

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
20th ANNIVERSARY OF THE EVIDENCE ACT
OPENING SPEECH: “COUNTING CEORLS AND EORLS”
SATURDAY 13 JUNE 2015*

1. Associate Professor Cossins, Richard Weinstein SC, thank you for inviting me to open this important occasion to mark the 20th anniversary of the uniform *Evidence Act*.¹ I respectfully acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, both past and present.
2. I would like to begin by wishing everyone first, a good morning, and second, a congratulation. Only outrageously eager evidence enthusiasts would have the dedication to spend their Saturday, celebrating the enactment of a piece of legislation. Like you however, I do feel that this particular piece of legislation is worthy of a celebration. For one thing, the Uniform Evidence Act provides a sizeable chunk of our procedural law. Given that substantive law is what is secreted through the rules of procedure, it stands to reason that the state of our law owes a lot to the Uniform Evidence Act.² Another, more specific reason we should celebrate this twentieth anniversary, is because it marks a significant, but by no means final step, in the law’s continuing journey to achieve the best system of proof possible for our society.
3. Given that my comments today are not subject to the rules of the uniform legislation itself, in particular, objections as to credibility, relevance and hearsay, I thought I would briefly discuss the history of our system of proof. The journey to where we are today began a very long time ago. The whole notion of having a system of rules for proving legal matters can easily be traced back in England to before the Norman Conquest. Prior to 1066, determining the truth in a dispute assumed and relied upon the assistance of God.³ The two methods of proof, by compurgation or ordeal, reflected this reliance.

*I express my thanks to my Research Director, Madeline Hall, for her assistance in the preparation of this address.

¹ 1995 (NSW) (the Uniform Evidence Act).

² Henry Maine, quoted in Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1954), 1.

³ Windeyer, *Lectures on Legal History* (The Law Book Company of Australasia Pty Ltd, 1938) (Windeyer), 11.

4. Proof by compurgation, required the party bearing the onus of proof, to “swear to the justice of his cause and to procure a number of others to do the same”.⁴ Importantly, these other people were not swearing what the truth was. They would most likely have no knowledge of the dispute in question at all. Rather, their oath was simply to “back up” or “clean” the oath of the party in the dispute who had called upon them. This process quickly became strategic, as the number of “oath-helpers” required for a party to win their case, varied depending on the offence or action.⁵ Moreover, the value of oaths themselves changed based on the type of oath. For instance, was it a pledged oath or an oath made on bones?⁶ To add a final layer of complexity, the value of oaths also varied depending on the person who swore it. Accordingly, the oath of an eorl was worth the oath of six ceorls and under some customs, the oath of an Englishman was considered more valuable than a Welshman.⁷ In fear of any welsh descendants present in the room, I will refrain from saying anything more about *that* distinction. Put simply, proof by compurgation required the counting of ceorls and eorls, commoners and all those between, to determine if the oaths stacked up to the standard of proof society set.
5. The other form of proof, by ordeal, is no doubt more familiar to all of you. The method is somewhat self-explanatory given the titles of the four different types of ordeal. There was ordeal by fire, hot water, cold water, or... by the morsel. The latter entailed giving the accused an ounce (in today’s terms about 28 grams) of bread or cheese. If it stuck in the accused’s throat they were guilty.
6. Undoubtedly, these different methods of proof did not necessarily favour the innocent. It would seem fair to say that they were more likely to favour those with robust immune systems, elementary swimming skills, and large oesophagi. However, I should not be too cynical. The methods were believed to arrive at the truth and were efficient, both in terms of time and money. I don’t know what the cost of cheese was back then, but now twenty eight grams of Bega will only set you back about a dollar. I have a feeling that this is a tad less than today’s cost to the taxpayer of an average trial.
7. Of course following the Norman Conquest, another method of proof was introduced. I will not detail the more gory aspects of trial by battle. These include the types of weaponry that were often used, the length of time battles would go for, and the particular word of surrender which had to be used to end the battle.⁸ I

⁴ Windeyer, 11.

