Uniform Evidence Law: Principles and Practice

*Uniform Evidence Law: Principles and Practice* is essential reading for students, legal practitioners and others seeking a detailed understanding of evidence law as it applies in New South Wales, Tasmania, Victoria, the Australian Capital Territory, the Northern Territory and Commonwealth jurisdictions. The authors explain, analyse and critically evaluate the law by reference to its history, underlying policy and operation in practice. They also explore key principles of the law, identify its often conflicting rationales and provide suggestions for its reform.

Several notable changes are presented in this second edition, including the:

- addition of the Uniform Evidence Act in the Northern Territory
- modification of the right to silence (NSW Act)
- addition of journalists’ privilege (NSW/VIC Acts)
- emergence of differences in the interpretation and application of tendency and coincidence evidence between jurisdictions, and
- proposed hearsay exception for domestic violence complainants’ evidence in New South Wales.

Points of law are illustrated by case examples, extracts, and references to relevant sections of the legislation.
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Uniform Evidence Law: Principles and Practice

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Preface

This second edition of *Uniform Evidence Law: Principles and Practice* sees a change in authors, with the departure of Peter Faris QC and Brad Johnson and the arrival of Theo Alexander.

The purpose of the book remains the same. It is to provide an overarching and detailed analysis of the law of evidence applicable in those jurisdictions that have adopted the model Uniform Evidence Law: the Commonwealth, New South Wales, Tasmania, Victoria, Australian Capital Territory and (since 2012) the Northern Territory. It was written with students of evidence law in mind, intending to provide a succinct, clear and comprehensive statement of the law.

Our discussion is both explicative and critical. We analyse the Uniform Evidence Law by reference to its history, its underlying policy and its operation in practice, which now covers almost a decade. We explain and evaluate the principles on which it is based and identify its often-conflicting rationales. Where appropriate, we make suggestions for how it might be made more principled and coherent.

Since the first edition, the Uniform Evidence Law has continued to evolve. Apart from its introduction in the Northern Territory, there have been other changes of note. Significant have been the modification of the right to silence in the New South Wales Act, the addition of a journalists’ privilege in New South Wales and Victoria, and the emergence of some further differences in the interpretation and application of tendency and coincidence evidence between the states.

We have attempted to state the law as at November 2014.

We thank the editorial staff of CCH, particularly Joan Rubel, Farhana Khan, Scott Abrahams, Fiona Harmsworth and Javier Dopico for their patience and diligence in preparing our manuscript.

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Author Dedications
For Joe, and for Tiger Lily and Rory.
— FF
For my mother, Irene.
— TA
For my lovely twins, Dimitri and Katya Bagaric.
— MB
THE NATURE OF EVIDENCE LAW, ITS HISTORICAL FOUNDATIONS AND THE UNIFORM EVIDENCE ACTS

The nature of evidence law ........................................... ¶1.1
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“The recognition by the common law of the injustice of adhering rigidly to the rule applied by the trial judge in the trial of the appellants is illustrated by the large number of ‘exceptions’ recognised in particular circumstances. This has produced an unacceptably complex set of ‘rules’. They are difficult for judges and trial counsel to remember and to apply with accuracy in the often stressful circumstances of a trial. Clearly, there is a need for a simpler set of rules that observe concepts rather than the wilderness of instances acknowledged by the courts in their so-called ‘exceptions’.”

Nicholls v R [2005] HCA 1, [203], Kirby J

¶1.1 The nature of evidence law

Evidence law is the branch of law that defines the type of information that can be received by a decision maker — whether a judge sitting alone or a member of a jury — that may properly be used by the decision maker in the resolution of the factual issues in dispute in a case.

Information that can be received for this purpose is called “admissible”. Information that is excluded is called “inadmissible” — it does not form part of the relevant inquiry. Thus, evidence law is largely concerned with distinguishing admissible from inadmissible information.

