

Lay Opinion Evidence

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'Opinion is the medium between knowledge and ignorance'

Plato (according to an online search engine)

1. According to the same online search engine, Plato also allegedly said: 'Knowledge is true opinion'. Arguably, no opinion can be 'true' - and therefore reliable - unless it is founded on observable and verifiable facts.

2. The admissibility of a witness's opinion evidence in courts of law frequently falls for judicial consideration. The reception of such evidence always has been qualified by certain prohibitions, classifications and exceptions. Part 3.3 of the *Evidence Act 1995* ('the Act') now deals with this class of evidence (it is set out at the end of the paper).

3. Section 76(1) of the Act provides a general exclusionary rule:

76 The Opinion Rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

The opinion rule in s 76(1) of the Act is qualified by s 76(2):

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

4. Certain specific exceptions to 'opinion rule' are provided in the Act, including: summaries of voluminous or complex documents (s 50(3)); evidence relevant otherwise than as opinion evidence (s 77); lay opinion (s 78); Aboriginal and Torres Strait Islander traditional laws and customs (s 78A); expert opinion (s 79); admissions (s 81); exceptions to the rule excluding evidence of judgments and convictions (s 92(3)); and character of and expert opinion about accused persons (ss 110 and 111).

5. This paper deals only with one exception to the 'opinion rule', namely 'lay opinion' evidence as provided in s 78 of the Act:

78 Exception: lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

6. Before the introduction of the *Evidence Act 1995*, the common law position was that generally that opinions of lay witnesses, i.e. non-expert witnesses, were not receivable; the opinions, inferences or beliefs of individuals were inadmissible in proof of material facts. Exceptionally, some types of opinion were receivable.

7. The list of circumstances where non-expert opinion was admissible at common law was lengthy and not closed. These exceptions to the general rule were said to have been permitted on the grounds of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness based his opinion were so numerous and so evanescent that they couldn't be held in the memory and detailed to the jury precisely as they appeared to the witness at the time. The basis upon which this exception to the general rule rested was that the nature of the subject-matter was such that it couldn't be reproduced or detailed to the jury precisely as it appeared to the witness at the time: see *South Sydney Junior Rugby Leagues Club Ltd v Gioia* [2000] NSWCA 249, per Powell JA at [13].

8. In *R v Cox* (1864) 3 SCR (NSW) 189, adverse opinion evidence of the accused's honesty called in reply by the crown was held to have been wrongly admitted. In a footnote to *R v Corcoran* (1865) 4 SCR (NSW) 83, evidence of a witness's belief as to an offender's identity as being the accused was said to have been admissible, but such evidence would be of little or no value unless there were probable grounds for it. In *R v Whitby* (1957) 74 WN (NSW) 441, a 37-year-old male civilian witness - a former soldier who gave evidence that he'd previously seen numbers of drunken men - and police officers - who gave evidence that the accused's breath smelt of intoxicating liquor, was unsteady on his feet, face flushed, eyes bleary, had

saliva on lips and had no idea how much he'd had to drink - were each permitted to give evidence of their opinion as the accused's state of intoxication.

9. In *R v Aldridge* (1990) 20 NSWLR 737, it was held that a police officer's opinion that a person was affected by intoxicating liquor was admissible in evidence provided that the factual basis for that opinion is first provided. In *South Sydney Junior Rugby Leagues Club Ltd v Gioia* evidence of lay witnesses as to the speed of an escalator in an action for damages for personal injury was admissible. The court followed *R v Whitby* in both these cases.

10. On the Judicial Commission of New South Wales website, read on 20 November 2009, a commentator notes (at [4-0620]):

The author of *Cross on Evidence*, at [29090] . . . has identified the following typical instances of admissible non-expert opinion: age, sobriety, speed, time, distance, weather, handwriting, identity, bodily health, emotional state, the physical condition of things, the reputation and character of persons, impressions of a person's temperament, relationships and attitudes.

