PRIOR INCONSISTENT STATEMENTS

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I INTRODUCTION

The rules relating to prior inconsistent statements are not always as simple as they may appear. This paper explores the potential difficulties that may be encountered in knowing when and how to adduce evidence of a prior inconsistent statement. It addresses when it may be permitted to lead a prior inconsistent statement both within the Non-Uniform Evidence Acts (UEA) jurisdictions and UEA jurisdictions.

This paper looks at what might constitute a prior inconsistent statement, as well as what it proves once admitted. It attempts to clarify whether any such statement may be admissible as evidence of its truth, or if it can merely go to credit. Finally, it explores when it may be possible to tender documentary evidence of a prior inconsistent statement at trial and the appropriate judicial directions that apply when dealing with evidence of this nature.

II WHAT EXACTLY IS A PRIOR INCONSISTENT STATEMENT?

A prior inconsistent statement of a witness is one, which contains 'discrepancies or divergences between the statement and the evidence' concerning an issue at trial, such as a witness omitting material facts, which were previously given in evidence.[1] The general rule is that a witness's prior inconsistent statement can only be received in evidence where the witness denies having made the previous statement.[2]

If the witness admits to having made the prior inconsistent statement the purpose of discrediting them has been achieved.[3]

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[1] *MJH v Western Australia* [2006] WASCA 167, [160] ('*MJH*'). See also: *Nicholls v R* (2005) 219 CLR 196, 232–233 (McHugh J); *R v DWB* [2006] VSCA 137; *R v Titijewski* [1970] VR 371. For a detailed discussion of the collateral evidence rule see: Tom Percy KC and Jessikah Niesten, 'The Collateral Evidence Rule: A Modern Perspective' (Australian Lawyer's Association National Conference, 20 October 2023).
[2] *Suresh v The Queen* (1998)102 A Crim R 18, [12] (Gaudron and Gummow JJ). See also:
[3] *R v Soma* (2003) 196 ALR 421, [55] (McHugh J).

An inconsistency arises in circumstances where the witness gives evidence that is inconsistent with statement to the contrary that is known to the cross-examiner.[4] However, the admission of a prior inconsistent statement will not constitute evidence of the facts.[5] The witness's evidence in court on the matter in issue will stand as the evidence.

The primary purpose of the exercise is to impugn the evidence of the witness and their credit generally.[6] To be admissible, the prior inconsistent statement must challenge the testimony of the witness, and the evidence must be sufficiently closely related to the subject matter of the proceeding.[7]

The cross-examination of a witness as to a prior inconsistent statement is therefore limited to those statements, which are relevant to a fact in issue or a fact relevant to any fact in issue in the proceeding.[8] The evidence of the prior inconsistent statement may then be used by the tribunal of fact to challenge the witness's evidence.[9]

III Relevant Statutory Provisions

The manner in which cross-examining the witness should be conducted with respect to prior inconsistent statements is contained within the various statutory provisions outlined in the Non-UEA and UEA jurisdictions.

A *Non-UEA Jurisdictions*

The rules which regulate whether secondary evidence may be given about an alleged prior inconsistent statement in a document are now governed by statute in both non-UEA jurisdictions and UEA jurisdictions.[10]

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[4] *R v Williams* [2001] 2 Qd R 442.
[5] *MJH* (n 1) [161] (Buss JA).
[6] Ibid. See also: David Field and Kate Offer, *Western Australian Evidence Law* (LexisNexis, 1st ed, 2015) 215.
[7] Ibid [50] (Buss J).
[8] Ibid [31]; *MJH* (n 1) [153]–[157] (Buss JA).
[9] Ibid [161].
[10] Andrew Hemming, and Layton Robyn, *Evidence Law in QLD, WA & SA* (Thomson Reuters, 1st ed, 2016). *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 1995* (Cth), hereafter known as the Uniform Evidence Acts (UEA).

1 *Western Australia*

The approach to prior inconsistent statements in Western Australia, which derives from UK statute law and the common law, provides an express statutory exception to the collateral evidence rule.[11] Its admissibility, however, is not as a result of it being rebuttal evidence.[12]

Section 21 of the *Evidence Act 1906* (WA) ('the *Evidence Act'*) deals with the independent proof of a prior inconsistent written or oral statement and provides:

> 21. Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does ` not distinctly admit that he made such statement, proof may be given that he did in fact make it.

