THE EVIDENCE ACT 1995 (NSW)

Important provisions relating to the conduct of criminal proceedings

Part 1- Commentary – Christopher Maxwell QC

Criminal CLE Presentation

1. COMPELLABILITY OF A CO- DEFENDANT TO GIVE EVIDENCE IN THE CROWN CASE – SECTION 17

a) "Associated defendant is defined in the dictionary. Section 17(3) allows for such a defendant to be compellable if he is tried separately. There is no requirement to finalise the proceedings although it is desirable that it be done.

b) The more interesting question is whether any ERISP of this associated defendant can be used in proof of the case against the defendant who is being tried. Assuming that the associated defendant will not give favourable evidence for the Crown, is it open to call this Defendant, cross examine on his prior inconsistent statement and then to tender this statement as evidence to establish the facts therein stated?

c) This matter will be addressed later in this commentary.(Sections 38, 60,65,66 102)

2. PROCEDURE FOR SPOUSES AND OTHERS TO OBJECT TO GIVING EVIDENCE - SECTION 18

a) The judge must be satisfied that the witness is aware of this right. Different approaches have been taken in NSW as to how this is done. Whether the Judge actually advises the person or whether the Crown needs to ensure that the person has had some independent legal advice before going into the witness box.

b) Another question is "Who should be arguing this objection?"

c) The resolution of such an objection involves a balancing exercise by the Judge – Section 18(7).

3. COMMENT ON THE FAILURE OF AN ACCUSED TO GIVE EVIDENCE – SECTION 20.

a) The prosecutor is absolutely precluded from making any comment, although the following part of a Crown address has been found not to breach the section "the only version giving rise to the charge has come from the prosecution witnesses" *R v Yammine (2002) 132 A Crim R 44.*

b) The tenor of the section seems to be about some negative comment, however in *Azzopardi v R (2001) 205 CLR 50,* the High Court has made it

very clear that in cases where the accused chooses not to give evidence, it is almost mandatory for the trial judge to give a direction that such decision cannot be used against him.

c) The same High court case also says that it will be very rare that a *Weissensteiner* direction should be given.

4. EVIDENCE MAY BE GIVEN IN NARRATIVE FORM – SECTION 29(2)

a) This allows a Judge to direct that a witness be allowed simply to give an account of what happened without any questioning. The ALRC Report 102 identified out certain categories of witnesses that this might apply to. It included: experts, Aboriginal and Torres Strait Islanders, children and people with intellectual disability.

b) It is interesting to note that this is an essential feature of the continental system which is said to greatly assist the concept of objective truth. The rationale seems to be that if a witness is not controlled by a questioner there is a far better chance that the truth will be revealed.

5. A WITNESS REVIVING MEMORY FROM A DOCUMENT – SECTION 32

a) Such reviving may be made from a document that either:
Was fresh in the memory at the time it was made OR at the time it was made was found to be accurate. There is the potential to read this section as though there does not necessarily have to be a close contemporaniety between the time the document was made and the time of the events that it describes.
The preferable view however is that the “time” referred to is the time when it was fresh in the memory, which does require a degree of contemporaneity.

6. RULE IN WALKER v WALKER (1937) 57 CLR ABOLISHED – SECTION 35

a) If a party calls for a document in the course of the evidence, that party can no longer be required to tender it.

7. CROSS EXAMINATION BY A PARTY WHO HAS CALLED THE WITNESS – SECTION 38

a) It has been said that this section has worked one of the most significant changes in the common law. Certainly it has made it very much easier to call a witness and then cross examine.

b) In practice in NSW the concept of unfavourability has been interpreted very broadly. It is only necessary for the party calling the witness to demonstrate that the witness is not favourable. It is no longer necessary to show that the witness is hostile in the common law sense. *R v Souleyman (1996) 40 NSWLR 267.*

c) There are 2 other bases available, one being the prior inconsistent statement and the other is the witness not making a genuine attempt to give evidence. Often the 3 will overlap.

d) Certainly the far greater ease in cross examining such a witness has placed the duty of the prosecutor to call all relevant evidence under greater scrutiny. It is arguable a lot easier for a prosecutor to make the decision whether or not to call a witness who appears to be somewhat unreliable. See *Kanaan & Ors [2006] NSW CCA 109 at para 84.* In addition there is strong support for the Crown who calls such a witness in his/her case to be given leave to cross examine. *Kanaan at para 85.*

e) Section 38 sets the platform for use of the prior inconsistent statement. In other words, once the prosecutor is given leave to cross examine and there is a prior inconsistent statement to cross-examine on, then certain other provisions can come into play. These will be discussed in the subsequent section dealing with credibility evidence.

