be established that the client's intention to use the third party's document to obtain legal advice was the dominant purpose of the document's existence.¹²⁹⁹ As such, the dominant purpose test would appropriately limit the availability of the privilege.

7.101 The policy basis for the Court's decision in *Pratt Holdings v Commissioner of Taxation* was that, faced with increasingly complex issues, clients themselves may not have the necessary skills or knowledge to provide adequate instructions to their lawyer. If the privilege was not extended, clients would have a disincentive to seek the necessary assistance of third parties.¹³⁰⁰

7.102 The uniform Evidence Acts provide for client legal privilege (section 118) and litigation privilege (section 119). These sections reflect the position at common law before the decision in *Pratt Holdings v Commissioner of Taxation*. Client legal privilege will attach to communications between a client, including an employee or agent of the client, and the lawyer, including an employee or agent of the lawyer.¹³⁰¹ Third party communications are protected only in the context of litigation privilege under section 119.

7.103 In light of the decision in *Pratt Holdings v Commissioner of Taxation*, the ALRC considered whether sections 118 and 119 of the uniform Evidence Acts should be amended to reflect the development of the common law, particularly given the proposed extension of those provisions to pre-trial proceedings.¹³⁰²

The ALRC's proposals

7.104 In its Discussion Paper, the ALRC accepted the reasoning of the Court in *Pratt Holdings v Commissioner of Taxation*, and expressed the view that communications to the lawyer of information obtained from a third party for the dominant purpose of providing legal advice to the client should fall within the scope of the privilege.¹³⁰³

1299 Ibid [45]–[47] (Finn J), [105]–[106] (Stone J).

1300 Ibid [42] (Finn J), [104] (Stone J).

1301 See the definition of 'client' and of 'lawyer' in s 117(1) of the uniform Evidence Acts, and para 7.48 and 7.60 of this Report. See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.10560].

1302 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.91.

1303 Ibid para 13.109.

7.105 The ALRC noted that sections 118 and 119 of the uniform Evidence Acts were originally intended to mirror the common law. The ALRC commented that it was important that the provisions ‘do not fall behind developments in judicial thinking that are consistent with the overall philosophy on which [the] provisions are based’.¹³⁰⁴ As such, the ALRC proposed that section 118 be amended as follows:¹³⁰⁵

Section 118(c) of the uniform Evidence Acts should be amended to replace the words ‘the client or a lawyer’ with ‘the client, a lawyer or another person’.

The QLRC’s view

7.106 The operation of legal advice privilege in Queensland is governed by the common law. *Pratt Holdings v Commissioner of Taxation* has been cited with approval by the Supreme Court of Queensland.¹³⁰⁶ The position in Queensland, therefore, is that confidential third party communications made for the dominant purpose of obtaining legal advice are protected.

7-9 The QLRC:

- (a) notes that the position at common law, as it is applied in Queensland, is that confidential third party communications made for the dominant purpose of obtaining legal advice are protected by legal professional privilege;**
- (b) considers that the ALRC’s proposal to extend section 118 of the uniform Evidence Acts to cover documents prepared by another person is consistent with the common law, as it applies in Queensland; and**
- (c) does not object to the ALRC’s proposal to amend section 118 of the uniform Evidence Acts to cover documents prepared by another person.**

1304 *Ibid.*

1305 *Ibid* Proposal 13–4, post para 13.111.

1306 *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] QSC 120, [17] (Holmes J).

Loss of client legal privilege

7.107 At common law, legal professional privilege will be lost in respect of a particular communication or document if the privilege is explicitly or implicitly waived by the client.¹³⁰⁷ The privilege may also be lost in other circumstances, such as where the document or communication is inadvertently disclosed¹³⁰⁸ and where the client brings proceedings against the lawyer.¹³⁰⁹ In addition, the privilege does not attach to confidential communications or documents made in the furtherance of an unlawful purpose.¹³¹⁰

7.108 Sections 121 to 126 of the uniform Evidence Acts set out the circumstances in which client legal privilege will be lost under those Acts. Client legal privilege may be lost, and evidence of the communication or document adduced, if:

- the evidence relates to a client or party who has died (section 121(1));
- the evidence would prevent the court from enforcing a court order if not adduced (section 121(2));
- the evidence is of a communication or document that affects a right of a person (section 121(3));
- the client or party, expressly or impliedly, consents to the disclosure or knowingly and voluntarily discloses the substance of the evidence (section 122);
- the evidence will be adduced by the defendant in a criminal proceeding (section 123);
- in civil proceedings where the lawyer was jointly engaged by two or more clients, and one of those clients seeks to adduce otherwise privileged material (section 124);
- the communication or document was made or prepared in the furtherance of the commission of a fraud, offence, an act attracting a civil penalty, or an abuse of power (section 125); or

¹³⁰⁷ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.175]. See *Mann v Carnell* (1999) 201 CLR 1, recently discussed in *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 210 ALR 220; and in *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392.

¹³⁰⁸ Unless an application is made to the court before the material goes into evidence, in which case the court may exercise its discretion to treat the privilege as intact: Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.180].

¹³⁰⁹ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.186].

¹³¹⁰ *Ibid* [A.181], citing *R v Cox and Railton* (1884) LR 14 QBD 153; *Minter v Priest* [1929] 1 KB 655; *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515.

- the evidence is reasonably necessary to enable a proper understanding of other evidence for which the privilege has been lost (section 126).

7.109 The ALRC raised a number of questions in relation to some of these provisions in its Issues Paper and Discussion Paper, each of which will be discussed in turn.

Loss of privilege by consent and waiver

7.110 In its Issues Paper, the ALRC posed the following question in relation to section 122 of the uniform Evidence Acts, which relates to consent to disclosure and waiver of client legal privilege:¹³¹¹

Are concerns raised by the operation of s 122 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

7.111 Section 122 provides:¹³¹²

122 Loss of client legal privilege: consent and related matters

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:
 - (a) in the course of making a confidential communication or preparing a confidential document; or
 - (b) as a result of duress or deception; or
 - (c) under compulsion of law; or
 - (d) if the client or party is a body established by, or a person holding office under, an Australian law—to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.
- (3) Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

¹³¹¹ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–7, post para 11.41.

¹³¹² For a summary of the operation of s 122 see *United Rural Enterprises v Lopmand* [2002] NSWSC 1142.

- (4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:
- (a) a lawyer acting for the client or party; or
 - (b) if the client or party is a body established by, or a person holding an office under, an Australian law—the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.
- (5) Subsections (2) and (4) do not apply to:
- (a) a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
 - (b) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers).

7.112 Section 122(1) provides that evidence can be adduced if a client or party gives his or her consent. Section 122(2) provides that evidence can be adduced if the client has 'knowingly and voluntarily' disclosed the 'substance of the evidence'.¹³¹³

7.113 There is some debate as to the precise meaning of the words 'knowing and voluntary',¹³¹⁴ although it has been held that:¹³¹⁵

Whatever may be the precise limits of those words, they do not apply in a case where everything indicates an intention to claim privilege in respect of the document and what has gone wrong is attributable to sheer inadvertence or carelessness.

¹³¹³ In its Interim Report, the ALRC originally proposed a test of voluntary disclosure. However, it considered that the privilege should not be lost if the material was disclosed accidentally, illegally, under erroneous compulsion or by trickery: Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 885.

¹³¹⁴ See Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.11080]. See also *Australian Securities and Investments Commission v Rich* [2004] NSWSC 934, [3]–[5] Austin J, citing *Ampolex v Perpetual Trustee Co (Canberra) Pty Ltd* (1996) 40 NSWLR 12, 22 (Rolfe J). Note also that there has been some criticism of the expression 'substance of the evidence' used in s 122(2) as 'elastic, and thus expandable' and which imposes a quantitative test in contrast to the qualitative assessment undertaken at common law: Desiatnik RJ, *Legal Professional Privilege in Australia* (2nd ed, 2005) 205.

¹³¹⁵ *Sovereign v Bevillesta* [2000] NSWSC 521, [23] (Austin J).

7.114 At common law, the holder of the privilege may relinquish it by waiver. Whether the privilege has been waived is determined by reference to the client's behaviour, rather than the client's intention. Waiver can be either express or implied.¹³¹⁶ Prior to the High Court's decision in *Mann v Carnell*,¹³¹⁷ the test was simply one of fairness – that is, whether, by reason of the privilege holder's conduct, for example, in using or referring to material while asserting that it or some related material is privileged, it becomes unfair to maintain the privilege.¹³¹⁸

7.115 However, in *Mann v Carnell*,¹³¹⁹ the test was reformulated in terms of inconsistency:¹³²⁰

It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. ...

What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

7.116 The ALRC noted a number of cases that had considered whether the common law test is applicable to the operation of section 122.¹³²¹

7.117 The question was more recently considered by the New South Wales Supreme Court in *Singapore Airlines v Sydney Airports Corporation*¹³²² in which McDougall J considered that:¹³²³

... the balance of authority is in favour of the proposition that the common law test, as enunciated most recently in *Mann*, can be applied to the statutory concept of consent referred to in s 122(1) of the Act. It follows, I think, that in asking whether there has been a consent for the purposes of s 122(1):

1316 *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). See also Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.175].

1317 (1999) 201 CLR 1.

1318 *A-G (NT) v Maurice* (1986) 161 CLR 475, 483 (Gibbs CJ), 487 (Mason and Brennan JJ), 492–3 (Deane J).

1319 (1999) 201 CLR 1.

1320 *Ibid* [28]–[29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). This test has been recently discussed and applied in *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 210 ALR 220; and *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392.

1321 *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346; *Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd* [1999] FCA 925; *Adelaide Steamship Co Ltd v Splavins* (1998) 81 FCR 360; *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152; Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.124–13.128.

1322 [2004] NSWSC 380.

1323 *Ibid* [55].

- (1) The search for consent extends to implied as well as express consent; and
- (2) For the purpose of ascertaining whether there has been implied (or imputed) consent, the common law test remains applicable.

7.118 This approach has been endorsed and adopted by subsequent cases and appears to reflect the current position.¹³²⁴

7.119 The ALRC questioned whether section 122 should be amended to reflect the common law test in *Mann v Carnell* and noted that many submissions agreed with this approach.¹³²⁵

The ALRC's proposal

7.120 In its Discussion Paper, the ALRC concluded that the test of 'knowing and voluntary' disclosure that is currently included in section 122(2) is appropriate and should remain. It also considered that the *Mann v Carnell* 'inconsistency test', which focuses on the privilege holder's behaviour, would be an attractive additional criteria. In the ALRC's view, the inconsistency test is less subjective than a fairness test alone, 'as was a feature of the common law' during the ALRC's original evidence review.¹³²⁶ In its view, the inconsistency test sits well with the underlying rationale of section 122 'that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end'.¹³²⁷ Accordingly, the ALRC proposed that section 122 be amended:¹³²⁸

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

7.121 The ALRC has included a proposed amended section 122 in its Discussion Paper as follows:¹³²⁹

1324 See *Silver v Dome Resources NL* [2005] NSWSC 349, [15] (Hamilton J); *FKP Constructions Pty Ltd v Smith* [2005] NSWSC 126, [19] (Gzell J); *Wyadra Pty Ltd v Mailler (No 2)* [2005] NSWSC 88, [6] (Gzell J).

1325 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.135–13.137.

1326 *Ibid* para 13.139.

1327 *Ibid*.

1328 *Ibid* Proposal 13–5, post para 13.139.

1329 *Ibid* Appendix 1, 553.

- 122 Loss of client legal privilege: consent and acting inconsistently with the privilege**
- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (4A), this Division does not prevent the adducing of evidence if the client or party has acted in a way that is inconsistent with its relying on section 118, 119 or 120 in relation to the evidence.
- (2A) Without limiting subsection (2), a client or party is taken to have so acted if:
- (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
 - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (3) The reference in paragraph (2A)(a) to a knowing and voluntary disclosure does not include a reference a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.
- (4) ...
- (4A) A client or party is not taken to have acted in a manner inconsistent with its relying on section 118, 119 or 120 in relation to particular evidence merely because:
- (a) the substance of the evidence has been disclosed with the express or implied consent of the client or party to a lawyer acting for the client or party; or
 - (b) the substance of the evidence has been disclosed:
 - (i) in the course of making a confidential communication or preparing a confidential document; or
 - (ii) as a result of duress or deception; or
 - (iii) under compulsion of law; or
 - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held; or
 - (c) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

- (d) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers).

The QLRC's view

7.122 Waiver of legal professional privilege in Queensland is governed by the common law. The *Mann v Carnell* inconsistency test has been applied and followed in Queensland.¹³³⁰

7-10 The QLRC:

- (a) notes that the *Mann v Carnell* inconsistency test applies in Queensland to determine whether legal professional privilege has been waived;
- (b) notes that the ALRC's proposed amendment to section 122(2) of the uniform Evidence Acts will include the inconsistency test that applies in Queensland;
- (c) considers that the issue of waiver of legal professional privilege would require further review if Queensland were to consider adopting the uniform Evidence Acts; and
- (d) does not object to the ALRC's proposal to amend section 122(2) to include an inconsistency test.

Loss of client legal privilege in a criminal proceeding

7.123 In its Discussion Paper, the ALRC raised concerns about the operation of section 123 of the uniform Evidence Acts.

7.124 Section 123 provides:

¹³³⁰

See *R v Dunwoody* (2004) 212 ALR 103, [30] (McMurdo P); *Metyor Inc v Queensland Electronic Switching Pty Ltd* [2002] QSC 252, [4]–[5] (Mullins J); *Rhyse Holdings Pty Ltd v McLaughlins* [2002] QCA 122, [14] (Williams JA).

123 Loss of client legal privilege: defendants

In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

- (a) a confidential communication made between an associated defendant¹³³¹ and a lawyer acting for that person in connection with the prosecution of that person; or
- (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person. [note added]

7.125 The ALRC argued in its Discussion Paper that the effect of section 123 is that the right of a party, usually the prosecution, to claim client legal privilege is lost if the evidence is sought to be adduced by an accused in a criminal proceeding, unless the accused is seeking the evidence from a co-accused.¹³³²

7.126 The inclusion of section 123 in the uniform Evidence Acts was proposed by the ALRC in its Interim Report¹³³³ on the basis of the common law exception to legal professional privilege in criminal proceedings established in *R v Barton*.¹³³⁴ In that case, it was held that, in criminal trials, privilege cannot attach to documents that might, if disclosed to a jury, establish the innocence of the accused.¹³³⁵

7.127 However, the High Court has since disapproved the rule in *R v Barton*, holding that there is no such exception at common law in favour of an accused person in criminal proceedings.¹³³⁶

7.128 Consequently, in jurisdictions in which the uniform Evidence Acts apply, the common law prevents the disclosure of privileged documents pre-trial, but privilege may be lost at trial by virtue of section 123 of the uniform Evidence Acts.

¹³³¹ The term 'associated defendant' is defined in the uniform Evidence Acts s 3(1), Dictionary, Part 1, as follows:

associated defendant, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:

- (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
- (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

¹³³² Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.141.

¹³³³ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 885.

¹³³⁴ [1973] 1 WLR 115.

¹³³⁵ Ibid 118 (Caulfield J).

¹³³⁶ *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 130–1 (Brennan J), 136 (Deane J), 159–60 (McHugh J). See also *DPP (Cth) v Kane* (1997) 140 FLR 468, 478.

7.129 This position has been criticised. On the one hand, it has been said that section 123 does little to assist an accused because ‘in most cases the time for obtaining such material is pre-trial’.¹³³⁷

7.130 On the other hand, submissions were made to the ALRC that, if the uniform Evidence Acts’ privilege provisions were extended to pre-trial matters, the common law right to claim privilege over documents prepared for the purpose of providing legal advice to the Director of Public Prosecutions would be removed.¹³³⁸

The ALRC’s proposal

7.131 The ALRC agreed with the submission that it would be undesirable if client legal privilege in relation to legal advice given to the Director of Public Prosecutions was removed by an extension of the privilege provisions to pre-trial proceedings.¹³³⁹ It considered that the rationale for client legal privilege in promoting full and frank disclosure between lawyer and client should apply equally to the Director of Public Prosecutions, and that significant court time could be wasted by unnecessary applications for access to documents that would yield little, if any, additional relevant material.¹³⁴⁰

7.132 The ALRC therefore proposed that, in the event that the privilege provisions of the uniform Evidence Acts are extended to pre-trial proceedings, section 123 should be amended.¹³⁴¹

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

7.133 The ALRC included a proposed amended section 123 in its Discussion Paper as follows.¹³⁴²

1337 McNicol SB, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 205, citing Roberts G, *Evidence: Proof and Practice* (1998) 225.

1338 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.149–13.150. One respondent suggested, however, that ‘the addition of a “substantial probative value” test to s 123 would stop baseless claims for documents being made by the defence’: at para 13.152. Note the prosecutor’s duty of pre-trial disclosure: *Criminal Procedure Act 1986* (NSW) ss 137, 138, 141. Note similar provisions in Queensland: *Criminal Code* (Qld) ss 590AA–590AX.

1339 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.156.

1340 *Ibid.*

1341 *Ibid* Proposal 13–6, post para 13.158.

1342 *Ibid* Appendix 1, 554–5.

123 Loss of client legal privilege: defendants

- (1) In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:
- (a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or
 - (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.
 - (c) any of the following:
 - (i) a confidential communication made between the prosecutor and a lawyer;
 - (ii) a confidential communication made between 2 or more lawyers acting for the prosecutor;
 - (iii) the contents of a confidential document (whether delivered or not) prepared by any person;

for the dominant purpose of either:

 - (iv) the lawyer, or one or more of the lawyers, providing legal advice to the prosecutor; or
 - (v) the prosecutor being provided with professional legal services relating to a criminal proceeding, or an anticipated or pending criminal proceeding, under a law of the [Commonwealth] [name of State] [name of Territory].
- (2) In paragraph (1)(c), **prosecutor** includes the Director of Public Prosecutions.

The QLRC's view

7.134 At common law, as it is applied in Queensland, there is no exception to legal professional privilege in favour of the accused.¹³⁴³ Legal professional privilege can be claimed in both pre-trial and trial proceedings.

1343

See para 7.127 of this Report.

7-11 The QLRC:

- (a) considers that section 123 of the uniform Evidence Acts, in creating an exception to legal professional privilege for the benefit of an accused, reflects a different approach from the common law, as is applied in Queensland;
- (b) considers that the approach taken to the loss of client legal privilege under section 123 would require further review if Queensland were to consider adopting the uniform Evidence Acts; and
- (c) does not object to the ALRC's proposal to amend section 123 to expressly preserve client legal privilege in respect of legal advice provided to the Director of Public Prosecutions.

Loss of client legal privilege by misconduct

7.135 In its Issues Paper, the ALRC posed the following question in relation to the operation of section 125 of the uniform Evidence Acts:¹³⁴⁴

Are concerns raised by the operation of s 125, in particular the proof of misconduct? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

7.136 Section 125 of the uniform Evidence Acts provides:

125 Loss of client legal privilege: misconduct

- (1) This Division does not prevent the adducing of evidence of:
 - (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
- (2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

¹³⁴⁴

Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11-8, post para 11.45.

- (a) the fraud, offence or act, or the abuse of power, was committed; and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power;

the court may find that the communication was so made or the document so prepared.

- (3) In this section:

power means a power conferred by or under an Australian law.

7.137 Section 125 provides that a confidential communication will not be protected by privilege if it was made in furtherance of a fraud, offence, an act attracting a civil penalty, or an abuse of power.

7.138 There is a similar rule at common law that legal professional privilege will not attach to communications or documents made in furtherance of an unlawful purpose.¹³⁴⁵ Where a party seeks to resist a claim of privilege on this basis, the onus is on that party to persuade the court that the privilege has been lost.¹³⁴⁶ It is not enough to merely assert that the communication was made in furtherance of an unlawful act. There must be prima facie evidence that gives 'colour to the charge'.¹³⁴⁷

7.139 In *Kang v Kwan*,¹³⁴⁸ the Supreme Court of New South Wales interpreted the test under section 125(2), that the court be persuaded 'on reasonable grounds', as requiring the same standard of proof as under the common law – that is, that the court must be satisfied by the party seeking to resist the privilege that there is prima facie evidence of the allegation.¹³⁴⁹

7.140 In its Issues Paper, the ALRC raised the concern that section 125 carries a high onus of proof.¹³⁵⁰ A submission to the ALRC, however, stated that the standard established in *Kang v Kwan* is appropriate and that amendments to section 125 are unnecessary.¹³⁵¹

¹³⁴⁵ *R v Cox and Railton* (1884) LR 14 QBD 153; *A-G (NT) v Kearney* (1985) 158 CLR 500, 513–14 (Gibbs CJ).

