

FACT-FINDING, PROOF AND INDIGENOUS KNOWLEDGE

Teaching Evidence in Australia

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The rules of evidence enable law to discover its truths. The rules enable material facts to be 'found' in a haystack of data, and they erect thresholds along a single pathway to admissibility. Each piece of evidence follows the same passage, is tested against the same thresholds, and if it survives it is ruled admissible, and can be used in adversarial litigation in the proof of claims or charges. In teaching the rules of evidence to law students, we are teaching them law's methodology for proving facts that are in dispute. Through the rules of evidence, we teach students to classify, abstract and reason like lawyers. This article questions whether Indigenous perspectives might offer an opportunity to think afresh about how we teach and use laws of evidence.

The rules of evidence attempt to ensure that evidence is admitted if it is relevant and helpful in resolving the facts that are in dispute, and that evidence is excluded if it is irrelevant, unreliable, unfair or privileged. Evidence might come from witnesses, documents, or 'real' (tangible) sources, and separate rules govern these different forms of evidence, in order to ensure that each form is capable of providing evidence that meets the standards of relevance and reliability.

So, for instance, a witness needs to be legally 'competent', legally 'compellable', and needs to be 'examined' or questioned in accordance with the processes set out in the rules. Their evidence needs to be legally 'relevant', it must not be 'hearsay' (that is, evidence of an out-of-court representation about a fact), nor 'opinion' evidence (evidence of the witness's opinion about a fact) unless it satisfies one of the exceptions to those rules. The rules permit that, in circumstances where it is relevant and probative, the witness can be tested for their 'credibility'. For certain witnesses, it is permissible for a judge to make a comment, or give a direction or warning to a jury about the use that may — or may not — be made of that witness's testimony. Some witnesses are recognised for their 'vulnerability', and special rules attempt to protect that witness whilst still obtaining their evidence.

For Indigenous Australians, the rules of evidence impact in both instrumental and epistemological ways. On an instrumental level, courtroom processes and culture have demonstrably had a differential impact on Indigenous people. Where Indigenous people appear as witnesses, they are exposed to methods of using and understanding language, silence and questioning that reveals a 'courtroom culture' at odds with Indigenous cultural modes.¹ Where the witness speaks an

Indigenous language, studies have shown the difficulties experienced by interpreters — where appropriate interpreters can be found — of translating distinctions that may be crucial in one language and absent from the other.² Where, for the Indigenous witness, silence may be a meaningful response to a question, Anglophone law infers certain meanings from that silence, and in many instances will compel an answer.³ The manner in which questions are asked of an Indigenous witness sometimes invites what has been termed 'gratuitous concurrence', where the witness agrees with a proposition that is contrary to their own knowledge, on the cultural misunderstanding that agreement is expected from a proposition that has been put in that form.⁴

On an epistemological level, the way Anglophone courts find knowledge or prove truths is based on assumptions that, in Indigenous cultures, might not operate. For instance, what is deemed to be legally 'relevant' to the court may be deemed 'private' or 'secret' in Indigenous culture. Equally, what is legally 'irrelevant' may be fundamental to forming an understanding about an Indigenous claim. The rules about 'hearsay' evidence are embedded with long-standing Anglophone cultural assumptions about the unreliability or instability of oral communications, whereas in Indigenous traditional culture, oral communication is the dominant method by which knowledge is transmitted. Whilst in some instances, 'special' rules are enacted to 'accommodate' Indigenous difference, these special rules nevertheless fall well short of acknowledging the existence of a complete, distinct Indigenous epistemology.⁵

Further, none of this addresses the grossly disproportionate over-representation of Indigenous people as defendants in criminal litigation, and some of the procedural and evidentiary causes of entrenched crimino-legal disadvantage.⁶ Simultaneously, Indigenous people are under-represented as legislators, litigators, judicial officers and jurors, creating very limited opportunities for Indigenous people to 'appear' within the legal process. In the one significant area where an evidentiary process has evolved around an Indigenous issue — the area of native title litigation — ongoing concerns and complaints demonstrate the unnatural 'fit' between an Anglophone fact-finding process and an Indigenous claim to truth.