⁵ Windeyer, 11-12.

⁶ Windeyer, 12.

⁷ Windeyer, 12.

⁸ Windeyer, 40. The heroic image of sword and lance was befittingly used in the Court of Chivalry. However, in ordinary courts the weapons were often batons with heads of horns on them. The accused could win by lasting till stars appeared in the evening, rendering it a distinct advantage if the battle occurred during the winter months. The accused could surrender by calling out “craven”.

will note however, that as ancient as all these methods of proof seem, as recently as 2002, an unemployed sixty year old mechanic, attempted to invoke the right of trial by combat. This was as an alternative to paying a twenty five pound fine for a motoring offence.⁹ Unfortunately for Leon Humphreys, the right had been formally abolished in 1819 after legislators were caught unawares by a man *successfully* insisting on the archaic procedure in response to a, far more serious, charge of murder.¹⁰

8. The far more familiar trial by jury was not used in the legal procedure as an alternative method of proof until the twelfth century.¹¹ Even then, “[e]arly jurymen in a sense had almost the character of the witnesses in a modern trial. They were chosen from the neighbourhood, because they were...persons who, either of their own knowledge, or by the common report...would know where the truth lay”.¹² Gradually, as witnesses were increasingly called to give evidence, the modern day distinction between jury and witnesses formed.¹³
9. The significance of the advent of jury trials is frequently discussed and dissected. Nonetheless, I think it is in fact difficult to overstate its importance. This is because the development of this method of proof represented a paradigm shift. It was the first time a system of proof was being used, where the inferred voice of God was replaced by the voice of the people, to determine what the truth was.¹⁴ While it may be assumed God cannot be led astray by unreliable evidence, fellow citizens definitely can. So as soon as this shift occurred, there was, all of a sudden, a real need and purpose for rules of evidence. The system of proof needed rules to protect the accused from the vulnerabilities that the jury system inevitably created. The advent of jury trials therefore, marks, not only the creation of a need for rules of evidence, but simultaneously a need for society’s system of proof to satisfy an extra purpose. It was no longer good enough that the method of proof would discover the truth and be efficient in doing so, as was the case with compurgation and ordeal. With the advent of jury trials, the system needed what we recognise today as rules of procedural fairness.
10. I do not think I am guilty of a gross simplification, when I say that since then the underlying purpose of our rules of evidence, has not changed.¹⁵ Then, as now, we expect our system of proof to discover the truth, efficiently and fairly. We rely on our rules of evidence to achieve this.

⁹ Sapstead, ‘Court refuses trial by combat’ *The Telegraph* (UK) 16 December 2002.

¹⁰ Windeyer, 41.

¹¹ Windeyer, 54.

¹² Windeyer, 55.

¹³ Windeyer, 56 and White, ‘Overview of the Evidence Act’ (2010) 34 *Australian Bar Review* 71 (White), 71.

¹⁴ Windeyer, 60.

¹⁵ Australian Law Reform Commission, *Evidence*, Report Paper No 38 (1987) (ALRC 38), [46].