¹³⁴⁶ *Commissioner of Australian Federal Police Commissioner v Propend Finance Pty Ltd* (1997) 188 CLR 501, 556 (McHugh J).

¹³⁴⁷ *A-G (NT) v Kearney* (1985) 158 CLR 500, 516 (Gibbs CJ), citing *O'Rourke v Darbishire* [1920] AC 581, 604 (Viscount Finlay). See also Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.182]; McNicol SB, *Law of Privilege* (1992) 105–6.

¹³⁴⁸ *Kang v Kwan* [2001] NSWSC 698.

¹³⁴⁹ Ibid [37], (3)–(6) (Santow J). See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.11680].

¹³⁵⁰ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) para 11.45.

¹³⁵¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.163, referring to NSW Ombudsman, *Submission E 13*, 27 January 2005.

The ALRC's view

7.141 The ALRC agreed with the submission that the standard of proof established in *Kang v Kwan* is appropriate. Consequently, it did not propose any amendment to section 125 of the uniform Evidence Acts.¹³⁵²

The QLRC's view

7.142 In Queensland, the common law rule that legal professional privilege does not attach to communications made in furtherance of an illegal purpose applies. The court must be persuaded that there is prima facie evidence that the communication was made in furtherance of an illegal purpose.¹³⁵³

7-12 The QLRC considers that section 125 of the uniform Evidence Acts, as interpreted by *Kang v Kwan*, is consistent with the position at common law as it is applied in Queensland.

7-13 The QLRC supports the ALRC's decision not to propose any amendment to section 125 with respect to the standard of proof required under section 125(2).

Disclosure to watchdog bodies

7.143 The submission of the New South Wales Ombudsman in response to the ALRC's Issues Paper queried whether legal professional privilege should be available to deny a 'watchdog body' access to documents of a public sector agency.¹³⁵⁴ The ALRC gave consideration to this question in its Discussion Paper.

7.144 The New South Wales Ombudsman considered that legal professional privilege 'can be abused and often serves little or no good purpose in practice'.¹³⁵⁵ It submitted that, while the rationale for legal professional privilege is to promote frankness and candour in communications between public officials and their lawyers, the effect of the privilege is to 'reduce the accountability of

1352 Ibid para 13.164.

1353 See para 7.138 of this Report.

1354 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.165.

1355 Quoted in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.167.

public sector agencies and officials by allowing them to keep often vital information from a watchdog body'.¹³⁵⁶

7.145 An example of this, noted by the ALRC, is the use of the privilege to frustrate investigation of complaints about a public agency's response to a request for information under the *Freedom of Information Act 1989* (NSW).¹³⁵⁷

7.146 The New South Wales Ombudsman suggested that the uniform Evidence Acts be amended to either abrogate the privilege in relation to investigations conducted by watchdog bodies set up by Commonwealth, state or territory governments, or provide that information and documents relating to the accountability of government may not be withheld from disclosure to a statutory watchdog.¹³⁵⁸

The ALRC's view

7.147 The ALRC accepted the New South Wales Ombudsman's argument that the rationale for the privilege must be balanced against the public interest in open and accountable government.¹³⁵⁹

7.148 The ALRC noted that, in its Report on federal civil and administrative penalties, it acknowledged that there may be times when the public interest in the conduct of investigations overrides the public interest in maintaining client legal privilege, and had recommended that, in those circumstances, the privilege be abrogated.¹³⁶⁰

7.149 However, the ALRC concluded in its Discussion Paper that, at this stage of its inquiry into evidence law, it would be preferable to deal with the New South Wales Ombudsman's concerns, if substantiated, by amendments to the relevant freedom of information or ombudsman legislation.¹³⁶¹ It expressed the

1356 Quoted in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.166. Under s 21 of the *Ombudsman Act 1974* (NSW), if the Ombudsman requires a person to give any information, produce any document or thing, or answer any question, the Ombudsman must set aside the requirement if it appears that the person, in a court proceeding, could claim privilege and resist compliance with a like requirement.

1357 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.168. The ALRC noted (at para 13.169) that the New South Wales Ombudsman gave, as an example, information and documents relating to the affairs of an agency or the conduct of public officials that contain or disclose information likely to:

- contribute to positive and informed debate about issues of serious public interest;
- assist the investigation of alleged misconduct or illegality by public sector agencies or officials.

1358 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.169.

1359 Ibid para 13.170.

1360 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (ALRC 95, 2002) para 19.48, cited in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.171.

1361 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.172.

view that it would be interested in further comments and posed the following question:¹³⁶²

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

The QLRC's view

7.150 In Queensland, a matter that would attract legal professional privilege in a legal proceeding is an exempt matter under the *Freedom of Information Act 1992 (Qld)*.¹³⁶³ Accordingly, a government agency can refuse access to such material.¹³⁶⁴

7.151 Similar provisions excluding documents that would attract legal professional privilege in a court proceeding operate in each of the other Australian states and territories, including New South Wales, and under Commonwealth freedom of information legislation.¹³⁶⁵

7.152 Unlike New South Wales, however, the ombudsman legislation in each of the other Australian states and territories, as well as the Commonwealth legislation, provides that legal professional privilege is not available to a government agency to deny the Ombudsman access to documents or information.¹³⁶⁶

7.153 Section 45(2) of the *Ombudsman Act 2001 (Qld)* provides that the State or an agency (being a department, local government or public authority¹³⁶⁷) is not entitled to claim a privilege that would be available in a court proceeding in respect of the production of documents or the giving of evidence

1362 Ibid Question 13–1, post para 13.172.

1363 *Freedom of Information Act 1992 (Qld)* s 43.

1364 *Freedom of Information Act 1992 (Qld)* s 28.

1365 *Freedom of Information Act 1982 (Cth)* s 42; *Freedom of Information Act 1989 (ACT)* s 42; *Freedom of Information Act 1989 (NSW)* Schedule 1, Part 3, cl 10; *Information Act (NT)* s 49(d); *Freedom of Information Act 1991 (SA)* Schedule 1, Part 3, cl 10; *Freedom of Information Act 1991 (Tas)* s 29; *Freedom of Information Act 1982 (Vic)* s 32; *Freedom of Information Act 1992 (WA)* Schedule 1, cl 7.

1366 *Ombudsman Act 1976 (Cth)* s 9(4)(ab)(ii); *Ombudsman Act 2001 (Qld)* s 45(2); *Ombudsman Act 1989 (ACT)* s 11(7)(b); *Ombudsman Act 1978 (Tas)* s 24(2), (3); *Ombudsman Act 1973 (Vic)* s 18(4); *Ombudsman Act 1972 (SA)* s 20; *Parliamentary Commissioner Act 1971 (WA)* s 20(2)(b); *Ombudsman (Northern Territory) Act (NT)* s 20(4).

1367 *Ombudsman Act 2001 (Qld)* s 8.

relevant to a preliminary inquiry or an investigation.¹³⁶⁸

7.154 The objects of the Act are to give people a timely, effective, independent and just way of having administrative actions of agencies investigated, and to improve the quality of decision-making and administrative practice in agencies.¹³⁶⁹ In order that this object is not frustrated, a claim of privilege should not be available 'as a shield' against the Ombudsman.¹³⁷⁰ An investigation by the Ombudsman is to be conducted in a way that maintains confidentiality.¹³⁷¹

7-14 As to the availability of a claim of legal professional privilege in respect of documents or information required to be disclosed to an Ombudsman, the QLRC:

- (a) notes that the question is dealt with in the ombudsman legislation in each Australian jurisdiction;
- (b) notes that the position in New South Wales differs from that in each of the other Australian jurisdictions; and
- (c) considers that any change to the position in New South Wales should be addressed by amending the *Ombudsman Act 1974 (NSW)*, and not by amending the uniform Evidence Acts.

¹³⁶⁸ Section 45(2) of the *Ombudsman Act 2001* (Qld) provides:

45 Information disclosure and privilege

...

- (2) In a preliminary inquiry or an investigation, the State or an agency is not entitled to any privilege that would apply to the production of documents, or the giving of evidence, relevant to the investigation, in a legal proceeding.

¹³⁶⁹ *Ombudsman Act 2001* (Qld) s 5.

¹³⁷⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 March 1974, 3159 (Hon J Bjelke-Petersen, Premier). This comment was made during the debate in relation to the *Parliamentary Commissioner Bill 1974* (Qld). The *Parliamentary Commissioner Act 1974* (Qld) was repealed and replaced by the *Ombudsman Act 2001* (Qld). See also Lane WB and Young S, *Administrative Law in Queensland* (2001) [5.3.6]:

The resulting accessibility of agency materials is generally considered to be of considerable importance to the effectiveness of the Ombudsman's investigations.

¹³⁷¹ *Ombudsman Act 2001* (Qld) s 25(2)(a).

PRIVILEGES PROTECTING OTHER CONFIDENTIAL COMMUNICATIONS

Common law

7.155 The common law does not recognise a privilege in respect of confidential communications with doctors (including psychiatrists),¹³⁷² journalists,¹³⁷³ accountants¹³⁷⁴ or members of the clergy.¹³⁷⁵ The only relationship whose communications attracts privilege is that of lawyer and client.¹³⁷⁶

7.156 It has been held, for example, that any rule of professional conduct requiring a journalist to protect his or her confidential sources is subject to the obligation to answer questions when compelled by a court or an investigative body.¹³⁷⁷

Even accepting a claim or suggestion of moral dilemma on the part of the defendant, such must clearly give way to the legal obligation to answer. There is the paramount public interest and the terms of the statute requiring that the defendant answer and produce documents. No obligation of honour, no obligation of secrecy or confidence, no private undertaking arising from the nature of a pursuit or calling can stand in the way of the imperative necessity of revealing the truth in the witness box: *McGuinness* (at 103-104) per Dixon J. The refusal to answer questions which are relevant or to produce documents undermines the rule of law.

7.157 Heydon, in *Cross on Evidence*, notes that the question of compelling a witness to disclose matters the subject of an ethical confidence 'presents difficulties'.¹³⁷⁸ It has been suggested that the courts have a discretion whether to require disclosure of matters 'which cause embarrassment to the witness and violation of the witness's code of ethics'.¹³⁷⁹

1372 *Duchess of Kingston's Case* (1776) 1 Leach 146; 168 ER 175; *R v Gibbons* (1823) 1 Car & P 97; 171 ER 1117; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681 (Jessel MR). See McNicol SB, *Law of Privilege* (1992) 339.

1373 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 102-3 (Dixon J).

1374 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.196], citing *Macedonia Pty Ltd v Federal Commissioner of Taxation* (1987) 18 ATR 929; *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717. Note, these cases concerned the question of whether communications with third party accountants used in the course of obtaining or providing legal advice attracted legal professional privilege.

1375 McNicol SB, *Law of Privilege* (1992) 324, 328. Although there is a paucity of judicial authority in support of this contention, '[t]he lack of judicial testing of this privilege would not, however, be sufficient to refute the traditional belief that there is no common law privilege': at 328.

1376 Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.196]; Heydon JD, *Cross on Evidence* (7th ed, 2004) [25325], [25315], [25340].

1377 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 234.

1378 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25340].

1379 *Ibid.*

7.158 In *Attorney-General v Mulholland*,¹³⁸⁰ Donovan LJ stated:¹³⁸¹

While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all: in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand—I prefer that expression to the term “necessary”. Both these matters are for the consideration and, if need be, the decision of the judge. And over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

... This would apply not only in the case of journalists but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship.

7.159 Heydon agrees, however, with the proposition that, if the question is relevant and proper, there would not seem to be any discretion in the trial judge as to whether the witness should be compelled to answer.¹³⁸²

Uniform Evidence Acts

7.160 In its original evidence inquiry, the ALRC proposed that:¹³⁸³

The court should have a general discretion to protect communications and records made in circumstances where one of the parties is under an obligation (whether legal, ethical or moral) not to disclose them. This should apply to such relationships as cleric and communicant, doctor and patient, psychotherapist and patient, social worker and client and journalists and their sources.

7.161 The ALRC also proposed that the discretion should apply to communications with accountants.¹³⁸⁴ It acknowledged that it is necessary to demonstrate a public interest in preserving confidentiality in order to support a

1380 [1963] 2 QB 477.

1381 Ibid 492–3. See also *W v Egdell* [1990] Ch 359, which concerned a treating psychiatrist's reports about a patient detained in a secure hospital. The Court of Appeal held that the doctor's duty of confidence was outweighed by the public interest in the disclosure. Bingham LJ commented (at 419):

the law treats such duties not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure. Thus the public interest in the administration of justice may require a clergyman, a banker, a medical man, a journalist or an accountant to breach his professional duty of confidence.

1382 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25340], citing *Re Buchanan* (1964) 65 SR (NSW) 9, 11.

1383 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, Summary of Recommendations, Recommendation 20.

1384 Ibid para 955.

privilege.¹³⁸⁵ It considered that confidentiality and trust are sometimes key elements in the functioning and maintenance of such relationships.¹³⁸⁶

7.162 Rather than propose that an absolute privilege be included in the uniform Evidence Acts, the ALRC proposed that the court be given the discretion to exclude evidence where one of the parties is under a legal, ethical or moral obligation not to disclose the communication or record.¹³⁸⁷

7.163 It also proposed that matters to be taken into account in exercising the discretion should include ‘the need for the evidence, the damage which would occur to the particular relationship by the enforced disclosure of confidential communications and the deterrent effect on similar relationships’.¹³⁸⁸

7.164 The ALRC considered that competing public interests could be taken into account in the court’s assessment of whether evidence should be given by a witness.¹³⁸⁹

7.165 The ALRC’s original proposal was not taken up in the *Evidence Act 1995* (Cth).¹³⁹⁰

7.166 However, the uniform Evidence Acts do include a privilege with respect to religious confessions.¹³⁹¹

7.167 In addition, the *Evidence Act 1995* (NSW) and the *Criminal Procedure Act 1986* (NSW) provide for a professional confidential relationship privilege and a sexual assault communications privilege,¹³⁹² while the *Evidence Act 2001* (Tas) provides for a medical communications privilege and a sexual assault communications privilege.¹³⁹³

1385 Ibid para 911.

1386 Ibid para 917, 921, 936, 951, 955. Note the ALRC’s discussion of the arguments in favour of a privilege in respect of each of these relationships at para 903–956. See also McNicol SB, *Law of Privilege* (1992) Chapter 6 (Doctor and Patient Privilege) and Chapter 5 (Clergy and Communicant Privilege).

1387 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, Summary of Recommendations, Recommendation 20.

1388 Ibid.

1389 Ibid para 918.

1390 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.174. Note, however, the criticism of the ALRC’s original proposal in Middleton T, ‘Privileges Under the *Evidence Act 1995* (Cth)’ (1995) 25 *Queensland Law Society Journal* 349, 356, citing Byrne DM and Heydon JD, *Cross on Evidence* (4th ed, 1991) 719:

The problem with this proposal was that the discretion (and therefore the question of admissibility) was cast so widely that it would be difficult before trial to predict whether an objection would be sustained. The parties should be able to predict (before trial) the material on which the Court will decide the case.

1391 Uniform Evidence Acts s 127.

1392 *Evidence Act 1995* (NSW) ss 126B, 126H; *Criminal Procedure Act 1986* (NSW) Chapter 6, Part 5, Division 2.

1393 *Evidence Act 2001* (Tas) ss 127A, 127B.

7.168 These privileges are considered below.¹³⁹⁴

7.169 In its Issues Paper, the ALRC posed the following questions:¹³⁹⁵

Should the *Evidence Act 1995* (Cth) adopt the provisions of Division 1A of the *Evidence Act 1995* (NSW) in relation to professional confidential relationships?

Should the sexual assault communications privilege available under Part 7 of the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) be included in the *Evidence Act 1995* (Cth)?

Should the sexual assault communications privilege available under s 127B of the *Evidence Act 2001* (Tas) be included in the *Evidence Act 1995* (Cth)?

Religious confessions

7.170 Section 127 of the uniform Evidence Acts provides:¹³⁹⁶

127 Religious confessions

- (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
- (3) This section applies even if an Act provides:
 - (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
 - (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.
- (4) In this section:

religious confession means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

7.171 The privilege belongs to the member of the clergy, and not to the penitent. The privilege attaches regardless of the wishes of the person who

¹³⁹⁴ See para 7.175–7.203 of this Report.

¹³⁹⁵ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Questions 11–9, 11–10 and 11–11, post para 11.52, 11.55.

¹³⁹⁶ Section 127 of the uniform Evidence Acts is said to be derived from s 10 of the *Evidence Act 1898* (NSW), which was inserted by s 3 of the *Evidence (Religious Confessions) Amendment Act 1989* (NSW). See Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.12680].

made the confession.¹³⁹⁷ This is at odds with McNicol's view that the holder of the privilege logically should be the penitent.¹³⁹⁸ There is no provision setting out the circumstances in which the privilege will be lost.

7.172 Evidence legislation in Victoria¹³⁹⁹ and the Northern Territory¹⁴⁰⁰ also includes a privilege for religious confessions. In those jurisdictions, the privilege does not apply if the person who made the confession consents to the disclosure. In the Northern Territory, the privilege does not apply to communications made for any criminal purpose.¹⁴⁰¹

7.173 In 1991, the QLRC considered the New South Wales provision on which section 127 of the uniform Evidence Acts was based,¹⁴⁰² and recommended that legislation to protect statements made to religiously ordained officials should not be enacted in Queensland.¹⁴⁰³ The QLRC considered that, on balance, the potential benefit to be derived from such a privilege was outweighed by the possible disadvantages in limiting the evidence before the court, for example, where the statement involved a confession about the commission of a crime.¹⁴⁰⁴ No such provision is contained in the *Evidence Act 1977* (Qld).

7.174 Section 127 of the uniform Evidence Acts was not raised as an issue for consideration in the ALRC's Issues Paper, and it was not addressed by any submissions.¹⁴⁰⁵ The ALRC commented that this suggested that the provision was working well, and did not propose any change to the section.¹⁴⁰⁶

1397 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.12680].

1398 McNicol SB, *Law of Privilege* (1992) 331.

1399 *Evidence Act 1958* (Vic) s 28(1).

1400 *Evidence Act* (NT) s 12(1).

1401 *Evidence Act* (NT) s 12(3).

1402 See note 1396 of this Report.

1403 Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991) 3, 4. See also para 7.185–7.186 of this Report.

1404 Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991) 3.

1405 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.250.

1406 *Ibid.*

Professional confidential relationship privilege

New South Wales

7.175 Chapter 3, Part 3.10, Division 1A of the *Evidence Act 1995* (NSW) creates a 'professional confidential relationship privilege'. The privilege applies in criminal and civil trial proceedings and in pre-trial civil proceedings.¹⁴⁰⁷

7.176 Section 126B(1) provides that the court may direct that evidence not be adduced if it would disclose a protected confidence,¹⁴⁰⁸ the contents of a document recording a protected confidence, or protected identity information.¹⁴⁰⁹ The court may give the direction either of its own motion or on the application of the confider or the confidant, whether or not either person is a party to the proceeding.¹⁴¹⁰

7.177 However, the court must give such a direction if it is satisfied that:¹⁴¹¹

- it is likely that harm¹⁴¹² would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
- the nature and extent of the harm outweighs the desirability of the evidence being given.

7.178 Section 126B(4) sets out a list of matters that must be taken into account by the court in deciding whether to make a direction:

- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
 - (a) the probative value of the evidence in the proceeding,
 - (b) the importance of the evidence in the proceeding,

1407 See note 1213 of this Report.

1408 *Evidence Act 1995* (NSW) s 126A(1) defines 'protected confidence' as follows:

protected confidence means a communication made by a person in confidence to another person (in this Division called the **confidant**):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

1409 'Protected identity information' is defined to mean 'information about, or enabling a person to ascertain, the identity of the person who made a protected confidence': *Evidence Act 1995* (NSW) s 126A(1).