REFERENCES

1. See Diana Eades (1995), extracted in Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (4th ed, 2009) 543–545.
2. *Ibid* 540.
3. *Ibid* 545.
4. *Ibid* 544–5.
5. Diana Eades, *Courtroom Talk and Neocolonial Control* (2008).
6. See for instance, Jill Hunter, Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005) 411–413.

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Existing opportunities to teach Indigenous issues in the Evidence curriculum

Evidence is a compulsory topic of study for students seeking admission to legal practice. The teaching of evidence in Australian law schools tends to follow one dominant mode, although there are several alternative models. The dominant mode has been termed a 'rule-sensitive' approach.⁷ Here, students are introduced to the different *forms of evidence* (witnesses, documents, real evidence) and specific rules and processes governing them. To these are applied the different *thresholds to admissibility* (relevance, hearsay, opinion, credibility, tendency and coincidence, character, exclusionary provisions, judicial warnings) and the current authority defining or limiting those thresholds. Throughout these courses students are introduced to a combination of leading appellate judgments, law reform recommendations and, in jurisdictions governed by the uniform Evidence Acts (currently NSW, ACT, Tasmania, Victoria, and Commonwealth courts) the legislation. These courses may also teach examples that illuminate various principles because they are controversial, anomalous, topical, or give rise to the opportunity to pursue particular personal research interests in the classroom. Evidence courses are, therefore, rich opportunities to follow the experiences of certain groups on whom the litigation process impacts most acutely: children, sexual assault complainants, defendants in criminal matters, people with mental illness or intellectual disability, and Aboriginal and Torres Strait Islander peoples. For each of these groups, the rules of evidence and procedure have recognised that the 'usual' rules have a disadvantageous impact, and may be subject to modification or discretionary use. Textbooks and case law offer a broad variety of examples illustrating how these different contexts, perspectives or life experiences give rise to problems with the usual operation of the rules.⁸

The appearance of Indigenous issues in some evidence textbooks focuses on aspects of language and cultural difference, both of which give rise to a recognition of the 'vulnerability' of Indigenous people in the policing and courtroom processes. Material about language derives from socio-linguistic and anthropological research of scholars including Michael Cooke, who has written persuasively about Indigenous interpretation issues in the courts;⁹ Diana Eades, who has examined Aboriginal English,¹⁰ 'gratuitous concurrence',¹¹ silence,¹² and problems that arise in the examination

and cross-examination of Indigenous witnesses,¹³ and of course TGH Strehlow, whose expertise in Aboriginal language and culture raised grave doubts about the safety of Rupert Max Stuart's conviction for the rape and murder of a child in 1959.¹⁴ Many of these issues, and others, were set out by Justice Dean Mildren of the Supreme Court of the Northern Territory.¹⁵

Several textbooks describe the Anunga Rules, which in 1976 set out guidelines to police officers in their dealings with, and questioning of, Indigenous people in police custody.¹⁶ Providing basic support for 'vulnerable suspects', the rules require police to caution Indigenous people in clear language, and ask that the caution be confirmed by the suspect in their own words. Police should seek independent proof of the offence rather than rely on confessional evidence, and should not conduct interrogations when the suspect is drunk, sick, or tired. Police should offer appropriate meals and breaks, and should provide substitute clothing when the suspect's clothing is taken for forensic examination. Where requested, they should contact a prisoner's friend, an interpreter, and a lawyer.¹⁷ The Anunga Rules, and subsequent legislative enactments in most Australian jurisdictions, are in part designed to ensure fair treatment of otherwise-vulnerable suspects, and in part to ensure that confessional evidence is obtained in reliable circumstances.