Section 21 is commonly relied upon in respect of prosecution witnesses, however, it applies to all witnesses in civil and criminal proceedings.[13] In order for the prior inconsistent statement to be proved, the approach specified in s 21 must be followed or else the witness will be discredited by their own admission.[14]

Section 22 of the *Evidence Act* regulates the cross-examination of a witness on a prior inconsistent written statement or deposition. This section expanded the common law approach to prior inconsistent written statements, by allowing a witness to be cross-examined about the contents of a document without being required to first show the document to the witness or to prove it.[15]

Notwithstanding this, if the purpose of adducing the prior inconsistent statement is to contradict the witness's written statement or deposition, then they must still be directed to

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[11] *O'Meara v The State of Western Australia* [2013] WASCA 228, [37] ('*O'Meara*'); *Criminal Procedure Act 1865* (UK); *Nicholls v R* [2002] WASCA 275, [85] (McHugh J); [280] (Hayne and Heydon JJ); *R v Umanski* [1961] VR 242, 244 (Herring CJ, Dean and Adam JJ).
[12] *O'Meara* (n 11) [146] (Mazza JJA).
[13] Ibid [147].
[14] *R v Soma* (2003) 196 ALR 421, [56] (McHugh J).
[15] *O'Meara* (n 11) [39]; Heydon JD (ed), *Cross on Evidence* (7th ed, LexisNexis Butterworths, 2004) [17545].

those relevant parts. This approach is consistent with the provisions under other non-UEA evidence jurisdictions.[16]

2 *Queensland*

Section 18 of the *Evidence Act 1977* (Qld) deals with proof of a previous inconsistent statement of a witness and applies in circumstances where a witness is being cross-examined as to a prior statement.

Under s 18(1), the statement must be connected to the subject matter of the proceeding and inconsistent with their present testimony. If the witness does not distinctly admit that they have made such statement, then proof may be given that the witness did in fact make it.

Section 18(2) requires that before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement.

As per s 19(1), a witness may be cross-examined about a written statement without being shown it. However, under s 19(1A), if the purpose is to contradict the witness, then the witness must be directed to the parts of writing, which are said to be contradictory in nature.

In accordance with s 19(2), the court may direct any time during the hearing of a proceeding that such a written statement be produced and the court may make such use in the proceeding of the writing as it thinks fit.

Section 20 addresses cross-examination as to credit. By virtue of s 20(1), court may disallow a question as to credit put to a witness in cross-examination, or inform the witness the question need not be answered, in circumstances where the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witness's evidence.[17]

[16] See: *Evidence Act 1977* (Qld), ss 17–19, 101; *Evidence Act 1929* (SA), ss 28–29.
[17] There appears to be no equivalent to s 20(1) in Western Australia.

Section 20(2) defines a question as to credit as firstly, a question that is not relevant to the proceeding; and secondly that an admission of the question's truth may affect the witness's credit by injuring the witness's character.

However, under s 101, a prior inconsistent statement will be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible. This is provided that the witness's previous inconsistent statement is proved under s 18 or 19, or that it is proved as rebuttal evidence suggesting that the witness's evidence has been fabricated.

However, s 101(3) provides that this section does not affect rules concerning the cross-examination of a witness using a document to refresh the person's evidence.

3 *South Australia*

Section 28 of the *Evidence Act 1929* (SA) deals with proof of contradictory statements of an adverse witness. The procedure outlined is that firstly, the prior statement must be put to the witness in cross-examination. The statement must be relative to the subject matter of the cause, and inconsistent with the witness's present testimony. Secondly, the witness must have declined to admit that they have made the statement.

Thirdly, before proof can be given that the witness has, in fact, made the statement, the circumstances of the supposed statement, sufficient to designate the particular occasion, must first be mentioned to the witness and they must be asked whether or not they have made the statement.

Section 29 addresses cross-examination as to previous statements in writing. This section provides that the witness may be cross-examined as to previous statements made by them in writing, or reduced into writing, relative to the subject matter of the cause, without the writing being shown to them.

If the purpose, however, is to contradict the witness by the writing, then the witness must be directed to the relevant parts to be used for contradicting them. Section 29 further provides that the judge, at any time during the trial, may require the production of the writing for their inspection and can then make use of it, for the purposes of the trial, as they think fit.

B *UEA Jurisdictions*

This section deals with the relevant statutory provisions with respect to prior inconsistent statements under the UEA laws.

The position under s 43(1) of the UEA is that is not necessary for complete particulars of the statement to be given, nor is it required that the written statement be shown to the witness. Pursuant to s 43(2), if the witness does not admit to the prior inconsistent statement, there are two preconditions required in order for the cross-examiner to adduce evidence of the statement.

Firstly, the witness must be provided with the circumstances to enable identification of the statement and secondly, their attention must be drawn to the inconsistency of the statement with respect to their evidence. Section 41(3) provides that for the purpose of adducing evidence of the statement, a party may re-open the party's case.[18]

Section 45 of the UEA relates to the production of documents. Section 45(1) applies if a witness is cross-examined about a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or a previous representation alleged to have been made by another person that is recorded in a document.