11. The common law position - whereby lay opinion evidence was admitted as an exception to the general rule as one of an anomalous miscellany of exceptions - has been changed by s78 of the Act. The ALRC explained the proposal on which the provision is based (ALRC 26 paragraphs 739-740):

. . . it is proposed to admit lay opinion testimony where it is based upon the personal perception of the witness and it is necessary to obtain an adequate account of his perceptions. The proposal, therefore, revives the original rationale based on the distinction between opinion based on the witness's perception and mere uniformed speculation.

12. In Guide Dog Owners and Friends Association v Guide Dog Association of New South Wales (1998) 154 ALR 527, Sackville J at 531 stated that s78 had substantially altered the common law and had expanded the scope for lay opinion evidence beyond the scope of certain classes of cases. Similarly, in R v Panetta (1997) 26 MVR 332, Hunt CJ at CL said:

Section 78 of the Evidence Act 1995 (NSW) has substantially altered the common law by permitting lay opinion evidence to be given by any person where the opinion is based upon what that person saw, heard or otherwise perceived about a matter or event. Mr Odgers, in his textbook *Uniform Evidence Law*, gives the speed of a motor vehicle as a good example of the evidence likely to be admitted under this section. He suggests that this is in any event admissible at common law. The common law, however, requires even the layman giving such evidence to demonstrate at least some experience before such an opinion is admissible, because there is still a need for the witness to be better equipped than the jury to form the opinion. Miss Conway's evidence that she had held a driver's license for about 14 years and that she considered that that driving experience enabled her to estimate roughly how fast a vehicle is actually travelling would not make her opinion as to the speed of a vehicle from its oncoming headlights admissible at common law.

13. In Connex Group Australia Pty Ltd v Butt [2004] NSWSC 379, citing R v Panetta as authority for the proposition that section 78 changed the common law, White J observed, (at [20]):

The admissibility of non-expert opinion evidence which is based upon personal perception is no longer confined to issues of age, identity, speed, or intoxication.

14. The expression 'opinion' is not defined in the Act. In All State Life Insurance Co. v Australia and New Zealand Banking Group Ltd (No. 5) (1996) 64 FCR 73, Lindgren J. said:

In the context of the general law of evidence, 'opinion' has been defined as 'an inference from observed and communicable data' . . . The origin of the courts' aversion to evidence of opinion is in the common law's concern to receive the most reliable evidence . . .

5. There must be a rational basis for the lay opinion otherwise it may be excluded as irrelevant by ss 55 and 56 of the Act. In *R v Panetta*, a case in which at 11 o'clock at night on a Sydney suburban road, not lit by streetlights, the accused was alleged to have driven in a dangerous manner causing grievous bodily harm. A crown witness - who had been travelling in a car at 70 kph in the opposite direction and observed the approaching headlights before making observations of the collision in her rear-vision mirror - said the appellant's car approached at a speed of 100 kph or more. It was held on appeal the evidence was not relevant evidence within s 55 of the Act, and should have been rejected as there was no rational basis for the opinion.

16. A rational basis for an opinion may be found in the familiarity of the witness with the matter on which the opinion is expressed. In *R v Fernando & Fernando* [1999] NSWCCA 66, a joint trial for an alleged murder in a country town, the crown called evidence in reply from a police officer and an Aboriginal Community Liaison Officer as to their opinion of the intelligence of one of the accused persons. On appeal the evidence was held to be admissible, based on the fact that both witnesses had extensive prior dealings with that accused person, of which they had given evidence in the trial.

17. Although lay opinion might be admissible even where the factual basis for it is not revealed in the evidence, such evidence may be excluded under s 137 of the Act where its prejudicial effect is high and its probative value is low. In *R v Harvey* (unrep. 11 December 1996, CCA (NSW); BC9605997), a case in which the accused schoolteacher was alleged to

have committed sexual offences on female pupils, a fellow teacher at the school gave evidence at trial she saw the accused and a pupil in a room. At the time, the witness said that accused had 'a look of sexual gratification' and the child 'had a glazed look on her face'. In a judgment with which Smart and James JJ agreed, Beazley JA said that evidence satisfied s 78 and was admissible, even though no evidence was given as to the primary facts upon which the opinion was based; that was a circumstance that only went to the weight of the evidence once admitted. However, s 137 of the Act required the exclusion of the evidence, as 'the prejudicial effect of this evidence was very high, whilst its probative value was slight'.