A case study that appears in several texts is *R v Robyn Kina*.¹⁸ While it has appeared in one textbook as an example of 'incompetent legal representation',¹⁹ it is more fundamentally an example of the difficulty of bridging a stark cultural divide.²⁰ Kina was convicted of murdering her de facto husband in 1988, and her appeal failed. Neither the trial court nor the appellate court was made aware of the circumstances that gave rise to the killing, and it was only during a television interview that Kina disclosed information about the physical abuse and sexual violence that she had survived, and that the deceased had threatened to perpetrate on her young niece. A subsequent petition to the Governor of Queensland was made, describing the

problems, difficulties, misunderstandings and mishaps occurring in the communication of my instructions to the Lawyers who prepared my case and represented me upon my appeal

giving rise to the grounds that her trial had been unfair, and that Kina was the victim of a miscarriage of justice.²¹

In my own course, I have used the opportunity of teaching a 'key' High Court decision on the relevance

7. Kathy Mack, 'Teaching Evidence: Inference, Proof and Diversity' (2000) 11 *Legal Education Review* 57.

8. Compare, for example, Jeremy Gans and Andrew Palmer, *Uniform Evidence* (2010); Hunter, Cameron and Henning, above n 6; Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995); Andrew Ligertwood and Gary Edmond, *Australian Evidence: A principled approach to the common law and the uniform Acts* (5th ed, 2010); Miiko Kumar, Stephen Odgers and Elisabeth Peden, *Uniform Evidence Law: Commentary and Materials* (3rd ed, 2009); John Anderson and Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (2nd ed, 2009); and P K Waight and C R Williams, *Evidence: Commentary and Materials* (7th ed, 2006).

9. Michael Cooke, *Indigenous Interpretation Issues for Courts* (2002); Michael Cooke, 'Understood by All Concerned? Anglo/Aboriginal Legal Translation' in Marshall Morris (ed), *Translation and the Law* (1995).

10. Diana Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992); Hunter and Cronin, above n 8, 250–1; McRae et al, above n 1, 373.

11. Hunter and Cronin, above n 8, 251, 307–9.

12. Ibid 251, 308. See also Diana Eades, 'Understanding Aboriginal silence in legal contexts' in Helga Kotthoff and Helen Spencer-Oatey (eds), *Handbook of Intercultural Communication* (2007) 285–301; Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' (2008) 20(2) *Current Issues in Criminal Justice* 209, 219–220.

13. See Eades (2008), *ibid*.

14. See T G H Strehlow, *Songs of Central Australia* (1971); Ken Inglis, *The Stuart Case* (1961).

15. Justice Dean Mildren, 'Redressing the imbalance against Aboriginals in the criminal justice system' (1997) 21(1) *Criminal Law Journal* 7.

16. See McRae et al, above n 1, 371–2; Hunter and Cronin, above n 8, 459–460;

threshold, and pointed to the way in which the evidence jurisprudence has, in that instance, rendered invisible the Aboriginality that fundamentally permeated the trial proceedings. In *Smith v The Queen*,²² the High Court held that the evidence of two police officers who testified at Smith's trial was irrelevant and, therefore, inadmissible. Only 'relevant' evidence is admissible and, to be relevant, evidence must have the capacity to 'rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.²³ The evidence of the police officers was that they 'recognised' Mundarra Smith from a photograph taken by a security camera during a bank robbery. The High Court majority found that the police evidence could not 'rationally affect' the jury's own assessment of whether or not it was Smith in the photograph, since the police recognition was based on powers of vision, perception, and opportunity to look at Smith that was equally available to the jury. What is never discussed in the Court's judgment, but plainly apparent when the case is studied in detail, is that Mundarra Smith is Aboriginal, and that the case turns upon whether or not it is possible to identify him as the bank robber in the photograph. The jurisprudence effaces the long history in which Indigenous people have been 'erased' from the visual imagination of Australia, but 'drawn into' discourses dominated by policing, criminal behaviour and victimisation. It ignores certain Indigenous cultural proscriptions against photographing people; it does not consider long-standing concerns in the United States about the effects of 'cross-racial identifications'; and it presumes that looking at a photograph in which an apparently-Aboriginal man is robbing a bank invites a simple, neutral and accurate conclusion. In fact, studies have shown that photographs are a highly unstable source of identification evidence, that identifications conducted by strangers (for instance, jurors) are prone to serious error, that the effects of visible racial differences compound the errors, and that pre-existing knowledge or stereotypes (for instance, about the criminality of certain racial groups) affects identifications.²⁴

