

Evidence of Criminal Convictions in Civil Proceedings

Terms of Reference

In 1970 the Committee was given a reference to consider the law relating to the introduction of evidence of criminal convictions in civil proceedings and report on the need, if any, for change.

Background of Reference

The rule in *Hollington v Hewthorn*¹ ("the rule") provides that in civil proceedings, a criminal conviction following trial cannot be tendered as evidence of the material facts upon which that conviction is based.² Since its creation, the rule has been widely criticised.³ This criticism resulted in legislative and judicial reform in Australia, New Zealand and the United Kingdom in the late 1960s.

The English Law Reform Committee released a report in 1967⁴ recommending that the rule be abolished. The United Kingdom Parliament responded by enacting the *Civil Evidence Act 1968* (UK) which, amongst other things, abrogated the rule.⁵ In 1969 the opportunity arose for consideration of the continued application of the rule in respect of civil proceedings in New Zealand. The New Zealand Court of Appeal also criticised and declined to follow the rule.⁶

In Australia, prior to this reference, some statutory modification of the rule at Commonwealth and state level had already occurred.⁷ In Western Australia s 79C of the *Evidence Act 1906* (WA) had been enacted to remedy some of the problems caused by the rule by allowing, subject to certain conditions, statements made in a document to be submitted as evidence. This meant that the transcript of evidence given at a criminal proceeding could later be adduced in civil proceedings. However, evidence of a conviction itself was still inadmissible. Other states enacted similar provisions⁸ and others went further by enacting specific legislation to abolish the rule.⁹

As a result of moves in other states to completely abolish the rule, the Attorney-General asked the Committee to investigate if further statutory action should also be taken in Western Australia. The Committee issued a working paper in September 1971 that outlined the issues and considered reforms undertaken in other jurisdictions. It invited comment on whether s 79C of the *Evidence Act* made further reform unnecessary. It also raised specific questions relating to how any legislative reform, if decided upon, might operate.

Nature and Extent of Consultation

Because of the specifically legal nature of the reference, consultation was limited to the legal community. The working paper was forwarded for comment to judicial officers of the District and Supreme Courts, legal academics, legal practitioners, law reform agencies, the Law Society of Western Australia and the Western Australian Commissioner of Police.

1 [1943] KB 587.

2 Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) para 5.94.

3 Law Reform Committee of Western Australia, *Evidence of Criminal Convictions in Civil Proceedings*, Working Paper, Project No 20 (1971) para 19.

4 English Law Reform Committee, *Fifteenth Report*, Cmnd. 3391.

5 See *Civil Evidence Act 1968* (UK) ss 11 & 13.

6 *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961.

7 Law Reform Committee of Western Australia, above n 3, paras 13–15.

8 *Ibid* 15.

9 See, eg, *Evidence Act 1929-1960* (SA) s 34A; *Evidence Act 1939* (NT) s 26A.

The Committee received a very small number of submissions in response to the working paper. Most valuable of these was the response by the Law Society of Western Australia which canvassed its members on the issue and made proposals for reform. The Committee published its final report on the subject in April 1972 which contained recommendations that substantially reflected those made by the Law Society.¹⁰

Recommendations

The Committee decided that s 79C of the *Evidence Act* had alleviated many of the potential hardships that might be caused by the operation of the rule. The Committee also felt that the difficulties that might arise in deciding what weight should be given to evidence of prior convictions would mean that abolishing the rule could create more problems than it solved. Thus the Committee's primary recommendation was that the rule in *Hollington v Hewthorn* should remain in force in Western Australia. However, the Committee recommended that an exception to this rule be statutorily created to provide that in defamation actions in which the commission of an offence is in issue or is relevant to an issue, a conviction after trial shall be admissible and shall be conclusive evidence that the party committed the offence.

The Committee also provided the following alternative recommendations to provide for statutory guidelines, should Parliament choose to abolish the rule.

- Evidence of a conviction should be admissible as prima facie evidence only and should serve as proof only if no acceptable evidence to the contrary is adduced.
- Evidence of a conviction should not be admissible against third parties.
- Convictions after summary trial should only be admissible if to do so appears to the court to be necessary in the interests of justice.
- For the purposes of identifying the facts on which a conviction is based, the contents of the complaint, indictment or other document should be admissible in evidence.

Legislative or Other Action Undertaken

No legislative action has been taken to implement the recommendations contained in the Committee's report.

Currency of Recommendations

The Full Court of the Supreme Court of Western Australia considered the validity of the rule in *Mickelberg v Director of the Perth Mint*.¹¹ The Court rejected the application of the rule and held that evidence of a criminal conviction could be admissible as prima facie evidence of the facts on which the conviction depended.

In the absence of legislative support for the rule, this decision affects the currency of the Committee's primary recommendation that the rule be preserved. However, the Committee made alternative recommendations to direct legislative action should the rule be abolished. Although the Committee assumed that any abrogation of the rule would be performed by statute, these alternative recommendations remain current.

¹⁰ Law Reform Committee of Western Australia, *Evidence of Criminal Convictions in Civil Proceedings*, Project No 20 (1972) para 7.

¹¹ [1986] WAR 365.

◀ Evidence of Criminal Convictions in Civil Proceedings

The Committee also recommended that in defamation actions, evidence of a conviction should not only be admissible but be conclusive evidence that the party committed the offence. This was due to concerns that a party could effectively have the issues of the previous conviction re-tried. Chief Justice Burt dealt with this potential abuse of process in the *Mickelberg* case.¹² This recommendation is no longer current.

Action Required

In September 1985, the Attorney-General announced that in view of the decision of the Full Court in the *Mickelberg* case, the Government had decided that it was now unnecessary to act on this report.¹³ However, in light of the continued currency of the Committee's alternative recommendations, this decision could be revisited.

Priority – Low

Although the primary concerns that initiated the reference have been dealt with judicially, legislative action would bring greater precision and certainty to the reform. Such legislative action to abolish the rule has been taken by other Australian legislatures including Queensland, Victoria, South Australia, the Northern Territory and the Commonwealth.¹⁴

¹² [1986] WAR 365, 372

¹³ Western Australia, *Parliamentary Debates*, Legislative Council, 26th September 1985, 1630 (Mr J M Berinson, Attorney-General).

¹⁴ *Evidence Act 1977* (Qld) ss 78–82; *Evidence Act 1958* (Vic) ss 90–91; *Evidence Act 1995* (Cth) ss 91–92; *Evidence Act 1929-1960* (SA) s 34A; *Evidence Act 1939* (NT) s 26A.