The process of distinguishing between helpful (admissible) and unhelpful (inadmissible) information is not something that is unique to the legal system. Indeed, people do it as part of their everyday affairs. Normally, it is intuitive and based on common sense and experience.

For example, if a person wants to know who won the 100m male sprint at the 2012 London Olympics, there is an almost infinite number of sources that could be identified to ascertain the answer. These include interviewing participants in the event, speaking to spectators, reading newspapers the day following the event, searching the internet, watching television footage or reading official reports about...
the event. Depending on the source that is used, a different answer may be given. Spectators may have a different recollection to participants, and newspaper reports may differ from official reports. If this is the case, the person must then make a decision about which information seems to be the most credible.

A similar process occurs where a person is trying to ascertain the exact time that a morning train is scheduled to leave a particular railway station. To ascertain the time, the person can seek to consult friends and work colleagues, look for information in a newspaper or a public transport customer service centre, or try to get the information from the internet. Again, different avenues of inquiry could lead to different answers, and the person will usually make the decision based on which source seems the most reliable.

These everyday examples reveal a commonality of approach to fact-finding in both daily life and in the courts: the sources or types of information that might be used to answer the question must be identified (relevance); the sources or types of information must be ranked (based on considerations such as reliability and credibility); and the sources or types of information which are ranked too low may be rejected — only those which remain being used as part of the decision-making process. What information should, or must, be rejected is an important part of the task. For example, in relation to the 2012 London Olympics, it would be a waste of time to consult newspapers printed before the event, and it would be pointless asking people who obviously have no knowledge of the event. To ascertain the morning train timetable, it might be misleading to ask people who have no familiarity with the public transport system.

This intellectual process occurs each time a person looks for an answer or makes a decision, mostly unconsciously. However, as the decisions made by courts and tribunals must be logical and are open to scrutiny, the law of evidence prescribes a rational and consistent set of rules that decision makers must use to resolve factual disputes. Evidence law is, thus, the formalisation of the fact-finding inquiry that individuals perform as part of their everyday lives.

1.1.1 Evidence law is procedural, not substantive

Broadly, there are two types of rules of evidence.

First, there are rules regulating matters of process concerning how evidence can be given and who can give the evidence. Thus, there are rules dealing with matters such as competence and compellability of witnesses, and the reception of material in the form of documents and physical objects (eg a weapon used to commit an armed robbery).

Second (and this is generally the more complex area), there are rules prescribing what sort of information can be received by the courts to resolve issues in dispute. The most overarching rule is that only relevant evidence may be adduced. There are also many other rules designed to exclude the reception of specific forms of evidence — examples are the rules against hearsay and similar fact evidence.

Both types of rules serve the same purpose (ie controlling what information can be received by the decision maker), and both fall within the definition of the law of evidence.
CHAPTER 1

The key distinction between the law of evidence and other areas of the law is that evidence is not substantive. Unlike the criminal law, tort law or the law of contracts (for example), it does not create legal rights or duties. By contrast, evidence law is procedural (or adjectival) in nature. It serves to lay down the process by which substantive legal issues are determined. The existence of evidence law is dependent upon the existence of substantive law. If there were no substantive areas of law; and there was no possibility of disputation concerning the rights and duties created by these areas of law, it would be futile having a law of evidence. The same cannot be said of substantive areas of law; a tort system of liability would still make sense and be functional in a world devoid of criminal law, contract law, and so on — and vice versa.

Although evidence law does not have a life of its own, it is crucial to the operation of substantive law. The determination of substantive rights occurs in the legal environment created by the adjectival law. As Jeremy Bentham said:

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‘Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.’
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Thus, a flawed system of procedural law has the potential to fundamentally undermine the operation of substantive law and thereby create injustice. How the rules of evidence can best ensure that the substantive law is properly executed and effective is obvious: evidence law must ensure that the substantive law (whatever area of law that may be) achieves accurate results. Thus, laws designed to provide for workers’ compensation work best if, in fact, only workers are compensated; laws aimed to punish burglars operate best if, in fact, only burglars are punished pursuant to such laws, and so on. There would be little point in having a body of substantive criminal law if, when it came to the trial stage, the factual inquiry had so many distortions that most guilty people were acquitted and most innocent individuals were convicted.

