Bench Book/ Uniform Evidence Manual.

Judicial College of Victoria

A Bench Book on the Evidence Act 2008. Contains explanations of key components of the Act, including commentary and discussion.

Uniform Evidence Manual

Introduction to the Evidence Act 2008

1. The *Evidence Act 2008* (Vic) (also referred to as 'the Victorian UEA') is the principal Act introducing uniform evidence law into Victoria.

2. The *Evidence Act 2008* (Vic) is largely uniform with the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2004* (Norfolk Island). The *Evidence Act 2001* (Tas) is also largely uniform with these Acts but includes a number of departures. Together, these Acts are known as the Uniform Evidence Acts (the UEA).

3. Subject to specific exceptions, the *Evidence Act 2008* applies to all proceedings commenced in Victorian courts after 1 January 2010.

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History of the Uniform Evidence Acts

1. Uniform evidence legislation has its origins in an Australian Law Reform Commission (ALRC) inquiry that commenced in 1979. The ALRC was charged with reviewing:

> …the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements and to report (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts and (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary (ALRC 26 Terms of Reference).

2. In response, the ALRC produced a number of research and discussion papers, an Interim Report (ALRC 26) in 1985 and a final report (ALRC 38) in 1987. The reports included draft provisions.

3. The New South Wales Law Reform Commission (NSWLRC) had commenced its own inquiry into evidence law. This work was suspended in 1979 pending the outcome of the ALRC's review. The NSWLRC produced its final report in 1988 and recommended (with some qualifications) that the ALRC's recommendations should be implemented in New South Wales.

4. In 1991, both the Commonwealth and New South Wales Governments developed Bills giving effect to most of the ALRC's recommendations. Neither of these Bills were passed. Instead, the Standing Committee of Attorneys General facilitated consultation between these two jurisdictions that lead to the development of uniform Bills.

5. In 1995, the Commonwealth and New South Wales Parliaments enacted new Evidence Acts, the Commonwealth legislation being applied in the ACT. Similar legislation was enacted in Tasmania in 2001 and in Norfolk Island in 2004. Importantly, the Acts all use uniform section numbering.

6. In July 2004 the ALRC and the NSWLRC received references to review the operation of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) respectively. The terms of reference asked the commissions to work together to produce agreed recommendations. In the same month, the Victorian Law Reform Commission (VLRC) received terms of reference that directed it to collaborate with the ALRC and the NSWLRC in their respective reviews. The effect was to create a joint review of the UEA by the three Commissions.

7. In February 2006, the commissions published a final report that considered perceived problems with the UEA and recommended necessary or desirable changes. Most of these recommendations were incorporated into a *Model Uniform Evidence Bill* developed by the Standing Committee of Attorneys General and have largely been implemented by amendments to the UEA in the various jurisdictions.

8. The VLRC also published an Implementation Report in February 2006. This report made recommendations of a technical nature for the implementation of the *Model Uniform Evidence Bill* in Victoria.

9. With a small number of exceptions, the *Evidence Act 2008* implements the model Uniform Evidence Bill. The overwhelming majority of provisions in the UEA are uniform.

10. The *Evidence Act 2008* was followed by the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009*, which made consequential amendments to evidentiary provisions in a range of Acts, and the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* which provided transitional arrangements for the commencement of the *Evidence Act 2008*. The latter Act also provided for the continued operation of the remaining parts of the *Evidence Act 1958*, now renamed the *Evidence (Miscellaneous Provisions) Act 1958*.

11. The process of evidence law reform continues today. In 2011 Tasmania's *Evidence Act 2001* was amended to bring it more closely into line with other uniform evidence jurisdictions. Further, in 2011 the ACT also passed its own Evidence Act modelled on the NSW and Commonwealth legislation. On its commencement, the ACT will transition to full independent membership of the uniform evidence scheme.

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Reports and papers

1. The interpretation of the Uniform Evidence Acts will be assisted by consideration of the relevant parts of the following reports and papers:

- ALRC, Evidence (Interim), Report 26, 1985 (ALRC Report 26)
- ALRC, Evidence (Final), Report 38, 1987 (ALRC Report 38)
- ALRC, NSWLRC and VLRC, Review of the Evidence Act 1995, ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) (Joint Discussion Paper)
- ALRC, NSWLRC and VLRC, Uniform Evidence Law, ALRC Report 102, NSWLRC Report 112 and VLRC Final Report (2005) (Joint Report)
- VLRC, Implementing the Uniform Evidence Act, Report, 2006 (Implementation Report)

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Policy underlying the UEA

1. To understand the changes made by the UEA and to interpret and apply that Act's provisions, it is necessary first to understand the underlying policy of the Act.

2. The UEA reflects both similarities and important distinctions in the policy applicable to civil and criminal proceedings. As a result, many provisions differentiate between the two kinds of proceedings.

Civil trial

3. The ALRC described a civil trial as a method for dispute resolution and argued that it serves the purposes of an ordered society and therefore should not merely resolve disputes but do so in a way that is "just" or "morally acceptable". The ALRC considered that in order to achieve its purpose, a civil trial must command the respect and confidence of the parties and that this was dependent on the following essential elements:

- **fact-finding** – the courts must make a genuine attempt to find the facts otherwise the trial will be viewed as arbitrary or biased and will lose the confidence and respect of the community

- **procedural fairness** – parties must be given, and feel that they have had, a fair hearing
- **expedition and cost** – a civil proceeding is judged by the community in part on its efficiency and cost effectiveness
- **quality of rules** – the more anomalous, technical, rigid or obscure the rules applicable in a civil trial appear, the less acceptable they become

Criminal trial

4. Community confidence in, and respect for, the criminal trial system is also vital. As with a civil trial, a criminal trial involves an attempt to establish facts. Its credibility depends on this, together with other factors such as procedural fairness, efficiency and quality of rules. Despite this similarity, the nature and purpose of a criminal trial is very different to that of a civil trial. The ALRC identified the following important features of criminal trials:

    - **Accusatorial system** – criminal trials are not directed to resolving disputes. The defendant is presumed innocent until proven guilty and has no obligation to assist the prosecution
    - **Minimising the risk of wrongful convictions** – it is in the community's interests to minimise the risk of conviction of the innocent even if this may occasionally result in the acquittal of the guilty
    - **Definition of central question** – the central question in a criminal trial is whether the prosecution has proved the defendant guilty beyond reasonable doubt of the offence charged. A criminal trial should, if the defendant is found guilty, allow the community to be confident that he or she committed the offence charged
    - **Recognition of rights of individual** – defendants in criminal trials are entitled to the benefits of certain rights and protections as a recognition of their personal dignity and integrity and as a measure of the overall fairness of society to the individuals comprising it
    - **Assisting adversarial contest** – defendants in criminal trials are entitled to protection consistent with "the idea of the adversary system as a genuine contest"

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Key policy elements

1. The following are the key elements of the policy framework on which the ALRC's recommendations (and the UEA) were based:

    - **Fact-finding** – the credibility of the trial system depends on a genuine attempt by the court to establish facts or reach conclusions about what happened before making a decision. The UEA is therefore directed primarily to enabling parties to have admitted into evidence the probative evidence available to them. Any limitation on that process must be justified
    - **Civil and criminal trials** – in criminal trials, a stringent approach should be taken in deciding whether evidence against the defendant (as opposed to evidence in favour of the defendant) should be admissible. In civil trials, a more flexible approach is appropriate
    - **Predictability** – rules should be preferred over judicial discretions. Judicial discretions should be minimised to reduce the scope for subjective decisions. Only when a rule does not satisfactorily address a particular problem should a judicial discretion apply
    - **Cost, time and other concerns** – consideration was given to the impact of changes to the time, and cost, of litigation and on the time, and cost, of activities outside court. Clarity and simplicity were objectives at all times

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Using the Victorian UEA

1. This chapter introduces some key considerations in using the Victorian UEA.

Application of the UEA

2. The Victorian UEA applies to all proceedings in a *Victorian court* (s 4).

3. The UEA defines *Victorian court* to mean the Supreme Court or any other court created by Parliament and includes any person or body that, in exercising a function under the law of the State, is required to apply the laws of evidence.

4. The Victorian UEA applies to the Victorian Civil and Administrative Tribunal only to the extent that the tribunal adopts the rules of evidence (*Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b)).

5. The UEA also applies to bail proceedings, interlocutory proceedings and matters heard in chambers (s 4(1)(a), (b) and (c)).

6. The UEA applies to sentencing only if the court directs that the law of evidence applies in the proceeding (s 4(1)(d) and (2)). The court must make such a direction if a party to the proceeding applies for it in relation to proof of a fact that in the court's opinion is or will be significant in determining a sentence (s 4(3)). The court must also make such a direction if the court considers it appropriate to do so in the interests of justice (s 4(4)).

7. For more information see s 4 – Courts and proceedings to which the Evidence Act 2008 applies.

Relationship with other legislation

8. The UEA does not affect the operation of the provisions of any other Act (s 8).

Preservation of proceedings that are not subject to the laws of evidence

9. It therefore preserves the operation of provisions across the statute book that relieve courts from the obligation to apply the laws of evidence, for example, s 215 of the *Children, Youth and Families Act 2005* and s 38 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1996*.

Evidence (Miscellaneous Provisions) Act 1958

10. The enactment of the *Evidence Act 2008* did not permit the complete repeal of its predecessor, the *Evidence Act 1958*, as there are some matters in the 1958 Act that the UEA does not address. Instead, the necessary provisions of the *Evidence Act 1958* have been preserved, and the Act renamed the *Evidence (Miscellaneous Provisions) Act 1958*.

11. The renamed Act primarily preserves procedural provisions, and provisions that deal with the technical requirements for certain forms of evidence such as oaths and affidavits. The structure of the residual Act provides a reasonable, if imperfect guide to it content. The *Evidence (Miscellaneous Provisions) Act 1958* is divided into the following Parts:

- Part I – The means of obtaining evidence
- Part II – Witnesses
- Part IIAA – Witness Identity Protection
- Part IIA – Use of Audio Visual and Audio Links
- Part III – Proof of Documents, Proof of Facts by Documents and Document Unavailability
- Part IV – Oaths Affirmations Affidavits Declarations

- Part V – Attestations Verifications Acknowledgments Notarial Acts etc
- Part VI – Recording of Evidence
- Part VII – Offences Perjury Forgery False Certificates etc
- Part VIII – Miscellaneous.

12. These provisions are largely, but not entirely complementary to the *Evidence Act 2008*. To the extent that the more specific provisions of the 1958 Act do address the same subject matter as more general provisions of the 2008 Act, it is the former that will apply.

13. For more information see s 8 – Operation of other Acts.

Relationship with the common law and equity – is the UEA a code?

14. Section 9(1) of the UEA preserves all evidentiary principles or rules of common law or equity in proceedings to which the UEA applies, except where the UEA provides otherwise (either expressly or by necessary intendment).

15. Some areas commonly treated as part of the common law of evidence are not dealt with by the UEA and are unaffected by it. These include the legal and evidential burden of proof, the parol evidence rule, *res judicata* and issue estoppel.

16. Therefore, the UEA is not a code of the laws of evidence. However, the UEA does appear to operate as a code in relation to the competence and compellability of witnesses (s 12), the admissibility of evidence (s 56) and the standard of proof for deciding a question relating to the admissibility of evidence or any other question arising under the UEA (s 142).

17. For more information see s 12 – Competence and compellability; s 56 – Relevant evidence to be admissible (ie: relevance as threshold rule of admissibility); and s 142 – Admissibility of evidence: standard of proof.

General powers of a court

18. Section 11 preserves the power of a court (subject to the other provisions of the UEA) to control its own proceedings. In particular, the powers of a court to control abuse of process in proceedings are not affected.

Structure of the UEA

19. The provisions of the UEA distinguish between adducing evidence, tendering evidence and admitting evidence. The structure of the UEA is influenced by these distinctions.

20. The expressions are not defined and therefore retain their ordinary meaning. The Compact Oxford English Dictionary defines "adduce" as "to cite as evidence", "tender" as "to offer or present formally" and "admit" as "to allow to enter".

21. Consistent with this, the word "adduce" is generally used in the context of adducing evidence from a witness, that is, in the context of a witness giving oral evidence in court. The word "tender" is used in relation to tendering "a document or other thing". The word "admit" generally appears as "admissibility" and refers to whether or not evidence that has been adduced is admissible to prove a fact in issue.

22. Generally, the UEA presents the law in the order in which issues arise in a trial.

23. Chapter 1 provides for the application of the UEA. Its main sections state when the UEA applies, the relationship between the Victorian UEA and other Acts and the residual application of common law and equity.

24. Chapter 2 is about how evidence is adduced in a proceeding. The Chapter makes separate provision in relation to adducing evidence from witnesses (Part 2.1), adducing documentary evidence (Part 2.2) and adducing other forms of evidence (Part 2.3).

25. Chapter 3 is about the admissibility of evidence. The Chapter sets out a general rule that relevant evidence is admissible (Part 3.1). It then provides for the following:

- the exclusion of hearsay evidence and exceptions to that rule (Part 3.2)
- the exclusion of opinion evidence and exceptions to that rule (Part 3.3)
- admissions (Part 3.4)
- the exclusion of certain evidence of judgments and convictions (Part 3.5)
- the exclusion of evidence of tendency or coincidence and exceptions to that rule (Part 3.6)
- the exclusion of evidence relevant only to credibility and exceptions to that rule (Part 3.7)
- the extent to which character evidence is admissible as exceptions to the hearsay rule, opinion rule, tendency rule and credibility rule (Part 3.8)
- requirements as to the admissibility of identification evidence (Part 3.9)
- various categories of privilege (Part 3.10)
- the discretionary and mandatory exclusion of evidence that would otherwise be admissible (Part 3.11)

26. Chapter 4 is about proof. The Chapter provides for:

- the standard of proof (Part 4.1)
- the matters that do not require proof (Part 4.2)
- the facilitation of proof of the matters set out in the Part (Part 4.3)
- corroboration requirements in certain circumstances (Part 4.4)
- the giving of warnings and information by judges to juries about the potential unreliability of certain kinds of evidence (Part 4.5)
- procedures for proving certain other matters (Part 4.6)

27. Chapter 5 contains miscellaneous facilitative provisions that relate to matters such as inferences relevant to the authenticity of documents (s 183), voir dire (s 189), waiver of rules of evidence (s 190) and agreements as to facts (s 191).

Structure of the admissibility of evidence provisions

28. The UEA provides a structure for the rules of admissibility. These rules are contained in Chapter 3 and are a major part of the UEA.

29. The rules that may exclude relevant evidence are set out in a diagram that appears at the beginning of Chapter 3 of the UEA. That diagram can be accessed through this manual as the 'Admissibility of Evidence' flowchart. See ***Flowcharts***.

30. The question of whether one of the exclusionary rules applies to exclude evidence will in most cases be determined by considering the purpose for which evidence is adduced. This is because a number of the rules exclude evidence that is adduced for a particular purpose. For example, the hearsay rule (s 59), the opinion rule (s 76), the tendency rule (s 97), the coincidence rule (s 98) and the credibility rule (s 102). This makes consideration of the purpose for which the evidence is adduced integral to the UEA.

31. While some of the changes made to the law by the UEA result in the relaxation of the rules in areas such as hearsay and the proof of the contents of documents, the UEA includes procedural provisions to prevent such relaxation compromising the fact-finding process or causing unfairness to a party against whom the evidence in question is admitted. For example, Division 1 of Part 4.6 contains a procedure to protect parties against whom evidence may be adduced or admitted under Part 2.2. Also, s 67 requires a party intending to adduce evidence under one of

three exceptions to the hearsay rule (ss 63, 64 or 65) to give each other party notice of its intention to do so.

Discretions to exclude or limit use of evidence

32. Evidence that is not excluded by a particular rule of admissibility may still be excluded by one of the discretionary or mandatory exclusions set out in Part 3.11. Because of the reforms made to the common law rules of admissibility in Chapter 3, Part 3.11 has an important role to play to ensure that the UEA's policy objectives are met. In criminal proceedings, s 137 is particularly important in this respect.

General discretion to exclude evidence

33. A court may refuse to admit evidence (in both civil and criminal proceedings) if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time (s 135).

General discretion to limit use of evidence

34. A court may limit the use of evidence (in a civil or criminal proceeding) if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading and confusing (s 136).

Exclusion of prejudicial evidence in criminal proceedings

35. A court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant (s 137).

Exclusion of improperly or illegally obtained evidence

36. Section 138 restates (with some modifications) the common law discretion in *Bunning v Cross* (1978) 141 CLR 54. Evidence that was obtained improperly or in contravention of an Australian law, or in consequence of an impropriety, is not to be admitted (in a civil or criminal proceeding) unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained (s 138). The section sets out a number of matters the court is to take into account in considering the desirability of admitting the evidence. The list does not limit the matters the court may take into account in so considering.

Transitional provisions

General application to new hearings

37. The VLRC recommended that the *Evidence Act 2008* should apply as soon as possible, to minimise the time for which two concurrent evidence regimes apply. This goal is achieved through Schedule 2 of the *Evidence Act 2008*, which contains the transitional provisions for the Act. For the full text of the transitional provisions see Schedule 2 – Transitional Provisions.

38. The Act commenced on 1 January 2010. Clause 2(1) of that Schedule states:

> '[e]xcept as otherwise provided by this Schedule, this Act applies to any proceeding (within the operation of s 4) commenced on or after the commencement day'.

39. Clause 2(2) of Schedule 2 states that:

Except as otherwise provided by this Schedule, in the case of any proceeding (within the operation of section 4) that commenced before the commencement day, this Act applies to that part of the proceeding that takes place on or after the commencement day, other than any hearing in the proceeding that commenced before the commencement day and-

(a) continued on or after the commencement day; or

(b) was adjourned until the commencement day or a day after the commencement day.

40. The effect of Clause 2(2) is that the commencement date of the proceeding is of limited significance. The *Evidence Act 2008* applies to any relevant hearing commenced after 1 January 2010, regardless of the date of the commencement of the proceeding. The general transitional provisions exclude the operation of the Act only for hearings which had begun but not ended prior to 1 January 2010, or had been adjourned from a date prior to 1 January 2010. For those hearings, the *Evidence Act 1958* (as it stood immediately before the commencement of the *Evidence Act 2008*) applies. As to when a hearing begins and ends, see *R v Darmody* (2010) 25 VR 209; [2010] VSCA 41 at [20].

Qualified application of particular provisions

41. The application of clause 2(1) is qualified by a number of schedule items which exclude the transitional operation of the Act for a number of matters, generally because of associations with procedural events that occurred before the commencement of the Act. The affected provisions are:

- s 128A (Privilege in respect of self-incrimination-exception for certain orders etc);
- Part 3.10 (Privileges);
- s 114 and s 115 (Exclusion of visual identification evidence and Exclusion of evidence of identification by pictures);
- s 146 and s 147 (Evidence produced by processes, machines and other devices and Documents produced by processes, machines and other devices in the course of business);
- s 148 and s 149 (Evidence of certain acts of justices, Australian lawyers and notaries public and Attestation of documents);
- ss 153–159 (provisions regarding matters of official record);
- s 191 (Agreements as to facts);
- s 139 (Cautioning of persons); and
- all the notice provisions contained in the *Evidence Act 2008*.

42. Specific transitional arrangements are set out for these provisions in Schedule 2, clauses 3–16.

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1 Preliminary

Part 1.1 – Formal Matters (ss 1–3)

1 Purpose

The purpose of this Act is to make fresh provision for the law of evidence that is uniform with Commonwealth and New South Wales law.

2 Commencement

(1) This Part and the Dictionary at the end of this Act come into operation on the day after the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.

(3) If a provision of this Act does not come into operation before 1 January 2010, it comes into operation on that day.

3 Definitions

(1) Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary.

(2) The Dictionary at the end of this Act forms part of this Act.

(3) * * * * *

Last updated: 13 October 2009

Part 1.2 – Application of the Evidence Act 2008 (ss 4–11)

Part 1.2 provides:

- the proceedings to which this Act will apply (s 4)
- the extended application of certain provisions (s 5)
- the Act binds the Crown (s 7)
- the Act does not affect the operation of any other Act (s 8)
- the Act does not affect the operation of any common law rule or principle unless by express or necessary intendment (s 9)
- Parliamentary privilege is preserved (s 10)
- the Act does not affect the general powers of a court unless by express or necessary intendment (s 11).

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s 4 – Courts and proceedings to which the Evidence Act 2008 applies

(1) This Act applies to all proceedings in a **Victorian court**, including proceedings that—

(a) relate to bail; or

(b) are interlocutory proceedings or proceedings of a similar kind; or

(c) are heard in chambers; or

(d) subject to subsection (2), relate to sentencing.

(2) If such a proceeding relates to sentencing—

(a) this Act applies only if the **court** directs that the **law** of evidence applies in the proceeding; and

(b) if the **court** specifies in the direction that the **law** of evidence applies only in relation to specified matters—the direction has effect accordingly.

(3) The **court** must make a direction if—

(a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and

(b) in the **court**'s opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.

(4) The **court** must make a direction if the **court** considers it appropriate to make such a direction in the interests of justice.

(5) In this section, a proceeding that relates to sentencing includes a proceeding for an order under Part 4 of the *Sentencing Act 1991*.

Notes

1 Section 4 of the Commonwealth Act differs from this section. It applies that Act to proceedings in a federal court or an Australian Capital Territory court. Some provisions of the Commonwealth Act extend beyond proceedings in federal courts and Australia Capital Territory courts (see sections 5, 185, 186 and 187 of the Commonwealth Act).

2 Victorian court is defined in the Dictionary. The definition includes persons or bodies required to apply the laws of evidence.

3 The Commonwealth Act includes 2 additional subsections that exclude the application of that Act to appeals from a court of a State (including appeals from a court of a State exercising federal jurisdiction) and certain other courts.

4 Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8.

5 Subsection (5) is not included in the Commonwealth Act or New South Wales Act.

The UEA applies to proceedings in a Victorian court

1. The *Evidence Act 2008* applies to all proceedings in a *Victorian court*.

2. The Act's application extends beyond final hearings in open court to include such proceedings as bail proceedings, interlocutory proceedings and matters heard in chambers (ss 4(1)(a), (b) and (c)).

What is a Victorian court?

3. The application of the Act is broadened by an expansive definition of the term *Victorian court.*

4. Victorian court is defined to mean:

   - the Supreme Court; or
   - any other court created by Parliament,

   and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence (UEA Dictionary).

5. This application is limited by the qualification in respect of sentencing proceedings (s 4(2)).

Bail proceedings and the role of s 8

6. Section 8 preserves provisions in other Acts which relieve the courts from the obligation to apply the laws of evidence to bail proceedings.

When does the UEA apply to sentencing?

7. The Act applies to a sentencing proceeding (including a proceeding for an order in addition to sentence under Part 4 of the *Sentencing Act 1991*) only if the court directs that the law of evidence applies in that proceeding (s 4(1)(d) and s 4(2)).

8. The court must direct that the law of evidence applies in a sentencing proceeding if:

   - a party to the proceeding applies for the direction in relation to the proof of a fact; and
   - in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding (s 4(3)).

9. The court must make such a direction, with or without an application by a party, if the court considers it appropriate to do so in the interests of justice (s 4(4)).

10. In *R v MG* [2016] NSWCCA 304, Meagher JA, Johnson and Rothman JJ, in three separate judgments, discuss without deciding whether an appeal against sentence (specifically a Crown appeal against a failure to fulfil an undertaking, under the NSW equivalent to *Criminal Procedure Act 2009* s 291) is a proceeding that relates to sentencing.

Does the UEA apply to VCAT?

11. The Act applies to the Victorian Civil and Administrative Tribunal only to the extent the Tribunal adopts the rules of evidence (*Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(1)(b)).

Last updated: 4 July 2017

s 8 – Operation of other Acts

This Act does not affect the operation of the provisions of any other Act.

The operation of other Acts

1. Section 8 preserves the operation of the provisions of other Acts.

2. It preserves the operation of those sections in force across the Victorian statute book which relieve courts from the obligation to apply the laws of evidence including, but not limited to:

    - s 44 of the *Accident Compensation Act 1985*;
    - s 8 of the *Bail Act 1977*;
    - s 215 of the *Children, Youth and Families Act 2005*;
    - ss 11 and 38 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

Direct inconsistency

3. The interpretation of s 8 will be straightforward in cases where a provision of the UEA appears to be directly inconsistent with a provision of another Act. In such cases, the provision of the other Act will apply (*Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397).

Indirect inconsistency

4. Finkelstein J. remarks that the scope of operation of s 8(1) of the *Evidence Act 1995* (Cth) is not clear in cases where there is no direct inconsistency. His Honour suggests that some indication of how the section is to operate may be gathered from considering s 8(1) with s 9(1). When considered together, these sections disclose the intention that the Act does not operate to impose an obligation to apply the rules of evidence if that obligation did not previously exist (*Epeabaka* at 409).

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s 9 – Application of common law and equity

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following—

(a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a **court**;

(b) the operation of a legal or evidential presumption that is not inconsistent with this Act;

(c) a **court**'s power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

Is the UEA a code of the laws of evidence?

1. Section 9 preserves principles or rules of common law or equity relating to evidence in proceedings to which the Act applies, except if the Act provides otherwise (either expressly or by necessary intendment).

2. Some areas commonly treated as part of the common law of evidence are not included in the UEA (and thus remain unaffected by it) because they are considered to belong to the substantive law and not the law of evidence. These areas include the legal and evidential burden of proof, the parol evidence rule, *res judicata* and issue estoppel.

3. Where the UEA makes express provision which varies from the common law, it is the language of the statute which determines the issue, and the meaning and effect of the provision is not to be determined in accordance with the pre-existing common law (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [10]).

4. Where the UEA has adopted formulae well known to the common law (for example 'unfairly prejudicial' and 'unfair prejudice' in ss 135–137 (discretionary and mandatory exclusions)) and these formulae have been interpreted in accordance with the common law, the High Court has approved of such interpretation (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [29], [91]).

5. Therefore it may be said that the UEA is not a code of the laws of evidence. However, the UEA does operate as a code in relation to:

   - competence and compellability of witnesses (Div. 1 of Part 2.1);
   - most aspects of admissibility of evidence in Chapter 3; and
   - the standard of proof for deciding a question relating to the admissibility of evidence or any other question arising under the UEA (s 142).

6. In *Haddara v R* (2014) 43 VR 53; [2014] VSCA 100, Redlich and Weinberg JJA (Priest JA dissenting) held that the common law power to exclude evidence to ensure a fair trial survived the introduction of the *Evidence Act 2008*, on the basis that the exclusionary rules in Chapter 3 are not a complete code.

Nature of principles or rules of common law or equity to which s 9 applies

7. An example of a principle to which s 9(1) applies is that it is for the prosecution to put its case both fully and fairly before the jury prior to the accused being called upon to announce the course that will be followed at trial (*R v Soma* (2003) 212 CLR 299 at 308; [2003] HCA 13 at [27]).

8. Section 9 does not seek to prevent developments in general law principles, nor should it be understood as purporting to freeze the general law in relation to evidence as at the date of its commencement of operation (*Meteyard and Others v Love and Others as receivers and managers of Southland Coal Pty Ltd* (2005) 65 NSWLR 36 at 67; [2005] NSWCA 444 at [118] per Basten JA).

9. Common law principles may continue to develop, subject to the qualification that a development which is inconsistent with the express terms of the UEA or its necessary intendment will not have effect in a proceeding to which the UEA applies (*Meteyard and Others v Love and Others as receivers and managers of Southland Coal Pty Ltd* (2005) 65 NSWLR 36 at 67; [2005] NSWCA 444 at [118] per Basten JA).

Last updated: 7 August 2015

s 11 – General powers of a court

(1) The power of a **court** to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a **court** with respect to abuse of process in a proceeding are not affected.

Preservation of the general powers of a court

1. Subject to the other provisions of the UEA, s 11 preserves the common law power of a court to control its own proceedings (including the powers with respect to abuse of process).

2. Section 11(1) does not provide any basis for applying evidentiary rules which are inconsistent with other provisions of the Act (*Lane v Jurd and Another (No 2)* (1995) 40 NSWLR 708 at 709).

3. However, section 11(2) has been held to enable receipt of evidence of settlement negotiations where a party contends that the negotiations revealed that proceedings were undertaken for an improper purpose and constituted an abuse of process (*Van Der Lee v New South Wales* [2002] NSWCA 286 at [62]).

4. In *Haddara v R* (2014) 43 VR 53; [2014] VSCA 100, Redlich and Weinberg JJA (Priest JA dissenting) held that the overriding common law discretion to exclude evidence to ensure a fair trial survived the introduction of the *Evidence Act 2008*, on the basis that the exclusionary rules in Chapter 3 are not a complete code as to both the admissibility and exclusion of evidence ([10]). For recent discussion of this common law discretion, see *Police v Dunstall* (2015) 256 CLR 403; [2015] HCA 26.

Last updated: 7 August 2015

2 Adducing Evidence

The key elements of the UEA policy framework include fact-finding, recognition of the different imperatives of civil and criminal trials (namely dispute resolution and accusatorial), meeting the need for a fair trial and predictability, and expedition, cost and other concerns.

With respect to fact-finding, the credibility of the trial system depends on a genuine exercise by a court to establish facts or to reach conclusions about events before making a decision. The UEA is thus primarily directed to enabling a party to have admitted into evidence the probative evidence that is

available to it. Any limitation on that process must be justified (for example, fairness and time and cost considerations).

Chapter 2 provides for how evidence is adduced in a proceeding. 'Adduced' includes evidence that is both led in examination-in-chief or re-examination and obtained by cross-examination.

Last updated: 13 October 2009

Part 2.1 – Witnesses (ss 12–46)

Part 2.1 includes:

- a presumption of competence (s 12);
- addresses a lack of capacity and provides that both sworn and unsworn evidence may be given (s 13);
- compellability (ss 14–18);
- oaths and affirmations (ss 21–25);
- general rules about giving evidence (ss 26–36);
- examination-in-chief and re-examination (ss 37–39);
- cross-examination (ss 40–46).

Last updated: 7 August 2015

Division 1 – Competence and compellability of witnesses (ss 12–20)

Division 1 deals with the competence and compellability of witnesses. It operates as a code (s 12).

Consistently with the UEA policy framework, Division 1 proceeds on the bases that the unnecessary exclusion of relevant evidence ought to be avoided and that a person who can give relevant evidence be permitted to do so. Key provisions in this Division facilitate the greater admissibility of evidence:

- there is a new presumption that every person is competent to testify unless he or she is shown to be otherwise. Competency is defined in terms of the questions asked of the witness and the capacity to provide an intelligible response (ss 12, 13);
- a witness may give sworn or unsworn evidence (s 13).

The need to recognise the accusatorial nature of the criminal trial and to balance considerations such as fairness to an accused's family and the significance of their relationships, and time and cost considerations, are addressed in that:

- an accused is not a compellable witness for the prosecution (s 17);
- compellable witnesses, namely spouses, de factos (itself inclusive of same-sex couples), parents and children (s 18), may object to the giving of evidence (s 18);
- a witness with reduced capacity is not compellable if the court is satisfied there would be substantial cost or delay (s 14).

Last updated: 13 October 2009

s 12 – Competence and compellability

Except as otherwise provided by this Act—

(a) every person is competent to give evidence; and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Competence and compellability generally

1. The effect of s 12 is that competence is presumed.

2. Subject to the exceptions specified in s 13 to s 18 (Victoria does not include s 19 of the UEA), all witnesses are competent and compellable to give evidence in proceedings under the UEA.

3. The following sections of the *Evidence Act 2008* are relevant in determining whether a person is not competent or not compellable to give evidence:

- s 13 (Competence – lack of capacity)
- s 16 (Competence and compellability – judges and jurors)
- s 17 (Competence and compellability – accused in criminal proceedings)
- s 18 (Compellability of spouses and others in certain criminal proceedings).

Last updated: 13 October 2009

s 13 – Competence – lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—

(a) the person does not have the capacity to understand a question about the fact; or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact—

and that incapacity cannot be overcome.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn or affirmed evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn or affirmed evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn or affirmed evidence is competent to give unsworn evidence if the **court** has told the person—

(a) that it is important to tell the truth; and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the **court** if this occurs; and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a **witness** does not become inadmissible merely because, before the **witness** finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the **court** may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

Competence–

(a) Presumption of capacity

1. There is a new rebuttable presumption that every person has the mental, intellectual and physical capacity to give evidence (s 12 and s 13(6)).

2. That s 13 deals exclusively with issues of competence (as opposed to including an understanding of the oath) is supported by s 24 (Requirements for oaths).

3. The burden of proving that a person is incompetent to give evidence because of incapacity in any of these respects is on the party so arguing (s 13(6)).

(b) When is the presumption rebutted?

4. There are two tests for determining whether a person is incompetent to give evidence about a fact for lack of capacity (s 13(1)). They are:

   - does the person have the capacity to understand a question about the fact?
   - does the person have the capacity to give an answer that can be understood to a question about the fact?

5. If a person is incapable in either of these respects and that incapacity cannot be overcome, then the person is not competent to give evidence about the fact (s 13(1)).

6. In determining whether an incapacity can be overcome, it may be relevant to consider s 30 (Interpreters) and s 31 (Deaf and mute witnesses).

7. The two tests for determining incompetence to give evidence about a fact are directed to the person's capacity in respect of individual questions. Therefore, it may be necessary to determine a person's capacity on multiple occasions. This is because a person may be capable of giving evidence about certain facts but not about others (s 13(2)).

8. For example, a child might be able to give an answer that can be understood to a simple factual question but not to a question that requires the child to draw an inference (ALRC 26:1 at [521]).

(c) When is a person incapable of giving *sworn* evidence?

9. The section draws a distinction between competence (including mental, intellectual and physical) to give evidence and competence to give sworn evidence.

10. A person who is competent to give evidence about a fact is not competent to give sworn evidence about that fact only if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence (s 13(3)).

11. In such a case, the person may give unsworn evidence if the court has told the person:

    - it is important to tell the truth; and
    - he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this happens; and
    - he or she may be asked questions that suggest certain statements are true or untrue, and
    - that he or she should agree with the statements which he or she believes are true and should feel no pressure to agree with the statements which he or she believes are untrue (s 13(4) and s 13(5)).

12. The Act does not otherwise distinguish between sworn and unsworn evidence.

13. A court must first find a witness incompetent to give sworn evidence (in accordance with s 13(3)) before complying with the requirements of s 13(5) to permit the witness to give unsworn evidence (*R v Brooks* (1998) 44 NSWLR 121).

14. Strict compliance with sections 13(4) and (5) is a necessary precondition to the witness being permitted to give unsworn evidence. Failure to determine whether the witness is competent to give sworn evidence or failure to give any part of the instruction will vitiate the trial process (*MK v R* [2014] NSWCCA 274 at [72]; *SH v R* (2012) 83 NSWLR 258; [2012] NSWCCA 79 at [35].

15. For a witness to give unsworn evidence pursuant to s 13(5), the requirements of s 13(1) must be satisfied and the court must tell the person of the matters contained in s 13(5)(a), (b) and (c). Once

these requirements are satisfied, there is no discretion to refuse to allow the person to give unsworn evidence (*R v Muller* (2013) 7 ACTLR 296; [2013] ACTCA 15 at [40]–[41] per Dowsett J (Penfold J and Nield AJ agreeing; see also *SH v R* (2012) 83 NSWLR 258; [2012] NSWCCA 79 at [6]–[8] per Basten JA (Blanch and Hall JJ agreeing)).

16. Section 13(5) only requires that the judge give a direction in accordance with the requirements of the section. It is not concerned with whether that direction is understood or even acknowledged (*R v Muller* (2013) 7 ACTLR 296; [2013] ACTCA 15 at [41] per Dowsett J (Penfold J and Nield AJ agreeing); see also *SH v R* (2012) 83 NSWLR 258; [2012] NSWCCA 79 at [8] per Basten JA (Blanch and Hall JJ agreeing)).

Consequence of death, or loss of competence, of a witness

17. Evidence does not become inadmissible merely because the witness who gave it dies, or becomes incompetent, after starting to give evidence but before finishing (s 13(7)). However, the court may, in its discretion, exclude evidence in these circumstances.

Procedure–

(a) The voir dire

18. The question of whether a person is competent to give evidence must be determined in the absence of any jury (s 189).

19. Where the jury asks to re-watch a witness' recorded evidence, the court should not provide the jury with any parts of the evidence which were conducted on voir dire, such as the determination of competence. A judicial determination that the witness is competent to give sworn evidence may be misused by a jury to decide the witness is likely to be telling the truth (see *Hill v The Queen* [2021] VSCA 316, [137]–[145] and compare *Caine v The Queen* (1993) 68 A Crim R 233).

(b) Court may 'inform itself as it thinks fit'

20. In determining a question about competence for lack of capacity, the court may 'inform itself as it thinks fit' and may obtain information from a person who has relevant specialised knowledge based on the person's training, study or experience (s 13(8)).

21. This subsection refers to 'information' (as opposed to 'opinion') and does not appear to require the information to be adduced in court.

22. 'As it thinks fit' enables a court to question a witness in a way it considers to be most suitable.

23. The court may allow the parties to question a child (Stephen Odgers, *Uniform Evidence Law* (12th edition, 2016), [EA.13.300]), but it has been suggested it is 'doubtful whether counsel for the accused should question a child in a competency inquiry' (*R v RAG* [2006] NSWCCA 343 at [46] per Latham J (McClellan CJ and Johnson J agreeing)).

(c) Standard of proof

24. The presumption of competency (s 13(6)) means a court will not find a lack of competency because of a lack of capacity unless it is satisfied 'on the balance of probabilities' (s 142) that there is a lack of capacity.

Child Witnesses

25. With respect to the rules for giving evidence, the UEA make no distinction between adults and children. However, the presumption of competence to give evidence is, in the case of children, more likely to be able to be rebutted.

26. There are a number of overarching principles which ought to guide all questioning of children, including when testing for competence. These principles also suggest preferred processes and content for such questioning. To refer to these principles, and the suggested processes and sample questions, see Appendix A.

Last updated: 15 December 2023

s 14 – Compellability – where reduced capacity

A person is not compellable to give evidence on a particular matter if the **court** is satisfied that—

(a) substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and

(b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

Compellability in cases of reduced capacity

1. Under s 14, a person is not compellable on a particular matter if undue cost or delay would be incurred in overcoming an incapacity of understanding and adequate evidence on the matter is available from another witness. If the person's evidence is necessary, all efforts to overcome the incapacity must be undertaken.

2. The questions to be resolved are:

- would substantial cost or delay be incurred in ensuring that a person has the capacity to understand a question about a matter or to give an answer that can be understood to a question about the matter?
- if no – the person is, subject to ss 15–19, compellable to give evidence;
- if yes – is the court satisfied that adequate evidence on the matter has already been given, or is able to be given, from another person or source? If yes – the person is not compellable to give evidence on the matter.

Last updated: 13 October 2009

s 17 – Competence and compellability in criminal proceedings – accused

(1) This section applies only in a **criminal proceeding**.

(2) An accused is not competent to give evidence as a **witness** for the prosecution.

(3) An **associated accused** is not compellable to give evidence for or against an accused in a **criminal proceeding**, unless the **associated accused** is being tried separately from the accused.

(4) If a **witness** is an **associated accused** who is being tried jointly with the accused in the proceeding, the **court** is to satisfy itself (if there is a jury, in the jury's absence) that the **witness** is aware of the effect of subsection (3).

Competence and compellability of an accused

1. This section applies only in a criminal proceeding.
2. In a trial in which an associated accused is being tried together with another accused:
   - he or she is not compellable to give evidence for or against another accused (s 17(3)), and
   - the court is to satisfy itself that the witness is aware he or she is not compellable to give that evidence (s 17(4)).

Last updated: 7 August 2015

s 18 – Compellability of spouses and others in criminal proceedings

(1) This section applies only in a **criminal proceeding**.

(2) A person who, when required to give evidence, is the spouse, **de facto partner**, **parent** or **child** of an accused may object to being required—

(a) to give evidence; or

(b) to give evidence of a communication between the person and the accused—

as a **witness** for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the **court** that a person may have a right to make an objection under this section, the **court** is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the **court** is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the **court** finds that—

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the **court** for the purposes of subsection (6), it must take into account the following—

(a) the nature and gravity of the **offence** for which the accused is being prosecuted;

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the **prosecutor**;

(d) the nature of the relationship between the accused and the person;

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the accused.

(8) If an objection under this section has been determined, the **prosecutor** may not comment on—

(a) the objection; or

(b) the decision of the **court** in relation to the objection; or

(c) the failure of the person to give evidence.

Compellability of spouses and others in criminal proceedings

1. This section applies only in a criminal proceeding.

2. Section 18 (s 12 supported by s 9) abrogates the common law marital communication privilege (*R v Glasby* [2000] NSWCCA 83).

May the spouse, de facto partner, parent or child of an accused be compelled to give evidence as a witness for the prosecution?

3. A person who is the spouse, the de facto partner, a parent or a child of the accused at the time he or she is required to give evidence may object to giving evidence as a witness for the prosecution (s 18(2)).

4. This objection may be in general or in relation to a particular communication between the person and the accused (s 18(2)(a)(b)).

5. The court is to satisfy itself that a witness to whom this section may apply is aware of his or her right to object under the section (s 18(4)).

6. Awareness of the right to object under the section requires more than a bare knowledge of the right to object. It also includes awareness of the court's power to determine whether to uphold the objection, and the factors which the court will consider (*DPP v Fuller* [2023] VSCA 121, [19], citing *Tran v The Queen* [2017] NSWCCA 93, [27], [39]–[41]).

7. If the witness is represented by a legal practitioner, the court may ask the practitioner whether the person understands the right to object. Otherwise, it is desirable that the witness have an opportunity to obtain independent advice. If that is not possible, then the judge should explain the operation of the section (*DPP v Fuller* [2023] VSCA 121, [19], [29]. See also *Tran v The Queen* [2017] NSWCCA 93, [28], [42]).

8. As part of ensuring that the witness understands the operation of the section, the judge must be informed about whether the witness has understood the advice, whether the witness has been asked whether they wish to object, and the witness' decision about whether to exercise that right (*DPP v Fuller* [2023] VSCA 121, [30], [32]).

9. A person who objects to giving evidence must do so before the person begins to give the evidence or as soon as practicable after becoming aware of the right to do so (s 18(3)).

10. In determining the objection, the question to be answered is whether the court is satisfied (taking into account the matters set out in s 18(7)) that:

    - there is a likelihood that harm would or might be caused to the person or to the relationship between the person and the accused if the person gives evidence as a witness for the prosecution; and
    - the nature and extent of that harm outweighs the desirability of having the evidence given.
    - If 'no' – the court may require the person to give evidence.
    - If 'yes' – the person must not be required to give the evidence.

11. If an objection under this section has been determined, the prosecution may not comment on an objection, on a decision of a court in relation to an objection or on a failure of the person to give evidence (s 18(8)).