1410 *Evidence Act 1995* (NSW) s 126B(2).

1411 *Evidence Act 1995* (NSW) s 126B(3).

1412 'Harm' is defined to include 'actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)': *Evidence Act 1995* (NSW) s 126A(1).

- (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
- (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
- (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
- (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
- (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
- (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

7.179 The privilege is lost if the confider consents to the disclosure, or if the communication was made or the document was prepared in furtherance of the commission of a fraud, an offence or an act attracting a civil penalty.¹⁴¹³

7.180 To limit the harm that may be caused by the disclosure of the evidence, the court may order that all or part of the evidence be heard in camera, and may order the suppression of publication of all or part of the evidence as it considers necessary to protect the confider's safety and welfare.¹⁴¹⁴

7.181 Odgers suggests that the relationships to which the definition applies would include 'doctor/patient;¹⁴¹⁵ nurse/patient; psychologist/client;¹⁴¹⁶ therapist/client; counsellor/client; social worker/client; private investigator/client; and journalist/source',¹⁴¹⁷ and notes that the provision has been held to apply to journalists.¹⁴¹⁸ Odgers suggests, however, that the precise scope of the term

1413 *Evidence Act 1995* (NSW) ss 126C, 126D.

1414 *Evidence Act 1995* (NSW) s 126E.

1415 See obiter in *Kadian v Richards* (2004) 61 NSWLR 222, [91]–[92] (Campbell J).

1416 See *Wilson v State of New South Wales* [2003] NSWSC 805, [13] (Bell J).

1417 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.11900].

1418 *Ibid*, citing *NRMA v John Fairfax* [2002] NSWSC 563.

'acting in a professional capacity' in the definition of a 'protected confidence' is uncertain.¹⁴¹⁹

7.182 Section 126B has been criticised as not clearly specifying that the court may give a direction only where the test in section 126B(3) is satisfied. Odgers notes that, while this appears to have been the legislative intention, it is not reflected in the drafting of section 126B.¹⁴²⁰ The test in section 126B(3) is not expressed to apply to the discretion conferred by section 126B(1) so that, even if the test is not satisfied, there is still a discretion to direct that the evidence not be adduced.¹⁴²¹

7.183 There has been only limited judicial consideration of section 126B. In obiter in *Kadian v Richards*,¹⁴²² Campbell J commented that the effect of the provisions is that, even if the confidant were called as a witness in the proceedings:¹⁴²³

it would not be inevitable that any confidential information which they had received concerning [the plaintiff] would be able to be elicited in evidence.

But neither is it the effect of these provisions that confidential information which they had received concerning [the plaintiff] would not be able to be elicited in evidence — it is a matter for the decision of the trial judge.

7.184 None of the other Australian states or territories has enacted similar provisions.

7.185 As noted previously, in its Report on the protection of statements made to religiously ordained officials, the QLRC recommended that legislation to protect such statements should not be enacted.¹⁴²⁴ It considered, however, that, if such protection were to be provided for in legislation, it should be done in general terms, rather than by providing a specific privilege for spiritual confidences.¹⁴²⁵ The QLRC considered that one option would be to have a provision that incorporates the following four conditions, as enunciated by Wigmore, that are necessary to establish a privilege:¹⁴²⁶

1419 Ibid [1.3.11900].

1420 Ibid [1.3.11940].

1421 Ibid. See also Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.181.

1422 (2004) 61 NSWLR 222.

1423 Ibid [91]–[92].

1424 Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991) 3, 4.

1425 Ibid 9.

1426 Ibid 10, 7, citing Wigmore JH, *Evidence in Trials at Common Law*, revised by McNaughton JT (1961) Vol 8, para 2285, 2396.

- the communication must originate in a confidence of secrecy;
- the confidentiality of the communication must be essential to the relationship between the two people;
- in the opinion of the community, the secrecy surrounding the relationship must deserve recognition and countenance; and
- the injury done to the relationship by compulsory disclosure must be greater than the benefit to justice.

7.186 The QLRC recognised that the public interest arguments for protection of statements made to a religiously ordained official also apply to other professional groups such as social workers, doctors and journalists, who require full and truthful accounts from their clients to properly perform their job.¹⁴²⁷ However, as the QLRC considered that a privilege for religious confessions was neither necessary nor desirable, it also concluded that a privilege extending the protection to other professionals should be avoided.¹⁴²⁸

Sexual assault communications privilege

7.187 Both New South Wales and Tasmania have enacted a privilege for confidential communications made to a sexual assault counsellor. These provisions are considered below.

7.188 In addition, the Victorian, South Australian and Northern Territory evidence legislation includes provisions creating a privilege in respect of sexual assault communications.¹⁴²⁹

New South Wales

7.189 Chapter 6, Part 5, Division 2 of the *Criminal Procedure Act 1986* (NSW) sets out the circumstances in which a confidential communication in relation to sexual assault counselling is protected from disclosure.¹⁴³⁰

7.190 In the context of ‘preliminary criminal proceedings’ (committal and bail proceedings),¹⁴³¹ the Act creates an absolute prohibition on requiring (whether by subpoena or other procedure) production of a document recording a

1427 Ibid 2.

1428 Ibid 3.

1429 *Evidence Act 1958* (Vic) Part II, Div 2A; *Evidence Act 1929* (SA) s 67E; *Evidence Act* (NT) ss 56–56G. See Heydon JD, *Cross on Evidence* (7th ed, 2004) para [25340].

1430 For a discussion of the history of the New South Wales provisions, see Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.182.

1431 *Criminal Procedure Act 1986* (NSW) s 295(1).

'protected confidence' for inspection by a party¹⁴³² and on the adducing of evidence that would disclose a 'protected confidence'.¹⁴³³

7.191 A 'protected confidence' is a confidential counselling communication made by, to or about a victim or alleged victim of a sexual assault offence.¹⁴³⁴

7.192 A person 'counsels' another if the person:¹⁴³⁵

- has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm;¹⁴³⁶ and
- listens to and gives verbal or other support or encouragement to the other person or advises, gives therapy to or treats the other person.

7.193 It is irrelevant whether the person counsels another for fee or reward.¹⁴³⁷

7.194 In trial and sentencing proceedings ('criminal proceedings'),¹⁴³⁸ a person may object to the production of a document recording a protected confidence for the inspection of a party¹⁴³⁹ and evidence that would disclose a 'protected confidence' can be adduced only with the leave of the court.¹⁴⁴⁰ A document must only be produced, and leave must only be given to adduce evidence, where the court is satisfied that:¹⁴⁴¹

- the party seeking production of the document or adducing of the evidence has given written notice of his or her intention to do so;¹⁴⁴²
- the contents of the document or the evidence will have substantial probative value;

1432 *Criminal Procedure Act 1986* (NSW) s 297(1).

1433 *Criminal Procedure Act 1986* (NSW) s 297(2).

1434 *Criminal Procedure Act 1986* (NSW) s 296(1).

1435 *Criminal Procedure Act 1986* (NSW) s 296(5).

1436 'Harm' includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear): *Criminal Procedure Act 1986* (NSW) s 295(1).

1437 *Criminal Procedure Act 1986* (NSW) s 296(5).

1438 *Criminal Procedure Act 1986* (NSW) s 295(1). Note that this also includes proceedings relating to an order under Part 15A (Apprehended violence) of the *Crimes Act 1900* (NSW).

1439 *Criminal Procedure Act 1986* (NSW) s 298(1).

1440 *Criminal Procedure Act 1986* (NSW) s 298(3).

1441 *Criminal Procedure Act 1986* (NSW) s 298(1), (4).

1442 *Criminal Procedure Act 1986* (NSW) s 299. Note that, alternatively, the court may give leave to dispense with the notice requirement.

- no other evidence of the protected confidence or contents of the document recording the protected confidence is available; and
- the public interest in preserving the confidentiality and preventing harm to the victim or alleged victim of a sexual assault offence is substantially outweighed by the public interest in allowing the inspection of the document or the adducing of the evidence.

7.195 The privilege will be lost if the alleged victim of a sexual assault offence (the ‘principal protected confider’) gives written consent to the production of the document or the adducing of the evidence.¹⁴⁴³ It will also be lost if the communication or document was made or prepared in furtherance of a fraud, an offence or an act attracting a civil penalty.¹⁴⁴⁴

7.196 The court is also given power to hold proceedings in camera, make suppression orders in relation to the evidence, and make non-disclosure orders in relation to protected identity information.¹⁴⁴⁵

7.197 Evidence that is found to be privileged in a criminal proceeding under this Act cannot subsequently be adduced in a civil proceeding in which substantially the same acts are in issue as those that were in issue in the criminal proceeding.¹⁴⁴⁶

Tasmania

7.198 Section 127B of the *Evidence Act 2001* (Tas) provides an absolute protection against the disclosure of ‘counselling communications’, the production of documents recording a ‘counselling communication’, and the adducing of evidence of ‘counselling communications’ in any criminal proceeding without the consent of the victim.

7.199 A ‘counselling communication’ is a confidential communication made by, to or about a victim of a sexual offence in the course of counselling or treatment for any emotional or psychological harm suffered in connection with the offence.¹⁴⁴⁷

7.200 The Tasmanian provision differs from the New South Wales provisions in that it is an absolute prohibition (subject to the consent of the victim), and it applies only to criminal proceedings.

1443 *Criminal Procedure Act 1986* (NSW) s 300.

1444 *Criminal Procedure Act 1986* (NSW) s 301.

1445 *Criminal Procedure Act 1986* (NSW) s 302.

1446 *Evidence Act 1995* (NSW) s 126H.

1447 *Evidence Act 2001* (Tas) s 127B(1).

Other jurisdictions

7.201 The provisions protecting confidential counselling communications in the Victorian, South Australian and Northern Territory evidence legislation provide that evidence of the communication can be adduced only with the leave of the court.¹⁴⁴⁸ Those provisions require the court to balance the competing public interests in maintaining the confidentiality of confidential counselling communications and in admitting the evidence.¹⁴⁴⁹

Medical communications privilege

Tasmania

7.202 Section 127A of the *Evidence Act 2001* (Tas) creates a medical communications privilege:

127A Medical communications

- (1) A medical practitioner, without the consent of his or her patient, must not divulge in any civil proceeding any communication made to him or her in a professional capacity by the patient that was necessary to prescribe or act for the patient unless the sanity of the patient is the matter in dispute.
- (2) A person who has possession, custody or control of any communication referred to in subsection (1) or of any record of such a communication made to a medical practitioner by a patient, without the consent of the patient, must not divulge that communication or record in any civil proceeding unless the sanity of the patient is the matter in dispute.
- (3) This section does not—
 - (a) protect any communication made for any criminal purpose; or
 - (b) prejudice the right to give in evidence any statement or representation made at any time to or by a medical practitioner in or about the effecting by any person of an insurance on the life of that person or any other person.

Other jurisdictions

7.203 Provisions creating a privilege in respect of medical communications are also contained in the evidence legislation of Victoria and the Northern Territory.¹⁴⁵⁰

1448 *Evidence Act 1958* (Vic) Part II, Div 2A; *Evidence Act 1929* (SA) s 67F; *Evidence Act* (NT) ss 56–56G.

1449 *Evidence Act 1958* (Vic) s 32D(1); *Evidence Act 1929* (SA) s 67F(5); *Evidence Act* (NT) s 56E(1).

1450 *Evidence Act 1958* (Vic) s 28(2)–(5); *Evidence Act* (NT) s 12(2).

The ALRC's proposals

7.204 The ALRC acknowledged that the extension of privilege to relationships other than lawyers and clients is a controversial issue and that several submissions had cautioned against such an extension in the *Evidence Act 1995* (Cth).¹⁴⁵¹

7.205 The Law Council of Australia submitted that courts already have powers to maintain the confidentiality of information disclosed to them for the specific purpose of ensuring justice in the individual case.¹⁴⁵²

7.206 The ALRC noted the views of another commentator that relevant evidence, such as evidence of a prior inconsistent statement made to a sexual assault counsellor, should not be privileged.¹⁴⁵³ It also noted the concern that the communication may include important evidence for a defendant.¹⁴⁵⁴

7.207 The ALRC stated, however, that most of the consultations supported the adoption of a qualified professional confidential relationships and sexual assault communications privilege.¹⁴⁵⁵ Practitioners and judges were unaware of any concerns caused by either of the privileges as they operate in New South Wales.¹⁴⁵⁶ This support was premised on the view that the privileges should be qualified ones and should apply only where the interests of justice dictated.¹⁴⁵⁷

Professional confidential relationships privilege

7.208 In the Discussion Paper, the ALRC expressed the view that the reasoning in its Interim Report in proposing a confidential relationships privilege remained sound.¹⁴⁵⁸

7.209 The ALRC favoured the New South Wales approach of a guided discretion, and did not support an absolute privilege for the same reason it gave in its Interim Report.¹⁴⁵⁹

1451 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.193–13.197.

1452 Ibid para 13.194.

1453 Ibid para 13.196.

1454 Ibid para 13.199, 13.200.

1455 Ibid para 13.198.

1456 Ibid.

1457 Ibid para 13.199.

1458 Ibid para 13.205.

1459 Ibid para 13.206, quoting Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 918.

The provision of a discretionary privilege would allow the competing public interests to be taken into account when the court is assessing whether evidence ought in the circumstances to be compelled from witnesses, thus allowing the courts to be sensitive to the individual needs of witnesses and of relationships.

7.210 The ALRC considered that an advantage of this approach is that judges will be in a position to ‘circumvent illegitimate attempts to claim the privilege’.¹⁴⁶⁰

Sexual assault communications privilege

7.211 The ALRC acknowledged that the professional confidential relationships privilege would likely cover confidential communications between a sexual assault victim and counsellor. However, it considered that records of the relationship between a sexual assault victim and a counsellor ‘are of particular importance and require a particular privilege’.¹⁴⁶¹ It also considered that a legislative provision of this kind would recognise the public interest in encouraging victims of sexual assault to seek therapy.¹⁴⁶²

Specific proposals

7.212 In its Discussion Paper, the ALRC proposed that:¹⁴⁶³

- Chapter 3, Part 3.10 of the *Evidence Act 1995* (Cth) (Privileges) should be amended to adopt the provisions dealing with the professional confidential relationships privilege, presently found in Chapter 3, Part 3.10, Division 1A of the *Evidence Act 1995* (NSW).¹⁴⁶⁴
- Chapter 3, Part 3.10 of the *Evidence Act 1995* (Cth) and Chapter 3, Part 3.10 of the *Evidence Act 1995* (NSW) should be amended to include a sexual assault counselling privilege of a discretionary kind applicable to both civil and criminal proceedings.¹⁴⁶⁵

¹⁴⁶⁰ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.208.

¹⁴⁶¹ Ibid para 13.210.

¹⁴⁶² Ibid.

¹⁴⁶³ The Australian Law Reform Commission acknowledged that the *Evidence Act 2001* (Tas) may not be amended to follow the New South Wales provisions, noting that states may choose a different path in the enactment of uniform legislation in order to maintain consistency with previous legislation or to follow the recommendations of law reform work in that state: Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.212.

¹⁴⁶⁴ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 13–7, post para 13.212.

¹⁴⁶⁵ Ibid Proposal 13–7a, post para 13.212. The ALRC further proposed that, if this proposal were accepted, the provisions of the *Criminal Procedure Act 1986* (NSW) that deal with the sexual assault communications privilege should be repealed: Proposal 13–7b, post para 13.212. The relevant provisions were previously contained in Part 7 of the *Criminal Procedure Act 1986* (NSW) but, as a result of amendments made by the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), are now contained in Chapter 6, Part 5, Division 2 of the *Criminal Procedure Act 1986* (NSW).

7.213 The ALRC noted that, in New South Wales, the professional confidential relationships privilege already operates in pre-trial civil proceedings and the sexual assault communications privilege already operates in preliminary criminal proceedings.¹⁴⁶⁶

7.214 It therefore proposed that both the confidential communications privilege and the sexual assault communications privilege proposed above should apply to 'pre-trial discovery and the production of documents in response to a subpoena and non-curial contexts such as search warrants and notices to produce documents, as well as court proceedings'.¹⁴⁶⁷

The QLRC's view

7.215 In Queensland, there are no legislative provisions creating a privilege in respect of religious confessions, professional confidential communications, medical communications or sexual assault counselling communications. The common law does not recognise such privileges.¹⁴⁶⁸

7.216 In its Report on the protection of statements made to religiously ordained officials, the QLRC considered that:¹⁴⁶⁹

as a general principle, all people who are called before courts to give evidence should be required to answer, fully and truthfully, the questions asked of them ... unless for some special reason the public interest is better served by not requiring a witness to testify.

7.217 The QLRC recommended that a privilege protecting statements made to religiously ordained officials not be enacted in Queensland.¹⁴⁷⁰ In the same Report, the QLRC commented that, if such a privilege were to be created, it should be expressed in general terms, rather than as a specific privilege for spiritual confidences.¹⁴⁷¹ However, as noted previously,¹⁴⁷² the QLRC considered that a privilege for religious confessions was neither necessary nor desirable, and should not be extended to protect communications with other professionals.¹⁴⁷³

¹⁴⁶⁶ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.211.

¹⁴⁶⁷ *Ibid* Proposal 13–8, post para 13.212.

¹⁴⁶⁸ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.196]. See para 7.155 of this Report.

¹⁴⁶⁹ Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991) 1.

¹⁴⁷⁰ *Ibid* 3, 4.

¹⁴⁷¹ *Ibid* 9.

¹⁴⁷² See para 7.186 of this Report.

¹⁴⁷³ Queensland Law Reform Commission, Report, *The Protection of Statements Made to Religiously Ordained Officials* (R 41, 1991) 3.

7-15 The QLRC:

- (a) notes that there is a clear difference in approach to the availability of privileges for religious confessions, medical communications, sexual assault communications and professional confidential communications under the Commonwealth, New South Wales and Tasmanian evidence legislation and at common law, as it is applied in Queensland;
- (b) considers that the approach taken to the availability of privileges for professional confidential relationships and sexual assault communications would require further review if Queensland were to consider adopting the uniform Evidence Acts; and
- (c) notes that the New South Wales professional confidential relationships privilege is consistent with the QLRC's view in its Report, *The Protection of Statements Made to Religiously Ordained Officials*, to the extent that it is not specific to any one professional relationship, is discretionary and incorporates a balancing test.

PRIVILEGE AGAINST SELF-INCRIMINATION**Common law**

7.218 The privilege against self-incrimination has sometimes been used as a general term to describe both the privilege against self-exposure to conviction for a criminal offence and the privilege against self-exposure to a penalty (the penalty privilege).¹⁴⁷⁴ However, although closely linked, these are different aspects or grounds of privilege.¹⁴⁷⁵

¹⁴⁷⁴ For a recent detailed consideration of the privileges against self-incrimination and self-exposure to a penalty see Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

¹⁴⁷⁵ *Price v McCabe; Ex parte Price* [1985] 2 Qd R 510, 512 (Derrington J, DM Campbell and Kelly JJ concurring), applying *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 336 (Mason ACJ, Wilson and Dawson JJ). See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [13] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). For a discussion of the relationship between the two grounds of privilege see Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004) para 2.26–2.32.

Note, there are two other grounds of privilege, less often invoked: the protection against self-exposure to the forfeiture of an estate (which has been abrogated by *Evidence Act 1977* (Qld) s 14(1)(a); Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.13]); and the protection against self-exposure to ecclesiastical censure. See McNicol SB, *Law of Privilege* (1992) 186–7.

7.219 The privilege is one element of the broader right to silence, which refers to a variety of immunities that differ in their nature, origins, incidents and importance.¹⁴⁷⁶ The privilege confers an immunity from an obligation to provide information tending to prove one's own guilt.¹⁴⁷⁷

7.220 In its modern form, the privilege has been ascribed to a number of different rationales. Briefly, the rationales most often put forward are:¹⁴⁷⁸

- to prevent abuse of power;
- to prevent conviction founded on a false confession;
- to protect the accusatorial system of justice;
- to protect the quality of evidence;
- to avoid the 'cruel trilemma';¹⁴⁷⁹ and
- to protect human dignity and privacy.

