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Update Summary

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UNIFORM EVIDENCE LAW

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Stephen Oders KC has made the following updates to Uniform Evidence Law:

Chapter 4C Opinion:

In *Ierardo v The King* [2024] VSCA 181 the Victorian Court of Appeal held at [57]-[61] that an opinion expressed by a police officer that a complainant appeared to have had "some sort of trauma" was admissible under this provision because it went no further than an observation of the appearance of the complainant and was not expressing an opinion that there had been some past history of trauma.

[EA.79.120] "specialised knowledge" (s 79(1))

Updated commentary

[EA.79.150] "based on the person's training, study or experience" (s 79(1))

Updated commentary

INSERT NEW SECTION: [EA.79.500] Appellate review

The Full Court of the Federal Court has accepted that the correctness standard applies to appellate review of a decision concerning the admission of opinion evidence under this provision.

Chapter 6A Character

Updated Commentary and References

Chapter 6B Identification Evidence

Updated Commentary and References

[EA.114.300] Unsafe conviction

Updated commentary; *Fennell v The Queen* [[2019] HCA 37; 93 ALJR 1219, Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ stated at [81]:

Where a court of criminal appeal is called upon to decide whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence charged, the court must not disregard or discount either that the jury is the body entrusted with primary responsibility of determining whether the prosecution has established the accused's guilt or that the jury has had the benefit of having seen and heard the witnesses

Chapter 7 Privileges

[EA.118.360] "for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client"

In cases where non-lawyers are involved, the key issue for determination remains whether the relevant communication was made for the dominant purpose of the lawyer giving advice to the client, despite being made by or disseminated to third party advisers. Advices given by non-legal advisers will rarely be capable of attracting privilege. If a non-legal advice is provided to a client who then chooses to provide it to the client's lawyer, that does not clothe the original non-legal advice with privilege.

[EA.119.180] The contents of a confidential document (s 119(b))

Updated commentary. As regards the meaning of "document".

Section 126 Commentary

As Lee J observed in Parkin v Boral Limited (Loss of Privilege Issue) [2024] FCA 1039 at [36]-[38] it is useful to approach the issue of an asserted loss of client legal privilege under this provision in the following two steps:

> *(a) First, identifying whether client legal privilege has been lost in a communication or document (first communication) because of the application of one or more of ss 121–125;*
>
> *(b) Secondly, if so, one then looks at the first communication (over which client legal privilege has been lost) and asks whether, to understand it properly, it is reasonably necessary to know what is in another communication or document (second communication).*

NEW SECTION INSERT: [EA.126.80] "reasonably necessary to enable a proper understanding of the communication or document"

Although the ALRC did not explain the rationale behind this provision, it is reasonably apparent that it was intended to provide that, where a client or party otherwise entitled to rely on client legal privilege with respect to a communication or document engaged in conduct which (pursuant to ss 121, 122, 123, 124 or 125) had the effect that privilege could not be relied upon to prevent the adducing of evidence of that communication or document, it would also be the case that privilege could not be relied upon to prevent the adducing of evidence of a second communication or document which was needed to understand the first communication or document.

[EA.126K.330] "the public interest in the communication of facts and opinion to the public ..." (s 126K(2)(b))

Updated commentary; On the other hand, In *Al Muderis v Nine Network Australia Pty Limited* [2023] FCA 1623, Bromwich J stated at [29]:

> The bar for the application of the exception is therefore inherently substantial and onerous. Merely being able to run a somewhat better case if the identity of a confidential source is required to be revealed will generally not suffice. The facts and circumstances in a given case may also serve to elevate the public interest in disclosure not taking place.

Chapter 8 Proof

Insert new section: Other provisions EA.144.130

Rebuttal Evidence: Updated Commentary;

It was observed by Wigney J in *Australian Competition and Consumer Commission v Mastercard Asia/Pacific Pte Ltd* [2024] FCA 999 at [35]:

It might perhaps be accepted that, once judicial notice is taken of knowledge pursuant to s 144 of the Evidence Act, there may be no sound basis upon which to receive rebutting evidence. That is because, before judicial notice is taken of knowledge pursuant to s 144 of the *Evidence Act*, the Court would need to be satisfied that the relevant knowledge is not reasonably open to question and is either a matter of common knowledge, or

capable of being verified by reference to a document the authority of which could not reasonably be questioned

[EA.144.130] Other provisions

Other legislation permits a court to take judicial notice of certain information. For example, s 85A of the Reserve Bank Act 1959 (Cth) requires courts to "take judicial notice of statistical information contained in a publication issued in the name of, by, or under the authority of, the [Reserve] Bank".