Teaching the *Smith* decision in this way allows students to question, from the very first threshold to admissibility (relevance), law's assumption that what is 'rational' is universally so. This is at the heart of Kathy Mack's approach to teaching evidence, which is critical of implicitly assuming that there is any such thing as 'rationality'.²⁵ Citing Marilyn McCrimmon's concept of 'universal cognitive competence', she challenges the assumption that 'common experience gives rise to universally accepted generalisations about human behaviour', because each of us comes from a perspective derived from our different experiences and locations in society.²⁶ Mack writes:

One aspect of power in society is the ability to determine what amounts to knowledge. The law of evidence is a manifestation of that epistemological power in the legal system. By formally determining who can speak within a legal setting and what they can say, the law of evidence reflects and constructs the social and cultural context in which it functions. The law of evidence, like law generally,

has a constitutive function — it tells us who we are, and by telling us, helps to make us so.²⁷

Mack draws us towards acknowledging the difference it makes when one comes from a non-dominant racial, gender or social group, citing Kim Lane Scheppele, who wrote,

[w]hat 'everyone knows' when they live life as a person of colour, a woman or a person in poverty, turns out to be surprisingly hard to prove under conventional rules of evidence.²⁸

My own research into, and teaching of, the High Court's decision in *Smith*, shows how these rules of evidence appear to operate without any regard for the enormous danger, offence and provocation that is caused when the state shows a photograph of an apparently-Aboriginal man committing a crime to a jury and invites them to engage in lawful judgment.²⁹

A different approach to teaching evidence, which Mack terms a 'fact-sensitive' model, is described by Andrew Palmer in a course he devised with Andrew Kenyon and Jeremy Gans. Rather than teaching legal analysis or rules of evidence (in which facts have already been 'found'), their course teaches students about proof and fact-finding, learning to sort, analyse, select and identify information, on the basis that 'the "facts" themselves are not neutral', in order to 'hopefully inoculate [students] against the fallacy that "the facts" are indeed "facts"'.³⁰ This approach demonstrates to students the flexibility with which the rules — once confronted — actually operate; while judicial decisions appear to be made from a position of objectivity and universality, by starting with the underlying facts, students are able to see the powerful role that the facts (or 'the facts') play in formulating evidence jurisprudence.

New opportunities to teach Indigenous perspectives following reform of the Uniform Evidence Laws

While a great epistemological gap continues to divide legal fact-finding from Indigenous ways of knowing, incremental legislative reforms attempt to build some bridges across the divide. Aside from the patchwork of measures in place to address the 'vulnerability' of Indigenous people in the criminal justice system,³¹ an inquiry into the Uniform Evidence Laws has yielded some significant changes. The uniform Evidence Acts commenced operating in federal and NSW courts in 1995, and in 2005 the Australian Law Reform Commission ('ALRC') inquired into how the Acts were functioning.³² Joined by the NSW and Victorian Law Reform Commissions, and publishing its final report in 2005,³³ the inquiry investigated several questions of direct relevance and importance to Indigenous Australians. These questions focused primarily on (1) Aboriginal and Torres Strait Islanders as witnesses; (2) the admissibility of evidence about Aboriginal and Torres Strait Islander traditional laws and customs; and (3) whether a privilege against self-incrimination ought to apply to Indigenous witnesses where, in answering a question, they would be incriminating themselves under an Indigenous law or custom.

J D Heydon, *Cross on Evidence* (8th Aust. ed., 2010) at [33745].

17. *R v Anunga* (1976) 11 ALR 412; but see also *R v Anderson* (1991) 105 FLR 25; *R v Butler (No 1)* (1991) 57 A Crim R 451; *R v Ninnal* (1992) 109 FLR 203; *R v Echo* (1997) 6 NTLR 51; but see also *Dumoo v Gardner* (1998) 7 NTLR 129.

18. 29 November 1993, CA Qld, unreported.

19. Hunter, Cameron and Henning, above n 6, 1279.

20. See, for instance, Diana Eades, 'Legal recognition of cultural differences in communication: The case of Robyn Kina' (1996) 16(3) *Language and Communication* 215–227.

