

CULTURAL EXPERTISE AND EVIDENCE IN AUSTRALIAN COURTS

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[A] INTRODUCTION

In this article, I will discuss four factors that are relevant to how cultural issues inform judicial decision-making in Australia. They are:

- ◇ internal cultural expertise in Australian courts;
- ◇ the admissibility of expert evidence on culture in Australian courts;
- ◇ the availability of authoritative documentary evidence on culture;
and
- ◇ the availability of expert witnesses on culture.

[B] AUSTRALIA'S LEGAL SYSTEM

Before I address these four issues, it is necessary to make some brief comments about some aspects of Australia's legal system and multiculturalism.

The uniform Evidence Act applies to proceedings before most Australian courts but generally does not apply to proceedings before administrative tribunals.

Proceedings before Australian courts are conducted on an adversarial basis and not on the inquisitorial system that applies to many European courts. This means that, in general, courts make decisions based upon the evidence presented by the parties and do not conduct their own investigations. The position is different for administrative tribunals, which are sometimes given inquisitorial powers.

[C] MULTICULTURALISM IN AUSTRALIA

Australia's indigenous population, which comprises Aboriginal and Torres Strait Islanders, dates back more than 40,000 years. As at 30 June 2021, that population numbered 984,000, representing 3.8% of Australia's

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then total population of nearly 26 million. The indigenous population is culturally diverse, with over 150 languages being spoken.

Australia's total population increased dramatically after the Second World War, with sponsored migration from Europe. In recent decades, more migrants have originated from Asian countries such as China and India, and also from New Zealand and other nearby South Pacific countries. Australia has also received refugees, including from Africa and the Middle East.

According to the 2021 Australian Census, 51.5% of all people then living in Australia were born overseas or had a parent who was born overseas. The top five countries of birth outside Australia were England, India, mainland China, New Zealand and the Philippines. Approximately 22.8% of the population—around 5.8 million people—spoke a language other than English at home (Australian Bureau of Statistics 2022), the most common non-English languages being Mandarin, Arabic, Vietnamese, Cantonese and Punjabi.

[D] INTERNAL CULTURAL EXPERTISE IN AUSTRALIAN COURTS

Australian courts have little, if any, internal cultural expertise. Where expert evidence on culture is admitted in court proceedings, the experts are always from outside the court, and they are usually appointed by the parties rather than the court.

Australian judges are predominantly of Anglo-Celtic background. It is only in the past 20 years or so that judges from more diverse backgrounds have been appointed.

The absence of internal cultural expertise in Australian courts does not necessarily apply to an administrative tribunal which is not bound by the rules of evidence and exercises inquisitorial powers. Such a tribunal can develop its own internal expertise and rely upon it in making decisions provided it discloses to the parties the information it proposes to rely upon and gives them an opportunity to make submissions on that information.

For example, when the Commonwealth Administrative Appeals Tribunal hears refugee claims, it is required to take into account country information reports prepared by the Department of Foreign Affairs and Trade. Those reports deal with cultural and other issues that are relevant

to the question of whether the claimant has a well-founded fear of being persecuted in his or her country of origin based upon one of the five recognized grounds.¹

[E] THE ADMISSIBILITY OF EXPERT EVIDENCE ON CULTURE IN AUSTRALIAN COURTS

Expert evidence on culture is potentially admissible under section 79 of the uniform Evidence Act. For evidence on culture to be admissible as expert evidence under that section, the person giving the evidence must have specialized knowledge on the cultural issue based upon his or her training, study or experience and that opinion must be wholly or substantially based upon that knowledge.

If an expert meets these threshold requirements, he or she can give expert evidence. Provided the threshold requirements are met, the court does not evaluate the degree of expertise or experience held by the expert in determining whether his or her evidence is admissible. However, that degree can be taken into account in assessing the weight the court will give to the expert's evidence. Similarly, whether an expert is independent or has a relationship with one of the parties is not relevant to the admissibility of the expert's evidence, but it is very relevant to the weight the court will give to the evidence. Ordinarily, independent expert evidence will be given greater weight than expert evidence from a witness who is connected to one of the parties.