Under s 45(2), if the Court or another party so requires, the party must produce for them the document; or such evidence of the contents of the document as is available to the party. Pursuant to s 45(3), the Court may then examine the document or evidence produced; give directions as to its use; and admit it even if it has not been tendered by a party.

[18] See also: Mirko Bagaric, *Ross on Crime* (Lawbook, 8th ed, 2018) 1167. See also: Judicial College of Victoria, 'Bench Book/ Uniform Evidence Manual' (Web Page, 13 October 2009) <https://www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#27237.htm>.

IV How Do You Lead a Prior Inconsistent Statement?

A *Oral Statements*

1 *Non-UEA Jurisdictions*

The position under the non-UEA jurisdictions with respect to oral statements is that if a witness does not admit the making of a prior statement the cross-examiner is required to identify the particular occasion when the supposed statement was made.

If the witness then denies or fails to distinctly admit that they made the statement, evidence may be asked to prove that they, in fact, made the oral statement.

2 *UEA Jurisdictions*

The approach under the UEA jurisdictions is similar to that taken under the provisions of non-UEA jurisdictions. Where the witness does not distinctly admit they have made the statement, proof of the supposed statement, which sufficient to designate the particular occasion must first be given before proof concerning the inconsistent statement can be provided to the witness.

Pursuant to s 28 of the UEA, the order of the examination-in-chief, cross-examination and re-examination is as follows. Unless the court otherwise directions, s 28(a) provides that cross-examination of a witness is not to take place before the examination in chief of the witness. Further, under s 28(b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

B *Written Statements*

1 *Non-UEA Jurisdictions*

Section 22 of the *Evidence Act* (WA) addresses the cross-examination of a witness on a prior inconsistent written statement and is consistent with other non-UEA acts.[19] This provision

[19] See: *Evidence Act 1977* (Qld), ss 17–19, 101; *Evidence Act 1929* (SA), ss 28–29.

does not require the witness be shown the document or to prove it, unless the purpose is to contradict its contents.[20]

2 *UEA Jurisdictions*

The position under the UEA is contained in s 29, which provides that a witness may be cross-examined on previous written statements relative to the subject matter of the cause, without the writing being shown to them.[21] However, if the purpose of the statement is to contradict the witness, then their attention may be called to the parts of the written statement that would contradict the evidence.[22]

V SOME PRACTICAL EXAMPLES OF COMPLIANCE AND NON-COMPLIANCE

In *Mahantheran v The State Of Western Australia*, the Court found that no attempt had been made to follow the process involved in making a witness statement admissible as a prior inconsistent statement.[23] As per s 21 of the *Evidence Act,* the first step was for the cross-examiner to ask the witness whether he had made any previous statement regarding the use of a machete in the course of an attack.[24]

In doing so, the cross-examiner did not identify the circumstances of the alleged statement.[25] If the witness then did not admit they made the statement, then evidence could then be led.[26] By failing to satisfy the necessary preconditions, the Court found the statement was therefore inadmissible as a prior inconsistent statement. Accordingly, the trial judge directed the jury to disregard the witness's evidence as it was hearsay.[27]

The case of *O'Meara v The State of Western Australia* ('*O'Meara*') addressed the inadmissibility of the prior inconsistent statement as evidence of its truth.[28] The accused in

[20] *O'Meara* (n 11) [39]; JD Heydon (ed), *Cross on Evidence* (7th ed, LexisNexis Butterworths, 2004), [17545].
[21] Scott Henchliffe, 'How Much is Enough? The Common Law and Statutory Limitations on Collateral and Credibility Evidence' (2009) 32 *Australian Bar Review* 24, 41.
[22] Ibid.
[23] [2014] WASCA 232, [55].
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid [54].
[28] [2013] WASCA 228 (Buss, Mazza JJA and Hall J); Field and Offer (n 6) 213.

O'Meara was employed as the chaplain at a private school for girls, where child pornography was found on a USB thumb drive.[29]

At trial, both the accused and his wife denied that the accused ever used thumb drives. On cross-examination at the trial, the prosecutor sought to impeach the credit of the accused's wife, by putting to her prior inconsistent statements she had allegedly made out of court to two friends.[30]

As the accused's wife denied in cross-examination at the retrial that she had made the alleged prior inconsistent statements. As such, the limited purpose in allowing the testimony was to attack her credibility as a witness rather than it being evidence that was relevant to the facts in issue.[31]

The Court of Appeal found that the procedure outlined under s 21 must be followed if evidence of a prior inconsistent statement made by a witness is to be admitted into evidence.[32] In dismissing the appeal, the Court of Appeal held that prejudicial effect of the rebuttal evidence did not exceed its probative value and therefore did not occasion an unfair trial or a miscarriage of justice.[33]