11. I will now fast forward from the twelfth century to the twentieth, and the events leading up to the introduction of the Uniform Evidence Act. I think it is important to remember, that although we are celebrating the twentieth anniversary of the Uniform Evidence Act, the idea of uniform legislation began a lot earlier in the twentieth century. In the second reading speech, the Uniform Evidence bill was described as the “culmination of a process of reviewing this State’s law of evidence which...[had]... been under way...for nearly 29 years”.¹⁶
12. It began as far back as 1966, when the New South Wales Law Reform Commission commenced an inquiry into the law of evidence. This was suspended pending the outcome of the Australian Law Reform Commission’s inquiry, which began in 1979.¹⁷ The ALRC did not produce a final report till 1987. The recommendations were then by and large adopted by the New South Wales Law Reform Commission’s report, which was produced the following year in 1988.¹⁸ Given the considerable length of time taken conducting the inquiries, developments occurred relatively quickly once the reports were delivered. By 1991, both the Commonwealth and New South Wales had developed separate bills from the recommendations in their respective reports. By 1993, both jurisdictions had collaborated to produce a uniform Evidence Bill to come into effect from January 1995.¹⁹
13. The second reading speech of the bill in New South Wales Parliament stated:
- “it is to be hoped that, at the end of the day, all Australian jurisdictions will take steps to adopt legislation which follows this model and is uniform in this field.”²⁰
14. Today, that hope continues and it is still somewhat of a misnomer to call the *Uniform Evidence Act*, just that. While both at the Commonwealth level and in this State the legislation was adopted in 1995, it was not until 2001 that Tasmania joined the scheme.²¹ Significantly, Victoria enacted the uniform legislation in 2008 (to commence operation in 2010).²² As recently as 2011, the ACT and Northern Territory joined the uniform scheme.²³ Queensland, Western Australian and South Australia are yet to see the light. Nonetheless, the developments, particularly within the last ten years, have meant that, while not strictly speaking

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 113-117 (J W Shaw, Attorney-General) (the Second Reading Speech), 113.

¹⁷ New South Wales Law Reform Commission, *Evidence*, Report Paper 56 (1988) (NSWLRC 56), [1.2].

¹⁸ NSWLRC 56, [1.2].

¹⁹ Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005), New South Wales Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 47 (2005) and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper (2005) (the Discussion Paper), [1.6].

²⁰ Second Reading Speech, 113.

²¹ *Evidence Act 2001* (Tas).

²² *Evidence Act 2008* (Vic).

²³ *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT).

uniform, the Evidence Act does now apply to well over half of Australia's population.²⁴ This in itself is an achievement to be noted.

15. One of the reasons for the significant delay in the adoption of the Uniform Evidence Act throughout the states is no doubt an understandable hesitation to change, which many believe is ingrained in all lawyers. Even within this State, the introduction of the Act was not one universally acclaimed. "Many in the legal profession objected to reform and legislative intervention, fearing that a new set of laws would only abolish many familiar, well-established rules and principles and introduce uncertainty where previously none existed".²⁵ This fear ran counter to simultaneous reports that, in practice, the complexities were being ignored, oversimplified versions applied, and judges were trying to discourage the use of the common law's technicalities.²⁶
16. Whatever the reality *before* the Uniform Evidence Act's introduction, I think there would be little doubt as to the reality *after* its enactment. Whether because the legislation was not liked, understood or publicised, the fact is that most lawyers ignored the Act's existence and carried on as if nothing had actually happened. In this respect, the Act was more honoured in the breach than the observance.²⁷ I myself must confess to being guilty of criticising the Act. I recall appearing in Victoria at a time well prior to that State's adoption of the Act. I made the grave mistake of describing the new piece of legislation in slightly disparaging terms. I think the adjective "wretched" may have been mentioned. Unfortunately, it transpired that the judge to whom I was venting had not only been the chairman on the ALRC division recommending the Act's very creation but had also taken a part in drafting it. Unsurprisingly, after this blunder I was unable to establish much rapport with the bench. The experience at least forced me to engage, grudgingly, with the Act; not to mention to be somewhat circumspect when travelling interstate.
17. Twenty years later, I must acknowledge that as much as the Uniform Evidence Act may be criticised, and it certainly has been, it undoubtedly did reform and modernise our rules of evidence, in many ways which were desperately needed. One area of technicality in which this is most evident is documentary evidence. Prior to the Act, at common law, the original document had to be produced if available, and evidence was required to authenticate any copies of documents before they could be admitted. In the second reading speech, the Attorney General noted the problems this old rule had been causing. Essentially, it encouraged "the most primitive form of record keeping", original paper copies, as

²⁴ Gans and Palmer, *Uniform Evidence* (Oxford University Press, 2010), 1. Although Australian Law Reform Commission, *Uniform Evidence Law*, Report Paper 102 (2006) (ALRC 102) considered it "likely" that Western Australia would join, that has not happened.