18. In *R v Van Dyk* [2000] NSWCCA 67, another case involving sexual allegations, the mother of a complainant gave evidence that when she saw the accused person around girls he 'had a look of wanting' on his face. The appeal court in considering s 78, decided along the same lines as *R v Harvey*: the evidence was admissible but should have been excluded under s 137.

19. Evidence about the state of the witness's own mind at the relevant time is fact and not opinion. In *R v Seltsam Pty Ltd v McNeill* [2006] NSWCA 158, Bryson JA said (at [123]):

I do not find it possible to see evidence given by a person about his state of mind, in an actual or hypothetical situation, as an opinion. The state of a person's mind is a fact and remains a fact whether what is under the discussion is an actual state of mind, or the state in which a person's mind would be in some contingency which has not happened. .

20. However, the question of what is 'merely' evidence of an opinion and what is evidence of fact is not always entirely clear. In *Connex*, White J said (at [3]):

Although the rules of evidence often assume a dichotomy between fact and opinion and the distinction is unavoidable, there is a continuum, rather than a dividing line, between fact and opinion.

21. In *R v Leung* (1999) 47 NSWLR 405 (CCA), Simpson J said (in obiter at [43]):

The line between opinion evidence and evidence of fact is not always clearly defined.

Evidence of physical identification illustrates the point. On the one hand such evidence may be characterised as evidence of fact; but, depending on the circumstances, it may more properly be characterised as evidence of opinion.

22. In *R v Mundarra Smith* [1999] NSWCCA 317, individual participants in a bank robbery were depicted in security camera photographs. In the trial two police officers gave evidence identifying that appellant as one of the persons so depicted. The court held that the evidence of the police officers was evidence of fact, and properly admitted. On an appeal from the CCA, the High Court decided the matter on a different issue (see the analysis of the *Mundarra Smith* decisions by Simpson J in *R v Drollett* [2005] NSWCCA 356, extracted below in paragraph 27 of this paper).

23. In *R v Marsh* [2005] NSWCCA 331, another case involving evidence of identification from surveillance photographic evidence, the photograph was published in a newspaper and the person depicted in it was recognised by the sister of the accused, who came forward and disclosed his identity. The sister gave evidence in the trial. Studdert J, with whom Kirby and Howie JJ agreed, reviewed the evidence and also the judgments of the Court of Criminal Appeal and the High Court in *Smith*. He came to the view that the evidence given by the sister was in a different category from that of the police officers in *Smith*, not least because of her longstanding familiarity with her brother and her opportunity to observe his stature,

stance, and facial features. Accordingly, he came to the conclusion that the evidence was direct evidence - that is, factual evidence and not opinion evidence (Simpson's J remarks in R v Drollett at [68 - 69]).

24. In R v Drollett, following a jury trial, the appellant was convicted of an offence of malicious wounding in company, committed in the Goulburn Correctional Centre. A melee had erupted in '6 yard' whereby eleven prisoners were charged with attacking another prisoner; the other accused pleaded guilty. The only issue in the trial was whether the appellant had been shown to be a participant in the attack. Two digital cameras producing jerky, indistinct images in which faces weren't to be seen provided electronic surveillance of '6 yard' that became evidence in the trial. A witness, Prisoner Officer Stephens, observed prisoners in the yard immediately after the attack: he had not been an eye witness to at least some of the events depicted on the film, and in which he had purported to identify the appellant.