In *CB v The State of Western Australia,* the accused was convicted, after trial, of several counts of penetration and indecent dealing against a child under the age of 13 years.[34] The accused appealed on the ground that the trial judge erred in law in directing the jury that an assertion of fact by a witness in an out of court statement was a prior inconsistent statement.[35]

In this case, the police statement of the pre-recorded evidence could only have been put to the witness in cross-examination on the basis it was, in either instance, a prior statement inconsistent with the evidence the witness had given at the trial.[36]

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[29] *O'Meara* (n 11) [9].
[30] Ibid [12].
[31] Ibid [113].
[32] Ibid [52]. The decisions of the Court of Appeal in *MJH* found that s 21 was limited to previous inconsistent statements, which were relevant to a fact in issue and went to credibility of the witness. *MJH* must now be read in light of the decision in *O'Meara.*
[33] Ibid [71].
[34] [2006] WASCA 227.
[35] Ibid [8].
[36] Ibid.

The Court of Appeal noted that the extent of the procedure permitted under s 21 and s 22 of the *Evidence Act* is that a witness should be asked about the facts, and only if there is an apparent inconsistency can a prior statement be put.[37] As s 21 required only that the witness does not admit making the statement, the Court found that there was no substance to this ground and dismissed the appeal.[38]

The UEA provisions can be seen in operation in the NSW case of *R v Gee*, which concerned a charge of armed robbery.[39] The State called the accused's former de-facto partner, who gave evidence identifying him as the person depicted in the security camera photos.[40]

The accused's current de-facto partner also gave evidence that the photo depicted a man who looked 'similar to' the accused.[41] The prosecutor was permitted to cross-examine her under s 38 of the *Evidence Act* and it was put to her that she had previously positively identified the accused.[42] While she denied this was the case, she did admit she had whispered to herself, 'that's him'.[43]

The de facto husband of the accused's daughter gave evidence that the photos depicted a man who looked 'a bit like' the accused.[44] On cross-examination, it was put to him that he had expressed no doubt that the man in the photos was the accused when the police had previously shown him the images.

The accused appealed against his conviction on the ground that the recognition evidence was admitted at trial.[45] He submitted that the earlier statements of identification were inadmissible, or in the alternative, that even if they were admissible, their probative value should have led the trial judge to reject them.[46]

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[37] Ibid [42].
[38] Ibid [47]; [54] Roberts-Smith JA (Martin CJ and Pullin JA agreeing).
[39] [2000] 113 A Crim R 376 (Spigelman CJ, Hidden and Grove JJ).
[40] Ibid [27].
[41] Ibid [28].
[42] Ibid.
[43] Ibid.
[44] Ibid [29].
[45] Ibid [30].
[46] Ibid.

The Court was of the opinion, however, that an identification out of court, which was earlier in time and made in the absence of any compulsion, was more likely to be reliable than an identification made in court.[47]

Pursuant to s 60, the evidence of the prior inconsistent statements was admitted as going to the truth of the facts asserted. Accordingly, Court of Criminal Appeal held that the evidence was admissible and dismissed the appeal.

VI Restrictions on Tendering Documents

As previously noted, a prior inconsistent statement can only be tendered in circumstances where the witness denies or does not distinctly admit making the statement.[48] In order to establish a prior inconsistent statement, which would discredit a witness's evidence, the witness may be shown their own document.[49]

The purpose of this is to obtain a concession that it does, in fact, contain a statement of an inconsistent nature.[50] However, if the witness then admits to the statement, the aim of discrediting their evidence has been achieved and the document cannot be tendered.[51]

Yet, the mere fact that the witness has been subject to cross-examination concerning a previous written statement does not mean that the cross-examiner will have to tender the document in evidence.[52]

McHugh in *Goldsmith v Sandilands* dealt with the situation where re-examination was required, in order to show there was a prior consistent statement. With respect to the tendering of documents, His Honour observed:

> Another exception to the finality rule is that sometimes a party may be permitted to tender evidence that a witness has made an earlier statement that is consistent with the witness's evidence. If the evidence of a witness concerning a material fact is attacked on the ground

[47] Ibid [34].
[48] Bagaric (n 18) 1167.
[49] *R v Moore* (1995) 77 A Crim R 577, 585 (Hunt CJ at CL).
[50] Ibid.
[51] Ibid.
[52] *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498, 509–510.

> that the witness has recently invented or reconstructed the evidence, the party calling the witness may tender evidence proving a previous consistent statement of the witness.[53]

In accordance with s 43(2), if the witness then denies making the previous statement, the cross-examiner must inform them of the circumstances and draw their attention to the inconsistent parts before being permitted to adduce evidence about the statement through other witnesses or documents and tender it.[54]

Section 106(1) of the UEA permits evidence relating only to collateral issues to be adduced, including the witness's credibility evidence in rebuttal. In doing so, there are three preconditions, which must be satisfied.