¶1.2 The objectives of evidence law — truth, discipline, protection

To achieve an accurate result, the laws about evidence should (at least notionally) identify and pursue only those objectives which help to achieve that result. In particular, three relevant objectives can be identified:

1. truth
2. discipline (disciplinary), and
3. protection (protective).

1.2.1 Truth objective is important

The most obvious objective of the law of evidence is to ascertain the “truth”. This view was propounded approximately two centuries ago. According to Bentham, the ultimate aim of the law of evidence is to ensure the rectitude (righteousness) of

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decision making.\(^2\) On this view, the rules of evidence should be designed to reach the true or correct outcome pursuant to the substantive law.

Theoretically, it is only possible to reach that outcome if the information which is relied upon is reliable. Hence, it is not surprising that one of the key pillars upon which the rules of evidence are based is the principle of reliability. In the criminal law domain, where the rules of evidence operate most acutely, it aims to ensure that the guilty are convicted and the innocent are acquitted. The reliability principle underpins a number of rules which are intended to enhance the accuracy of the outcome. Thus, for example, hearsay evidence is excluded as a matter of principle, but may be ruled admissible; identification evidence may be highly relevant, but it is also inherently unreliable, and so is often ruled inadmissible.

However, the law has not gone down the path of pursuing truth as the only, or even the ultimate, objective of evidence law. The two other broad objectives (ie disciplinary and protective objectives) attenuate the search for the truth.

1.2.2 Disciplinary objective — arguably flawed

The “disciplinary” objective may lead to the exclusion of certain forms of “wrongly” obtained evidence. Thus, in some cases, forced admissions and illegally or improperly obtained evidence are excluded in a bid to discourage law enforcement officers from adopting inappropriate practices in the detection and investigation of crime. In theory, this also has the additional benefit that the community is seen not to condone unfair tactics employed against suspects.\(^3\)

The strongest expression of the disciplinary objective is found in the form of a discretion to exclude improperly or illegally obtained evidence. As we shall see in Ch 14 however, this discretion is rarely exercised to exclude evidence and hence, the importance of the disciplinary objective is diminishing. However, in rare cases the principle also operates in a reverse manner, such that parties who act unfairly can be compelled to disclose evidence that would otherwise come within an exclusionary rule. This arises in the context of legal professional privilege, which is discussed further in Ch 13.

It is not clear whether the disciplinary objective should be permitted to shape evidence law. Arguably, the disciplinary aim should be abandoned because the law of evidence is an ineffective vehicle for achieving such ends. If a police officer beats up a suspect to obtain an admission, the (potential) exclusion of the admission does not constitute a sufficiently meaningful disciplinary measure to deter future misconduct.


\(^{3}\) This principle was central to the reasoning of the House of Lords in *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* (2004) A and others (Appellants) (FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2005] UKHL 71, where it held that information that may have been obtained by the use of torture is not admissible against accused being tried for terrorist offences.
CHAPTER 1

The police officer suffers no tangible detriment whatsoever. He/she may be displeased that the case has been weakened, but his/her job is not to punish criminals; merely to detect crime and to investigate the case. Police are not meant to have a personal stake in the case. If they do, they are misguided.

By contrast, employing other approaches to deter such behaviour would appear far more effective. Police who resort to illegal means to obtain evidence should be charged with a criminal offence, or face internal disciplinary proceedings. Where less drastic, but, nevertheless, inappropriate means are used to obtain evidence (such as providing an inducement), the police officer should be counselled at work. Again, the law of evidence appears to be a blunt and ineffective instrument to secure this objective.

Moreover, the reception of unfairly obtained evidence does not necessarily entail an endorsement by the community of the means used to obtain the evidence. Rather, it is a reflection of the fact that we should always maximise whatever resources we have at our disposal to make the community the best it can be (eg by convicting the guilty). It is simply about making the most of a bad thing, rather than compounding the problem.