12. Where a person objects to give evidence under this section, that person will be "unavailable to give evidence". A party may then seek to tender previous statements by that person under s 65. In determining whether to allow such a tender under s 65, the policy of s 18 does not have any residual work to do (*Fletcher v R* (2015) 45 VR 634; [2015] VSCA 146 at [61]; *DPP v Nicholls* [2010] VSC 397).

Procedure – Determination of objection

13. An objection under this section is to be determined in the absence of any jury (s 18(5)).

Last updated: 15 December 2023

s 20 – Comment on failure to give evidence

Note

Section 20 of the Commonwealth Act and the New South Wales Act requires the judge to give certain directions to the jury relating to the failure to give evidence or call witnesses in a criminal proceeding for an indictable offence. Division 6 of Part 4 of the *Jury Directions Act 2015* contains provisions relating to the failure to give evidence or call a witness that apply in criminal trials.

Operation of section

1. Section 20 previously regulated the power of the judge, prosecutor or counsel for a co-accused to make comments about an accused's failure to give evidence.
2. This provision was repealed from the Victorian Evidence Act with the passage of the *Jury Directions Act 2015*, which specifies the directions and comments that may or must not be given in relation to an accused's failure to give evidence.
3. See ***Chapter 4.10*** of the Victorian Criminal Charge Book for information on the relevant provisions of the *Jury Directions Act 2015.*

Last updated: 7 August 2015

Division 2 – Oaths and affirmations (ss 21–25)

Division 2 covers the general requirement that a witness (or interpreter) be sworn by oath or affirmation. There is an overall move away from reliance on religious belief.

Unsworn evidence is permissible only when a witness lacks competence to give sworn evidence (see s 13).

The Division includes:

- a requirement that sworn evidence be on oath or affirmation (s 21);
- a requirement that interpreters take an oath or make an affirmation (s 22);
- a witness or an interpreter has a choice of an oath or an affirmation (s 23);
- requirements for taking an oath (including displacement of the requirement for the use of Biblical text) (s 24);
- a person who has no religious beliefs may take an oath (s 24A).

Last updated: 13 October 2009

s 21 – Sworn evidence of witnesses to be on oath or affirmation

(1) A **witness** in a proceeding must either take an oath, or make an affirmation, before giving evidence.

(2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.

(3) A person who is called merely to produce a **document** or thing to the **court** need not take an oath or make an affirmation before doing so.

(4) The **witness** is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.

(5) Such an affirmation has the same effect for all purposes as an oath.

(6) For the purposes of subsection (4), in the case of a child or a person with a cognitive disability, the following words are taken to be a similar form of oath or affirmation -

"I promise to tell the truth".

Oath or affirmation required for sworn evidence

1. The UEA requires a person either to take an oath or to make an affirmation before giving evidence (s 21). The exceptions are persons who give unsworn evidence or who are called only to produce a document or thing to the court.
2. The oath or affirmation is to be taken in accordance with the appropriate form in Schedule 1 or in a similar form.

Last updated: 13 October 2009

s 22 – Interpreters to act on oath or affirmation

(1) A person must either take an oath, or make an affirmation, before acting as an interpreter in a proceeding.

(1A) An oath taken, or an affirmation made, by a person before acting as an interpreter on a day is taken for the purposes of subsection (1) to be an oath taken or affirmation made by that person for the purposes of any subsequent proceedings in that **court** on that day in which the person acts as an interpreter.

(2) The person is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.

(3) Such an affirmation has the same effect for all purposes as an oath.

Interpreters required to take oath or make affirmation

1. A person must either take an oath to make an affirmation before acting as an interpreter in a proceeding (s 22).

2. If an oath is so taken or an affirmation so made on a particular day, the oath or affirmation is taken to be an oath taken or an affirmation made by that person for any subsequent proceedings in that court on that day in which the person acts as an interpreter.

3. The oath or affirmation is to be taken in accordance with the appropriate form in Schedule 1 or in a similar form.

Last updated: 13 October 2009

s 23 – Choice of oath or affirmation

(1) A person who is to be a **witness** or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.

(2) The **court** is to inform the person that he or she has this choice, unless the **court** is satisfied that the person has already been informed or knows that he or she has the choice.

(3) The **court** may direct a person who is to be a **witness** to make an affirmation if—

(a) the person refuses to choose whether to take an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to take an appropriate oath.

Oath or affirmation?

1. A court must inform a proposed witness that they may choose whether to take an oath or to make an affirmation before acting as a witness.

2. If the person refuses to choose whether to take an oath or to make an affirmation, or if it is not reasonably practicable for the person to take an oath, the court may direct the person to make an affirmation before giving evidence.

3. Reasons it may not be reasonably practical to take an appropriate oath include religious reasons (*R v Kemble* (1990) 91 Cr App R 178, 179–180).

Last updated: 13 October 2009

s 24 – Requirements for oaths

(1) It is not necessary that a religious text be used in taking an oath.

(2) An oath is effective for the purposes of this Division even if the person who took it—

(a) did not have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

Oaths

1. Section 24 clarifies that:

- it is not necessary to use a religious text in taking an oath; and
- an oath is effective even if the person who took it did not have a religious belief or did not have a religious belief of a particular kind, or did not understand the nature and consequences of the oath.

2. This section confirms that s 13 deals exclusively with issues of competence (as opposed to including an understanding the oath).

Last updated: 13 October 2009

s 24A – Alternative oath

> (1) A person may take an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.
>
> (2) Despite anything to the contrary in this Act, the form of oath taken by a person—
>
> (a) need not include a reference to a god; and
>
> (b) may instead refer to the basis of the person's beliefs in accordance with a form prescribed by the regulations.

Alternative oath

1. Section 24A clarifies that a person may take an oath even if the person's religious or spiritual beliefs do not include the existence of a god.
2. An oath taken for the purposes of this Act need not include a reference to a god and may refer to the basis of the person's beliefs in accordance with a form prescribed by the regulations.

Last updated: 13 October 2009

Division 3 – General rules about giving evidence (ss 26–36)

This Division establishes a number of general procedural rules with respect to adducing the evidence of a witness in a proceeding (and so complements s 11). It provides:

- specified express powers to control the questioning of witnesses (s 26);
- that, subject to this Act, a party may question any witness (s 27);
- for the sequence of questioning/examination (s 28);
- for the manner and form of questioning witnesses (including narrative form) (s 29), through an interpreter (s 30), and to accommodate deaf and mute witnesses (s 31));
- procedures to revive memory in court (s 32), including a new provision for police officers (s 33);
- a new power which enables the court to order production of a document or thing used to revive memory out of court (s 34);
- effects on tendering of documents which are called for and/or inspected (s 35);
- a compellable person may be examined without a subpoena or other process (s 36).

Last updated: 13 October 2009

s 26 – Court's control over questioning of witness

The **court** may make such orders as it considers just in relation to—

(a) the way in which **witness**es are to be questioned; and

(b) the production and use of **document**s and things in connection with the questioning of **witness**es; and

(c) the order in which parties may question a **witness**; and

(d) the presence and behaviour of any person in connection with the questioning of **witness**es.

Questioning of witnesses

1. Section 26 is a general statement that a court may make such orders as the court considers just in relation to the questioning of witnesses.

2. The section is very broad, and extends to allowing a witness give to evidence by non-traditional means, such as by allowing a witness who is struggling to answer questions to use cards with "yes", "no" and "I don't understand" on them. However, the use of such a process must be approached with care, as it may limit a cross-examiner's ability to probe the witness' answers, and will be unsuited if the witness needs to give evidence which is not on the answer cards (see *ABR v The Queen* [2020] NSWCCA 33, [77]–[80]).

Complement to s 11 power to control conduct of a proceeding

3. Section 26 complements s 11. By s 11, the common law power of a court to control the conduct of a proceeding is not affected by the *Evidence Act 2008*, except so far as the Act provides otherwise expressly or by necessary intendment. In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

Power to 'make such orders …' – s 192

4. Section 192 details a number of matters a court must take into account in any decision about whether to give leave, permission or direction. The NSW Court of Appeal held that where the power to make an order is derived from s 11, s 192 does not apply (*Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1342]).

5. Subsequently, it was held that, notwithstanding s 26 refers to 'orders', it is subject to s 192 (which refers to 'directions') (*Australian Securities and Investments Commission v Rich* [2006] NSWSC 643 per Austin J). This construction was applied in *ASIC v Citigroup Global Markets Australia Pty Ltd (No 2)* (2007) 157 FCR 310; [2007] FCA 121 at [7]–[8] per Jacobson J.

Last updated: 15 December 2023

s 27 – Parties may question witnesses

A party may question any **witness**, except as provided by this Act.

Questioning of witnesses by parties

1. Section 27 is the source of the general principle that, subject to the limitations imposed by the Act, a party may question any witness.

2. If a party wishes to cross-examine a witness on matters in dispute in a proceeding, that wish must generally be respected, as part of the court's duty to provide a fair trial, provided that the party gives reasonable notice of its desire to cross-examine the witness (*Tarrant v Statewide Secured Investments Pty Ltd* [2012] FCA 582 at [34]–[35]).

Last updated: 13 October 2009

s 28 – Order of examination in chief, cross-examination and re-examination

Unless the **court** otherwise directs—

(a) **cross-examination** of a **witness** is not to take place before the **examination in chief** of the **witness**; and

(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**.

Order of examinations

1. Subject to a direction by a court to the contrary, the UEA requires that:
   - cross-examination not take place before the examination in chief of the witness; and
   - re-examination not take place before all other parties who wish to do so have cross-examined the witness.

Last updated: 13 October 2009

s 29 – Manner and form of questioning witnesses and their responses

(1) A party may question a **witness** in any way the party thinks fit, except as provided by this Chapter or as directed by the **court**.

(2) A **court** may, on its own motion or on the application of the party that called the **witness**, direct that the **witness** give evidence wholly or partly in narrative form.

(3) Such a direction may include directions about the way in which evidence is to be given in that form.

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the **court** that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Questioning of witnesses and responses

1. The UEA allows a party to question a witness in any way the party thinks fit, except as limited by Chapter 2 (Adducing Evidence) or as directed by the court (s 29(1)).
2. A court, either of its own motion or on the application of the party calling the witness, may direct a witness to give evidence wholly or partially in narrative form (s 29(2)).
3. Section 29(4), which permits evidence to be given in the form of charts, summaries and other explanatory material, also applies to evidence from 'evidence gatherers', experts and opinion givers.

Giving evidence in narrative form

4. 'Narrative form' appears to refer to evidence given as a continuous story in the witness' own words and uninterrupted by questions.

5. Narrative presentation is most likely to suit witnesses who are experts, Aboriginal and Torres Strait Islanders, children and persons with an intellectual disability.

Operation of other Acts

6. The provisions of other Acts may:

   - impose limitations on the manner and form of questioning witnesses (s 8). For example, s 41E of the *Evidence Act 1958* (Alternative arrangements for giving evidence in certain proceedings by child complainants or complainants with a cognitive impairment); and/or
   - complement the provisions of s 29. For example, s 29(4) is complemented by s 223 (Jury documents) and s 232 (Manner of giving evidence) of the *Criminal Procedure Act 2009*.

Last updated: 13 October 2009

s 30 – Interpreters

A **witness** may give evidence about a fact through an interpreter unless the **witness** can understand and speak the English language sufficiently to enable the **witness** to understand, and to make an adequate reply to, questions that may be put about the fact.

When may a witness give evidence though an interpreter?

1. Section 30 sets out that the circumstances in which a witness may give evidence through an interpreter.

2. Those circumstances are if the witness cannot understand and speak the English language sufficiently to enable him or to understand, and to make an adequate reply to, questions that may be put about a fact.

Last updated: 13 October 2009

s 31 – Deaf and mute witnesses

(1) A **witness** who cannot hear adequately may be questioned in any appropriate way.

(2) A **witness** who cannot speak adequately may give evidence by any appropriate means.

(3) The **court** may give directions concerning either or both of the following—

(a) the way in which a **witness** may be questioned under subsection (1);

(b) the means by which a **witness** may give evidence under subsection (2).

(4) This section does not affect the right of a **witness** to whom this section applies to give evidence about a fact through an interpreter under section 30.

Questioning of deaf and mute witnesses

1. Section 31 provides for the giving of evidence by deaf and/or mute witnesses.

2. A deaf witness may be questioned in any appropriate way.

3. A mute witness may give evidence by any appropriate means.

4. Section 31(2) does not apply to a witness who becomes unable to answer questions because they are upset. Such a witness is not mute, and so their questioning cannot be adjusted by s 31. It may, however, be adjusted in accordance with the powers in s 26 to control the questioning of witnesses (*ABR v The Queen* [2020] NSWCCA 33, [78]–[79]).

5. A court may give directions in relation to the way in which a witness may be questioned under s 31 or the means by which a witness may give evidence under s 31.

6. The language 'any appropriate' provides a wide scope for a court to make directions. Such direction might include the use of augmentative and alternative communication to enhance or replace speech.

7. A witness to whom s 31 applies is not precluded from giving evidence through an interpreter under s 30.

Last updated: 15 December 2023

s 32 – Attempts to revive memory in court

(1) A **witness** must not, in the course of giving evidence, use a **document** to try to revive his or her memory about a fact or opinion unless the **court** gives leave.

(2) Without limiting the matters that the **court** may take into account in deciding whether to give leave, it is to take into account—

(a) whether the **witness** will be able to recall the fact or opinion adequately without using the **document**; and

(b) whether so much of the **document** as the **witness** proposes to use is, or is a copy of, a **document** that—

(i) was written or made by the **witness** when the events recorded in it were fresh in his or her memory; or

(ii) was, at such a time, found by the **witness** to be accurate.

(3) If a **witness** has, while giving evidence, used a **document** to try to revive his or her memory about a fact or opinion, the **witness** may, with the leave of the **court**, read aloud, as part of his or her evidence, so much of the **document** as relates to that fact or opinion.

(4) The **court** is, on the request of a party, to give such directions as the **court** thinks fit to ensure that so much of the **document** as relates to the proceeding is produced to that party.

Reviving memory in court

1. Section 32 applies only to a document and not to a thing.

2. Leave of the court is required for a witness to use a document to revive his or her memory in the course of giving evidence.

What must a court take into account in deciding whether to give leave?

3. When deciding whether to give leave under s 32(1) a court is take into account the matters set out in s 32(2). Section 32(2) does not limit the matters the court may take into account and they must include the matters listed in s 192(2). Leave may be given on terms (s 192(1)).

Witness may read aloud from document

4. A court may give leave for a witness who has used a document to revive his or her memory while giving evidence to read aloud from that document as part of his or her evidence.

Party may request production of document: s 32(4)

(a) Request

5. A party may request a court to direct that so much of a document that was used in accordance with s 32 (as relates to the proceeding) is produced to that party.

(b) Consequences of non-compliance

6. The consequence of not complying with a direction under subsection (4) is not clear. Odgers suggests it would depend on timing:

    - if the direction were made before the document is used by a person to revive his or her memory, leave to do so would not be granted;
    - if the request for a direction were made during cross-examination, and this were followed by an unreasonable failure to comply, there is no provision to allow the court to refuse to admit the evidence. The court may choose to rely on its contempt power in such circumstances (Stephen Odgers, *Uniform Evidence Law* (12th edition, 2016), [EA.32.300]).

Consequences of calling for production of documents

7. A party is not to be required to tender a document only because the party called for the document to be produced to the party or inspected it when it was so produced (s 35(1)).

8. The party who produces a document called for by another party is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it (s 35(2)).

Loss of client legal privilege

9. Client legal privilege is lost in respect of a document that a witness has used as mentioned in s 32 or s 33 (Evidence given by police officers) (s 122(6)).

Last updated: 13 October 2009

s 33 – Evidence given by police officers

(1) Despite section 32, in any **criminal proceeding**, a **police officer** may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the **police officer**.

(2) Evidence may not be so given unless—

(a) the statement was made by the **police officer** at the time of or soon after the occurrence of the events to which it refers; and

(b) the **police officer** signed the statement when it was made; and

(c) a copy of the statement had been given to the person charged or to the person's **Australian legal practitioner** a reasonable time before the hearing of the evidence for the prosecution.

Note

Paragraph (c) differs from the Commonwealth Act and New South Wales Act.

(3) A reference in this section to a **police officer** includes a reference to a person who, at the time the statement concerned was made, was a **police officer**.

Manner of giving evidence by police officers

1. Section 33 applies only in a criminal proceeding.
2. It provides that, subject to the conditions imposed by s 33(2), a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by him or her for giving of by police officers.
3. The conditions on the giving of evidence under s 33(2) are:
   - the statement must have been made by the police officer at the time of, or soon after, the occurrence of the events to which the statement refers; and
   - the police officer must have signed the statement when it was made; and
   - a copy of the statement must have been given to the person charged or to the that person's legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.
4. For the purposes of s 33, police officer includes a person who was a police officer at the time at which the statement concerned was made.

Consequences of calling for production of documents

5. A party is not to be required to tender a document only because the party called for the document to be produced to the party or inspected it when it was so produced (s 35(1)).
6. The party who produces a document called for by another party is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it (s 35(2)).

Loss of client legal privilege

7. Client legal privilege is lost in respect of a document that a witness has used as mentioned in s 32 (Attempts to revive memory in court) or s 33 (s 122(6)).

Last updated: 13 October 2009

s 34 – Attempts to revive memory out of court

(1) The **court** may, on the request of a party, give such directions as are appropriate to ensure that specified **document**s and things used by a **witness** otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) The **court** may refuse to admit the evidence given by the **witness** so far as it concerns a fact as to which the **witness** so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

Reviving memory out of court

1. This section provides that a party may request the court to give directions to ensure specified documents and things used by a witness to revive memory otherwise than while giving evidence are produced to the party for the purposes of the proceeding.
2. If a party refuses (without reasonable excuse) to comply with such a direction, the court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness had so tried to revive his or her memory.

Consequences of calling for production of documents

3. A party is not to be required to tender a document only because the party called for the document to be produced to the party or inspected it when it was so produced (s 35(1)).
4. The party who produces a document called for by another party is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it (s 35(2)).

Loss of client legal privilege

5. Client legal privilege is lost in respect of a document that a witness has used to try to revive their memory about a fact or opinion (s 122(6)).

Last updated: 13 October 2009

s 35 – Effect of calling for production of documents

(1) A party is not to be required to tender a **document** only because the party, whether under this Act or otherwise—

(a) called for the **document** to be produced to the party; or

(b) inspected it when it was so produced.

(2) The party who produces a **document** so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

Effect of calling for documents to be produced

1. Section 35 abolishes the rule in *Walker v Walker* (1937) 57 CLR 630. It provides that a party is not required to tender document only for the reason the party called for the document to be produced to the party or inspected it when it was so produced (s 35(1)).

2. The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it (s 35(2)).

Last updated: 13 October 2009

s 36 – Person may be examined without subpoena or other process

(1) The **court** may order a person who—

(a) is present at the hearing of a proceeding; and

(b) is compellable to give evidence in the proceeding—

to give evidence and to produce **document**s or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.

(2) A person so ordered to give evidence or to produce **document**s or things is subject to the same penalties and liabilities as if the person had been duly served with such a subpoena or other process.

(3) A party who inspects a **document** or thing produced to the **court** because of subsection (1) need not use the **document** in evidence.

Examination of persons without subpoena or other process

1. A court may order a person who is present at the hearing of a proceeding and who is compellable to give evidence in the proceeding, to give evidence and to produce documents or things even if a subpoena or other process had not been served on the person (s 36(1)).

Penalties and liabilities

2. Section 36(2) clarifies that a person ordered to give evidence or to produce documents under this section is subject to the same penalties and liabilities as if the person had been duly served with a subpoena or other process.

Effect of inspecting a document or thing under s 36

3. A party who inspects a document or thing produced under this section need not use the document in evidence (s 36(3)).

Last updated: 13 October 2009

Division 4 – Examination in chief and re-examination (ss 37–39)

This Division establishes a number of procedural rules with respect to adducing the evidence from a witness in examination and re-examination. It provides:

- leading questions are prohibited in examination and re-examination-examination unless an exception applies (s 37);
- the replacement of 'hostile witness' with 'unfavourable witness' and provision that the party who called such a witness may question him or her as if in cross-examination (s 38);

- re-examination is restricted to matters arising out of cross-examination unless the court gives leave otherwise (s 39).

Last updated: 13 October 2009

s 37 – Leading questions

(1) A leading question must not be put to a witness in examination in chief or in re-examination unless—

(a) the **court** gives leave; or

(b) the question relates to a matter introductory to the **witness**'s evidence; or

(c) no objection is made to the question and (leaving aside the party conducting the **examination in chief** or **re-examination**) each other party to the proceeding is represented by an **Australian legal practitioner** or **prosecutor**; or

(d) the question relates to a matter that is not in dispute; or

(e) if the **witness** has specialised knowledge based on the **witness**'s training, study or experience—the question is asked for the purpose of obtaining the **witness**'s opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.

(2) Unless the **court** otherwise directs, subsection (1) does not apply in **civil proceeding**s to a question that relates to an investigation, inspection or report that the **witness** made in the course of carrying out public or official duties.

(3) Subsection (1) does not prevent a **court** from exercising power under rules of **court** to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Leading questions

1. Section 37 makes provision for leading questions during examination-in-chief and re-examination.

2. A leading question is defined as a question that

"(a) directly or indirectly suggests a particular answer to the question or

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked" *(Evidence Act 2008* Dictionary).

When may a leading question be put to a witness during examination-in-chief or re-examination?

(a) General

3. A leading question may be put to a witness in examination-in-chief or re-examination only if:

- the court gives leave; or

- the question relates to a matter introductory to the witness' evidence; or
- no objection is made to the question and each party (other than the party conducting the examination-in-chief or re-examination) is represented; or
- the question relates to a matter that is not in dispute; or
- the question is asked of a witness who has specialised knowledge based on his or her training, study or experience and the question is asked for the purpose of obtaining the witness' opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given (s 37(1)).

(b) Civil proceedings

4. In a civil proceeding, a leading question may be put to a witness in examination-in-chief or in re-examination if the court directs and the question relates to an investigation, inspection or report the witness made in the course of carrying out public or official duties (s 37(2)).

Preservation of rules

5. A court is not prevented from exercising a power under rules of court to allow a written statement or report to be tendered or treated as examination-in-chief of its maker (s 37(3)).

Leading questions and VARE interviews

6. The prohibition on leading questions applies equally in VARE interviews which are used as the evidence-in-chief of a witness. However, questions which are leading in form may be used if the witness has previously broached the subject-matter of the question (*SLJ v R* (2013) 39 VR 514; [2013] VSCA 193, [30]–[33]; *Knowles v R* [2015] VSCA 141, [68]). This allows a questioner to clarify or seek more detail on earlier statements.

7. Where a leading question is asked in a VARE interview, the question will be improper and arguably contrary to law, and may be excluded as an exercise of discretion under section 138 (*Knowles v R* [2015] VSCA 141, [72]).

Last updated: 7 August 2015

s 38 – Unfavourable witnesses

(1) A party who called a **witness** may, with the leave of the **court**, question the **witness**, as though the party were cross-examining the **witness**, about—

(a) evidence given by the **witness** that is unfavourable to the party; or

(b) a matter of which the **witness** may reasonably be supposed to have knowledge and about which it appears to the **court** the **witness** is not, in **examination in chief**, making a genuine attempt to give evidence; or

(c) whether the **witness** has, at any time, made a **prior inconsistent statement**.

(2) Questioning a **witness** under this section is taken to be **cross-examination** for the purposes of this Act (other than section 39).

(3) The party questioning the **witness** under this section may, with the leave of the **court**, question the **witness** about matters relevant only to the **witness**'s **credibility**.

(4) Questioning under this section is to take place before the other parties cross-examine the **witness**, unless the **court** otherwise directs.

(5) If the **court** so directs, the order in which the parties question the **witness** is to be as the **court** directs.

(6) Without limiting the matters that the **court** may take into account in determining whether to give leave or a direction under this section, it is to take into account—

(a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and

(b) the matters on which, and the extent to which, the **witness** has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other **witness** if—

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and

(b) the party is a **witness** in the proceeding.

Unfavourable witnesses

1. This section abrogates the law relating to hostile witnesses in Victoria (*R v McRae* [2010] VSC 114 at [21]).
2. A court may grant leave for a party to question its own witness as though the party were cross-examining the witness, about the following:
   - evidence given by the witness that is unfavourable to the party; or
   - a matter which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

- whether the witness has, at any time, made a prior inconsistent statement.

3. The party questioning the witness may, with leave of the court, also question the witness about matter relevant only to the witness' credibility.

4. Section 38 does not permit cross-examination at large.

Meaning of 'unfavourable'

5. The word 'unfavourable' is not defined in the UEA. It has been held to mean 'not favourable'; and not to mean 'adverse' in the sense of 'hostile' (*DPP v Garrett* [2016] VSCA 31 at [64]–[66]; *R v Souleyman* (1996) 40 NSWLR 712 at 715; *R v Velevski(No 2)* (1997) 93 A Crim R 420; *Kanaan v R* [2006] NSWCCA 109 at [83]).

6. Consistent with this meaning, evidence will be unfavourable when it is not favourable to the case which the party is seeking to advance. This may arise even when the witness gives no evidence of some fact, if the circumstances are such that the party calling the witness contends that the witness should be able to give evidence of that fact (*DPP v Garrett* [2016] VSCA 31 at [67], [69]).

7. A party's case may be identified from the party's opening, its pleadings and the evidence the party has already called. Evidence inconsistent with or contradictory of that case will ordinarily meet the test of 'unfavourable' (*DPP v Garrett* [2016] VSCA 31 at [68]).

8. Earlier authorities stated that evidence is not unfavourable merely because it did not fit within a particular case theory postulated by the prosecution (*R v Kneebone* (1999) 47 NSWLR 450 at 461–462; [1999] NSWCCA 279; see also *Doyle v R; R v Doyle* [2014] NSWCCA 4 at [292] per Bathurst CJ (Price and Campbell JJ agreeing)). This approach has now been disapproved. Whatever is meant by the term 'case theory', it does not apply to a clearly identified case which the calling party seeks to establish. The prosecution is entitled to present a version of evidence consistent with the guilt of the accused, and to test the evidence of witnesses which is inconsistent with that version (*DPP v Garrett* [2016] VSCA 31 at [70]; *Randall v R* [2004] TASSC 42 at [24]).

9. Where a party's case is clearly identified, evidence may be unfavourable even if there is other evidence that is inconsistent with that party's case. Section 38 does not require the judge to consider where the balance of evidence lies, or where the truth lies, to determine whether evidence is unfavourable (*DPP v Garrett* [2016] VSCA 31 at [73]; *Randall v R* [2004] TASSC 42 at [24]).

10. Where a party seeks leave under s 38(1)(a), the focus must be on whether the evidence is unfavourable, and not whether the witness is unfavourable (*DPP v Garrett* [2016] VSCA 31 at [44]).

Calling a witness known to be unfavourable

11. 'Unfavourable' is not restricted to unexpectedly unfavourable.

12. The High Court has held:

- s 38 allows a party (subject to a grant of leave) to call a witness the party knows is unfavourable to it in order to cross-examine the witness and thereby to have a prior inconsistent statement admitted into evidence under s 38(1)(c);
- further, notwithstanding the hearsay rule, the prior inconsistent statement made by the unfavourable witness may be admissible under s 60 to prove the facts contained in it (*Adam v R* (2001) 207 CLR 96; [2001] HCA 57).

Granting of leave under s 38–

(a) Relevant matters

13. Without limiting the matters a court may take into account in deciding whether to give leave under s 38, it is to take into account:

- whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and
- the matters upon which, and extent to which, the witness has been, or is likely to be, questioned by another party.

14. The Court should also consider whether the accused would have conducted his or her case differently if notice had been given, or an application had been made, earlier (see *R v Semaan & Ors (Rulings 11 & 12)* [2016] VSC 552 at [16]).

15. Whether the party gave notice at the 'earliest opportunity' will depend on when the party learnt that the witness' evidence may be unfavourable. In the case of a prosecution witness who has indicated a desire to change his or her statement in a way that makes the statement relevantly unfavourable, the prosecution will be on notice of the risk at that time. The prosecution should then give notice that, if the witness gives evidence in accordance with the proposed changes to his or her statement, then the prosecution will seek leave to cross-examine (*R v Semaan & Ors (Rulings 11 & 12)* [2016] VSC 552).

16. Similarly, when a prosecution witness gives 'unfavourable' evidence on a Basha hearing, the prosecution should give notice that, if the witness gives equivalent evidence in the substantive hearing, then it will seek leave to cross-examine (*R v Semaan & Ors (Rulings 11 & 12)* [2016] VSC 552).

17. When considering the grant of leave it is essential to consider:

- how far, at least initially, cross-examination might be permitted to extend, having regard to the bounds set by s 38;
- the matters to which regard must be had when granting leave in ss 38(6) and 192; and
- whether prejudicial matters to which ss 135 and 137 might apply might be raised (*R v Hogan* [2001] NSWCCA 292 at [80]).

18. *R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186 states:

> 'No doubt it will often not be right to grant leave to ask s 38 questions on the widest possible basis at the outset. But it will often not be right for the court to distribute small dollops of leave in response to repeated small-scale applications. That would produce a stop-start approach to questions which is likely to be ineffective, likely to distract the jury as they go in and out, likely to lengthen the trial, and likely to make it more complex. It is a question of judgment to be made in the circumstances of each case what the extent of a particular grant of leave should be, and how far the questioner should be forced to make more than one application' (R v Le (2002) 54 NSWLR 474; [2002] NSWCCA 186 at [73] per Heydon JA); see also Doyle v R; R v Doyle [2014] NSWCCA 4 at [293] per Bathurst CJ (Price and Campbell JJ agreeing)).

(b) Standard of proof

19. *Evidence Act 2008* s 142 specifies that the standard of proof for determining whether evidence is admissible is the balance of probabilities. In the context of an application under s 38 made on the basis of a prior inconsistent statement, the relevant fact in issue will be whether the prior statement is inconsistent and was made by the witness. The court does not decide which is true, as a precondition to granting leave, as that is a question for the jury (*R v Officer A (No 2)* [2023] NSWSC 1285, [25]).

Questioning under s 38–

(a) Order of questioning

20. Unless the court otherwise directs, questioning under s 38 is to take place before the other parties cross-examine the witness (s 38(4)). If the court so directs, the order in which the parties question the witness is to be as the court directs (s 38(5)).

21. It is not an abuse of s 38 for the Crown, while knowing its witness was likely to give unfavourable evidence on a particular issue during cross-examination, to defer an application under s 38 until after cross-examination by the defence (*R v Parkes* [2003] NSWCCA 12).

(b) Scope of questions

22. If leave is granted under s 38(1) the questioning must be 'about' the subject/s described in s 38(1) which provided the basis for the granting of leave. Heydon JA in *R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186, [66]–[67] stated:

> 'One purpose of a s 38 examination must be to enable counsel calling the witness to demonstrate that the evidence in chief which led to the s 38 order is false. Another must be to enable counsel to demonstrate that any prior statement inconsistent with it is true. That latter purpose is assisted by s 60, which permits a prior inconsistent statement to be considered as evidence of what is represented, not merely as a matter affecting credibility. But s 60 by itself is not wholly effectual unless the questioner is able to interrogate with a view to demonstrating the truth of the prior inconsistent statement. There would be little point in permitting s 38 examinations otherwise and no point in the existence of s 38(3). The purposes described can be assisted by obtaining concessions from the witness about matters tending to indicate the falsity of the impugned evidence. One of these is the lateness with which the impugned story is advanced. Another is the inherent improbability of the impugned story. These purposes must also be capable of being assisted by the eliciting of evidence tending to show the truthfulness of prior statements inconsistent with the impugned evidence, such as the fact that they were made under conditions conducive to accurate recollection and expression and conducive to sincerity' (*R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186 at [66] per Heydon JA); see also *Doyle v R*; *R v Doyle* [2014] NSWCCA 4 at [293] per Bathurst CJ (Price and Campbell JJ agreeing)).

> 'In my opinion, on the true construction of s 38, leave may be granted under s 38 to conduct questioning not only if the questioning is specifically directed to one of the three subjects described in s 38(1), but also if it is directed to establishing the probability of the factual state of affairs in relation to those subjects contended for by the party conducting the questioning or the improbability of the witness's evidence on those subjects. In establishing the probability or improbability of one or other state of affairs, the questioner is entitled to ask questions about matters going only to credibility with a view to shaking the witness's credibility on the s 38(1) subjects' (*R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186 at [67] per Heydon JA); see also *Doyle v R; R v Doyle* [2014] NSWCCA 4 at [293] per Bathurst CJ (Price and Campbell JJ agreeing)).

Last updated: 15 December 2023

s 39 – Limits on re-examination

On re-examination—

(a) a **witness** may be questioned about matters arising out of evidence given by the **witness** in **cross-examination**; and

(b) other questions may not be put to the **witness** unless the **court** gives leave.

Nature of questions that may be asked during cross-examination

1. On re-examination, a witness may be questioned about matters arising out of evidence given by the witness in cross-examination (s 39(a)).
2. Other questions may not be put to the witness unless the court gives leave (s 39(b)).
3. Leave is required for a leading question to be put to a witness in re-examination (s 37(1)).
4. Section 38 (Unfavourable witnesses) applies to evidence elicited during re-examination.
5. In *Ward v R* [2017] VSCA 37 at [135], Maxwell P and Redlich JA made the following statement about the use of re-examination in relation to a child witness:

> Where the purpose of the cross-examination was to discredit an allegation made by a child in evidence in chief, or to raise questions as to its reliability, prosecuting counsel may in re-examination ask the child whether a particular statement made on the VARE is true or false. Particularly when defence counsel has elicited arguable inconsistencies, but has not taken the child to the terms of her allegations on the VARE and asked whether they are true, it would be entirely appropriate to do that in re-examination.

6. Earlier in the decision, Maxwell P and Redlich JA emphasised the importance of defence counsel, directly asking a child during cross-examination, after eliciting some seemingly significant inconsistency, whether the child maintains their initial account (at [125]). Without such direct questioning, the jury may not be properly assisted in assessing the witness' evidence and it will be appropriate for re-examination to ask the question which should have been asked in cross-examination.

Last updated: 4 July 2017

Division 5 – Cross-examination (ss 40–46)

Division 5 establishes a number of procedural rules with respect to cross-examination of a witness called by another party. It provides:

- no cross-examination of a witness who is called in error and who has not yet given evidence (s 40);
- the court may disallow improper questions or improper questioning in cross-examination (s 41(1)) and must do so for vulnerable witnesses (s 41(2));
- leading questions may be put in cross-examination unless the court disallows (s 42);
- a witness may be cross-examined about a prior inconsistent statement (s 43);
- a witness must not be cross-examined about a previous representation of another person except as provided by this section (s 44);
- provides for the production and use of documents which have been used in cross-examination pursuant to ss 43 or 44 (s 45);
- the court may, in specified circumstances, give leave to recall a witness with respect to a matter about which there was no cross-examination (s 46).

Last updated: 13 October 2009

s 40 – Witness called in error

> A party is not to cross-examine a **witness** who has been called in error by another party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

A witness called in error and not questioned may not be cross-examined

1. Section 40 prohibits a party from cross-examining a witness who has been called in error by another party and who has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

Last updated: 13 October 2009

s 41 – Improper questions

(1) The **court** must disallow an improper question or improper questioning put to a **witness** in **cross-examination**, or inform the **witness** that it need not be answered.

(3) In this section, *improper question or improper questioning* means a question or a sequence of questions put to a **witness** that—

(a) is misleading or confusing; or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

(c) is put to the **witness** in a manner or tone that is belittling, insulting or otherwise inappropriate; or

(d) has no basis other than a stereotype (for example, a stereotype based on the **witness**'s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(5) A question is not an improper question merely because—

(a) the question challenges the truthfulness of the **witness** or the consistency or accuracy of any statement made by the **witness**; or

(b) the question requires the **witness** to discuss a subject that could be considered distasteful to, or private by, the **witness**.

(6) A party may object to a question put to a **witness** on the ground that it is an improper question.

(7) However, the duty imposed on the **court** by this section applies whether or not an objection is raised to a particular question.

(8) A failure by the **court** to disallow a question under this section, or to inform the **witness** that it need not be answered, does not affect the admissibility in evidence of any answer given by the **witness** in response to the question.

Notes

1 A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section - see section 195

2 Section 41 differs from the Commonwealth Act and New South Wales Act.

Powers and duty to control improper questions

1. In relation to cross-examination, s 41:

- confers a discretion on the court to disallow an improper question or improper questioning put to a witness, or to inform the witness that the question need not be answered (s 41(1));
- imposes a duty on the court to disallow an improper question or improper questioning put to a vulnerable witness in certain circumstances.

Definition of improper question or improper questioning

2. The section defines *improper question or improper questioning* as a question or sequence of questions put to a witness that:

   - is misleading or confusing; or
   - is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
   - is put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
   - has no basis other than a stereotype (for example, based on the witness' sex, race, culture, ethnicity, age or mental, intellectual or physical disability) (s 41(3)).

3. A question is not an improper question only because:

   - it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
   - it requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness (s 38(5)).

Discretion to disallow improper question or questioning

4. A court may disallow an improper question,question or improper questioning, put to a witness in cross-examination, or inform the witness that he or she does not need to answer it.

Duty to disallow improper question or questioning of a vulnerable witness

5. A court must disallow any improper question or improper questioning put to a vulnerable witnesses unless the court is satisfied that, in all the relevant circumstances of the case, it is necessary for the question to be put (s 41(2)).

6. The obligation to disallow improper questions also forms part of the judicial officer's duty to ensure a fair trial, which includes controlling questioning which could jeopardise a fair trial (*Ward v R* [2017] VSCA 37 at [129] per Maxwell P and Redlich JA).

7. Some judges hold a pre-trial hearing to assess the capacity of a vulnerable witness to give evidence. As part of this process, it may be appropriate for the judicial officer to foreshadow " a disposition not to allow certain types of questions". The judge may also "where it is clear from the material available to the judge …disallow particular questions because of their form or content" (*Ward v R* [2017] VSCA 37 at [132]–[133] per Maxwell P and Redlich JA).

Who is a vulnerable witness?

8. A vulnerable witness is a witness who (a) is under the age of 18 years; or (b) has a cognitive impairment or an intellectual disability; or (c) the court considers to be vulnerable having regard to the matters set out in the section (s 41(4)).

9. One of the matters a court can consider in determining whether a witness is vulnerable is any mental or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject (s 41(4)(c)(ii). Without limiting the class of persons to which this may apply, a mental or physical disability is likely to include a communication disability.

10. For the purposes of the definition of *vulnerable witness*, it appears the court does not have to observe the relevant condition or characteristic which causes the witness to be vulnerable – it need only be made 'aware' of it (s 41(4)(c)(i)).

Objection to question

11. A party may object to a question put to a witness on the ground that it is an improper question; however, that duty imposed on the court by s 41 applies whether or not an objection is raised in relation to a particular question (s 41(6) and s 41(7)).

Consequences of failure to disallow, or to inform, under s 41

12. A failure by the court to disallow a question under s 41 or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question (s 41(8)).

Prohibited question not to be published

13. A person must not, without the express permission of a court, print or publish any question the court disallowed under this s 41 (s 195).

Last updated: 4 July 2017

s 42 – Leading questions

(1) A party may put a **leading question** to a **witness** in **cross-examination** unless the **court** disallows the question or directs the **witness** not to answer it.

(2) Without limiting the matters that the **court** may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which—

(a) evidence that has been given by the **witness** in **examination in chief** is unfavourable to the party who called the **witness**; and

(b) the **witness** has an interest consistent with an interest of the **cross-examiner**; and

(c) the **witness** is sympathetic to the party conducting the **cross-examination**, either generally or about a particular matter; and

(d) the **witness**'s age, or any mental, intellectual or physical disability to which the **witness** is subject, may affect the **witness**'s answers.

(3) The **court** is to disallow the question, or direct the **witness** not to answer it, if the **court** is satisfied that the facts concerned would be better ascertained if **leading question**s were not used.

(4) This section does not limit the **court**'s power to control **leading question**s.

Leading questions

1. A court may disallow a leading question put to a witness in cross-examination or direct the witness not to answer the question (s 42(1)).

2. Section 42 does not limit a court's power to control leading questions (s 42(4)).

3. A court must so disallow or direct if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used (s 42(3)).

4. Without limiting the matters a court may take into account in deciding whether to disallow or direct, the court is to take into account the extent to which:

- evidence given by the witness in examination-in-chief is unfavourable to the party who called the witness; and
- the witness has in interest consistent with an interest of the party of the examining party; and
- the witness is sympathetic to the party conducting the cross-examination, either generally or in relation to a particular matter; and
- the witness' age, and any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers (s 42(2)).

Last updated: 4 July 2017

s 43 – Prior inconsistent statements of witnesses

(1) A **witness** may be cross-examined about a **prior inconsistent statement** alleged to have been made by the **witness** whether or not—

(a) complete particulars of the statement have been given to the **witness**; or

(b) a **document** containing a record of the statement has been shown to the **witness**.

(2) If, in **cross-examination**, a **witness** does not admit that he or she has made a **prior inconsistent statement**, the **cross-examiner** is not to adduce evidence of the statement otherwise than from the **witness** unless, in the **cross-examination**, the **cross-examiner**—

(a) informed the **witness** of enough of the circumstances of the making of the statement to enable the **witness** to identify the statement; and

(b) drew the **witness**'s attention to so much of the statement as is inconsistent with the **witness**'s evidence.

(3) For the purpose of adducing evidence of the statement, a party may re-open the party's **case**.

(a) Scope

1. This section:

- sets out a procedure that must be followed if a witness does not admit having made an inconsistent statement;
- ensures a witness who is about to be attacked on credit is dealt with fairly;
- does not deal with other circumstances – such as when a witness admits having made a prior inconsistent statement;
- nothing in s 43 is directed to the admissibility of a prior inconsistent statement to prove the truth of its assertions;
- nothing in s 43 purports to limit the effect of ss 38, 103 or 60 (*Aslett v R* [2006] NSWCCA 49 at [75]).

(b) Preconditions to cross-examination on prior inconsistent statement

2. The section applies whether or not:

   - complete particulars of the statement have been given to the witness; or
   - a document containing a record of the statement has been shown to the witness (s 43(1)).

When may evidence of a prior inconsistent statement be adduced otherwise than from the witness who made the statement?

3. Under s 43, if a witness (in cross-examination) does not admit he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, during the cross-examination, the cross-examiner:

   - informs the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
   - draws the witness's attention to so much of the statement as is inconsistent with the witness's evidence (s 43(2)).

4. A party may re-open its case for the purpose of adducing evidence of the statement (s 43(3)).

Production of documents - refer s 45

5. Section 45 makes provision with respect to the production of a document which contains a prior inconsistent statement and which has been the subject of cross-examination under ss 43 or 44.

6. Section 45 applies to a party who is cross-examining, or has cross-examined, a witness 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.

