

LAWS5107: EVIDENCE

Suggested time breakdown:

Reading time: 5 minutes

Item #1: 30 minutes

Item #2: 15-20 minutes

Item #3: 15-20 minutes

Item #4: 25 minutes

Item #5: 15-20 minutes

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

CRIMINAL OFFENCES

444. Criminal damage

- (1) Any person who wilfully and unlawfully destroys or damages any property is guilty of a crime and is liable —
 - (a) if the property is destroyed or damaged by fire, to life imprisonment; or
 - (b) if the property is not destroyed or damaged by fire, to imprisonment for 10 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years.

Alternative offence: s. 445.

Summary conviction penalty: for an offence where —

- (a) the property is not destroyed or damaged by fire; and
 - (b) the amount of the injury done does not exceed \$25 000,imprisonment for 3 years and a fine of \$36 000.
- (2) Property that is capable of being destroyed or damaged by fire includes vegetation.

[Section 444 inserted by No. 4 of 2004 s. 37; amended by No. 70 of 2004 s. 35(4) and 36(3); No. 80 of 2004 s. 11; No. 43 of 2009 s. 11.]

378. Penalty for stealing

Any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 7 years.

Alternative offence: s. 382, 383, 388, 390A, 409, 414, 417 or 429.

Punishment in special cases

- (1) If the thing stolen is a testamentary instrument, whether the testator is living or dead, the offender is liable to imprisonment for 10 years.
- (2) If the thing stolen is a motor vehicle and the offender —
 - (a) wilfully drives the motor vehicle in a manner that constitutes an offence under the *Road Traffic Act 1974* section 60 or 60A; or
 - (b) drives the motor vehicle in a manner that constitutes an offence under section 61 of the *Road Traffic Act 1974* (i.e. the offence known as dangerous driving),

the offender is liable to imprisonment for 8 years.

[(3), (4) deleted]

- (4a) If the thing stolen is an aircraft the offender is liable to imprisonment for 10 years.
- (5) If the offence is committed under any of the circumstances following, that is to say —
 - (a) If the thing is stolen from the person of another;
 - (b) If the thing is stolen in a dwelling, and its value exceeds \$10 000, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling;
 - (c) If the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;
 - (d) If the thing is stolen from a vessel which is in distress or wrecked or stranded;
 - (e) If the thing is stolen from a public office in which it is deposited or kept;
 - (f) If the offender, in order to commit the offence, opens any locked room, box, or other receptacle by means of a key or other instrument;

the offender is liable to imprisonment for 14 years.

- (6) If the offender is a person employed in the Public Service, and the thing stolen is the property of Her Majesty, or came into the

possession of the offender by virtue of his employment, he is liable to imprisonment for 10 years.

- (7) If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for 10 years.
- (8) If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, he is liable to imprisonment for 10 years.
- (9) If the thing stolen is any of the things following, that is to say —
 - (a) Property which has been received by the offender with a power of attorney for the disposition thereof;
 - (b) Money received by the offender with a direction that the same should be applied to any purpose or paid to any person specified in the direction;
 - (c) The whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction;
 - (d) The whole or part of the proceeds arising from any disposition of any property which have been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or paid to any person specified in the direction;

the offender is liable to imprisonment for 10 years.

INTRODUCTION TO EVIDENCE

The criminal trial

- Its process and structure.
- The rules relating to what material can/cannot be used by the fact-finder in determining the outcome of the case.
- It also considers broader notions of fairness and justice.
- This unit includes and incorporates Indigenous knowledges, experiences, and perspectives.

History of UEL

- 1979 – the ALRC was tasked with reforming the rules of Evidence.
- 1987 – ALRC Report 38 ‘Evidence’ published with draft legislation.
- 1995 – Very similar new Evidence Acts commenced in Cth and NSW.
- 2001 – Tasmania adopted a version of the UEL.
- 2004 – Norfolk Island adopted the UEL.
- 2005 – ALRC Report 102 ‘Uniform Evidence’ (by ALRC, NSWLRC and VLRC) published and later adopted by each UEL jurisdiction.
- 2008 – Victoria enacted a version of the UEL incorporating changes following ALRC 102. 2011 – ACT and NT enacted versions of the UEL incorporating changes following ALRC 102.
- Saint Lucia, Barbados, St Kitts and Nevis, and the British Virgin Islands have also adopted versions of the UEL.

UEL in Western Australia?

- 1996

8.8 Recommendations
The Committee recommends that:
Western Australia enact a new Evidence Act which would include -
(1) the Commonwealth Model Evidence Act in the form of mirror legislation but subject to the Commonwealth Model forming Part A of the new Act; and
(2) incorporating those sections of the current Western Australian Act thought to be worthy of retention and discussed in this report as Part B of the Act .