8. THE HEARSAY RULE AND SECTION 60.

a) The rule stated in Section 59 excludes a witness coming to court and giving evidence of a representation made to him by another person if that representation is being used to prove the existence of the fact that the other person **intended to assert.**

b) There are a number of exceptions to this rule but it is obviously important to know what the rule really excludes before considering whether the evidence under consideration is one of these exceptions.

c) The first question must always be - “What did the other person intend to assert in the representation?”

d) This is the question considered in *R v Hannes* (2000) 158 FLR 359 and upon which the ALRC expressed concern. Accordingly the definition of hearsay has been further refined.

e) The new test to be applied under Section 59(2) is what a person in the position of the maker of the representation can reasonably be supposed to have intended, having regard to the circumstances in which the representation was made. The test is not dissimilar to the "ordinary person in the position of the accused" test under Section 23 Crimes Act 1900 (NSW). The similarity is seen in the part subjective/ part objective test.

f) New section 60 (2) is a response to the decision of the High Court in *Lee v The Queen* (1998) 195 CLR 594. The Court held that section 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. The Report considered that this approach may be regarded as inconsistent with the intention or scheme of the Principal Act (para 7.104). [Explanatory Note]

g) New section 60 (2) confirms that section 60 permits evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether or not the person had first-hand knowledge based on something they saw, heard or otherwise perceived.
New section 60 (3) ensures that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of section 60. [Explanatory Note]

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

9. EXCEPTION: CONTEMPORANEOUS STATEMENTS ABOUT A PERSON'S HEALTH ETC

a) Section 72 of the Principal Act contains an exception to the hearsay rule for contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind.

b) There has been some uncertainty about the ambit of this section and the amendment whilst not changing the words of the section, has put it into a different division (Division 2) which deals with exceptions only to the use of firsthand hearsay. This is the new Section 66A.

c) In other words, this exception now only applies to representations made by a person who has personal knowledge of an asserted fact and not second-hand and more remote forms of hearsay.

d) Section 62(3) states with greater clarity what is meant by "**contemporaneous".** The asserted fact about one of these categories (health, feelings etc.) is a fact as it exists at the time the representation is made.

10. EXCEPTION: CRIMINAL PROCEEDINGS IF MAKER NOT AVAILABLE

a) Section 65(2)(d) has been amended to overcome the perceived unfairness to an accused person of allowing in certain circumstances, the use of an ERISP of an accomplice who has earlier pleaded guilty, to be used against that accused.
In R *v Suteski* (2002) 56 NSWLR 182 the prosecution relied on s 65(2)(d) to tender an electronic recording of a police interview with an accomplice who had subsequently pleaded guilty. The person had refused to give evidence at the committal, and adopted the same position at trial.

b) The Crown had taken all reasonable steps to compel the witness to give evidence and that the trial judge had regarded that acknowledgement as a recognition that the sanction of contempt was unlikely to make the witness change his mind.

c) The decision in *Suteski* has provoked concern about allowing the admission of previous representations from a person complicit in an offence to be used against a defendant who does not have the opportunity to cross-examine that person.

d) The assumption behind s 65(2)(d) is that where a statement is against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may not be the case. An accomplice or co-

accused may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other. (a to d above is taken from ALRC Report 102 Chapter 8.39 to 8.45)

e) The amendment requires an additional guarantee of trustworthiness due to the possibility that in some circumstances it may be that a statement made against the interests of the person who made it, may not be reliable.

11. EXCEPTION: CRIMINAL PROCEEDINGS IF MAKER AVAILABLE

a) This new Section 66 (2A) is a response to *Graham v The Queen* (1998) 195 CLR 606. The usual situation where this arises is in evidence of complaint, both from the maker of the compliant and the person to whom the complaint is made.

b) The change means that freshness does not depend upon the temporal connection between representation and the event that is represented. The concept recognises that something can remain fresh in the memory by virtue of the nature of the event and the age and health of the person who is remembering it.