Last updated: 13 October 2009

s 44 – Previous representations of other persons

(1) Except as provided by this section, a **cross-examiner** must not question a **witness** about a **previous representation** alleged to have been made by a person other than the **witness**.

(2) A **cross-examiner** may question a **witness** about the **representation** and its contents if—

(a) evidence of the **representation** has been admitted; or

(b) the **court** is satisfied that it will be admitted.

(3) If subsection (2) does not apply and the **representation** is contained in a **document**, the **document** may only be used to question a **witness** as follows—

(a) the **document** must be produced to the **witness**;

(b) if the **document** is a tape recording, or any other kind of **document** from which sounds are reproduced—the **witness** must be provided with the means (for example, headphones) to listen to the contents of the **document** without other persons present at the **cross-examination** hearing those contents;

(c) the **witness** must be asked whether, having examined (or heard) the contents of the **document**, the **witness** stands by the evidence that he or she has given;

(d) neither the **cross-examiner** nor the **witness** is to identify the **document** or disclose any of its contents.

(4) A **document** that is so used may be marked for identification.

Limits on cross-examination of previous representations of others

1. A witness must not be cross-examined about a previous representation alleged to have been made by a person other than the witness other than in accordance with s 44.

When may a witness be cross-examined about a previous representation alleged to have been made by another person?

2. A cross-examiner may question a witness about a previous representation (and its contents) alleged to have been made by another person only if:
   - evidence of the representation has been admitted; or
   - the court is satisfied it will be admitted (s 44(2)).
3. However, if evidence of the previous representation has not been admitted (or the court is not satisfied it will be admitted) and the representation is contained in a document, the document may be used to question a witness as follows:
   - the document must be produced to the witness;

- if the document is a tape recording, or any other kind of document from which sounds are reproduced, the witness must be provided the means to listen to the contents of the document without other persons present at the cross-examination hearing those contents;
- after examining or hearing the contents of the document, the witness must be asked whether the witness stands by the evidence he or she has given.

Identity of document to remain confidential

4. Neither the cross-examiner nor the witness is to identify the document or to disclose its contents.

5. A document used in accordance with s 44 must be marked for identification.

Production of documents - refer s 45

6. Section 45 makes provision with respect to the production of a document which contains a prior inconsistent statement and which has been the subject of cross-examination under s 43 or s 44.

7. Section 45 applies to a party who is cross-examining, or has cross-examined, a witness 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.

Last updated: 13 October 2009

s 45 – Production of documents

(1) This section applies if a party is cross-examining or has cross-examined a **witness** about—

(a) a **prior inconsistent statement** alleged to have been made by the **witness** that is recorded in a **document**; or

(b) a **previous representation** alleged to have been made by another person that is recorded in a **document**.

(2) If the **court** so orders or if another party so requires, the party must produce—

(a) the **document**; or

(b) such evidence of the contents of the **document** as is available to the party—

to the **court** or to that other party.

(3) The **court** may—

(a) examine a **document** or evidence that has been so produced; and

(b) give directions as to its use; and

(c) admit it even if it has not been tendered by a party.

(4) Subsection (3) does not permit the **court** to admit a **document** or evidence that is not admissible because of Chapter 3.

(5) The mere production of a **document** to a **witness** who is being cross-examined does not give rise to a requirement that the **cross-examiner** tender the **document**.

Production of documents the subject of cross-examination under s 43 or s 44

1. Section 45 applies to documents that have been the subject of cross-examination under s 43 or s 44.
2. The section applies to a party who is cross-examining, or has cross-examined, a witness 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.
3. If the court so orders, or if another party so requires, the party must produce to the court or to that other party:
   - the document; or
   - such evidence of the contents of the document as is available to the party.
4. The court may:
   - examine the document or other evidence that has been produced; and
   - give direction as to its use; and

- admit it even if it has not been tendered by a party.

5. The admissibility of the document produced is controlled by Chapter 3 (s 45(4)).

6. The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document (s 45(5)).

Impounding documents

7. The court may direct that a document tendered or produced before the court (whether or not it is admitted in evidence) is to be impounded and kept in the custody of an officer of the court or of another person for such period, and subject to such conditions, as the court thinks fit (s 188).

Last updated: 13 October 2009

s 46 – Leave to recall witnesses

(1) The **court** may give leave to a party to recall a **witness** to give evidence about a matter raised by evidence adduced by another party, being a matter on which the **witness** was not cross-examined, if the evidence concerned has been admitted and—

(a) it contradicts evidence about the matter given by the **witness** in **examination in chief**; or

(b) the **witness** could have given evidence about the matter in **examination in chief**.

(2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

Recalling witnesses

1. The UEA has not abrogated the rule in *Browne v Dunn* (1893) 6 R 67 (*Heaton v Luczka* 3/3/1998 NSWCA).

2. Consistently with this rule, s 46 addresses an evidential aspect of its operation by allowing, with leave, a witness to be recalled to give evidence about a particular matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined.

3. Therefore, a court is still required to consider whether a breach of that rule occurred.

4. Matters of fact and degree necessarily arise with respect to the application of the rule (*Vines v Australian Securities & Investments Commission* (2007) 73 NSWLR 451; [2007] NSWCA 75 at [62]).

5. If, during the course of the trial, it appears the rule has been offended and unfairness may result, the judge has a discretion about how best to remedy the unfairness in order that the trial does not miscarry (*Scalise v Bezzina* [2003] NSWCA 362 at [97]).

6. Consistently with this principle, in cases where a court determines a breach of the rule has occurred, in consequence of that breach a court may give leave under s 46(1) for the recall of the witness who was not cross-examined.

7. With respect to whether the evidence led is admissible when a breach of the rule has occurred:

- on one hand, the Act does not provide that a breach of the rule in *Browne v Dunn* is grounds for the exclusion of evidence, and s 56(1) provides that relevant evidence is admissible in the absence of express provision otherwise (see also *R v Allen* [1989] VR 736);

- on the other hand, Odgers suggests that the general powers of a court to control the conduct of a proceeding and to ensure fairness (s 11) means the exclusion of the evidence would be permissible (and not itself breach s 56 (the relevance rule)) (Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.2.4480]).

8. It should be noted, however, that ALRC Report 38 proposed that 'non-compliance should not result in the exclusion of the evidence and the judge should have a discretion to permit recall of the witness' (at p 65). Admissibility and use of this evidence is controlled by Chapter 3, especially ss 135, 136 and 137.

9. A breach of the rule in *Browne v Dunn* may be curable by the trial judge giving appropriate directions to the jury (*De Vries v R* [2013] VSCA 210 at [21]–[39] per Osborn JA (Bongiorno JA and Hargrave AJA agreeing); *CMG v R* (2013) 46 VR 728; [2013] VSCA 243 at [194]–[216] per Coghlan JA (Warren CJ and Redlich JA agreeing)). For further information on this matter, see the commentary in the Victorian Criminal Charge Book at 4.11.3 - Failure to Challenge Evidence (Browne v Dunn).

10. For detailed discussion of possible consequences of breach of the rule in *Browne v Dunn*, refer to Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.2.4480].

When may a court give leave under s 46 to a party to recall a witness?

11. Has evidence about a matter raised by evidence adduced by another party, being a matter on which a witness was not cross-examined, been admitted and:

- that evidence contradicts evidence about the matter given by the witness in examination-in-chief; or
- the witness could have given evidence about the matter in examination-in-chief?

12. If yes – the court may give leave to a party to recall the witness to give evidence about the matter.

13. A matter raised by evidence adduced by another party includes an inference drawn from, or that the party intends to draw from, that evidence (s 46(2)).

Last updated: 4 July 2017

Part 2.2 – Documents (ss 47–51)

On the basis of the UEA policy that all relevant evidence should be put before the tribunal of fact, Part 2.2 introduces significant reforms to the rules governing the admissibility of documentary evidence. The purpose of these reforms is to remove technical objections, to address technological change and to increase the flexibility to admit the contents of documents into evidence.

The Part 2.2 reforms are consistent with other UEA reforms such as those relating to cross-examination on documents, refreshing memory on documents, and proving attested documents.

Under the UEA, 'document' is broadly defined. Part 2.2 addresses documents as a source of evidence and facilitates the proving of their contents (as distinct from addressing the admissibility of those contents). It:

- establishes the scope of this Part is restricted to the adducing of evidence as to the contents of documents (s 47);
- sets out ways the contents of a document may be proved (s 48);
- provides for the proof of documents in foreign countries (s 49);
- subject to a direction from the court, permits voluminous or complex documents to be adduced in summary form (s 50);
- abolishes the original document rule (s 51).

Last updated: 13 October 2009

s 47 – Definitions

(1) A reference in this Part to a *document in question* is a reference to a **document** as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a **document** in question includes a reference to a **document** that is not an exact copy of the **document** in question but that is identical to the **document** in question in all relevant respects.

References to documents in question and to copies of such documents

1. The definition provided by s 47 is relevant to: s 48 (Proof of contents of documents); s 49 (Documents in foreign countries); and s 50 (Proof of voluminous or complex documents).

2. It establishes that these rules apply only when it is the contents of the document which is in issue.

Last updated: 13 October 2009

s 48 – Proof of contents of documents

(1) A party may adduce evidence of the contents of a **document** in question by tendering the **document** in question or by any one or more of the following methods—

(a) adducing evidence of an **admission** made by another party to the proceeding as to the contents of the **document** in question;

(b) tendering a **document** that—

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of **document**s;

(c) if the **document** in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a **document** that is or purports to be a transcript of the words;

(d) if the **document** in question is an article or thing on or in which information is stored in such a way that it cannot be used by the **court** unless a device is used to retrieve, produce or collate it—tendering a **document** that was or purports to have been produced by use of the device;

(e) tendering a **document** that—

(i) forms part of the records of or kept by a **business** (whether or not the **business** is still in existence); and

(ii) is or purports to be a copy of, or an extract from or a summary of, the **document** in question, or is or purports to be a copy of such an extract or summary;

(f) if the **document** in question is a **public document**—tendering a **document** that is or purports to be a copy of the **document** in question and that is or purports to have been printed—

(i) by a person authorised by or on behalf of the Government to print the **document** or by the Government Printer of the Commonwealth or by the government or official printer of another State or a Territory; or

(ii) by the authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country; or

(iii) by authority of an **Australian Parliament**, a House of an **Australian Parliament**, a committee of such a House or a committee of an **Australian Parliament**.

(2) Subsection (1) applies to a **document** in question whether the **document** in question is available to the party or not.

(3) If the party adduces evidence of the contents of a **document** under subsection (1)(a), the evidence may only be used—

(a) in respect of the party's **case** against the other party who made the **admission** concerned; or

(b) in respect of the other party's **case** against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a **document** in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by—

(a) tendering a **document** that is a copy of, or an extract from or summary of, the **document** in question; or

(b) adducing from a **witness** evidence of the contents of the **document** in question.

Proof of contents of documents

1. **Unavailability of documents and things** is defined (refer to Dictionary, Part 2, clause 5).
2. **Document in question** is defined in s 47.
3. Under the s 48, a party may adduce evidence of the contents of a document by tendering the document or by one or more of the following methods:
   - adducing evidence of an admission made by another party to the proceeding as to the content of a document (s 48(1)(a))
   - tendering a copy of a document (s 48(1)(b)
   - tendering a transcript of a recording (s 48(1)(c))
   - tendering a document produced by use of a device (s 48(1)(d))
   - tendering a copy, extract or summary of a business record (s 48(1)(e))
   - tendering an authorised copy of a public document (s 48(1)(f))
4. A party may adduce evidence of the contents of a document that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by tendering a copy, or an extract from, the document or adducing evidence from a witness of the contents of the document (s 48(4)).
5. The admissibility of evidence adduced under s 48 is to be determined in accordance with the provisions of Chapter 3.
6. Section 48 does not address any need to satisfy the court of the authenticity of the document (*National Australia Bank Ltd v Rusu & Ors* (1999) 47 NSWLR 309; [1999] NSWSC 539).
7. Admissibility is, however, subject to the document being validly authenticated (*Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419). See further Chapter 3 (particularly Part 3.1 (Relevance)), Chapter 4 (particularly Part 4.3 (Facilitation of Proof)), and s 183 (Inferences).
8. CCTV footage of the commission of an offence has been held to be a document for the purposes of s 48 'because it is a medium from which images of the offence can be reproduced with the aid of an appropriate play-back machine'. Further, security camera footage capturing the commission of an offence is a photograph or series of photographs which comprise a visual and permanent record of what could have been observed by a person in the position of where the camera was (*Wade v R* (2014) 41 VR 434; [2014] VSCA 13 at [24], [26] per Nettle JA (Redlich and Coghlan JJA agreeing)).

Last updated: 2 June 2014

s 49 – Documents in foreign countries

No paragraph of section 48(1) (other than paragraph (a)) applies to a **document** that is in a foreign country unless—

(a) the party who adduces evidence of the contents of the **document** in question has, not less than 28 days (or such other period as may be prescribed by the regulations or by rules of **court**) before the day on which the evidence is adduced, served on each other party a copy of the **document** proposed to be tendered; or

(b) the **court** directs that it is to apply.

Proof of contents of documents in foreign countries

1. Section 49 provides for the proof of the contents of documents in foreign countries.

2. It provides that the methods for proof of the contents of documents referred to in s 48 (other than the method under s 48(1)(a)) do not apply to proof of a document that is in a foreign country, unless:

- the party who adduces evidence of the contents of a document served a copy of the document on each other party at least 28 days (or any other period prescribed by the regulations or rules of court) before the evidence is adduced; or
- the court directs that one of the methods for proof of contents of documents set out in s 48 applies.

Last updated: 13 October 2009

s 50 – Proof of voluminous or complex documents

(1) The **court** may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more **document**s in question in the form of a summary if the **court** is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the **document**s in question.

(2) The **court** may only make such a direction if the party seeking to adduce the evidence in the form of a summary has—

(a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and

(b) given each other party a reasonable opportunity to examine or copy the **document**s in question.

(3) The **opinion rule** does not apply to evidence adduced in accordance with a direction under this section.

Proof of contents of voluminous or complex documents

1. **Document in question** is defined in s 47.

2. On the application of a party, a court may direct that the party may adduce evidence of the contents of two or more documents in the form of a summary if the court is satisfied it would not

otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in questions (s 50(1)).

3. For the purposes of the section, "summary" refers to the nature of the document and does not refer to the process by which it is produced. The fact that a "summary" is derived from another more comprehensive summary document does not prevent it from being a summary of the underlying document (*Re Idylic Solutions Pty Ltd* [2012] NSWSC 568 at [105]).

4. A court must not make such a direction unless the party seeking to adduce the evidence in the form of a summary serves on each other party a copy of the summary which discloses the name and address of the person who prepared the summary; and gives each other party a reasonable opportunity to examine or copy the documents to which the summary relates (s 50(2)).

5. There are three questions which must be decided when a party makes an application pursuant to s 50:

    - first, does the relevant document summarise the information contained in the underlying documents (as opposed to comprising conclusions or opinions)?;
    - secondly, are the underlying documents so voluminous and/or complex that it would not otherwise be possible conveniently to examine the evidence?; and
    - finally, has any other party been given a reasonable opportunity to examine or copy the documents in question (whether there might be time to do this between the date of a ruling and the commencement of trial is not strictly relevant) (*Re Idylic Solutions Pty Ltd* [2012] NSWSC 568 at [63])?

6. The summary may summarise one aspect of the underlying documents, provided that doing so does not provide a misleading picture of the contents of those underlying documents *(Re Idylic Solutions Pty Ltd* [2012] NSWSC 568 at [66]).

7. The opinion rule does not apply to evidence adduced in accordance with a direction under s 50 (s 50(3)).

Last updated: 29 May 2013

s 51 – Original document rule abolished

The principles and rules of the common **law** that relate to the means of proving the contents of **document**s are abolished.

Abolition of original document rule

1. Subject to some exceptions, the common law rule is that original documents are required to be tendered in evidence to prove their contents. This is described as the 'original document rule'. Section 51 abolishes this rule.

Last updated: 13 October 2009

Part 2.3 – Other Evidence (ss 52–54)

This Part:

- preserves the laws relating to adducing evidence other than documentary evidence or that given by a witness (s 52);
- provides for the conduct of an out-of-court view (which is now defined to include demonstrations, experiments and inspections) (s 53);
- provides that a view is admissible as evidence (s 54).

Last updated: 13 October 2009

s 52 – Adducing of other evidence not affected

This Act (other than this Part) does not affect the operation of any **Australian law** or rule of practice so far as it permits evidence to be adduced in a way other than by **witness**es giving evidence or **document**s being tendered in evidence.

Adducing of other evidence not affected

1. Section 52 preserves the law relating to the adducing of real evidence.

Last updated: 13 October 2009

s 53 – Views

(1) A **judge** may, on application, order that a demonstration, experiment or inspection be held.

(2) A **judge** is not to make an order unless he or she is satisfied that—

(a) the parties will be given a reasonable opportunity to be present; and

(b) the **judge** and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the **judge** may take into account in deciding whether to make an order, the **judge** is to take into account the following—

(a) whether the parties will be present;

(b) whether the demonstration, experiment or inspection will, in the **court**'s opinion, assist the **court** in resolving issues of fact or understanding the evidence;

(c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;

(d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;

(e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

(4) The **court** (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the **court** or, if there is a jury, by the jury.

Views

1. Section 53 permits a judge, on the application of a party, to order that a demonstration, experiment or inspection be held.

When may a judge order that a demonstration, experiment or inspection be held?

2. A judge is not to order that a demonstration, experiment or inspection be held unless he or she is satisfied:

    - the parties will be given a reasonable opportunity to be present during the demonstration, experiment or inspection; and
    - the judge and any jury will be present.

3. Under s 53(2)(a), the defendant in a criminal proceeding is entitled to be present at the demonstration, experiment or inspection (*Jamal v R* [2012] NSWCCA 198 at [26]–[41]).

4. A view which occurs in circumstances where the defendant is not given a reasonable opportunity to be present will constitute a fundamental flaw in the trial process (*Jamal v R* [2012] NSWCCA 198 at [46]).

5. In deciding whether to order that a demonstration, experiment or inspection be held, the judge may take into account the matters listed in s 53(3) (which list is not exhaustive).

Limited application of section

6. Section 53 does not apply to demonstrations, experiments or inspections conducted inside a courtroom (*Evans v R* (2007) 235 CLR 521; [2007] HCA 59).

7. In any event, an experiment is not to be conducted in the course of the court's deliberations (s 53(4)).

8. Section 53 does not apply in relation to the inspection of an exhibit by the court or jury (s 53(5)).

Last updated: 13 October 2009

s 54 – Views to be evidence

> The **court** (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

Views to be evidence

1. Section 54 permits a court and members of a jury to draw any reasonable inference from what the court or member sees, hears or otherwise notices during a demonstration, experiment or inspection.

Last updated: 13 October 2009

3 Admissibility of Evidence

Introduction

The UEA policy foundations – fact-finding, recognition of the different imperatives of civil and criminal trials, the need for procedural fairness, the need for predictability, and other concerns such as time and cost – are pivotal to the scheme and rules provided by this gateway chapter.

The overall scheme of the Chapter is the establishment of a primary rule of admissibility (relevance) which all evidence must satisfy to be admissible. If the relevance rule is satisfied, to be admitted the evidence must then satisfy whatever exclusionary rule/s of admissibility may apply to it – for example hearsay, opinion, credibility. Each exclusionary rule is itself qualified by a number of exceptions.

The foundational rules of the scheme are:

- all relevant evidence is admissible, and evidence that is not relevant is not admissible;
    - relevance is decided by consideration of the use that may rationally be made of the evidence;
    - 'use' means the use (or uses) to which the evidence, if admitted, could rationally be put (this is referred to as 'the relevance test');
- all relevant evidence is subject to the exclusionary rules (including their exceptions) and discretions.

To ensure procedural fairness, Chapter 3 contains various notice requirements and rights to call for production of witnesses and documents.

Key to admissibility: the relevance rules

The relevance rules provide the initial gateway through which all evidence must pass if it is to be admitted.

The critical relevance rule is the relevance test. Applying this test is the key to:

- the application of most of the exclusionary rules and discretions; and
- ensuring all necessary evidentiary directions and warnings are given.

The test is able to perform these roles because it requires the identification of the uses to which the evidence may be put. Once that is done, it will usually be straightforward to identify:

- the relevant exclusionary rules;
- the issues to be considered in applying ss 135–137; and
- when evidence is admitted, the permitted uses and potential prejudice relevant to warnings and directions.

To make this purposive identification:

- it will usually be sufficient to make the traditional inquiry of counsel, namely 'How is this put?';
- however, with evidence such as evidence of representations, prior conduct and character, it can be vital also to ask 'How else might this evidence be used (whether or not rationally)?' Such evidence often is relevant, or potentially so, for more than one reason and may carry with it the risk of unfair prejudice.

Identifying such matters (i.e. whether the evidence is relevant for more than one reason and the risk of unfair prejudice) is critical to:

- the application of the exclusionary rules;
- the assessment of the probative value and prejudice when applying ss 135–137; and
- the identification of the nature and content of directions that will need to be given to the jury to ensure:
    - evidence admitted for a limited purpose is used only for that purpose; and
    - when appropriate, warnings with respect to potential prejudicial effect are given.

Last updated: 22 October 2009

Part 3.1 – Relevance (ss 55–58)

Part 3.1 provides:

- relevant evidence is evidence which, if accepted, could 'rationally affect' the probability of the existence of a fact in issue (s 55);
- relevant evidence is admissible unless an exception applies (s 56(1));
- evidence that is not relevant is not admissible (s 56(2));
- relevance is determined by whether, if admitted, the evidence could rationally affect the existence of a fact in issue (s 55(1));
- a court may find evidence to be provisionally relevant and therefore provisionally admissible (s 57);
- a court may draw reasonable inferences from a document or thing to determine its relevance (s 58).

Last updated: 10 June 2015

s 55 – Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to—

(a) the **credibility** of a **witness**; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

Relevant evidence–

(a) Definition

1. Evidence is relevant when, if accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55(1)). This definition directs attention to the capacity rather than the weight of the evidence.
2. Evidence may still be relevant even if it relates only to the credibility of a witness, the admissibility of other evidence, or a failure to adduce evidence (s 55(2)).

(b) Minimal logical connection

3. This definition requires a minimal logical connection between the evidence and the fact in issue.
4. Relevant evidence need not make a fact in issue probable or sufficiently probable – it is enough if it could make the fact in issue more or less probable than it would have been without that evidence. In other words, it is enough for the evidence to be capable of affecting the probability of the existence of the fact (*DPP v Paulino* (2017) 54 VR 109, [66]–[67]).
5. When assessing the relevance of evidence tendered under an exception to the opinion rule, the court must consider whether the witness is adding anything to what the jury can itself determine from the primary evidence. For example, in *Smith v R* (2001) 206 CLR 650; [2001] HCA 50, the High Court held that evidence from police officers purporting to identify a person from CCTV images was irrelevant, as it added nothing to what the jury could observe from the CCTV images. In contrast, the Victorian Court of Appeal in *Meade v R* [2015] VSCA 171 at [183]–[185] held that evidence from a professional boot manufacturer regarding the possible brand of boots depicted

on CCTV was admissible, as it required specialised knowledge of the features of brands of boots (see also *Honeysett v R* (2014) 253 CLR 122; [2014] HCA 29).

6. Evidence will only be relevant if there is a means for the court to determine whether there is a minimal logical connection with the fact in issue. In *R v Crupi (Ruling No 1)* [2020] VSC 654, [86]–[88], Beale J held that evidence of forensic gait analysis was irrelevant due to uncertainties in the evidence:

> It may well be, as P submitted, that none of these matters significantly affected the accuracy of Professor Pandy's calculations but, on the present state of the evidence, there is no way of knowing whether that is the case. If the jury is to act rationally, there must be a proper basis for the jury to conclude that the accuracy of his calculations were not significantly affected by these matters. The evidence fails to provide a proper basis for such a conclusion.
> Another significant issue with Professor Pandy's evidence is the difficulty in concluding rationally that he was "comparing apples with apples". He conceded in cross — examination that there was no way of knowing whether the subjects in clips 1–95 were walking at their preferred speed. And yet he based his opinion that the subjects had gait patterns more consistent with older persons primarily on a comparison of the data with results obtained in gait studies of young and old adults whom it was known were walking at their preferred speed.
> In my view, these issues with Professor Pandy's evidence mean that it fails the test of relevance (s 55) and renders his evidence inadmissible (s 56).

7. In a circumstantial evidence case, whether a piece of evidence is relevant depends on the whole of the case. It is a mistake to attempt to determine the relevance of a piece of evidence in isolation from all other evidence (*Elomar v R* [2014] NSWCCA 303 at [240]).

8. Evidence that the accused was found in possession of the accoutrements of offending of the type charged is capable of rationally affecting whether the accused had committed offending of that type. Such evidence may be directly relevant as circumstantial evidence of guilt, even though it may also be indicative of a tendency towards crime (*R v Falzon* (2018) 264 CLR 361, [1]). For example, possession of a firearm, scales, numerous mobile telephones or significant quantities of cash can be relevant to prove that the accused was engaged in a business of trafficking drugs. Similarly, possession of a firearm may be relevant to whether the accused threatened to shoot someone (*R v Falzon* (2018) 264 CLR 361, [1]; *Arico v The Queen* (2018) 272 A Crim R 450, [43]–[120]).

9. An item of circumstantial evidence will only be relevant if there is a logical basis for rebutting other explanations of the evidence. When an item of circumstantial evidence only has probative value if a jury engages in speculation or conjecture about the connection between that evidence and the facts in issue, then the evidence will not be logically relevant (see *DPP v Massey* [2017] VSCA 38 at [21]–[24], [90]–[91]; *DPP v Wise* [2016] VSCA 173; *DPP v Paulino* (2017) 54 VR 109, [96]; *R v Wannouch* [2019] VSCA 97, [54]–[59]; *R v Crupi (Ruling No 2)* [2020] VSC 656).

10. Relevance is a relative concept, which must be assessed in the context of the whole of the evidence tendered in a trial. A piece of evidence may be relevant even if, standing alone, it is not capable of establishing guilt (*Marsh v R* [2015] NSWCCA 154 at [54]–[56]).

(c) 'Fact in issue'

11. Evidence must be relevant to a 'fact in issue'. 'A fact in issue' is a fact which is to be determined as a matter of substantive law (In a criminal proceeding, the elements of (a) the offence, (b) any applicable mode of complicity; (c) any defences that are open. In a civil proceeding, the elements of (a) the cause of action; (b) any defences). Thus, 'a fact in issue' has been described as 'the ultimate fact in issue', behind which issue 'there will often be many issues about facts relevant to the facts in issue' (*Smith v R* (2001) 206 CLR 650; [2001] HCA 50); cited with approval in *Murdoch (a Pseudonym) v R* (2013) 40 VR 451; [2013] VSCA 272 at [76] per Priest JA).

12. Evidence will not be relevant if the only issue to which it relates is a question of law. However, a court may receive expert evidence when determining whether particular words or phrases have

any specialised meaning and, if so, what that meaning is (*Victorian WorkCover Authority v Elsdon* (2013) 42 VR 434; [2013] VSCA 235 at [84]–[85] per Bongiorno JA and Dixon AJA).

(d) No discretion as to whether evidence is relevant or not

13. Section 55 does not allow any discretion as to whether evidence is relevant or not: 'although questions of relevance may raise nice questions of judgment, no discretion falls to be exercised. Evidence is relevant or it is not' (*Smith v R* (2001) 206 CLR 650; [2001] HCA 50).

14. All evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in a proceeding, is relevant to the proceeding (s 55(1)). In the majority decision in *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, [39], it was stated

> The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence. This follows from the words "if it were accepted", which are expressed to qualify the assessment of the relevance of the evidence. This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact. There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.

Determining admissibility – threshold question

15. The first step in determining admissibility is to ascertain whether the evidence is relevant:

- if it is not – it must be excluded;
- if it is – it is admissible unless an exclusionary rule applies or the court exercises a discretion to exclude it.

16. In *Murrell v R*, the Court of Appeal summarised how the principle of relevance applies to evidence that the accused possessed items which could have been used in the crime. Evidence that the accused had such items will ordinarily be admissible. However, where the evidence clearly establishes that the items in question were not used in the crime, then the evidence will have no probative value. Finally, where the link between the items in question and the items used in the crime is tenuous, the evidence will be relevant, but may be subject to exclusion under section 137 (*Murrell v R* [2014] VSCA 334 at [62]–[66], per Redlich JA (Maxwell P agreeing; Priest JA agreeing on the principles, but dissenting on the application to the facts of the case).

17. For cases involving culpable driving or dangerous driving causing death, evidence of a person's manner of driving prior to the accident in relation to which they are charged will only be relevant if there is a 'sufficient relationship between that earlier driving and the driving which is the subject of the charges' (*Semaan v R* (2013) 39 VR 503; [2013] VSCA 134 at [32] per Priest JA (Buchanan and Ashley JJA agreeing)).

18. In *Semaan*, the Court of Appeal stated that the general principles were set out by Winneke P in *R v Scott* [2003] VSCA 55 at [11]: Whether the lack of care and attention in driving at one point can be logically probative of lack of care and attention at another point must ultimately depend upon whether the two points are *so closely related in time, distance and circumstance* to allow the tribunal of fact to draw an inference that the manner of driving at the second point was of the same character as the manner of driving at the first point (*R v Scott* [2003] VSCA 55 at [11], cited with approval in *Semaan v R* (2013) 39 VR 503; [2013] VSCA 134 at [32] per Priest JA (Buchanan and Ashley JJA agreeing)).

19. In *Semaan*, the Court of Appeal ultimately concluded that evidence of two separate episodes of driving which occurred in the days before the relevant accident was too remote, both temporally

and circumstantially, to be relevant to the driving which led to the alleged offences (*Semaan v R* (2013) 39 VR 503; [2013] VSCA 134 at [33] per Priest JA (Buchanan and Ashley JJA agreeing)).

Relevance and evidence sought to be tendered by an accused

20. In *Green v R* [2015] VSCA 279, the Victorian Court of Appeal (Redlich and Kaye JJA and Beale AJA) noted that: The threshold for relevance, for an accused, is quite low, because the evidence, to be adduced on behalf of an accused, need only be capable of rationally affecting the probability of a fact in issue by raising a doubt in respect of it (at [34]).

21. The Court noted that trial judges should be slow to exclude defence evidence on the basis of relevance unless it is clear that the evidence is not relevant (*Green v R* [2015] VSCA 279 at [34]).

Last updated: 20 September 2021

s 56 – Relevant evidence to be admissible (ie: relevance as threshold rule of admissibility)

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

Relevant evidence to be admissible

1. Section 56 contains the primary rule of admissibility – all relevant evidence is admissible except as otherwise provided in the UEA (s 56(1)). If evidence is not relevant, it is not admissible (s 56(2)).

2. As section 56(1) makes clear, this primary rule of admissibility is subject to other provisions in the Act. Therefore, relevant evidence may be excluded pursuant to an exclusionary rule or a discretion (Haddara v The Queen (2014) 43 VR 53, [60]–[63]).

3. If evidence is objected to on the basis that it is not relevant, the party tendering the evidence needs to make clear the purpose for which the evidence is tendered and how it is relevant and admissible (*Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342 at [30] per Meagher JA (McColl JA and Sackville AJA agreeing); see also *Potts v Miller* (1940) 64 CLR 282 at 292 per Starke J).

4. As to when reasons need to be given for a ruling regarding the admissibility of a particular piece of evidence, not every ruling about the admissibility of evidence needs to be accompanied by reasons and it is not possible to 'formulate a single criterion by reference to which it can be judged whether reasons should be given' (*Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342 at [33] per Meagher JA (McColl JA and Sackville AJA agreeing), citing *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 at 260, 279; *Kwan v Kang* [2003] NSWCA 336 at [113]–[114]; *Evans v R* (2007) 235 CLR 521; [2007] HCA 59 at [34]).

5. However, for cases involving the exercise of a discretion or an intermediate question of fact or law must be resolved before determining whether evidence is admissible, short reasons may be warranted. The perceived importance of the evidence and the likely effect of its rejection or admission on the outcome of the case are also important factors to consider in determining whether reasons are necessary (*Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342 at [33] per Meagher JA (McColl JA and Sackville AJA agreeing), citing *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 at 260, 279; *Kwan v Kang* [2003] NSWCA 336 at [113]–[114]; *Evans v R* (2007) 235 CLR 521; [2007] HCA 59 at [34]).

6. If a party wants to preserve its rights to appeal a particular ruling and the basis for the ruling is not clear from the argument, 'it should press for that basis to be stated, however shortly' (*Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342 at [33] per Meagher JA (McColl JA and Sackville AJA agreeing)).

Odgers on determination of admissibility

7. Odgers (*Uniform Evidence Law* (online at 2 June 2014) at [EA.56.60]) suggests that, in determining whether evidence may be admitted and how it may be used, it will be necessary to determine:

- whether the evidence in question is relevant (as defined in s 55) or, at least, provisionally relevant (s 57)
- how the evidence is relevant (it may be relevant in different ways and in respect of more than one fact in issue)
- what use or uses are sought to be made of the evidence
- whether any of the exclusionary rules in Chapter 3 apply to the evidence (some of the rules only apply to a particular use of evidence)
- whether one permissible use of the evidence will allow it to be used for an otherwise impermissible use (e.g., s 60)
- whether discretionary exclusion of the evidence is appropriate (ss 135, 137, or 138)

and, it may be necessary to determine:

- whether an order should be made under ss 169(1)(c) or (3) that the evidence not be admitted in evidence (due to non-compliance with the request procedure in ss 166–169)
- whether discretionary prohibition of a particular use of the evidence is appropriate (s 136)
- whether, in civil proceedings, an order can and should be made that a provision of the Act is not to apply to the evidence (s 190(3))
- whether there has been an effective waiver of a provision of the Act (s 190(1)).

Last updated: 20 September 2021

s 57 – Provisional relevance

(1) If the determination of the question whether evidence adduced by a party is relevant depends on the **court** making another finding (including a finding that the evidence is what the party claims it to be), the **court** may find that the evidence is relevant—

(a) if it is reasonably open to make that finding; or

(b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or as part of involvement in the commission of an offence or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Relevant evidence

1. Section 57 enables the court to find that evidence is relevant in circumstances where its relevance depends on the court making some other finding. The court may make such finding of provisional relevance:

- if it is reasonably open to make that other finding; or
- subject to further evidence being admitted that will make it reasonably open to make that other finding.

'Reasonably open'

2. The requirement that the finding be 'reasonably open' is a similar test to 'reasonable evidence' and equivalent to 'a prime facie case' (*R v Watt* [2000] NSWCCA 37 at [8]; *Jackson v TCN Channel 9 Pty Ltd* [2002] NSWSC 1229 at [40] per Adams J; cf *ACCC v Leahy Petroleum* (2007) 160 FCR 321 at 340 [54] per Gray J).

Common Purpose

3. The court may use the evidence in question in order to determine whether it is open to make the other finding. That other finding may be that a person was acting to further a common purpose with another person/s. This includes where that common purpose was to effect an unlawful conspiracy and criminal offending.

4. At common law, evidence of statements made by co-conspirators was admissible if the statements were in furtherance of the conspiracy and there was independent evidence that the maker of the statement was part of the conspiracy. The equivalent principle under the *Evidence Act 2008* is covered by a combination of ss 57(2) and 87. The effect of these provisions is that there is no requirement for independent evidence of conspiracy (s 57(2); *Macdonald v The Queen* [2023] NSWCCA 250, [143]–[149], [166]), and the test for admissibility is whether it is reasonably open to find that the statement was made in furtherance of the conspiracy (s 87(1)(c)).

Authentication

5. It is suggested that a court does not need to make a finding as to the authenticity of a document when determining if it is provisionally relevant, provided that a finding as to authenticity is reasonably open (*Boucher v The Queen* [2022] VSCA 3, [51]–[56]; *Cordelia Holdings Pty Ltd v Newkey Investment Pty Ltd* [2002] FCA 1018 at [52]–[54] per Carr J; *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 305 at [25] per Madgwick J; *O'Meara v Dominican Fathers* (2003) 153 ACTR 1; [2003] ACTCA 24 at [85] per Gyles and Weinberg JJ; *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355 at [99]–[100] per Perram J).

Last updated: 15 December 2023

s 58 – Inferences as to relevance

(1) If a question arises as to the relevance of a **document** or thing, the **court** may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

When will s 58 be relevant?

1. In determining the provisional relevance of evidence, the Act – by s 58 and s 183 - allows the court to draw inferences about the authenticity of a document or thing from the document or thing itself (at common law, such reasoning was not permitted). For example:

- a court may, from its contents, draw the inference that a book of receipts forms part of a particular, relevant business record. The practical realities of a case may, however, require other evidence authenticating the document.

Last updated: 15 September 2017

Part 3.2 – Hearsay (ss 59–75)

Overview

A particular UEA policy imperative for the hearsay provisions is that the 'best evidence available' to a party should be received to assist the parties to present all relevant evidence and to give the courts competing versions of the facts. 'Best available evidence' adverts to a balance between the quality of the evidence and its availability. Receiving the best available evidence also contributes to both the appearance and the reality of fact-finding, and so enhances the fairness of the trial process.

Part 3.2 rationalises and simplifies hearsay law. The rules and the exceptions are based on factors which affect reliability and the ability to test the evidence by cross-examination. They are also designed to overcome the need for complicated directions to juries with respect to how hearsay evidence may be used.

Division 1 provides a basic exclusionary rule for hearsay evidence, a rule which is purposive and reduced in scope from that at common law.

The hearsay rule is subject to exceptions and the application of the discretions. The exceptions are broader than existing common law and statutory exceptions, and are distinguished on the bases of 'first-hand' or more remote hearsay and, in the case of first-hand hearsay, on the bases of:

- civil or criminal proceedings, and
- the availability or unavailability of a witness.

The hearsay exceptions which relate to civil proceedings are broad in scope. Those which relate to criminal proceedings, particularly with respect to hearsay led by the prosecution, are more restricted than those available in the civil jurisdiction.

The main exceptions have been rationalised and are found at:

- Div. 2 ('First-hand' hearsay) of this Part 3.2;
- Div. 3 (Other exceptions to the hearsay rule) of this Part 3.2 – this Division applies to more remote hearsay; and
- Part 3.4 (Admissions) (including admissions (s 81) and representations about employment or authority (s 87)).

The other important 'exception' to the hearsay rule is:

- Section 60 of Div. 1 (The hearsay rule) of this Part 3.2.

Other exceptions include:

- exceptions to the rule excluding evidence of judgments and convictions (s 92(3));
- character of and expert opinion about accused persons (ss 110 and 111).

Last updated: 22 October 2009

Division 1 – The hearsay rule (ss 59–61)

This Division establishes the hearsay rule. The rule excludes evidence of a previous representation in specified circumstances.

The rule is subject to a number of exceptions created in the remainder of this Part 3.2 (including first-hand and more remote hearsay), and in Part 3.4 (Admissions), Part 3.5 (Evidence of Judgments), and Part 3.8 (Character).

Last updated: 22 October 2009

s 59 – The hearsay rule: exclusion of hearsay evidence

(1) Evidence of a **previous representation** made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the **representation**.

(2) Such a fact is in this Part referred to as an **asserted fact**.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the **representation**, the **court** may have regard to the circumstances in which the **representation** was made.

The hearsay rule–

(a) A purposive rule

1. The exclusionary rule set out in s 59(1) is referred to as the hearsay rule. It is a purposive rule.

2. A 'representation' is defined to include both statements and conduct.

3. While the hearsay rule captures implied assertions, the court must pay attention to what 'it can reasonably be supposed that the person intended to assert'. Where a person asks a question, there might not be any intended assertion (see *Crawford v The King* [2023] VSCA 173, [59]–[62]).

(b) The rule does not include unintended implied assertions

4. The hearsay rule applies to only intentional assertions of fact (reasonably supposed). The terms of the rule exclude assertions of fact the maker did not intend to assert, such as accidental assertions. Thus, unintended assertions are not covered by the hearsay exclusionary rule and, unless not relevant or excluded on another basis, will be admissible (s 59(1)).

5. The representation-maker's intention, when in issue, is to be determined having regard to the circumstances in which the representation was made (s 59(2A)).

6. In Commissioner of the *Australian Federal Police v Zhang & Anor (Ruling No 2)* [2015] VSC 437, T Forrest J held that in relation to a report from the Australian Taxation Office on a person's taxation status, particular pages that were blank constituted an absence of representations.. While the blank entries allowed for an inference that the ATO held no information for the relevant time, this was not an assertion made by the document (at [19]).

7. Section 59(2A) requires the application of an objective test in determining the issue of intention to assert a fact (e.g., the circumstances and the maker's conduct). This test was inserted in response to the decision of the Supreme Court of New South Wales in *R v Hannes* [2000] NSWCCA 503 in which the court adopted a potentially far-reaching approach to this issue.

Does the hearsay rule apply?

8. The hearsay rule applies to evidence in relation to which the following questions can all be answered in the affirmative:

- is the evidence under consideration evidence of a previous representation?
- was the previous representation made by a person?
- is evidence of the previous representation being adduced to prove the existence of a fact asserted by the representation? (e.g., a prior statement tendered for credibility purposes would not be excluded by s 59.)
- can it 'reasonably be supposed' that the person who made the representation intended to assert the existence of the fact? (This requirement discourages subjective investigation of the intent of the person who made the representation; and the court may have regard to the circumstances in which the representation was made to determine this.)

The hearsay rule and assessing probative value

9. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the High Court stated that when assessing the probative value of evidence, the judge must assume that the evidence is accepted. That is, that the evidence is both credible and reliable (at [39] and [48]) and taken at its highest [50].

10. For further discussion on *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 and the meaning of "probative value", see the ***Dictionary***.

Previous representations and interpreters

11. Evidence of previous representations made through an interpreter is not second-hand hearsay. The interpreter functions as a translation device and evidence of the representation is treated as if it was made in a language the witness understood. However, the witness's account of the representation will only be admissible if the interpreter gives evidence that they could and did accurately translate the representation. If that condition is satisfied, then a witness may give evidence of the representation under the first-hand hearsay rules (*Gaio v R* (1960) 104 CLR 419; *DPP v BB* (2010) 29 VR 110; [2010] VSCA 211; *Azizi v R* [2012] VSCA 205; *NT v R* [2012] VSCA 213).

Last updated: 15 December 2023

s 60 – Exception: evidence relevant for a non-hearsay purpose

(1) The **hearsay rule** does not apply to evidence of a **previous representation** that is admitted because it is relevant for a purpose other than proof of an **asserted fact**.

(2) This section applies whether or not the person who made the **representation** had personal knowledge of the **asserted fact** (within the meaning of section 62(2)).

(3) However, this section does not apply in a **criminal proceeding** to evidence of an **admission**.

Section 60 exception to hearsay rule: evidence relevant and admitted for a non-hearsay purpose

1. This section operates to enable evidence of a previous representation, which is admitted because it is relevant for a purpose other than proof of an asserted fact, to be used to prove the existence of that fact, once it is admitted for the other purpose. This is in direct contrast to the position at common law.