WA’s new evidence act

- 2025

25 SEP 2025

MESSAGE NO. 18

The Governor has the honour to inform the Legislative Council of Western Australia that he has this day assented in the name and on behalf of The King to the Bills for the undermentioned Acts:

Reserves Act 2025
(No. 13 of 2025)

Statutes (Repeals and Minor Amendments) Act 2025
(No. 14 of 2025)

Evidence Act 2025
(No. 15 of 2025)



GOVERNOR

- The new Evidence Act 2025 (WA) will replace the Evidence Act 1906 (WA).

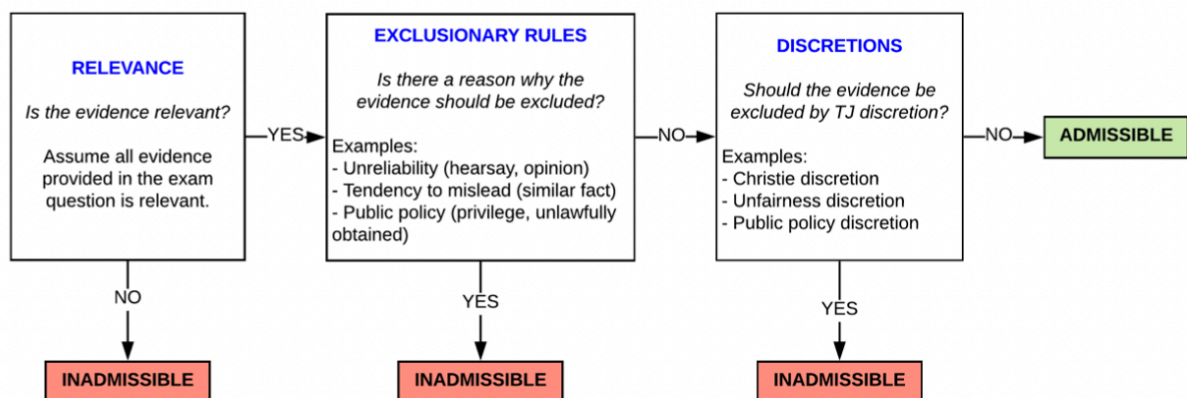
- Commencement:
 - Some basic provisions have commenced, but none of the operative provisions have yet commenced.
 - The operative provisions will commence upon proclamation (indicated to be ~mid 2027).

Accessing WA's new evidence act

- Because only a few sections have actually commenced, you will only see 32 pages of sections if you are looking at the PDF of the EAWA on the official WA Legislation website.
- In reality, the Act will be many hundreds of pages long. The operative sections of the law do not become part of the Act until they commence.
- If you want to read all provisions of the new Act you can follow the links in my blog post: <https://waevidence.com/2025/09/22/the-evidence-bill-2025-wa-passes-both-houses-of-parliament/>
 - As set out in the post: The final version of the Bill is, therefore, a culmination of the Evidence Bill 2025 (WA) as it passed the originating house, and the amendments noted in Supplementary Notice Paper 9 (2), all of which were agreed to by both houses of Parliament.
- Once the operative provisions have commenced upon proclamation, the new EAWA will completely replace and repeal the 1906 Act.

Uniform(ish) evidence law

- Not only do the UEL Acts across the various jurisdictions differ in some respects, but the interpretation of identical provisions sometimes differs across jurisdictions too.
- The Evidence Act 2025 (WA) is the most different of all.
 - There are entire areas of evidence which are fundamentally different.
 - You can hear me talking about some of the uniquely Western Australian provisions on ABC's Law Report program here: <https://waevidence.com/2024/09/09/new-evidence-laws-for-wa/>
 - There are a number of smaller – but consequential – tweaks throughout.
 - The section numbers are not the same as those in the UEL Acts!



Step 1: Relevance

s 69 EAWA – Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

s 68 EAWA – 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) Evidence cannot be considered 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.

Sub-step 1 Step 1: a fact in issue in the proceedings

- What is a fact in issue?
 - Hughes v The Queen [2017] HCA 20, [16]: ‘The facts in issue in a criminal proceeding are those which establish the elements of the offence [and any available defence].’
 - I.e., it refers to the elements – the ‘ultimate’ facts in issue.
 - But behind these ultimate facts ‘there will often be many... facts relevant to the [ultimate] facts in issue’ – Smith v R (2001) 206 CLR 650.
 - Note that facts remain ‘in issue’ even if they are not in dispute in the proceedings – see, eg, R v Niguidula (No 5) [2023] NSWSC 500.

