Gummow and Crennan JJ reached the same conclusion, noting the use in Division 104 of the concept 'reasonable' – 'the great workhorse of the common law' – and the origins of the term 'reasonably appropriate and adapted' in the well-known decision of the United States Supreme Court in *McCulloch v Maryland*.[15]

Gleeson CJ rejected the argument that Division 104, if it did confer judicial power, required it to be exercised in a manner inconsistent with Chapter III. Although interim orders may be made *ex parte*, the procedure requires a confirmation hearing to follow, governed by the rules of evidence, with the burden of proof on the balance of probabilities being on the applicant, the provision of documents, cross-examination, argument and rights of appeal.[16] Gummow and Crennan JJ reached the same conclusion.

Callinan J also rejected the plaintiff's arguments on the Chapter III issues and upheld the validity of Division 104. Heydon J agreed with Gleeson CJ, Gummow and Crennan JJ and Callinan J on the Chapter III issues.

Kirby J criticised Division 104 as an example of 'legal exceptionalism' and accepted the argument that the criteria for the exercise of the power conferred by Division 104 imposed on federal courts power which was not judicial, stating that:

> the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country. It is therefore invalid.[17]

Hayne J ruled the legislation invalid for the same reason, expressed as follows:

> To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.[18]

The likelihood of Kirby J's estimation that had the Communist Party Dissolution Bill been challenged today its constitutional validity would have been upheld by the High Court cannot be tested.[19] Only time will tell whether Justice Kirby's prediction about future regard for the majority's decision in this case becomes true.

By Chris O'Donnell

Endnotes

1. [2007] HCA 33, para. [387].
2. Para. [9].
3. Para. [7].
4. Para. [140].
5. Para. [146].
6. Para. [147], citing Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 192.
7. Callinan J at para [583]; Heydon J at para. [611].
8. Callinan J at para [585]; Heydon J at para. [649].
9. Hayne J at para. [444].
10. Kirby J at paras. [251] – [255].
11. Kirby J at para. [267].
12. Kirby J at para. [294].
13. Gleeson CJ at para. [16].
14. Gleeson CJ at para. [27].
15. Gummow and Crennan JJ at paras. [94 – 103].
16. Gleeson CJ at para. [30].
17. Kirby J at para. [322]
18. Hayne J at para. [516].
19. Kirby J at para. [386].

Key changes to the Evidence Act

Background

The *Evidence Amendment Bill 2007* (the Bill) was passed by both houses of the NSW Parliament on 24 October 2007. The Bill will commence upon proclamation, which is 'most likely' to be at least six months after assent, to give time for consultation with the legal profession in relation to the changes.[1]

The Bill will make miscellaneous amendments to the *Evidence Act 1995* (NSW) (and some related acts such as the *Civil Procedure Act 2005* (NSW) and the *Criminal Procedure Act 1986* (NSW)). The amendments arise out of the collaborative report on the review of operation of the Uniform Evidence Acts of 2005 by the Australian, New South Wales and Victorian law reform commissions. The report found that the Evidence Acts were generally working well with no major structural or policy problems, although 63 recommendations for reform were made. The amendments are uniform (with some very minor amendments) and are based on a Uniform Evidence Bill endorsed by the Standing Committee of Attorneys General on 26 July 2007. The amendments are said to 'fine tune' the law and promote harmonisation.

The amendments constitute the first thorough overhaul of the Evidence Act since it came into force in 1995 and will affect those who practise in both the criminal and civil areas.

This article is a summary of key changes and readers are referred to the text of the Bill for details of all of the changes to be made by the Bill.

Summary of key changes

Competence and Compellability

Section 13 of the Evidence Act will be repealed and replaced by a new section 13. All witnesses will be required to satisfy a new test of general competence in section 13(1).

The new test focuses on the ability of a person to comprehend and communicate. Under the new test, a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand a question about the fact, or to give an answer to that question that can be understood, and that incapacity cannot be overcome. A person not competent to give evidence of one fact, may still be competent to give evidence about other facts (section 13(2)).

New section 13(3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence (restating the current section 13(1)). A person not competent to give sworn evidence, may be competent to give unsworn evidence if the requirements of section 13(5) are met. The existing presumption is continued, namely that a person is presumed to be competent to give evidence unless it is proven that he or she is incompetent.