2. The section operates by force of law where evidence is admitted for a non-hearsay purpose. It does not depend on the judge exercising a discretion. Instead, the effect of s 60 may be reduced by the judge exercising the power under s 136 (see below).

3. The section also does not depend on the subjective purpose or intention of the party adducing the evidence. Instead, the court must objectively assess whether the evidence is admissible for a non-hearsay purpose, and, if so, s 60 has the effect of enabling hearsay uses of the evidence, subject to exclusionary and discretionary provisions (*Schanker v The Queen* [2018] VSCA 94, [100]).

4. Subsection (2) was inserted to overcome the High Court's decision in *Lee v The Queen* (1998) 195 CLR 594; [1998] HCA 60, which on one view limited the s 60 exception to first-hand hearsay. Section 60(3), however, provides, consistent with *Lee v The Queen*, that the s 60(1) exception does not extend to evidence of admissions adduced in criminal proceedings.

5. As mentioned, the limit of this exception is that it does not apply to evidence of admissions in criminal proceedings (s 60(3)).

    - However, an admission might still be admissible under s 81 as an exception to the hearsay rule if it is 'first-hand' hearsay (see s 82).
    - If the admission is more remote hearsay, then even if it has been admitted for a non-hearsay purpose, it can be used only for that purpose.

Jury warning

6. If hearsay evidence has been admitted for another purpose and s 60 applies, then:

    - there is no requirement to warn any jury with respect to use of that evidence for a hearsay purpose. It has, however, been suggested that it is preferable for a trial judge to direct a jury that the factual assertions in a representation so admitted may be used as evidence of those facts (*Raimondi v R* [2013] VSCA 194 at [25] per Redlich JA (Osborn JA and Macaulay AJA agreeing));
    - if requested, there is a requirement to consider warning any jury with respect to the reliability of that evidence (s 165 regarding civil proceedings and *Jury Directions Act 2015* s 32 regarding criminal proceedings).

Relevance of discretionary and mandatory exclusions

7. While s 60 lifts the hearsay rule in certain circumstances, the powers conferred by s 135 (General discretion to exclude evidence), s 136 (General discretion to limit use of evidence) and s 137 ([Mandatory] Exclusion of prejudicial evidence in criminal proceedings), provide controls to ensure, in particular, that unfair prejudice is avoided (*Schanker v The Queen* [2018] VSCA 94, [84]).

    - For example, s 60(1) lifts the hearsay exclusionary rule from the evidence of an expert witness as to the basis of his or her opinion which otherwise could not be used to prove the truth of the facts relied on (because of the hearsay rule). Section 136 may be used to limit the use of this evidence, and ss 135 and 137 to exclude the evidence if their terms apply.

Last updated: 29 September 2019

s 61 – Exceptions to the hearsay rule dependant on competency

(1) This Part does not enable use of a **previous representation** to prove the existence of an **asserted fact** if, when the **representation** was made, the person who made it was not competent to give evidence about the fact because of section 13(1).

(2) This section does not apply to a contemporaneous **representation** made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

(3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the **representation** was made the person who made it was competent to give evidence about the **asserted fact**.

Exceptions to hearsay rule dependant on competency of maker of previous representation

1. The exceptions to the hearsay rule do not allow the use of a previous representation (other than a contemporaneous representation – s 61(2)) to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about that fact because of s 13(1) (Competence – lack of capacity).
2. For the admissibility of contemporaneous representations, see s 66A.

Last updated: 22 October 2009

Division 2 – 'First-hand' hearsay (ss 62–68)

The exceptions in Division 2 all relate to 'first-hand' hearsay and are distinguished on the bases of civil or criminal proceedings and the availability or unavailability of a witness.

With respect to civil proceedings, the exceptions are broad. This scope, while still based on policy imperatives of best available evidence, procedural fairness and the containment of the costs of such access to justice, nonetheless recognises the dispute resolution nature of such proceedings.

With respect to criminal proceedings, the additional policy concern to avoid wrongful convictions ensures the exceptions are more restrictive, particularly for hearsay led by the prosecution.

The first-hand exceptions are:

- civil proceedings if maker not available (s 63)
- civil proceedings if maker available (s 64)
- criminal proceedings if maker not available (s 65)
- criminal proceedings if maker available (s 66)
- contemporaneous statements about a person's health etc (s 66A).

There are notice requirements for first-hand hearsay (s 67) and the discretions apply.

Last updated: 23 December 2021

s 62 – Restriction to 'first-hand' hearsay

(1) A reference in this Division (other than in subsection (2)) to a **previous representation** is a reference to a **previous representation** that was made by a person who had personal knowledge of an **asserted fact**.

(2) A person has personal knowledge of the **asserted fact** if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a **previous representation** made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the **asserted fact** if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the **representation** referred to in that section was made.

'First-hand' hearsay

1. The hearsay exceptions in Division 2 of Part 3.2 are limited to first-hand hearsay as defined in s 62.

2. First-hand hearsay is evidence of a previous representation made by a person who has personal knowledge of an asserted fact (s 62(1)).

3. A person has personal knowledge of an asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on the person having seen, heard or otherwise perceived the asserted fact (s 62(2)).

4. Knowledge about a fact based on another's previous representation about the fact is not "personal knowledge' as defined (s 62(2)).

5. Whether a statement is first-hand or more remote hearsay may depend on the intended use of the statement. In *Glowacki v The King* [2023] VSCA 176 at [10]–[19], A made a statement to B, which revealed that A had sustained injuries escaping from police. B then reported that statement to C, a police officer, and made a police statement. B however refused to give evidence. The court held that B's police statement of her conversation with A was second-hand hearsay and so inadmissible, as it was only relevant to establish that A had in fact sustained the relevant injuries. In contrast, in *R v Lindholm* [2019] VSC 726 at [19]–[25], A made a statement to B (PR1) which was to be used indirectly to show that A had killed the deceased, as it was evidence that A knew or believed the deceased had been killed. B reported the statement to C (PR2). B and C were available to give evidence. The court held that both B and C could give evidence of PR2, as the asserted fact was treated as whether A made PR1.

First-hand hearsay exceptions

6. These exceptions are set out in five provisions. The first four are separated based on:
    - civil proceedings–
        - witness not available (s 63)
        - witness is available (s 64)
    - criminal proceedings–
        - witness not available (s 65)
        - witness is available (s 66).

7. An additional provision that may be applied in either civil or criminal proceedings is s 66A (Exception – contemporaneous statements about a person's health etc).

Last updated: 15 December 2023

s 63 – Exception: civil proceedings if maker not available

(1) This section applies in a **civil proceeding** if a person who made a **previous representation** is not available to give evidence about an **asserted fact**.

(2) The **hearsay rule** does not apply to—

(a) evidence of the **representation** that is given by a person who saw, heard or otherwise perceived the **representation** being made; or

(b) a **document** so far as it contains the **representation**, or another **representation** to which it is reasonably necessary to refer in order to understand the **representation**.

Exception to hearsay rule – civil proceedings if maker of previous representation not available to give evidence

1. **Unavailability of persons** has the meaning given by clause 4 of Part 2 of the Dictionary.

2. Section 63 applies in civil proceedings where a person who made a previous **representation** is not available to give evidence about an asserted fact (s 63(1)).

3. The previous representation must concern a fact within the maker's personal knowledge (s 62(1)).

4. In such a case, the hearsay rule does not apply to:

   - evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made; or
   - a document, in so far as it contains the representation or is needed to understand the representation (s 63).

Credibility of persons who are not witnesses

5. Section 108A allows a party against whom hearsay evidence has been admitted in circumstances where the person who made the previous representation was not called as a witness, to adduce credibility evidence about that person if the evidence could substantially affect the assessment of that person's credibility (s 108A).

Notice to be given

6. There are notice requirements for s 63(2). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under this exception. The notice must set out the provisions and grounds relied upon (s 67).

Last updated: 22 October 2009

s 64 – Exception: civil proceedings if maker available

(1) This section applies in a **civil proceeding** if a person who made a **previous representation** is available to give evidence about an **asserted fact**.

(2) The **hearsay rule** does not apply to—

(a) evidence of the **representation** that is given by a person who saw, heard or otherwise perceived the **representation** being made; or

(b) a **document** so far as it contains the **representation**, or another **representation** to which it is reasonably necessary to refer in order to understand the **representation**—

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the **representation** to give evidence.

(3) If the person who made the **representation** has been or is to be called to give evidence, the **hearsay rule** does not apply to evidence of the **representation** that is given by—

(a) that person; or

(b) a person who saw, heard or otherwise perceived the **representation** being made.

(4) A **document** containing a **representation** to which subsection (3) applies must not be tendered before the conclusion of the **examination in chief** of the person who made the **representation**, unless the **court** gives leave.

Exception to hearsay rule – civil proceedings if maker of previous representation available to give evidence

1. Section 64 applies in civil proceedings where a person who made a previous representation is available to give evidence about an asserted fact (s 64(1)). *Unavailability of persons* has the meaning given by clause 4 of Part 2 of the Dictionary.
2. The previous representation must concern a fact within the maker's personal knowledge (s 62(1)).
3. Section 64 effectively creates two separate exceptions to the hearsay rule in the above circumstances:

(a) under **s 64(2)**, if it would cause undue expense, undue delay or would not be reasonably practicable to call the maker of the representation, the hearsay rule does not apply to:

- evidence of a previous representation given by a person who saw, heard or otherwise perceived the representat6ion being made; or
- a document in so far as it contains the representation or is needed to understand the representation.

(b) under **s 64(3)**, if the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation given by:

- that person; or
- a person who saw, heard or otherwise perceived the representation being made.

4. In these circumstances, unless the court gives leave, a document containing the representation must not be tended before the conclusion of the examination-in-chief of the person who made the representation (s 64(4)).

Undue expense, undue delay or not reasonably practicable

5. Relevant matters in determining whether it would cause undue expense to call the maker of a representation include:

    - the actual cost of securing the witness's attendance;
    - the amount of that cost compared to the value of what is at stake in the litigation; and/or
    - the importance of the evidence the witness might give (*Wilson v Mitchell* [2014] VSC 332 at [19] per T Forrest J; *Caterpillar Inc v John Deere Ltd (No 2)* [2000] FCA 1903 at [25] per Heerey J).

6. It is unlikely the mere fact that the maker of a representation is overseas will be sufficient to establish this exception to the hearsay rule. It will often be practicable to secure an overseas witness' attendance by means of an audio-video link (*Wilson v Mitchell* [2014] VSC 332 at [20] per T Forrest J).

Credibility of persons who are not witnesses

7. Section 108A allows a party against whom hearsay evidence has been admitted in circumstances where the person who made the previous representation was not called as a witness, to adduce credibility evidence about that person if the evidence could substantially affect the assessment of that person's credibility (s 108A).

Notice to be given

8. There are notice requirements relating to s 64(2). A party must provide reasonable notice in writing to each other party of its intention to adduce first-hand hearsay evidence. That notice must set out the provisions and grounds relied upon (s 67).

Objections to tender of hearsay evidence in civil proceedings if maker available

9. A party may object to the failure to call a witness on the grounds of undue expense or delay or impracticability (s 68). The court will determine whether the objection is unreasonable, and may order the objecting party to bear the costs of calling the person who made the representation.

Last updated: 1 December 2014

s 65 – Exception: criminal proceedings if maker not available

(1) This section applies in a **criminal proceeding** if a person who made a **previous representation** is not available to give evidence about an **asserted fact**.

(2) The **hearsay rule** does not apply to evidence of a **previous representation** that is given by a person who saw, heard or otherwise perceived the **representation** being made, if the **representation**—

(a) was made under a duty to make that **representation** or to make **representation**s of that kind; or

(b) was made when or shortly after the **asserted fact** occurred and in circumstances that make it unlikely that the **representation** is a fabrication; or

(c) was made in circumstances that make it highly probable that the **representation** is reliable; or

(d) was—

(i) against the interests of the person who made it at the time it was made; and

(ii) made in circumstances that make it likely that the **representation** is reliable.

(3) The **hearsay rule** does not apply to evidence of a **previous representation** made in the course of giving evidence in an **Australian or overseas proceeding** if, in that proceeding, the accused in the proceeding to which this section is being applied—

(a) cross-examined the person who made the **representation** about it; or

(b) had a reasonable opportunity to cross-examine the person who made the **representation** about it.

(4) If there is more than one accused in the **criminal proceeding**, evidence of a **previous representation** that—

(a) is given in an Australian or overseas proceeding; and

(b) is admitted into evidence in the **criminal proceeding** because of subsection (3)—

cannot be used against a accused who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the **representation**.

(5) For the purposes of subsections (3) and (4), an accused is taken to have had a reasonable opportunity to cross-examine a person if the accused was not present at a time when the **cross-examination** of a person might have been conducted but—

(a) could reasonably have been present at that time; and

(b) if present could have cross-examined the person.

(6) Evidence of the making of a **representation** to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the **representation** that is authenticated by—

(a) the person to whom, or the **court** or other body to which, the **representation** was made; or

(b) if applicable, the registrar or other proper officer of the **court** or other body to which the **representation** was made; or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2)(d), a **representation** is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—

(a) to damage the person's reputation; or

(b) to show that the person has committed an **offence** for which the person has not been convicted; or

(c) to show that the person is liable in an action for damages.

(8) The **hearsay rule** does not apply to—

(a) evidence of a **previous representation** adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the **representation** being made; or

(b) a **document** tendered as evidence by an accused so far as it contains a **previous representation**, or another **representation** to which it is reasonably necessary to refer in order to understand the **representation**.

(9) If evidence of a **previous representation** about a matter has been adduced by an accused and has been admitted, the **hearsay rule** does not apply to evidence of another **representation** about the matter that—

(a) is adduced by another party; and

(b) is given by a person who saw, heard or otherwise perceived the other **representation** being made.

Exception to hearsay rule – criminal proceedings if maker of previous representation not available to give evidence

1. Section 65 creates seven separate exceptions to the hearsay rule which may apply in criminal proceedings where the maker of the representation is not available to give evidence.

2. **Unavailability of persons** has the meaning given by clause 4 of Part 2 of the Dictionary.

3. Section 65 applies in criminal proceedings when a person who made a previous representation is not available to give evidence about an asserted fact (s 65(1)).

4. The previous representation must concern a fact within the maker's personal knowledge (s 62(1)).

5. In a criminal proceeding, if the maker of the representation is not available for cross-examination, first-hand hearsay is admissible only if:

    - the previous representation (of which the maker had personal knowledge) was made in one of the following circumstances:
        - it was made under a duty to make it or representations of that kind (s 65(2)(a)); or
        - it was made shortly after the asserted fact occurred and in circumstances whereby it is unlikely to be a fabrication (s 65(2)(b)); or
        - it was made in circumstances which make it highly probable it was reliable (s 65(2)(c)); or
        - it was against the interests of the maker at the time it was made and was made in circumstances which make it reliable (s 65(2)(d)); or
    - the previous representation was made in another legal proceeding and the accused (in that other proceeding) cross-examined the person who made the representation or had a reasonable opportunity to do so (s 65(3)).
    - however, evidence admitted in these circumstances in a proceeding in which there is more than one accused cannot be used against an accused who did not cross-examine and did not have a reasonable opportunity to cross-examine the person about the representation (s 65(4)); or
    - evidence of a previous representation adduced by an accused and, if that evidence is admitted, evidence on the same matter adduced by another party (ss 65(8) and (9)).

6. In applying these exceptions, the court must assess each representation individually. It must identify the particular representation relied on to prove a particular fact, and then consider the circumstances in which that representation was made. However, where several representations are made at the same time to the same person, those representations may be addressed together (*Bufton v The Queen* [2019] VSCA 96, [46]–[48]; *Sio v The Queen* (2016) 259 CLR 47; [2016] HCA 32; *Tasmania v Dolegg* [2016] TASSC 65, [20]; *Moore v The King* [2023] VSCA 236, [40]; *Thomas v DPP* [021] VSCA 269, [22]).

7. In *Sio v R* (2016) 259 CLR 47; [2016] HCA 32 at [72], the High Court explained:

> Attention is directed by the language of s 65(2)(d) to an assessment of the circumstances in which the statement was made to establish its likely reliability, rather than to a general assessment of whether or not it is likely that the representor is a reliable witness. This is precisely because the representor will not be a witness at the trial.

8. The same focus on the circumstances in which the representation was made applies to paragraphs (b) and (c), though the court must bear in mind the different language of the test under each paragraph, with paragraph (d) sitting between (b) and (c) in stringency (*Priday v The Queen* [2019] NSWCCA [36]).

9. Despite the need to assess each representation individually, it is permissible to identify where the circumstances are materially identical in relation to each representation and to group such representations together. Provided the court is alert for existence of considerations which differ between various representations, it is not necessary to repeat the identification of the circumstances in relation to each representation (*Prasad v The Queen* [2020] NSWCCA 349, [89]–[94]).

10. Where the Act requires the court to consider 'the circumstances' in which the representation was made, it is accepted that circumstances include previous and subsequent statements or conduct of the person who made the representation, to the extent those matters are relevant to the reliability of the circumstances in which the person made the representation in question (*DPP v Asling (Ruling No 2)* [2017] VSC 38, [22]; *DPP v Lo (Ruling No 2)* [2018] VSC 148, [66]–[68]).

11. However, matters that only tend to address the asserted fact are not relevant circumstances (*Thomas v DPP* [2021] VSCA 269, [32]).

12. Further, at least for the purpose of s 65(2)(b), the fact that the unavailable person repeated the representation in similar terms at different times, or to different people, is not relevant (see *Thomas v DPP* [2021] VSCA 269, [35]).

Previous representation made under a duty to make it, or representations of that kind: s 65(2)(a)

13. This exception operates where there is a relevant duty.

14. Odgers's Uniform Evidence Law (online at 19 October 2021) at [EA.65.120] states that "under this provision the duty need not be a legal duty". No authority is provided for that proposition. Judicial officers will therefore need to consider, in any given case, whether the duty in question is sufficient to engage the exception.

15. There is little case-law on the kinds of duties that can engage this exception. However, it has been considered in relation to:

- The duty on the registered owner of a motor vehicle to disclose the identity, or information about the identity, of the vehicle's driver and passengers on a particular occasion under Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 14 (*R v Al Batat (No 5)* [2020] NSWSC 1077, [42]–[50]. See *Road Safety Act 1986* s 60 for the equivalent duty in Victoria);
- The duty of a person who enters the witness box in a court proceeding to give evidence (*R v Keir (No 2)* [2016] ACTSC 394, [17]–[36]).

Previous representation made when or shortly after the asserted fact occurred, and in circumstances which make it unlikely the representation is a fabrication: s 65(2)(b)

16. This limb of s 65, along with ss 65(2)(c), 66(2)(b) and 66A, replace the common law doctrine of 'res gestae', which did not survive the commencement of the *Evidence Act 2008* (*Karam v The Queen* [2015] VSCA 50, [69]; *Schanker v The Queen* [2018] VSCA 94, [48]–[49]).

17. The rationale for the exception to the hearsay rule contained in s 65(2)(b) is not based only upon the necessity to ensure the events in question may easily be recalled. As a whole, the provision is intended to allow evidence that is unlikely to be a fabrication. One condition of this is that the statements have been made spontaneously during ('when') or under the proximate pressure of ('shortly after') the occurrence of the asserted fact (*Williams v R* [2000] FCA 1868 at [48]; *DPP v Cooling (Ruling No 1)* [2019] VSC 603, [24]–[26]; *Conway v The Queen* (2000) 172 ALR 185, [123], [133]).

18. When deciding whether a previous representation is admissible under s 65(2)(b), the court must decide:

(a) Were the various representations made 'shortly after' the asserted facts occurred?

(b) And were the various representations made in circumstances that made it unlikely that the representations were fabrications? (*Moore v The King* [2023] VSCA 236, [71])

19. Answering the first question requires a court to make findings of fact regarding:

(a) The time and place at which the representations were made;

(b) The time and place at which the asserted facts occurred (or were said to have occurred); and

(c) Whether the complainant was under the proximate pressure of the events in question (*Moore v The King* [2023] VSCA 236, [72]).

20. In assessing whether the representation was made shortly after the asserted fact, the court must make a normative judgment based on the circumstances of the case. The primary considerations will be the period of delay between the event and when the person made the representation, the subject-matter of the event, the extent to which the person was involved in the event and how long a memory of the event is likely to remain clear (*R v Mankotia* [1998] NSWSC 295; *Huici v The King* [2023] VSCA 5, [61]).

21. The court will also consider whether the representations are associated in place and circumstances with the relevant event (*Huici v The King* [2023] VSCA 5, [60]).

22. Spontaneity is a hallmark of a statement made during or shortly after the occurrence of the asserted fact. Statements made in response to formal questioning, after a period of reflection and which lack spontaneity, will likely fall outside s 65(2)(b) (*Huici v The King* [2023] VSCA 5, [65]). However, the fact that the person made the representation while being questioned is not determinative. For example, representations made while providing a history to a treating paramedic may be relevantly spontaneous (see *Moore v The King* [2023] VSCA 236, [115]).

23. A court should be careful not to give too much weight to the period of delay at the expense of considering whether the representation was likely to be a fabrication (*Williams v R* [2000] FCA 1868, [48]; *DPP v Lo (Ruling No 2)* [2018] VSC 148, [70]).

24. Periods of up to 24 hours have been accepted as being 'shortly after' the occurrence of the asserted fact. Periods longer than 24 hours are sometimes accepted, and sometimes treated as removed from the 'proximate pressure' of the asserted fact (see *Moore v The King* [2023] VSCA 236, [44]–[46], [95], [102], [114]; *R v Tarantino* [2019] NSWSC 939, [25]–[27]).

25. Information about what occurred between the occurrence of the asserted fact and the time when the person made the previous representation is relevant, but it is not necessary for a court to have that information in order to decide whether the previous representation was made shortly after and in circumstances that make it unlikely that the representation is a fabrication (*Moore v The King* [2023] VSCA 236, [94]).

26. Equally, a court should not treat s 65(2)(b) as if it were concerned with reliability in a general sense. A court should not invert the statutory test by concluding that a representation was made shortly after the alleged event simply because it was likely to remain fresh in the memory of the person (*Huici v The King* [2023] VSCA 5, [63]).

27. The court may consider any later statements and conduct by the person who made the representation, provided they have a 'degree of contemporaneity' with the representation in question. But the later statements and conduct must be relevant to the circumstances in which the representations were made and improbability of fabrication, rather than addressing the asserted fact (*Moore v The King* [2023] VSCA 236, [48]–[50], [82]–[83]).

28. The court may also take into account that the person made demonstrably true statements at the time of making the relevant representation when considering the improbability of fabrication. For example, in *Moore v The King* [2023] VSCA 236, the Court of Appeal upheld the decision to admit statements made to a paramedic and police officer about the identity of her attacker in the course of obtaining medical assistance, where it was clearly established that the person had been attacked by someone (at [115]. See also [145]).

29. Section 65(2)(b) does not require the fact asserted in the previous representation to have, in fact, occurred (*R v Polkinghorne* [1999] NSWSC 704 at [38]).

30. For s 65(2)(b) to apply, the court must have evidence before it which enables it to judge when the asserted fact occurred, relative to when the representation was made. Without such evidence, the court cannot determine whether the representation was made 'when or shortly after the asserted fact occurred' (*Azizi v R* [2012] VSCA 205 at [47] per Bongiorno JA (Buchanan JA and Hollingworth AJA agreeing)).

31. As with s 65(2)(d), it is necessary to consider the circumstances in which the representation was made. In applying s 65(2)(b), however, these circumstances are considered for the purpose of

assessing whether the representation is a fabrication. In applying s 65(2)(d) the circumstances are considered for the purpose of assessing reliability (*Tasmania v Dolega* [2016] TASSC 65 at [19]).

32. The question of whether a representation is a fabrication directs attention to whether the representation is a deliberate concoction, and does not concern the possibility of an honest mistake (*Thomas v DPP* [2021] VSCA 269, [24]; *Huici v The King* [2023] VSCA 5, [57]; *Moore v The King* [2023] VSCA 236, [51]).

33. While the Act has abolished the common law notion of a 'dying declaration', a court can continue to take into account, for the purpose of s 65, the approach from the common law that a person speaking on the brink of death is likely to tell the truth (*DPP v Jones (Ruling)* [2018] VSC 43, [14]).

Previous representation made in circumstances which make it highly probable it was reliable: s 65(2)(c)

34. The requirement that surrounding circumstances make it 'highly probable' that a representation was 'reliable' is an onerous one, which is difficult to satisfy (*Conway v R* (2000) 98 FCR 204 at 244; [2000] FCA 461; cited with approval in *Azizi v R* [2012] VSCA 205 at [47] per Bongiorno JA (Buchanan JA and Hollingworth AJA agreeing)).

35. The party seeking to invoke s 65(2)(c) bears the onus of proving that it is 'highly probable' that a representation is 'reliable' (*Azizi v R* [2012] VSCA 205 at [51] per Bongiorno JA (Buchanan JA and Hollingworth AJA agreeing)).

36. In assessing whether the circumstances make it highly probable that the representation was reliable, the court may consider the nature of the event, any reason for the speaker to embellish or exaggerate, the passage of time between the event and the making of the representation and the conduct of third parties which may have affected what the speaker said (*Huici v The King* [2023] VSCA 5, [72]).

37. Courts have not yet resolved whether independent evidence which corroborates the truthfulness of the representation is relevant for the purpose of s 65(2)(c) (see *Huici v The King* [2023] VSCA 5, [77]).

Previous representation against interest and in circumstances which make it likely that it was reliable: s 65(2)(d)

38. This provision was amended following the recommendations of the joint Law Reform Commission report on Uniform Evidence Law, ALRC 102, to introduce an explicit reliability requirement. *R v Suteski* (2002) 56 NSWLR 182; [2002] NSWCCA 509 and other cases decided before those reforms must be treated with caution.

39. In applying this exception, a court must consider each representation individually and ask, in relation to that representation, whether it was against interest and in circumstances which made it likely that that representation was reliable. It is an error to adopt a 'compendious approach' to a series of representations, (*Sio v R* (2016) 259 CLR 47; [2016] HCA 32 at [58]; *Madina v The Queen* [2019] VSCA 73, [49]–[50])).

40. The burden is on the prosecution to show that the circumstances made it likely that the representation was reliable. As the High Court stated in *Sio v R* (2016) 259 CLR 47; [2016] HCA 32 at [71]:

> It is to risk being distracted from the task set by s 65(2)(d)(ii) to be overly concerned with what circumstances may properly be taken into account to determine the unreliability of a representation. The true concern of the provision is with the identification of circumstances which of themselves warrant the conclusion that the representation is reliable notwithstanding its hearsay character.

41. Despite the risk of distraction, it may be useful to note that the circumstances which are sought are ones which make it likely that the evidence is reliable despite its hearsay nature. Factors such

as contemporaneity and the statement being against interest can be relevant circumstances for the purpose of this question, though it is important to apply this consideration to each statement individually and not to a series of statements as a whole. Conversely, the fact that a statement is made by a possible accomplice is a powerful consideration tending to show that the circumstances are not such that it is likely that it was reliable (*Sio v R* (2016) 259 CLR 47; [2016] HCA 32 at [65]–[68]).

42. Where relevant, the fact that the representation was made by an alleged accomplice is a significant matter which usually detracts from whether the statement was made in circumstances which make it likely to be reliable. Accomplices may have a motive to shift blame or seek favour from authorities. However, this does not mean that statements by alleged accomplices can never be admissible under s 65(2)(d) (*Asling v The Queen* [2018] VSCA 132, [81]; *DPP v Madina* [2019] VSCA 73, [51]).

43. For example, a statement by an accomplice to a trusted friend, discussing the offending by the accomplice and the accused, where there is no motivation to exaggerate, may be a circumstance that makes the representation reliable (see, e.g., *Asling v The Queen* [2018] VSCA 132).

44. The requirement that the statement be against the interest of the person who made the statement can be met by an alleged accomplice's statement, even if the statement is also against the interests of the alleged co-offender. A statement which admits some involvement in an offence remains a statement against interest, even if there is a risk that the accomplice is seeking to minimize their role in the offending (*Vitale v The Queen* [2020] VSCA 237, [83]).

45. Circumstances which support the reliability of an accomplice's statement may include:

- An accomplice initially denying involvement, only to make inculpatory statements after being confronted with other evidence;
- Whether the accomplice spoke to a lawyer before making the statement;
- The nature of the relationship between the accomplice and the accused, such as a familial relationship;
- Whether the representation was made in a sworn statement;
- Whether the circumstances presented little scope for the accomplice to fabricate an account (*Vitale v The Queen* [2020] VSCA 237, [84]–[88]).

46. Conversely, circumstances that may impede the ability to reach a conclusion that an accomplice's statement was made in circumstance that make it likely that it was reliable include:

- A motive for the accomplice to seek police protection;
- A motive to seek favours from authorities in relation to future sentencing, or in relation to crimes under investigation;
- Evidence that the accomplice harboured ill-will towards the accused;
- Evidence that the accomplice sought to use police to put pressure on former cooffenders;
- An inability to fully explore the circumstances in which the representation was made, due to claims of public interest immunity (*DPP v Madina* [2019] VSCA 73, [53]–[57]).

Previous representation made in another proceeding: s 65(3)

47. For the purposes of s 65(3), the fact that a defendant had the opportunity to cross-examine the maker of a representation but chose not to do so cannot, of itself, mean that the evidence must be excluded. Such a conclusion would undermine the policy of the Act *(Bray (A Pseudonym) v R* (2014) 46 VR 623; [2014] VSCA 276 at [70] per Santamaria JA (Maxwell P and Weinberg JA agreeing)).

48. A poor quality cross-examination at committal, including a failure to challenge a complainant on critical aspects of their account, still constitutes a 'reasonable opportunity' for the purpose of s 65(3) (*Snyder v The Queen* [2021] VSCA 96, [20]).

49. In cases where the evidence of a witness cannot be tested, 'there are mechanisms available to ensure a fair trial, including the capacity of the trial judge to give appropriate and strong directions to the jury regarding the dangers of giving too much weight to untested statements' (*Bray (A Pseudonym) v R* (2014) 46 VR 623; [2014] VSCA 276 at [101] per Santamaria JA (Maxwell P and Weinberg JA agreeing)).

50. Under s 65(3), the previous representation is the evidence given by the witness in another proceeding. If, while giving evidence in the other proceeding, the witness gave evidence of first-hand hearsay, those representations become second-hand hearsay for the purpose of s 65(3) and are excluded by s 62 (*DPP v Price & Brown (Ruling No 1)* [2023] VSC 149, [26]–[53]).

Credibility of persons who are not witnesses

51. When a person who made a previous representation is not called as a witness, a party against whom hearsay evidence has been admitted may adduce credibility evidence about that person if that evidence could substantially affect the assessment of that person's credibility (s 108A).

52. When the person who made the previous representation is an accused in a criminal proceeding, s 108B provides further protection to that provided by s 108A. In such a case, credibility evidence about the accused is admissible only if:

- the court gives leave; or
- the evidence is about whether the accused:
  - is biased or has a motive to be untruthful; or
  - is, or was, unable to be aware of or to recall matters to which his or her previous representation relates; or
  - has made a prior inconsistent statement.

53. The prosecution must not be given leave under s 108B unless evidence adduced by the accused has been admitted:

- tends to prove that a witness called by the prosecution has a tendency to be untruthful; and
- is relevant solely or mainly to the witness' credibility.
- (If such leave is granted, it may be given on terms (s 192)).

Notice to be given

54. Notice requirements apply to ss 65(2), 65(3) and 65(8). A party is required to provide reasonable notice in writing to each other party of its intention to adduce first-hand hearsay evidence. The notice must set out the provisions and grounds relied upon (s 67).

Last updated: 15 December 2023

s 66 – Exception: criminal proceedings if maker available

(1) This section applies in a **criminal proceeding** if a person who made a **previous representation** is available to give evidence about an **asserted fact**.

(2) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if—

(a) the person who made the representation has been or is to be called to give evidence; and

(b) either—

(i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or

(ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

(2A) In determining whether the occurrence of the **asserted fact** was fresh in the memory of a person, the **court** may take into account all matters that it considers are relevant to the question, including—

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the **asserted fact** and the making of the **representation**.

(3) If a **representation** was made for the purpose of indicating the evidence that the person who made it would be able to give in an **Australian or overseas proceeding**, subsection (2) does not apply to evidence adduced by the **prosecutor** of the **representation** unless the **representation** concerns the identity of a person, place or thing.

(4) A **document** containing a **representation** to which subsection (2) applies must not be tendered before the conclusion of the **examination in chief** of the person who made the **representation**, unless the **court** gives leave.

Exception to hearsay rule – criminal proceedings if maker of previous representation available to give evidence

1. Section 66 applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
    - Note: **Unavailability of persons** has the meaning given by clause 4 of Part 2 of the Dictionary.
2. The previous representation must concern a fact within the maker's personal knowledge (s 62(1)).

3. If the maker of a previous representation is to be called as a witness, the hearsay rule does not apply to evidence of the representation given by that person or by another person who also has personal knowledge of the representation if, when the representation was made, the occurrence of the fact asserted in it was fresh in the memory of the person who made it (s 66).

4. Following the commencement of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the hearsay rule also does not apply if the maker of a previous representation is called to give evidence, is the alleged victim of the offence and was under the age of 18 when making the representation (s 66(2)(b)).

When is a person 'available'?

5. Clause 4(1) of Part 2 of the Dictionary to the *Evidence Act 2008* defines when a person is unavailable to give evidence. Thus, a person is unavailable if:

- they are deceased; or
- they are, for any reason other than through the application of s 16 (Competence and compellability – judges and jurors), not competent to give evidence about the fact in question; or
- they are mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability; or
- it would be unlawful for them to give evidence about the fact; or
- a provision of the Act prohibits the evidence being given; or
- all reasonable steps have been taken, by whoever seeks to prove that the person is not available, to find that person or to secure their attendance, but without success; or
- all reasonable steps have been taken, by whoever seeks to prove that the person is not available, to compel that person to give the evidence, but without success.

6. Unless a person falls into one of these categories of 'unavailability', they are deemed by cl 4(2) of Part 2 of the Act's Dictionary to be available to give evidence, for the purposes of s 66 (*Singh v R* (2011) 33 VR 1; [2011] VSCA 263, 4 [15] per Almond AJA (Buchanan and Bongiorno JJA agreeing)).

7. A complainant who is too intoxicated to remember making the relevant representations will not be considered 'unavailable' as he or she does not fall within one of the categories of 'unavailability' contained in clause 4(1) of the Dictionary. The complainant will therefore be 'available' in accordance with s 66 and the admissibility of his or her previous representations as an exception to the hearsay rule will depend on whether the evidence comes within the exceptions provided by s 66 (*Singh v R* (2011) 33 VR 1; [2011] VSCA 263, [25]).

8. Section 66 is not confined to evidence led by the prosecution. It applies generally including to relevant out of court representations by the accused where the accused has given or will give evidence (s 66(2)(a); *Constantinou v R* [2015] VSCA 177, [185]).

9. Section 66 applies where the maker of the representation is available to give evidence. The availability of the person who received the representation does not affect the admissibility of evidence under s 66, but may affect the weight of the evidence. The weight of the evidence will 'almost invariably be considerably diminished' if the other party who received the representation does not give evidence confirming the representation (*Barrow v The Queen* [2020] VSCA 102, [75]). However, while the weight of the evidence may be diminished, the probative value is not, because, for the purpose of assessing probative value, the general rule is that one assumes the credibility and reliability of the evidence (*IMM v The Queen* [2016] HCA 14; 257 CLR 300). This is important when considering the application of s 137 to a previous representation which is admissible under s 66.

Section 66(2)(b)(i) hearsay exception - Determining whether occurrence of asserted fact was 'fresh in the memory'

10. Proof that the evidence was fresh in the memory of the witness is a threshold issue for the admissibility of evidence under the s 66(2)(b)(i) hearsay exception. The prosecution bears the onus of proof to establish this fact, on the balance of probabilities (see *Boyer v R* (2015) 47 VR 640; [2015] VSCA 242 at [69]–[70]).

11. In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters it considers relevant to the question. This includes, including the nature of the event concerned, the age and health of the person and the period of time between the occurrence of the asserted fact and the making of the representation (s 66(2A). See Tiba v The Queen [2020] VSCA 204, [71]–[72] for an example of how this is applied in the context of identification evidence).

12. Section 66(2A) was inserted in response to the decision of the High Court of Australia in *Graham v R* (1998) 195 CLR 606; [1998] HCA 61. In that case, 'fresh in the memory' was interpreted temporally to mean 'recent' or 'immediate', being hours or days.

13. Section 66(2A) now broadens this application. While the time between the occurrence of the asserted fact and the making of the representation is a relevant consideration, the phrase 'fresh in the mind' does not impose a 'determinative temporal limitation' (*ISJ v R* (2012) 38 VR 23; [2012] VSCA 321, [48]; *Barrow v The Queen* [2020] VSCA 102, [59]) and there is no 'single bright line figure' beyond which a representation cannot be fresh in the memory (*Pate v The Queen* [2015] VSCA 110, [64]–[65]).

14. In the context of sexual offences, it is accepted that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years. While memory of mundane events tends to diminish with time, memory of traumatic, terrifying or unusual events might remain vivid for many years. However, whether it does so in a particular case depends on the facts in that case (see *R v Bauer* (2018) 266 CLR 56, [89]; *Barrow v The Queen* [2020] VSCA 102, [59]; *LMD v The Queen* [2012] VSCA 164, [24]–[25]; *Clay v The Queen* (2014) 43 VR 405; [2014] VSCA 269, [48]).

Section 66(2)(b)(ii) – hearsay exception – previous representations by child complainants

15. Section 66(2)(b)(ii) was inserted in 2017 and applies where the person who made the previous representation is the alleged victim of offence to which the proceeding relates, and was under 18 when he or she made the representation.

16. The section provides an alternative means of making the previous representations of the alleged victim admissible, without the need to prove the representation was fresh in the memory.

17. The introduction of this exception in 2017 replaced and widened the previous hearsay exception in *Criminal Procedure Act 2009* s 377, which made hearsay statements by a complainant under the age of 18 admissible in criminal proceedings that related to a charge for a sexual offence.

Limitation on evidence adduced by the prosecution in certain circumstances

18. An additional qualification for criminal proceedings is that, if a representation was made for the purpose of indicating the evidence the person who made it would be able to give, then the s 66 exceptions do not extend to evidence adduced by the prosecution unless the representation concerns the identity of a person, place or thing (s 66(3)).

Document not to be tendered before conclusion of examination in chief

19. A document to which this exception applies must not, without leave of the court, be tendered before the conclusion of the examination in chief of the person who made the representation (s 66(4)).

Last updated: 21 October 2021

s 66A – Exception: contemporaneous statements about a person's health etc.

> The **hearsay rule** does not apply to evidence of a **previous representation** made by a person if the **representation** was a contemporaneous **representation** about the person's health, feelings, sensations, intention, knowledge or state of mind.

Exception to hearsay rule – contemporaneous statements about personal health, feelings, sensations, intention, knowledge or state of mind

1. Section 66A creates an exception to the hearsay rule in respect of contemporaneous personal representations.

2. The exception does not require a person who made a contemporaneous representation to have been competent to give evidence at the time of making the representation (s 61).

3. The application of s 66A to contemporaneous representations about a person's state of mind must be approached with care. Applied improperly, it could do away with large parts of the hearsay rule. However, courts have avoided that result. A party must show that a person's state of mind, as evidenced by a contemporaneous representation, is directly relevant to a fact in issue and not merely inferentially relevant (*Karam v The Queen* [2015] VSCA 50, footnote 11. See also ALRC 102, [8.162]–[8.164]).

4. The relevance of this provision in relation to medical reports is limited. The history given by a patient to a treating medical practitioner may be admissible hearsay whether it is contemporaneous (in which case s 66A applies) or historical (in which case it is admissible through s 60 as providing the basis for the medical opinion) (see *Pulling v Yarra Ranges Shire Council* [2018] VSC 248, [43]–[47]; *Welsh v The Queen* (1996) 90 A Crim R 364).

Last updated: 23 December 2021

s 67 – Notice to be given

(1) Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state—

(a) the particular provisions of this Division on which the party intends to rely in arguing that the **hearsay rule** does not apply to the evidence; and

(b) if section 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the **court** may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction—

(a) is subject to such conditions (if any) as the **court** thinks fit; and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the **court** specifies.

Notice to be given of intention to adduce evidence in reliance on certain exceptions to hearsay rule

1. Section 67 imposes notice requirements relating to all first-hand hearsay exceptions:
   - s 63(2) (Exception to hearsay rule – civil proceedings if maker of previous representation not available)
   - s 64(2) (Exception to hearsay rule – civil proceedings if maker of previous representation is available)
   - ss 65(2), 65(3) and 65(8)–(Exception to hearsay rule – criminal proceedings if maker of previous representation is not available)
2. A party must provide reasonable notice in writing to each other party of its intention to adduce first hand hearsay evidence under one of these sections (s 67(1)).
3. The notice must set out the provisions relied upon and, in the case of s 64(2), the ground specified in that provision that is relied upon (s 67(3)).
4. The requirement to give notice is 'not an empty formality. Its existence and form of the notice are necessary conditions precedent subject to judicial dispensation to the non-application of the hearsay rule' (*Azizi v R* [2012] VSCA 205 at [32] per Bongiorno JA (Buchanan JA and Hollingworth AJA agreeing)).
5. If notice has not been given, a court may (on the application of a party) direct that one or more of ss 63(2), 64(2), 65(2), 65(3) and 65(8) applies, despite the party's failure to give notice.
6. A direction under s 67:
   - is subject to such conditions (if any) as the court thinks fit; and

- may provide that in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

7. In *DPP v Azizi (Ruling No 2)* [2012] VSC 600, Kaye J declined to give a direction under s 67(4) in respect of relevant and 'important' evidence because the prosecution had not explained why they had not given proper notice pursuant to s 67(1). His Honour held that admitting the evidence would cause incurable unfairness and injustice to the accused, as well as disrupt and compromise the proper conduct of the trial (*DPP v Azizi (Ruling No 2)* [2012] VSC 600 at [20]–[21]).

8. In so concluding, Kaye J noted that, if proper notice had been given, the defence may have adopted a different approach both in their opening to the jury and their cross-examination of the two witnesses whose evidence was complete (*DPP v Azizi (Ruling No 2)* [2012] VSC 600 at [21]).

9. Further, admitting the evidence at the stage which the trial had reached would give it excessive prominence and weight. The prejudice caused to the defence by this would not have been able to be offset by any appropriate directions from the trial judge (*DPP v Azizi (Ruling No 2)* [2012] VSC 600 at [22]).

10. Finally, Kaye J noted that if the evidence were admitted, an otherwise quite short and concise trial would be disproportionately delayed and procedural difficulties would have arisen which would have been insurmountable (*DPP v Azizi (Ruling No 2)* [2012] VSC 600 at [27]–[28]).