Sub-step 2 Step 1: could rationally affect

- ‘Minimal logical connection’
 - DPP v Paulino [2017] VSCA 38, [66]: ‘in order for evidence to be relevant, it must [be capable of] rendering a fact in issue more [or less] probable than it would be without the evidence.’
 - Does the evidence need to make the fact probable?
 - How much more (or less) probable does it need to make the fact to be relevant?
 - Elomar v The Queen [2014] NSWCCA 303: ‘It is a mistake... to attempt to determine the relevance of each individual item of evidence in isolation from all of the other evidence.’
 - Marsh v The Queen [2015] NSWCCA 154, [54]: ‘Relevance is necessarily a relative concept. The question of whether or not a particular piece of evidence has relevance can only be determined or assessed in the context of the whole of the evidence tendered in the trial... In a circumstantial case such as the present, no individual fact could establish the appellant’s guilt. The jury was required in this case to reason in a staged approach... to inferring or concluding from a combination of [facts which couldn’t alone prove guilt] that a further fact/facts existed. The ultimate fact the Crown asked the jury to find based upon these facts was that [Marsh] was guilty of the murder of the deceased.’

Sub-step 3 Step 1: directly or indirectly

- Ways in which evidence can be relevant to an ultimate FII
 - Directly: The evidence goes right to the existence/non-existence of an ultimate FII.
 - Eg, evidence of direct perception which goes right to satisfying an element.
 - Indirectly: The evidence either (a) requires an inference, or a series of inferences before satisfying an element; or (b) goes only to the credibility of other evidence.
 - We call type (a) ‘circumstantial’ evidence.
 - We call type (b) ‘collateral’ or simply ‘credibility’ evidence.
- Consider an assault case where it is alleged that Jamie punched me in the Courtyard
 - An ultimate fact in issue:
 - Directly relevant evidence:
 - Indirectly relevant circumstantial evidence:
 - Collateral evidence:
 - Further collateral evidence

Smith v The Queen [2001] HCA 50:

- Smith was convicted of a bank robbery at trial.
- Pros adduced CCTV footage of the robbery, as well as evidence from police officers who spent some time with the accused at the police station.
- The officers gave evidence that the person in the footage was the accused.
- Smith appealed to the HCA arguing that the evidence from the officers was improperly admitted.

Lithgow City Council v Jackson [2011] HCA 36, [25]–[26]: ‘the [note] referred to a fall of 1.5m onto concrete. It does not say where the fall took place. A fall from one of the non-vertical sides meant a vertical fall of the same distance as a fall from the vertical face... An opinion that there had been a fall of 1.5m from one of the non-vertical sides would be relevant within the meaning of s [68 EAWA] because it could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding: its relevance would lie in negating the respondent's case that he fell from the vertical head wall, not one of the sides. An opinion that there had been a fall of 1.5m from the vertical head wall would be relevant for the opposite reason: it would support the respondent's case. But ... the statement was so ambiguous that it had no probative value: it supported neither the theory of a fall from the vertical head wall nor the theory of a fall from one of the sides...’

Green v The Queen [2015] VSCA 279, [34]: ‘The threshold for relevance, for an accused, is quite low, because [it] need only be capable of rationally affecting the probability of the existence of a fact in issue by raising a doubt in respect of it. Accordingly, a trial judge should be slow to exclude evidence, sought to be adduced on behalf of an accused person, unless it is clear that the evidence does not satisfy the definition of relevance contained in s [68 EAWA].’

Step 2: Admissibility (exclusionary rules)

- Although relevant material is prima facie admissible, there are many rules which can make relevant evidence inadmissible, eg:
 - o Opinion rule
 - o Hearsay rule
 - o Credibility rule
 - o Etc
 - Of course, each rule has exceptions
- At CL we had 'exclusionary rules' and 'discretions to exclude', but the UEL and new EAWA have 'rules about admissibility of evidence' and then 'mandatory and discretionary exclusions'
- DOES THE HEARSAY RULE APPLY?
 - o (see part 3 div 2 EAWA)
- DOES THE OPINION RULE APPLY?
 - o (see part 3 div 3 EAWA)
- DOES THE TENDENCY RULE OR THE COINCIDENCE RULE APPLY?
 - o (see part 3 div 6 EAWA)
- DOES THE CREDIBILITY OR CHARACTER RULE APPLY?
 - o (see part 3 div 7 EAWA and part 3 div 8 EAWA)
- DOES THE EVIDENCE CONTRAVENE THE RULES ABOUT IDENTIFICATION EVIDENCE?
 - o (see part 3 div 9 EAWA)
- DOES A PRIVILEGE APPLY?
 - o (see part 4 EAWA)