12. EXCEPTION: OPINIONS BASED ON SPECIALISED KNOWLEDGE

a) The exception to excluding evidence of opinion based on specialised knowledge has been specifically extended to include evidence of persons with specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and of their behaviour during and following abuse). Section 79(2).

b) It includes evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

13. CRIMINAL PROCEEDINGS: RELIABILITY OF ADMISSIONS BY DEFENDANTS

a) In *Kelly v The Queen* (2004) 218 CLR 216 the High Court interpreted "in the course of official questioning" referred to in existing section 85 as " a period of time running from when questioning commenced to when it ceased" (at [52]).

b) New section 85 (1) (a) potentially widens the window to cover admissions made "to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence". In addition, section 85 (1) (b) provides that section 85 applies where an admission is made as a result of the act of a person who "the defendant knew or reasonably believed to be" capable of influencing a decision about the prosecution of the defendant. This removes covert operatives from the ambit of the provision.

14. THE TENDENCY RULE

a) The amendment does not change the substantive law. It removes double negatives and makes other changes to make the subsection easier to understand, namely that the evidence must have significant probative value.

15. COINCIDENCE RULE

a) The new section lowers the threshold of admissibility to require consideration of similarities in events or circumstances, rather than the existing threshold that there are similarities in events and circumstances.

b) Currently section 98 provides that similar fact evidence is not admissible to prove that a person did a particular act or had a particular state of mind by reason of the improbability of the **related** events occurring coincidentally unless certain conditions are satisfied. Events are related events only if they are **substantially and relevantly similar and the circumstances in which they occurred are substantially similar.**

c) The view taken by the ALRC is that this formulation could exclude highly probative evidence from the ambit of the provision.

d) New section 98 applies where there are **any** similarities in the events or the circumstances in which they occurred, or similarities in both the events and the circumstances in which they occurred.

e) So no longer will the Crown need to establish that 2 events are **substantially and relevantly similar.** It is difficult to see that this will make much difference because the new section still requires this concept of "improbability of coincidence" and in addition the evidence, if led by the prosecution must overcome the hurdle of Section 101, which remains the same. In other words, the evidence must substantially outweigh any prejudicial effect it may have on the defendant.

16. CREDIBILITY EVIDENCE

a) To ensure that evidence which is relevant both to credibility and a fact in issue, but that is not admissible for the latter purpose, is subject to the same rules as other credibility evidence and to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination.

b) In *Adam v The Queen* (2001) 207 CLR 96 evidence of a prior representation which was relevant both on credibility and to a fact in issue was allowed to be used on both bases. The Court interpreted the provision in a way that has meant that the credibility rule will not apply if evidence is relevant both to credibility and a fact in issue, even where the evidence is not admissible for the purpose of proving a fact in issue.

c) The ALRC analyses the unsatisfactory nature of this decision in the following way.

d) Evidence of a prior statement, which is 1st hand hearsay may not be admissible to prove the facts stated therein, because it does not fall within one of the exceptions in Parts 3.2 to 3.6. However it may nevertheless be relevant to a witness's credibility.

e) Because the credibility rule in Section 102 applies to evidence that is relevant only to a witness's credibility then this evidence would not be governed by Part 3.7. The evidence is admissible because of relevance, but circumvents the conditions of admissibility laid down by Part 3.7.

f) Having got in under the guard of Section 102 being relevant for a credibility purpose it then is lifted in for all purposes under Section 60.

g) The new Section 101A works to defeat this interpretation. So that Part 3.7 will still now apply to evidence which is relevant for credibility **AND** for some other purpose. Furthermore it operates to maintain the inadmissibility resulting from an application of Parts 3.2 to 3.6.

h) The kind of witness statement which was used in R *v Adam* to prove the facts therein stated will not be allowed to be used in that way under the new amendments, unless it fits into one of the exceptions to the rule laid down by Section 59. In the *Adam* case, the relevant exception was Section 65 (2) (b) (c) or (d).