7.221 An important qualification to the privilege is that it protects a person only from *self*-disclosure.¹⁴⁸⁰ As such, it applies to oral and documentary disclosure¹⁴⁸¹ but not to information that can be obtained by independent means such as seizure under a search warrant.¹⁴⁸² Neither does it apply to real evidence such as fingerprints, a blood sample or a breath test.¹⁴⁸³

1476 Other immunities encompassed by the right to silence include those possessed by people suspected of or charged with a criminal offence from being compelled to answer questions at a police interrogation or that which protects an accused person from having to give evidence at trial. See *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 30–1 (Lord Mustill).

1477 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 512 (Brennan J).

1478 These rationales are identified and discussed in Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004) Chapter 3. See also McNicol SB, *Law of Privilege* (1992) 139.

1479 This originally referred to the unfairness of placing a witness in the position of having to choose between refusing to provide the information in question (thereby risking punishment for contempt of court), providing the information (thereby furnishing evidence of guilt and risking conviction), or lying (thereby risking punishment for perjury). See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498 (Mason CJ and Toohey J).

1480 See McNicol SB, *Law of Privilege* (1992) 140; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.6]. It is 'designed not to provide a shield against conviction but to provide a shield against conviction by testimony wrung out of the mouth of the offender': *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514 (Brennan J).

1481 The privilege applies to documentary evidence such as affidavits, responses to subpoenas and applications for discovery and inspection: Heydon JD, *Cross on Evidence* (7th ed, 2004) [25090]; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.5].

1482 McNicol SB, *Law of Privilege* (1992) 140; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.6]. See also *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392–3 (Gibbs CJ, Mason and Dawson JJ).

1483 *R v McLellan* [1974] VR 773, 777 (Gowans, Nelson and Anderson JJ). See also *Sorby v Commonwealth* (1983) 152 CLR 281, 292 (Gibbs CJ).

7.222 The privilege against self-incrimination applies in criminal and civil proceedings, including pre-trial proceedings such as discovery and interrogatories.¹⁴⁸⁴ Like legal professional privilege, it is more than a mere rule of evidence being 'deeply ingrained in the common law'.¹⁴⁸⁵ It is 'inherently capable of applying in non-judicial proceedings'.¹⁴⁸⁶ However, the privilege is not constitutionally guaranteed and may be abrogated by statute.¹⁴⁸⁷

7.223 The existence of the penalty privilege in relation to court proceedings has been recently confirmed by the High Court.¹⁴⁸⁸ The penalty privilege may be claimed in a civil proceeding, and is not confined to discovery and interrogatory procedures.¹⁴⁸⁹ There is some uncertainty, however, as to whether the penalty privilege is available in non-judicial proceedings.¹⁴⁹⁰

7.224 In seeking the protection of the privilege, it is not enough for the witness merely to assert the privilege.¹⁴⁹¹ The court must decide whether the witness's apprehension of self-incrimination is reasonable and bona fide.¹⁴⁹² The risk of self-incrimination must be 'real and appreciable',¹⁴⁹³ and not fanciful or 'so improbable that no reasonable man would suffer it to influence his conduct'.¹⁴⁹⁴

1484 Heydon JD, *Cross on Evidence* (7th ed, 2004) [25075].

1485 *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ).

1486 Ibid. See also McNicol SB, *Law of Privilege* (1992) 136, 140–51; Heydon JD, *Cross on Evidence* (7th ed, 2004) [25085].

1487 *Sorby v Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ), 314 (Brennan J).

1488 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Rich v Australian Securities and Investments Commission* (2004) 209 ALR 271.

1489 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 337 (Mason ACJ, Wilson and Dawson JJ).

1490 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Note that the Queensland Law Reform Commission recommended that, in the absence of an express legislative provision to the contrary, the penalty privilege should be available in non-judicial proceedings and investigations as well as in judicial proceedings: Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004) Recommendation 5-1.

1491 McNicol SB, *Law of Privilege* (1992) 174, citing *R v Boyes* (1861) 1 B & S 311; 121 ER 730.

1492 *Jackson v Gamble* [1983] 1 VR 552, 555–6 (Young CJ), applying *R v Boyes* (1861) 1 B & S 311; 121 ER 730 and *Re Reynolds* (1882) 20 Ch D 294; *Zappia v Registrar of the Supreme Court (SA)* (2004) 90 SASR 193, [33] (Duggan J, with whom Doyle CJ and Anderson J agreed).

1493 *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, 257; *R v Bolton Magistrates' Court* [2005] 2 All ER 848, [25] (Kennedy LJ, with whom Royce J agreed).

1494 *R v Boyes* (1861) 1 B & S 311, 330; 121 ER 730, 738.

7.225 The privilege must be claimed ‘at the point at which the risk of actual incrimination arises’,¹⁴⁹⁵ and cannot be claimed as a blanket objection.¹⁴⁹⁶ Where a claim of privilege is upheld, the witness cannot be compelled to give the evidence.¹⁴⁹⁷

7.226 There is no strict requirement on the court to warn a witness when it appears that a claim of privilege may be appropriate, although this is often done in practice.¹⁴⁹⁸

Queensland

7.227 The common law rules in relation to the privilege apply in Queensland.¹⁴⁹⁹ As discussed above, section 10 of the *Evidence Act 1977* (Qld) confirms the common law privilege against self-incrimination in the context of the laws of evidence.¹⁵⁰⁰

7.228 The privilege is abrogated, in part, by section 15 of the Act, which provides that an accused who gives testimony in a criminal proceeding cannot refuse to answer a question on the ground that to do so would tend to prove the commission of the offence with which the accused is there charged.¹⁵⁰¹

¹⁴⁹⁵ *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253, 265 (Wilcox J): ‘The objection must be taken to the specific question, when its tendency may be considered.’

¹⁴⁹⁶ *C v National Crime Authority* (1987) 78 ALR 338, 343 (Northrop J); *Spokes v Grosvenor & West End Railway Terminus Hotel Co Ltd* [1897] 2 QB 124, 132–3.

¹⁴⁹⁷ McNicol SB, *Law of Privilege* (1992) 181.

¹⁴⁹⁸ *Ibid* 180; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.23].

¹⁴⁹⁹ Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [10.1].

¹⁵⁰⁰ See para 7.12 of this Report. Section 10 of the *Evidence Act 1977* (Qld) provides:

10 Privilege against self incrimination

(1) Nothing in this Act shall render any person compellable to answer any question tending to criminate the person.

(2) However, in a criminal proceeding where a person charged gives evidence, the person’s liability to answer any such question shall be governed by section 15.

¹⁵⁰¹ Note that this abrogation derives from the *Criminal Evidence Act 1898* (UK) and has been enacted in most Australian states and territories: Heydon JD, *Cross on Evidence* (7th ed, 2004) [25165], [23140] note 55. Section 15 of the *Evidence Act 1977* (Qld) provides:

15 Questioning a person charged in a criminal proceeding

(1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.

7.229 As noted above,¹⁵⁰² the privilege has also been removed in a number of other situations such as coronial inquests,¹⁵⁰³ before a commission of inquiry,¹⁵⁰⁴ and in the course of various non-judicial investigations.¹⁵⁰⁵ In many instances where the privilege has been removed, provision is made to limit the use that can be made of the disclosed information ('use immunity') or of information directly or indirectly obtained as a result of the disclosure ('derivative use immunity') in other situations.¹⁵⁰⁶

7.230 The QLRC recently conducted a review of the abrogation of the privilege against self-incrimination.¹⁵⁰⁷ In its Report, the QLRC made a number of recommendations, including that legislation of general application should be enacted to govern the circumstances in which the privilege may be abrogated.¹⁵⁰⁸ It considered that an individual should be entitled to claim the privilege in the absence of a clear, express provision to the contrary.¹⁵⁰⁹ It also considered that a 'derivative use immunity'¹⁵¹⁰ should not be granted unless exceptional circumstances existed that justified the extent of its impact.¹⁵¹¹

Uniform Evidence Acts

Application to witnesses generally

7.231 Section 128 of the uniform Evidence Acts creates an entirely new regime for the operation of the privilege against self-incrimination. The regime is based on the issuing of a certificate to the witness, with the effect that the evidence given, or evidence obtained as a direct or indirect result of the evidence given, cannot be used against the person in any proceeding.

7.232 Under section 128(1), a witness may object to giving particular evidence on the ground that it may tend to prove that the witness:

1502 See para 7.13 of this Report.

1503 *Coroners Act 2003* (Qld) s 39.

1504 *Commissions of Inquiry Act 1950* (Qld) s 14(1A).

1505 For example, *Fire and Rescue Service Act 1990* (Qld) s 58; *Financial Administration and Audit Act 1977* (Qld) s 87.

1506 For a detailed discussion of the abrogation of the privilege against self-incrimination and self-exposure to a penalty, including immunities, see Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

1507 Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

1508 *Ibid* Appendix 3, Draft Bill.

1509 *Ibid* Recommendation 7-1.

1510 'Derivate use immunity' is discussed at para 7.280 of this Report.

1511 Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004) Recommendation 9-3.

- has committed an offence against or arising under an Australian law or a law of a foreign country; or
- is liable to a civil penalty.

7.233 Upon objection, the court is required, under section 128(2), to determine if there are reasonable grounds for the objection. If the court finds that there are reasonable grounds for the objection, the court is not to compel the witness to give the evidence, and must inform the witness that he or she does not need to give the evidence. The court must also inform the witness that, if he or she gives the evidence, the court will give the witness a certificate under section 128 of the Act.

7.234 However, under section 128(5), the court has the power to compel the witness to give certain self-incriminating evidence 'in the interests of justice'. Section 128(5) provides:

- (5) If the court is satisfied that:
- (a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
 - (b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (c) the interests of justice require that the witness give the evidence;

the court may require the witness to give the evidence.

7.235 If the witness chooses to give the evidence under section 128(2) or is compelled to give the evidence under section 128(5), the court is required to give the witness a certificate.¹⁵¹² Section 128(7) provides that, where a certificate has been given, evidence given by the witness and evidence of any information, document or thing obtained as a direct or indirect result of that evidence cannot be used against the witness in any Australian court proceeding. As such, section 128 incorporates both a 'use immunity' and a 'derivative use immunity'.¹⁵¹³

1512 Uniform Evidence Acts s 128(3), (6).

1513 A 'use immunity' prevents the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide the information. A 'derivative use immunity' prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character': *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, 443 (Lord Wilberforce).

7.236 The certification process adopted by section 128 is said to represent a 'radical, but not unprecedented, departure from the common law'.¹⁵¹⁴ Certificate-based regimes have been enacted, although later repealed, in Tasmania¹⁵¹⁵ and the Australian Capital Territory.¹⁵¹⁶

7.237 In Western Australia, a certificate procedure currently operates.¹⁵¹⁷ Once a witness refuses to give evidence and the court determines that, in the interests of justice, the witness should be compelled to give the evidence, a certificate is to be given to the witness. Thereafter, the witness is no longer entitled to refuse to give evidence.¹⁵¹⁸

7.238 In its original evidence inquiry, the ALRC recommended an 'optional' or 'voluntary' certification procedure.¹⁵¹⁹ It considered that this approach 'provided the best compromise between the need for a privilege and the need to make all relevant material available to the court'.¹⁵²⁰ It stated that 'to compel a witness to testify under certificate when the witness was unwilling was likely to result in evidence of limited value'.¹⁵²¹

7.239 Section 128 of the uniform Evidence Acts differs from the ALRC's original recommendation in that it sets out circumstances, in section 128(5), in which the witness may be compelled to give the self-incriminating evidence.¹⁵²²

Application to a defendant in a criminal proceeding

7.240 Section 128(8) of the uniform Evidence Acts provides that section 128 does not apply to evidence given by a defendant in a criminal proceeding that he or she did, or omitted to do, an act that is a fact in issue, or that he or she had a state of mind the existence of which is a fact in issue. Accordingly, the process of certification that applies in respect of self-incriminatory evidence given by witnesses does not apply to evidence of this kind given by a defendant in a criminal proceeding.

¹⁵¹⁴ Heydon JD, *Cross on Evidence* (7th ed, 2004) [25175].

¹⁵¹⁵ *Evidence Act 1910* (Tas) s 101.

¹⁵¹⁶ *Evidence Act 1971* (ACT) s 57.

¹⁵¹⁷ *Evidence Act 1906* (WA) ss 11, 11A.

¹⁵¹⁸ *Evidence Act 1906* (WA) s 11. The *Evidence Act 1910* (Tas) s 101 and *Evidence Act 1971* (ACT) s 57 operated in a similar way.

¹⁵¹⁹ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 862; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 215.

¹⁵²⁰ Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 215.

¹⁵²¹ *Ibid.*

¹⁵²² Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.216. Section 128(5) is set out at para 7.234 of this Report.

7.241 However, if a defendant in a criminal proceeding objects to giving particular evidence on the ground that the evidence may tend to prove that he or she committed an offence other than that with which he or she is charged, section 128(8) does not prevent section 128 from applying. Accordingly, in this situation, the court will give the defendant a certificate if the defendant chooses to give the evidence or is required by the court to give the evidence.

Issues for consideration

7.242 In Chapter 11 of its Issues Paper, the ALRC posed a number of questions in relation to the operation of section 128. In its Discussion Paper, it proposed a number of amendments to section 128 in relation to:

- the process of certification;
- the application of section 128 to pre-trial proceedings;
- the application of section 128 to ancillary proceedings; and
- the definition of ‘use in any proceeding in an Australian court’.

7.243 Each of these issues will be considered in turn.

7.244 Although it was not raised by the ALRC in its Issues Paper, consideration will also be given to the extent to which a defendant who gives evidence in a criminal proceeding may be compelled, under the uniform Evidence Acts, to give evidence that would tend to incriminate him or her in relation to the offence charged.

Process of certification

7.245 In its Issues Paper, the ALRC posed the following general question in relation to section 128 of the uniform Evidence Acts:¹⁵²³

Are any general concerns raised by the issuing of certificates under s 128 of the uniform Evidence Acts?

7.246 The main concern raised by submissions to the ALRC in relation to section 128 was the process of certification. The submissions referred to in the Discussion Paper were from judges and magistrates who expressed the concern that the process under section 128 is ‘cumbersome’,¹⁵²⁴ ‘clumsy’,¹⁵²⁵

1523 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–12, post para 11.58.

1524 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.219.

1525 Ibid para 13.220.

'hard to explain to witnesses'¹⁵²⁶ and 'requires streamlining'.¹⁵²⁷

7.247 One submission, from a judge of the New South Wales Supreme Court, suggested that witnesses 'tend to assume that they will be exempted from answering questions, rather than understanding that they will be required to give the evidence and then be issued with a certificate'.¹⁵²⁸

7.248 Other judges of the New South Wales District Court submitted that section 128 'serves a useful purpose', but requires redrafting.¹⁵²⁹

7.249 Many of the submissions referred to in the Discussion Paper raised the concern that the necessity to invoke the process in relation to each question, rather than being able to grant a blanket certificate, is unclear and clumsy.¹⁵³⁰

The ALRC's proposal

7.250 The ALRC's original 'optional certification' proposal was described by it at the time as a modification of the provisions then applying in the Australian Capital Territory.¹⁵³¹ The ALRC suggested in its Discussion Paper that section 128 was modelled on those provisions.

¹⁵²⁶ Ibid para 13.219.

¹⁵²⁷ Ibid para 13.221.

¹⁵²⁸ Ibid para 13.219.

¹⁵²⁹ Ibid para 13.220.

¹⁵³⁰ Judges of the New South Wales District Court submitted that the process should apply to the broader 'subject matter' of the evidence, rather than 'particular evidence'. New South Wales magistrates submitted that time restraints meant that the process should be streamlined. Judges of the Family Court submitted that 'the situation where a person must be asked the question, then object to it, is a charade'. See Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.220–13.222.

¹⁵³¹ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 861. See also Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.223. See also Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.12820].

Section 57 of the *Evidence Act 1971* (ACT), omitted by *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) s 2, Sch 2, Part 2.4, provided:

57 Incriminating questions

- (1) Subject to this Act and to any other law of the Territory, a person is not bound to answer a question or interrogatory in a proceeding if the answer to the question or interrogatory would incriminate, or would tend to incriminate, the person or his or her spouse or would tend to expose the person or his or her spouse to proceedings for an offence against a law in force in Australia.
- (2) Where, in a proceeding, a person called as a witness or required to answer an interrogatory declines under subsection (1) to answer a question or interrogatory, the court may, if it is satisfied that, in the interests of justice, the person should be compelled to answer the question or interrogatory, inform the person—
 - (a) that, if the person answers the question or interrogatory and all other questions or interrogatories that may be put to him or her, the court will give the person a certificate under this section; and
 - (b) of the effect of such a certificate.

7.251 However, like the current Western Australian procedure,¹⁵³² the former Australian Capital Territory procedure allowed a single certificate to be issued in respect of all answers given by the witness.

7.252 In its Discussion Paper, the ALRC made some suggestions as to how the requirement in section 128 that certificates be issued on a question-by-question basis could be overcome.

7.253 One suggestion was that the expression 'particular evidence', which is used in section 128(1) and (2), be defined to include 'evidence both in response to questions and evidence on particular topics'.¹⁵³³ Another suggestion was to provide, in section 128(1), that the section applies to a witness giving 'any or some evidence which may tend to prove' that the witness has committed an offence or is liable to a civil penalty.¹⁵³⁴

7.254 The ALRC also noted a suggestion made to it that section 128(5), which sets out the circumstances in which the court can compel the witness to give evidence, could be re-located so that it is nearer to section 128(2), which provides that the witness may object to giving the evidence.¹⁵³⁵

7.255 The ALRC appears to have accepted the criticism raised by submissions that the certification procedure under section 128 is unclear and cumbersome. It made the following proposal and posed an additional question:

Section 128 should be re-drafted to clarify the procedure by which a witness is able to object to giving evidence, may be compelled to give evidence and may be granted privilege in respect of self-incrimination in other proceedings.¹⁵³⁶

On what terms should s 128 be redrafted to clarify its procedure?¹⁵³⁷

-
- (3) Where, in relation to a proceeding, a person has been informed by the court of the matters referred to in paragraphs (2) (a) and (b), that person is not thereafter entitled to refuse to answer a question or interrogatory put to him or her in that proceeding.
 - (4) Where, after being informed by the court of the matters referred to in paragraphs (2) (a) and (b), a person answers all questions and interrogatories put to him or her in the proceeding, the court shall give to the person a certificate that the person's evidence in the proceeding was given under this section.
 - (5) Where a person is given a certificate under this section, a statement made by the person in answer to a question or interrogatory in the proceeding in which that certificate was given is not admissible in evidence against the person in criminal proceedings other than proceedings for an offence arising out of falsity of the statement.

¹⁵³² See para 7.237 of this Report.

¹⁵³³ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.225.

¹⁵³⁴ *Ibid.*

¹⁵³⁵ *Ibid* para 13.224.

¹⁵³⁶ *Ibid* Proposal 13–9, post para 13.226.

¹⁵³⁷ *Ibid* Question 13–2, post para 13.226.

The QLRC's view

7.256 As noted above, the common law privilege against self-incrimination and against self-exposure to a penalty is confirmed in Queensland in the context of the laws of evidence by section 10 of the *Evidence Act 1977* (Qld). The common law rules in relation to the privilege apply in Queensland.¹⁵³⁸

7.257 At common law, the privilege must be claimed on a question-by-question basis. Where a claim of privilege is upheld, the witness cannot be compelled to give the evidence.¹⁵³⁹

7-16 As to the approach to the privilege against self-incrimination and self-exposure to a penalty, the QLRC:

- (a) notes that section 128 of the uniform Evidence Acts is an entirely different regime from the common law, as it is applied in Queensland, in that it is based on the issuing of a certificate;
- (b) notes that, in its Report on *The Abrogation of the Privilege Against Self-incrimination*, the QLRC recommended that:
 - (i) the privilege should not be abrogated unless the abrogation is justified and appropriate; and
 - (ii) where the privilege is abrogated, a derivative use immunity should not be granted unless exceptional circumstances existed that justified the extent of its impact; and
- (c) considers that section 128 of the uniform Evidence Acts would require rigorous examination if Queensland were to consider adopting the uniform Evidence Acts, particularly to determine whether:
 - (i) the abrogation of the privilege is justified and appropriate in accordance with the guidelines set out in the QLRC's Report on *The Abrogation of the Privilege Against Self-incrimination*; and
 - (ii) there are exceptional circumstances justifying the derivative use immunity granted by section 128(7)(b);

¹⁵³⁸ See para 7.227 of this Report.