Last updated: 29 May 2013

s 68 – Objections to tender of hearsay evidence in civil proceedings if maker available

(1) In a **civil proceeding**, if the notice discloses that it is not intended to call the person who made the **previous representation** concerned because it—

(a) would cause undue expense or undue delay; or

(b) would not be reasonably practicable—

a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.

(2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.

(3) The **court** may, on the application of a party, determine the objection at or before the hearing.

(4) If the objection is unreasonable, the **court** may order that, in any event, the party objecting is to bear the costs incurred by another party—

(a) in relation to the objection; and

(b) in calling the person who made the **representation** to give evidence.

Objections to tender of hearsay evidence in civil proceedings if maker of previous representation available to give evidence

1. Section 68 sets out a procedure to be followed in determining whether a party in a civil proceeding may adduce hearsay evidence under s 64 (Exception to the hearsay rule – civil proceedings if maker of previous representation is available).

2. If a notice given under s 67 discloses that a party does not intend to call the person who made the previous representation because it would either cause undue expense or delay or it would not be reasonably practicable, a party may object to the tender of the evidence or of a specified part of the evidence (s 68(1)).

3. An objection under s 68(1) must be made not later than 21 days after the notice was given.

4. An objection is to be made by giving each other party a written notice setting out the grounds on which the objection is made (s 68(2)).

5. The court may, on the application of a party, determine the objection at or before the hearing (s 68(3)).

6. If a court determines an objection under s 68 is unreasonable, the court may order that the party who made the objection is to bear the costs incurred by another party in relation to the objection and in calling the person who made the representation to give evidence (s 68(4)).

Last updated: 22 October 2009

Division 3 – Other exceptions to the hearsay rule (ss 69–75)

The exceptions in this Division 3 are available for second-hand or more remote hearsay. Given the issue of reliability with respect to such evidence, the exceptions are restricted in scope, are based on necessity and identify categories of evidence that are likely to be reliable.

In combination with the documentary provisions of Chapter 2, the provisions in this Division that pertain to documentary evidence (ss 69, 70 and 71) provide a flexible approach to dealing with documentary evidence.

Last updated: 23 December 2021

s 69 – Exception: business records

(1) This section applies to a **document** that—

(a) either—

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a **business**; or

(ii) at any time was or formed part of such a record; and

(b) contains a **previous representation** made or recorded in the **document** in the course of, or for the purposes of, the **business**.

(2) The **hearsay rule** does not apply to the **document** (so far as it contains the **representation**) if the **representation** was made—

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the **asserted fact**; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the **asserted fact**.

(3) Subsection (2) does not apply if the **representation**—

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an **Australian or overseas proceeding**; or

(b) was made in connection with an investigation relating or leading to a **criminal proceeding**.

(4) If—

(a) the occurrence of an event of a particular kind is in question; and

(b) in the course of a **business**, a system has been followed of making and keeping a record of the occurrence of all events of that kind—

the **hearsay rule** does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a **previous representation** made by a person about the fact).

Exception to hearsay rule – business records

1. Section 69 creates an exception to the hearsay rule in respect of business records that belong to, or are kept by, a person, body or organisation in the course of, or for the purpose of, a business, as well as documents that record representations that were made in the course of, or for the purposes of, the business (s 69(1)).
2. Application of the exception depends on whether the previous representation:

(a) is contained in a document which forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business (as defined in Dictionary, Part 2, clause 1), or at any time was or formed part of such a record (s 69(1)(a));

(b) was made or recorded in that document in the course of, or for the purposes of, that business (s 69(1)(b)); and

(c) was made by a person (as defined in Dictionary, Part 2, clause 6) who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact (s 69(2)) (*Maaz v Fullerton Property Pty Ltd* [2021] NSWCA 79, [58]).

3. The section draws a distinction between a document and a representation. Section 69(1) refers to a document, which must be part of the records belonging to or kept by the business in the course of, or for the purpose of, the business. Section 69(2) directs attention to the representation which is in the document. The representation must be made by a person who had personal knowledge of the asserted fact, or on the basis of information directly or indirectly supplied by such a person (*Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, [86]–[87]).

4. Section 69(2) requires a court to direct its attention to each representation made in the document, and determine whether that representation was made by a person with the relevant knowledge (see *Capital Securities XV Pty Ltd v Calleja* [2018] NSWC 26, [88]).

5. Section 69(2) does not require the person who made the representation in the document, or the person who supplied the information which formed the basis for the representation, to be identified (*Lin v Tasmania* [2012] TASCCA 9 at [87] per Tennant and Porter JJ; see also *Guest v Federal Commissioner of Taxation* [2007] FCA 193, [25] per Heerey J; *Hillig v Battaglia* [2018] NSWCA 67, [74]).

6. For the purposes of s 69(2), inferences may be drawn from the form of the document and the nature of the information contained in the impugned representation (*Commissioner of the Australian Federal Police v Zhang & Anor (Ruling No 2)* [2015] VSC 437, [29]; *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984, [19]; cited with approval in *Lin v Tasmania* [2012] TASCCA 9, [87] per Tennant and Porter JJ. See also *Capital Securities XV Pty Ltd v Calleja* [2018] NSWC 26, [95]–[98] on matters that can be considered in deciding whether a document is a business record).

7. The business records exception is not limited to first or second-hand hearsay. It allows records made on the basis of information supplied "directly or indirectly" by a person with personal knowledge of the asserted fact. It is not necessary to identify the supplier of the information provided the court can infer, on the basis of the nature and context of the representation, that the original supplier of information had personal knowledge of the asserted fact (*Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333, [27]).

8. It is also not necessary that the representation be recorded in the form of direct speech (*Hillig v Battaglia* [2018] NSWCA 67, [80]).

9. The business records exception does not allow a witness to give second-hand hearsay regarding the contents of a business record (*Davies v The Queen* [2019] VSCA 66, [148]–[149]).

10. The exception does not extend to documents prepared for court proceedings or criminal investigations (s 69(3)). For example, autopsy reports prepared for the Coroner's Court are not admissible under this exception (*Jausnik v Nominal (No 3)* [2015] ACTSC 131, [26]–[28]).

11. Further, sub paragraphs (a) and (b) of s 69(3) are directed to future litigation in different ways. Paragraph (a) requires a court to ask why the representation was prepared or obtained, whereas paragraph (b) looks at the circumstances in which the representation was made. Under paragraph (b), there is no question of purpose – there merely needs to be a sufficient connection between the making of the representation and an investigation. While the investigation must have related to a criminal proceeding, the proceedings do not need to have existed at the time the representation was made and may, in fact, never commence (*Averkin v Insurance Australia Ltd* (2016) 92 NSWLR 68, [112]–[113], [115]).

12. While the term ‘investigation’ is not defined, it is not likely to have commenced merely on police receiving a report of activity that might, with further information, suggest a crime has been committed (see *Averkin v Insurance Australia Ltd* (2016) 92 NSWLR 68, [119], where the mere report of a burning vehicle was not considered sufficient to engage s 69(3), until the police had investigated sufficiently to determine that the case likely involved arson).

13. The purpose of the exceptions in s 69(3) is to reduce the risk of self-serving documents being admitted (*Vitali v Stachnik* [2001] NSWSC 303, [12]; *Thomas v New South Wales* (2008) 74 NSWLR 34, [25], [88]; *Averkin v Insurance Australia Ltd* (2016) 92 NSWLR 68, [114]).

14. Sections 48, 49, 50, 146, 147, 150(1) and 183 are relevant to the mode of proof, and authentication, of business records.

What is a business record?

15. Business records are not limited to documents created by the relevant business as part of its records. The term extends to documents received and kept by the business as part of its records. For this purpose, there is no requirement that the business has adopted the external document in some way, such as by marking an invoice "paid". However, some care is required in relation to third party documents in establishing that the representation was made "for the purpose of" the business which possesses the record and not solely for the purpose of the third party business (*Maaz v Fullerton Property Pty Ltd* [2021] NSWCA 79, [60]–[69]).

16. Some cases have distinguished between a business record and the product of a business. Under this distinction, books, newspapers, magazines and journals are not records of the business which created those materials, and the materials would not be admissible as business records (see *Roach v Page (No 15)* [2003] NSWSC 939. See also *Hansen Beverage Co v Bickfords (Australia) Pty Ltd* [2008] FCA 406, [133]).

17. This distinction has been criticized as not grounded in the text of the Act (*Charan v Nationwide News Pty Ltd* [2018] VSC 3, [463]).

18. In any event, the operation of that distinction depends on the circumstances in which the relevant document was produced. Audit reports, and the material lying behind audit reports, have been treated as business records, rather than products of the auditing business (*Charan v Nationwide News Pty Ltd* [2018] VSC 3, [470]).

19. Patient records maintained by a hospital or doctor are business records, even though they are concerned with the treatment of the patient, rather than the running of the business *per se*. Similarly, records maintained by DHS from those providing social welfare services to a person will also be business records of DHS (*Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333, [18]–[19]. See also *Thomas v Victoria (Ruling No 1)* [2019] VSC 276, [26]–[27], holding that an ergonomic risk assessment was a business record).

20. Further, notes taken by a medical panel under legislation such as the *Workplace Injury, Rehabilitation and Compensation Act 2013* are business records (*Tait v Rehabilitation Care Solutions Pty Ltd* (2018) 56 VR 649, [55], [58]–[65]).).

Business records and the opinion rule

21. The business records exception only suspends the exclusionary effects of the hearsay rule in relation to business documents. Other exclusionary rules, like the opinion rule, may make statements in a business record inadmissible (*Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333, [68]; *SC v The Queen* [2023] NSWCCA 60, [41]).

22. For example, a business record which contains a lay opinion regarding a medical diagnosis will not be admissible (*Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333 at [68]).

23. Whether a business record which records a medical diagnosis by a third party is admissible will depend on a close analysis of the document and the circumstances in which it was made. In particular, the party seeking to tender the document will need to show that the diagnosis is

"information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact" (compare *Duncan v R* [2015] NSWCCA 84, [46]–[50] (Simpson J) and [209]–[214]).

Business records and onus of proof

24. The onus is on the party seeking to tender the documents to establish that the documents are business records (*Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, [85], [96]).

25. A party may call upon s 183 to help satisfy this onus of proof, which allows the court to examine the document and draw reasonable inferences from it (see *Maaz v Fullerton Property Pty Ltd* [2021] NSWCA 79, [23], [59]).

26. For the purpose of ss 69(2)(a), (b) and (5), a court may draw inferences from the nature of the document and the nature of the information to decide whether the maker of the representation "might reasonably be supposed to have had person knowledge". Similarly, the court can draw inferences from the form and context of the document to decide whether it purports to be a copy (*Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, [89]–[91]).

27. Courts have not yet determined who carries the onus of proof that s 69(3) is engaged (see *Averkin v Insurance Australia Ltd* (2016) 92 NSWLR 68, [8], [117]; *Hillig v Battaglia* [2018] NSWCA 67, [66]–[67]).

Last updated: 15 December 2023

s 70 – Exception: contents of tags, labels and writing

> The **hearsay rule** does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed—
>
> (a) in the course of a **business**; and
>
> (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Exception to hearsay rule – contents of tags, labels and writing

1. Section 70 creates an exception to the hearsay rule in respect of tags or labels attached to, and to writing placed on, an object (including a document).

2. The exception applies if it may reasonably be supposed that the tag, label or writing was attached or placed in the course of business for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object or contents of the object.

Last updated: 22 October 2009

s 71 – Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to—

(a) the identity of the person from whom or on whose behalf the communication was sent; or

(b) the date on which or the time at which the communication was sent; or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Exception to hearsay rule – electronic communications

1. Section 71 creates an exception to the hearsay rule in respect of evidence of a representation contained in a document recording an electronic communication insofar as the representation is a representation as to electronic communications of a kind referred to in the section.
2. Section 161 contains presumptions about electronic communications.

Last updated: 22 October 2009

s 72 – Exception: Aboriginal and Torres Strait Islander traditional laws and customs

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

Exception to hearsay rule – Aboriginal and Torres Strait Islander traditional laws and customs

1. Section 72 creates an exception to the hearsay rule in respect of evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

Last updated: 22 October 2009

s 73 Exception: reputation as to relationships and age

(1) The **hearsay rule** does not apply to evidence of reputation concerning—

(a) whether a person was, at a particular time or at any time, a married person; or

(b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or

(c) a person's age; or

(d) family history or a family relationship.

(2) In a **criminal proceeding**, subsection (1) does not apply to evidence adduced by an accused unless—

(a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or

(b) the accused has given reasonable notice in writing to each other party of the intention of the accused to adduce the evidence.

(3) In a **criminal proceeding**, subsection (1) does not apply to evidence adduced by the **prosecutor** unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception to hearsay rule – reputation as to relationships and age

1. Section 73 creates an exception to the hearsay rule in respect of evidence of reputation concerning:
   - whether a person was, at a particular time or at any time, a married person; or
   - whether a man and a woman cohabiting at a particular time were married to each other at that time; or
   - a person's age; or
   - family history or a family relationship (s 73(1)).
2. In a criminal proceeding, this exception does not extend to:
   - evidence adduced by an accused unless:
     - the evidence tends to contradict evidence of reputation concerning the above mentioned matters, or
     - the accused has given reasonable notice in writing to each other party of the accused's intention to adduce the evidence (s 73(2));
   - evidence adduced by the prosecution, unless the evidence tends to contradict evidence of reputation concerning the above mentioned matters (s 73(3)).

Last updated: 22 October 2009

s 74 – Exception: reputation of public or general rights

(1) The **hearsay rule** does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

(2) In a **criminal proceeding**, subsection (1) does not apply to evidence adduced by the **prosecutor** unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception to hearsay rule – reputation of public or general rights

1. Section 74 creates an exception to the hearsay rule in respect of evidence of reputation concerning the existence, nature or extent of a public or general right (s 74(1)).
2. In a criminal proceeding, this exception does not extend to evidence adduced by the prosecution unless that evidence tends to contradict evidence of reputation concerning the existence, nature or extent of a public or general right that has been admitted in the proceeding (s 74(2)).

Last updated: 22 October 2009

s 75 – Exception: interlocutory proceedings

In an interlocutory proceeding, the **hearsay rule** does not apply to evidence if the party who adduces it also adduces evidence of its source.

Exception to hearsay rule – interlocutory proceedings

1. Hearsay evidence is admissible in an interlocutory proceeding if the party who adduces it also adduces evidence of its source.
2. The source must be identified by name (Liesfield v SPI Electricity Pty Ltd [2014] VSC 348, [38]–[43]).
3. This exception is not limited to first hand hearsay (*United Dairy Power Pty Ltd v Murray Goulburn Co-operative Co Ltd* [2011] FCA 762, [53]).
4. It is not necessary for evidence of the source of hearsay evidence adduced under this section to be exclusively in the form of an affidavit (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 222 at [45]).
5. It is sufficient compliance with s 75 to identify the source of the hearsay statements in a compendious way (*Proctor & Gamble v Medical Research* [2001] NSWSC 183 at [55]).

Last updated: 23 December 2021

Part 3.3 – Opinion (ss 76–80)

In accord with the foundational UEA policy imperatives, the opinion provisions specifically recognise that a primary event ('fact') and any epistemological inferences drawn from it ('opinion') exist on a continuum rather than as distinct categories. For this reason, the UEA does not define 'opinion' but does recognise the importance of controlling evidence that tends more to that end of the continuum.

Part 3.3 establishes a basic exclusionary rule for opinion evidence (s 76). It is a purposive rule. This opinion rule is subject to exceptions and the application of the discretions.

The two main exceptions are:

- lay opinions (s 78); and
- opinions based on specialised knowledge (s 79). Importantly, this section clarifies that specialised knowledge includes knowledge with respect to child development and child behaviour.

Other exceptions include:

- opinion that is admitted for another purpose (s 77, this is the opinion equivalent to the hearsay exception at s 60);
- Aboriginal and Torres Strait Islander traditional laws and customs (s 78A).

The most significant change is:

- s 80 – by which the common law 'ultimate issue' and 'common knowledge' rules are abolished. These rules were found to be uncertain, unevenly applied, conceptually problematic and, in some instances, to have the effect of denying relevant evidence to the court.

Other exceptions to the opinion rule can be found at: **s 50(3)** (voluminous documents); **s 81** (admissions); **s 92(3)** (certain judgments and convictions saved); **s 110** (character of accused person); and **s 111** (character of co-accused).

Last updated: 23 December 2021

s 76 – The opinion rule

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

A purposive rule

1. Section 76 is the source of the general rule that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. The rule is expressed in this way to direct attention to the question – how does the party tendering the evidence submit that it is relevant? (*Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [31] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Definition of opinion

2. 'Opinion' is not defined in the UEA. But consistently with the policies underlying the Acts, courts have adopted a working definition of 'opinion'. This defines it as 'an inference from observed and communicable data'(*Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5) (Allstate Judgment No 32)* (1996) 64 FCR 73 at [9] per Lindgren J; *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [43] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445; [2011] FCAFC 55 at [212] per the Court).
3. In *Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36, the Court proceeded on the assumption that this was the meaning of an 'opinion' (at [10] per French CJ, Heydon and Bell JJ in a joint judgment (Gummow J and Crennan J agreeing in separate judgments)).
4. Opinion evidence has also been described as 'evidence of a conclusion, usually judgmental or debateable, reasoned from facts' (*RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 34 NSWLR 129, 130. Cited with approval in *Hodgson v Amcor Limited* [2011] SVC 272, [46]; *Matthews v SPI Electricity (Ruling No 9)* [2012] VSC 340, [38]).
5. This second definition has been used to distinguish between opinion evidence and factual evidence known to the expert by reason of their expertise (see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20)* [2019] VSC 44, [17]; *Matthews v SPI Electricity (Ruling No 9)* [2012] VSC 340, [38]).

6. Factual evidence known to the expert may include observations the expert has made, using their specialised knowledge, including factual conclusions drawn from those observations. Such factual evidence is not opinion evidence (*Matthews v SPI Electricity (Ruling No 9)* [2012] VSC 340, [38]–[41]; *Matthews v SPI Electricity (Ruling No 18)* [2013] VSC 185, [19]; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20)* [2019] VSC 44, [49]).

Distinction between evidence of fact and evidence of opinion

7. It can be difficult to distinguish between factual and opinion evidence. One relevant consideration is 'the extent to which the evidence goes beyond the witness' direct observations or perceptions' (*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [46] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point)).

8. Whether an identification should be characterised as a statement of fact or an opinion will depend on the circumstances in which the person was observed and the circumstances in which the person was identified. This must be determined on the proposed evidence and all relevant circumstances, as they exist in each case (see *Haidari v R* [2015] NSWCCA 126, [73]–[74]; *R v Drollet* [2005] NSWCCA 356, [42]–[55]; *Smith v R* (2001) 206 CLR 650; [2001] HCA 50).

9. A lack of particularity does not necessarily render evidence, adduced as opinion evidence, inadmissible. However, it may affect the weight given to that evidence (*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [46] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point)).

10. Comparisons are not opinion evidence, but direct observations (*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [48] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point)).

Evidence of state of mind and hypothetical reactions

11. Evidence by a person about his or her state of mind ('fact' / 'experiential') is not evidence of an opinion ('inferential'). (*Seltsam Pty Ltd v McNeil* [2006] NSWCA 158 at [123] per Bryson JA (Handley and Tobias JJA agreeing); *Fitness Australia Ltd v Copyright Tribunal* [2010] FCAFC 148 at [65] per the Court). On the other hand, evidence by a person as to another person's state of mind ('she intended to …') may be evidence of an opinion.

12. Similarly, evidence by a person of what he or she would have done or thought in a particular situation is not opinion evidence (*Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73; *Seltsam Pty Ltd v McNeil* [2006] NSWCA 158 at [123]; *Vella & Siskos v R* [2015] NSWCCA 148, [117]).

13. For example, an insurance underwriter can give evidence of how certain information would have affected his or her decision to issue an insurance policy, without needing to meet an exception to the opinion rule (*Vella & Siskos v R* [2015] NSWCCA 148, [116]–[119]).

(d) Evidence of experience

14. Similarly, evidence of opinion ('inferential') may be distinguished from evidence of an experience (which is not opinion evidence but evidence of inferences drawn from those experiences will be) (*Clark v Ryan* (1960) 103 CLR 486; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5) (Allstate Judgment No 32)* (1996) 64 FCR 73 at 75–76 [9]).

15. This distinction is less likely to apply where a person gives evidence about a company's state of mind, where that person knows intimately the company's practices, such as a board member or senior employee (see *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [57] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point) and the cases there cited).

16. This tends to serve the best available evidence objective of the UEA by enabling evidence to be received that is likely to be the 'most reliable evidence' available of the impugned company's state of mind (*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [57] per Finkelstein J (Jacobson and Besanko JJ agreeing on this point)).

Admissible hearsay must still satisfy opinion requirements

17. Hearsay evidence which comes within one of the exceptions to the hearsay rule and which can also be characterised as evidence of an opinion must also come within an exception to the opinion rule before it can be admitted (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [19] per French CJ, Heydon and Bell JJ in a joint judgment (Gummow J and Crennan J agreeing in separate judgments)).

Exceptions to the opinion rule

18. The opinion rule does not apply to the following:

- evidence of summaries of voluminous or complex documents (s 50(3))
- evidence relevant otherwise than as opinion evidence (s 77)
- lay opinions (s 78)
- evidence expressed by a member of an Aboriginal or Torres Strait Islander group about the traditional laws and customs of the group (s 78A)
- opinions based on specialised knowledge (s 79)
- evidence of admissions (s 81)
- evidence of the grant of probate or letters of administration or convictions (s 92(3))
- evidence adduced about the character of an accused or the character of a co-accused (ss 110 and 111).
- These exceptions are discussed in the commentary that follows.

Evidence of opinion – special cases

19. *Competence* – a court may inform itself as it sees fit in determining whether a witness is competent to give evidence (s 13(8)), including by obtaining relevant information from experts. This inquiry appears to be outside the normal evidentiary process.

20. *Credibility* – evidence of an expert opinion concerning the credibility of a witness may (with leave of the court) be admitted if the evidence could substantially affect the assessment of the credibility of that witness (s 108C).

The opinion rule and assessing probative value

21. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the High Court stated that when assessing the probative value of evidence, the judge must assume that the evidence is accepted and taken at its highest [50]. That is, that the evidence is both credible and reliable, unless no reasonable jury could accept the evidence (at [39] and [48]).

22. For further discussion on *IMM* (2016) 257 CLR 300; [2016] HCA 14 and the meaning of "probative value", see the ***Dictionary***.

Last updated: 23 December 2021

s 77 – Exception to the opinion rule: 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.

Exception to opinion rule – evidence relevant otherwise than as opinion evidence

1. Section 77 provides an exception to the opinion rule in respect of evidence that is relevant otherwise than as opinion evidence.
2. Evidence of an opinion is admissible if it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed (s 77).
3. If opinion evidence is admitted for another purpose, s 77 permits it to be used to also prove the facts about which the opinion is expressed (as with the hearsay rule).

Last updated: 12 April 2012

s 78 – Exception to the opinion rule: 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.

Exception to opinion rule – lay opinions

1. Section 78 provides an exception to the opinion rule in respect of evidence of lay opinions.
2. Evidence of a lay opinion comes within the s 78 exception if it:
   - is relevant (ss 55 and 56); and
   - is based on what the person saw, heard or otherwise perceived about a matter or event (s 78(a)); and
   - is necessary to obtain an adequate account or understanding of the person's perception of the matter or event (s 78(b)).

Opinion must have rational basis

3. Sections 55 and 56 require a rational basis for the opinion because the definition of relevance in s 55 requires that evidence is only relevant if it is capable of *rationally* affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
4. Opinion evidence that does not have a rational basis will not satisfy that test and will not be admissible (*Jackson v Lithgow City Council* [2010] NSWCA 136 at [32] per Allsop P (Grove J agreeing), referring to *R v Panetta* (1997) 26 MVR 332 at 336 and *Guide Dog Owners' & Friends' Association v Guide Dog Association of New South Wales & ACT* (1998) 154 ALR 527; and *Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [25]–[26] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

5. Where the admissibility of relevant evidence is challenged under s 78, careful consideration needs to be given to both requirements of that section. Particular consideration needs to be given to the requirement in s 78(b) that the evidence is '*necessary to obtain an adequate account or understanding of the person's perceptions* about a matter or event'.

6. When applying s 78(a), it must be 'possible to extract' from what the person giving the opinion says that the opinion is about a 'matter or event' and that it is 'based' on what they 'saw, heard or otherwise perceived' about that matter or event (*ICM Investments Pty Ltd v San Miguel Corporation & Anor (Ruling No. 1)* [2013] VSC 463 at [57] per Vickery J).

Requirement to perceive the 'matter or event'

7. A person giving evidence within this exception must have witnessed the relevant matter or event.

8. This requires a court and parties to be clear about the relevant 'matter or event'.

9. For example, in *Lithgow City Council v Jackson* (2011) 244 CLR 352, [41]–[46], the relevant matter or event was the circumstances in which the plaintiff fell near a drain, and ambulance officers who found the plaintiff later did not witness the fall. Similarly, in Smith v The Queen (2001) 206 CLR 650, the relevant event was a robbery, and police who later viewed security camera footage of the robbery did not witness the robbery (at [60] per Kirby J).

10. In contrast, in *Angel v Hawkesbury City Council* [2008] NSWCA 130, [51]–[56] a person who saw the plaintiff trip on a footpath slab could give opinion evidence about the deceiving nature of the slab, because the witness was at the scene moments after the plaintiff tripped, as the relevant matter was the visibility of the slab due to the influence of a shadow.

Meaning of 'necessary'

11. Section 78(b) operates to:

> make up for incapacity to perceive the primary aspects of events and conditions, or to remember the perception, or to express the memory of that perception (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [51] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

12. The High Court has cautioned about the need to give effect to the requirement of necessity. While noting that 'in some statutory contexts 'necessary' does not mean 'sine qua non' [and] can mean merely conducive', it commented that it would 'not be correct to construe 'necessary' as meaning not unreasonable in s 78'. It noted that s 78, as an exception to the exculsionary rule in s 76, must not "be construed so amply as to nullify the rule of exclusion" (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [53] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

13. The High Court also noted at [53] that s 78 should not be interpreted in such a way that it admits lay opinion evidence merely because it is 'helpful' to do so. That term 'sets such a low threshold and is so flexible that it would be impossible for appellate courts to exercise any real control over the exercise of the power' (ALRC Report 26:1 [740]).

14. It emphasised that the word 'necessary' is 'directed to the relationship between the perceiver's evidence and the perceiver's opinion'. It is where the 'only way' that the witness' perceptions can be understood is by also admitting evidence of their opinion that evidence of the opinion is admissible under s 78(b) (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [50]–[51], [54] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

15. In deciding whether the evidence is necessary, it is helpful to identify the deficiency in the witness' account or perception of the facts that the lay opinion aims to address (*McLaren v Chief of Navy* [2013] ADFDAT 5, [46]).

16. One situation in which lay opinion evidence may be available is where a witness no longer remembers the precise words spoken and can only remember the 'gist' of the earlier conversation.

There is no rule that memory of precise speech is admissible while memory of the gist of a conversation is inadmissible (*Gan v Xie* [2023] NSWCA 136, [120]; *Kane's Hire Pty Ltd v Anderson Aviation Australia Ltd* [2023] FCA 381, [121]–[129]).

17. It appears that it will rarely be permissible to admit evidence under s 78 which seeks to ascribe a particular state of mind to another person (see, e.g., *R v Whyte* [2006] NSWCCA 75, [53] (per Simpson J, Spigelman CJ contra, Barr J not deciding); *McLaren v Chief of Navy* [2013] ADFDAT 5, [49]; *Patrick v The Queen* (2014) 42 VR 651, [33], [50]; *Petch v The Queen* [2020] NSWCCA 133, [87]–[89])

18. Section 78 is not a 'best evidence' rule. It is not analogous to those sections of the Act which allow hearsay evidence to be admitted where better evidence is not available (e.g. ss 63 and 65) or where calling better evidence could cause undue expense or delay or would not be reasonably practicable (s 64) (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [54] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

19. Like the common law, s 78 does not require witnesses to fully state their perceptions and observations, although any gaps may affect the weight given to the evidence (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [57] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

20. However:

> the less the witness or other observer states his or her primary perceptions, the harder will it be for the tendering party to establish the condition of admissibility in s 78(a) (because of the difficulty of establishing that the opinion is "based" on the perceptions) and the condition of admissibility in s 78(b) (because of the difficulty of establishing that the opinion is necessary to obtain an adequate account or understanding of the person's perceptions) (*Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36 at [57] per French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing)).

Application to voice identification

21. In Victoria, s 78 is the accepted basis on which a person may give voice identification evidence, on the basis of having listened to multiple examples of speech. A person who has listened to many hours of voice recordings is in a better position to make a comparison about the identity of speakers than the jury, and so such evidence is relevant, and the opinion is necessary as a way to shed light on the witness' observation about the similarities of the different voices (*Kheir v The Queen* [2014] VSCA 200, [65]; *Tran & Chang v The Queen* [2016] VSCA 79). However, in New South Wales, such extended observation has been treated as a basis for ad hoc expertise under s 79 (*Nguyen v The Queen* [2017] NSWCCA 4, [81], [105]; *Ali v The Queen* [2022] NSWCCA 199, [42]).

Last updated: 15 December 2023

s 78A – Exception to the opinion rule: 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.

Exception to opinion rule – Aboriginal and Torres Strait Islander traditional laws and customs

1. Section 78A provides an exception to the opinion rule in respect of evidence about Aboriginal and Torres Strait Islander traditional laws and customs.

2. Evidence of an opinion about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group is not excluded by s 76 as a result of the s 78A exception if the opinion:

- is relevant (ss 55 and 56); and
- is expressed by a member of that group.

Last updated: 12 April 2012

s 79 – Exception to the opinion rule: 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 **child**ren 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 **child**ren generally;

(ii) the development and behaviour of **child**ren who have been victims of sexual **offence**s, or **offence**s similar to sexual **offence**s.

Summary of applicable principles

1. The principles applying to the admissibility of expert evidence pursuant to s 79 were summarised in *Nicholls & Ors v Michael Wilson & Partners Ltd* [2012] NSWCA 383. In that case, Sackville AJA noted:

- s 79 assumes that opinion evidence is tendered to prove the existence of a fact in issue. Therefore, before considering whether an opinion falls within s 79, it is necessary to identify why the evidence is relevant;
- evidence must satisfy two criteria to be admissible under s 79(1). First, the witness must have specialised knowledge based on his or her training, study or experience. Second, his or her opinion must be wholly or substantially based on that knowledge;
- thus, the party tendering an expert's report must demonstrate that the author has specialised knowledge based on training, study or experience, which enables him or her to express an opinion on a matter relevant to an issue in the proceeding. The party tendering the report must also be able to show that the opinion was wholly or substantially based on the expert's specialised knowledge;
- this explains why the opinion should be expressed in a manner which makes it possible to determine whether the opinion is wholly or substantially based on specialised knowledge;

- generally, expert evidence must explain how the field of specialised knowledge in which he or she is expert and on which the opinion is substantially based applies to facts which are assumed or observed in order to produce the opinion given;
- failure to demonstrate that an opinion is based on a witness's specialised knowledge based on his or her training study or experience goes to the admissibility of the evidence, not its weight (*Nicholls & Ors v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [209] per Sackville AJA (Meagher and Barrett JJA agreeing)).

2. These principles are considered in more detail below.

Exception to opinion rule - opinions based on 'specialised knowledge'

3. Section 79 provides an exception to the opinion rule in respect of opinion evidence based on specialised knowledge.

4. To be admissible, opinion evidence requires application of, in order, the relevance test, the opinion rule, the exceptions to the opinion rule, and the discretionary provisions.

5. Opinion evidence will satisfy the s 79 exception if:

- it is relevant (ss 55 and 56); and
- it is given by a person who has specialised knowledge; and
- that specialised knowledge is based on his or her training, study or experience; and
- his or her opinion is wholly or substantially based on that specialised knowledge (this applies to each opinion sought to be given).

6. Whether a person has specialised knowledge, that knowledge is based on his or her training, study or experience, and his or her opinion is wholly or substantially based on that specialised knowledge, is determined on the balance of probabilities (s 142).

7. The onus is on the party seeking to have the evidence admitted to demonstrate that the person has specialised knowledge based on his or her training, study or experience which enables him or her to opine on a matter that is relevant to an issue in a proceeding. That party must also demonstrate that the opinion is wholly or substantially based on that knowledge (*Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 603–604; [2011] HCA 21 [35] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

8. It is not the responsibility of the other party to identify deficiencies in an expert report, or a failure to comply with the relevant Practice Note, before trial. A judge should not criticise a party making a legitimate forensic decision to wait until trial to object to the admissibility of a report, in circumstances where an early objection would provide the expert an opportunity to produce a report which does demonstrate specialized knowledge, identify relevant facts and provide a solid path of reasoning (*Nwagbo v The Queen* [2021] VSCA 93, [48]).

9. Failure to demonstrate that a witness's opinion is based on his or her specialised knowledge affects its admissibility, not its weight (*Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 605; [2011] HCA 21 [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Gunnersen v Henwood* [2011] VSC 440 at [64] per Dixon J).

Comment about the application of s 79

10. The commentary below details specific issues that have arisen in proceedings in relation to s 79. In considering those matters:

> Experience has shown that, provided ss 55 and 79 (and, where appropriate, ss 135 and 136) are applied when objection is taken to the admissibility of expert opinion evidence, the issues of admissibility can be resolved sensibly (ALRC Report 102 at [9.82]).

11. While s 79 applies to all expert evidence, expert evidence about reliability or credibility of other evidence may meet the definition of credibility evidence in s 101A, and so require a court to also consider the operation of s 108C and other relevant provisions in Part 3.7 of the Act (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328, [260]–[273]).

'Specialised knowledge'

12. The Act does not:

- define 'specialised knowledge'; or
- require the specialised knowledge to be derived from a 'field of expertise' established according to certain criteria.

13. The Act does require the demonstration of specialised knowledge before expert opinion can be given in evidence.

Meaning and scope of specialised knowledge

14. 'Specialised knowledge' is intended both to extend the common law (i.e. the notion of a 'peculiar skill' which conveys relevant information outside the experience and knowledge of the tribunal of fact), and to emphasise that experience can be as sound a basis for opinion as study (ALRC Report 26:1 at [742]).

15. While the elements which make information 'specialised knowledge' have not been finally settled, the term is 'not restrictive; its scope is informed by the available bases of training, study and experience' (*Adler v ASIC* [2003] NSWCA 131 at [629] per Giles JA (Mason P and Beazley JA agreeing)). This case held that proper professional conduct, in the sense of due care and obedience to customary practices and ethical rules, was a field of specialised knowledge.

16. The High Court has held that specialised knowledge 'is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter'. The training, study or experience is not by itself enough; it 'must result in the acquisition of knowledge'. For the purposes of s 79(1), 'knowledge' is defined as 'acquaintance with facts, truths or principles, as from study or investigation' (*Honeysett v R* (2014) 253 CLR 122; [2014] HCA 29 at [23] per the Court) and includes ideas — inferences, hypotheses and theories — based on those facts (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [72]).

17. Courts should be careful not to confine the ambit of a person's knowledge too closely. Specialised knowledge often provides the understanding and skills to extrapolate from one situation which is well-studied to another, less common, situation. In *Hatziandoniou v Ruddy* [2015] NSWCA 234, the Court of Appeal held that the trial judge had taken "an unduly narrow approach" in excluding evidence from an expert in mechanical engineering and crash test interpretation on the basis that the witness had not "tested the flow of liquid from a motor cycle engine" and therefore " was not qualified to express the opinions that he had ([43]–[44]).

18. Conversely, in *R v Crupi (Ruling No 1)* [2020] VSC 654, [94]–[97], Beale J held that specialised knowledge must relate to the task which the witness is seeking to perform. In that case, the task was characterised as "forensic gait comparison analysis of subjects recorded on CCTV footage". The witness' evidence was excluded as he did not demonstrate specialised knowledge in performing the comparison task, or using CCTV recordings to perform forensic gait analysis.

19. Odgers notes that, while courts have accorded 'ample scope' to the term 'specialised knowledge', 'it is apparent [it] contains two elements. First, there must be 'knowledge', as distinct from, for example, 'belief'. Secondly, the 'knowledge must be 'specialised' rather than generally held in the community' (Odgers, *Uniform Evidence Law,* (online at 23 December 2021) at [EA.79.120]; *Nominal Defendant v Ismail* [2014] NSWCA 432, [26]).

Reliability

20. The judge does not have any role under s 79 in determining whether the underlying specialized knowledge is reliable (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [70]. See also *Meade v The Queen* [2015] VSCA 171, [189]; *Chen v The Queen* (2018) 98 NSWLR 915, [62]; *Xie v The Queen* [2021] NSWCCA 1, [297]–[300]).

21. This is consistent with the approach to issues of reliability for the purpose of s 137 (see *IMM v The Queen* (2016) 257 CLR 300).

22. It only appears to be in a limiting case where no rational jury could accept the evidence that the judge will have a role in assessing the reliability of the opinion evidence (see *IMM v The Queen* (2016) 257 CLR 300, [39]).

23. This means that s 79 allows a suitably qualified or experienced person to give evidence of theories, based on his or her expertise, which have not yet been accepted as correct within the relevant field of expertise. Provided the evidence establishes the necessary link between the opinion and the specialised knowledge, there is no basis for an objection under s 79 that the opinion is novel, or does not attract general support within the scientific community (see *Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [76]–[77]; *Xie v The Queen* [2021] NSWCCA 1, [297]–[298]). The assessment of such matters is, instead, a matter for the jury.

Specialised knowledge and children

24. Section 79 expressly includes 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 abuse).

25. Specialised knowledge relating to the development and behaviour of children can be relevant to a range of matters, including competence and/or the credibility of a child witness.

26. Such evidence must still be relevant, is still subject to the discretions, and may require the giving of appropriate jury directions (see ALRC Report 102 at [9.157]).

Determining specialised knowledge for each opinion

27. In determining whether a person has specialised knowledge, the person purporting to have the specialised knowledge must, in fact, have that knowledge in relation to each opinion given. This is determined on the balance of probabilities (s 142).

'Training, study or experience'

28. A person may qualify as an expert and give opinion evidence in a particular area if he or she has training, study or experience in that area. Any claim to specialised knowledge based on 'experience' should be clearly demonstrated, with much depending on the area of knowledge.

29. Section 79 encompasses 'ad hoc' experts, who are people who have: acquired expertise in a narrow subject matter that would not ordinarily call for or warrant or be susceptible to specialised training, a course of study or experience (*Chen v R* [2011] NSWCCA 145 at [70] per Simpson J (Davies J and Grove AJ agreeing); see also *R v Leung* (1999) 47 NSWLR 405; [1999] NSWCCA 287).

30. A common example of such 'ad hoc' expertise is where a person listens to an otherwise indecipherable tape recording repeatedly and can transcribe its contents through that process (*Butera v DPP* (1987) 164 CLR 180; [1987] HCA 58; *Li v R* [2003] NSWCCA 290). Such ad hoc expertise does not extend to voice identification in Victoria, where identity evidence has never been treated as a matter of expertise (*Kheir v R* (2014) 43 VR 308; [2014] VSCA 200 at [62] per the Court). This contrasts with the position in New South Wales, where voice identification has been recognised as a kind of 'ad hoc' expertise (*R v Leung* (1999) 47 NSWLR 405; [1999] NSWCCA 287; *R v Madigan* [2005] NSWCCA 170; *Chen v R* [2011] NSWCCA 145 at [70] per Simpson J (Davies J and Grove AJ agreeing); *Nguyen v R* [2017] NSWCCA 4 per RA Hulme and Schmidt JJ).

‘Wholly or substantially based on that knowledge’

31. A witness with specialised knowledge may only express an opinion on relevant matters within his or her area of expertise (*Idoport Pty Ltd v National Australia Bank Ltd* [1999] NSWSC 828 at [272] per Einstein J; *Nominal Defendant v Ismail* [2014] NSWCA 432 at [21]–[22]).

32. An opinion which is outside an expert’s specialised knowledge, which may be no more than the expert’s own factual inferences, can be invested with a spurious appearance of authority and should not be admitted due to risk of subverting legitimate fact-finding processes (*HG v R* (1999) 197 CLR 414 at [44] per Gleeson CJ; affirmed in Wood v R (2012) 84 NSWLR 581; [2012] NSWCCA 21 at [466] per McClellan CJ at CL (Latham and Rothman JJ agreeing)).

Proof of logical and factual basis of opinion

33. In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (No 3) [2012] VSC 99, [98] John Dixon J analysed the judgment of Heydon J in *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 and set out three "factual basis rules" which apply under s 79:

> i. are the "facts" and "assumptions" on which the expert’s opinion is founded disclosed (the assumption identification rule);
> ii. is there evidence admitted, or to be admitted before the end of the tendering party’s case, capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value (the proof of assumptions rule);
> iii. is there a statement of reasoning showing how the "facts" and "assumptions" relate to the opinion stated to reveal that that opinion is based on the expert’s specialised knowledge (the statement of reasoning rule)?

34. Failure to comply with the factual basis rules makes the opinion evidence irrelevant (*Parrish v Specialized Australia Pty Ltd (Rulings)* [2020] VSC 15, [26]).

Proof of link between specialised knowledge and opinion

35. To establish admissibility under s 79, the witness’ evidence must show how the field of ‘specialised knowledge’ which the witness is expert in applies to the facts assumed or observed so as to produce the opinion given (D*asreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 602; [2011] HCA 21 at [37] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) FCR 397; [2007] FCAFC 70 at [108]–[109]).

36. Thus, for example, in *Morgan v R* [2011] NSWCCA 257, Hidden J held that it was ‘never satisfactorily explained’ how an expert in anatomy ‘could perform an anatomical comparison between relatively poor quality CCTV images of a person covered by clothing from head to foot with images of the appellant’. In those circumstances, it had not been established that his evidence of similarity in body shape ‘could be said to be based upon his specialised knowledge of anatomy’ (*Morgan v R* [2011] NSWCCA 257 at [140], [144] per Hidden J; see also *Honeysett v R* (2014) 253 CLR 122; [2014] HCA 29).

37. Further, in *Gilham v R* [2012] NSWCCA 131, the Court held that opinions from forensic pathologists that stab wounds in three different victims were ‘similar’ (and thus showed a pattern) were not shown to be substantially based on their experience in analysing stab wounds (*Gilham v R* [2012] NSWCCA 131 at [345]).

38. Section 79 requires the expert to identify their reasoning process. There is a danger that without a transparent reasoning process, opinions may be:

> dressed up with "a spurious appearance of authority, [subverting] the legitimate processes of fact finding", when careful evaluation of the logical steps to such opinions, including the basis for them, is needed. Opinions which do not go beyond a bare ipse dixit (I say so), fall short of being "intelligent, convincing and tested" (*Gunnersen v Henwood* [2011] VSC 440 at [63] per Dixon J (footnotes omitted)).