Section 106(1)(a) provides two of these preconditions. The first is that the substance of the evidence must have been put to the witness in cross-examination. The second is that the witness must have denied, or not admitted, or not agreed to, the substance of the evidence.

As per s 106(1)(b), the final precondition is that the court must give leave to adduce evidence of this kind. Leave is not required to rebut a denial if the evidence falls under one of the exceptions outlined in s 106(2).

Section 106(2)(c) permits the tender of any prior inconsistent statements. There is no requirement, however, for the statement to be relevant to the facts in issue, in order to be admissible.[55] In accordance with s 60, which provides that the exclusionary hearsay rule does not apply to evidence of a previous representation, once admitted, the prior statement thus becomes evidence of the truth of the facts stated.[56]

An example of this can be seen in the case of *R v Siulai,* where the accused and his brother were charged with breaking and entering the complainant's home before stealing his property and assaulting him.[57] The accused provided an alibi notice that he was at home during the relevant period of time and could call a witness who would verify that claim.

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[53] (2002) 190 ALR 370, [36]. See also: *Nominal Defendant v Clements* (1960) 104 CLR 476.
[54] Ibid.
[55] Henchliffe (n 21) 42.
[56] Ibid 43.
[57] [2004] NSWCCA 152.

The State tendered the alibi notice, noting that this was a deliberate lie demonstrating a consciousness of guilt.[58] As the accused had formally admitted that he was present at the complainant's home, the appeal against the admissibility of the alibi note in accordance with s 106(2)(c) was unsuccessful.[59]

Notwithstanding this, the Court of Appeal held that the alibi notice should have been rejected as it went to credibility and posed a real risk that the jury would use it to infer his guilt.[60] For this reason, a miscarriage of justice was established and the conviction was set aside.

In the NSW case of *JCS & JMS*, the complainant's mother and step-father, were convicted of failing to provide necessary food and unlawful imprisonment of the complainant.[61] The trial was the second in the matter, with the previous trial having been terminated late in the proceedings.

At the first trial, the complainant agreed she had written a letter, which contained prior inconsistent statements apologising to her mother and praising her family.

At the second trial she denied writing it. The defence then sought to tender the letter alleged to have been written by the complainant. The state, however, objected to the tender of the letter on the ground that the witness had not adopted it as her letter.[62] On this basis, the trial judge did not allow the letter to be tendered.[63]

On appeal, the accused submitted that as the letter contained a prior inconsistent statement, it was admissible pursuant to s 43 of the UEA.[64] The accused further contended that there was sufficient material in the letter's content for the jury to infer its authorship and that the judge therefore erred in rejecting the tender of the letter.[65]

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[58] Ibid [68].
[59] Ibid [75]; [78].
[60] Ibid [84].
[61] [2006] 164 A Crim R 1, [1].
[62] Ibid [69.
[63] Ibid [68].
[64] Ibid [67].
[65] Ibid.

Yet, as there was no evidence led as to the provenance of the letter, the Court of Appeal found that s 43(2)(a) had been correctly applied and that it could therefore not be admitted at trial.[66] Accordingly, the Court dismissed the appeal.

VII What Does it Prove Once Admitted?

Unless the witness is a party, a prior inconsistent statement can only be used for the purpose of testing the witness's present evidence.[67] The first step is to have the witness admit that they made the prior inconsistent statement.[68]

If the witness refuses to admit that they made a prior inconsistent statement, the second step is to tender the statement.[69] A statement of this nature merely goes to the credit and credibility of a witness and is not evidence of the whether or not the events central to the case actually occurred.[70] The prior inconsistent statement can therefore only be used to discredit the witness's evidence.[71]

The accused in *MJH v The State of Western Australia* ('*MJH*') was convicted of sexual offending against his 15-year-old stepdaughter, as well as unlawfully assaulting and threatening to kill her.[72]

The accused appealed his conviction on the ground that the trial Judge erred by not permitting the complainant's mother to give evidence about statements that the complainant had made five days after the offences.[73] These previous statements included that she had 'fooled around' with another man and was later that day, violently assaulted by the accused and left covered in blood.[74]

The accused contended that the statements were inconsistent with the complainant's evidence at trial and that they showed the complainant had a motive to lie.[75] Although the statements

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[66] Ibid [71], McClellan CJ at CL (James and Hoeben JJ agreeing)
[67] Michael H McHugh, 'Cross-Examination on Documents' (1985) 1 *Australian Bar Review* 51, 59. See also: David K Malcolm, 'Cross-Examination on Documents' (1986) 2 *Australian Bar Review* 267, 278.
[68] McHugh (n 67) 59.
[69] Ibid.
[70] Ibid.
[71] For a practical guidance on how to cross-examine a witness as to prior inconsistent statements see: Annexure A.
[72] [2006] WASCA 167 ('*MJH*'). See also: Percy and Niesten (n 1).
[73] Ibid [63] (Roberts-Smith JA); [116] (McLure JA).
[74] Ibid.
[75] Ibid [9]; [86].