21. McRae et al, above n 1, 545–7.

22. (2001) 206 CLR 650.

23. *Evidence Act 1995* (NSW and other uniform jurisdictions) s 55.

24. Katherine Biber, *Captive Images: Race, Crime, Photography* (2007); Gary Edmond et al, 'Law's Looking Glass: Expert identification evidence derived from photographic and video images' (2009) 20(3) *Current Issues in Criminal Justice* 337.

25. Mack, above n 7, 60.

26. *Ibid* 61.

27. *Ibid* 59.

28. *Ibid* 65.

29. Biber, above n 24. See also Katherine Biber, 'The spectre of crime: Photography, law and ethics' (2006) 16(1) *Social Semiotics* 133; Katherine Biber, 'The Hooded Bandit: Aboriginality, Photography and Criminality in *Smith v The Queen*' (2002) 3(3) *Current Issues in Criminal Justice* 286.

30. Andrew Palmer, 'A Proof-oriented Model of Evidence Teaching' (2002) 13 *Legal Education Review* 109, 117.

31. See, for example, *Law Enforcement (Powers and Responsibilities) Regulations 2005* (NSW) Reg 24(d) and subsequent provisions.

Although the ALRC identified native title law as the major area of contestation, these hurdles also affected the operation of criminal law defences, sentencing, family law and child placement.

Aboriginal and Torres Strait Islander witnesses

The ALRC reported that the question/answer method of eliciting evidence may not be suited to some Aboriginal and Torres Strait Islander witnesses, either because it is 'socially distressing' or 'antithetical to their culture and style of communication'.³⁴ The NSW LRC identified specific problems relating to silence, gratuitous concurrence, and difficulties with the use of numbers and descriptions of events involving days, dates and times.³⁵ Noting that some individual courts had accommodated these differences when Indigenous witnesses were questioned,³⁶ and that the Evidence Acts contained a provision for a party to request that evidence be given in narrative form,³⁷ the ALRC recommended, and the legislature enacted, an amendment to section 29 of the Act, which now says that: 'A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form'.³⁸ This amendment is expected to improve the gathering of evidence from a range of witnesses: Indigenous witnesses, experts, children, and people with intellectual disabilities, and gives explicit power to the court — not only a requesting party — to ensure that the witness is questioned in an appropriate manner and form.³⁹

Evidence of Aboriginal and Torres Strait Islander traditional laws and customs

Drawing upon the 1986 ALRC report on *The Recognition of Aboriginal Customary Laws*,⁴⁰ including its consideration of the adverse affects upon Aboriginal and Torres Strait Islander peoples of the rules of evidence, the ALRC in 2005 again focused on two major hurdles that pose difficulties for proving traditional Indigenous laws and customs. Those hurdles are the rule against hearsay (which prevents previous representations about facts from being used to prove those facts), and the rule against opinion evidence (which prevents opinions about facts from being used in deciding those facts). Both rules already operate together with numerous exceptions, but the exceptions do not address the issues that arise from the significance of oral culture to Indigenous law and communal life, nor do they give special status (for instance, as 'experts') to Indigenous elders whose opinions about facts do place them in the position of having 'specialised knowledge' unavailable to the layperson. The ALRC cited Peter Gray, who wrote:

Perhaps the greatest clash between Aboriginal and Anglo-Australian systems of knowledge is in relation to the form

knowledge takes. Oral traditions and history are usually the basis of Aboriginal connection with land and, accordingly, are of major importance to land claims and native title applications. As well as the dreaming, genealogies, general historical stories and land use information will be transmitted orally in most Aboriginal communities. Yet the Anglo-Australian legal system is the 'most prohibitively literate of institutions'.⁴¹

Although the ALRC identified native title law as the major area of contestation, these hurdles also affected the operation of criminal law defences, sentencing, family law and child placement. Consultations and submissions revealed that different jurisdictions approached these issues in diverse ways, not all of which gave rise to difficulties for Indigenous claims. Nevertheless, there was widespread support for the ALRC's proposal to provide exceptions to the hearsay and opinion rules for evidence of Indigenous traditional laws and customs. Two new provisions were enacted:⁴²

s 72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

s 78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

It is anticipated that these amendments will restore to Indigenous people the authority and legitimacy to make claims about their own laws and customs inside the evidentiary process. Previously, non-Indigenous experts (say, anthropologists or historians) were required to seek information from Indigenous informants, produce expert reports about their findings, and testify as witnesses about their findings, thus excluding the Indigenous knowledge-holders from direct participation in the fact-finding process. While experts will continue to have the same standing they held previously in such claims, the reforms attempt to open the process to Indigenous people themselves.