The message that it is unacceptable to use inappropriate means to obtain evidence can be communicated in a number of (more effective) ways than by excluding the evidence from court proceedings. For this reason, the disciplinary objective should be abandoned.

1.2.3 Protective objective

Another objective that shapes evidence law is the “protective” objective. This objective requires that parties to litigation are treated fairly and protected from possible prejudices. It has its strongest expression in the criminal law, given that accused persons are potentially the most vulnerable, and have the most at stake, in the justice system. Moreover, many of the criminal acts of which a person may be accused, or even may have once committed, can attract social opprobrium (eg crimes against children and the elderly and serious sex crimes). Thus, this principle finds its strongest expression in rules prohibiting the admission of prior criminal convictions of an accused, including those which are of a similar nature to the offence with which the accused is charged. Accused people are afforded the right to remain silent during official questioning, during the court process, and generally, to have no adverse comment made about that silence.

Despite the intuitive appeal of the protective principle, some empirical data suggests that decision makers are not, in fact, highly influenced by extraneous considerations (eg negative personal qualities associated with an accused). A study in New Zealand analysed the decision-making processes of 48 juries. In only 19 of the 48 trials considered in that study did individual jurors overtly raise arguments based upon some irrational sympathy or prejudice during deliberations. And, even on these occasions, such sentiments rarely played an important role in the ultimate decision:

“[When feelings of sympathy or prejudice were raised] they were routinely overridden by the remainder of the jury who ultimately persuaded or pressured them to accept the majority approach. As a result, there were only six cases in
which feelings of sympathy or prejudice were identified as having affected the outcome of the trial in some way: three resulted in a hung jury; one in a questionable verdict; and two in a verdict which was justifiable but arrived at by dubious reasoning.\(^4\)

These findings were supported by another study which showed that an “old previous conviction was found to have little or no effect on jury decisions”. Surprisingly, magistrates were more influenced by prior convictions than jurors. However, where the previous conviction is similar to the charged offence or the prior criminality is serious, this increases the likelihood of the conviction.\(^5\)

In this case, the weight of the research data indicates that pre-judgments stemming from prejudicial information about an accused are readily formed and cannot be reversed, even by directions from the trial judge.

In relation to the effect of media publicity, James Ogloff and Neil Vidmar tested a pool of 121 graduates to ascertain its impact on potential jurors, and discovered that, while they were unable to determine the exact psychological mechanism involved, exposure to television and print media, in fact, biased potential jurors. The level of bias was the greatest when potential jurors were exposed to both forms of media.\(^6\)

More concerning, most potential jurors were not aware of their bias, thereby making it more difficult to eliminate.

In a further study, Geoffrey Kramer et al observed the ineffectiveness of directions in eradicating juror bias.\(^7\) Again, the exact reason is unclear. However, it has been suggested that if jurors are unaware that they are biased, logical instructions are unlikely to overcome their emotional inclinations.\(^8\)

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7 Geoffrey P Kramer, Norbert L Kerr and John S Carroll “Pre-trial publicity, judicial remedies, and jury bias” (1990) 14 No (5) Law and Human Behaviour 409.

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On the basis of current research and knowledge in this area, the logical guiding assumption is that the level of pre-judgment and the difficulty in erasing it is directly proportional to the amount of adverse prejudicial material that is admitted against an accused.\(^9\)

The usual charge to the jury, which directs the members to decide the case only on the basis of the evidence, ignoring all other considerations, and dismissing any feelings of sympathy or prejudice, may be of limited value and effect to correct these prejudices and biases. It appears that the human mind is such that memories cannot be selectively erased and emotional dispositions cannot be negated on command. Accordingly, the protective objective remains important and the rules of evidence that prohibit unfairly prejudicial evidence being admitted against an accused should be interpreted strictly.