A new section 13(8) will be added which provides that when a court is determining whether a person is competent to give evidence, the court may inform itself as it thinks fit, including by obtaining information from an expert.

The NSW Bar Association in its submissions commenting on an earlier issues paper opposed this change. It was noted that the common law requirements for competence were considerably more stringent and the association believed that a further weakening of the test was undesirable. The minimum standard for giving unsworn evidence is that the person understands the difference between the truth and a lie and indicates that he or she will not tell lies.

In a change that is likely to impact on the scope of the compellability exception, the Bill proposes a change in the definitions used from 'defacto spouse' to 'defacto partner' to cater for same sex couples. As a result of these changes, a 'defacto partner' will be able to object to giving evidence against their partner under section 18 of the Evidence Act.

Narrative form evidence

Previously evidence was able to be given in narrative form where a party calling the witness applied for a direction to call such evidence and the court gave the direction (section 29 of the Evidence Act). Narrative form refers to the situation where a witness stands in the witness box and speaks without being questioned, as opposed to the conventional model where the witness gives evidence in answer to questions put to the witness.

The Bill will amend section 29 to relax the requirement that leave be sought before a witness can give evidence in narrative form by providing that the court of its own motion can direct a witness to give evidence in narrative form, as well as when requested to do so by the party calling the witness.

The NSW Bar Association in its submissions opposed the relaxation proposed, submitting that there was an increased risk that a witness may give irrelevant or prejudicial evidence in this form.

The Report identified the basis for this amendment as being that it would be particularly helpful for vulnerable witnesses, such as children and the intellectually disabled. There is, however, scope for attempts to use this section in a more wide ranging manner, for example to try to overcome difficulties or objections as to form with the evidence proposed to be led.

Improper questions in cross-examination of witnesses

Amendments to be made to section 41 of the Evidence Act provide that the court must disallow improper questions which are, amongst other things, misleading, unduly annoying, harassing, intimidating, offensive, oppressive, repetitive, or based on stereotype, as opposed to previously being permitted to disallow such questions (the new section will replicate section 275A of the *Criminal Procedure Act 1986* (NSW) which presently applies to criminal proceedings in New South Wales in any event, not section 41 of the present Evidence Act).

Leading questions

Section 37 will be amended to permit leading questions to be put to a witness in examination in chief if no objection is taken and each party is represented by an Australian legal practitioner or legal counsel (which includes a party represented by a prosecutor).

The Hearsay Rule

Section 59 of the Evidence Act will be amended to provide that the test as to what a person intended to assert by a representation is based on 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 (this is to overcome the position taken by the court in *R v Hannes (*2000) 158 FLR 359).

Section 60 of the Evidence Act will also be amended to clarify that the changes to section 59 in relation to 'intention' will also apply to section 60.

The new section 60(2) of the Evidence Act will confirm 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 said, heard or otherwise perceived (this amendment is in response to the High Court's decision in *Lee v The Queen (1998)* 195 CLR 594).

Section 60(3) will ensure that evidence of an admission in criminal proceedings that is not first hand, will be excluded from the scope of section 60.

The NSW Bar Association in its submissions opposed the change to section 60 of the Evidence Act, taking the view that section 60 should remain restricted to first hand hearsay, as the proposed amendment would reverse the High Court's decision in *Lee v The Queen*. The policy consideration behind the hearsay rule was that, the further the evidence gets from direct testimony of eye witnesses, the greater the likelihood of it being unreliable and the more difficult to test by cross-examination.

Changes will also be made to s64 (the exception to the hearsay rule if the maker is available in civil proceedings), to s65 (the exception to the hearsay rule if the maker is not available in criminal proceedings) and to section 66 (the exception to the hearsay rule if the maker is available in criminal proceedings).

Section 72 (exception to the hearsay rule for contemporaneous statements about a person's health etc) is to be moved to Division 2 of Part 3.2 and re-enacted as section 66A to make it clear that the exception only applies to first-hand hearsay.