39. Similarly, in *Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq)* [2016] NSWCA 308 at [67], the New South Wales Court of Appeal found that expert evidence from a solicitor on lending practices had no

significant evidentiary value because it did not explain the reasoning process or assumed facts which led to the witness' conclusion.

40. In contrast, in *Meade v R* [2015] VSCA 171, the Court accepted that the evidence of a professional boot manufacturer was properly admitted, as the witness identified the features of different brands of boots and pointed out how those features could be observed on CCTV images. The Court noted at [212] that there is a significant distinction to be drawn between:

    (a) observations of human characteristics, which are not standardised and which have not been measured and statistically analysed, as was under consideration in *Honeysett*; and

    (b) the identification of characteristics of manufactured objects, which are the product of human endeavour and whose features can be reliably identified by the manufacturer.

41. Experts may rely on reputable articles, publications and material produced by others in the area in which they have expertise as part of their reasoning process (*Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 at [93] per the Court). Section 60 was, in part, intended to preserve that common law position.

42. The timing of the tender of expert evidence will affect how the admissibility of the evidence is addressed (see discussion below).

43. Opinion based on the expert witness' own interpretation of the evidence is not inadmissible, provided the reasoning process is properly explained and is shown to depend on the expert's specialised knowledge (*ASIC v Rich* [2005] NSWSC 149 at [289]–[291] per Austin J).

Requirements as to form

44. The requirement that an opinion be wholly or substantially based on specialised knowledge based on training, study or experience affects the form in which the opinion is expressed (*HG v R* (1999) 197 CLR 414 at [39], [41] per Gleeson CJ; see also *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 604; [2011] HCA 21 [36] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

45. However, this does not prevent an expert witness taking matters of 'common knowledge' into account when formulating his or her opinion (s 80(b); *Velevski v R* [2002] HCA 4 at [82] per Gaudron J; *Campbell v R* [2014] NSWCCA 175 at [223]–[224] per Bathurst CJ (Simpson and Hidden JJ agreeing); *Lang v The Queen* [2023] HCA 29, [435]; *Maher v Tasmania* [2023] TASCCA 7).

46. A person giving evidence of his or her opinion under s 79 should differentiate between the assumed facts which his or her opinion is based on, and his or her actual opinion. That is, the person's reasoning process should be sufficiently exposed to allow the court to evaluate how the witness used his or her expertise to form his or her opinion to be evaluated. To answer that question a court need not be 'subjectively certain'; rather, the test is whether the court is satisfied on the balance of probabilities that the opinion is wholly or substantially based on that knowledge: s 142' (*Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549; [2002] FCAFC 157 at [14] per Branson J. See also *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65, [108]).

47. Importantly, satisfying this element is not sufficient to make the evidence admissible – it must also be relevant and ss 135 and 137 may need to be considered.

Requirement to demonstrate method of reasoning less rigorous in certain circumstances

48. The need to demonstrate the process for drawing an inference is less likely to be strictly required where the area of expertise is well-accepted, than in cases where it is not (*Hannes v Director of Public Prosecutions* (Cth) (No 2) [2006] NSWCCA 373 at [292] per Barr and Hall JJ).

49. In *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated at 604 [37] that s 79 will be 'met in many, perhaps most, cases very quickly and easily'. Their Honours then noted: a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying 'specialised knowledge' based on his or her 'training, study or experience' … will require little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered (*Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 604; [2011] HCA 21 [37] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Lang v The King* [2023] HCA 29, [433]–[434]).

50. Similarly, nuclear DNA testing is sufficiently established that in an ordinary criminal trial, the evidence may focus on the relevant likelihood ratios and provide a basic explanation of what those ratios mean. This should be done in language that is as simple and comprehensible as possible. It is not necessary for the witness to explain the underlying science of DNA profiling (*Tuite v The Queen* [2020] VSCA 318, [113]; *Vyater v The Queen* [2020] VSCA 32).

51. In contrast, in *Townsend v The King* [2022] VSCA 201, the Court of Appeal strictly distinguished between a forensic pediatrician's ability to give evidence about possible accidental and non-accidental causes of injuries, and the witness' ability to draw an inference, based on the accumulation of injuries, that certain injuries were likely to be non-accidental. The Court noted that there was no evidence which established that the process of drawing an inference from an accumulation of injuries was a product of the witness' expertise.

Role of the discretionary and mandatory exclusions

52. If evidence is more prejudicial than probative or could mislead or confuse the tribunal of fact, it can be excluded (ss 135 or 137) or its use may be limited (s 136).

53. Odgers notes that relevant considerations when exercising the discretion in respect of expert opinion include

- where the opinion is based on facts the expert 'observes', whether those facts are identified and proved, or evidence capable of proving those facts is proposed to be tendered;
- whether any 'assumed' facts which the opinion is based on are identified and proved or evidence capable of proving those facts is proposed to be tendered;
- if the opinion is based on hearsay (and is not general and specialised knowledge ordinarily relied on by experts in the field), whether non-hearsay evidence has been admitted or is proposed to be tendered to prove the facts asserted in the hearsay evidence;
- where the opinion is based, consciously or not, on inadmissible material or material that will not be the subject of evidence, the impact of that on the probative value of the opinion:
    - in assessing probative value, a critical factor is the logical force of the reasoning process exposed by the disclosed facts. The mere fact that some other facts also influenced the formation of the opinion does not necessarily reduce the probative value of the opinion, or render it of low probative value. The fact that a broader range of information was originally used when forming the opinion does not necessarily detract from the probative value of the opinion to a significant extent;
- whether the expert has failed to consider relevant facts and, if so, whether it is difficult to correct that failure;
- whether any legal assumptions on which the opinion is based are correct;
- whether the reasoning process underpinning the formation of the opinion is clear and valid;
- whether the opponent can test alleged or assumed facts that form the basis of the opinion;

- the tribunal of fact's capacity to understand and assimilate the evidence, without being misled or deferring to the expert's opinion:
    - this may require the trial judge to direct the jury that it is their responsibility to determine the facts and that they should not simply defer to expert evidence;
- the tribunal of fact's capacity to determine the issue without the expert opinion;
- whether the issue to which the evidence relates is particularly important;
- how much court time would be taken up by admitting the opinion;
- the danger of the focus of the trial shifting from the facts in dispute to the conflict between competing expert witnesses' theories;
- whether the evidence is led against a defendant in a criminal trial;
- whether it is trial by jury and, if so, whether appropriate directions would be effective (Odgers, *Uniform Evidence Law,* (online at 23 December 2021) at [EA.79.300]).

Specialised knowledge of sexual offences

54. *Criminal Procedure Act 2009 s 388* states:

> Despite any rule of law to the contrary, in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court may receive evidence of a person's opinion that is based on that person's specialised knowledge (acquired through training, study or experience) of—
>
> (a) the nature of sexual offences; and
>
> (b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence.

55. This provision allows evidence of specialised knowledge to be admitted to rebut the doubts that might otherwise arise where a complainant displays behaviour that might otherwise be thought to be inconsistent with being the victim of a sexual offence. As the New Zealand Law Reform Commission explained:

> … the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and therefore be better able to evaluate it.
> Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called 'counter-intuitive evidence' … The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women (New Zealand Law Reform Commission, Evidence: Evidence Code and Commentary (Report No 55, 1999) vol 2, 67).

56. Evidence of counter-intuitive behaviour is not able to show that the complainant is more likely to have been the victim of a sexual offence. The evidence is descriptive of the conduct of many victims, but cannot be used as a predictive tool to establish that a person who displays such behaviours is more likely to have been the victim of a sexual offence (*M v R* [2011] NZCA 191, [32]; *Jacobs v The Queen* [2019] VSCA 285, [83]).

57. As the Victorian Court of Appeal explained in *Jacobs v The Queen* [2019] VSCA 285, [61], counter-intuitive behavior evidence may be relevant for two possible purposes:

> First, it may explain conduct or reactions by the complainant at the time of the alleged offending, which, in the absence of such an explanation, might be considered

> to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. Secondly, such evidence might be relevant to explain conduct by a complainant, during the period between the date of the offence and the time at which it is reported to the police, which, if not explained, might seem to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. In either or both of such cases, the evidence would be relevant to explain counterintuitive conduct by a complainant which, if not properly understood, might lead a jury to erroneously conclude that the conduct, alleged against the accused, might have been consensual. In that way, the evidence would be directed to dispel misconceptions or 'myths' held as to the manner in which it might be expected that a victim of a sexual offence might react either at the time of the offending or in the period that followed it (see also *Aziz v The Queen* [2022] NSWCCA 76, [63]).

58. However, in deciding whether those purposes are relevant in a particular case, the court must look at the evidence and cross-examination of the complainant. Counterintuitive behaviour evidence will not be relevant where the complainant does not display counter-intuitive behaviour (*Jacobs v The Queen* [2019] VSCA 285, [62]–[71], [133]–[146]). The risk that a jury may misuse evidence of the complainant's behaviours can be precluded by an appropriate jury direction to ensure there is no impermissible reasoning that disadvantages the prosecution (*Jacobs v The Queen* [2019] VSCA 285, [73]).

59. Further, *Evidence Act 2008* s 79(2) and *CPA 2009* s 388 do not provide for the admission of evidence about the patterns of offending behaviour by perpetrators. Such evidence is not an aspect of child development or child behaviour, and expertise in child development will not necessarily indicate expertise in offender behaviour (*AJ v The Queen* [2022] NSWCCA 136; *BQ v The King* [2023] NSWCCA 34, [213]–[219]).

60. Like all opinion evidence, the counter-intuitive behaviour evidence must be evidence that is based on the witness' training, study or experience (*BQ v The King* [2023] NSWCCA 34, [221]–[240]).

Trial process - relationship between provisional relevance and the factual basis of the opinion

Expert opinion evidence adduced early in the proceedings

61. It is often necessary for a court to make a ruling under s 79 before all the relevant evidence of the factual basis is adduced. In such cases, s 57 (Provisional relevance) may be used to enable opinion evidence to be provisionally admitted, subject to further evidence of the factual basis being admitted (see, e.g. *Allianz Australia Ltd v Sim; WorkCover Authority (NSW) v Sim*; *Wallaby Grip (BAE) Pty Ltd (In liq) v Sim* [2012] NSWCA 68).

62. It is sufficient for admissibility for the court to be satisfied on the balance of probabilities on the evidence and other material before the court that an expert has drawn his or her opinion from known or assumed facts by reference, wholly or substantially, to his or her specialised knowledge (*Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549; [2002] FCAFC 157 at [16] per Branson J; affirmed in *R v Howard* [2005] NSWCCA 25 at [25] per the Court).

63. Expert opinion evidence can be admitted provisionally (relying on s 11 powers) on the basis of foreshadowed evidence. The question of admissibility (including whether one of the discretionary exclusions applies under ss 135 or 137) may be reviewed at a later stage in light of the evidence ultimately given.

Expert opinion evidence adduced later in the proceedings

64. As noted, an expert's opinion must be wholly or substantially based on specialised knowledge based on training, study or experience. If cross-examination discloses that the opinion lacks such a basis, two questions arise:

- whether, and to what extent, the requirements of s 79 are satisfied, and/or
- what is the probative value of the evidence.

65. The approach to be taken may depend on whether or not the case is a jury trial:

- **non-jury trial** – depending on the extent of the failure to demonstrate a connection with his or her with training, study or experience, the judicial officer might revisit the admissibility ruling or take such matters into consideration when deciding whether and to what extent to accept the expert evidence. (Note: evidence is often accepted 'subject to objection'. This is the practical option of considering criticism in the fact-finding stage that can make its relevance to admissibility 'hypothetical'.) The power to revisit the ruling on admissibility of evidence under s 79 lies in the reservation of powers under s 11 and/or the power under s 79;
- **jury trial** – if an issue emerges about a lack of connection between an opinion and training, study or experience, the appropriate approach will depend on the judge's view regarding whether the nature and extent of the alleged lack of connection is something which renders the evidence inadmissible:
    - if s 79 is satisfied and it remains admissible, a direction may need to be given to jurors about their approach to the issues raised to challenge the connection
    - if s 79 is not satisfied, the issue of admissibility can be revisited using common law powers (s 11) or by applying ss 135 and/or 137 and, having ruled the evidence inadmissible, jurors should be instructed to ignore the evidence and the reasons for so doing.

66. If evidence adduced later (most likely during cross-examination) reveals an expert opinion given earlier in proceedings (most likely in an affidavit or a report) is not wholly or substantially based on specialised knowledge, it does not necessarily mean that the initial ruling was incorrect:

> The correctness of that ruling is to be judged by reference to the relevant evidence and other material before the judge at the time of the ruling. The evidence might, however, be of crucial importance with respect to the weight to be accorded the opinion (*Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549; [2002] FCAFC 157 at [17] per Branson J).

67. As noted above, if it emerges that the basis of the evidence is not fully disclosed or proved, the evidence can be ruled inadmissible under ss 57, 135 or 137.

Investigation of bias not required at the admissibility stage

68. The possibility that expert evidence may be tainted by bias (whether unconscious or not) does not mean that it should not be admitted (*Li v R; R v Li* [2003] NSWCCA 290 at [71] per Ipp JA (Whealy and Howie JJ agreeing), citing *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 per Ormiston JA (Chernov and Eames JJA agreeing), *Collins Thomson v Clayton* [2002] NSWSC 366 per Austin J, and *Kirch Communications Pty Ltd v Gee EngineeringPty Ltd* [2002] NSWSC 485 per Campbell J; see also *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [217] per Ipp JA (Beazley and Giles JJA agreeing); *Rush v Nationwide News Pty Ltd (No 5)* [2018] FCA 1622, [32]–[35]).

69. Questions of bias go to 'weight and not admissibility'. It is therefore for the tribunal of fact to assess (*Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [219] per Ipp JA (Beazley and Giles JJA agreeing); see also *Haoui v R* [2008] NSWCCA 209 at [127] per Beazley JA (Johnson and McCallum JJ agreeing); *Rush v Nationwide News Pty Ltd (No 5)* [2018] FCA 1622, [32]–[35]).

70. Similarly, the fact that the expert may have considered, or been influenced by, facts or reasoning processes which are not disclosed in the report affects weight, not admissibility:

> The fact that the opinion was initially formed or later reinforced by reference to other facts, not said by the expert in his evidence to be proved or assumed, is irrelevant to the question of admissibility. Once the opinion is capable of being based on the

proved facts, it is admissible. The fact that the expert's opinion was at one time – or even still is – reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion (although these matters may go to weight) (*ASIC v Rich* (2005) 218 ALR 764, [136]).

71. There may, however, be instances where expert evidence is so biased that it cannot be said to be based on the expert's specialised knowledge. In such cases, the evidence may have so little weight that it should be excluded under Part 3.11 (see, e.g., *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416 at [157] per Emmett J).

Court Rules

72. Compliance with any of the following may also be required:

- Order 44 of the Supreme Court (General Civil Procedure) Rules 2015
- Order 44 of the County Court Civil Procedure Rules 2018
- Order 44 of the Magistrates' Court General Civil Procedure Rules 2020
- Expert Evidence in Criminal Trials Practice Note

73. Failure to comply with relevant court rules or a practice note does not make expert evidence inadmissible, as such materials cannot confine the operation of the Evidence Act. It may, however, be relevant to discretionary exclusion of the evidence (see *Chen v The Queen* (2018) 97 NSWLR 915, [20]–[21]).

Last updated: 15 December 2023

s 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.

Abolition of ultimate issue rule and common knowledge rule

1. Section 80 abolishes the common law ultimate issue and common knowledge rules.

2. The effect of s 80 is that a court may not exclude evidence of an opinion solely on the basis that the evidence is about:

- a fact in issue; or
- an ultimate issue; or
- a matter of common knowledge.

3. Section 80 does not alter the aspect of the ultimate issue rule which prohibits a witness' opinion with respect to the identification of the relevant law or its application, at least where it will determine the rights and liabilities of the parties (*Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6) (Allstate Judgment No 33)* (1996) 64 FCR 79 at [83] per Lindgren J).

4. This does not preclude a witness from expressing an opinion about the ultimate legal issue (for example, whether a defendant was negligent) (*Forge v Australian Securities & Investments Commission* [2004] NSWCA 448 at [276]–[278] per McColl JA (Handley and Santow JJA agreeing); see also *Adler and Anor v Australian Securities and Investments Commission; Williams v Australian Securities and Investments Commission* [2003] NSWCA 131 at [622] per Giles JA (Mason P and Beazley JA agreeing);

R v GK (2001) 53 NSWLR 317 at 326–7 per Mason P (Dowd J agreeing); [2001] NSWCCA 413). In such cases, the statutory discretion may be applied.

5. At common law, the common knowledge rule prohibited expert evidence about matters thought to be within common human experience. Under the Evidence Act, matters within common experience may be admissible, provided the evidence passes through the other admissibility gateways. For example, in the case of evidence about the behaviour of children, such evidence may be admissible under section 79, provided it is based on the witness' specialized knowledge (see *Verryt v Schoupp* [2015] NSWCA 128, [52]–[59]).

6. The role played by the ultimate issue and common knowledge rules at common law is, under the UEA, played by ss 135–137.

Last updated: 7 August 2015

Part 3.4 – Admissions (ss 81–90)

Part 3.4 regulates key aspects of the reception and use of admission evidence. It applies to both civil and criminal proceedings, but includes specific provisions that apply to criminal proceedings. These provisions reflect the different nature and purposes of the civil and criminal trial and their policy goals.

Reform

This Part brings a key change to the law by substituting new rules for the voluntariness test that regulated admissibility of confessions in criminal trials under the common law. The ALRC considered that the voluntariness test had become internally inconsistent and unclear, and had resulted in the onus shifting from the prosecution to the accused to demonstrate that he or she was overborne or inducements had been offered by a person in authority (ALRC Report 38, p87 at [156]).

The reform provisions take a practical and direct approach to address public interest and human rights concerns and the reliability of the admission.

Meaning of admission

The dictionary of the Act defines an admission as:

> A previous representation that is –
>
> (a) made by a person who is or becomes a party to a proceeding (including an accused in a criminal proceeding); and
>
> (b) adverse to the person's interest in the outcome of the proceeding.

The definition is not limited to confessions of guilt. Previous representations that support a conclusion of guilt are considered admissions under the Act. Therefore, evidence of motive comes within the scope of admissions (*DPP v Natale* [2018] VSC 339, [30]).

This definition extends to statements relied on to support an inference of consciousness of guilt. Such statements, while they appear exculpatory in their terms, are admissions when they are relevant for that purpose, and tendered as statements adverse to the person's interests in the outcome of the proceeding. In contrast, where a person is charged with making a false statement, proof of the making of that false statement is evidence of the offence itself and is not the making of an admission (*Beckett v R* [2014] NSWCCA 305, [179]).

Statements in pleadings will not necessarily constitute an admission for the purpose of other proceedings. The court must determine whether the pleading constitutes a positive assertion or whether it is no more than an acknowledgment that a fact may be taken as true for the purpose of particular litigation (*ACCC v Pratt (No 3)* (2009) 175 FCR 558; [2009] FCA 407; *Taylor v R* [2017] NSWCCA 2 at [48]–[50]).

Agreed facts under section 191 are not admissions for the purpose of the Act, as the agreement cannot be used in other proceedings (*ACCC v Pratt (No 3)* (2009) 175 FCR 558; [2009] FCA 407).

Overview of Part 3.4

The following list provides a brief overview of the provisions of this Part, divided between provisions of general operation and provisions that apply only in criminal proceedings:

(a) Provisions applicable in both civil and criminal proceedings:

Exception to the hearsay and opinion rules

- first-hand evidence of admissions is not excluded by the hearsay and opinion rules (ss 81 and 82);
- the hearsay and opinion rules, however, do prevent the use of admission evidence against a third-party to the admission (i.e. a co-accused) unless the third party consents to that use (s 83);

Exclusionary rule

- evidence of an admission is not admissible unless the court is satisfied that the admission and its making were not influenced by violence or other proscribed conduct (s 84);

Proof of facts relevant to the admissibility of admissions

- **maker of admission**; for the purpose of admissibility, the court must find a person made an admission if that finding is reasonably open (s 88), rather than the 'on the balance of probabilities' standard that applies for other evidence (s 142).
- **Admissions made with authority**; in defined circumstances, a previous third-party representation (e.g. by an agent or employee) may be taken to be an admission by a party (s 87);

(b) Provisions applicable in criminal proceedings only:

Further exclusionary rules

- admissions by an accused to investigating officials or others capable of influencing the prosecution are not admissible unless the circumstances in which the admission was made were unlikely to adversely affect the truth of admission (s 85);
- documentary evidence of oral admissions to investigating officials is not admissible unless an accused signed or marked the document (s 86);
- the court may exclude an admission if it would be unfair to the accused to use that evidence (s 90) having regard to the circumstances in which it was made.

Preservation of the right to silence

- no adverse inference (including with respect to credibility) may be drawn from silence in response to a question put by an investigating official (s 89);

Last updated: 12 April 2022

s 81, s 82 – Hearsay and opinion rules: exceptions for admissions and related representations

81 Hearsay and opinion rules—exception for admissions and related representations

(1) The **hearsay rule** and the **opinion rule** do not apply to evidence of an **admission**.

(2) The **hearsay rule** and the **opinion rule** do not apply to evidence of a **previous representation**—

(a) that was made in relation to an **admission** at the time the **admission** was made, or shortly before or after that time; and

(b) to which it is reasonably necessary to refer in order to understand the **admission**.

82 Exclusion of evidence of admissions that is not first-hand

Section 81 does not prevent the application of the **hearsay rule** to evidence of an **admission** unless—

(a) it is given by a person who saw, heard or otherwise perceived the **admission** being made; or

(b) it is a **document** in which the **admission** is made.

Summary of continuity and change

- No significant change to the law.

Exceptions to hearsay and opinion rules – admissions and related representations

1. Section 81 provides an exception to the hearsay and opinion rules for admissions and related representations.
2. The hearsay and opinion rules do not apply:
    - to evidence of an admission; or
    - to evidence of a previous representation:
        - that was made in relation to an admission (at the time the admission was made or shortly before or after that time); and
        - that it is reasonably necessary to refer to in order to understand the admission (s 81).

Exception limited to first-hand hearsay

3. Section 82 limits the exception to the hearsay rule set out in s 81 (Hearsay and opinion rules – exception for admissions and related representations) to first-hand hearsay of the admission or to a document in which the admission is made.

4. In applying s 82, it is important to distinguish between a document that records an admission by another person and a document in which an admission is made. A third party record of an admission (e.g., a police officer's notes recording an admission made by a suspect) is a form of second-hand hearsay and is not exempt from the hearsay and opinion rules.

5. Note that s 60 (Exception to the hearsay rule – evidence relevant for a non-hearsay purpose) does not apply to evidence of an admission in a criminal proceeding (s 60(3)).

Mixed statements

6. Section 81(2) provides a means by which other parts of a statement, which contains representations that are both adverse and not adverse to the maker, can be admitted. Such a statement, in criminal proceedings, is often called a 'mixed statement'.

7. In *Nguyen v The Queen* [2020] HCA 23, the plurality judgment observed at [22] that:

> It is to be expected that exculpatory statements made in a record of interview which also contains admissions will usually satisfy the requirements of s 81(2)(a) and (b). In the event that there is some doubt about the connection between an exculpatory statement and an admission, it should be borne in mind that what is to be made of a mixed statement is a matter for the jury, which might attach different degrees of credit to different parts of it. It has been observed that, under the Uniform Evidence Acts, provided relevant evidence is rationally capable of acceptance, questions of credibility and reliability are to be seen as squarely within the province of the jury. Considerations of this kind suggest that no narrow approach should be taken to the relationship between exculpatory statements and admissions.

8. The prosecution obligation to conduct its case fairly includes an obligation to tender mixed statements, unless there is a good reason not to do so, such as where it would be unfair to the accused to tender the statement.

9. However, the prosecution is not required to tender "evidence of a witness whose account has been carefully prepared or is otherwise contrived", or where the witness' evidence is clearly demonstrated to be false by other objective evidence. These exceptions, however, are likely to be rare (*Nguyen v The Queen* [2020] HCA 23, [44], [63]–[64]).

10. In deciding whether the exculpatory part of a mixed statement is "reasonably necessary to refer in order to understand the admission", the court should recognise that the definition of admissions is broad, that a record of interview almost invariably contains some admissions, and it will often be reasonably necessary to see and hear the exculpatory statement to consider why the accused made the admission (*Nguyen v The Queen* [2020] HCA 23, [57]–[58], [75] (Edelman J).

Records of interview and self-serving 'statements'

11. The duty to conduct the case fairly by tendering the accused's police interview may even apply where s 81(2) is not be available (such as where the interview does not contain any admissions); the prosecution should, with the consent of the accused invite the court to exercise the discretion in s 190 to waive the relevant exclusionary rules (*Nguyen v The Queen* [2020] HCA 23, [39]–[43], [73], [78]–[80]). This is because fair presentation of the prosecution case ordinarily requires tender of the accused's police interview.

12. In *Abernethy & Hawkins v The Queen* [2020] VSCA 96, the accused were charged with intentionally causing injury to the victim. The prosecution case was that following an acrimonious property settlement, the victim attended the house to take possession and found it was occupied by the son of one of the accused. The pair argued, and the son contacted the two accused, who attended the property. A further argument occurred between the two accused and the victim and the accused struck the victim a number of times. The accused were interviewed and asserted that they acted in self-defence. The prosecution tendered the interviews of each accused as a matter of fairness, but each accused sought to use the interview of the co-accused under *Evidence Act 2008* s 83. The Court of Appeal held that the attempt to invoke s 83 failed at the threshold, as the statements by the

accused did not contain admissions, as the nature of the case meant there were no statements in the interviews which were against the accused's interests ([57]–[61]).

13. This approach to the definition of admissions can be contrasted with the approach of the High Court in *Nguyen v The Queen* [2020] HCA 23, where it was largely assumed that the statements were admissions, even though the interviews also took the form of admitting the physical acts but asserting self-defence. At [75] Edelman J referred to "the almost invariable circumstance that the interview contains some admission" and, at [79] considered that the admission of the physical acts were "plainly more than minimally relevant".

14. The correct approach to whether a statement is properly characterised as an admission will rarely be relevant in relation to an accused's record of interview in a criminal trial. This is because the High Court in *Nguyen* held that if an interview is not admissible under s 81, the prosecution would ordinarily be required, as a matter of fairness, to offer to tender the interview at the accused's request by agreeing to waive the rules of evidence under s 190.

15. The correct approach to statements which admit only matters that are not in issue is likely then to only be significant where the duty of fairness does not require the prosecution to offer to waive the rules of evidence under s 190.

Last updated: 28 April 2022

s 83 – Exclusion of evidence of admissions as against third parties

(1) Section 81 does not prevent the application of the **hearsay rule** or the **opinion rule** to evidence of an **admission** in respect of the **case** of a third party.

(2) The evidence may be used in respect of the **case** of a third party if that party consents.

(3) Consent cannot be given in respect of part only of the evidence.

(4) In this section, *third party* means a party to the proceeding concerned, other than the party who—

(a) made the **admission**; or

(b) adduced the evidence.

Summary of continuity and change

- No significant change to the law.
- Section 83 ensures one defendant's admission cannot be used against another defendant in the same proceedings without the latter's consent. If the latter does consent, the admission is admissible only in its entirety.

Exclusion of evidence of admissions as against third parties

1. The exception to the hearsay rule set out in s 81 (Hearsay and opinion rules – exception for admissions and related representations) does not allow evidence of an admission to be used in the case of a third party unless the third party consents to the use of the evidence in its entirety (s 83(1)).

2. That consent must relate to the whole of the admission (s 83(3)). This includes any parts of a mixed statement made admissible under s 81(2) to give meaning to the admission (*Abernethy & Hawkins v The Queen* [2020] VSCA 96, [75] per Niall and Emerton JJA, Maxwell P contra).

3. The purpose of the section is to ensure that admissions and related statements by one party to a proceeding are not admissible against a co-party without that party's consent (*Power v R* (2014) 43 VR 261; [2014] VSCA 146 at [65] per Redlich JA and Robson AJA).

4. Section 83 operates to allow admissions that were admissible against one party to the proceeding to be used in the case of another party to the proceeding. Before s 83 can operate, the admission must be admitted or be admissible under s 81. Where the inculpatory parts of the purported admission relate only to matters that are not in issue in the proceeding, it may be that the relevant statement does not contain any admissions admissible under s 81 (see *Abernethy & Hawkins v The Queen* [2020] VSCA 96, [57]–[61], but compare *Nguyen v The Queen* [2020] HCA 23, [75]–[79] (Edelman J)).

Who is a third party?

5. A third party is a party to the proceeding concerned, other than a person who made the admission or who adduced evidence of the admission (s 83(4)).

6. As a result, the section does not apply to earlier statements by a co-accused who is tried separately, as such a co-accused is not a 'third party' as defined. It does, however, apply to joint trials of co-accused (*Power v R* (2014) 43 VR 261; [2014] VSCA 146 at [65] per Redlich JA and Robson AJA; *Abernethy & Hawkins v The Queen* [2020] VSCA 96, [68]–[69]).

Last updated: 28 April 2022

s 84 – Exclusion of admissions influenced by violence and certain other conduct (all proceedings)

(1) Evidence of an **admission** is not admissible unless the **court** is satisfied that the **admission**, and the making of the **admission**, were not influenced by—

(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the **admission** or towards another person; or

(b) a threat of conduct of that kind.

(2) Subsection (1) only applies if the party against whom evidence of the **admission** is adduced has raised in the proceeding an issue about whether the **admission** or its making were so influenced.

Summary of continuity and change

- This section introduces a specific exclusionary rule which is directed to the conduct of persons other than the person who made the admission. It identifies types of conduct that warrant prima facie exclusion of evidence of admissions. This section applies in both civil and criminal proceedings.

Exclusion of evidence of admissions influenced by violence and certain other conduct

1. This section applies in civil and criminal proceedings.

2. An admission is not admissible unless the court is satisfied the admission was not influenced by violent, oppressive, inhuman or degrading conduct, or a threat of such conduct (s 84).

3. The provision applies:

- in respect of conduct directed towards either the person who made the admission or another person; and
- only if the relevant party raises the issue of violence or other conduct.

4. Section 84 is stronger in its operation than the common law rule that a confession or admission must be voluntary but is confined to the types of conduct described. The section excludes any admission unless the court is satisfied that the admission was not influenced by proscribed conduct (*R v Baladjam (No 48)* [2008] NSWSC 1467).

Meaning of violent, oppressive, inhuman or degrading conduct

5. The scope of 'oppressive conduct' is not limited to physical conduct, but can encompass mental and psychological pressure: see Hoeben J in *Higgins v R*. However, the fact that the section provides for automatic exclusion of evidence in both civil and criminal proceedings is a reason for not giving the term an expansive meaning (see *R v Heffernan & Peters*, unreported, NSWCCA, Smart, Bruce James and Sperling JJ, 16 June 1998; *Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34; *R v Zhang* [2000] NSWSC 1099; *Higgins v R* [2007] NSWCCA 56; *R v Ul-Harque* [2007] NSWSC 1251; *R v Baladjam (No 48)* [2008] NSWSC 1467; *R v Tang* [2010] VSC 578 at [25]; *DPP v Hou* [2020] VSCA 190, [150]).).

6. Oppressive conduct may include persistent police questioning when the accused indicates they intend to exercise the right to silence. Whether questioning becomes relevantly oppressive is a matter of judgment, looking at the behaviour of the police and the behaviour of the accused during the interview to see whether the accused was oppressed or overborne. Mere persistence in response to an indication that the witness does not intend to answer questions does not mean the continued questioning was oppressive or improper (see *Maher v State of Tasmania* [2023] TASCCA 7, [5]–[18]).

7. Illegal conduct may constitute oppressive conduct, as well as being a basis for exclusion of evidence under s 138. However, not all illegal conduct will be relevantly oppressive, or capable of influencing the admission or the making of the admission (see *R v Baladjam (No 48)* [2008] NSWSC 1467).

8. 'Inhuman conduct' means conduct that is incompatible with the International Covenant on Civil and Political Rights (*R v JF* [2009] ACTSC 104; *R v Troung* (1996) 86 A Crim R 188).

Establishing violent, oppressive, inhuman or degrading conduct

9. Once a party raises the issue of violent, oppressive, inhuman or degrading conduct, the onus falls on the party seeking to tender the evidence to establish, on the balance of probabilities, that the admission and the making of the admission were not influenced by the proscribed conduct or threat (ss 84, 142; *R v GH* (2000) 105 FCR 419; [2000] FCA 1618 at [59]).

10. The maker of the alleged admission does not need to prove that violent, oppressive, inhuman or degrading conduct *did* influence the admission (*Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34 at [234]; *R v JF* [2009] ACTSC 104).

11. A person seeking to raise the issue may rely on evidence in the tendering party's case to raise an issue under s 84(1), without needing to call evidence on a voir dire. In other cases, a voir dire may be convenient as a matter of procedure and, if there is nothing in the evidence to raise the issue, a party may need to call evidence on a voir dire (*R v GH* (2000) 105 FCR 419; [2000] FCA 1618 at [59]; *Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34).

12. Section 84 will be relevant if there is some evidence that indicates, through legitimate reasoning, that there is a reasonable possibility that an admission or its making were influenced by the proscribed conduct or threat (*Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34 at [234]; *R v JF* [2009] ACTSC 104).

Consequences of violent, oppressive, inhuman or degrading conduct

13. Once proscribed conduct or threats that may influence an admission or the making of an admission occur, the party tendering the admission must show that the conduct or threat did not influence the admission or the making of it. That onus is not necessarily discharged by showing that the confessing party was not experiencing that conduct at the time they made the admission. The court will consider the context in which the admission was made, including the situation confronting the maker of the admission (see *Burut v Public Prosecutor* [1995] 2 AC 579; *Thomas v R* (2006) 14 VR 475 [2006] VSCA 165; *Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34 at [280], [281]).

14. The section applies to any violent, oppressive, inhuman or degrading conduct or threats of such conduct towards the person who made the admission, or another person, that may have affected the admission, or the making of the admission. It is irrelevant who engaged in the conduct (*Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34; *R v JF* [2009] ACTSC 104; *R v GH* (2000) 105 FCR 419; [2000] FCA 1618).

15. Unlike the common law test of voluntariness, section 84 does not require the court to consider whether the confessor's will was overborne. The test is whether it can be shown that the conduct did not influence the admission or the making of the admission. The word 'influence' does not evoke a particularly high test of causation. Instead, under the 'influence' test, evidence may be inadmissible because of conduct that has a relatively limited causal relationship with the making of the admission (*R v JF* [2009] ACTSC 104 at [32], [37]; *Habib v Nationwide News* (2010) 76 NSWLR 299; [2010] NSWCA 34 at [237]–[241]; *R v Zhang* [2000] NSWSC 1099 at [44]).

16. Section 84 does not require the court to consider whether the proscribed conduct was the sole or dominant reason for making the admission. In many cases, there will be a number of factors that contribute to an admission or the making of an admission. An admission is inadmissible unless the party tendering the evidence can establish that the proscribed conduct was not one of the factors that influenced the admission (*R v Zhang* [2000] NSWSC 1099 at [43]–[44]; *Higgins v R* [2007] NSWCCA 56).

Last updated: 15 December 2023

s 85 – Criminal proceedings: reliability of admissions by accused

(1) This section applies only in a **criminal proceeding** and only to evidence of an **admission** made by an accused—

(a) to, or in the presence of, an **investigating official** who at that time was performing **function**s in connection with the investigation of the commission, or possible commission, of an **offence**; or

(b) as a result of an act of another person who was, and who the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the accused should be brought or should be continued.

(2) Evidence of the **admission** is not admissible unless the circumstances in which the **admission** was made were such as to make it unlikely that the truth of the **admission** was adversely affected.

(3) Without limiting the matters that the **court** may take into account for the purposes of subsection (2), it is to take into account—

(a) any relevant condition or characteristic of the person who made the **admission**, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the **admission** was made in response to questioning—

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

Summary of continuity and change

- This section, combined with s 84, replaces the common law voluntariness test in criminal proceedings. These sections operate together with ss 90, 137 and 138.
- The section is intended to ensure that admissions made in circumstances connected to the investigation of an offence or as a result of the action of a person who could influence whether or not a prosecution is to proceed, are reliable.
- This section focuses on the circumstances in which an admission was made. The court must exclude evidence of an admission unless satisfied that the circumstances were such as to make it unlikely that the truth of the admission was adversely affected.

Application of s 85

1. Section 85 applies only in a criminal proceeding where an accused makes an admission:
   - to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission or possible commission of an offence (which does not include undercover police); or
   - as a result of an act of another person who was, and who the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the accused should be brought or continued.

2. Where s 85 applies, evidence of an admission is not admissible unless the court is satisfied the circumstances in which the admission was made were such as to make it unlikely the truth of the admission was adversely affected (s 85(2)).

3. Section 85(1)(a) previously applied to admissions 'in the course of official questioning'. It was amended in response to the High Court decision in *Kelly v R* (2004) 218 CLR 216; [2004] HCA 12, which (by majority) interpreted narrowly the expression 'official questioning' in a way that excluded admissions made after, or as a result, of official questioning. Cases on the meaning of the section prior to the amendments must be treated with care.

Admissions made to investigating officials and others capable of influencing a prosecution

4. 'Investigating official' is defined in the Dictionary to exclude officers engaged in covert operations. It has been held to cover an agent of an investigating official (*R v Truong* (1996) 86 A Crim R 188; *R v Donnelly* (1997) 96 A Crim R 432).

5. The term 'investigating official' may encompass the officer in charge of a naval party which boards a vessel suspected of being used for the purpose of people smuggling (*Bin Sulaeman v R* [2013] NSWCCA 283 at [75] per R A Hulme J (Beazley P and Bellew J agreeing)).

6. The scope of the phrase 'performing functions in connection with the investigation … of an offence' is broad and flexible. It may cover preliminary questions an investigating official asks to orientate himself or herself when arriving at a location, but it may not cover statements by a suspect in a 'siege' situation (compare *R v Naa* (2009) 76 NSWLR 271; [2009] NSWSC 851 and *R v Mclaughlan* [2008] ACTSC 49).

7. Whether a particular person can influence the decision to prosecute depends on the facts of the case. It often includes investigating officials, prosecuting bodies and may even include complainants. In *R v Lieske* (2006) 116 A Crim R 213, Gray J excluded evidence of a 'pretext' telephone call between a complainant and the accused, where the judge characterised the complainant's persistent questioning as an interrogation. His Honour held that the complainant was capable of influencing the decision to prosecute, through her attitude to giving evidence (see also *Lyon v The Queen* [2019] VSCA 251, [18], where the complainant was held to be a person capable of influencing the decision to prosecute).

Unlikely to affect the truth of the admission

8. Once the accused satisfies the evidentiary burden required to raise an issue under s 85, the prosecution bears the onus of establishing, on the balance of probabilities, that the circumstances in which the admission were such as to make it unlikely that the truth of the admission was adversely affected (*R v Moffatt* (2000) 112 A Crim R 201; *R v Esposito* (1998) 45 NSWLR 442).

9. Section 85 differs from the common law, which presumed that a promise by a person in authority rendered any subsequent admission involuntary. Under this section, the evidence of admissions made following such behaviour is inadmissible unless the court is satisfied that the circumstances were such as to make it unlikely that the truth of the admission was adversely affected.

10. It will be relevant to consider the age, mental or physical condition, intellectual capacity, or state of sobriety, of the accused impaired his or her orientation, comprehension or recollection and hence the reliability or truthfulness of the accused's statements (s 85(3), *R v Esposito* (1998) 45 NSWLR 442; *R v Dunn* [2020] VSC 372, [208]–[211]).

11. An inquiry into whether the circumstances may have affected the truthfulness of the accused's admission may arise where the representation is directly inculpatory or when it is relied on as a lie demonstrating a consciousness of guilt. In the latter situation, the court will need to consider whether the circumstances may have contributed to the accused making a deliberately untrue statement (see *R v Esposito* (1998) 45 NSWLR 442, but compare *R v GH* (2000) 105 FCR 419; [2000] FCA 1618, which held that consciousness of guilt lies are not admissions under the Act).

Circumstances in which the admission was made

12. The expression 'the circumstances in which the admission was made' means the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions were relevant (*R v Garry James Rooke* (unreported, NSWCCA, 2 September 1997)).

13. Section 85(3) specifies a number of matters the court must take into account as part of the circumstances, including characteristics of the accused and, if the admission was made in response to questioning, the nature of the questions, the manner of questioning and the nature of any threat, promise or inducement offered to the accused. For an example of the approach a court may take to this task, see *R v Tang* [2010] VSC 578 at [30].

14. For the purpose of s 85(2), it is not necessary to show that the circumstances involved any misconduct on the part of investigating officials. The section focuses on circumstances in existence at the time of questioning by an investigating official, as well as anything done prior to questioning by a person capable of influencing the decision to commence or continue a prosecution (*R v Mclaughlan* [2008] ACTSC 49; *R v Esposito* (1998) 45 NSWLR 442).

15. The court will also consider any personal or psychological vulnerabilities which affect the accused's truthfulness (*R v Mclaughlan* [2008] ACTSC 49).

16. This may include language and cultural factors that may affect the truthfulness of any admissions, such as where the witness does not understand the explanation of a suspect's rights, or the questions asked, or where the witness uses words in a different manner to their conventional meaning (see *Headland v The King* [2023] VSCA 174, [60]–[67]).

17. For the purpose of s 85, 'the circumstances' include both subjective and objective matters (*R v BL* [2015] NTSC 85, [29], [32]; *Headland v The King* [2023] VSCA 174, [59]).

18. Courts should exercise care when considering any admissions made 'in the course of an exchange between persons who do not speak the same language and who emanate from different cultural backgrounds' (*Bin Sulaeman v R* [2013] NSWCCA 283 at [85] per R A Hulme J (Beazley P and Bellew J agreeing)).

Assessing reliability and truthfulness of admissions

19. Strictly, s 85 is not concerned with whether the admission was made or whether it was truthful. Those are matters for the jury (*R v McLaughlan* [2008] ACTSC 49).

20. The section plays no part in admissibility of evidence of admissions that may be untrue or unreliable for reasons other than the circumstances in which they were made (*R v Garry James Rooke* (Unreported, NSWCCA, 2 September 1997); *R v Ul-Haque* [2007] NSWSC 1251).

21. The court may consider the terms of a confession as part of assessing whether the circumstances adversely affected the reliability of the admission (*R v Donnelly* (1997) 96 A Crim R 432).

22. Section 189(3) provides that when hearing a preliminary question about whether an accused's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the accused.

23. Where an accused raises the issue of the admission's truth or untruth, as described in s 189(3), the prosecution and the court may examine the evidence to prove the admission, although the extent to which that will be considered may be limited (*R v Ye Zhang* [2000] NSWSC 1099 at [52]).