went to the complainant's credibility, he submitted that her credibility was inextricably linked to whether or not the offences occurred.[76]

On appeal, the Court found that the trial Judge had erred in not allowing the evidence of the complainant's mother to be adduced at trial, as it was inconsistent with the complainant's evidence at trial and was directly relevant to the facts in issue.[77] The Court explained:

> The alleged prior inconsistent statements went to the issue of whether the assault, of which the complainant gave evidence, had occurred. They did not go merely to credit. The alleged prior inconsistent statements were not, of course, admissible to prove the truth of the statements, but were admissible to impugn the complainant's evidence concerning the assault and her credit generally.[78]

Nevertheless, while the Court found that trial Judge's ruling was, in part, erroneous, it did not consider it to amount to a substantial miscarriage of justice, within s 30(4) of the *Criminal Appeals Act 2004* (WA).[79] The appeal was therefore dismissed.

In *CND v Western Australia [No 2]*, the accused's conviction for sexual penetration without consent was set aside and a new trial ordered on the basis of a witness's fresh evidence.[80] The witness, KM, stated that the complainant had told her in a telephone call that she 'just decided to tell people that it was rape, that she made it up'.[81]

At trial, the complainant had rejected the KM's suggestion that she had admitted to lying about the allegations.[82] As the prior inconsistent statement was relevant to the credibility of the complainant, the trial Judge allowed it to be admitted.[83]

However, on appeal, the Court of Appeal held that there was a potential risk of the witness's evidence materially affecting assessment of the complainant's lack of consent. For this reason, a miscarriage of justice was established and the conviction was set aside.

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[76] Ibid [9].
[77] Ibid [9].
[78] Ibid [162].
[79] Ibid [164].
[80] [2022] WASCA 159
[81] Ibid [134].
[82] Ibid [135].
[83] Ibid.

Prior inconsistent statements may be relevant to a fact in issue or go solely to a witness's credit.[84] In the New South Wales case of *Lee v The Queen*, the witness had made an oral statement to the police that the accused had admitted he was involved in the murder.[85] At trial, the prosecution were permitted to lead evidence of the statement. At trial, however, he could not recall making a statement of this nature.[86]

The case went to the High Court, which found that the prior inconsistent statement constituted hearsay evidence.[87] Notwithstanding this, it was admissible as its purpose was to prove that the previous statement had been made and went only to the accused's credit.[88] The High Court therefore held that the trial judge had made an error in suggesting it was evidence of the fact under the *Evidence Act 1995* (NSW).[89]

VIII What Judicial Directions are Required?

A judge's direction to the jury should address the basic principle of prior inconsistent statements; identify them; relate them to the present evidence; and relate them to the issues in the trial.[90] The jury should be told that the previous statement, unless it satisfies the test of admissibility as evidence of its truth, is admitted merely as to the issue of credibility. The purpose of this is to show that the witness is unreliable.

In some cases it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness, although this is not an inflexible rule of law.[91]

The Court in *R v Rendell* explained:

> The question as to what direction should be given in relation to inconsistent statements made by a prosecution witness depends very much on the circumstances of the particular case...

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[84] Ibid.
[85] (1998) 195 CLR 594. This decision was followed in the NSW case of *Klein v The Queen* (2007) 172 A Crim R 290.
[86] Ibid [8].
[87] Ibid [40].
[88] Ibid [39]; [41].
[89] Ibid [2].
[90] *R v Schmahl* [1965] VR 745 , 748–749 (Winneke CJ).
[91] *Driscoll v The Queen* (1977) 137 CLR 517, 536–537 (Gibbs J).

> In most cases it is important to remind the jury, as the trial judge did in this case, of the limited use to which the actual prior inconsistent statement can be made. In other cases it will be essential to refer to the statements, give the jury careful directions on the matter of credibility and, in some cases, warn them about accepting the evidence of the witness who has made prior inconsistent statements.[92]

In a case heard by judge alone, in summary proceedings for a magistrate, the judge or magistrate should direct themselves as to the use to which the evidence should be put in the same terms as the jury would be instructed.

The trial judge must give reasons in their directions, so as to reflect that they have properly understood the task and correctly applied those principles, which have a bearing on the outcome of the trial.[93]

In the Western Australian case of *Wilson v R,* the accused was convicted of the rape of a 14-year-old girl.[94] The complainant was at the same party as the accused and left with another man, B. The accused had sex with the complainant in B's presence and B then became a witness for the State at trial.