25. The leading judgment in R v Drollett was by Simpson J, with whom McClellan CJ at CL and Rothman J agreed. Simpson J said (at [51]):

Because of the greater advantage Mr Stephens had compared with the jury in relation to his capacity to identify or recognise the appellant, I have come to the view that the decision in [Smith (Mundarra) v The Queen] [2001] HCA 50] does not operate in such a way to require a finding that his evidence was irrelevant. Mr Stephens' evidence was sufficiently different in quality from the evidence of the two police officers in Smith to permit a different conclusion. I am of the view that his evidence was relevant.

(And at [53]):

That then requires a consideration of whether Mr Stephens' evidence was evidence of opinion or fact.

(And at [60]):

On the basis of the whole of the evidence given by Mr Stephens, I have come to the view that his identification of the appellant was made, not by recognition or familiarity with the appearance of the appellant, but rather by a process of deduction. What he purported to do was to track the indistinct image of a person he asserted to be the person initially identified as the appellant by reference to his clothing. That, in my view, is opinion evidence. It would be different if, at any time, he had said that he recognised the footage as depicting the scene to which he had been an eyewitness, *and* that the footage accurately depicted what he had seen; that would properly have been classified as evidence of fact.

26. Simpson J also decided the lay opinion exception did not permit reception of the evidence because clause (b) was not satisfied, saying (at [63]):

The exception provided by s78 is not applicable as evidence of Mr Stephens' opinion is not necessary to obtain an adequate account or understanding of his perception of any matter or event His evidence, in my view, did no more than this. He selected a person on the film footage whom he considered to be the appellant; he then followed that person through the film footage in order to isolate him at different points during the course of the incident. There was no evidence that Mr Stephens had any particular expertise in deciphering indistinct, staccato-like, jerky film footage. Nor was there any adequate evidence that he had the advantage of particular familiarity with the appellant, such as to enable his classification as an 'ad hoc expert'.

27. Her Honour also made some remarks on the court's and the High Court's decisions in *Mundarra Smith*. She said (at [33-34]):

A not dissimilar issue arose in *Smith (Mundarra) v The Queen* [2001] HCA 50; 206 CLR 650. There, a bank robbery had taken place which had been recorded in photographs taken by security cameras. Individual participants were depicted in the photographs. In the trial two

police officers gave evidence identifying that appellant as one of the persons so depicted. Each did so, on the basis that he had some familiarity with the appellant by reason of prior encounters with him. In this court (*R v Mundarra Smith* [1999] NSWCCA 317) the appellant's appeal was dismissed. The court held that the evidence of the police officers was evidence of fact, and properly admitted.

It is material to note that, from the judgments of the High Court, it appears that at least one of the photographs said to have been of the appellant was of good quality and clarity. All five members of the High Court agreed that the evidence of the police officers should not have been admitted. However, there were two radically different approaches that led to the same result. In the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ, the reason was that the evidence failed the test of relevance posed by s56 of the *Evidence Act 1995*. Kirby J held that it was relevant evidence, but was properly characterised as opinion evidence, and was not brought within the admissibility rules referable to opinion evidence contained within Part 3.3 of the *Evidence Act*.

(And at [41 - 43]):

While Kirby J was plainly in dissent on the question of whether the evidence was or was not relevant, it would not be right to dismiss his Honour's view on whether the evidence was opinion evidence as a dissenting one: it did not command the support of the other members of the bench because they decided the case on the anterior question of relevance. Counsel for the Crown has urged that, since the majority in the High Court did not rule upon the question, the prevailing view of this court, expressed in *Smith*, is that evidence of identification from photographs is evidence of fact and not opinion.

I do not accept that the decision of this court in *Smith* can be so construed. Sheller JA, with whom the other members of the court agreed, recognised the difficulty of too rigid a classification of evidence into fact or opinion. His Honour said:

‘19. If a distinction must be made it can only be one of degree, calling for a decision as to whether, on a continuum which is unmarked and for which there is no exact

measure, particular testimony has past (sic) the point where it has become evidence opinion'.