¹⁵³⁹ See para 7.225 of this Report.

- (d) considers that section 128 is inconsistent with recommendations contained in the QLRC's Report on *The Abrogation of the Privilege Against Self-incrimination* in that it does not provide that the witness may waive the immunity that is conferred in respect of the evidence given; and
- (e) suggests that, if Queensland were to consider adopting the uniform Evidence Acts generally, consideration should be given to adoption of the uniform Evidence Acts without adopting the provisions dealing with the privilege against self-incrimination.

Application to pre-trial proceedings

7.258 As discussed above, one of the main concerns raised by the ALRC is the fact that the uniform Evidence Acts' privilege provisions do not apply to pre-trial proceedings or other situations in which documents can be compulsorily disclosed.¹⁵⁴⁰ It has made a number of proposals to extend the application of the privilege provisions of the uniform Evidence Acts to pre-trial discovery and to the production of documents in response to a subpoena and in non-curial contexts such as search warrants and notices to produce documents.¹⁵⁴¹ This raises the issue of whether section 128 of the uniform Evidence Acts should apply in pre-trial proceedings.

The ALRC's view

7.259 In its Discussion Paper, the ALRC considered that the 'policy aim' of section 128 'is premised on the desirability of encouraging witnesses to testify'.¹⁵⁴² It concluded that, because section 128 deals with witnesses and testimonial evidence, it should not apply to pre-trial proceedings.¹⁵⁴³ It noted that the 'common law rules regarding the privilege against self-incrimination will continue to apply in pre-trial and non-curial matters'.¹⁵⁴⁴

¹⁵⁴⁰ See para 7.44–7.45, 7.214 of this Report.

¹⁵⁴¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 13–1, post para 13.49; Proposal 13–8, post para 13.212.

¹⁵⁴² Ibid para 13.227.

¹⁵⁴³ Ibid.

¹⁵⁴⁴ Ibid.

The QLRC's view**7-17 As to the privilege against self-incrimination and self-exposure to a penalty, the QLRC:**

- (a) notes that, in Queensland, the common law rules apply both at trial and in pre-trial proceedings, as well as in non-curial contexts;¹⁵⁴⁵
- (b) notes that section 128 of the uniform Evidence Acts is an entirely different regime from the common law, as it is applied in Queensland, in that it is based on the issuing of a certificate; and
- (c) considers that the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.

Application to ancillary proceedings

7.260 In its Issues Paper, the ALRC posed the following question:¹⁵⁴⁶

Are there concerns raised by the application of s 128 to ancillary proceedings for the compulsory disclosure of information in civil matters? Should these concerns be addressed through amendment of the uniform Evidence Acts or by other means?

7.261 In its Discussion Paper, the ALRC raised, as a particular concern, the application of section 128 in the context of proceedings for 'Anton Piller' orders¹⁵⁴⁷ and 'Mareva' injunctions¹⁵⁴⁸ in which an affidavit of assets is required to be given.¹⁵⁴⁹

7.262 In such a case, the court may order the person against whom the order is sought to attend court to give oral testimony as to his or her assets.¹⁵⁵⁰ The

¹⁵⁴⁵ See, however, para 7.223 of this Report as to the doubt about the application of the penalty privilege in non-curial contexts.

¹⁵⁴⁶ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–13, post para 11.64.

¹⁵⁴⁷ If destruction or concealment of evidence is likely to occur, a party may apply ex parte for an 'Anton Piller' order, which is akin to a civil search warrant: Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [Q.11], citing *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

¹⁵⁴⁸ A 'Mareva Injunction' can be ordered, ex parte, to prevent a party from dissipating assets or taking assets out of the jurisdiction before judgment: *Mareva Compania Naviera SA v International Bulkcarriers SA The Mareva* [1980] 1 All ER 213; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

¹⁵⁴⁹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.228.

¹⁵⁵⁰ Ibid.

ALRC stated that the oral examination usually follows the preparation of an affidavit of assets.¹⁵⁵¹ The ALRC considered the issue of whether section 128 would apply to such affidavit evidence.¹⁵⁵²

7.263 In *Bax Global (Australia) Pty Ltd v Evans*,¹⁵⁵³ Austin J set out the procedure adopted by the Equity Division of the Supreme Court of New South Wales in applying section 128 to such affidavits.¹⁵⁵⁴ Under that procedure, the court orders the disclosure affidavit to be prepared and delivered to the judge's associate in a sealed envelope. A hearing is then held at which the judge inspects the affidavit and determines the validity of the person's objection to disclosure. If the objection is upheld, the affidavit is returned to the person for destruction. However, if the objection fails, the affidavit is read and a certificate is attached to it.

7.264 It has been suggested that this procedure may be an improper infringement of the common law privilege against self-incrimination. At common law, the privilege is available as an answer to procedures of civil discovery such as answers to interrogatories, discovery and inspection of documents, production of documents by subpoena and Anton Piller orders.¹⁵⁵⁵ The privilege also extends 'beyond answers which directly criminate the witness to those answers which indirectly criminate by setting in train a process of inquiries which leads to the discovery of other incriminating evidence'.¹⁵⁵⁶

7.265 Prior to the decision in *Bax*,¹⁵⁵⁷ the High Court held, in *Reid v Howard*,¹⁵⁵⁸ that the common law privilege can be abrogated only by statute

1551 Ibid.

1552 Ibid.

1553 (1999) 47 NSWLR 538.

1554 Ibid [41]–[46], quoted in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.229:

The Court initiates the disclosure procedure by making an order that a disclosure affidavit be prepared and delivered to the judge's associate in a sealed envelope, together with directions that the affidavit not be filed or served on any other party, and that the further hearing be notified to the Director of Public Prosecutions. At that hearing the judge opens the envelope and inspects the affidavit. Any affidavit or oral evidence to support the witness' objection is then adduced, and submissions are heard as to whether for the purposes of s 128(2) there are reasonable grounds for the objection, even though at that stage the plaintiff's counsel has not had access to the affidavit which is the subject of the objection. The judge then rules on that question ... Once the affidavit has been read, the s 128 certificate is given and attached to it.

If the witness elects not to give the evidence, then the Court hears any further submissions as to whether it should require the witness to give the evidence under s 128(5), and makes a determination accordingly. If the Court decides to require the witness to give the evidence, then it follows the procedure for the reading of the affidavit as outlined above. If the Court decides not to require the witness to give the evidence, the judge directs that all copies of the affidavit be returned to the witness' legal representative and authorises their destruction.

1555 McNicol SB, *Law of Privilege* (1992) 140–1.

1556 Ibid 213, citing *R v Boyes* (1861) 1 B & S 311, 330; 121 ER 730, 738.

1557 *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538.

and that it is not susceptible to being overridden by the courts in the absence of statutory authority:¹⁵⁵⁹

... it is inimical to the administration of justice for a civil court to compel self-incriminatory disclosures, while fashioning orders to prevent the use of the information thus obtained in a court vested with criminal jurisdiction with respect to matters disclosed. Nor is justice served by the ad hoc modification or abrogation of a right of general application, particularly not one as fundamental and as important as the privilege against self-incrimination.

7.266 In *Vasil v National Australia Bank*,¹⁵⁶⁰ the New South Wales Court of Appeal held, applying *Reid v Howard*, that an order for disclosure in aid of a Mareva injunction that is inconsistent with the privilege against self-incrimination should not be made.¹⁵⁶¹ Where the privilege will be infringed by compliance with such an order, the party against whom it was made is entitled to have the order set aside.¹⁵⁶²

7.267 More recently, the New South Wales Court of Appeal held in *Ross v Internet Wines Pty Ltd*¹⁵⁶³ that the procedure set out in *Bax* should not be followed:¹⁵⁶⁴

it is impermissible for the court to substitute for a person's fundamental common law right the statutory balance of rights, supplemented by court-devised additional protection by way of artificially making the disclosing party a witness, closure of the Court, limitations on who can see the disclosure affidavit, or if privilege is upheld and no certificate is granted return of the affidavit to its maker; all not pursuant to statute but by the court devising a procedure intended to inhibit the direct or derivative use against the person of information tending to incriminate.

7.268 Other decisions have also questioned the correctness of the *Bax* procedure.¹⁵⁶⁵ In *Pathways Employment Services Pty Ltd v West*,¹⁵⁶⁶ Campbell J made the following statement:¹⁵⁶⁷

It is only by the active involvement of the Court, in setting a time and place for a special hearing which otherwise would never occur, that the first defendant would become a witness. I am not persuaded that these are circumstances

1558 (1995) 184 CLR 1.

1559 Ibid 8 (Deane J), 17 (Toohey, Gaudron, McHugh and Gummow JJ).

1560 (1999) 46 NSWLR 207.

1561 Ibid 222–3 (Fitzgerald JA, Stein JA agreeing).

1562 Ibid 213. See also *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257.

1563 (2004) 60 NSWLR 436.

1564 Ibid [104] (Giles JA, with whom Spigelman CJ and McColl JA agreed).

1565 *ASIC v Michalik* (2004) 211 ALR 285; *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140; *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257, 269 (Tobias JA).

1566 (2004) 212 ALR 140.

1567 Ibid [40].

within the scope of the circumstances for which parliament intended s 128 of the *Evidence Act* to provide an exception to the privilege against self-incrimination.

7.269 In a more recent case, Campbell J ordered that the defendant, against whom a Mareva order had been made, make disclosure of his assets 'to the extent, and only to the extent, that such disclosure does not impinge upon any claim for privilege which he may make'.¹⁵⁶⁸ On the terms of the order, the defendant was required to file and serve an affidavit setting out his claim to the privilege, if any, within seven days. If the claim to privilege was upheld, the information did not need to be disclosed.¹⁵⁶⁹

The ALRC's proposal

7.270 In its Discussion Paper, the ALRC noted a submission from a committee of the Council of Chief Justices of Australia and New Zealand, which is currently investigating the question of harmonisation of court rules, practice notes and forms in relation to Mareva injunctions and Anton Piller orders.¹⁵⁷⁰ The Committee submitted that the uniform Evidence Acts be amended to abrogate the privilege so that a disclosure order must be obeyed.¹⁵⁷¹

7.271 The ALRC considered that a general abrogation of the privilege in civil proceedings is unwarranted.¹⁵⁷²

7.272 The ALRC concluded that a limited abrogation of the privilege in respect of specific types of orders is preferable. The approach proposed by the ALRC is that the evidence will be compulsorily disclosed, but a use and derivative use immunity will be granted to prevent the compelled evidence from being used against the person in other proceedings.¹⁵⁷³

7.273 It is noted that the ALRC's proposed approach does not involve the granting of a certificate in respect of the compelled evidence.¹⁵⁷⁴

7.274 The ALRC proposed:¹⁵⁷⁵

1568 *Macquarie Bank v Riley Street Nominees* [2005] NSWSC 162, [12] (Campbell J).

1569 *Ibid* [21].

1570 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.234.

1571 *Ibid*.

1572 *Ibid* para 13.237.

1573 *Ibid*.

1574 Compare with uniform Evidence Acts s 128(5). See note 1522 of this Report.

1575 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Proposal 13–10, post para 13.237.

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

7.275 The ALRC included a draft of proposed section 128A in its Discussion Paper.¹⁵⁷⁶

7.276 The proposed section 128A(3) provides that information disclosed by the person and information or a document or thing obtained as a direct or indirect result of the disclosure by the person cannot be used against the person in any proceeding in an Australian court. As such, the ALRC's proposed provision incorporates both a 'use immunity' and a 'derivative use immunity'.¹⁵⁷⁷

The QLRC's view

7.277 In Queensland, the common law rules relating to the privilege against self-incrimination and self-exposure to a penalty are available in answer to pre-

¹⁵⁷⁶

Ibid Appendix 1, 559. Proposed s 128A(1)–(3) provides:

128A Privilege in respect of self-incrimination in relation to certain orders etc

(1) In this section:

asset means property of any kind, including a chattel and a financial asset.

court order means an order made by [a federal court or an ACT court] [a [name of State] court] in a civil proceeding requiring a person (including a party to the proceeding) to do 1 or more of the following:

- (a) to disclose information about assets or documents;
- (b) to permit premises to be searched;
- (c) to permit inspection, copying or recording of assets or documents (whether of the person or another person);
- (d) to secure, or to deliver up or permit removal of, assets or documents.

It does not matter who owns the assets or documents.

relevant person means a person to whom a court order is directed.

(2) A relevant person is not excused from complying with a court order on the ground that compliance with it may tend to prove that the person:

- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
- (b) is liable to a civil penalty.

(3) In any proceeding in [an Australian court] [a [name of State] court] to which the relevant person is a party:

- (a) evidence of information disclosed by the relevant person in compliance with a court order; and
- (b) evidence or any document or thing found in the course of a search of premises under a court order; and
- (c) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given that information or as a consequence of such a search;

cannot be used against the relevant person if the court finds that the evidence tends to prove that the relevant person:

- (d) has committed an offence against or arising under an Australian law or a law of a foreign country; or
- (e) is liable to a civil penalty.

¹⁵⁷⁷

'Use immunity' and 'derivative use immunity' are explained at note 1513 of this Report.

trial civil discovery procedures, including Anton Piller orders and Mareva injunctions.¹⁵⁷⁸

7.278 As noted above,¹⁵⁷⁹ the QLRC recently made a number of recommendations in relation to the abrogation of the privilege against self-incrimination.¹⁵⁸⁰ It considered that an individual should be entitled to claim the privilege in the absence of a clear, express provision to the contrary.¹⁵⁸¹

7.279 The QLRC considered that the privilege should not be abrogated unless the abrogation is justified on either of the following bases:¹⁵⁸²

- the importance of the public interest sought to be protected or advanced by the abrogation of the privilege, and the extent to which information obtained as a result of the abrogation could reasonably be expected to benefit the relevant public interest; or
- whether the information relates to the conduct of an activity regulated under an Act, in which the individual is or was authorised to participate.

7.280 Where abrogation is justified, the QLRC considered that an immunity against the use of the compelled information should be provided to compensate for the loss of that right and its concomitant protection.¹⁵⁸³ However, it concluded that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances that justify the extent of its impact.¹⁵⁸⁴

7-18 As to the availability of the privilege against self-incrimination and self-exposure to a penalty in respect of pre-trial civil discovery procedures, such as disclosure orders made ancillary to Anton Piller orders and Mareva injunctions, the QLRC:

- (a) notes that, at common law, as it is applied in Queensland, the privilege is available in respect of pre-trial civil discovery procedures;**

¹⁵⁷⁸ See para 7.264 of this Report.

¹⁵⁷⁹ See para 7.230 of this Report.

¹⁵⁸⁰ Queensland Law Reform Commission, Report, *The Abrogation of the Privilege Against Self-incrimination* (R 59, 2004).

¹⁵⁸¹ *Ibid* Recommendation 7-1.

¹⁵⁸² *Ibid* Recommendation 6-2.

¹⁵⁸³ *Ibid* para 9.81.

¹⁵⁸⁴ *Ibid* para 9.89, Recommendation 9-3.

- (b) notes that the proposed section 128A of the uniform Evidence Acts is a departure from the position at common law, as it is applied in Queensland;
- (c) notes that, in its recent Report on *The Abrogation of the Privilege Against Self-incrimination*, the QLRC recommended that:
 - (i) the privilege should not be abrogated unless the abrogation is justified and appropriate; and
 - (ii) where the privilege is abrogated, a derivative use immunity should not be granted unless exceptional circumstances existed that justified the extent of its impact;
- (d) considers that proposed section 128A of the uniform Evidence Acts would require rigorous examination if Queensland were to consider adopting the uniform Evidence Acts, particularly to determine whether:
 - (i) the abrogation of the privilege in proposed section 128A is justified and appropriate in accordance with the guidelines set out in the QLRC's Report on *The Abrogation of the Privilege Against Self-incrimination*; and
 - (ii) there are exceptional circumstances justifying the derivative use immunity granted by proposed section 128A(3);
- (e) considers that proposed section 128A is inconsistent with recommendations contained in the QLRC's Report on *The Abrogation of the Privilege Against Self-incrimination* in that it does not provide that the witness may waive the immunity that is conferred in respect of the evidence given; and

- (f) suggests that, if Queensland were to consider adopting the uniform Evidence Acts generally, consideration should be given to adoption of the uniform Evidence Acts without adopting the provisions dealing with the privilege against self-incrimination.

Meaning of ‘use in any proceeding in an Australian court’

7.281 In its Issues Paper, the ALRC posed the following question in relation to section 128(7) of the uniform Evidence Acts:¹⁵⁸⁵

Are there any concerns about the definition of ‘any proceeding in an Australian court’ under s 128 of the uniform Evidence Acts?

7.282 Section 128(7) of the *Evidence Act 1995* (Cth) provides:

128 Privilege in respect of self-incrimination in other proceedings

...

(7) In any proceeding in an Australian court:

- (a) evidence given by a person in respect of which a certificate under this section has been given; and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

7.283 ‘Proceeding’ is not defined in the uniform Evidence Acts. However, ‘Australian court’ is defined widely to mean:¹⁵⁸⁶

- the High Court; or
- a court exercising federal jurisdiction; or
- a court of a State or Territory; or
- a judge, justice or arbitrator under an Australian law; or

¹⁵⁸⁵ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–14, post para 11.69.

¹⁵⁸⁶ *Evidence Act 1995* (Cth) s 3(1), Dictionary, Part 1.

- a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence.

7.284 Odgers argues that both terms should be given a liberal interpretation.¹⁵⁸⁷ He notes:¹⁵⁸⁸

In interpreting the provision, it should be noted that the general principle that the ingrained nature of the protection against self-incrimination requires a strict construction of provisions said expressly to remove that protection, also requires that a liberal interpretation be given to the protective provisions in a statute purporting to protect a person from the consequences of the abrogation of the protections against self-incrimination. [notes omitted]

7.285 In its Discussion Paper, the ALRC considered two concerns raised by the meaning of 'use in any proceeding in an Australian court' in section 128(7).

7.286 First, it noted that the scope of section 128(7) of the *Evidence Act 1995* (NSW) is narrower than in the Commonwealth legislation. Section 128(7) of the *Evidence Act 1995* (NSW) refers to proceedings of a 'NSW court'. This is defined narrowly to include the Supreme Court, or a person or body required to apply the laws of evidence. Unlike the Commonwealth legislation, section 128(7) of the New South Wales legislation does not apply to a person or body who is simply authorised to hear, receive and examine evidence.

7.287 A second concern is whether section 128(7) would apply to a re-trial. This question was recently raised in *R v Cornwell*.¹⁵⁸⁹ In that case, a section 128 certificate had been granted to the accused in respect of answers that may have incriminated him in relation to other possible charges. A verdict could not be reached at the trial. At the re-trial, Judge Blackmore ruled that, for the purposes of section 128(7), the re-trial was a different proceeding and that the certificate would apply. Consequently, the Crown would be prevented from tendering evidence given by the accused in the original trial where that evidence fell within the ambit of the certificate.

7.288 A subsequent application before the original trial judge was made to settle the terms of the section 128 certificate. Although the correctness of Judge Blackmore's ruling was not in issue, the question whether a re-trial could properly be considered to be a 'proceeding' for the purpose of a section 128 certificate was considered. Howie J stated:¹⁵⁹⁰

¹⁵⁸⁷ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.13100].

¹⁵⁸⁸ Ibid [1.3.12820], citing *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141, 147 (Cole JA).

¹⁵⁸⁹ [2004] NSWSC 45.

¹⁵⁹⁰ Ibid [11].