Last updated: 12 April 2022

s 86 – Criminal proceedings: exclusion of oral questioning

(1) This section applies only in a **criminal proceeding** and only if an oral **admission** was made by an accused to an **investigating official** in response to a question put or a **representation** made by the official.

(2) A **document** prepared by or on behalf of the official is not admissible to prove the contents of the question, **representation** or response unless the accused has acknowledged that the **document** is a true record of the question, **representation** or response.

(3) The acknowledgement must be made by signing, initialling or otherwise marking the **document**.

(4) In this section, **document** does not include—

(a) a sound recording, or a transcript of a sound recording; or

(b) a recording of visual images and sounds, or a transcript of the sounds so recorded.

Summary of continuity and change

- This section ensures that a documentary record of an official interview will not be admissible in criminal proceedings unless the accused has signed or marked the document.
- The purpose of the section is to exclude fabricated documentary admissions, in particular, 'verbals'.
- Given that s 8 of the Act preserves the operation of other Acts, including provisions relating to the mandatory taping of interviews, the need to apply this section may not arise frequently.

Exclusion of unacknowledged documentary records of oral questioning

1. This section applies only in a criminal proceeding.
2. It provides that a documentary record of an oral admission made by an accused to an investigating official to a question put, or a representation made by, the official is not admissible to prove the contents of the question, representation or response unless the accused has acknowledged that the document is a true record of the question, representation or response.
3. The accused may provide that acknowledgement by signing, initialling or otherwise marking the document (s 86(3)).
4. The exclusion only applies where there is a nexus between the subject matter under investigation in the questioning and the matter to which any admissions might be expected to arise. It does not apply to exclude implied admissions in the form of lies, made during questioning of a person as a witness for a different offence (*DPP v Lo (No 4)* [2018] VSC 147, [68]–[71]).

Meaning of 'document'

5. The definition of document for the purposes of s 86 does not include sound recordings, recordings of visual images or sounds or transcripts of such recordings (s 86(4)).

6. The section only applies to the documentary record of the admission and does not apply to oral evidence that an investigating official might give of the admission (*DPP v Lo (No 4)* [2018] VSC 147, [68]).

Operation of other Acts

7. By virtue of s 8, s 86 does not affect the operation of the provisions of other Acts, such as s 464H of the *Crimes Act 1958*, which impose preconditions on the admissibility of confessions or admissions by suspects to investigating officials. In practice, s 86 only applies when provisions like s 464H do not apply (e.g., when the accused was not, and should not reasonably have been, a suspect at the time of making the confession or admission).

Last updated: 12 April 2022

s 87 – All proceedings: admissions made with authority

(1) For the purpose of determining whether a **previous representation** made by a person is also taken to be an **admission** by a party, the **court** is to admit the **representation** if it is reasonably open to find that—

(a) when the **representation** was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the **representation** was made; or

(b) when the **representation** was made, the person was an employee of the party, or had authority otherwise to act for the party, and the **representation** related to a matter within the scope of the person's employment or authority; or

(c) the **representation** was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the **hearsay rule** does not apply to a **previous representation** made by a person that tends to prove—

(a) that the person had authority to make statements on behalf of another person in relation to a matter; or

(b) that the person was an employee of another person or had authority otherwise to act for another person; or

(c) the scope of the person's employment or authority.

Summary of continuity and change

- This provision sets out a flexible approach to the admissibility of an admission made by a third person with the party's authority. The court must decide whether it was 'reasonably open' to find that the previous representation was made with the party's authority.
- Section 87(1)(c) preserves the common law co-conspirators rule, which allows evidence of admission by one party to a criminal enterprise to be used against other parties to that enterprise if the representation was made in the furtherance of that enterprise (*Beqiri and Hajko v The Queen* [2017] VSCA 112, [90]–[93]). However, the New South Wales Court of Criminal Appeal has held that the section operates differently to the position at common law, which required there to be

independent evidence connecting the accused to the conspiracy. This requirement of independent evidence is removed by operation of s 57(2), which allows a court in determining whether a person was acting in furtherance of a common purpose to use the evidence which is sought to be adduced (*Macdonald v The Queen* [2023] NSWCCA 250, [143]–[149], [166]).

Admissions made with authority

1. In determining whether a previous representation made by a person who is not a party may be taken to be an admission by a party, s 87(1) provides that the court is to admit the representation if it is reasonably open to find that:

    - when the representation was made, the person had the authority to make it on behalf of the party; or
    - when the representation was made, the person was an employee of the party or had authority to act for the party and the representation related to a matter within the scope of the person's employment or authority; or
    - the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

2. Section 87(2) allows a previous representation made by the person to be used to prove:

    - that the person had authority to make statements on behalf of another person in relation to a matter; or
    - that the person was an employee of another person or had authority otherwise to act for another person; or
    - the scope of the person's employment or authority.

3. Despite the mandatory language in s 87(1) ('the court is to admit'), s 87 is not directed to admission of evidence in the substantive proceeding. Instead, it addresses the preliminary question of whether a representation by one person is taken to be an admission by a party to the proceeding. Resolving this preliminary question requires the court to decide whether any of the subparagraphs of subsection (1) apply. If one or more of the subparagraphs do apply, the court must then decide whether the admission should be admitted in the proceeding (*R v Dolding* (2018) 100 NSWLR 314, [21]–[27]). This requires an application of the various exceptions and exclusions in Part 3.4.

4. The mandatory language of s 87(1) does, however, demonstrate that there is no element of discretion. If the requirements in s 87(1) are met, the court must treat the admission as if it had been made by a party to the proceeding (*R v Dolding* (2018) 100 NSWLR 314, [25]–[26]).

Meaning of 'in furtherance of'

5. The phrase carries with it the ordinary English dictionary meaning encapsulated in the word 'furtherance' – in the context of s 87(1)(c), it denotes an act done to advance, aid or help a common purpose whether that purpose is lawful or not (*Landini v New South Wales* [2007] NSWSC 259 at [19]; *R v Dolding* (2018) 100 NSWLR 314, [56]–[57]).

6. A mere narrative statement of past events will seldom be a statement made in furtherance of a common purpose (*Tripodi v The Queen* (1961) 104 CLR 1, 7, cited with approval for its continuing relevance to s 87(1)(c) in *R v Dolding* (2018) 100 NSWLR 314, [54]).

7. The alleged admission must have been made in furtherance of the common purpose alleged. It is not sufficient that the representation was made in furtherance of any common purpose (*R v Dolding* (2018) 100 NSWLR 314, [28]–[32]).

8. This means that if there is no common purpose alleged in the substantive proceeding, s 87(1)(c) will not be capable of applying (see *Higgins v The Queen* [2020] NSWCCA 149, [39]).

‘Common purpose’

9. Generally speaking, ‘common purpose’ involves the concept of a combination or some form of pre-concert formed between two or more persons to do an act or acts of a particular kind – when used in s 87(1)(c), it applies to a common purpose whether that common purpose is lawful or not (*Landini v New South Wales* [2007] NSWSC 259 at [19]).

10. The common purpose must exist at the time the person makes the relevant representation. A statement cannot be in furtherance of a common purpose if it is made before the common purpose comes into existence (*Clancy v Plaintiff A & Ors* [2022] NSWCA 119, [114]–[115]).

Standard of proof

11. The test for establishing any of the conditions in ss 87(1)(a)–(c) is whether ‘it is reasonably open’ to find the conditions satisfied. This excludes the general test in s 142, that preliminary facts affecting the admissibility of evidence must be established on the balance of probabilities.

Hearsay exception to aid proof

12. Under s 87(2), the court may admit evidence of a previous representation by the person about his or her authority and employment to establish the matters specified in ss 87(1)(a) or (b), but not (c).

13. For the purpose of s 87(1)(c), the court may use the evidence itself to determine whether the common purpose exists (s 57(2); *Macdonald v The Queen* [2023] NSWCCA 250, [143]–[149], [166]).

Last updated: 15 December 2023

s 88 – Proof of admissions

> For the purpose of determining whether evidence of an **admission** is admissible, the **court** is to find that a particular person made the **admission** if it is reasonably open to find that he or she made the **admission**.

Proof of admissions

1. In determining whether evidence of an admission is admissible, a court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admissions (s 88).

2. A finding under this section is only made for the purpose of determining whether the evidence is admissible. It does not foreclose the question a tribunal of fact must decide of whether the admission was made (*R v Lodhi* (2006) 163 A Crim R 526).

3. Section 88 applies to the question of whether an alleged statement is an admission at the admissibility stage (*R v Hall* [2001] NSWSC 827 at [28]).

Last updated: 1 April 2011

s 89 – Criminal proceedings: evidence of silence

(1) In a **criminal proceeding**, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—

(a) to answer one or more questions; or

(b) to respond to a **representation**—

put or made to the party or other person by an **investigating official** who at that time was performing **function**s in connection with the investigation of the commission, or possible commission, of an **offence**.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the **representation** if the failure or refusal is a fact in issue in the proceeding.

(4) In this section, *inference* includes—

(a) an inference of consciousness of guilt; or

(b) an inference relevant to a party's **credibility**.

Evidence of silence

1. This section applies only in a criminal proceeding.
2. A court may not draw an inference unfavourable to a party from a person's failure to answer a question, or to respond to a representation, put or made to the person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
3. Evidence of silence is not admissible if its only relevant use is to draw an adverse inference. This does not prevent the admission of evidence of silence to prove a refusal to answer a question where that is relevant for a different reason (such as where a person unlawfully refuses to answer a question).

Meaning of inference

4. For the purposes of s 89, 'inference' includes an inference of consciousness of guilt or an inference relevant to a party's credibility (s 89(4)).

Selective failure or refusal

5. The words 'one or more questions' in s 89(1)(a) indicates that selective refusal falls within the ambit of s 89. Accordingly, the provision does not permit an adverse inference to be drawn from selective answering of questions by the accused (ALRC Report 38 at [165]).

Last updated: 7 August 2015

s 90 – Criminal proceedings: discretion to exclude admissions

In a **criminal proceeding**, the **court** may refuse to admit evidence of an **admission**, or refuse to admit the evidence to prove a particular fact, if—

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the **admission** was made, it would be unfair to an accused to use the evidence.

Summary of continuity and change

- No significant change to the law.
- This provision reflects the common law discretion dealing with unfairly obtained admissions. Like that discretion, s 90 focuses on the effects of the conduct on the accused and whether reception and use of the evidence will be unfair for the accused. 'Unfairness' is not defined and the discretion is broad in scope.
- The s 90 discretion differs from the s 138 discretion, which allows a court to exclude improperly or illegally obtained evidence, in three main ways. Section 138 applies to all evidence and is not restricted to admissions; only applies to illegal or improper conduct; and is directed to broader public policy issues rather than fairness to the accused.

Discretion to exclude admissions in criminal proceedings

1. Section 90 applies only in criminal proceedings.
2. Under s 90, the court may refuse to allow the prosecution to adduce evidence of an admission or refuse to admit evidence of an admission to prove a particular fact if, having regard to the circumstances in which the admission was made, use of the evidence would be unfair to the accused.
3. The s 90 discretion is consistent with the common law discretion relating to evidence of admissions in criminal proceedings – i.e., the *R v Lee* (1950) 82 CLR 133 discretion (*Em v R* (2007) 232 CLR 67; [2007] HCA 46 at [51], [52] per Gleeson CJ and Heydon J; [108]–[109] per Gummow and Hayne JJ).
4. The onus is on the accused to demonstrate that it would be unfair to admit evidence of an admission (*Bin Sulaeman v R* [2013] NSWCCA 283 at [98] per R A Hulme J (Beazley P and Bellew J agreeing); *Khamisi v R* [2015] VSCA 355, [31]).
5. The section has been described as a 'final or safety net provision', which is available once the more specific exclusionary provisions in the Act have been considered and applied (*Em v R* (2007) 232 CLR 67, [109] per Gummow and Hayne JJ; *Bin Sulaeman v R* [2013] NSWCCA 283 at [97] per RA Hulme J (Beazley P and Bellew J agreeing); *DPP v Myles* [2021] VSCA 324, [29]).
6. In *Em v R* (2007) 232 CLR 67, Gleeson CJ and Heydon JJ (Kirby J concurring on this point) indicate that a party may rely upon s 90, regardless of what other sections the accused also relies upon (at [42] and [196]). See also ALRC Report 38 at [160(b)].

'Fairness': meaning and scope

7. 'Unfair' is not defined and there is no guidance in the application of the discretion (cf s 138). Instead, it is a highly fact-specific concept (*Em v R* (2007) 232 CLR 67, [56] per Gleeson CJ and Heydon J).

8. This is to ensure breadth and flexibility in the application of the discretion. According to ALRC Report 102, the discretion may include but is not limited to considerations of reliability and/or any infringement of the rights and privileges of the accused (ALRC Report 102 at [10.137]–[10.143]).

9. The role of reliability in the context of s 90 is uncertain. The High Court majority judgment in *IMM v The Queen* observed that "only limited provision is made in the Evidence Act for a court to take into account the reliability of evidence in connection with its admissibility". The majority went on to identify ss 65(2)(c), 65(2)(d), 85(2) and 165 as provisions where reliability or unreliability is relevant (*IMM v The Queen* (2016) 257 CLR 300, [17]–[18]).

10. Earlier, in *EM v The Queen*, Gummow and Hayne JJ, in noting that s 90 operated as a final or safety net provision, stated that "the questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90" (*Em v R* (2007) 232 CLR 67; [2007] HCA 46, [109], quoted with approval in *DPP v Myles* [2021] VSCA 324, [29]). However, Gummow and Hayne JJ did accept that, if s 85 was not engaged (such as where the admission was not made in the course of official questioning) then questions of reliability "may well have a role to play in the application of s 90" (*Em v R* (2007) 232 CLR 67, [112]).

11. The result appears to be that if a court has considered a matter as part of applying an exclusionary rule in another section, the court cannot consider the same matter again as part of an analysis of fairness (*Hinton v The Queen* [2015] VSCA 40, [4]–[8]; *R v Meade (No 1)* (2013) 233 A Crim R 40, [114]–[118]; *R v Cooney* [2013] NSWCCA 312, [8]).

12. The purpose of s 90 is to exclude evidence if its use would be unfair to the accused rather than to require a balancing of public policy interests (cf: s 138) (ALRC Report 38 at [160]).

13. This reflects the fact that the relevant type of unfairness is that it would be unfair to use the admission against the accused. The section is not concerned with whether the admission was obtained through unfair means (*DPP v Natale* [2018] VSC 339, [34]–[35]; *Haddara v The Queen* (2014) 43 VR 53, [14(ii)]).

14. Assessment of unfairness may require the court to consider the personal condition and characteristics of the accused at the time of the admission, such as level of education and language proficiency, fatigue and ability to understand questions and cautions, and ability to communicate answers. The court may also consider the conduct of investigative officials, even if not amounting to misconduct, in persisting with an interview with a vulnerable accused (*DPP v Natale* [2018] VSC 339, [41]–[43], [51]; *Haddara v The Queen* (2014) 43 VR 53, [14(ii)]; *R v KS (No 2)* [2023] NSWSC 1475).

15. The Act does not require a court to assume that confessions obtained through the 'scenario' technique are presumptively unfair or unreliable (*Weaven v The Queen* [2018] VSCA 127, [40]–[42]).

Contrasting ss 85 and 90

16. Section 85(2) provides that an admission is not admissible unless it is unlikely that the circumstances in which the admission was made were unlikely to adversely affect the truth of the admission.

17. The difference between ss 85(2) and 90 is that while s 85(2) is concerned with the evidentiary reliability of the admission, s 90 is concerned with the procedural unfairness of the use of the admission (*DPP v Natale* [2018] VSC 339, [23], with evidentiary reliability likely only relevant if s 85 is not engaged (see *Em v R* (2007) 232 CLR 67, [112] per Gummow and Hayne JJ).

Examples of circumstances which may impact upon fairness

18. In *Czako v R* [2015] NSWCCA 202, McCallum J (Hoeben CJ at CL and Harrison J concurring) held that the use of a statement in a foreign language overheard by a native speaker of that language during the execution of a search warrant was not inherently unfair. There was no evidence that the native speaker was present specifically for the purpose of translating private remarks. The

requirements of fairness did not require the native speaker to interrupt the suspect and ask the person to adopt a note of what he had just said (at [83]–[85]).

19. Section 90 is not limited to situations where admissions are made to police officers or comparable officials. It also applies to admissions made to informers and to non-police investigators. In *Pavitt v R* [2007] NSWCCA 88, the majority summarises the key common law principles from Australian and Canadian jurisprudence regarding the admissibility of covertly recorded conversations (at [70]). Two considerations are:

- whether the evidence was obtained by a 'state agent' and,
- whether the evidence was 'elicited'.

20. The majority in *Pavitt* also noted that lawful covert recording is not, of itself, unfair or improper.

21. Where evidence falls outside ss 90, 137 and 138, it may be relevant to consider the residual common law discretion to exclude evidence where it would lead to an unfair trial (*Haddara v R* (2014) 43 VR 53; [2014] VSCA 100 per Redlich and Weinberg JJA (Priest JA contra); see also *Police v Dunstall* (2015) 256 CLR 403; [2015] HCA 26 and ***s 11 - General powers of a court***).

Section 90 and pretext conversations

22. A common context in which arguments for the exclusion of admissions pursuant to s 90 arise is in relation to pretext conversations. A 'pretext conversation' occurs where a complainant, often a victim of sexual offences, speaks to an accused in an attempt to elicit admissions from the accused. The conversation between the complainant and the accused is then recorded to enable it to be used in evidence. Usually, the conversation will take place at the suggestion of investigating police.

23. In *R v Burton* [2013] NSWCCA 335, the Court analysed the admissibility of a pretext conversation and found that the complainant was not acting as an agent of the State, because the conversation would have occurred irrespective of whether the police had intervened, and the intervention of the police was limited to the time at which the conversation occurred and the fact that it was recorded (*R v Burton* [2013] NSWCCA 335 at [124]–[125] per Simpson J (RA Hulme J and Barr AJ agreeing)).

24. Further, the Court held that the admission had not been 'elicited' and the conversation could not be considered an 'interrogation'. This was because:

- there had been no unfair derogation from the accused's right to exercise a free choice to speak or remain silent;
- the accused was able to cease the conversation at any time;
- the complainant had not made any accusations, directly or indirectly; and
- the accused had raised the subject of the events surrounding the alleged offences and had apologised (this echoed a previous unsolicited apology) (*R v Burton* [2013] NSWCCA 335 at [127]–[128] per Simpson J (RA Hulme J and Barr AJ agreeing)).

25. Other factors the Court considered relevant to the conclusion that evidence of the admission had not been unfairly or improperly adduced included that:

- the police had not exploited any special characteristic of the relationship between the accused and the complainant, as there was no relationship of trust between them;
- the accused was not obligated or vulnerable to the complainant;
- the complainant did not manipulate the accused so as to make him more likely to talk;
- the conversation had not been 'scripted'; and
- the complainant and the investigating officer had different understandings about the reasons for the call, with the complainant considering that the call was for her to get an

explanation from the accused, rather than it being to 'capture' evidence (*R v Burton* [2013] NSWCCA 335 at [129]–[131] per Simpson J (RA Hulme J and Barr AJ agreeing)).

26. In *Lyon v The Queen*, the admissibility of a pretext call under s 90 was upheld by reference to the following factors:

- the complainant was significantly younger than the accused;
- at the time of the call, the accused had not been charged or interviewed;
- the conduct of the pretext call did not interfere with the accused's right to speak or be silent. The accused was free to speak or to terminate the call;
- while the pretext call began with the complainant falsely saying that she was pregnant, this lie was not suggested by police and was not unfair or improper, as its purpose was only to introduce the topic of the accused's sexual interference (*Lyon v The Queen* [2019] VSCA 251, [26]–[32]).the complainant and the investigating officer had different understandings about the reasons for the call, with the complainant considering that the call was for her to get an explanation from the accused, rather than it being to 'capture' evidence (*R v Burton* [2013] NSWCCA 335 at [129]–[131] per Simpson J (RA Hulme J and Barr AJ agreeing)).

Last updated: 15 December 2023

Part 3.5 – Evidence of judgments and convictions (ss 91–93)

Part 3.5 is based on a balance between procedural fairness and the capacity to adduce probative evidence. It:

- establishes a general rule to exclude evidence of judgments and convictions (s 91)
- creates exceptions for:
  - probate and letters of administration (and like court documents) in both civil and criminal proceedings (s 92(1)), and
  - convictions in civil matters (s 92(2));
- does not affect the operation of the laws relating:
  - convictions for defamation in both civil and criminal proceedings (s 93(a)), and
  - does not affect the operation of the laws relating judgments in rem, res judicata or issue estoppel (ss 93(b) and (c)).

Last updated: 12 April 2012

s 91 – Exclusion of evidence of judgments and convictions

(1) Evidence of the decision, or of a finding of fact, in an **Australian or overseas proceeding** is not admissible to prove the existence of a fact that was in issue in that proceeding.

(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Summary of continuity and change

- Section 91 provides a general rule against admissibility of judgments and convictions that is consistent with existing law.
- However, significant exceptions are provided by s 92 (which represents a major change to the law) and s 93. Discretions are available.

Exclusion of evidence of judgments and convictions

1. Section 91 prohibits the use of evidence of a decision, or a finding of fact, in Australian or overseas proceeding, to prove the existence of a fact that was in issue in that proceeding. Such evidence is not admissible to prove the existence of a fact even if the decision or finding of fact is relevant for another purpose.
2. That is, s 91 does not prevent the tender of judgments which contain findings as to the existence of facts relevant to the issues in the trial in which they are tendered – the section merely prevents the judgments from being tendered for the purpose of proving the existence of those facts. If they are admissible for another purpose, they may not then be used to prove the existence of those facts, a consequence which would otherwise have flowed from s 60 (*Ainsworth v Burden* [2005] NSWCA 174 at [109] per Hunt AJA (Handley and McColl JJA agreeing); *Daunt v Daunt* [2015] VSCA 58, [59]–[60]; *Stephensen v Salesian Society In* [2018] VSC 622, [18]).
3. Section 91 does not preclude the use of previous judgments in determining whether a person has engaged in vexatious litigation for the purpose of the *Vexatious Proceedings Act 2014*. Findings in past cases that the respondent has acted vexatiously, or engaged in an abuse of process, are mixed findings of fact and law which are not covered by s 91 (*Attorney-General for the State of Victoria v Garrett* [2017] VSC 75 at [21]–[26]).
4. Section 91 has also been held to be limited in its application in disciplinary proceedings against lawyers. In *King v Muriniti,* Basten JA held that:

   > … because of the relationship between the court and a legal practitioner, with the concomitant duty of candour imposed on the practitioner, the disciplinary jurisdiction would not permit a practitioner to require the Prothonotary to prove again a finding of misconduct made in other proceedings because reliance could not be placed upon those findings. Hence s 91 was not engaged (*King v Muriniti* (2018) 97 NSWLR 991, [35]. See also *Council of the Law Society of New South Wales v Yoon* [2020] NSWCA 141, [23]–[25]. But c.f. *Legal Services Board v Forster (Ruling No 1)* [2016] VSC 356; *Legal Services Board v McGrath* (2010) 29 VR 325, [39]; *Council of the Law Society of New South Wales v Jafari* [2020] NSWCA 53, [28]).
5. Further, section 91 does not prevent a court making use of its judgment in the principal proceeding when deciding whether to make a third party costs order, such as under *Civil Procedure Act 2010* s 29. This is because the decision in relation to costs is part of the one proceeding (see *King v Muriniti* (2018) 97 NSWLR 991, [45]).
6. Section 178 (Convictions, acquittals and other judicial proceedings) provides for the giving of certificates by courts as evidence of convictions, acquittals, sentences and certain other orders.

Exceptions and savings

7. Section 92 provides exceptions to this rule.

8. Section 93 preserves the operation of certain laws that may be relevant to the application of this section.

Last updated: 12 April 2022

s 92 – Exceptions to exclusion of evidence of judgments and convictions

(1) Section 91(1) does not prevent the **admission** or use of evidence of the grant of probate, letters of administration or a similar order of a **court** to prove—

(a) the death, or date of death, of a person; or

(b) the due execution of a testamentary **document**.

(2) In a **civil proceeding**, section 91(1) does not prevent the **admission** or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an **offence**, not being a conviction—

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or

(b) that has been quashed or set aside; or

(c) in respect of which a pardon has been given.

(3) The **hearsay rule** and the **opinion rule** do not apply to evidence of a kind referred to in this section.

Summary of continuity and change

- This section provides specified exceptions to the general rule. Most notably s 92(3) abrogates the rule in *Hollington v Hewthorn and Co Ltd* [1943] KB 587.

Exceptions

1. Section 92(1) creates an exception to s 91 in respect of evidence of the grant of probate, letters of administration and similar court orders to prove the death or date of death of a person or the due execution of a testamentary document.

2. Section 92(2) creates an exception to s 91 in respect of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence other than a conviction that is the subject of current appeal or review, that has been quashed or set aside or in respect of which a pardon has been given.

3. The exception in s 92(2) only applies to the fact of conviction, and any element of the offence in question. It does not extend to detailed facts found when sentencing, or on an appeal (*The Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341 at [9]; *Prothonotary of the Supreme Court of New South Wales v Livanes* [2012] NSWCA 325 at [9]–[10]; *Edwards v State Trustees Ltd* (2016) 54 VR 1, [112]–[117]).

4. The effect of s 92(2) is to impose an evidentiary onus on a person who disputes the correctness of the conviction to produce evidence that it is incorrect (but it does not alter the legal onus of proof of the facts underlying the conviction) (ALRC Report 26:1 at [773]–[778]).

5. Evidence of a kind referred to in s 92 is not subject to exclusion by the hearsay rule or the opinion rule (s 92(3)).

6. The Part 3.6 rules (tendency and coincidence) remain applicable.

Last updated: 28 April 2022

s 93 – Savings

This Part does not affect the operation of—

(a) a **law** that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a **criminal proceeding**) for defamation; or

(b) a judgment in rem; or

(c) the **law** relating to res judicata or issue estoppel.

Savings

1. Section 93 preserves the operation of:

- a law that relates to the admissibility or effect of evidence of a convicted tendered in a proceeding for defamation; or
- a judgment in rem; or
- the law relating to res judicata or issue estoppel.

Last updated: 12 April 2012

Part 3.6 – Tendency and coincidence (ss 94–101)

Part 3.6 deals with evidence of previous character, reputation, prior conduct and tendencies when the evidence is relevant to the facts in issue. Part 3.7 applies to evidence relevant only to credibility, and Part 3.8 applies only to criminal proceedings to deal with character evidence led for and against an accused.

In accordance with overall UEA policy, specific tendency and coincidence policy concerns include ensuring probative value, limiting unfair prejudice, avoidance of collateral issues, ensuring parties are not taken by surprise, and the impact on time and costs of litigation.

Part 3.6:

- provides the scope of the tendency and coincidence rules (s 94);
- provides that both rules are purposive (so the restrictions apply to prevent evidence being used for a tendency or a co-incidence purpose (as the case may be)) (s 95)
    - Note: unlike the hearsay, opinion and credibility rules, neither the tendency rule nor the coincidence rule has 'other use exceptions' – compare s 60 (hearsay), s 77 (opinion) and Part 3.7 (credibility);
- provides that references in Part 3.6 to 'doing an act' includes omissions (s 96);
- establishes the tendency rule which excludes such evidence unless reasonable notice is given and the evidence has significant probative value (s 97);
- establishes the coincidence rule which excludes such evidence unless reasonable notice is given and the evidence has significant probative value (s 98);
- provides the requirements for notices under this Part (s 99);

- provides for the dispensing of notice requirements (s 100);
- in criminal proceedings, imposes an additional (i.e. to ss 97 and 98) requirement for prosecution evidence – namely that probative value substantially outweighs any possible prejudicial effect (s 101).

The exceptions to these rules include when the evidence is 'adduced' to respond to evidence already adduced by another party (ss 97(2), 98(2) and 101(3)).

Analytic framework for admissibility of tendency and coincidence evidence

When applying Part 3.6 as a whole, there are four questions the court must consider in deciding whether tendency evidence is admissible:

(a) Does the evidence support the particular tendency that is sought to be relied upon?

(b) Is the particular tendency capable of rationally affecting the assessment of the probability of a fact in issue?

(c) Does the tendency evidence have significant probative value in respect of that fact in issue?

(d) Does the probative value of the tendency evidence substantially outweigh any prejudicial effect it may have on the accused (*Dempsey v The Queen* [2019] VSCA 224, [59]).

This four-step analysis can also be expressed in the context of coincidence evidence as follows:

(a) Are the similarities in specified events and/or in circumstances in which they occur such that it is improbable that the events occurred coincidentally;

(b) If so, would the evidence of those events and circumstances tend to prove that the accused:

  (a) Did the specified act, or

  (b) Had the specified state of mind, where doing that act or having that state of mind is a fact in issue or is relevant to a fact in issue;

(c) If so, does the evidence have significant probative value either by itself or having regard to other evidence adduced or sought to be adduced by the prosecution; and

(d) If so, does the probative value of the evidence substantially outweigh any prejudicial effect it may have on the accused (see *Dempsey v The Queen* [2019] VSCA 224, [70]; *Patton v The Queen* [2021] VSCA 104, [41]; *CGL v The Queen* (2010) 24 VR 486, [22]).

Example of tendency and coincidence reasoning

- *R v Straffen* [1952] 2 QB 911 concerned the murder of a young girl. Evidence was admitted that the accused had escaped for two hours from a nearby prison where he was being held for killing two young girls in the same manner as the murder the subject of the case. It was not disputed that the accused had killed the other two girls in the same circumstances as those of this case. Evidence that the accused had killed the other two young girls in similar circumstances was tendency evidence to show the accused had a tendency to kill in a certain manner. His presence in the area of, and the similarities with, the subject murder identified him as the perpetrator. See also *Pfennig v R* (1995) 182 CLR 461; [1995] HCA 7.
- *Quarrell v R* [2011] VSCA 125 concerned seven arson, and two attempted arson, offences in respect of fires that occurred at beach boxes at a particular Victorian beachside town. Evidence of each offence was admitted as coincidence evidence in relation to each other offence on the basis that it was improbable that each of the offences was committed by more than one person and that it was improbable that the offender was a person other than the accused.

Last updated: 22 April 2022

s 94 – Application of Part 3.6: limits

(1) This Part does not apply to evidence that relates only to the **credibility** of a **witness**.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of—

(a) the character, reputation or conduct of a person; or

(b) a tendency that a person has or had—

if that character, reputation, conduct or tendency is a fact in issue.

Application of provisions relating to tendency and coincidence

1. Part 3.6 (ss 94–101) does not apply:
   - to evidence that relates only to the credibility of a witness; or
   - to a proceeding, as far as it relates to bail or sentencing; or
   - to evidence of the character, reputation or conduct or a person or a tendency that a person has or had if that character, reputation, conduct or tendency is a fact in issue in the proceeding.
2. The term 'fact in issue' in s 94(3) has been interpreted to mean the 'ultimate fact in issue' (*Allam v Aristocrat Technologies Australia Pty Ltd (No 2)* [2012] FCAFC 75 at [33]).

Last updated: 10 June 2015

s 95 – Use of evidence for other purposes: limits

(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

Summary of continuity and change

- This provision is consistent with existing law. Its work for tendency and coincidence evidence is the reverse of those rules which allow hearsay, and opinion evidence, if admitted for another purpose, then also to be used for a hearsay or opinion purpose (s 60 and s 77 respectively).

Use of evidence for other purposes

1. The tendency and coincidence rules control both the admissibility and the use of evidence. Section 95 prohibits:
   - the use of evidence for a tendency or a coincidence purpose if the evidence is not admissible for that purpose under Part 3.6 (Tendency and Coincidence) even if the evidence is relevant for another purpose (s 95(1)); and
   - the use of evidence for a tendency or a coincidence purpose if it cannot be used for that purpose under Part 3.6 even if it is relevant for another purpose (s 95(2)).

2. That is, even if evidence is admissible for another purpose, it must still satisfy the requirements for tendency or coincidence evidence under ss 97 and 98 before it can be used for a tendency or coincidence purpose.

3. Section 95 is concerned with evidence that 'may be relevant both because it tends to establish a propensity and because it may tend independently to prove a fact in issue' (*Trylow v Commissioner of Taxation* [2004] FCA 446 at [115] per Hill J).

4. Because s 95 limits the use of evidence to its admissible purposes, if a jury hears evidence that is admissible for another purpose but inadmissible for tendency or coincidence reasoning, then this will usually require the judge to warn the jury to only use the evidence for permissible purposes and not for any impermissible purposes (*R v AH* (1997) 42 NSWLR 702 at 708–709 per Ireland J (Hunt CJ at CL and Levine J agreeing); *R v OGD (No 2)* (2000) 50 NSWLR 433; [2000] NSWCCA 404 at [63], [68] and [87] per Simpson J; *Qualtieri v R* [2006] NSWCCA 95 at [73] and [80]–[81] per McClellan CJ at CL; *Martin v State of Tasmania* [2008] TASSC 66 at [64] and [69]–[70] per Slicer J).

5. More detailed commentary on jury warnings is provided in the Victorian Criminal Charge Book.

'Relevant for another purpose'

6. There will be 'cases where evidence of conduct is relevant to a fact in issue independently of its tendency to show that a person had a propensity to act in a particular way' (*Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886 at [65]–[67] per Sackville J (Whitlam and Mansfield JJ agreeing)).

7. This will depend on whether the evidence revealing the tendency of a person to act in a particular way [or to have a particular state of mind] is a 'necessary link in the reasoning making the evidence relevant to a fact in issue' (*Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886 at [65]–[67] per Sackville J (Whitlam and Mansfield JJ agreeing)).

8. This means that practitioners must clearly identify how evidence is relevant, so that judges can apply sections 95, 97 and 98 (*R v AH* (1997) 42 NSWLR 702; *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18).

9. Evidence about a person's conduct does not become relevant for a non-tendency purpose merely by asserting that the evidence tends to establish a system of behaviour or a business practice (*Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886 at [65] per Sackville J (Whitlam and Mansfield JJ agreeing)). However, where there is some non-tendency evidence that a consistent business system existed, then conduct on other occasions may be relevant to show the existence and scope of that system, which then supports an inference, in the absence of evidence to the contrary, that the system was followed on a particular occasion (*Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886, [67]; *ACCC v 4WD Systems* [2003] FCA 850, [51]–[52]).

10. Similarly, in terrorism cases, evidence that the accused made or viewed terrorist material, or made statements supportive of terrorism, may be relevant either as evidence of motive, or, for preparatory offences, that the accused intended to commit a terrorist act (see *R v Benbrika* (2010) 29 VR 593; *DPP v Fattal* [2013] VSCA 276; Elomar & Ors v The Q*ueen* (2014) 316 ALR 206).

11. Further, evidence of a connected series of events, even if not closely contemporaneous to the relevant acts, may demonstrate a continuing state of mind which is relevant without tendency reasoning. That is, the evidence may demonstrate that the accused had the relevant state of mind, rather than had a tendency to have the relevant state of mind (*Higgins v The Queen* [2016] VSCA 47, [19]; *Di Paolo v The Queen* [2019] VSCA 194, [30]–[31]; *Davies v The Queen* [2019] VSCA 66, [109]).

12. However, it has been argued that use of evidence to prove a continuing state of mind should be limited to states of mind concerning political or religious beliefs. This limit has not been finally approved or rejected in Victoria (compare *Parachoniak v The Queen* [2017] VSCA 347, [7]–[9] (Maxwell P) and [70] (Priest JA). See also *Davies v The Queen* [2019] VSCA 66, [111]–[112]).

Last updated: 28 April 2022

s 96 – Failure to act

A reference in this Part to doing an act includes a reference to failing to do that act.

Meaning of 'failure to act'

1. Section 96 clarifies that, in ss 94–101, a reference to 'doing an act' includes a reference to 'failing to do that act'.

2. Odgers (9th ed, 2010 at [1.3.6600]) asserts that, despite the limited language of this section, 'it is intended that evidence of the absence of a particular state of mind … will be subject to this Part'. While there is no binding decision on the point, this interpretation is consistent with the fact that Chapter 3 codifies the rules for admissibility.

Last updated: 10 June 2015

ss 97, 98 – Civil and criminal proceedings: the tendency rule and the coincidence rule

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the **court** thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant **probative value**.

(2) Subsection (1)(a) does not apply if—

(a) the evidence is adduced in accordance with any directions made by the **court** under section 100; or

(b) the evidence is adduced to explain or contradict **tendency evidence** adduced by another party.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the **court** thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant **probative value**.

(2) Subsection (1)(a) does not apply if—

(a) the evidence is adduced in accordance with any directions made by the **court** under section 100; or

(b) the evidence is adduced to explain or contradict **coincidence evidence** adduced by another party.

Summary of continuity and change

- The Uniform Evidence Act was intended to make substantial changes to the common law rules relating to tendency and coincidence evidence.
- The terminology has changed from ‘propensity’ to ‘tendency’ evidence, and from ‘similar fact’ to ‘coincidence’ evidence (although it should be noted that, under the common law, similar fact evidence could also be used for propensity reasoning)..

- **Tendency rule**: unlike s 398A of the *Crimes Act 1958* (which deals with evidence which discloses a criminal propensity even when that evidence is not sought to be used for that propensity reason), s 97 captures only that evidence which is adduced to prove a tendency. Evidence that is not adduced for such a purpose is not 'tendency' evidence for the purposes of the Act.
- **Coincidence rule**: the threshold for the admissibility of coincidence evidence captures similarities in either the events or the circumstances, or both.

The tendency rule and the coincidence rule (ss 97, 98)

1. The tendency (s 97(1)) and coincidence (s 98(1)) rules are purposive rules which apply in both civil and criminal proceedings. The tendency rule has been described as a 'contingent exclusionary rule' (*Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886 at [48] per Sackville J (Whitlam and Mansfield JJ agreeing)).
2. Evidence is not admissible as tendency or coincidence evidence unless:
    - it has significant probative value; and
    - the other parties to the proceedings are given reasonable written notice of the intention to adduce the evidence (though application may be made to the court to dispense with this requirement) (s 100). Though no notice is required if the evidence is led in response to tendency evidence (s 97(2)(b)) or coincidence evidence (s 98(2)(b)) adduced by another party.

What is tendency evidence?

3. Tendency evidence is a type of circumstantial evidence which supports a particular mode of reasoning (*Chen v R* [2011] NSWCCA 145 at [96] per Simpson J (Davies J and Grove AJ agreeing); *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18 at [138]).
4. It is:

    > evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings (*Elomar v R* [2014] NSWCCA 303 at [359]. See also *Murdoch v R* (2013) 40 VR 451; [2013] VSCA 272 at [81]; *Page v R* [2015] VSCA 357 at [42]–[66]; *R v Cittadini* [2008] NSWCCA 256; 189 A Crim R 492 at [23] per Simpson J).

5. The Act defines tendency evidence as evidence of the character, reputation or conduct of a person, or a tendency a person has or had, which a party seeks to adduce for the purpose of proving the person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind (*Evidence Act 2008* s 97, Dictionary Part 1).
6. Evidence of forensic gait analysis must comply with the tendency rule, as evidence of how the accused walked on other occasions is evidence of a tendency to walk in that way (*R v Crupi (Ruling No 1)* [2020] VSC 654, [102]–[103]). Therefore, using forensic gait analysis involves reasoning that because the accused had a tendency to walk in a particular fashion, a person walking in that fashion on another occasion is more likely to be the accused.
7. The tendency rule may also prohibit reasoning that the accused, as a member of a particular class, is more likely to engage in conduct that is associated with members of that class. For example, an argument that the accused, as a man, is predisposed to commit a sexual assault against sleeping women in his house, was held to involve an impermissible appeal to tendency reasoning (*Hubbard v The Queen* [2020] VSCA 303, [54]–[55], [70]).
8. The definition focuses on the purpose for which evidence is tendered (*R v Quach* [2002] NSWCCA 519 at [32] per Spigelman CJ (James J agreeing)).

9. A court is not bound to only consider the characterisation the tendering party gives to the impugned evidence when determining that purpose (*RWC v R* [2010] NSWCCA 332 at [129]–[130] per Simpson J (Price and Garling JJ agreeing)).

10. Rather, a court must carefully analyse the evidence 'to ascertain what is sought to be achieved by its admission' (*Chen v R* [2011] NSWCCA 145 at [97] per Simpson J (Davies J and Grove AJ agreeing)).

11. Despite this, a court should not lightly determine that the purpose stated by responsible counsel is not the real reason for tendering the evidence (*RG v R* [2010] NSWCCA 173 at [34] per Simpson J (Campbell JA and Whealy J agreeing)).

12. Tendency evidence has been said to be 'no more than a building block or stepping stone' which provides the basis for inferring that on a relevant occasion 'a person behaved in a particular way or had a particular state of mind' (*DAO v R* (2011) 81 NSWLR 568; [2011] NSWCCA 63 at [180] per Simpson J).

What is coincidence evidence?

13. Coincidence evidence is evidence that two or more events occurred, which is adduced to prove a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which the events occurred, or any similarities in both the events and their surrounding circumstances, it is improbable that they occurred coincidentally (see Part 1 of the Dictionary to the Act, in combination with s 98).

14. The use of "coincidence evidence" relies on a process of inferential reasoning, in which the jury:

- Infers from evidence of similarities between two or more events, and/or the circumstances in which the events occurred, that is improbable that the events occurred coincidentally; and
- Infers from the improbability of such a coincidence the existence of a relevant fact in issue (*Evidence Act 2008* s 98. See also *R v DCC* (2004) 11 VR 129; [2004] VSCA 230, [8]).

15. While there are many ways in which coincidence evidence may be relevant, some of the most common forms of coincidence reasoning are to show:

- That an offence was committed;
- That it was the accused who committed the offence;
- That the accused was acting voluntarily;
- That the accused had a particular state of mind; or
- That several independent witnesses or complainants have given truthful evidence (see, e.g., *Makin v Attorney-General of New South Wales* [1894] AC 57; *Pfennig v R* (1995) 182 CLR 461; [1995] HCA 7; *DPP v Boardman* [1975] AC 421; *R v Anderson* (2000) 1 VR 1; [2000] VSCA 16; *Wilson v R* (1970) 123 CLR 334; *R v Buckley* (2004) 10 VR 215; [2004] VSCA 185).

16. When using coincidence evidence to prove that it was the accused who committed an offence, the evidence will need to show that the *modus operandi* used makes it likely that the same person was responsible for two separate offences. Other or additional evidence will then be needed to show that it was the accused who committed one of the offences (see *Pfennig v R* (1995) 182 CLR 461; [1995] HCA 7; *R v Straffen* [1952] 2 QB 911; *Thompson and Wran v R* (1968) 117 CLR 313; *R v Dupas (No 2)* (2005) 12 VR 601; [2005] VSCA 212; *DPP v Mariona* [2019] VSCA 155).