There may be many instances where identification from photographs, even if a person is well known to the witness as a spouse, has to be classified as opinion evidence. It cannot always be assumed that the photographic material will clearly depict the person who is its subject. The person may be partly obscured, or may be photographed from an unusual angle concealing facial or other defining features. In such a case, the evidence would properly, in my view, be classified as opinion evidence.

28. Her Honour also said (at [44]):

The result of this analysis is that, in every case, it will be necessary to examine the nature of the evidence . . . and all relevant circumstances, before a determination can be made whether the evidence tendered falls into the category of opinion evidence and subject to the admissibility provisions of Part 3.3 of the *Evidence Act*.

29. In *R v Whyte* [2006] NSWCCA 75, the appellant was convicted after trial by jury of an offence of detain for advantage, namely to have sexual intercourse with the complainant, and causing actual bodily harm to her. The accused had followed the complainant, grabbed her and pushed her; she screamed and struggled; he pulled her ponytail back and put his hand on her breast. She escaped and ran away. Subsequently, a packet of two condoms was found on the accused. The crown case was - and the Trial Judge directed the jury they would need to be satisfied of the fact beyond reasonable doubt - that the accused intended penile intercourse with the complainant. On appeal, evidence of the complainant's belief: 'He tried to rape me', was held to be admissible.

30. In that appeal, distinguishing *Mundarra Smith*, Spigelman CJ said: 'A case of a

complainant of a sexual assault and a case of police officers viewing photographs have nothing to do with each other. A victim has an understanding of the events in which he or she has been involved of a character which is quite different to that of a third party viewing objective evidence.' His Honour also said (at [33-34]):

a belief by a woman who has been assaulted that the intention of the attack was sexual gratification . . . is not something necessarily capable of full description by describing the movement of parts of the body or other physically observable acts. Such a belief can arise from the impression given at the time by matters which cannot be described in a physical way.

In my opinion, the evidence was relevant to a fact in issue. It is sufficient to say that it was relevant to whether the assault had a sexual overtone of any character. I am also of the view that it was relevant to the particularised fact in issue, i.e. whether the Appellant intended penile intercourse.

31. After referring to s 78, His Honour also said (at [36]):

An opinion of this character is obviously based on what the complainant perceived and, in my opinion, it was, in this case, necessary to obtain an adequate account of that perception. Putting aside the issue of whether it supports the particular of an intent to have penile intercourse, the evidence was necessary to give an 'account of [the] perception 'that the assault had a sexual purpose.

32. In the appeal, Barr J. thought the evidence admissible as complaint evidence, without discussion of s 78.

33. Simpson J reached a conclusion different to the Chief Justice. She said (at [53]) that when the complainant asserted the appellant tried to rape her, what she said was 'properly

characterised, her conclusion, drawn from the conduct she observed, of what was in the appellant's mind.' Her Honour continued (at [56-7]):

The Crown advanced . . . proposition that the evidence was admissible as evidence of the complainant's opinion. By s76, evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. There are, however, as with the general prohibition on hearsay evidence, a number of exceptions to this general prohibition. By s78 the opinion rule does not apply to evidence of an opinion expressed by a person if the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

The first condition is, in this case, met; if what the complainant said can be properly characterised as an opinion, then it was plainly an opinion or conclusion based upon what she saw, heard and otherwise perceived about the events in question; however, the second criterion is not met. Evidence of the complainant's opinion is not necessary to obtain (or to give the jury) an adequate account or understanding of her perception of the matters and events in question. S78 does not operate to render the complainant's statement admissible as opinion evidence.