1.2.4 Other objectives

In addition to the above three objectives, there are also miscellaneous ideals, policies and objectives which have shaped, and continue to shape, the rules of evidence. For example, as we shall see in Ch 3, in some cases relatives of an accused are excused from having to give evidence against the accused. The reasoning for this appears to be a recognition that loyalty is an important virtue which should be given some expression in the law and a policy of protecting the basic social unit, the family. For that same reason, the exception also extends to spouses. Further, in Ch 14 we shall see that communications between lawyers and their clients are generally not admissible. A number of reasons have been advanced for this, including the desirability of fostering trust between lawyers and clients, and the importance of giving meaningful advice to a client based on complete and honest instructions.

Thus, it is clear that the law of evidence pursues a number of objectives. There is no ranking of their respective importance, and often the objectives will conflict.

However, despite statutory reform, the corollary of that conflict is that evidence-based inquires can often be unpredictable, seemingly complex and may not ultimately lead to the truth.

\[1.3\] Continued reform of evidence law

Throughout this book, the difficulties and shortcomings of evidence law are identified and discussed. This includes divergences in the approach to the law between jurisdictions.

But, it can be said at once that the future direction of evidence law reform should be guided by a clear methodology and be based on clear and identifiable premises. The merits of this approach can only be assessed after a thorough understanding of evidence law, considering both texts and cases. However, the approach is set out at this early point to provide readers with a framework to critically evaluate the current law.

The suggested approach to further developing evidence law is based on the following premises:

1. The current state of evidence law is unsatisfactory — it is replete with complex, vague and often seemingly contradictory rules.

2. There is no empirical evidence (nor unchallengeable intuitive basis) to support the bulk of the rules.

3. The process of incremental change to a fundamentally flawed system will not fix existing distortions and anomalies — painting a crumbling house is a wasted task.

4. Reform, as opposed to change, can only occur if the current system is fundamentally reshaped. There is no “evidence” that the current system is based on a verifiable body of knowledge.

5. The starting point with any system is to ascertain the objective that it seeks to achieve.

6. The aim of evidence law should be to ascertain the truth.

7. If commentators wish to urge for other goals, the onus is on them to:
   (i) prove why these goals are desirable
   (ii) prove how evidence law can achieve these goals, and
   (iii) establish why these goals are important enough to trump the search for the truth.

8. The fundamental rule of evidence is that any information that is relevant to the inquiry at hand is admissible.

9. Information should only be excluded if there is cogent evidence that it will tend to frustrate the search for the truth (eg because it belongs to a class of information which is demonstrably and inherently unreliable).

10. There is little firm evidence to suggest that any class of information will distort the search for the truth, apart from information that is demonstrably prejudicial to an accused.

11. Unless, and until such evidence is forthcoming, we logically revert to the default position — all relevant evidence is admissible.

12. This methodology and, in particular, the demand for evidence before a rule of exclusion is adopted, might seem to be setting the bar too high. This is commensurate with the importance of the institution that is evidence law. The price for getting it wrong, not only in terms of wrongful convictions, but also wrongful acquittals, is high.

A defining aspect of evidence law and court procedure is that the fundamental processes have remained constant for centuries. Scientific advances, dealing with human behaviour and psychology or the use of technology, have not penetrated the courtroom.

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10 Section 190 of the Evidence Act 1995 (Cth), in fact, allows for the waiver of most of the rules of evidence, especially in civil proceedings.
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However, in the not too distant future, there is a prospect that pioneering research into human credibility testing may be adapted to the courtroom, thereby making many of the rules of evidence redundant. For example, research suggests that functional Magnetic Resonance Imaging (MRI) may provide a means to categorically distinguish between honest and dishonest eyewitnesses. Scientific analysis shows that five areas of the brain reveal significant activation during lying compared with telling the truth: the right inferior frontal, right orbitofrontal, right middle frontal, left middle temporal and right anterior cingulated areas. Such approaches to discerning between the oral evidence given by witnesses (although not fool proof), would do more to ensure the integrity of the fact-finding process than the unscientific and intuitive rules of evidence law.¹¹