I find it difficult to see any justifiable policy which would permit an accused to give evidence in a trial on the basis that some or all of it could not be used against him in any subsequent proceeding for the same offence. There are many situations in which a retrial can occur other than because of a jury disagreement. It is, to my mind at least and generally speaking, an affront to the administration of criminal justice that the evidence given by an accused at a trial of a serious criminal offence could not be used by the Crown at a subsequent trial of the same offence either as evidence in the Crown case or by way of cross-examination of the accused if he or she gave evidence on that occasion. Yet that would be the result of the issuing of the certificate issued by me if the further trial is caught by s 128(7). I do not believe that could have been the intention of the Law Reform Commission or the legislature in giving effect to the Commission's recommendations.

7.289 Howie J doubted that the meaning of 'proceeding' in section 128(7) could include a re-trial and considered that, if it did, the section should be amended to provide otherwise.¹⁵⁹¹

7.290 The statement of Howie J in *R v Cornwell* has not be considered in any subsequent cases.

The ALRC's proposal

7.291 The ALRC considered that the current definition of a 'NSW court' in the *Evidence Act 1995* (NSW) 'unduly limits' the application of a section 128 certificate.¹⁵⁹² It considered that the scope of the protection offered by a certificate should be the same under both the Commonwealth and New South Wales legislation.¹⁵⁹³ It proposed:¹⁵⁹⁴

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

7.292 The ALRC also noted that there was general support for the view that a 'proceeding' for which a certificate may be used under section 128 should not include a re-trial for the same offence.¹⁵⁹⁵ It considered the analysis in *R v Cornwell* 'persuasive',¹⁵⁹⁶ and concluded that section 128 should be clarified to reflect this provision:¹⁵⁹⁷

1591 Ibid [18].

1592 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.248.

1593 Ibid.

1594 Ibid Proposal 13–12, post para 13.248.

1595 Ibid para 13.247.

1596 Ibid.

1597 Ibid Proposal 13–11, post para 13.248.

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

7.293 The ALRC included a draft provision to this effect in its Discussion Paper:¹⁵⁹⁸

128 Privilege in respect of self-incrimination in other proceedings

...

(7A) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the offence or a prosecution of the defendant for an offence arising out of the same, or substantially the same, circumstances as the first-mentioned offence.

The QLRC's view

7-19 As to the approach to the privilege against self-incrimination and self-exposure to a penalty, the QLRC:

- (a) notes that section 128 of the uniform Evidence Acts is an entirely different regime from the common law, as it is applied in Queensland, in that it is based on the issuing of a certificate;
- (b) notes that the ALRC's proposal to amend section 128 by adding a new subsection (7A), which is to provide that subsection (7) does not apply to a retrial for the same offence, is specific to the certificate procedure under section 128 of the uniform Evidence Acts;¹⁵⁹⁹ and
- (c) considers that the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.

¹⁵⁹⁸ Ibid Appendix 1, 558.

¹⁵⁹⁹ A simpler alternative might be to amend the introductory words to section 128(7), so that it reads: 'In any proceeding in an Australian court, other than the proceeding in which the certificate is given or a retrial of that proceeding' and add a definition of 'retrial'.

The extent to which a defendant in a criminal proceeding may be compelled to give self-incriminatory evidence

7.294 In *Cross on Evidence*, it is explained how, if a defendant in a criminal proceeding could claim the privilege against self-incrimination, the defendant would be unduly favoured:¹⁶⁰⁰

by being able to give the [defendant's] version of the circumstances of the offence charged without the risk of being subject to cross-examination as to those matters by claiming the privilege against self-incrimination on the ground that an answer to a question might show that the [defendant] had committed the crime under investigation.

7.295 It is noted that, to avoid this danger, all jurisdictions have legislative provisions under which a defendant 'may be asked any question in cross-examination notwithstanding that it would tend to incriminate the [defendant] as to the offence charged'.¹⁶⁰¹ Section 128(8) of the uniform Evidence Acts is cited as one of the provisions having this effect, as is section 15(1) of the *Evidence Act 1977 (Qld)*.¹⁶⁰²

7.296 Section 128(8) of the uniform Evidence Acts provides:

- (8) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
- (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.

7.297 As noted previously, the effect of section 128(8) is that section 128, and therefore the certification process that applies under the section, does not apply to evidence given by a defendant that is relevant to the proof of the commission of the offence with which the defendant is charged.

7.298 However, it is not apparent how the uniform Evidence Acts abrogate the privilege against self-incrimination in order to compel the giving of evidence that may tend to prove the commission of the offence with which a defendant is charged.

7.299 Section 128(8) does not expressly abrogate the privilege against self-incrimination. In the absence of express words of abrogation, the abrogation of the privilege will depend on whether the provision in question sufficiently demonstrates the relevant intention by 'necessary implication'.¹⁶⁰³ The

¹⁶⁰⁰ Heydon JD, *Cross on Evidence* (7th ed, 2004) [23140].

¹⁶⁰¹ Ibid.

¹⁶⁰² Ibid note 55.

¹⁶⁰³ *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ).

expression 'necessary implication' has been said to import 'a high degree of certainty as to legislative intention'.¹⁶⁰⁴

7.300 In contrast, there is no doubt under the Queensland legislative provision that the privilege against self-incrimination is abrogated in this situation. Section 15(1) of the *Evidence Act 1977* (Qld) provides:

15 Questioning a person charged in a criminal proceeding

- (1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.

The QLRC's view

7.301 As explained above, it is not entirely clear that section 128 of the uniform Evidence Acts abrogates the privilege against self-incrimination in respect of evidence, given by a defendant in a criminal proceeding, that tends to prove the commission of the offence with which the defendant is charged. In the QLRC's view, it is undesirable that, if section 128 does not abrogate the privilege against self-incrimination in this situation, the privilege against self-incrimination may still apply. The uniform Evidence Acts should expressly abrogate the privilege against self-incrimination in this situation.

7-20 The QLRC is of the view that section 128 of the uniform Evidence Acts should be amended to provide expressly that, where a defendant gives evidence in a criminal proceeding, the defendant is not entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove that the defendant:

- (a) did an act the doing of which is a fact in issue;¹⁶⁰⁵ or
- (b) had a state of mind the existence of which is a fact in issue.

¹⁶⁰⁴ *Hamilton v Oades* (1989) 166 CLR 486, 495 (Mason CJ).

¹⁶⁰⁵ Note that s 128(9) of the uniform Evidence Acts provides that a reference in the section to doing an act includes a reference to failing to act.

EVIDENCE EXCLUDED IN THE PUBLIC INTEREST

Common law

7.302 As noted above,¹⁶⁰⁶ the common law recognises a rule excluding evidence about state matters. This is referred to as the public interest immunity rule. The public interest immunity rule is that '[r]elevant evidence must be excluded from a court or other body having the power to coerce the giving of evidence if its disclosure would be prejudicial or injurious to public or state interest'.¹⁶⁰⁷

7.303 The rule applies not just to the adducing of evidence at trial, but also in respect of pre-trial proceedings such as discovery and interrogatories and seizure of documents pursuant to search warrants¹⁶⁰⁸ and applies to both documentary and real evidence.¹⁶⁰⁹

7.304 Unlike a privilege, however, a claim of public interest immunity can be made by the State, a non-governmental party to proceedings or by the court on its own motion.¹⁶¹⁰

7.305 In dealing with a claim of public interest immunity, the court is to balance the public interest in the need for the due administration of justice against the alleged injury to the public interest in production and disclosure.¹⁶¹¹

Uniform Evidence Acts

7.306 In its earlier reports, the ALRC expressed no serious concerns about the common law approach to public interest immunity.¹⁶¹² It recommended that the courts' role in raising public interest immunity as a matter to be considered should be maintained.¹⁶¹³

7.307 The ALRC did, however, consider that the common law test was expressed too generally in terms of requiring the court to consider the competing public interests at a general level. It recommended that the test provide more specifically that the court is to balance 'the nature of the injury

¹⁶⁰⁶ See para 7.7 of this Report.

¹⁶⁰⁷ McNicol SB, *Law of Privilege* (1992) 375. See *Sankey v Whitlam* (1978) 142 CLR 1.

¹⁶⁰⁸ Heydon JD, *Cross on Evidence* (7th ed, 2004) [27035].

¹⁶⁰⁹ *Ibid* [27040].

¹⁶¹⁰ McNicol SB, *Law of Privilege* (1992) 374–5, citing *Sankey v Whitlam* (1978) 142 CLR 1, 58 (Stephen J).

¹⁶¹¹ *Ibid* 391, citing *Sankey v Whitlam* (1978) 142 CLR 1.

¹⁶¹² See Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 863–864; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 220–221.

¹⁶¹³ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 865–866; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 221.

which the nation or the public service would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation'.¹⁶¹⁴ The ALRC also recommended that specific guidance be given to the court in undertaking that balancing exercise.¹⁶¹⁵

7.308 Claims of public interest immunity are dealt with under section 130 of the uniform Evidence Acts. Section 130 provides:

130 Exclusion of evidence of matters of state

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:
 - (a) prejudice the security, defence or international relations of Australia; or
 - (b) damage relations between the Commonwealth and a State or between 2 or more States; or
 - (c) prejudice the prevention, investigation or prosecution of an offence; or
 - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
 - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
 - (f) prejudice the proper functioning of the government of the Commonwealth or a State.

¹⁶¹⁴ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 866, adopting the formulation expressed in *Alister v The Queen* (1984) 154 CLR 404.

¹⁶¹⁵ *Ibid.*

- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:
- (a) the importance of the information or the document in the proceeding;
 - (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;
 - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
 - (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
 - (e) whether the substance of the information or document has already been published;
 - (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.
- (6) A reference in this section to a State includes a reference to a Territory.

7.309 The ALRC recently examined the operation of section 130 in the context of the protection of classified and security sensitive information in court proceedings, concluding that section 130 worked effectively.¹⁶¹⁶

7.310 In its Issues Paper, the ALRC posed the following question in relation to section 130:¹⁶¹⁷

Are concerns raised by the operation of s 130 of the uniform Evidence Acts? Should these concerns be addressed through amendment to the uniform Evidence Acts and if so, how?

Appeal process

7.311 In its Discussion Paper, the ALRC considered a submission from the Australian Government Solicitor that a more clearly defined appeal process is needed for public interest immunity claims.¹⁶¹⁸

¹⁶¹⁶ Australian Law Reform Commission, Report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004), cited in Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.256.

¹⁶¹⁷ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 11–18, post para 11.86.

¹⁶¹⁸ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.259.

7.312 In its original evidence inquiry, the ALRC considered whether procedural provisions should be included to enable a judge's ruling about public interest immunity to be obtained in advance of the trial, and to allow time for an appeal.¹⁶¹⁹ The ALRC considered that such provision would not be necessary given the decision in *Sankey v Whitlam*.¹⁶²⁰ In that case, Gibbs ACJ stated that:¹⁶²¹

If a strong case has been made out for the production of the documents, and ... an order for production will be made ... it is desirable that the government concerned, Commonwealth or State, should have an opportunity to intervene and be heard before any order for disclosure is made. Moreover, no such order should be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so.

The ALRC's view

7.313 In its Discussion Paper, the ALRC noted the concern of the Australian Government Solicitor about the 'need for a more defined appeal process from a ruling on a claim for public interest immunity'.¹⁶²² However, the ALRC considered that, as the concern was one of procedure, it 'should not be something that falls under the ambit of an Evidence Act of general application'.¹⁶²³ It noted that appeal procedures in respect of other evidentiary rulings are not dealt with in the uniform Evidence Acts, and did not propose any amendment to section 130 in that regard.¹⁶²⁴

The QLRC's view

7.314 In Queensland, the common law rule as to public interest immunity applies. At common law, it is clear that the Crown has a right to appear to argue the case for immunity, even where the Crown is not a party to the proceeding.¹⁶²⁵

1619 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 868.

1620 Ibid. See *Sankey v Whitlam* (1978) 142 CLR 1.

1621 *Sankey v Whitlam* (1978) 142 CLR 1, 43. See also *Alister v The Queen* (1984) 154 CLR 404, 412 (Gibbs CJ).

1622 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.261.

1623 Ibid.

1624 Ibid.

1625 McNicol SB, *Law of Privilege* (1992) 403, where McNicol suggests that, 'where the Crown is not a party to the action, it may be necessary to call the Attorney-General to appear and argue the case or join the Attorney-General as an appellant to the case on appeal'. See also *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404; *Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090.

7-21 The QLRC notes that the approach to the public interest immunity rule under the uniform Evidence Acts is broadly consistent with the common law, as it is applied in Queensland.

Application to pre-trial proceedings

7.315 As noted above,¹⁶²⁶ at common law, a claim of public interest immunity can be made in respect of pre-trial procedures such as discovery, interrogatories and subpoenas.¹⁶²⁷

7.316 In its Discussion Paper, the ALRC noted that, in the case of tribunals and investigative agencies, public interest immunity is often preserved by specific statutory provision.¹⁶²⁸

7.317 Currently, section 130 of the uniform Evidence Acts applies only to the adducing of evidence in court.¹⁶²⁹ In pre-trial proceedings, the common law still applies.

The ALRC's proposal

7.318 In its Discussion Paper, the ALRC expressed the view that section 130 is 'essentially a restatement of the common law, with a non-exhaustive formula indicating how the competing interests are to be balanced'.¹⁶³⁰ It concluded that it would be 'desirable' to extend the operation of the section to pre-trial proceedings. It proposed:¹⁶³¹

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

1626 See para 7.303 of this Report.

1627 Heydon JD, *Cross on Evidence* (7th ed, 2004) [27035].

1628 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.262.

1629 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.13500].

1630 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.263.

1631 *Ibid* Proposal 13–13, post para 13.263.

The QLRC's view

7.319 As noted above,¹⁶³² the common law rule of public interest immunity applies in Queensland, and can be claimed in respect of pre-trial discovery procedures and seizure of evidence by search warrant.

7-22 The QLRC notes that, in Queensland, a claim of public interest immunity can be made in pre-trial proceedings, as well as in response to a search warrant.

7-23 The QLRC supports the ALRC's proposal to extend the application of section 130 of the uniform Evidence Acts to apply to the pre-trial and non-curial contexts specified in the proposal.

EXCLUSION OF EVIDENCE OF SETTLEMENT NEGOTIATIONS

Common law

7.320 As noted above, the common law recognises a privilege attaching to communications made in aid of settlement, also referred to as the 'without prejudice' privilege.¹⁶³³

7.321 The general rule is that 'communications between parties which are genuinely aimed at settlement whether oral or in writing, cannot be put in evidence without the consent of both parties in the event of those negotiations for settlement being unsuccessful'.¹⁶³⁴

7.322 The primary rationale for the rule is the public interest in encouraging out-of-court settlement of disputes and of preventing statements made in the course of negotiations from being put before the court as admissions of liability.¹⁶³⁵

7.323 At common law, the rule operates as a privilege to be claimed in objection to the admissibility of evidence.¹⁶³⁶

¹⁶³² See para 7.315 of this Report.

¹⁶³³ See para 7.14 of this Report.

¹⁶³⁴ McNicol SB, *Law of Privilege* (1992) 435, citing *Rush and Tompkins Ltd v Greater London Council* [1988] 3 All ER 737, 740.

¹⁶³⁵ *Ibid* 436–7, citing *Cutts v Head* [1984] Ch 290, 306 (Oliver LJ). See also Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.197]. The privilege is available against third parties: *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276.

¹⁶³⁶ McNicol SB, *Law of Privilege* (1992) 441, citing *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285, 292 (Dixon CJ, Webb, Kitto and Taylor JJ).

7.324 There are also a number of exceptions to the privilege, including:¹⁶³⁷

- where both parties consent to the disclosure or the privilege is waived by the parties;
- where a settlement agreement is reached and evidence of the negotiations is used in court to enforce the agreement;
- where protecting the communication from disclosure would mislead the court; and
- where the communication is a statement of objective fact having no connection to the matters in issue.

Uniform Evidence Acts

7.325 In its original evidence inquiry, the ALRC recommended that the rule about admissibility of settlement negotiations be cast as an exclusionary rule, rather than as a privilege.¹⁶³⁸

7.326 Section 131 of the uniform Evidence Acts sets out the exclusionary rule. Section 131(1) provides:¹⁶³⁹

131 Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

¹⁶³⁷ McNicol SB, *Law of Privilege* (1992) 461–85. See also Heydon JD, *Cross on Evidence* (7th ed, 2004) [25375]–[25385]; Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A.204]–[A.205].

¹⁶³⁸ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 891; Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) para 222.

¹⁶³⁹ Section 131(1) of the uniform Evidence Acts is to be construed broadly so that evidence of settlement negotiations between disputing parties cannot be adduced even in litigation to which neither of them is a party or which involves another party: *First Capital Partners Pty Ltd v Sylvatech Ltd* (2004) 186 FLR 266.

7.327 Section 131(2) provides a number of exceptions to the rule including where the parties consent to the disclosure or where the substance of the evidence has been disclosed.¹⁶⁴⁰

7.328 In its Discussion Paper, the ALRC noted a submission that the scope of the exceptions provided for in section 131(2) may be too wide.¹⁶⁴¹ It was submitted that certain statements made during mediation, that would ordinarily be protected, may be caught by the exceptions.¹⁶⁴²

¹⁶⁴⁰ Uniform Evidence Acts s 131(2)(a), (b). The remaining exceptions are contained in s 131(2)(c)–(k):

131 Exclusion of evidence of settlement negotiations

...

(2) Subsection (1) does not apply if:

...

- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

¹⁶⁴¹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 13.270, citing M Hoyne, *Submission E 42*, 21 March 2005.

¹⁶⁴² *Ibid*, listing the following examples:

7.329 It was submitted to the ALRC that provision should be made to ensure:¹⁶⁴³

that nothing that is said or done in mediation, or in preparation for mediation or in consequence of a mediation, should be admissible in any court unless:

- it amounts to a criminal act;
- such disclosure is necessary in order to protect the safety of a person;
or
- it vitiates a written agreement that is alleged to have been made.

7.330 Alternatively, it was submitted that section 131 could be amended to provide that agreements reached as a result of mediation will be enforceable only if, and to the extent that, they are in writing.¹⁶⁴⁴ It was suggested that this would alleviate the need for the courts to examine without prejudice discussions to determine if a binding agreement was reached.¹⁶⁴⁵

-
- Where the statement forms part of a discussion that is alleged to give rise to an agreement;
 - If a party is alleged to have made any mis-statement at a mediation that may be said to amount to a misrepresentation or an estoppel. It may be sufficient that a party simply over-states that strength of their case;
 - If the ACCC calls for information of what transpired at a mediation under s 155 of the *Trade Practices Act 1974* (Cth);
 - If there is an examination undertaken by ASIC or a liquidator under s 597 of the *Corporations Law 2001* (Cth);
 - Possibly, where an administrative decision maker seeks to rely on the admission;
 - Where the other party is said to have expressly, or impliedly, waived the privilege;
 - If a party makes a statement that is outside the parameters of the precise dispute in question;
 - If a party acknowledges that they are impecunious;
 - If a party says that they will move assets to make themselves "judgment proof";
 - If a party makes a defamatory statement or threatens to institute patent, copyright or trade mark proceedings; or
 - If a party concedes that he or she may give evidence contrary to what he or she concedes to be the case during mediation.

1643 Ibid para 13.271.

1644 Ibid para 13.272.

1645 Ibid.

7.331 The ALRC also noted some drafting discrepancies with section 131.¹⁶⁴⁶

The ALRC's view

7.332 In its Discussion Paper, the ALRC considered that there appear to be no significant difficulties in the operation of section 131.¹⁶⁴⁷ It was 'reluctant' to recommend any change to the section 'without reference to a specific difficulty that requires remedy'.¹⁶⁴⁸ It posed the following question for further consideration:¹⁶⁴⁹

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

The QLRC's view

7.333 In Queensland, the common law privilege attaching to communications made in aid of settlement applies. As noted above, the *Supreme Court of Queensland Act 1991* (Qld) additionally provides that anything done or said in the course of alternative dispute resolution, including an admission, is admissible in a civil proceeding only if all the parties agree.¹⁶⁵⁰

7-24 As to the exclusion of evidence of communications made in aid of settlement, the QLRC:

- (a) considers that the rule in section 131 of the uniform Evidence Acts appears broadly consistent with the common law privilege, as it is applied in Queensland;**

¹⁶⁴⁶ Ibid para 13.273–13.274:

Under s 131(1)(a) the communication is protected where it is made in connection with an attempt to negotiate the settlement of 'the' dispute. Under s 131(1)(b) documents are protected that have been prepared in connection with an attempt to negotiate 'a' dispute. ... if the section is amended then any differences in language should be corrected.

