



LAWS304 EVIDENCE LAW



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LAWS304 Evidence Law

TOPIC 1

The Nature of the Law of Evidence

The Law of Evidence

- The rules of evidence applied in Australian courts serve a number of functions:
 - They regulate what material a court may consider in determining factual issues;
 - How that material is to be presented in the court; and
 - How the court actually goes about the task of deciding the factual issues on the basis of the evidence
- The goals of evidence law:
 - Ensuring reliability of evidence
 - Ensuring a fair trial
 - Controlling investigators
 - Efficiency by keeping trial issues to the real issues
- If procedures are unjust, the outcome of the process is likely to be unjust
- Trial procedure determined by law of evidence
- Rules regulate how evidence is produced in court and how the court is to perform its task of deciding the issues before it
- Rules of evidence provide the legal framework by which the judge determines how evidence may be adduced, whether it will be taken into account (admissible), and how the tribunal of fact (judge or jury) is to decide the factual issues on the evidence.

Outline of the Act

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

Chapter 1 – Preliminary

- Part 1.1 Formal Matters
- Part 1.2 Application of this Act

Chapter 2 – Adducing Evidence

- Part 2.1 Witness (containing divisions relating to competence and compellability, oaths and affirmations, examination-in-chief, cross-examination and re-examination).
- Part 2.2 Documents
- Part 2.3 Other Evidence

Chapter 3 – Admissibility of Evidence (containing Parts relating to the relevance rule, various exclusionary rules and discretions to exclude evidence)

Chapter 4 – Proof

- Part 4.1 Standard of Proof
- Part 4.2 Judicial Notice
- Part 4.3 Facilitation of Proof
- Part 4.4 Corroboration
- Part 4.5 Warnings and Information
- Part 4.6 Ancillary Provisions

Chapter 5 – Miscellaneous (including provisions on proof by affidavit, waiver of the rules of evidence and procedure for determining admissibility)

An Evidence Code?

- The Act is not a code of the law of evidence
- As a result, the Act doesn't deal with the allocation of the burden of proof in respect of facts in issue
- If evidence is "relevant" in accordance with the very general definition in s 55, and not excluded by any provision in the Act, the effect of s 56(1) is that it "is admissible in the proceeding".

Differences from the Common Law and Significant Changes to the Criminal Law

- Some differences from the common law are listed on page 11 of the 'Uniform Evidence Law' textbook
- Changes to specific criminal proceedings listed on page 12 of the same text.

Amendments implementing ALRC 102

- There have been important changes to the Commonwealth and NSW Acts which are summarised on page 13 to 17 of the textbook

Differences between the Acts

The Evidence Acts in the Commonwealth, NSW, Victoria, the ACT and the NT are almost identical, however there are some important differences.

These include:

- Improper questions (s 41)
- Professional confidential relationship privilege (Div 1A of Pt 3.10)
- Sexual assault communications privileges
- Privilege in respect of self-incrimination
- Privilege in preliminary court proceedings (s 131A)
- Jury warning in respect of delay in prosecution (s 165B)
- Definition of who is "not available to give evidence about a fact".

Policy Framework

- Given the wide application of the Act and the fact that it constitutes a major reform of the law of evidence, interpretation of individual provisions should occur in the context of the policy framework on which it is built: see s 35 of the *Interpretation of Legislation Act 1984* (Vic)
- A clear distinction was drawn by the ALRC between civil and criminal trials:
 - Fact-finding
 - Procedural fairness
 - Expedition and cost
 - Quality of rules
 - It made further points regarding differences in:
 - Accusatorial system
 - Minimizing the risk of wrongful convictions
 - Definition of central question
 - Recognition of rights of the individual
 - Assisting adversary contest.

Current Issues Arising Under Uniform Evidence Law

- Evidence "in narrative form"
- Refreshing memory of a witness
- Unfavourable witnesses
- Circumstantial evidence and the requirement of relevance
- Authentication and the requirement of relevance
- Failure of Crown to call a particular witness
- Hearsay exceptions
- Lay opinion evidence
- Expert opinion evidence → needs to be shown to be reliable
- Admissions
- Wholly exculpatory previous representations by a criminal defendant
- Tendency and coincidence evidence
- Identification evidence
- Client legal privilege
- Professional confidential relationship privilege
- Privilege in respect of self-incrimination
- Privilege in preliminary court proceedings
- Discretion to exclude unfairly prejudicial evidence
- Discretion to exclude improperly or unlawfully obtained evidence

- Standard of proof in civil proceedings
- Standard of proof in criminal proceedings
- Unreliable evidence
- Failure to object
- Appellate review

Different Types of Jurisdiction

Criminal/Civil Jurisdiction; Paternal Jurisdiction; Administrative Function

- The law is applied less strictly against the accused in a criminal case. In particular, evidence more prejudicial to the accused than probative of the prosecution case may be excluded.
- Another factor contributing to the difference between the rules applying in criminal and civil proceedings is that of the form of procedure and method of trial.
- In criminal cases, pleading is generally oral, and there are often no interlocutory hearings.
- In civil cases, there are relatively few juries.