34. In *Partington v R* [2009] NSWCCA 232, McClellan CJ at CL considered an appeal against a conviction for manslaughter after a trial for murder. The only issue on appeal was whether lay opinion evidence was correctly admitted at trial. The prosecution witness LB had heard noises coming from outside while she was inside the residential unit where she resided. The door of the unit was closed. She saw the door shake and heard banging and moaning sounds. She recognised the loud voice of the accused, her neighbour. When her grandmother opened the door, the deceased was seen slumped with his head at the bottom left hand corner of the door. The opinion evidence now argued as inadmissible on appeal was to the effect that the witness thought that what she'd perceived before the door was opened was the deceased's

head being pushed up against the door. Hulme J agreed with the judgment of McClellan CJ at CL who stated at [42], ‘It seems to me that there may be difficulties for a court in determining whether the evidence is ‘necessary’ under s78(b) unless there is evidence of what the person saw, heard or perceived. McClellan later stated at [47]:

In the present case, LB both saw the door and heard noises outside of it. That is the event, or in fact sequence of continuous events, which she both saw and heard. There was no difficulty in understanding her account of that event. However, she did not see, although obviously she heard, the sounds of the event which was happening on the other side of the door. Although she may have had an opinion, either speculative or an informed guess, as to what was happening outside the door she did not relevantly perceive the event. Her perception was confined to what she could see and hear on the inside. The door deprived her to any capacity to perceive what was happening on the outside. Evidence as to her opinion as to what may have been happening outside the door was not necessary to understand what she perceived from her position inside the room. She was able to give an account of her perception of the event – what she saw and heard – without proffering her opinion as to what she believed was taking place on the other side of the door.

35. In *Lithgow City Council v Jackson* [2011] HCA 36, Ambulance officers who’d attended a person who’d fallen and injured himself had made notes including the words, ‘?Fall from 1.5 metres onto concrete’. The High Court held that s78 only permits the admission of an opinion ‘about’ some matter or event that was actually witnessed by the person expressing the opinion. French CJ, Heydon and Bell JJ stated at [48] that,

. . . in cases of the present type, the primary facts are not too evanescent to remember or too complicated to be separately narrated. It would be possible for an observer to list his or her perceptions of specifically identifiable medical circumstances of someone found in a drain, perceptions of specifically measurable distances between limbs and other objects and perceptions of specifically describable angles of limbs . . . The process is not one where

component observations are made which are incapable of meaningful expression without stating the composite opinion to which they led. It is not necessary, in order to obtain an adequate account or understanding of perceptions of that kind, that the opinion be received.

36. What principles might be drawn from the forgoing review of the authorities?

I venture to suggest the following:

- i) The common law as to the reception of lay opinion evidence has been altered by the s 78 Evidence Act. Admissibility of lay opinion evidence depends not on it being one of an anomalous miscellany of exceptions; rather it depends on an analysis of the precise evidence and the applicability or otherwise of s78.
- ii) The common law rationale for the reception of lay opinion evidence still informs that analysis under s78. Both (a) and (b) of s78 will be given consideration by the courts in deciding whether or not to admit lay opinion evidence.
- iii) Whether evidence is opinion evidence or factual evidence depends on the character of the particular evidence and the circumstances of the particular case – there is not so much a defined dividing line as a continuum between the two.
- iv) S78 doesn't permit admission in evidence of an opinion about some matter or event unless the matter or event was actually witnessed by the person expressing the opinion.
- v) Where the factual basis of lay opinion evidence is not received in evidence, then the lay opinion evidence might still fall to be excluded under s 137 Evidence Act.

vi) There must be a rational basis for the reception of lay opinion evidence for it to satisfy the test of relevance in ss 55 and 56.

vii) Where the factual basis of lay opinion evidence is not received in evidence, then the court may have difficulty in determining whether the lay opinion evidence is 'necessary' under s78(b).

37. As the ALRC explained (ALRC 26 paragraphs 739-740):

Consideration was given to including the express requirement that the opinion be rationally based. Arguably, however, this is the way the clause would be interpreted. If it is not, the second requirement - that it be necessary to obtain an adequate account of the witness's perception of the relevant event - should provide sufficient protection.

Brian Hancock,
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Evidence Act 1995, Part 3.3 - Opinion

76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

77 Exception: evidence relevant otherwise than as opinion evidence

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

78 Exception: lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

80 Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about:

(a) a fact in issue or an ultimate issue, or

(b) a matter of common knowledge.