Psychologists and behaviourists have long shown that there are external tell-tale signs of a person who is lying. Evidence suggests, however, that the normal signals that judges and jurors commonly associate with a positive (honest) demeanour are flawed. People are in fact bad at detecting lies. Myths about lying include that people who cannot look you in the eye are lying and that pleasant facial expressions or directness of speech are associated with the truth.¹² One recent study showed that: “most people are lousy lie detectors, with few individuals able to spot duplicity more than 50% of the time”.¹³ A study by University of California Psychology Professor, Paul Ekman, revealed that when people lie, they provide a cluster of verbal and nonverbal clues. The clues are mainly found in parts of the face and derive from the fact that musculature of the face is directly connected to the areas of the brain that process emotion. Neurological studies even suggest that genuine emotions travel different pathways through the brain than insincere ones. These clues often last no more than a quarter of a second and hence, are lost to the untrained eye.¹⁴

While such studies are promising signs that the legal fact-finding process can become more accurate and reliable, for now, it is necessary to have a thorough understanding of the rules of evidence. This book examines and evaluates these rules, starting with a brief review of the historical foundations of evidence law.

1.4 The historical foundations of evidence law

While the Act has contributed substantially to the reform of evidence law, it has largely done that by unifying and simplifying the law as it stood prior to its enactment.

It is beyond the scope of this book to examine in detail the historical development of the law of evidence, particularly in relation to the specific exclusionary rules and discretions which are now contained in the Act. However, it is useful to consider the

13 Ekman’s study is discussed in James Geary, “How to spot a liar” (2000) Vol 155 No (10) Time Europe.
10

broad themes and ideas which have emerged during the several centuries over which this area of the law has developed, and which now culminates in the law of evidence contained in the Act.

1.4.1 Early modes of trial

The historical foundations of Australian evidence law are not to be found in the law reports or statutes of the late 1700s, but rather, in the much older processes of dispute resolution prevalent in England from the time of William the Conqueror in 1066. Around that time, disputes were usually settled by ordeal: the evidence of guilt or innocence (for these were almost always criminal, rather than civil trials) was revealed by the “Iudicium Dei” (meaning “The Judgment of God”). There were three principal types of ordeals. These were by:

1. fire (the flesh was burned, and healing meant a person was innocent)
2. water (a person was thrown into water and if they sank they were innocent), and
3. combat (only for the noblemen, the winner being favoured by God and therefore innocent).

These ordeals were not abolished until much later (eg trial by combat remained an option in England until around 1819), but added to them, was a new approach to resolving disputes: the use of oaths as means of proving a claim. Oaths could be sworn to prove both civil and criminal charges. Maitland explains how they were used:

“It is adjudged, for example in an action of debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators or oath helpers. The defendant must then solemnly swear that he owed nothing, and his oath helpers must swear that his oath is clean and unperjured. If they safely get through this ceremony, punctually repeating the right formula, there is an end of the case, the plaintiff, if he is hardy enough to go on, can only do so by bringing a new charge, a criminal charge of perjury against them. . .

Maitland, Forms of Action, 309”

1.4.2 Reform to the modes of trial

Between 1100 and 1200 (approximately), the swearing of oaths to prove matters before the courts — whether that be the court of the King at Westminster, or a local manorial court, or an ecclesiastical court — became increasingly prevalent. Henry II extensively reformed the law, both in substance and in form, during his reign in the 1100s. Primary among the procedural changes was the expansion of the “Petty Assize” and the “Grand Assize” as a dispute resolution mechanism (assidere, meaning “to sit beside” from Latin). The petty assizes would be used to establish the answers to particular pre-established questions, and grand assizes were used to determine the guilt or innocence of a defendant. The assize was made up of 12 knights who were sworn to determine the dispute by “Recognition” — according to their knowledge of the facts and their conscience about the truth. From this process, the jury began to emerge.