In his examination-in-chief, B's testimony strongly supported the complainant's evidence that she had not consented. While under cross-examination, however, B's evidence was that the complainant had been a willing party to the accused's sexual penetration.

Under s 22 of the *Evidence Act (WA),* a witness under cross-examination may be questioned as to a previous written statement inconsistent with their testimony and in this case, it was the trial judge who asked these questions of B, as distinct from counsel.[95]

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[92] (Unreported, Court of Criminal Appeal, South Australia, Prior, Duggan and Debelle JJ, 29 May 1996) [161].
[93] *Fleming v R* (1998) 197 CLR 250, [37]; *AM v The State of Western Australia* (2008) 188 A Crim R 457, [16]. See also: *Bropho v The State of Western Australia* [2006] WASCA 109, [42].
[94] [1985] WAR 279.
[95] See also: s 119 of the *Criminal Procedure Act 2004* (WA); s 33 *Criminal Procedure Act 1986* (NSW).

His Honour put it to him that his evidence was inconsistent, before directing the jury as follows:

> ...Here the law provides that where a witness is shown to have made a previous statement – in this case it was a declaration acknowledging to be the truth – inconsistent with what he had said under oath in the trial, such evidence should be regarded as unreliable... You might think that is just common sense. How can you accept the evidence of somebody who alters his evidence, each of which is said to be the truth?

On appeal, the accused contended that the trial judge erred in directing the jury to entirely disregard the evidence of B.[96] However, the Court of Appeal reiterated that if the witness does not in evidence admit that the previous statement, then the jury must be warned that they could not treat that statement as evidence.

Furthermore, any inconsistency could go to credit and it would thus be open to direct the jury, as the trial judge did, that the statement should be regarded as unreliable.[97] The Court therefore held that there was no miscarriage of justice and dismissed the appeal.[98]

Russell v The State of Western Australia was an appeal against conviction.[99] The accused was convicted after trial of wilful murder and was tried together with KLA, who was convicted of being an accessory after the fact.

The trial judge granted counsel for KLA leave to cross-examine the accused on the whole of his criminal record and about alleged prior inconsistent statements the accused had made to two psychiatrists, who were engaged to examine him.[100]

The cross-examination as to the previous statements made to the psychiatrists was allowed provided that counsel complied with s 21 of the *Evidence Act* (WA).[101] While these statements may have cast doubt upon the accused's version of events at trial, the evidence was only capable of going to his credit and not to the facts in issue.

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[96] Ibid (Brindsen J). See: *Driscoll v The Queen* (1977) 137 CLR 517.
[97] *R v Golder, Jones and Porritt* (1960) 45 Cr App R 5, 536 (Gibbs J).
[98] Ibid (Brinsden, Kennedy and Pidgeon JJ).
[99] [2011] WASCA 246.
[100] Ibid [238].
[101] Ibid [241]; [365].

In the Queensland case of *Collins v R*, the accused was convicted of indecent assault, two counts of aggravated indecent assault, and rape.[102] The accused appealed on the single ground that the directions given to the jury concerning the issue that could be made of the evidence of the complainant's mother gave at the 2007 committal hearing.

The evidence from this hearing was that her daughter had told her that she could not remember the events. The mother then gave evidence at trial that her daughter had said to her, 'I think I was raped' and 'I think he's raped me'.[103]

At first instance, the trial judge gave directions to the jury that a prior inconsistent statement made by a witness was not evidence of the truth of what the witness said on the earlier occasion.[104] His Honour directed that if the prior inconsistent statement was proved, then it would become relevant to the credibility of that particular witness's evidence.[105]

His Honour further directed that what the complainant's mother had said to the committal court seven years ago previously was not evidence of the fact that the complainant said those things to her, nor was it evidence of the truth of the contents of the statement.[106]

On appeal, the Court of Appeal found that the misdirection of the trial judge to the jury as to the use that could be made of the witness's prior inconsistent statement had not occasioned a substantial miscarriage of justice as it went to an assessment of the complainant's credibility and reliability.[107]

The accused then appealed the decision to the High Court, which unanimously held that the Queensland Supreme Court of Appeal had not paid sufficient regard to the natural limitations that apply to appellate review of the record.[108]

In other words, the jury were in a better position make an assessment of the evidence. Whilst obviously the prior inconsistent statement once proved affected the mother's credibility, it

[102] (2018) 355 ALR 203.
[103] Ibid.
[104] Ibid 207.
[105] Ibid.
[106] Ibid.
[107] Ibid (Gotterson and Morrison JJA and Burns J).
[108] Ibid 213 (Kiefel CJ, Bell, Keane, Edelman and Gordon JJ; Edelman J agreeing).

further had the propensity to be considered in any assessment of the complainant's evidence as well.