Step 3: Mandatory and discretionary exclusions

- What makes exclusions different to the rules about admissibility?
 - o The exclusions are considered a 'safety net' – they should only be applied after considering (1) relevance; (2) the rules about admissibility; and (3) the exceptions to those rules.
 - o Rules focus on particular types of evidence whereas most exclusions are generally framed and can apply to any type of evidence.
 - o Most exclusions focus on the impact that the evidence might have if admitted – typically operating to exclude evidence where any undesirable impact would outweigh a legitimate or permissible impact.
 - o New EAWA/UEL exclusions are broader than the old CL discretions. Why?
- s 105 EAWA – Discretion to exclude admissions: In a criminal proceeding, the court may refuse to admit an admission if, having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.
- s 201 EAWA – General discretion to exclude evidence: A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that it might (a) be unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause an undue waste of time.
 - o CAN ONLY BE USED BY THE PROSECUTION AGAINST THE DEFENCE
- s 202 EAWA – General discretion to limit use: A court may limit the use to be made of evidence if there is a danger that a particular use might (a) be unfairly prejudicial; or (b) mislead/confuse.

- s 203 EAWA – 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 accused.
 - CAN ONLY BE USED BY THE DEFENCE AGAINST THE PROSECUTION
- s 204 EAWA – Exclusion of improperly or illegally obtained evidence: A court must not admit evidence obtained improperly or in contravention of Australian law unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in that way.

Sub-step 1 Step 3: Ss 201 and 203 EAWA

- s 201 EAWA – General discretion to exclude evidence: A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that it might (a) be unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause an undue waste of time.
 - CAN ONLY BE USED BY THE PROSECUTION AGAINST THE DEFENCE
- s 203 EAWA – 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 accused.
 - CAN ONLY BE USED BY DEFENCE AGAINST THE PROSECUTION
- Differences
 - Applicable proceedings
 - Standard necessary for how much the PV needs to outweigh the undesirable outcomes
 - Substantially = ‘well outweighed’ – see R v Clarke [2001] NSWCCA 494, [163].
 - Which party would make use of each section in a criminal proceeding
 - s 201 EAWA includes possibilities for exclusion other than unfair prejudice
- Probative value
 - s 3 EAWA: Probative value means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.
 - At this stage the evidence is to be ‘taken at its highest’ – meaning issues relating to credibility and reliability should not be considered in determining PV.
 - Except if the credibility/reliability issues are such that a rational jury couldn’t accept it (and thus it could not rationally affect the assessment of probability) – IMM v The Queen [2016] HCA 14.
- Unfair prejudice
 - ss 201 & 203 EAWA are worded differently (danger of unfair prejudice vs danger that the evidence might be unfairly prejudicial) – does this matter?
 - See DPP v JG [2010] NSWCCA 222.

- Festa v The Queen [2001] HCA 72, [51] (McHugh J): ‘evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial... when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury...’
- Papakosmas v The Queen [1999] HCA 37: Will arise where there is a real risk the jury will misuse the evidence – eg in a forbidden/improper chain of reasoning or for a forbidden purpose.

Sub-step 2 Step 3: Ss 201 EAWA

– CAN ONLY BE USED BY THE PROSECUTION AGAINST THE DEFENCE

- Misleading/confusing
 - Less relevant in trial by judge alone than in trial by jury – see Re GHI [2005] NSWSC 466, [8]:
 - ‘There is something bizarre in submitting to a judge sitting alone that [they] should reject evidence on the ground that it might mislead or confuse [them]. I propose to trust myself...’
 - More recently, see Faruqi v Hanson [2024] FCA 225, [53]–[54].
 - Reading v ABC [2003] NSWSC 716: TJ excluded transcript as evidence where audiovisual program itself admitted – transcript could mislead jurors because it could result in focus on words alone, removed from their context as spoken (eg, tone, setting, mood, non-verbal communication).
- Undue waste of time
 - ‘Waste of time’ isn’t the same as ‘take up a lot of time’.
 - High threshold – ‘undue’ means that just any ‘waste of time’ is not enough to warrant exclusion.
 - Cadbury v Darrell Lea [2007] FCAFC 70, [55]: ‘if the matter about which expert evidence is to be given is patent and known to all, the Court’s time would normally be wasted by such evidence.’
 - Unnecessary duplication of evidence making the same point may give rise to exercise on this ground – see R v Taylor [2003] NSWCCA 194, Faruqi v Hanson [2024] FCA 225, [53]–[54].

Sub-step 1 Step 3: Ss 202 EAWA

- Limiting the use of evidence
 - Can only apply if the evidence is relevant and admissible for more than one purpose.
 - Eg, V’s out of court statement that A did/did not offend against them may be relevant for the truth of its contents (a hearsay purpose); and to show that V has either changed their story or maintained the same story (a credibility purpose).
 - Allows TJ to forbid use for any purpose if there is a danger that such use might be unfairly prejudicial or misleading/confusing.
 - When a TJ exercises s 202 EAWA, they will need to give a strong direction to the jury that they can only use it for the limited purpose – see Ainsworth v Burden [2005] NSWCA 174, [103].