Privilege and traditional laws and customs

The rules about 'privilege' recognise that certain relationships ought to be given special protection by the courts, and that certain information or knowledge is confidential or secret, and that the preservation of the confidence or secrecy is fundamental to the

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

33. Australian Law Reform Commission, *Uniform Evidence Laws*, ALRC Report 102, Final Report (2005).

34. *Ibid* [5.14].

35. *Ibid* [5.15].

36. *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 171; *De Rose v South Australia* [2002] FCA 1342, [252].

37. *Evidence Act 1995* (NSW and other uniform jurisdictions) s 29.

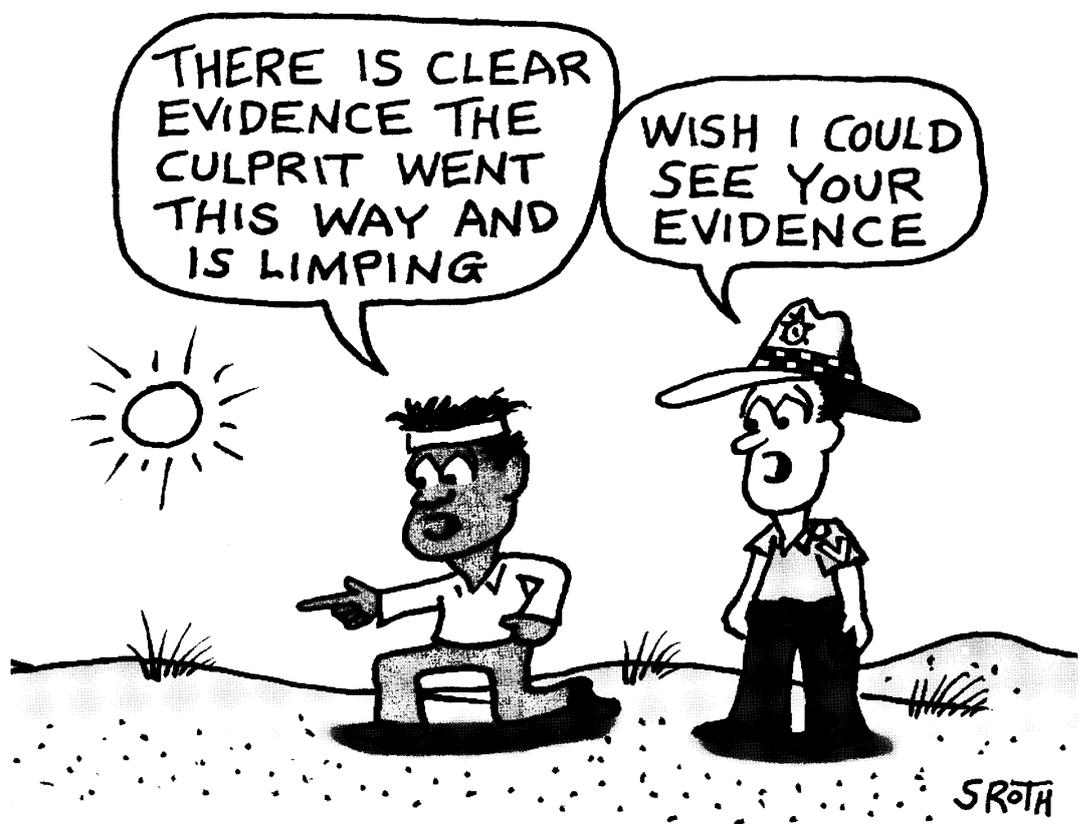
38. Section 29(2). In jurisdictions that already had the uniform Acts in force, the amendment commenced in 2009. In Victoria, the Act commenced operating in 2010.