²⁵ White, 740.

²⁶ ALRC 38, [3].

²⁷ Shakespeare, *Hamlet*, Act I, Scene IV, 7-16.

opposed to the use of far more efficient and economical record keeping technologies that were and are increasingly available.²⁸ In respect of this reform alone, I think the New South Wales Cabinet's estimate that the financial impact of introducing the legislation would be nil, was somewhat of an understatement.²⁹

18. It has been suggested that the common law's original document rule stemmed from the doctrine surrounding another ancient form of proof, which I did not mention earlier, trial by charter.³⁰ If this is true, it is of limited comfort to think it took several hundreds of years for all traces of this archaic attitude to documents to be abolished. Nonetheless, that is what the Uniform Evidence Act achieved. Some may say, better late than never, but it was in fact just in time. Fortunately for the New South Wales legal profession, the founders of Google, Hotmail, Facebook and Twitter, were all kind enough to hold off their inventions, until the legislation was introduced and passed by the New South Wales Parliament. This meant that while the internet rendered the concept of an original paper document largely obsolete and meaningless, our rules of evidence did not suffer the same fate. Other jurisdictions have not been so fortunate.³¹
19. The Uniform Evidence Act has, of course, not solved all problems. Over its twenty year lifetime there have definitely been continuing areas of uncertainty. When first introduced, there was frequent litigation around whether the privilege provisions applied to pre-trial applications. There was also a lot of criticism of the tests for competency to give sworn and unsworn testimony.³² Ten years after its enactment, the Australian, NSW and Victorian Law Reform Commissions reviewed the implementation of the Uniform Evidence Act and made sixty three recommendations. These were in large part adopted and implemented in NSW in 2007.³³ Reassuringly, it was reported that the Uniform Evidence Act was working well and there were no major structural or underlying policy problems.³⁴ There was however, as stated in parliament, a need for clarification, procedural improvements and rectification of what was termed "confusing court decisions".³⁵ I am glad it was also acknowledged that there were some uncertainties in the words of the legislation itself, not just court decisions.³⁶

²⁸ Second Reading Speech, 115.

²⁹ Spigelman, 'Access to justice and access to lawyers' (2007) 14 *Australian Journal of Administrative Law* 158, 164.

³⁰ Stone and Wells, *Evidence Its History and Policies* (Butterworths Pty Limited, 1991), 25.

³¹ Hoseah, 'The foundations of the law of evidence and their implications for developing countries: the background of the Tanzania law of evidence project' (Paper presented at Conference of the Law of Evidence, Northwestern University Law School Chicago Illinois USA, 21-22 November 2014) 5.

³² Discussion Paper, [4.30].

³³ *Evidence Amendment Act 2007* (NSW).

³⁴ ALRC 102, 17.

³⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2007, 3198 (Penny Sharpe- Parliamentary Secretary) (Second Reading Speech for the Amendment Bill).

³⁶ Second Reading Speech for the Evidence Amendment Bill.