The Best Evidence Rule

A Definition and Statement of Rule

Primary and Secondary Evidence

- “Primary evidence” is that which does not suggest that better evidence may be available
- “Secondary evidence” is that which does suggest that better evidence may be available
- The original of a document is primary evidence, and a copy would be secondary evidence.
- There are limits to including the “best” evidence, for example using hearsay to present the best case.
- The best evidence rule is currently declining, and is no longer regarded as a general principle of law of evidence.

Relevance, Admissibility and Weight of Evidence

Admissibility of relevant evidence and inadmissibility of irrelevant evidence

- All evidence which is sufficiently relevant to the issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded.

Common Law and Statutory Definitions

- The expression “relevance” refers to a certain relationship between evidence which is tendered and the issues being tried – the matters of factual controversy which in civil cases are isolated by pleadings or otherwise and in criminal cases are expressed by reference to the elements of the offence charged.
- Relevance can sometimes be established by reason of evidence already submitted, or the pleadings, or an opening, or the plain trend of one side’s case. However, sometimes it’ll be necessary for the court to seek and accept an assurance that counsel will “make it relevant” – by this we mean that the relevance of a particular piece of evidence (although not apparent at the moment of tender) will subsequently appear evident. This is particularly common in cross-examination
- In order to be relevant it’s not necessary for an item of evidence to be capable of proving by itself the fact it is tendered to establish
- A question cannot be irrelevant merely because one possible answer isn’t relevant.

Exceptions

- Hearsay → a person who has committed perjury previously on the stand should also have their evidence admissible, but that the judge has provisions to be able to advise the jury on how to take that evidence, as it may not be as reliable. To be admissible hearsay must not be in favour of the maker of the statement.

- Opinion → witnesses are generally not allowed to inform the court of the inferences they draw from facts perceived by them, but must confine their statements to accounts of such facts. Opinions are usually irrelevant, however expert witnesses may testify to their opinion on matters involving their expertise.
- Character → an accused person's reputation among neighbours as a person likely to have committed the offence charged is usually inadmissible evidence of guilt, although it might be regarded as a relevant fact, and witnesses' opinions about a person's disposition to act that particular way are generally excluded.
- Conduct on other occasions → how the accused has acted previously

Multiple Relevance and Admissibility

- An item of evidence may be relevant for more than one reason.
- If evidence is admissible for one purpose, it cannot be rejected on the ground that it is inadmissible for another purpose.
- It is desired in these circumstances that the two purposes be clearly distinguished in the mind of the trier of fact.
- In criminal cases tried by a jury, the judge should be particularly careful in direction, and the jury must be properly instructed as to the use which may be made of the evidence, and hence ordinarily must be warned as to how the evidence may not be used.
- There are some instances where a party consents to the tender of a document for a limited purpose – in this case it has two purposes but only one of these is admissible.
- Section 55(1) of the Evidence Acts 1995 (Cth) and 2008 (Vic) provides that relevant evidence is that which, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.
- Completely ambiguous evidence may be irrelevant. Evidence isn't taken to be irrelevant simply because it relates only to the credibility of a witness, the admissibility of other evidence, or to the failure to adduce evidence: s 55(2).
- Credibility evidence is also not irrelevant at common law.
- S 56(2) renders irrelevant evidence inadmissibly and, save as otherwise provided in the Act, s 56(1) renders relevant evidence admissible in the proceeding. S 56(1) isn't limited to evidence tendered at a trial as distinct from pre-trial stages.
- S 57 deals with "provisional relevance" – it provides that if the relevance of evidence depends on the court making another finding (including a finding that the evidence is what the tendering party claims it to be, e.g. that a document is authentic), the court may find that the evidence is relevant if it is reasonably open to make the finding, or subject to further evidence being later admitted which will make it reasonably open to make the finding.
- S 57 makes specific provision to the same effect in relation to proof of common purpose.
- S 58 provides that in determining the relevance of a document or thing, the court may examine it and draw any reasonable inference from it, including an inference as to its authenticity or identity.

Inadmissibility of Irrelevant, and Insufficiently Relevant, Evidence

Remoteness

- The fact that the defendant altered its sidings after an accident was held to be inadmissible as evidence that the accident was caused by the defendant's negligence.

Multiplicity of Issues

- Evidence which might be highly relevant in a protracted academic investigation is treated as too remote from the issue under forensic inquiry because the body which has to come to the conclusion is controlled by the time factor, not to mention considerations such as the danger of distracting the jury and the undesirability of pronouncing upon matters which are not being litigated.

Danger of Manufactured Evidence

- The courts take the view that the degree to which an item of evidence is relevant to an issue diminishes in proportion to the likelihood of evidence being manufactured.