Changes to the Opinion Evidence rule

Two reforms are implemented: the first to enable a court to use expert opinion to inform itself about the competence of a witness (by the insertion of the new s13(8) – addressed above), and the second to provide expressly by the insertion of a new s79(2) that an expert for the purposes of s79 of the Evidence Act includes persons with specialised knowledge of child development and behaviour and/or development and behaviour of children who are victims of sexual offences.

The NSW Bar Association in its submissions was concerned that it was undesirable that this field of knowledge was singled out for specific legislative acknowledgment as an admissible field. The field of knowledge that was 'crying out' to be singled out was the field of expert evidence about the dangers of mistaken identification.

It was also concerned that this proposed amendment (to the extent that it may allow an expert to give evidence that there may be reasons why a complainant delayed making a complaint or gave inconsistent accounts) comes close to permitting a witness to express an opinion that the complainant is telling the truth and may usurp the function of the jury.

Admissions in criminal proceedings

A new s60(3) will be inserted to make it clear that s60 (exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose) does not apply to evidence of an admission in a criminal proceeding. This gives effect to the recommendation in the Report that admissions in criminal proceedings that are not first-hand are excluded from the ambit of sections 60 and 82 of the Evidence Act.

Section 85 of the Evidence Act will be amended by the insertion of a new s85(1) which broadens the scope of the section so that admissions made 'to or in the presence of, an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission, of an offence' are covered (cf. the narrow view of the previous section taken by the High Court in *Kelly v The Queen (*2004) 218 CLR 216).

Tendency and coincidence evidence

The tendency rule in s97 will be amended to remove double negatives and make the section easier to understand. But otherwise, no substantive changes are being made.

The amendments to s98 of the Evidence Act will reduce the threshold for admitting coincidence evidence so that what is required is a consideration of any similarities in events and/or circumstances, rather than the existing threshold requiring that there are similarities in events and/or circumstances.

Credibility of witnesses

New sections 101A and 102 will be inserted into the Evidence Act.

The current credibility rule in section 102 of the Evidence Act provides that evidence that is relevant only to a witnesses' credibility is not admissible. This section was interpreted literally by the High Court in (2001) 207 CLR 96 as meaning that evidence relevant in a proceeding in some other way other than to the witness' credibility was not caught by the section (even though it is inadmissible for that other purpose).

The new sections were inserted as a response to the decision in *Adam*. They provide that evidence going to credibility that is relevant for another purpose but which is inadmissible for that purpose, will not be admissible for credibility purposes.

Privilege against self incrimination

Section 128 will be replaced and the new s128(1) will expand the grounds of objection to cover not only particular evidence, but evidence on a particular matter. A certificate can be relied upon despite any challenge, quashing or calling into question a ground of the decision to give or the validity of the certificate, although a certificate in relation to a proceeding does not apply to a retrial for the same offence (cf. the position under the old section taken in *Cornwell v The Queen* [2007] HCA 12).

A new s128A will be inserted and will provide that privilege against self incrimination applies to complying with disclosure orders, such as a search order (Anton Piller), freezing order (Mareva) or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* in civil proceedings, although the privilege cannot be claimed over information in a document that was in existence before the order was made and is an annexure or exhibit to a 'privilege' affidavit (the affidavit containing so much of the information required to be disclosed to which objection is taken which is provided in a sealed envelope to the court)(s128A(9)). A new section 131A will be inserted to extend the privilege against self incrimination to a 'disclosure' requirement, such as in answer to a subpoena, pre-trial discovery, non-party discovery or notice to produce.

Advance rulings on evidentiary issues

A new s192A will be inserted to make it clear that the court has the power to make an advance ruling or finding before the evidence is adduced in respect to the admissibility or use of evidence proposed to be adduced, the operation of the Evidence Act or another law in relation to evidence proposed to be adduced or leave or the giving of leave or a direction in respect of the Evidence Act under s192, where it is appropriate to do so.

There is potential for an application for an advance ruling to be used tactically to identify in advance whether a key piece of evidence will be admitted in the present form at the hearing or whether further efforts will be required to obtain the evidence in admissible form.

Warnings and directions to the jury

Section 165 is amended and new sections 165A and 165B will be inserted which deal with warnings in relation to children's evidence and delays in prosecution. These changes clarify that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child. The courts are to treat child witnesses the same as adult witnesses when determining whether a warning is appropriate and are prohibited from suggesting that children as a class are unreliable witnesses or their evidence is

inherently less credible. They clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and when such information should be given (only if a party applies for it and there is an identifiable risk of prejudice to the accused).