Section 78A of the uniform Evidence Act provides that evidence by a member of an indigenous group about the existence or non-existence, or the content, of the traditional laws and customs of that group can be admissible.²

¹ The grounds are race; religion; nationality; membership of a particular social group; and political opinion. Section 499 of the Migration Act 1958 (Commonwealth) requires the Administrative Appeals Tribunal to comply with any written directions given by the Minister for Immigration in the performance of its function of deciding whether to accept a claim for refugee status. Ministerial Direction 84 requires the Tribunal to take into account country information reports prepared by the Department of Foreign Affairs and Trade. Section 33(1)(c) of the Administrative Appeals Tribunal Act 1975 (Commonwealth) provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

² The Dictionary to the uniform Evidence Act defines "traditional laws and customs" as including "any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs" of the relevant indigenous group.

As a result of the above statutory requirements for expert evidence on culture to be admissible, such evidence has not been a prominent feature of legal proceedings in Australia. It has been used mainly in cases involving our indigenous population, family law, criminal law and immigration law.

Anthropological expert evidence is commonly admitted under section 79 of the uniform Evidence Act in native title claims brought by indigenous communities.³ Such claims can be brought where an indigenous community seeks to establish that its members have had a continuous connection with the land or waters of which they claim to be the traditional owners. That connection must date back at least to the time the land or waters were annexed by European settlers.

A case where expert evidence relating to indigenous art and culture was admitted in a non-native title context is *Australian Competition and Consumer Commission v Birubi Art Pty Limited (in liq) [No 3]*.⁴ That case concerned a successful claim by a regulator alleging that the respondent had engaged in conduct likely to mislead potential purchasers by falsely implying that products had been hand-painted by Australian Aboriginal persons in Australia.

Evidence on cultural practices is admitted in family law proceedings because culture is relevant to determining what is in a child's best interests,⁵ particularly where the child is indigenous.⁶

In criminal cases, cultural factors might be relevant on the issue of guilt where personal subjective elements are involved. One such case is *Warren v The Queen*,⁷ where Aboriginal defendants unsuccessfully relied upon the defence of duress to charges involving the infliction of physical injuries upon the victim. An independent witness gave evidence that, under the customary law of the defendants' Aboriginal tribe, they would

³ See eg *Malone v Queensland [No 5]* (2021) 397 ALR 397, 457-460 [197]-[206], 624-625 [954], [2021] FCA 1629; *Malone v Queensland [2022]* FCA 827, [34].

⁴ (2019) 374 ALR 776, 780-781 [12]-[15]; [2019] FCA 996.

⁵ Since the commencement of section 69ZT of the Family Law Act 1975 (Commonwealth) on 1 July 2006, section 79 of the uniform Evidence Act has not applied to child-related family law proceedings. Compare *In the Marriage of H* (2003) 198 ALR 383, 391-394 [35]-[43], which was decided prior to the enactment of section 69ZT. Evidence on cultural practices may otherwise be admissible under section 144 of the uniform Evidence Act or other provisions of the Family Law Act 1975 (Commonwealth): *Donnell v Dovey* (2010) 237 FLR 53, 89-98 [193]-[230]; [2010] FamCAFC 15.

⁶ Family Law Act 1975 (Commonwealth), section 60CC(3)(g)-(h), (6).

⁷ (1996) 88 A Crim R 78.

be severely beaten unless they severely beat the victim as punishment for his alleged breaches of customary law.

Issues regarding the admissibility of expert evidence on cultural practices have also arisen in criminal proceedings involving female genital mutilation.⁸ In *A2 v The Queen*,⁹ the court held that an expert's opinion on a particular practice within an Indian community was not admissible under section 79 of the uniform Evidence Act because it was not based upon an area of specialized knowledge.

In *R v Singh [No 1]*,¹⁰ a husband was charged with murdering his wife by setting her on fire. The husband's defence was that the burns were self-inflicted. The prosecution sought to rely upon an expert report about aspects of Punjabi-Sikh culture for the purpose of assisting the jury to understand the victim's behaviour, including why she had not reported to police prior acts of domestic violence by her husband. The court held that the report did not satisfy section 79 of the uniform Evidence Act in part because the expert's specialized knowledge was too narrow.¹¹

Cultural factors feature more prominently at the sentencing stage of the criminal process because a defendant's personal circumstances, including his or her cultural background where relevant, must be taken into account by the court in deciding an appropriate sentence.¹² Evidence of the defendant's personal circumstances is usually given in the form of a report by a psychiatrist or psychologist which is based upon information provided by the defendant. These experts are usually selected and remunerated by the defendant and may, where relevant, express an opinion on whether the defendant's upbringing and cultural background played a role in the offending.