...

It is also suggested that s 131(2)(h) requires amendment. This section provides an exception to the privilege where the communication or document is relevant to determining liability for costs. It is argued that there is an anomaly in the legislation because the privilege is lost when the court is determining the question of costs but not when it is determining the question of other matters not related to liability, such as the question of interest on damages awarded. On this basis, s 131(2)(h) could be amended to include the words 'liability for costs or interest'.

¹⁶⁴⁷ Ibid para 13.275.

¹⁶⁴⁸ Ibid.

¹⁶⁴⁹ Ibid Question 13–3, post para 13.275.

¹⁶⁵⁰ *Supreme Court of Queensland Act 1991* (Qld) s 114(1).

- (b) considers that the exceptions to the rule contained in section 131(2) appear broadly consistent with the exceptions to the common law privilege; and**
- (c) considers that the issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

Chapter 8

Identification evidence

INTRODUCTION

8.1 Traditionally, identification evidence referred to evidence of eyewitness identification of a defendant as the person who committed, or was connected with, an offence.¹⁶⁵¹ The general unreliability of identification evidence has been discussed at length by the courts, law reform bodies and commentators.¹⁶⁵²

8.2 The approach of the courts at common law to the admissibility of identification evidence is that it:¹⁶⁵³

is admissible evidence, that its probative value may be important, that the judge has a discretion to exclude it when he considers its prejudicial effect outweighs that value, and that directions may be given to ensure that unfair use is not made of the evidence.

8.3 A number of High Court decisions have provided guidelines as to the appropriate procedures for the conduct of identification parades, photo identification and out-of-court and in-court identifications.¹⁶⁵⁴ These guidelines aim to ensure fairness to the accused and greater reliability of the evidence. Adherence to these guidelines reduces the risk of discretionary exclusion or of an unsafe conviction. This chapter discusses a number of the key guidelines.

8.4 The guidelines provided by the High Court suggest that an identification parade should be held wherever possible,¹⁶⁵⁵ on the basis that an identification parade has been considered the 'safest and most satisfactory way of ensuring that a witness makes an adequate identification'.¹⁶⁵⁶

1651 Voice identification is a related issue and similar principles apply: see *Bulejck v The Queen* (1996) 185 CLR 375.

1652 See for example *Alexander v The Queen* (1981) 145 CLR 395; Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 415–421, 826; Great Britain Criminal Law Revision Committee, Report, *Evidence (General)* (11th Report, 1972) para 196; Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.9600].

1653 *Alexander v The Queen* (1981) 145 CLR 395, 430 (Mason J). The public policy discretion enunciated in *Bunning v Cross* (1978) 141 CLR 54 may also be used to exclude identification evidence: see *R v Clune* [1982] VR 1, 11 (Crockett J).

1654 *Davies and Cody v The Queen* (1937) 57 CLR 170; *Alexander v The Queen* (1981) 145 CLR 395; *Domican v The Queen* (1992) 173 CLR 555; *Festa v The Queen* (2001) 208 CLR 593.

1655 *Davies and Cody v The Queen* (1937) 57 CLR 170, 181; *Alexander v The Queen* (1981) 145 CLR 395, 399–400 (Gibbs CJ), 430–1 (Mason J).

1656 *Alexander v The Queen* (1981) 145 CLR 395, 399 (Gibbs CJ).

8.5 Identification by means of photograph is open to a number of objections. First, the accused is necessarily absent and has no means of knowing whether there was any unfairness in the process.¹⁶⁵⁷ Secondly, the production of such photographs may suggest that the accused had a police record.¹⁶⁵⁸ Thirdly, the photographic identification may have a ‘displacement effect’ – that is, that once a witness sees a photograph, the memory of it may supplant the memory of the original sighting.¹⁶⁵⁹ A further concern is that a photo board may put subconscious pressure on the witness to identify someone in the photos presented.¹⁶⁶⁰

8.6 Despite these objections, photographic identification evidence is not inadmissible or necessarily excluded in the court’s discretion where an identification parade was not conducted¹⁶⁶¹ or where the photographic identification took place after the accused had been taken into custody.¹⁶⁶² There may be circumstances in which it will not be reasonable or practical to hold a parade.¹⁶⁶³ It has been observed by Thomas J that a ‘line-up’ will not necessarily always be the best option:¹⁶⁶⁴

Factors such as the stage of the enquiry, urgency, public safety, the area (country or city), the degree of suspicion, the number of suspects or potential suspects, and many others may play a part.

8.7 If the procedure adopted for a photographic identification does not overcome the objections noted above, the evidence may be excluded because of its high prejudice to the accused.¹⁶⁶⁵ These objections are often explicitly referred to in the courts’ consideration whether to exercise its discretion to exclude the evidence.¹⁶⁶⁶

1657 Ibid 400 (Gibbs CJ).

1658 Ibid 400–1 (Gibbs CJ).

1659 Ibid 409 (Stephen J).

1660 *Pitkin v The Queen* (1995) 130 ALR 35, 38 (Deane, Toohey and McHugh JJ).

1661 *Alexander v The Queen* (1981) 145 CLR 395; *Pitkin v The Queen* (1995) 130 ALR 35; *R v Murphy* [1996] 2 Qd R 523; *R v Bell* [2000] QCA 442.

1662 *Alexander v The Queen* (1981) 145 CLR 395, 431 (Mason J, Aickin J concurring), rejecting the English approach.

1663 See for example *R v Kostic* (2004) 115 A Crim R 10, [34] in which the South Australian Court of Criminal Appeal held that the witness should not have been asked to identify anyone from a police line-up of men, including the defendant, when the witness’s statement to police described a female as the person he saw in connection with the offence, and that the identification evidence should not have been admitted.

1664 *R v Murphy* [1996] 2 Qd R 523, 530.

1665 *Alexander v The Queen* (1981) 145 CLR 395, 410–411 (Stephen J).

1666 *Festa v The Queen* (2001) 208 CLR 593, 602–3 (Gleeson J); *R v Murphy* [1996] 2 Qd R 523, 528–9 (Thomas J).

8.8 At common law, where identification evidence is relied on as any significant part of the proof of guilt of an offence, the judge must warn the jury about the dangers of convicting on such evidence where its reliability is disputed.¹⁶⁶⁷

Queensland

8.9 In Queensland, the admissibility of identification evidence is governed by the common law with some statutory modification.¹⁶⁶⁸ In particular, section 377A of the *Police Powers and Responsibilities Act 2000* (Qld) provides:

377A Identification of suspects

- (1) It is lawful for a police officer to use 1 or more of the following procedures to help gather evidence of the identity of a person suspected of having committed an offence—
 - (a) an identification parade;
 - (b) a photo board containing at least 12 photos of people of similar appearance, 1 of whom is the person suspected of having committed the offence;
 - (c) videotape;
 - (d) computer generated images.
- (2) The police officer must comply with the procedures in the responsibilities code for identification procedures.
- (3) The police officer may ask a person to take part in an identification parade.
- (4) The person may refuse to take part in the parade.
- (5) This section does not limit the procedures a police officer may use to help gather evidence of the identity of a person suspected of having committed an offence.

8.10 The 'responsibilities code' referred to in section 377A(2) is the *Police Responsibilities Code 2000* (Qld), which is contained in Schedule 10 of the *Police Powers and Responsibilities Regulation 2000* (Qld). The requirements for witness identification are set out in Part 6 of the Code.

8.11 In relation to identification parades, clauses 50 and 51 of the *Police Responsibilities Code 2000* (Qld) provide:

¹⁶⁶⁷ *Domican v The Queen* (1992) 173 CLR 555, 561.

¹⁶⁶⁸ See generally Forbes JRS, *Evidence Law in Queensland* (5th ed, 2004) [A77]–[A79], [130.70]–[130.74]. See also *Evidence Act 1977* (Qld) s 21AT in relation to identification of a person by an 'affected child'.

50 Conducting the identification parade

- (1) Each witness must view the identification parade separately.
- (2) The police officer conducting the identification parade must ask the witness to carefully view the parade and to state whether the witness recognises anyone in the parade.
- (3) The police officer must ask the question in a way that does not suggest the identity of any participant in the identification parade.
- (4) If the witness indicates he or she recognises a person in the identification parade, the police officer conducting the parade must ask the witness to clearly identify the person recognised, for example, by stating the number of the person identified or describing his or her position in the parade.

51 Use of suitable persons in the identification parade

An identification parade must include the suspect and at least 11 other people of similar physical appearance and wearing similar clothing.

8.12 The way a witness identifies a person during an identification procedure must, if reasonably practicable, be electronically recorded,¹⁶⁶⁹ and the behaviour and position of each person in an identification parade must also be electronically recorded or photographed.¹⁶⁷⁰

8.13 As far as reasonably practicable, the conditions in which the witness saw a person involved in the offence, such as lighting, distance and concealment of particular aspects of the person, must be replicated for the identification parade.¹⁶⁷¹

8.14 The procedure for an identification parade must be explained to a suspect before the parade is conducted.¹⁶⁷²

8.15 In relation to identification using photographs, clauses 52 and 53 of the responsibilities code provide:

52 General requirements for identification using photographs

To avoid directing the attention of the witness to a particular photograph, the police officer must ensure nothing is marked on any photograph or the backing board on which the photograph is mounted.

¹⁶⁶⁹ *Police Responsibilities Code 2000* (Qld) cl 45(3).

¹⁶⁷⁰ *Police Responsibilities Code 2000* (Qld) cl 47.

¹⁶⁷¹ *Police Responsibilities Code 2000* (Qld) cl 49.

¹⁶⁷² *Police Responsibilities Code 2000* (Qld) cl 48.

53 Conducting a photoboard identification

- (1) A police officer showing witnesses a photoboard must show the photoboard to each witness separately.
- (2) Also, the police officer must ask the witness to carefully view the photoboard and to state whether the witness recognises anyone whose photo is on the photoboard.
- (3) The police officer must ask the question in a way that does not suggest the identity of a person whose photograph is on the photoboard.
- (4) If the witness indicates he or she recognises a person in a photo on the photoboard, the police officer must ask the witness to—
 - (a) clearly state the number of the photograph the witness has identified as being that of the person alleged to be responsible for committing the relevant offence; and
 - (b) write the photograph number and the date the photoboard was shown to the witness—
 - (i) on the front of an unmarked photocopy of the photoboard; or
 - (ii) on the back of the photoboard or the selected photograph; and
 - (c) sign the photoboard, photocopy or photograph where the person has written on it.

8.16 A breach of the provisions of the *Police Responsibilities Code 2000* (Qld) will not render the identification evidence automatically inadmissible.¹⁶⁷³ Non-compliance may, however, give rise to discretionary exclusion. Section 8 of the *Police Powers and Responsibilities Act 2000* (Qld) expressly preserves the court's discretion, at common law, to exclude evidence in a criminal proceeding.¹⁶⁷⁴ Discretionary exclusion may arise on the basis that:

- non-compliance affects the reliability of the identification evidence such that its undue prejudicial effect outweighs its probative value;¹⁶⁷⁵ or
- non-compliance means that the evidence was unlawfully obtained and should be excluded after a consideration of the competing issues of 'on the one hand, the need for the citizen to be protected from illegal actions

¹⁶⁷³ *R v Murphy* [1996] 2 Qd R 523; *R v Stott, Van Embden and Voss* (2000) 116 A Crim R 15.

¹⁶⁷⁴ *R v Batchelor* [2003] QCA 246, [32].

¹⁶⁷⁵ *Alexander v The Queen* (1981) 145 CLR 395, 430 (Mason J); *R v Murphy* [1996] 2 Qd R 523, 531.

from the authorities and, on the other, the interest of the State to secure evidence relevant to the commission of serious crime'.¹⁶⁷⁶

Uniform Evidence Acts¹⁶⁷⁷

8.17 Identification evidence is dealt with in Chapter 3, Part 3.9 of the uniform Evidence Acts, which applies only in respect of criminal proceedings.¹⁶⁷⁸ It should be noted that, in addition to the statutory framework of the uniform Evidence Acts, police officers are also required to comply with detailed guidelines on identification procedures.¹⁶⁷⁹

8.18 The term 'identification evidence' is defined in the uniform Evidence Acts to mean evidence that is:¹⁶⁸⁰

- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
 - (i) the offence for which the defendant is being prosecuted was committed; or
 - (ii) an act connected to that offence was done;

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or
- (b) a report (whether oral or in writing) of such an assertion.

8.19 The uniform Evidence Acts distinguish between 'visual identification evidence'¹⁶⁸¹ (section 114) and 'picture identification evidence'¹⁶⁸² (section 115).

¹⁶⁷⁶ *R v Batchelor* [2003] QCA 246, [32], citing *Bunning v Cross* (1978) 141 CLR 54. Although this observation was made in the context of a breach of ss 249 (Right to communicate with friend, relative or lawyer) and 254 (Questioning of intoxicated persons) of the *Police Powers and Responsibilities Act 2000* (Qld), it expresses a general principle that would apply to the matter under discussion here.

¹⁶⁷⁷ *Evidence Act 2001* (Tas) does not include uniform Evidence Acts ss 114, 115.

¹⁶⁷⁸ Uniform Evidence Acts s 113.

¹⁶⁷⁹ Commissioner of Police NSW, *Procedures for the Evidence Act* (1998) 32–7 (Identification of evidence); *Crimes Act 1914* (Cth) ss 3ZM–3ZO.

¹⁶⁸⁰ Uniform Evidence Acts s 3(1), Dictionary (definition of 'identification evidence').

¹⁶⁸¹ 'Visual identification evidence' means identification evidence relating to an identification based wholly or partly on what a person saw, but does not include picture identification evidence: uniform Evidence Acts s 114(1).

¹⁶⁸² 'Picture identification evidence' means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers: uniform Evidence Acts s 115(1). 'Picture' includes a photograph: uniform Evidence Acts s 115(10)(a).

8.20 The general effect of section 114 is that visual identification evidence of a defendant in criminal proceedings is not admissible when adduced by the prosecution unless:¹⁶⁸³

- an identification parade was utilised by the police¹⁶⁸⁴ or it would not have been reasonable to have held such a parade;¹⁶⁸⁵ and
- the identification of the defendant was made without any intentional influence on the witness to identify the defendant.¹⁶⁸⁶

8.21 In recommending that an identification parade be a pre-condition to the admissibility of identification evidence, the ALRC rejected the view that eyewitness identification was no more unreliable or prejudicial than other evidence and therefore could be left to discretionary control in criminal trials.¹⁶⁸⁷ The ALRC concluded that the adoption of an exclusionary rule would ensure that the best evidence of identification was placed before the court.¹⁶⁸⁸ Practical problems of holding identification parades were addressed through the exceptions.¹⁶⁸⁹

8.22 Section 115 provides that picture identification evidence, including photographic identification, adduced by the prosecution is not admissible in a number of particular circumstances, including where the pictures examined 'suggest that they are pictures of persons in police custody'.¹⁶⁹⁰ This reflects one of the fundamental objections to the use of photos for identification noted by the High Court in *Alexander v The Queen*.¹⁶⁹¹ The ALRC considered that there was no doubt that an accused would be seriously prejudiced by a witness's assumption that the person represented in a police photograph had a police record.¹⁶⁹² It considered that rules were necessary to control the admissibility of such evidence.¹⁶⁹³

¹⁶⁸³ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.9520].

¹⁶⁸⁴ Uniform Evidence Acts s 114(2)(a), reflecting the preference for identification parades.

¹⁶⁸⁵ Uniform Evidence Acts s 114(2)(b). Section 114(3)–(6) sets out factors to be taken into account in determining whether it was reasonable to hold an identification parade.

¹⁶⁸⁶ Uniform Evidence Acts s 114(2).

¹⁶⁸⁷ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 826.

¹⁶⁸⁸ *Ibid* para 830.

¹⁶⁸⁹ *Ibid* para 830, 833.

¹⁶⁹⁰ Uniform Evidence Acts s 115(2).

¹⁶⁹¹ (1981) 145 CLR 395, 409 (Stephen J) discussed at para 8.5 of this Report.

¹⁶⁹² Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 836.

¹⁶⁹³ *Ibid*.

8.23 Section 116 provides that, if identification evidence has been admitted, the judge is to inform the jury that there is a special need for caution before accepting the identification evidence, and of the reasons for that need for caution, both generally and in the circumstances of the case.¹⁶⁹⁴

8.24 A judge may also give a warning concerning the unreliability of identification evidence under the general warning provision contained in section 165 of the uniform Evidence Acts.¹⁶⁹⁵

8.25 Identification evidence that satisfies the requirements of sections 114 or 115 may be subject to exclusion under section 137, which requires evidence in criminal proceedings to be excluded if its probative value is outweighed by the danger of unfair prejudice to the defendant, or under section 138, which requires improperly or illegally obtained evidence to be excluded unless the desirability of admitting the evidence outweighs the undesirability of admitting improperly or illegally obtained evidence.¹⁶⁹⁶

The QLRC's view

8.26 To some extent, the uniform Evidence Acts reflect the common law's preference for identification parades as the most reliable form of identification.¹⁶⁹⁷ However, this preference is not reflected in the existing practice in Queensland, where identification parades are not commonly held.¹⁶⁹⁸

8.27 The approach of the uniform Evidence Acts to identification evidence goes beyond the common law, in that compliance with the requirements for identification evidence is a pre-condition to admissibility, rather than a matter relevant to discretionary exclusion.

8.28 This represents a significant change from the approach taken to identification evidence at common law, as applied in Queensland.

¹⁶⁹⁴ Section 116 of the uniform Evidence Acts is set out at note 1728 of this Report.

¹⁶⁹⁵ Uniform Evidence Acts s 165 provides that, in certain circumstances, a judge may be required to warn the jury that particular evidence may be unreliable.

¹⁶⁹⁶ Section 138 has a similar effect to the common law *Bunning v Cross* discretion, except for the onus of proof which is now on the party seeking admission: see Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.14880], [1.3.15000] and cases cited.

¹⁶⁹⁷ See also Commissioner of Police NSW, *Procedures for the Evidence Act* (1998) 32, cl 1.1: 'when investigating an offence, consider identification must be proved beyond reasonable doubt and the best form of identification evidence is the *identification parade*'.

¹⁶⁹⁸ See for example *R v Murphy* [1996] 2 Qd R 523, 530 (Thomas J): 'In the experience of the members of this Court ... the holding of a line-up by Queensland Police is a relatively rare occurrence'.

8-1 The QLRC is of the view that:

- (a) the existing practice in Queensland in relation to identification evidence adequately meets policing needs and concerns of fairness to accused persons; and**
- (b) in light of the existing law and practice in Queensland, which is substantially different from the approach taken under the uniform Evidence Acts, this issue would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

ISSUES FOR CONSIDERATION

8.29 In its Issues Paper, the ALRC raised a number of questions about how the uniform Evidence Acts deal with identification evidence. Those questions concerned the following issues:

- DNA and fingerprint evidence;
- exculpatory identification evidence;
- picture identification; and
- directions to the jury.

8.30 In its Discussion Paper, the ALRC did not propose that any amendments be made to any of the relevant provisions.¹⁶⁹⁹ However, it raised a further question for discussion in relation to in-court identification.¹⁷⁰⁰

8.31 Each of these issues is discussed in this chapter in light of the position in Queensland.

¹⁶⁹⁹ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) Chapter 12.

¹⁷⁰⁰ *Ibid* Question 12–1, post para 12.50.

DNA AND FINGERPRINT EVIDENCE

8.32 In its Issues Paper, the ALRC posed the following question in relation to DNA and fingerprint evidence.¹⁷⁰¹

Does the definition of identification evidence in the uniform Evidence Acts inadvertently encompass DNA and fingerprint evidence? If so, is this a problem and how should it be remedied?