39. It should be noted that, prior to the amendments, the Evidence Acts already contained a power for a judge to control the questioning of witnesses: s 26, and so the amendment to s 29 supplements that power, and draws specific attention to questioning in 'narrative form'. See Eades (2008), above n 12.

40. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC Report 31, Final Report (1986).

41. ALRC Report 102, above n 33, [19.11].

42. In jurisdictions where the Evidence Act was already operating, the new provisions commenced in 2009; in Victoria the Act commenced operating in 2010.



43. *Evidence Act 1995* (NSW and other uniform jurisdictions) s 128(1). The Dictionary of the Evidence Act defines 'Australian law' to mean 'a law of the Commonwealth, a State or a Territory', and cl.9 of Part 2 of the Dictionary further states: '(1) A reference in this Act to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place. (2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia'.

44. In ALRC Report 102, above n 33, [19.111].

45. *Ibid* [19.113].

46. *Ibid* [19.117] and [19.125–6].

47. *Ibid* [19.127].

protection of the relationship. The privilege against self-incrimination does not work to protect a relationship, but to protect the presumption of innocence, the burden of proof, and the vulnerability of any witness who, by testifying, may harm themselves. Apart from the relationship of a client with their lawyer, and the clerical privilege for religious confessions (both of which can give rise to an absolute privilege), the remaining privileges tend to balance the harm done by disclosing the information against the value of having the evidence.

The ALRC considered the question, which was also considered in ALRC Report 31, of whether a privilege should apply to Aboriginal and Torres Strait Islander witnesses, excusing them from answering questions if their responses would tend to incriminate them under Indigenous traditional laws and customs. The existing privilege against self-incrimination applies to a witness who objects to answering a question on the ground that the evidence may disclose their commission of an offence 'against or arising under an Australian law or a law of a foreign country', or a civil liability.⁴³ In ALRC Report 31, the ALRC wrote that a court should not compel an Indigenous witness to answer a question that might incriminate them under Indigenous laws 'unless there are good reasons for doing so', but that it was not desirable to create a specific and absolute privilege 'because there are other ways of protecting confidential or secret information'.⁴⁴ In determining whether 'good reasons' existed for compelling the witness, the usual balancing exercise would apply (looking at the importance of the evidence, the nature of the proceeding, whether other sources of the information existed, and other powers of the court).⁴⁵

Some submissions to the ALRC recognised that flexible and responsive approaches to this issue were already working in some jurisdictions,⁴⁶ and that the creation of a new privilege might disadvantage the people it was designed to protect, by creating an expectation that Indigenous witnesses would use the privilege and not give evidence in certain matters.⁴⁷ Given that there was little support for a new privilege to be created in the

legislation, the ALRC recommended against it, and it was not enacted.

Conclusion

Anglophone rules of evidence conceal the hierarchies of knowledge embedded within them. Claims to truth, factuality and probative value assume their own stability, without conceding their implicit epistemological relativisms. Where questions arise about fairness, reliability and dangerous reasoning, they are typically answered by following a linear process that imagines a single, correct result is discoverable. These evidentiary norms are absorbed by the Australian student of evidence. It is important that we recognise the rich opportunity we have for comparing statutory rules and judicial decisions with Indigenous ways of knowing and learning; Indigenous methods for discovering knowledge offer enormous potential for exposing the fragile assumptions upon which our fact-finding processes are based.

This epistemological distinction overshadows the instrumental obstacles that Indigenous people confront in approaching judicial processes. These obstacles continue to test how our court systems accommodate Indigenous participants, address vulnerability, elicit testimony, whilst also recognising the very limited number of ways in which Indigenous people actually participate in this system.

Recent inquiries and reforms show that the rules of evidence need not be inherently prohibitive of Indigenous claims, nor are they unable to accommodate Indigenous difference. What seems essential is to develop, through the teaching of evidentiary principles to students, an understanding that the processes and rules of evidence operate flexibly, and that the focus must always be upon reliability and fairness.

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