Regardless of the terms of the complaints made, the Court therefore found that the 2007 account had the capacity to affect the jury's assessment of the reliability of the complainant's account, as proof of guilt was wholly dependent on her evidence.[109]

The High Court held it was an error to dismiss the appeal.[110] The accused was deprived of the opportunity to address the court as to why it should not find that no substantial miscarriage of justice had occurred.[111] As the error was significant, the High Court allowed the appeal.[112]

IX Conclusion

This paper has attempted to demystify the applicable rules and the practical aspects of leading prior inconsistent statements at trial in both non-UEA and the UEA jurisdictions. It has sought to address the pitfalls that may be encountered when one seeks to adduce evidence of this type.

The whole process of adducing prior inconsistent statements, whether oral or written, is not always as easy as it appears at first blush. If there is one lesson to be learned from the decided cases, it might be that some care should be paid to the formal requirements of leading this sort of evidence, as well as the use to which the evidence must be put in the resolution of the issues involved in the trial.

[109] Ibid 214–215.
[110] Ibid 204.
[111] Ibid.
[112] Ibid 205.

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ANNEXURE

X is charged with robbery. The prosecution case is that X left the bank after the offence in a *black* car. He was later located driving a *black* car.

Witness A made an oral statement about the matter telling the police shortly after the events in question that the getaway car was *white*.

Witness B, who was present at the time of the robbery, made a written statement to the police saying the getaway car was *white*.

At trial, both witnesses testify in chief that the getaway car was *black*.

How do you cross-examine each of these witnesses on this issue?

Witness A: First Scenario

Counsel for the accused asserts a prior oral inconsistency, which is admitted.

Question (1): "You said in your evidence that the getaway vehicle was *black.* Have you ever told anyone anything different?"

Answer (1): "Yes I did, at the time I was confused and nervous, and I accidentally said the wrong thing. I'm sorry."

Consequences: That is the end of it. The fact of the earlier contradictory statement may ultimately be an issue regarding the witness's credibility.

Witness A: Second Scenario

Counsel for the accused asserts a prior oral inconsistency, which is denied.

Question (2)(a): "You said in your evidence that the getaway vehicle was *black*. Have you ever told anyone anything different?"

Answer (2)(a): "Not that I can recall."

Question (2)(b): "Did you not tell a police officer, Constable Z, at the scene that the getaway vehicle was *white*?"

Answer (2)(b): "No".

Consequences: The fact of the earlier contradictory statement may ultimately be an issue regarding the witnesses' credibility. As part of the accused's case, Constable Z can then be called to confirm the contradictory earlier statements.[113]

Witness B: First Scenario

Counsel for the accused asserts a prior written inconsistency, which is admitted.

Question 1: "Have you ever given a different version of events, in particular the colour of the car?"

Answer 1: "Yes, I have. I realise now that in my written statement to the police, I said the car was *white*. I'm sorry for making that mistake. It was just an error. I had a momentary brain fade at the time I was making the statement. The car was definitely *black*."

[113] Subject to the restrictions of the collateral evidence.

Consequences: That is the end of it and the fact that the prior written statement was made will stand as going only to the witness's credit.

Witness B: Second Scenario

Counsel for the accused asserts a prior written inconsistency, which is denied.

Question 2(a): "Do you remember making a statement about this matter to police in which you described the getaway car as being *white*?"

Answer 2(a): "No, I don't. I can't remember having said anything different to that. I've always said the car was *black.*"

Question 2(b): "Do you remember making a written statement to the police?"

Answer 2(b): "Yes."

Question 2(c): "Can you look at this statement?"

The witness is then shown the statement and asked to concede it was their statement they made to the police.

Answer 2(c): "Ok".

The witness reads statement to themselves.

Question 2(d): "Do you agree that in a written statement to the police you described the getaway car as being *white*?"

Answer 2(d): "I agree. I did but it doesn't coincide with my current memory."

Question 2(e): "Having seen that statement, would you now concede was, in fact, *white*?'

Answer 2(e): "No".

Consequence: The cross-examiner tenders the statement as an exhibit. The statement, however, does not become evidence of the truth of its contents.

Overview

Unless the witness admits that the truth of the matter (that the car was white), then the fact of the prior inconsistent statement will go only towards the witness's credit. It cannot establish that the car was white.

In none of the circumstances outlined in the example is there anything, which would entitle the tribunal of fact to conclude that the car was actually white.

The contradictions in the proven prior inconsistent statements will be a basis to impugn the credit of the witness in question. But unless the proposition is specifically embraced by the witness (i.e. that contrary to the evidence in chief, they now recall and accept that the car was white), the content of the prior inconsistent statement does not become evidence of the truth of that fact.

The jury should be instructed in those terms (in a jury trial) and the judge or magistrate will need to recite this proposition in his or her findings of fact, in a trial by judge alone or by magistrate.