8.33 The ALRC considered that both DNA and fingerprint evidence are usually the subject of expert opinion and that, consequently, the admissibility of such evidence would be determined according to the provisions in the uniform Evidence Acts about the admissibility of expert opinion evidence.¹⁷⁰²

8.34 Additionally, most States and the Commonwealth have enacted legislation governing forensic procedures, including the collection of DNA evidence.¹⁷⁰³

8.35 Part 1D of the *Crimes Act 1914* (Cth) provides that evidence obtained from a forensic procedure (such as the taking of a DNA sample) is inadmissible if there has been a breach of, or a failure to comply with, a provision in relation to the conduct of the forensic procedure or in relation to the recording or use of information on the DNA database system.¹⁷⁰⁴

8.36 In Queensland, Chapter 8A, Part 5 of the *Police Powers and Responsibilities Act 2000* (Qld) sets out procedures for the taking of DNA samples and the subsequent use of such samples. If the procedures are not complied with, the evidence is not rendered inadmissible, but may be subject to discretionary exclusion.¹⁷⁰⁵

8.37 Section 95A of the *Evidence Act 1977* (Qld) relates to DNA evidentiary certificates for criminal proceedings and the procedural rules to be followed when a certificate is intended either to be relied on or challenged by a party.

1701 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 10–1, post para 10.11.

1702 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.1, 12.17.

1703 For example, *Crimes Act 1914* (Cth) Part 1D; *Crimes (Forensic Procedures) Act 2000* (ACT); *Crimes (Forensic Procedures) Act 2000* (NSW); *Criminal Law (Forensic Procedures) Act 1998* (SA); *Forensic Procedures Act 2000* (Tas); *Crimes Act 1958* (Vic) Part III, Div 1 (Forensic procedures) ss 464R–464ZGF; *Criminal Investigation (Identifying People) Act 2002* (WA).

1704 *Crimes Act 1914* (Cth) s 23XX(4); unless the person does not object to the admission of the evidence or the court is satisfied on the balance of probabilities of matters that justify the admission of the evidence, such as the probative value of the evidence.

1705 See *R v The Queen* [2003] 2 Qd R 544.

The ALRC's view

8.38 In response to the suggestion that the breadth of the definition of 'identification evidence' in the uniform Evidence Acts inadvertently encompasses DNA evidence and fingerprint evidence, the ALRC concluded that the problem is 'conjecture'.¹⁷⁰⁶

8.39 The ALRC concluded that, for two reasons, the definition of 'identification evidence' does not cover, and was not intended to cover, DNA or fingerprint evidence that is used as identification evidence. First, it would be most unusual for a witness to give evidence in the form of an 'assertion' as required by the definition. Secondly, the definition of identification evidence is limited to identification 'by a person'.¹⁷⁰⁷

8.40 The ALRC did not propose to amend the uniform Evidence Acts to cover DNA or fingerprint evidence that is used as identification evidence.¹⁷⁰⁸

The QLRC's view

8.41 In the Queensland Court of Appeal decision of *R v Braithwaite*,¹⁷⁰⁹ the issue of DNA and fingerprint evidence being categorised as identification evidence was discussed:¹⁷¹⁰

There is, it seems to me, some confusion about what is meant by identification evidence in this context. Depending on its relevance to the issue of identity, even fingerprints and DNA fall into that category when it is evidence that tends to identify a particular person as a participant in events that have occurred at the time of the crime ... There is, it might be thought, an obvious difference between circumstantial evidence, and the testimony given by a witness of his or her visual or aural recognition of a person based on previous knowledge, sighting or experience.

8.42 The QLRC agrees with the ALRC's conclusion that the meaning of 'identification evidence' in Part 3.9 of the uniform Evidence Acts does not extend to DNA or fingerprint evidence.

1706 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.15.

1707 Ibid.

1708 Note that the ALRC has earlier recommended amendments to the *Crimes Act 1914* (Cth) in relation to forensic procedures in its joint report, Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) Recommendation 41–13.

1709 [2004] QCA 123.

1710 Ibid [31] (McPherson JA).

8-2 The QLRC agrees with the ALRC's conclusion that the definition of 'identification evidence' in the uniform Evidence Acts does not cover DNA or fingerprint evidence.

EXCULPATORY IDENTIFICATION EVIDENCE

8.43 In its Issues Paper, the ALRC posed the following question in relation to exculpatory identification evidence:¹⁷¹¹

Are concerns raised by the application of the uniform Evidence Acts to identification evidence that is exculpatory of the accused and, if so, how should any concerns be addressed?

8.44 In *R v Rose*,¹⁷¹² the New South Wales Court of Criminal Appeal concluded that exculpatory identification evidence of the accused does not fall within the definition of 'identification evidence' and that, therefore, no direction under section 116 is required to be given.

8.45 However, it was noted in that case that visual identification evidence is no more reliable simply because the person being identified is not the accused.¹⁷¹³ Wood CJ and Howie J considered that it may be appropriate for a judge to give a warning concerning the unreliability of such evidence under section 165 in such circumstances.¹⁷¹⁴

The ALRC's view

8.46 In its Discussion Paper, the ALRC concluded that the uniform Evidence Acts provisions, as interpreted in *R v Rose*, are adequate. It did not propose any amendment in relation to the issue of identification evidence that is exculpatory of the accused.¹⁷¹⁵

1711 Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 10–2, post para 10.11.

1712 (2002) 55 NSWLR 701, [285] (Wood CJ at CL and Howie J), [324]–[325] (Smart A-J).

1713 Ibid [289] (Wood CJ at CL and Howie J).

1714 Ibid [289]–[296].

1715 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.23.

The QLRC's view

8-3 The QLRC agrees with the ALRC's view that no amendment to the uniform Evidence Acts is necessary in relation to identification evidence that is exculpatory of the accused.

PICTURE IDENTIFICATION EVIDENCE WHERE DEFENDANTS ARE IN POLICE CUSTODY

8.47 In its Issues Paper, the ALRC posed the following question in relation to picture identification evidence:¹⁷¹⁶

Should the *Evidence Act 1995* (Cth) be amended to ensure that the provisions relating to the admission of picture identification evidence where defendants are in 'police custody' are not able to [be] avoided by police and, if so, how?

8.48 Section 115 of the uniform Evidence Acts prescribes the circumstances in which picture identification evidence will be admissible. It provides that picture identification evidence is not admissible if the pictures examined suggest that they are pictures of persons in police custody.¹⁷¹⁷ Further, section 115(3) provides that, subject to a number of exceptions, picture identification evidence is not admissible if the defendant was in police custody when the pictures were examined and the picture of the defendant that was examined was taken before the defendant was in police custody. These provisions seek to address the objection noted above that the possession by the police of the person's photograph suggests that the person has a police record.¹⁷¹⁸

8.49 The uniform Evidence Acts seek to ensure additional reliability of identification evidence by giving primacy to identification evidence from an identification parade:¹⁷¹⁹

The policy objective is to ensure that where a person is in police custody (the police having established the identity of the offender to their satisfaction), any attempt to secure identification evidence should be by an identification parade, that being the best method available for that purpose.

¹⁷¹⁶ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 10–3, post para 10.14.

¹⁷¹⁷ Uniform Evidence Acts s 115(2).

¹⁷¹⁸ See para 8.5 of this Report.

¹⁷¹⁹ Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1, para 838.

8.50 Concern has been expressed that this policy objective could be deliberately avoided by police through reliance on a narrow interpretation of the phrase ‘in the custody of a police officer’.¹⁷²⁰ Odgers comments that:¹⁷²¹

Whatever interpretation is given to the term “police custody”, it is clear that it does not extend to a situation where the police suspect that the defendant committed a crime but choose to engage in picture identification before asking or compelling the defendant to come to a police station.

8.51 The ALRC noted in its Discussion Paper that ‘submissions and consultations do not indicate that police deliberately avoid the application of s 115’.¹⁷²²

The ALRC’s view

8.52 The ALRC considered that the discretion under section 138 of the uniform Evidence Acts to exclude improperly or illegally obtained evidence may be a sufficient safeguard.¹⁷²³ It did not propose any amendments to the uniform Evidence Acts on the issue of picture identification evidence where defendants are in police custody.

The QLRC’s view

8.53 The admissibility of photo identification evidence in Queensland is governed by the common law and by the *Police Powers and Responsibilities Act 2000* (Qld) and the *Police Responsibilities Code 2000* (Qld).¹⁷²⁴

8.54 This approach differs substantially from the admissibility requirements contained in Part 3.9 of the uniform Evidence Acts. Detailed procedures as to the conduct of photo identification are not contained in the uniform Evidence Acts, but are set out in police guidelines or in other legislation.¹⁷²⁵

1720 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.28–12.30.

1721 Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.9800].

1722 Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.33.

1723 Ibid para 12.38.

1724 See para 8.9–8.10, 8.15 of this Report.

1725 Commissioner of Police NSW, *Procedures for the Evidence Act* (1998) 32–7 (Identification evidence); *Crimes Act 1914* (Cth) ss 3ZM–3ZO.

- 8-4** The QLRC considers that there is a clear difference between the approach taken to the admissibility of photo identification under the *Police Powers and Responsibilities Act 2000* (Qld), and that taken under the uniform Evidence Acts.
- 8-5** The QLRC considers that the approach taken to the admissibility of photo identification would require further review if Queensland were to consider adopting the uniform Evidence Acts.

DIRECTIONS TO THE JURY

8.55 In its Issues Paper, the ALRC posed the following question in relation to directions to the jury:¹⁷²⁶

Should s 116 of the uniform Evidence Acts be amended to clarify that directions to the jury in relation to identification evidence are not mandatory and, if so, how?

8.56 In *Dhanhoa v The Queen*,¹⁷²⁷ the High Court held that, where evidence is given at a criminal trial identifying the accused as a person who committed the alleged crime, a warning under section 116 of the uniform Evidence Acts is not required if the identification evidence is not disputed.¹⁷²⁸

8.57 Their Honours concluded that directions under section 116 must be given only where the reliability of the identification evidence is disputed.¹⁷²⁹ It was noted that to give section 116 a literal interpretation would produce a wholly unreasonable result 'in the light of the adversarial context in which the legislation operates'.¹⁷³⁰

¹⁷²⁶ Australian Law Reform Commission, Issues Paper, *Review of the Evidence Act 1995* (IP 28, 2004) Question 10–4, post para 10.18.

¹⁷²⁷ (2003) 217 CLR 1.

¹⁷²⁸ Ibid [19], [22] (Gleeson CJ and Hayne J), [53] (McHugh and Gummow JJ), Callinan J dissenting. Section 116 of the uniform Evidence Acts provides:

116 Directions to jury

- (1) If identification evidence has been admitted, the judge is to inform the jury:
- (a) that there is a special need for caution before accepting identification evidence; and
 - (b) of the reasons for that need for caution, both generally and in the circumstances of the case.
- (2) It is not necessary that a particular form of words be used in so informing the jury.

¹⁷²⁹ (2003) 217 CLR 1, [19], [22] (Gleeson CJ and Hayne J), [53] (McHugh and Gummow JJ), Callinan J dissenting.

¹⁷³⁰ Ibid [22] (Gleeson CJ and Hayne J).

8.58 This approach to identification evidence under Part 3.9 of the uniform Evidence Acts is consistent with the approach at common law where a *Domican* identification warning is given when the reliability of the evidence is disputed.¹⁷³¹

The ALRC's view

8.59 In its Discussion Paper, the ALRC did not propose any amendment to section 116 of the uniform Evidence Acts, considering that it is preferable to rely on the decision in *Dhanhoa v The Queen*.¹⁷³²

The QLRC's view

8.60 In *Dhanhoa v The Queen*, the High Court acknowledged that it had construed section 116 of the uniform Evidence Acts contrary to the section's literal meaning. The QLRC considers it desirable for section 116 of the uniform Evidence Acts to be amended to reflect the High Court's interpretation.

8-6 The QLRC considers that the requirement in section 116 of the uniform Evidence Acts for a jury direction is specific to identification evidence dealt with under Part 3.9 of the uniform Evidence Acts, although it appears consistent, in light of the decision in *Dhanhoa v The Queen*, with the approach at common law, as it is applied in Queensland.

8-7 The QLRC considers that the approach taken to jury directions in respect of identification evidence would require further review if Queensland were to consider adopting the uniform Evidence Acts.

8-8 The QLRC does not support the ALRC's view that no amendment to section 116 of the uniform Evidence Acts is necessary in light of the decision in *Dhanhoa v The Queen*.

8-9 The QLRC is of the view that section 116 of the uniform Evidence Acts should be amended to reflect the High Court's interpretation of that provision in *Dhanhoa v The Queen*.

¹⁷³¹ *Domican v The Queen* (1992) 173 CLR 555, 561. See *Dhanhoa v The Queen* (2003) 217 CLR 1, [19] (Gleeson CJ and Hayne J).

¹⁷³² Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.46.

IDENTIFICATION IN COURT

8.61 In its Discussion Paper, the ALRC posed the following question:¹⁷³³

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

8.62 In-court identification (or ‘dock identification’) evidence has been described as ‘one of the most notoriously dangerous’ of all forms of identification evidence as it is usually performed in circumstances that strongly suggest the answer that is ultimately given.¹⁷³⁴

8.63 Although it is generally acknowledged that in-court identification is ‘of little probative value’,¹⁷³⁵ such evidence is not inadmissible at common law. In *Alexander v The Queen*,¹⁷³⁶ Mason J stated:¹⁷³⁷

It has been the practice to reinforce this “in-court” identification by proving that the witness had earlier identified the accused out of court in a line-up or by selecting his photograph from a collection of photographs.

8.64 It is clear that, at common law, dock identification may be allowed in appropriate circumstances, including where:¹⁷³⁸

- the witness had earlier identified the accused out-of-court in an identification parade or from a collection of photographs;
- the witness, by reason of previous knowledge or association, is familiar with the appearance of the accused;¹⁷³⁹
- there is ‘strong evidence’ apart from dock identification that the person accused was the offender;¹⁷⁴⁰
- the judge gives the jury an appropriate direction with respect to the value of an in-court identification.¹⁷⁴¹

1733 Ibid Question 12–1, post para 12.50.

1734 *Festa v The Queen* (2001) 208 CLR 593, 601 (Gleeson CJ).

1735 *Alexander v The Queen* (1981) 145 CLR 395, 426–7 (Mason J); *Davies & Cody v The Queen* (1937) 57 CLR 170, 181–2.

1736 (1981) 145 CLR 395.

1737 Ibid 427.

1738 *R v Chatters* (Unreported, Queensland Court of Appeal, Fitzgerald P, Pincus and McPherson JJA, 15 March 1995).

1739 *Davies and Cody v The Queen* (1937) 57 CLR 170, 181.

1740 *R v Demeter* [1995] 2 Qd R 626, 632 (Pincus JA, Mackenzie J concurring).

1741 Ibid.

8.65 In Queensland, the prima facie admissibility of in-court identification evidence is reflected in the provisions relating to the identification of a person by an 'affected child'. Section 21AT of the *Evidence Act 1977* (Qld) is based on the premise that an affected child may be required to identify a person while giving evidence, and sets out the procedures to be adopted.¹⁷⁴²

8.66 The uniform Evidence Acts do not specifically provide for the admissibility of in-court identification. However, the definition of 'visual identification evidence' in section 114(1) of the uniform Evidence Acts¹⁷⁴³ would clearly cover this form of identification.¹⁷⁴⁴

8.67 In-court identification would, therefore, not be admissible under the uniform Evidence Acts unless the requirements for the conduct of an identification parade had been satisfied or one of the exceptions applied.¹⁷⁴⁵

8.68 The identification parade requirements and the exceptions thereto encompass most of the circumstances in which it may be appropriate to allow in-court identification at common law, as listed above.¹⁷⁴⁶ However, once again, an important difference is that the uniform Evidence Acts requirements are a test of admissibility, rather than matters that go to the court's discretion to exclude the evidence.

The ALRC's view

8.69 The ALRC considered that the definition of 'visual identification' evidence contained in section 114(1) clearly covers in-court identification.¹⁷⁴⁷

¹⁷⁴² Section 21AT of the *Evidence Act 1977* (Qld) provides:

21AT Identification of persons or things by affected child

(1) This section applies if an affected child is required to identify a person, including the defendant, or thing when the child is giving evidence.

(2) The court may make the orders it considers appropriate to ensure that the identification is carried out in a way that limits the distress or trauma that might be suffered by the child when making the identification.

Note—

See section 9E for the general principles to be applied when dealing with a child witness.

(3) The court must also decide at what point during the giving of the child's evidence the identification is to be made.

(4) If an affected child is required to be in the defendant's presence for the purposes of identification, the child should not be required to be in the defendant's presence for the identification for any longer than is necessary.

¹⁷⁴³ See note 1681 of this Report.

¹⁷⁴⁴ Odgers S, *Uniform Evidence Law* (6th ed, 2004) [1.3.9500].

¹⁷⁴⁵ These requirements are discussed at para 8.20 of this Report.

¹⁷⁴⁶ See para 8.64 of this Report.

¹⁷⁴⁷ Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005) para 12.49.

8.70 The ALRC posed the question set out above¹⁷⁴⁸ to determine the extent to which in-court identification is used. Subject to further information, the ALRC did not propose any amendment to section 114(1).

The QLRC's view

8-10 The QLRC is of the view that:

- (a) there is a clear difference in the approach taken to the admissibility of in-court identification at common law, as applied in Queensland, and under the uniform Evidence Acts;**
- (b) the approach taken to the admissibility of in-court identification would require further review if Queensland were to consider adopting the uniform Evidence Acts.**

8-11 The QLRC agrees with the ALRC's approach in not proposing any amendment to section 114(1) of the uniform Evidence Acts, subject to information received in response to its question about the extent to which in-court identification is used.

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See para 8.61 of this Report.

Appendix 1

Terms of reference

A review of the uniform evidence act

1. I, ROD WELFORD, Attorney-General and Minister for Justice, having regard to:

- the importance of maintaining an efficient and effective justice system in which clear and comprehensive laws of evidence play a fundamental role;
- the experience gained from almost a decade of operation of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) (the uniform evidence act);
- the desirability of achieving greater clarity and effectiveness and promoting greater harmonisation of the laws of evidence in Australia;
- the fact that the Australian Law Reform Commission is reviewing the *Evidence Act 1995* (Cth), in association with the New South Wales Law Reform Commission which is reviewing the *Evidence Act 1995* (NSW), with a view to producing agreed recommendations; and
- the desirability of having involvement in that review;

refer to the Queensland Law Reform Commission, for review pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), the uniform evidence act.

2. In carrying out its review of the uniform evidence act, the Commission is to have particular regard to:

- (a) the following topics, which have been identified as areas of particular concern:
 - (i) the examination and re-examination of witnesses, before and during proceedings;
 - (ii) the hearsay rule and its exceptions;
 - (iii) the opinion rule and its exceptions;
 - (iv) the coincidence rule;

- (v) the credibility rule and its exceptions; and
 - (vi) privileges, including client legal privilege;
- (b) the different approaches adopted by the uniform evidence act and the *Evidence Act 1977* (Qld) in relation to the matters outlined above, and the advantages and disadvantages of those approaches;
- (b) the relationship between the *Evidence Act 1977* (Qld) and other Queensland legislation regulating the laws of evidence; and the extent to which, if at all, the fact that areas of evidence law are dealt with in other legislation poses any significant disadvantages to the objectives of clarity, effectiveness and uniformity; and
- (c) recent legislative and case law developments in evidence law, including the extent to which common law rules of evidence continue to operate in areas not covered by the uniform evidence act and the *Evidence Act 1977* (Qld);
- (d) the application of the rules of evidence contained in the uniform evidence act and the *Evidence Act 1977* (Qld) to pre-trial procedures; and
- (e) any other related matters.
3. In undertaking this reference, the Commission is to work in association with the Australian Law Reform Commission and the New South Wales Law Reform Commission with a view to producing agreed recommendations for inclusion in the Australian Law Reform Commission's proposed June 2005 Discussion Paper.
4. The Commission is to provide a report to the Attorney-General on its review of the uniform evidence act by 31 July 2005.

Dated the 31st day of March 2005.

Rod Welford MP

Attorney-General and Minister for Justice