In immigration cases, evidence on culture tends to be used in claims for refugee status and in deportation cases. In refugee cases, a claimant may rely upon expert evidence about his or her cultural group and how

⁸ *R v A2 [No 2]* [2015] NSWSC 1221, [45]; *A2 v R* [2018] NSWCCA 174, [713]-[714]; *R v A2* (2019) 269 CLR 507, 513 [6].

⁹ *A2 v R* (n 8 above) [713]-[714].

¹⁰ [2019] NSWSC 1000.

¹¹ *Ibid* [123]. See also section 388 of the Criminal Procedure Act 2009 (Victoria) regarding the admissibility of expert evidence about cultural factors that may affect the behaviour of a victim of a sexual offence.

¹² Crimes Act 1914 (Commonwealth), section 16A(2A), precludes a court from taking into account cultural practices as a reason for excusing, justifying, authorizing, requiring, lessening or aggravating the seriousness of the criminal conduct. That Act only applies to Commonwealth offences.

that group is persecuted in his or her country of origin. That evidence may seek to contradict any country information report prepared by the Department of Foreign Affairs and Trade. For example, a report prepared by the United Nations High Commissioner for Refugees on a particular country may be used to contradict the Department's country information report.

In deportation cases, the person facing deportation may rely upon evidence about factors relating to his or her culture that might cause him or her hardship if he or she is deported to his or her country of origin. For example, based upon cultural and other information provided by the applicant, a psychiatrist or psychologist may express an opinion about the effects of deportation upon the applicant.

[F] THE AVAILABILITY OF AUTHORITATIVE DOCUMENTARY EVIDENCE ON CULTURE

Expert evidence on culture is potentially admissible under section 144 of the uniform Evidence Act. For a court to rely upon a cultural matter under that section, that matter must not be "reasonably open to question" and either be "common knowledge in the locality in which the proceeding is being held or generally" or "capable of verification by reference to a document the authority of which cannot reasonably be questioned".

A number of reports have been published following public inquiries relating to issues affecting Australia's indigenous population, including stolen generations (Human Rights and Equal Opportunity Commission 1997) and Aboriginal deaths in custody (Royal Commission into Aboriginal Deaths in Custody 1991). It is possible that cultural matters dealt with in these types of reports, and also reports of some organizations which have a long-standing reputation for rigorous and impartial research, may satisfy section 144 of the uniform Evidence Act.

Apart from these types of reports, it is difficult to think of other examples of evidence on culture that would satisfy the requirements of section 144.

[G] THE AVAILABILITY OF EXPERT WITNESSES ON CULTURE

The parties to criminal or civil proceedings may call expert witnesses to give evidence on a matter within their expertise. Civil procedure legislation or court rules may confer power on the court to appoint an expert to inquire into and report on any issue in a proceeding.¹³ I am not aware of any case where a court has used such a power to appoint an expert to report on a cultural issue in a proceeding involving private litigants.

Courts have access to online information about interpreters accredited by the National Accreditation Authority for Translators and Interpreters, but they do not have a comprehensive register or database of expert witnesses on particular cultures.

Anthropologists with expertise on indigenous cultures can be readily identified. It is likely that there are experts, particularly at universities, who could give expert evidence on linguistic issues and historical issues relating to some cultural groups. Also, leaders of particular cultural groups might be able to give evidence regarding certain customs, such as wedding dowries, and a senior cleric of a particular religion might be able to give evidence about the principles and practices of that religion.

Because of the limited use of expert witnesses on culture to date, beyond these examples, there may be difficulty in identifying individuals who may be able to qualify as expert witnesses in particular cultures.

It must be borne in mind that our indigenous population and many cultural groups are not homogenous but have internal diversity. It must also be borne in mind that some cultural groups are small in number, and it would be difficult to find a cultural expert regarding such groups.

[H] CONCLUSION

As we have seen, expert evidence on culture has not been a prominent feature of proceedings in Australian courts. This is partly due to the statutory requirements for the admissibility of such evidence. Such evidence is used mainly in cases involving Australia's indigenous population, family law, criminal law and immigration law. Australia does not have a comprehensive register or database of expert witnesses on culture, and finding an individual who may be able to qualify as an expert witness in a particular culture may be problematic.

¹³ See, for example, Civil Procedure Act 2010 (Victoria), section 65M.

About the author

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