17. EXCEPTION: CROSS EXAMINATION AS TO CREDIBILITY

a) Section 103 is simply amended to provide instead that the rule does not apply if such evidence "could substantially affect the assessment of the credibility of the witness".

18. EXCEPTION: REBUTTING DENIALS BY OTHER EVIDENCE

a) Does not change things too much. Sets out the conditions for cross examination on credibility a little more clearly. Also extends the basis to allow for the situation where the witness does not agree or admit to the substance of the evidence put to him/her in cross examination.

b) Under new section 106 (2), leave is not required to adduce evidence of the kind currently described in section 106.

19. EXCEPTION: RE-ESTABLISHING CREDIBILITY

20. ADMISSIBILITY OF EVIDENCE OF CREDIBILITY OF PERSON WHO HAS MADE A PREVIOUS REPRESENTATION.

Schedule 1 [49] replaces section 108A (1) with a new subsection which makes it clear that the subsection applies to all situations in which evidence of a previous representation has been admitted where the maker has not been called and will not be called to give evidence. It implements recommendations 12–1 (in part), and 12–6, of the Report. The amendment updates section 108A (1) to reflect the new definition of ***credibility evidence*** inserted by **Schedule 1 [40]**.

21. FURTHER PROTECTIONS: PREVIOUS REPRESENTATIONS OF AN ACCUSED WHO IS NOT A WITNESS

a) Section 108A of the Principal Act applies where hearsay evidence has been admitted and the defendant who made the previous representation has not been or will not be called to give evidence. It permits admission of evidence relevant only to credibility about matters on which the defendant could have been cross-examined if he or she had given evidence.

b) New section 108B provides for the same restrictions on adducing the evidence relevant to the defendant's credibility as apply under section 104 of the Principal Act (as proposed to be amended elsewhere in Schedule 1).

c) Under new section 108B (2), the prosecution must seek the court's leave to tender evidence relevant only to the defendant's credibility. When deciding whether to grant leave the court is required to take into account specified matters. Leave is not required if the evidence falls within specified exceptions. [Explanatory Notes].

22. DIVISIBILITY OF CHARACTER EVIDENCE – SECTION 110

a) Where a defendant calls evidence of good character in a particular respect the Crown is limited to rebut with evidence of bad character only in that respect. There may be bad character evidence available but if it does not go this particular category it is not admissible.

23. IDENTIFICATION EVIDENCE – SECTIONS 114 AND 115

a) Section 114 governs the photo array form of ID. Section 115 holds ID is not admissible unless and ID parade has been held. There are certain exceptions to this.

24. CLIENT LEGAL PRIVILEGE – SECTION 118

a) This section protects certain confidential communications which were made for the **dominant purpose** of a lawyer providing legal advice to the client.

25. A WITNESS MAY BE FORCED TO GIVE EVIDENCE NOTWITHSTANDING THAT IT MY BE INCRIMINATING – SECTION 128

a) This section has been used extensively in NSW. It is a regular practice for trial judges to grant a certificate.

26. DISCRETIONS TO EXCLUDE – SECTIONS 135,136,137,138.

a) These are important sections. They involve a balancing exercise. Note that the Defence should use Section 137 which poses a higher hurdle for the Crown.

26. WARNINGS IN RELATION TO CHILDREN'S EVIDENCE.

a) New section 165A is intended to displace certain common law practices relating to warnings and to ensure that the courts treat child witnesses the same as adult witnesses when determining whether a warning is appropriate.

b) New section 165A (1) prohibits a judge from warning or suggesting that children as a class are unreliable witnesses, that the evidence of children as a class is inherently less credible or reliable than the evidence of adults, that a particular child's evidence is unreliable solely on account of the age of the child or that it is dangerous to convict on the uncorroborated evidence of a child.

c) However, section 165A (2) provides that the judge may in certain circumstances inform the jury that the evidence of a particular child may be unreliable and the reasons why it may be unreliable or warn or inform the jury of the need for caution in determining whether to accept the evidence of a particular child and the weight to be given to it.

27. WARNINGS IN RELATION TO DELAY IN PROSECUTION

a) Section 165(B) puts the warnings in *Longman v R* legislative form.