20. Noteworthy amendments at the ten year anniversary included the definition of a “de facto partner” in gender neutral terms³⁷ and exceptions to the hearsay and opinion rule for evidence of Aboriginal and Torres Strait Island traditional laws and customs.³⁸ The phrase traditional laws and customs was itself defined broadly and in a non-exhaustive way, contrary to established caselaw at the time.³⁹ These, and other changes, were also accepted by the Commonwealth, thus ensuring that the unity of the Act was to an extent preserved.
21. However, it is not just at the ten year review that the Uniform Evidence Act has been changed. Throughout the life of the Act it has been amended, on average, more than once a year. No less than five provisions have been altered by the legislature following decisions by the High Court.⁴⁰ All this to-ing and fro-ing, could sceptically be seen as a failure of the certainty originally promised by the very concept of a Uniform Evidence Act. Legal practitioners could certainly be forgiven for asking whether all the hullabaloo, has resulted in a system which is any more simple or certain than what existed before.
22. However, I do not think that the frequent amendments or the ongoing debates as to how the Uniform Evidence Act operates, should be seen as a sign of failure. This is because first of all, it is important to remember that, as history shows, systems of proof have never been developed and emerged in complete form overnight. For instance, the United States declared independence in 1776. However, it was not until 1975, 200 years later, that the Federal Rules of Evidence were promulgated. If there is to be any truth in the adage that the life of the law is not logic, but experience, the changes to the Uniform Evidence Act should be acknowledged as positives.⁴¹ There is no denying it has not been a static piece of legislation, but then, given its subject matter, it never should be.
23. There is also a second point. It strikes me that many of the doubts and uncertainties that do remain, are not necessarily solely due to problems with the precision of the provisions themselves. Rather, I see them, in part, as semantic, linguistic and philosophical problems. These inherently arise when the truth is to be discovered using rules based on societal assumptions as to how humans

³⁷ Evidence Act, Dictionary Part 11, s 11.

³⁸ Evidence Act, ss 72 and 78A.

³⁹ Second Reading Speech for the Evidence Amendment Bill.

⁴⁰ Evidence Act, section 60 (after *Lee v The Queen* [1998] HCA 60; (1998) 195 CLR 594 (*Lee v The Queen*)), s 66 (after *Graham v The Queen* [1998] HCA 61; (1998) 195 CLR 606), section 85 (after *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216), section 101A (after *Adam v The Queen* [2001] HCA 57; (2001) 207 CLR 96) and section 128 (after *Cornwell v The Queen* [2007] HCA 12; (2007) 231 CLR 260).

⁴¹ Holmes, *The Common Law*, (Macmillan & Co, 1882), 1.

communicate and act. Some have referred to this as the epistemological problem of a legal system.⁴²

24. Take, for instance, section 60. The High Court's decision in *Lee v The Queen* assumed that when persons give evidence of a representation made to them, unless they had personal knowledge of the content of the representation, in giving evidence they are not intending to assert the truth or otherwise of the content of the representation.⁴³ In short, the High Court assumed that when people say "X told me Y" and they know nothing about Y, they are not intending to say that Y is true but simply that X *told* them Y. On some level, a parallel could be drawn with this reasoning and the limited role of the oath-helpers during trial by compurgation.
25. However, the amendment to section 60, introduced following *Lee*, is predicated on the (completely) opposite assumption. So now, when a person gives evidence of a representation made to them, even if they don't have personal knowledge of the representation's content, they are asserting the truth of the content.⁴⁴
26. The reality is that sometimes, as is verified by our tone and expressions, we are intending to endorse the truth of what we are repeating, and other times we are not. There will, therefore, always be problems with rules that by necessity assume everyone always communicates in one set way. This is regardless of what those assumptions actually are. Nonetheless, the fact that there has been a change to the legislation, altering the underlying assumption, is not an indicator of failure. It is simply an indication of the inherent complexities and limitations of human communication.
27. Another example, is the ongoing debate over the tendency and coincidence rules. Just running your eye down the program for today, noting the second and third and indeed to some extent the sixth, seventh and eighth sessions, it is clear how much of a real issue this continues to be. Now, I do not intend to encroach on what other speakers will say today. However, it again strikes me that, whatever the test, either way, at some stage the question will have to be asked: "what reasoning processes are open to a jury". Determining that question, will inherently involve a person using their own experiences and beliefs to make assumptions about what types of past behaviour are indicative of the truth of the presently disputed behaviour. As the judgments in *The Queen v Cakovski* illustrate, this will lead different people, different judges, to different opinions on

⁴² See Allen, 'Introduction Reforming the law of evidence of Tanzania (Part Three): the foundations of the law of evidence and their implications for developing countries' (2015) 33 *Boston University International Law Journal* 283.

⁴³ *Lee v The Queen*, 600.