The Bar Association in its submissions took the position that it was preferable to leave to the courts the development of appropriate directions in sexual assault cases where there was a long delay in complaint.

Evidence of traditional law and custom excepted from the hearsay rule

New sections 72 and 78A will be inserted to create exceptions to the hearsay and opinion evidence rules for evidence of a representation about the existence, non-existence or content of the traditional laws and customs of an Aboriginal or Torres Strait Islander group. A definition of 'traditional laws and customs' will be inserted into the Dictionary. Reliability of the evidence is now the key issue.

Proof of voluminous or complex documents and changes in relation to electronic communications

Voluminous documents or complex documents are presently admissible in the form of a summary pursuant to section 50 of the Evidence Act provided that an application had been made for this leave prior to the hearing. The Bill amends this section so that there is no longer any requirement that the leave be obtained prior to the hearing.

A new definition of 'electronic communications' has been inserted into the Dictionary (with the same meaning as it has in the *Electronic Transactions Act 2000* (NSW)). A new section 71 is inserted into the Evidence Act by the Bill which broadens the technologies which fall within the exception to the hearsay rule presently contained in section 71.

Amendments relating to lawyers and their clients and client legal privilege

Previously, a 'lawyer' was defined in the Dictionary as a barrister or solicitor. A new definition of 'lawyer' will be inserted into s117(1) of the Evidence Act with various definitions of categories of lawyers which is said to be consistent with the definition used in national uniform legislation. The definition of 'client' has also been expanded to include, for example, someone who employs a lawyer.

By reason of changes to the definition of 'lawyer' used in s117(1), client legal privilege will extend to advice provided by an 'Australian lawyer' which will be defined as per this term in the *Legal Profession Act 2004* (NSW) and includes a lawyer admitted to practice but who does not necessarily have a practising certificate, and will extend to employees and agents of a 'lawyer'.

The privilege conferred by s118 of the Evidence Act (legal advice privilege) will be extended to confidential documents prepared by a 'client, lawyer or other person' i.e. someone other than a lawyer (for e.g. an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client. The effect of this change is to continue the trend of moving away from a distinction between litigation privilege and legal advice privilege. In respect of documents prepared by a third party, as a result of the proposed amendments it will no longer be necessary to bring the documents within the exception in *Pratt Holdings Pty Ltd v Commissioner of Taxation (*2004) 207 ALR 217 in order for legal advice privilege to be claimed.

An important change has been made to the waiver of privilege provisions in s122 of the Evidence Act. Now loss of legal privilege will occur where a client or party has acted in a way that is inconsistent with the maintenance of the privilege, whereas the previous test required the substance of the evidence to have been knowingly and voluntarily disclosed to another person. This new section moves the statutory test under the Evidence Act closer to the common law test for loss of privilege set out in *Mann v Carnell* (1999) 201 CLR 1.

Conclusion

For any who are still coming to terms with the uniform Evidence Acts, the new changes may cause further confusion. For others, the changes will clarify and change the law in a number of important respects. The full impact of the changes will not be known until the new provisions have been tested in practice. The precise terms of any savings of transitional provisions will be contained in the regulations which are not yet available.

It is interesting to note that in the Second Reading Speech for the Bill, the NSW Parliamentary Secretary said that the Commonwealth Government had taken the position that it will not implement a number of the changes in the Uniform Evidence Bill and so the Commonwealth and State acts on evidence will further diverge, assuming there is no change of position by reason of, for example, a change of Commonwealth government. The major areas of difference have been identified as being that the Commonwealth will not change the definition of "defacto spouse" to "defacto partner" and will not make the changes to the hearsay rule to make evidence of Aboriginal and Torres Strait Island traditional law and custom an exception to the hearsay rule. This will be of relevance where cases are conducted in the Federal Court. There is also no present indication as to when the Commonwealth Evidence Act will be amended in line with the recommendations accepted by the Standing Committee of Attorneys General.

By Julie Soars

Endnotes

a. Legislative Review Committee, Legislative Review Digest No. 4 of 2004, 23 October 2007 p34