

OPINION EVIDENCE RE-ESTABLISHING CREDIT OF A WITNESS UNDER THE UNIFORM EVIDENCE REGIME

1. Legislative Background¹

(a) 1995 to Date

At his time the Uniform Evidence Act 1995 is enacted in the following jurisdictions:

- (i) Commonwealth – Evidence Act 1995 – this Act applies in Federal courts and ACT courts, by agreement.
- (ii) NSW – Evidence Act 1995 – this applies in state proceedings in courts and tribunals.
- (iii) Tasmania – Evidence Act 2001 – this Act is the same as the Commonwealth and NSW with minor differences
- (iv) Norfolk Island – Evidence Act 2004 – this is the same as the Commonwealth and NSW Acts.

To date no other states or Territory has adopted the Uniform Evidence legislation.

(b) December 2005

In December 2005 the Australian, New South Wales and Victorian Law reform Commission delivered their report following an 18 month inquiry into the Uniform Evidence Act 1995.

¹ It is appropriate that I acknowledge that the legislative history recited in this paper and the observations as to advance rulings were reproduced in this paper with the consent of Wayne Roser SC from his paper “Amendments to the Evidence Act” delivered 7 December 2007.

During the inquiry, the following governments indicated their intentions to adopt the Uniform Evidence regime:

- (i) Victoria
 - (ii) Western Australia
 - (iii) Northern Territory
 - (iv) South Australia
 - (v) Queensland – March 2005 – A-G requested a review be undertaken by QLD Law Reform Commission under similar terms of reference to ALRC inquiry into the Uniform Evidence regime.
- (c) 26 July 2007**

The NSW Act and amendments were endorsed by the Standing Committee of the A-G

- (d) 6 November 2007**

The Evidence Amendment Bill 2007 was passed by NSW Parliament, unopposed, on 6/11/07 and the as at May 2008 the amended provisions were expected to operate in NSW.

2. Advance Rulings

- (a) Before TKWJ v The Queen²**

A practice developed before 2002 whereby a practitioner would seek advance rulings from a court as to the admissibility of evidence. This had obvious practical consequences:

- Certainty of evidence to be led in a matter
- Planning the case and the witnesses
- Content of an opening to a jury

² (2002) 212 CLR 124

- Removed the necessity of preparation and argument of admissibility of evidence during the trial
- Management of witness availability
- Jury time was better utilised
- No bill following a ruling
- Changes in pleas by accused if ruled admissible
- Character
- Co-accused and jury discharges

(b) TKWJ v The Queen

High Court ruled that advance rulings on the admissibility of evidence should not occur (except for leave, permission or directions).

This decision has since been criticised – see R v TR and VG³.

(c) Post TKJW v The Queen

The ALRC, NSWLRC and VLRC agreed that the the Evidence Act should be amended to accommodate the procedure for advance rulings for both criminal and civil proceedings.

Section 192A – grants a discretion to a court to give a ruling or make a finding in relation to the question of the admissibility or use of evidence before it is adduced.

3. The Opinion Rule

³ (2004) 180 FLR 424 per Crispin J at [6]

(a) Section 79

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to the evidence of an opinion of that person that is wholly or substantially based on that knowledge

Consequently:

- Generally an opinion is not admissible
- Absent proof of the opinion deriving from specialised knowledge⁴
- Which is based upon a person's training, study or experience⁵
- Derivation of the opinion from the specialised knowledge is wholly or substantially so⁶

(b) The Credibility Rule

(i) Section 102

Evidence relevant to a witness's credibility is only is inadmissible.

(ii) Section 103

Exception – evidence adduced in cross-examination which is substantially probative

(iii) Section 108

⁴ Specialised knowledge is not defined in the Act; the courts have indicated a willingness to give it broad application – All State Life Insurance Co v ANZ Banking Group Ltd (No. 6) (1996) 64 FLR 79 at 85 – eg, investor behaviour; coded language by drug dealers – R v Lam (2002) 135 A Crim R 302;

⁵ Cf. the common law which acknowledges the admissibility of an expert opinion must derive from an “field of expertise”. This is not resolved in Australian law – eg: general acceptance in a scientific discipline; or the use of accepted theories – the Act leaves it to the discretion of the court.

⁶ Evidentiary burden of reliability on party – HG v The Queen (2002) 76 ALJR 402 at [82] – the ultimate test for admissibility is reliability of the body of knowledge.

Exception – evidence adduced to re-establish credibility in re-examination or of a prior consistent statement

(c) Expert Evidence to Re-establish Credibility of a Witness – Common Law

The ALRC, NSWLRC and VLRC considered whether to allow expert evidence, not to rebut a matter going to credibility, but to re-establish the credibility of a child witness by expert evidence.

Eg: sexual assaults – children complainants – delay in complaint/absence of complaint – continued association by complainant with accused.

Common law permitted the adducing of expert evidence to explain the conduct of the child and thereby re-establish the credit of a child witness; but there was a practice within the courts to exclude this type of expert evidence on the grounds that it considered the children’s development and behaviour was within the ordinary experience of the jury⁷.

(d) Expert Evidence to Re-establish the Credibility of a Witness – Evidence Act

A party cannot lead evidence to bolster the credit of the party’s own witness⁸. Any expert evidence must come within the exceptions in ss 106 or 108. The impact of evidence of an expert led for the purpose of re-establishing credit could be:

- Draw jury’s attention away from facts – “expert wars”
- Whether that training, study or experience of the expert furnishes evidence of substance that can be assessed by the jury
- Can the accused call evidence in rebuttal that children lie
- Treating counsellors/doctors may not be independent

⁷ C v The Queen [1993] SASC 4095 at [17] per King CJ

⁸ Section 102

- The evidence invites the jury to reason that abused children elicit certain behavioural responses, the complainant exhibited some/all of these, the complainant is likely to be telling the truth

ALRC, NSWLRC and VLRC acknowledged that s 79 provided scope for the admission of the evidence. However, due to the reluctance of courts to admit the evidence, it was recommended that s 79 be amended.

It was proposed that section 79 provide that:

- Specialised knowledge of child development and behaviour
- specialised knowledge that the effect of abuse on children and of their behaviour during and following abuse as to either or both:
 - the development and behaviour of the child, generally
 - the development and behaviour of children who are victims of sexual offences

This amendment was accepted.

There is no provision which directly excludes expert evidence relevant to credibility. The ALRC, NSWLRC and VLRC wanted to overcome the reluctance of courts to treat such evidence as coming from a relevant field of expertise and was beyond the common knowledge of the tribunal of fact. They reasoned:

- it s preferable to allow juries to assess the 2 opinions
- to ensure a proper factual basis for the evaluation of the credibility of witnesses

A new provision was enacted to include a new exception to the credibility rule relating to expert evidence of substantially probative value⁹. It required the evidence of an opinion:

⁹ Section 108C

- to be based wholly or partly be based on that knowledge
- could substantially affect the assessment of the credibility of a witness
- with the leave of the court

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