⁴⁴ Evidence Act, s 60(2).

the available reasoning processes.⁴⁵ This “difference of view does not point to any problem with the uniform Evidence Acts” themselves.⁴⁶

28. Leaving intractable epistemological issues aside, I do think the Uniform Evidence Act has successfully made needed reforms and modernised our rules of evidence. It has ensured our rules remain close to what current standards dictate the best system of proof must incorporate. As I mentioned at the start, those standards demand our rules of evidence operate fairly and efficiently. The Uniform Evidence Act has been a step in the right direction to better achieve those, quite often competing, purposes of rules of evidence. Take for example the general discretions to limit or exclude evidence where its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, misleading or a waste of time.⁴⁷ These are clear illustrations of a rationalising and refining of the pre-existing law, for the better.

29. Without treading on the toes of the speakers later in the day, I would like to conclude by hypothesising the following for the future. The current standards expected of our rules of evidence are, as I said, by and large the same as those from the twelfth century. However, I do think we are currently undergoing another paradigm shift, which the rules of evidence and our use of them, will have to respond to. This shift is being driven by three phenomena. First, the general trend away from the use of juries and towards judge alone trials. Second, the increased level of permissible judicial interference in the running of proceedings. And third, the growing number of exceptions to rules considered the hallmarks of procedural fairness, such as the right to silence, client legal privilege and against self-incrimination.⁴⁸

30. The first trend has been a long and gradual one. Yet there has been a significant increase in judge alone trials since the amendments in 2010 to the *Criminal Procedure Act*.⁴⁹ These amendments allow an accused to select a judge alone trial, even if the Crown does not consent.⁵⁰

⁴⁵ *R v Cakovski* [2004] NSWCCA 280; (2004) 149 A Crim R 21.

⁴⁶ The Discussion Paper, [10.14].

⁴⁷ Evidence Act, ss 90, 135-138.

⁴⁸ See for instance *Crime Commission Act 2012* (NSW), section 39 (similar to the previous *New South Wales Crime Commission Act 1985* (NSW), section 18B), *Independent Commission Against Corruption Act 1988* (NSW), sections 24-26 and 37 and most recently, *Evidence Act 1995* (NSW), section 89A, introduced in 2013. At the Commonwealth level, the ALRC is currently reviewing legislation to identify provisions that unreasonably encroach upon traditional rights, such as those mentioned above (See Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws*, Issues Paper 46 (2014)).

⁴⁹ 1986 (NSW), s 132.

⁵⁰ Ierace, ‘Judge alone: Dispensing with the jury’ (December 2012) 50(11) *Law Society Journal*, 53. Also note *Supreme Court Act 1970* (NSW), s 85 which requires a trial without jury in most civil matters unless the Court orders otherwise.

31. The second trend has begun more recently, over the last twenty to thirty years, due to both specific legislative enactments and the advent of case management. It is reasonable to suppose that a culture encouraging judicial interference, by way of case management in pre-trial proceedings, would naturally lead to increased interference during the actual hearing of a matter. This has, as I said, been complemented with specific legislative provisions. For instance, the Uniform Evidence Act itself increased the level of judicial involvement in proceedings by mandating the court intervene and disallow improper questions, even when there is no objection from the opposing party.⁵¹ Equally, the Act authorises the court *on its own motion* to direct that a witness give their evidence in narrative form.⁵²
32. The first and second trends tend to be interrelated. This is partly because the New South Wales Court of Criminal Appeal, has confirmed that in the case of judge alone trials, more latitude to judicial interference, by way of judicial questioning of a witness, is allowed. This is based on a presumption, which explains rather than justifies the latitude. The presumption is that a trained judicial officer is more adapt at correcting any wrongly formed opinions that may arise as a result of such questioning.⁵³
33. As I stated, the question prompted by the existence of these two trends, of disappearing jury trials and increased judicial interference, is how should our rules of evidence respond to the new realities? One suggestion was indicated by Justice White from this Court. He stated that “the historical need for visible and transparent rules on admissibility to manage the distrust of the jury’s ability to disregard unreliable evidence” has abated.⁵⁴ He went on to say that, “[l]ogically, the question must be asked whether we must still contend with such a large volume of rules on admissibility”.⁵⁵
34. Hearsay in particular, has been an admissibility rule that has increasingly been attracting the ire of academics and legislators.⁵⁶ For instance, the United Kingdom largely abolished the rule in civil proceedings in 1995.⁵⁷ Currently in Singapore, where there are no jury trials, there are also calls for the rule’s abolition.⁵⁸ I do not think these movements have reached our shores with much impact yet. However, I do think moving forward, these two trends will require less adherence to rules grounded in the minutia and greater focus on flexibility and discretionary principles. To this end, it is important that provisions, such as

⁵¹ Evidence Act, s 41.

⁵² Evidence Act, s 29.

⁵³ *FB v R* [2011] NSWCCA 217 at [84].

⁵⁴ White, 107.

⁵⁵ White, 107.

⁵⁶ Park, ‘Exporting the Hearsay Provisions of the Federal Rules of Evidence’ (2015) 33 *Boston University International Law Journal* 327.

⁵⁷ *Civil Evidence Act 1995* (UK).

⁵⁸ Singapore, *Parliamentary Debates*, Singapore Parliament, 14 February 2012, [22] (Shanmugam-Minister for Law).

section 190, are utilised to their full potential. When exercised in a judicial and accountable way, flexibility in the, more often than not, judge alone trials, can be ensured this way.

35. This leads me to the third trend currently afoot. The increasing in-roads to procedural fairness are perhaps not new or surprising.⁵⁹ What is, if not new, at least topical, is the impact, if any, on proceedings that rely on evidence that was obtained by denying someone principles of procedural fairness or more importantly, what has been described as fundamental rights or immunities. If legislation on its true construction does operate to abrogate the fundamental principle of the common law, that the prosecution must discharge the onus of proof and cannot compel the accused to give evidence for it,⁶⁰ the impact could be through innumerable ways. For instance, direct or derivative use of the evidence or explicit or implicit contamination of the prosecution's team or witnesses. The possibilities that have already come through the Court of Criminal Appeal in this State alone have been varied and numerous.⁶¹ Again, I think this trend will require an emphasis on flexibility. An individual tailoring of such trials will be necessary to make allowances for the unique situations presented to the trial judge. Such flexibility can be achieved by the exclusion of evidence or caveats on the use of evidence being imposed, which fortunately our rules already provide for.

36. Beyond this and more fundamentally, I think what all these new trends will require is a renewed focus on the conceptual framework underpinning and justifying the very existence of the Uniform Evidence Act. As has been identified in China in the wake of their own reforms and unification of evidence law, there are complex policy considerations underlying rules of evidence.⁶² The value society ascribes to each of these concepts is indicated by the operation and content of the rules. Moving forward, we must not forget the *key* concept, which differentiates our current system from those of the past. Principles of procedural fairness and the accusatorial system must be safeguarded. If they are not, can we really say, that all the reports, reforms, provisions, cases and amendments over the last twenty years, have given us a system that is all that different from compurgation or ordeal? Will we really have moved beyond systems that determine justice by

⁵⁹ The 1487 Star Chamber in England had the power to compel an accused person to give evidence.

⁶⁰ *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196, 266 [176] (Kiefel J).

⁶¹ *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196; *Lee v R* [2014] HCA 20; (2014) 88 ALJR 65; *R v Seller*; *R v McCarthy* [2013] NSWCCA 42; *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92; *X7 v R* [2014] NSWCCA 271 and *R v Seller*; *R v McCarthy* [2015] NSWCCA 76.

⁶² Zhang, 'Reflecting on Development of Evidence Law in China' (Paper presented at Conference of the Law of Evidence, Northwestern University Law School Chicago Illinois USA, 21-22 November 2014), 14.

counting ceorls and eorls? How our rules of evidence respond to the future trends will determine the answer to that question.