17. When using coincidence evidence to prove that independent witnesses have given truthful evidence, a party will rely on the improbability of independent witnesses making similar false allegations against the accused. The jury may reason that the similarities are more than can be explained by coincidence, and so their evidence is mutually supporting (*R v Buckley* (2004) 10 VR 215; [2004] VSCA 185; *R v DCC* (2004) 11 VR 129; [2004] VSCA 230; *R v Papamitrou* (2004) 7 VR 375; [2004] VSCA 12; *R v Rajakaruna* (2004) 8 VR 340; [2004] VSCA 114; *R v Glennon (No 2)* (2001) 7 VR 631;

[2001] VSCA 17).). In this mode of reasoning, it is important to note that it is the similarity of the *witness' accounts* which is the coincidence evidence, and not similarity in the *accused's actions* (*Saoud v The Queen* (2014) 87 NSWLR 481, [43]; *Addo v The Queen* (2022) 108 NSWLR 522, [67]–[69]).

18. However, reasoning from the improbability of similar false allegations is not available where the fact in issue is whether the accused engaged in *non-consensual* sexual activity with several independent complainants. In that situation, a jury could not reason that each complainant is telling the truth about the absence of consent, as evidence of one complainant's absence of consent cannot inform the issue of consent regarding another complainant (*Jacobs v The Queen* [2017] VSCA 309, [34]–[35], [45]–[46]. See also *Phillips v The Queen* (2006) 225 CLR 303, [49]. But compare *Bektasovski v The Queen* [2022] NSWCCA 246, [91]–[95], where a *tendency* to engage in sexual intercourse through persistence, pressure or coercion, culminating in non-consensual intercourse was upheld).

Overlap between s 97 and s 98

19. While tendency evidence and coincidence evidence both describe different modes of reasoning, there is potential for overlap between those two types of evidence (*Saoud v R* (2014) 87 NSWLR 481; [2014] NSWCCA 136; *Murdoch v R* (2013) 40 VR 451; [2013] VSCA 272 at [62]).

20. In Victoria, while it has previously been common for prosecutors, especially in sexual offence cases, to identify the same pieces of evidence and relevant similarities in both a notice of tendency evidence and a notice of coincidence evidence (see, e.g. *Murdoch v R* (2013) 40 VR 451; [2013] VSCA 272 at [24]–[25]; *Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121 at [23]; *Rapson v R* (2014) 45 VR 103; [2014] VSCA 216 at [10]–[11]; *Page v R* [2015] VSCA 357 at [51]), that practice is no longer widespread. It is now more common for prosecutors to only rely on tendency notices in sexual offence cases (see, e.g, *Avalos v The Queen* [2020] VSCA 56; *Lewers v The Queen* [2019] VSCA 272; *Danny v The Queen* [2018] VSCA 223; cf *Jacobs v The Queen* [2017] VSCA 309. Compare also *Dempsey v The Queen* [2019] VSCA 224, [4], which was not a sexual offence case, on the need sometimes to file coincidence notices even if the primary prosecution argument is that the evidence shows a tendency to offend in a particular manner).

21. Where evidence is relied on to prove that certain acts occurred, evidence of the accused's conduct on another occasion may support an inference that the accused has a tendency to commit the charged acts, while the implausibility of fabrication from independent witnesses will also support proof of the commission of the charged acts on a coincidence basis. However, this dual-track mode of reasoning is only available if the prosecution has served both tendency and coincidence notices (see *Saoud v R* (2014) 87 NSWLR 481; [2014] NSWCCA 136 at [43]; *Gardiner v The Queen* [2023] NSWCCA 89, [203]–[205]).

22. Where coincidence evidence is relied on to show that a particular event occurred, due to similarities of events such as allegations by others, the rationale of coincidence evidence is the improbability of several witnesses independently telling the same lies. "With tendency reasoning, on the other hand, the evidence may reveal a 'pattern of conduct' or 'modus operandi' without there necessarily being the similarity required in order to exclude coincidence" (*Page v R* [2015] VSCA 357, [54])

23. Judges are entitled to restrict the basis of admission to the mode of reasoning which is most relevant. There is not currently any uniform practice on whether evidence of multiple complainants should be characterised as tendency evidence or coincidence evidence (compare *Cox v R* [2015] VSCA 28 and *Bauer v R* (2015) 46 VR 382; [2015] VSCA 55). See, for example, *Page v R* [2015] VSCA 357 at [72] for a case in which the court considered whether the evidence was more probative as tendency evidence or coincidence evidence.

Considerations that apply to both s 97 and s 98

(a) Admissibility and use hurdles for tendency or coincidence evidence

24. The tendency and coincidence rules control the admissibility and use of evidence when a party seeks to have the evidence admitted as tendency or coincidence evidence, or where it can be used in that way but is sought to be admitted for another relevant purpose. The court must consider how the evidence is relevant and whether the proposed use of the evidence depends on tendency or coincidence reasoning.

25. Whether evidence is admissible as tendency or coincidence evidence is a question of fact which must be 'answered in light of the facts and circumstances of the particular case' (*Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121 at [172] per the Court; see also *KRI v R* [2011] VSCA 127 at [57] per Hansen JA (Buchanan and Tate JJA agreeing); affirmed in *RHB v R* [2011] VSCA 295 at [18] per Nettle JA (Harper JA agreeing)).

(b) Relevance

26. Relevance is to be determined according to whether the evidence, if accepted, could rationally affect the assessment of the probability or the existence of a fact in issue (s 55).

27. The assessment of the relevance of evidence must take place having regard to the ultimate facts in issue and against the background of the issues at the trial. This may involve a dispute whether particular acts occurred, or whether they occurred in certain circumstances, or whether it was the accused who committed the acts (see *Cox v R* [2015] VSCA 28 at [26])

28. The tendering party must identify the tendency or coincidence reasoning it proposes to advance and how the evidence is relevant for that purpose (see *HML & Ors v R* (2008) 235 CLR 334; [2008] HCA 16 per Hayne J). In relation to coincidence evidence, this involves identifying the relevant events, the act or state of mind which those events are said to prove, the relevant similarities relied upon and the reasoning process sought to be engaged (*MR v R* [2013] NSWCCA 236 at [66]; *R v Cornell* [2015] NSWCCA 258 at [111]).

29. This allows the court to assess the probative value of the evidence (and will inform subsequent jury directions, where applicable) (*R v Rajakaruna* (2004) 8 VR 340; [2004] VSCA 114 at [87]–[88] per Eames JA (Smith AJA agreeing); *R v Tektonopoulos* [1999] 2 VR 412; [1999] VSCA 93 at [22]–[25] per Winneke P (Charles and Batt JJA agreeing); *R v BJC* (2005) 13 VR 407; [2005] VSCA 154 (see especially the judgment of Byrne AJA)).

30. The court must then determine whether the evidence, if accepted, could rationally affect any of the issues in the case. If the evidence is not logically relevant to any fact in issue, it is not admissible (s 55; *Phillips v R* (2006) 225 CLR 303; [2006] HCA 4 at [50] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

31. Evidence need not be confined to conduct committed prior to the offence; evidence of subsequent conduct may be admitted if it is relevant (*Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333 at [83]–[86]).

(c) Significant probative value

Meaning

32. To be admissible, tendency or coincidence evidence must have significant probative value for the relevant purpose for which it is tendered (ss 97(1)(b), 98(1)(b)).

33. The UEA Dictionary defines 'probative value' to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. This refers to concepts similar to those used in the test for relevance, and does not import considerations of reliability or credibility, unless no reasonable jury could accept the evidence (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [48]).

34. The court assesses whether the evidence has significant probative value on the assumption that the jury will accept the evidence, and taking the evidence at its highest (*IMM v R* (2016) 257 CLR 300).

35. However, at least in non-sexual cases, there may be a qualification on the process of taking the evidence at its highest to prevent circular reasoning. In *Townsend v The King* [2022] VSCA 201, the Court of Appeal was considering the admissibility, as tendency evidence, of a series of injuries sustained by a young child. The Court noted that a jury could not use evidence of earlier injuries to support proof that the accused had a tendency to harm the child in a particular way unless the prosecution proved the accused intentionally and deliberately inflicted those injuries on the earlier occasions beyond reasonable doubt. To do otherwise would be to permit circular reasoning (*Townsend v The King* [2022] VSCA 201, [122]–[132]).

36. In assessing whether evidence has significant probative value, the court must consider what facts are in issue. In a case where the facts in issue are narrowly defined, evidence may lack significant probative value on the basis that it is only minimally probative of the contested facts in issue (see *Larsen v The Queen* [2020] VSCA 335, [20]–[30]).

37. Where the defence position is unclear or fluid, the court must assess the probative value of the evidence by reference to the facts in issue as they stand at the time admissibility must be determined (see, e.g., *Thompson v The King* [2023] NSWCCA 244, [257]–[264]). The evidence will remain properly admitted even if the defence case later narrows so that those matters are no longer in issue.

38. The court will also consider the relevant standard of proof. Greater probative value is required for evidence to have 'significant probative value' in a criminal proceeding where the standard is beyond reasonable doubt than in a civil proceeding where matters are probed on the balance of probabilities (*The Owners – Strata Plan 87265 v Saaib* [2022] NSWCA 63, [32]).

39. Similarly, where the defence wishes to adduce tendency or coincidence evidence, the absence of any onus of proof means that the threshold for significant probative value is very different to prosecution tendency or coincidence evidence. Defence tendency or coincidence evidence only need to establish a reasonably possible alternative (*R v Rumsby (No 4)* [2023] NSWSC 770, [10]–[11]).

40. The definition of 'probative value' emphasises the capacity of evidence to have the specified effect, not the likelihood that it will do so (*KRI v R* [2011] VSCA 127 at [53] per Hansen JA (Buchanan and Tate JJA agreeing); see also *DSJ v R; NS v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [55] per Whealy JA (Bathurst CJ, Allsop P, McClellan CJ at CL and McCallum J agreeing); *DAO v R* (2011) 81 NSWLR 568; [2011] NSWCCA 63 at [182] per Simpson J; *Vojneski v R* [2016] ACTCA 57 at [59]).

41. A decision to admit coincidence or tendency evidence:

> merely opens a gate to enable the tribunal of fact to consider the import of the evidence. The actual probative value ultimately to be ascribed to the evidence lies within the province of the jury (*DAO v R* (2011) 81 NSWLR 568; [2011] NSWCCA 63 at [183] per Simpson J, citing *R v Fletcher* [2005] NSWCCA 338 at [33] per Simpson J (McClellan CJ at CL agreeing)).

42. The term 'actual probative value' in this proposition means 'weight'. Thus, the court determines whether the evidence has the capacity to be regarded by a hypothetical jury as 'significant', in determining whether to admit evidence for ss 97 or 98 purposes. In doing this, the court does not evaluate the actual weight of the evidence. Nor does it predict what weight a jury will give the evidence (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [51]; *DSJ v R; NS v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [72] per Whealy JA; and at [7]–[9] per Bathurst CJ (Allsop P, McClellan CJ at CL and McCallum J agreeing)).

43. Rather, the court assesses the capacity of the evidence to contribute to the jury's determination of the fact or facts in dispute (*DSJ v R; NS v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [72]–[77] per Whealy JA; and at [7]–[9] per Bathurst CJ (Allsop P, McClellan CJ at CL and McCallum J agreeing); see also discussion of these authorities in this context in *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [165]–[174]).

44. For discussion of the meaning of "probative value", see the ***Dictionary***.

45. Evidence will have:

> significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent (*Hughes v R* [2017] HCA 20 at [16]; *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [46]).

46. To be 'significant', evidence must be more than merely relevant. However, it need not meet the higher test of having a 'substantial' degree of relevance (see Evidence Bill 2008, Explanatory Memorandum, clause 97). It must be 'important', 'of consequence' or 'influential in the context of fact-finding' (*R v Lockyer* (1996) 89 A Crim R 457; *Donohue v Tasmania* [2016] TASCCA 17 at [19]; *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [46] But cf *Semann v The Queen* (2013) 39 VR 503, [38] where Priest JA suggests the meaning of 'significant' is closer to 'substantial' than to 'important' (reiterated in *Wedi v The Queen* [2020] VSCA 86, [3]).

47. Evidence can have significant probative value as tendency evidence even if the evidence involves acts committed after the acts in question in the proceeding. Depending on the circumstances (and even where there is a very substantial time gap), the evidence may allow a tribunal of fact to infer that the person had the tendency at an earlier point in time, rather than merely showing the person had the tendency from the later point onwards (see *TB v The Queen* [2019] NSWCCA 224, [90], [103]).

48. When assessing whether evidence has significant probative value, the court does not assess the evidence in isolation. The court may find that the "evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged" (*Hughes v R* [2017] HCA 20, [40]; *Danny v The Queen* [2018] VSCA 223, [32]).

49. The assessment of whether evidence has significant probative value is an open-textured evaluative judgment on which reasonable minds may differ. Prosecution agencies should be cautious before relying on tendency evidence in borderline cases, due to the risk that an appellate court will reach a different conclusion, with consequences for the safety of any conviction (*Hughes v R* [2017] HCA 20, [42]).

Two-step analysis

50. In *Hughes v R* [2017] HCA 20, the majority judges (Kiefel CJ, Bell, Keane and Edelman JJ; Gageler, Nettle and Gordon JJ dissenting) explained at [41] that determining whether evidence has significant probative value involves two separate but related matters:

- The extent to which the evidence proves the alleged tendency;
- The extent to which the alleged tendency makes the facts in issue more likely.

51. The majority observed at [41] that:

> [T]here is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

52. The second matter referred to above requires a comparison between the tendency alleged and the facts in issue. The strength of the connection will depend on the degree of particularity of the tendency (*Hughes v R* [2017] HCA 20 at [64]).

53. It is important that the alleged tendency and the fact in issue are defined with some precision. This allows the court to determine whether the evidence to prove that tendency, and the relevance of that tendency to that fact in issue, has significant probative value that substantially outweighs any unfair prejudice. The less precise the identified tendency, the more difficult it will be to determine whether it is relevant to a fact in issue, has significant probative value and whether the probative value substantially outweighs the prejudicial effect. A more precise tendency also reduces the risk of misuse by the jury (*Dempsey v The Queen* [2019] VSCA 224, [60], [74]. See also *Morey v The King* [2023] VSCA 153, [45]–[50]).

Tendency evidence, similarity and probative value

54. As the majority (Kiefel CJ, Bell, Keane and Edelman JJ; Gageler, Nettle and Gordon JJ dissenting) explained in *Hughes v R* [2017] HCA 20, the degree of similarity required for tendency evidence to have significant probative value depends on what the evidence is led to prove. At [39], the majority said:

> Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

55. The High Court majority therefore sets out two situations:

- Where the issue is identity, a high level of similarity between occasions is generally required;
- Where the issue is whether a crime was committed at all, significant probative value can come from features other than a high level of similarity.

56. As the majority explained in *Hughes v R* [2017] HCA 20 at [34]:

> The circumstance that the text of s 97(1)(b) does not include reference to similarity or to the concepts of "underlying unity", "pattern of conduct" or "modus operandi" is a clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms. The omission of these familiar common law concepts is eloquent of the intention that evidence which may be significantly probative for the purposes of s 97(1)(b) should not be limited to evidence exhibiting the features so described.

57. The general requirement of a high level of similarity where identity is in issue applies where tendency evidence is the primary evidence of identity. Where other evidence establishes that there are only a small number of people with the opportunity to commit a known crime, a lower level of similarity between past actions and the present offence may suffice (see *TL v The King* [2022] HCA 35, [30]–[31]; *TL v The Queen* [2020] NSWCCA 265, [207]–[228]).

58. The dichotomy the High Court set out between identity and non-identity uses should not be approached as if it created a universal rule. Such rules should be avoided. Instead, it should be treated as helpful guidance on when evidence is likely to have significant probative value. This is because "similarity is relevant to, but not determinative of, probative value" (see *TL v The King* [2022] HCA 35, [29]).

59. The majority judgment in Hughes rejected the line of Victorian authority summarised in *Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121 which had held that significant probative value required sufficient similarity or commonality of features between the charged conduct and/or circumstances on the one hand and the other conduct and/or circumstances on the other hand (*Hughes v R* [2017] HCA 20 at [37]–[38]).

60. The majority stated:

> The *Velkoski* analysis proceeds upon the assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of "operative features" of the acts that prove the tendency. It is an analysis that treats tendency evidence as if it were confined to a tendency to perform a particular act. Depending upon the issues in the trial, however, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it (*Hughes v R* [2017] HCA 20 at [37]).

61. In the case of sexual offences against children:

> Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case (*Hughes v R* [2017] HCA 20 at [40]).

62. Victorian cases had held that a relationship of parent and child, or teacher and student was relevant but not sufficient, and additional commonality or similarity in either the acts, circumstances or a combination of acts and circumstances was necessary before such evidence could have significant probative value (*Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121; *Rapson v R* (2014) 45 VR 103; [2014] VSCA 216)

63. However, in *Hughes*, the High Court majority held that in the circumstances of that case, where the issue was whether an offence had been committed at all, evidence had significant probative value which showed that:

> [T]he appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection.
> …
> In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi – for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question (*Hughes v R* [2017] HCA 20 at [56]–[57]).

64. The majority in *Hughes* went on to note that the probative value of the evidence could be assessed by considering that without the evidence, juries in separate trials would be faced with an allegation of opportunistic offending in circumstances where there was a real risk of discovery which may have seemed inherently unlikely (*Hughes v R* [2017] HCA 20, [58]–[59]).

65. This demonstrates that probative value can come from similarity of the circumstances in which the alleged conduct occurred. It is not only the similarity of the conduct itself that can be probative (see *Taylor v The Queen* [2020] NSWCCA 355, [122(ix)]).In assessing the degree of relevant similarity, the evidence must be considered as a whole. It is not correct to compare individual acts in isolation for the purpose of identifying apparent dissimilarities (*BC v The Queen* [2019] NSWCCA 111, [75]–[76]).

66. The Victorian Court of Appeal has interpreted *Hughes* as admitting the tendency evidence because:

> [I]t made probable that which would otherwise be regarded as improbable; that is, engaging in sexual conduct in circumstances in which the appellant ran a real risk of discovery by other adults. Had that singular feature been absent, it may be inferred that the evidence would not have been considered to possess the requisite degree of significant probative value (*Bauer v R (No 2)* [2017] VSCA 176, [62]).

67. This analysis must be qualified by the High Court overruling that judgment in *R v Bauer* (2018) 266 CLR 56. However, because of the issues that arose in the High Court, it may be that the Court of Appeal's analysis remains correct in cases involving alleged offending against multiple complainants. See Single complainant - significant probative value (below).

Tendency evidence and states of mind

68. In *Hughes*, the majority rejected the Victorian Court of Appeal's statement in *Velksoki* that the prosecution should not seek to adduce tendency evidence that the offender had a sexual interest in particular victims and was willing to act on that interest (see *Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121, [173(f)]). Instead, the majority noted that s 97 allows for evidence of a person's tendency to have a particular state of mind, and that an adult's sexual interest in young children may have the capacity to have significant probative value (*Hughes v R* [2017] HCA 20, [32]).

69. In *Elomar v R* [2014] NSWCCA 303, the New South Wales Court of Criminal Appeal considered the application of the tendency rule in the context of evidence that the accused supported terrorism. The court concluded that the trial judge had been right to conclude that the tendency rule did not apply to evidence that the accused supported terrorism in 2001–02 when used to conclude that the accused supported terrorism in 2004. Such evidence was directly relevant to prove a continuing state of mind between 2001 and 2004 and did not rely on the intermediate inference that the accused had a tendency to have a particular state of mind (*Elomar v R* [2014] NSWCCA 303, [360]–[369]. See also *Higgins v R* [2016] VSCA 47, [19]–[20]; *R v Abbas (Rulings 1-40)* [2019] VSC 855, [58]).

Similarity, Coincidence Evidence and significant probative value

70. In relation to coincidence evidence, it has been stated that the 'touchstone of admissibility is similarity' (*PNJ v DPP (Vic)* (2010) 27 VR 146; [2010] VSCA 88, [8]).

71. Circumstances do not need to be identical for two or more events to be admitted as coincidence evidence. The degree of similarity will, however, often affect whether the evidence has significant probative value (*Samadi v R* [2008] NSWCCA 330, [85], [97] per Beazley JA (Hislop and Price JJ agreeing); *AE v R* [2008] NSWCCA 52, [43] per the Court).

72. The following questions may assist in determining whether the alleged coincidence evidence satisfies the requirements of ss 98 and 101:

- Are the similarities in the specified events and/or in the circumstances in which they occurred such that it is improbable that the events occurred coincidentally?
- If so, would evidence about events tend to prove that the accused:
  - did the specified act; or
  - had the specified state of mind

  where doing that act or having that state of mind is a fact in issue or is relevant to a fact in issue?
- If so, does the evidence have significant probative value, either by itself or having regard to other evidence adduced or to be adduced by the prosecution
- If so, does the probative value of the evidence substantially outweigh any prejudicial effect it may have on the accused (*CGL v DPP (Vic)* (2010) 24 VR 486; [2010] VSCA 26, [22]).

73. These questions must be approached with a degree of precision, identifying the specific fact in issue and how the similarities that are relied on are able to give the coincidence evidence significant probative value (*Dempsey v The Queen* [2019] VSCA 224, [71]).

74. In *NAM v R* [2010] VSCA 95, there were 'strikingly distinctive' similarities between some of the alleged conduct and 'distinctive' or 'strikingly similar' behaviour by the accused in the circumstances surrounding some of the offences. These similarities made it 'highly improbable, to the point of impossibility, that the similarity in the complainants' accounts could be explained by coincidence' (*NAM v R* [2010] VSCA 95, [12] per Maxwell P (Buchanan and Nettle JJA agreeing)).

75. 'Striking' similarity is not always required for coincidence evidence to have 'significant probative value' (*CW v R* [2010] VSCA 288, [22] per the Court; see also *CV v DPP* [2014] VSCA 58, [9];

R v MR [2013] NSWCCA 236, [77] per Beech-Jones J (Hoeben CJ at CL and Schmidt J agreeing); *R v Velkoski* (2014) 45 VR 680; [2014] VSCA 121, [169] per the Court).

76. Nor does evidence need to have features of 'underlying unity, or pattern or signature system', provided that 'for some identifiable reason the high probative value necessary to overcome prejudice existed' (*CV v DPP* [2014] VSCA 58, [9], citing with approval *Phillips v R* (2006) 225 CLR 303; [2006] HCA 4).

77. In any particular case,

> There may be such a relationship between the events in purpose, circumstances and mode of conduct that coincidence reasoning will be open. The necessary relationship is not confined to events, each of which possesses unusual characteristics in its execution. The evidence of each may provide strong support for the others, making it just to admit them all notwithstanding the prejudicial effect of admitting the evidence (*CV v DPP* [2014] VSCA 58 at [10]).

78. The extent to which the events alleged to constitute coincidence evidence are convincing or significant will depend on the issue to be proved and the nature of the evidence (*CV v DPP* [2014] VSCA 58, [11]).

79. It has been suggested that, where multiple witnesses give similar accounts of an accused's conduct, as the number of those witnesses increases, there will be less need for their evidence to be 'distinctive' before that evidence will constitute admissible coincidence evidence (*Velkoski v R* [2014] VSCA 212, [175]–[176] per the Court). It must, however, still satisfy the requirement of 'significant probative value'.

80. In *CW v R*, the applicant was charged with three separate arson offences. The basis for the probative value of the coincidence evidence was the fact that victims of the fires were all business associates of the applicant, and each was in a current dispute with him. This relationship 'uniquely' linked 'the accused person with two or more victims of similar crimes' (*CW v R* [2010] VSCA 288, [22]. See also *Davies v The Queen* [2019] VSCA 66, [105]–[169] regarding the coincidence reasoning arising from the accused's presence in the vicinity of a number of fires).

81. In *PNJ v DPP (Vic)* (2010) 27 VR 146; [2010] VSCA 88, [19], the Court of Appeal considered that circumstances outside the accused's control could not be treated as relevant similarities for the purpose of establishing coincidence evidence.

82. However, *PNJ* has subsequently been criticised, and subsequent cases have distinguished it on its facts (see *RHB v R* [2011] VSCA 295, [17] per Nettle JA (Harper JA agreeing); *KRI v R* [2011] VSCA 127, [58] per Hansen JA (Buchanan and Tate JJA agreeing). See also *Hughes v R* [2017] HCA 20, [101] per Gageler J).

83. One event which is said to constitute coincidence evidence may be an event the occurrence of which is a fact in issue in the proceeding.

84. For a civil case in which coincidence evidence of certain events involving a franchisee's actions of a franchisee in the context of a franchise dispute was admitted, see *Bodycorp Repairers v Maisano (No 6)* [2013] VSC 265.

85. Care must be exercised with respect to older cases on the scope of the coincidence rule. Prior to 2007, the uniform evidence legislation 'coincidence rule' applied only to 'related events' (defined as substantially and relevantly similar events which occurred in substantially similar circumstances). The new rule is broader. It and is designed to avoid the paradox of an exclusionary rule that limits the admissibility of related events but does not apply to unrelated events. Therefore, cases prior to this time must be treated with caution (see *ALRC Report 102* at [11.19]–[11.25]).

86. The use of terms such as 'sufficient connection in time and circumstance', 'an underlying unity' or 'a pattern of conduct' must not distract attention from the essential question posed by the legislation. The coincidence rule requires attention to the features of commonality or similarity to determine whether the evidence possesses significant probative value. This might involve a single, distinctive, feature or a combination of features. In the case of coincidence evidence, this

similarity must make an explanation of coincidence or invention improbable (*Page v R* [2015] VSCA 357 at [55]–[58]. See also *Hughes v R* (2015) 93 NSWLR 474; [2015] NSWCCA 330 at [166]; *Vojneski v R* [2016] ACTCA 57 at [53]–[55]).

87. Once evidence possesses similarities which raise the improbability of coincidence, the existence of dissimilarities cannot alter that conclusion (*Page v R* [2015] VSCA 357, [59]). Courts must be careful of undertaking too detailed a search for dissimilarities and treating that as a basis for discounting the probative value of the broader similarities (*DPP v Alexander* [2016] VSCA 92, [29]–[31]). Instead, the question is whether the dissimilarities detract from the strength of the evidence by undercutting the improbability of something being a coincidence (*Selby v The Queen* [2017] NSWCCA 40, [26]; *Dempsey v The Queen* [2019] VSCA 224, [72]).

Relevant issues when assessing probative value

88. Factors relevant to the assessment of the probative value of alleged tendency or coincidence evidence may include:

- the issue to which the evidence is relevant (*Hughes v R* [2017] HCA 20, [39]; *Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121, [166]. See also *Bryant v R* [2011] NSWCCA 26, [79]);
- the number of occasions of particular conduct that are relied on (*Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121, [166] per the Court. See also *Semaan v R* (2013) 39 VR 503; [2013] VSCA 134, [40] per Priest JA (Buchanan and Ashley JJA agreeing); *Reeves (a Pseudonym) v R* (2013) 41 VR 275; [2013] VSCA 311);
- the time lapse between them (*Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121, [166] per the Court. See also *R v Watkins* [2005] NSWCCA 164, [36] per Barr J (Grove and Howie JJ agreeing); *Twynam Pastoral Co Pty Ltd v AWB (Australia) Ltd* [2008] FCA 1922, [13] per Jagot J; *Semaan v R* (2013) 39 VR 503; [2013] VSCA 134, [40] per Priest JA (Buchanan and Ashley JJA agreeing); *Reeves (a Pseudonym) v R* (2013) 41 VR 275; [2013] VSCA 311);
- possibly, the geographic connection between the alleged conduct (*Semaan v R* (2013) 39 VR 503; [2013] VSCA 134, [40] per Priest JA (Buchanan and Ashley JJA agreeing));
- the degree of specificity of the conduct or alleged tendency or coincidence (*Hughes v R* [2017] HCA 20, [64]; *Ibrahim v Pham* [2007] NSWCA 215, [264]–[266] per Campbell JA (Hodgson and Santow JJA agreeing); *O'Keefe v R* [2009] NSWCCA 121, [65]–[68] per Howie J (McColl JA and Grove J agreeing); *CGL v DPP* (2010) 24 VR 486; [2010] VSCA 26, [40] per the Court);
- the extent of the similarity between the conduct on the various occasions, especially where identity is in issue (*Hughes v R* [2017] HCA 20, [39], [64]):
- the extent to which the circumstances in which the conduct occurred are similar (*Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121, [166] per the Court. See also *Rapson v R* (2014) 45 VR 103; [2014] VSCA 216; *R v Milton* [2004] NSWCCA 195, [31] per Hidden J (Tobias JA and Greg James J agreeing); *R v Fletcher* [2005] NSWCCA 338, [57], [68] per Simpson J (McClellan CJ at CL agreeing)); *Semaan v R* (2013) 39 VR 503; [2013] VSCA 134, [40] per Priest JA (Buchanan and Ashley JJA agreeing); *Reeves (a Pseudonym) v R* (2013) 41 VR 275; [2013] VSCA 311);
- whether the evidence is adduced to explain or contradict tendency or coincidence evidence adduced by another party.

89. Some of these factors are considered in further detail below, along with other factors courts have considered relevant.

90. The availability of defences is not a relevant consideration in assessing probative value or the risk of unfair prejudice. The fact that tendency evidence would weaken a defence which might otherwise be available in relation to a charge is not a relevant form of prejudice, but is the kind of legitimate prejudice associated with probative evidence (*DPP v Matthews* [2019] VSCA 11, where the trial judge had erroneously ruled that tendency evidence was not cross-admissible, because it

would impede the accused's ability to contend that one of the charges involved accidental conduct).

91. **The issue to which the evidence is relevant**. Assessing the probative value of tendency evidence is a fact specific exercise. This limits the extent to which previous decisions can provide guidance on the probative value of evidence in a later case. Further, the probative value is assessed by reference to the asserted tendency. Differences in how the party characterises the alleged tendency may affect the probative value of the evidence, even if the acts relied on to prove the tendency are similar between cases (see *Harlen v The King* [2023] VSCA 269, [69]–[70]).

92. **Time lapse between the events.** At least in the case of tendency evidence, there is difficulty in using conduct committed within a single occasion to prove a tendency to engage in other conduct alleged on that same occasion. In other words, where the alleged conduct occurs too closely together, it will not be possible for the jury to analyse the conduct so as to conclude there is a tendency to engage in other behaviour alleged to have committed at the same time (see *R v Villela (Rulings 1-3)* [2022] VSC 535, [108]–[113]).

93. In the case of sexual offences, an extended gap between alleged demonstrations of the tendency will tend to weaken the probative value of the evidence. In contrast, for drug importation, an extended gap, which represents the time the accused spent in prison due to previous offending, may not relevantly affect the probative value (compare *McPhillamy v The Queen* [2018] HCA 52 and *Geraghty v The Queen* [2023] NSWCCA 47, [46]–[47]. See also *Gan v Xie* [2023] NSWCA 163, [113] on how time lapse may be relevant to the probative value of tendency evidence in civil cases).

94. **Issues about the credibility and reliability of the evidence.** Following *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the court must assess the probative value of the evidence on the assumption that the jury will accept the evidence and that, therefore, questions as to the "credibility" and "reliability" of the evidence and the witness do not arise. The majority decision stated:

> Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two – reliability and credibility – as *Dupas v The Queen* may imply. They are both subsumed in the jury's acceptance of the evidence (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14, [52] (French CJ, Bell, Kiefel and Keane JJ). Cf *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328).

95. The High Court expressed the same idea in a different manner in *R v Bauer* (2018) 266 CLR 56, [95]:

> [I]t is not for a trial judge to say what probative value a jury should give to evidence but only what probative value the jury acting rationally and properly directed could give to the evidence. Hence, unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value of the evidence must be assessed, for the purposes of s 137, at its highest.

96. Further, as Simpson AJA explained in *Burns-Dederer v The King* [2023] NSWCCA 191, evidence may have significant probative value even if it comes from a single witness. While the evidence of an event from multiple witnesses will further enhance the probative value of that evidence, it does not follow that a single witness' evidence is incapable of having significant probative value (at [66]).

97. For further discussion of these matters, including the issues of the role of credibility and reliability of evidence in assessing probative value, see section 137 – Exclusion of prejudicial evidence in criminal proceedings and the meaning of 'probative value', see the Dictionary.

98. **Alternative explanation for conduct.** Following *R v Bauer* (2018) 266 CLR 56, it is generally not appropriate to consider alternative explanations for the alleged conduct. The existence of alternative explanations can only be relevant if those explanations rise to the level that it would

not be open to the jury acting rationally to accept the evidence (*R v Bauer* (2018) 266 CLR 56, [68]–[69], [81]. See also *Thomas v The King* [2023] VSCA 87, [33]–[34]).

99. Common forms of alternative explanations include concoction, collusion or contamination. These are, following *R v Bauer* (2018) 266 CLR 56, questions for the jury. Cases to the contrary should no longer be followed (see, eg, *AE v R* [2008] NSWCCA 52, [44]; *Tasmania v S* [2004] TASSC 84; *Tasmania v Farmer* [2004] TASSC 104; *PNJ v DPP (Vic)* (2010) 27 VR 146, [28]; *Murdoch v R* (2013) 40 VR 451, [95]–[99]; *SLS v R* (2014) 42 VR 64, [170]).

Cross-admissibility of evidence of allegations in sexual offence cases

100. As discussed above, the High Court in *Hughes v R* [2017] HCA 20 rejected the Victorian line of authorities which had required a high level of similarity before evidence of allegations of sexual offences could be admitted as tendency evidence.

101. The majority held at [40]:

> In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case.

102. The majority further explained at [60]:

> The force of the tendency evidence as significantly probative of the appellant's guilt was not that it gave rise to a likelihood that the appellant, having offended once, was likely to offend again. Rather, its force was that, in the case of this individual accused, the complaint of misconduct on his part should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience.

103. Finally, the majority rejected Victorian authorities which had held that "the offender's interest in particular victims and his willingness to act upon that interest" discloses "only rank propensity" (see *Velkoski v R* (2014) 45 VR 680; [2014] VSCA 121 at [173](f)). The majority observed that the terms of s 97(1) allows for evidence of a person's tendency to have a particular state of mind and stated at [32]:

> An adult's sexual interest in young children is a particular state of mind. On the trial of a sexual offence against a young child, proof of that particular state of mind may have the capacity to have significant probative value.

104. In *R v Bauer* (2018) 266 CLR 56, the High Court expressed the requirement for tendency evidence in multi-complainant cases as being whether there was some feature which links the different offences together. As the court explained:

> In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of

> or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true (at [58]).

105. The majority in *Hughes* noted that the risk of tendency evidence working unfairness is addressed by s 101 (*Hughes v R* [2017] HCA 20, [32]). The majority did not go on to comment or consider how s 101 operates in relation to this risk of "rank propensity", or the circumstances in which a court should exclude evidence of significant probative value which shows a tendency to have and act on a sexual interest in young children due to the operation of s 101.

106. Since *Hughes*, subsequent Victorian decisions have, in relation to the admissibility of tendency in multi-complainant cases, found significant probative value in the commission of offending in circumstances where there is an evident risk of detection (see, eg, *Danny v The Queen* [2018] VSCA 223, [7], [35]; *DPP v Matthews* [2019] VSCA 11, [16]).

107. However, a risk of discovery is not the only means by which offending against different complainants can be linked together. Similarity of conduct, such as a process of offering inducements, or commonality of location, can also provide a sufficient linkage (*Lambert v The King* [2023] VSCA 133, [57]–[68]), as can acting with 'persistence, pressure or coercion' (*Bektasovski v The Queen* [2022] NSWCCA 246, [89]–[91]).

108. A court should not examine the different events for the purpose of determining similarity in microscopic detail. Rather, the search will be for features of the particular evidence of the different complainants about the conduct of the accused that provides the probative value (*Matthews v The King* [2023] VSCA 229, [64]).

Single complainant – significant probative value

109. In most cases, evidence of the accused's other sexual acts against a complainant is admissible as tendency evidence without the need for proof of special, particular or unusual features. As the High Court explained in *R v Bauer*:

> Taken in combination with other evidence, [the tendency evidence] may establish the existence of a sexual attraction of the accused to the complainant and a willingness to act on it which assists to eliminate doubts that might otherwise attend the complainant's evidence of the charged acts....
> The juridicial basis of cross-admissibility of evidence of charged acts and of the admissibility of evidence of uncharged acts in such cases rests of the "very high probative value" of that kind of evidence which results from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person (*R v Bauer* (2018) 266 CLR 56, [49], [51]).

110. In *Bauer*, the High Court qualified the principle it stated in *IMM v R* (2016) 257 CLR 300, [62] that it is difficult to see how a complainant's unsupported evidence of conduct of a sexual kind from another occasion can have significant probative value. The result in *IMM* was due to the case involving a single uncharged act of significantly different severity and remote in time from the charged acts (see *R v Bauer* (2018) 266 CLR 56, [55]).

111. The High Court also stated that the requirement of special, particular or unusual features, laid down in *R v Hughes* [2017] HCA 20 at [57]–[58], reflects the process of probability reasoning that applies where there are multiple complainants. A different process of reasoning applies in single complainant tendency cases (*R v Bauer* (2018) 266 CLR 56, [57]).

112. The High Court summarised the rule relating to tendency evidence in single complainant sexual assault cases as follows:

> [I]n a single complainant sexual offences case, where a question arises as to whether evidence that the accused has committed one sexual offence against the complainant is significantly probative of the accused having committed another sexual offence against that complainant, there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other. As

> was established in *HML* and has since been applies in Victoria under s 97 of the Evidence Act in *JLS*, *MR*, *PCR* and *Gentry*, and was recognised, too, in *Velkoski*, evidence that an accused has committed one sexual offence against a complainant taken in conjunction with evidence of another sexual offence against the complainant suggests that the accused has a sexual interest in or sexual attraction to the complainant and a tendency to act upon it as occasion presents. And as has been seen, that is so because, where one person is sexually attracted to another and has sought to fulfil that attraction by committing a sexual act with him or her, it is the more likely that the person will continue to seek to fulfil the attraction by committing further sexual acts with the other person as the occasion presents (*R v Bauer* (2018) 266 CLR 56, [60]).

113. This approach to cross-admissibility in relation to sexual offences does not extend to non-sexual offences. For example, in *R v Villella (Rulings 1-3)* [2022] VSC 535, Croucher J considered that two instances of physical violence, threats or property damage against the same person, of different gravity, over a 17 month period involved conduct too distant in time to have significant probative value.

(d) Limited application of ss 97 and 98 (s 94)

114. The tendency and coincidence provisions do not apply to:

- evidence relating only to a witness's credibility (s 94(1), see Part 3.7 for credibility); or
- a proceeding, insofar as it relates to bail or sentencing (s 94(2)); or
- evidence of a person's character, reputation or conduct or evidence of a tendency that a person has or had, if that character, reputation, conduct or tendency is a fact in issue (s 94(3)).

(e) Limited use of evidence that is inadmissible to prove tendency or coincidence (s 95)

115. If the tendency or coincidence rules render evidence inadmissible, but that evidence is admitted for a different purpose (e.g., for relationship or context purposes), it cannot be used to prove a tendency or coincidence (s 95) (see *ES v R (No 1)* [2010] NSWCCA 197, [39]–[40] per Hodgson JA (Whealy and Buddin JJ agreeing)). This contrasts with the approach taken in relation to hearsay and opinion evidence.

116. Because s 95 limits the use of evidence to its admissible purposes, if a jury hears evidence that is admissible for another purpose but inadmissible for tendency or coincidence purposes, the jury will usually need to be warned to only use the evidence for permissible purposes and not for any impermissible purposes (*R v AH* (1997) 42 NSWLR 702, 708–9 per Ireland J (Hunt CJ at CL agreeing); *R v OGD (No 2)* (2000) 50 NSWLR 433; [2000] NSWCCA 404, [63] per Simpson J (Mason P and Dowd J agreeing); *Qualtieri v R* [2006] NSWCCA 95, [72]–[81] per McClellan CJ at CL (Howie and Latham JJ agreeing); *Martin v State of Tasmania* [2008] TASSC 66, [16]–[19] per Crawford CJ; [95]–[102] per Blow J (Slicer J dissenting)).

(f) Exceptions

117. The tendency and coincidence rules are subject to specific exceptions concerning character of and expert opinion about accused persons (ss 110 and 111).

118. Other provisions of this Act, or other laws, may operate as further exceptions.

(g) Criminal proceedings: s 101 additional requirement

119. Section 101 imposes an additional requirement on the admissibility of tendency and coincidence evidence about an accused that is adduced by the prosecution. Such evidence cannot

be used against an accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

120. For further detail, refer to ***commentary on s 101***.

(h) Defence tendency evidence in criminal proceedings

121. The assessment of significant probative value operates differently where the defence seeks to call tendency evidence. In most matters, the defence only ever carries an evidentiary onus. Where the defence seeks to call tendency evidence in relation to a matter on which the defence carries an evidentiary onus, evidence has probative value if it rationally affects whether there is a reasonable possibility consistent with innocence (see *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665; *R v White* [2012] NSWSC 467; *R v Cakovski* [2004] NSWCCA 280).

122. Once satisfied that the evidence has probative value in relation to an issue, the court must then consider whether it may be 'important', 'of consequence' or 'influential' in relation to that issue (see *R v Lockyer* (1996) 89 A Crim R 457; *Donohue v Tasmania* [2016] TASCCA 17, [19]; *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, [46]).

123. Evidence may have significant probative value in relation to an issue where the defence has an evidentiary onus even if it would not have significant probative value if the prosecution sought to introduce that evidence (*DPP v Campbell (Ruling No 1)* [2013] VSC 665).

(i) Discretionary exclusion

124. As noted, ss 97 and 98 capture all tendency and coincidence evidence in civil proceedings and all tendency and coincidence evidence adduced by the defence in criminal proceedings. To be admissible, such evidence must have 'significant probative value'.

125. Section 135 (General discretion to exclude evidence) permits this evidence to be excluded if its probative value is 'substantially outweighed' by a danger it might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time.

126. While it may be rare for s 135 to be applied to exclude evidence adduced for an accused under ss 97 or 98, it is not impossible that this will be appropriate in certain circumstances (*R v Cakovski* [2004] NSWCCA 280, [70]–[72] per Hidden J).

Evidence that may not be tendency evidence or coincidence evidence

127. Odgers (Uniform Evidence Law (2021) at [EA.97.240]) identifies eight categories of evidence that may not constitute tendency or coincidence evidence and would, therefore, not be subject to the tendency or coincidence rules. The categories are:

- evidence showing opportunity
- evidence of other conduct revealing a motive (but see below)
- evidence of a system
- evidence identifying the accused with the crime charged
- evidence relevant to a person's state of mind
- evidence of 'relationship'
- evidence putting other admissible evidence in context
- evidence of conduct which forms part of a relevant transaction (See also *Ivanoff v R* [2015] VSCA 116, [19]; *Higgins v R* [2016] VSCA 47, [19]–[20]).

128. The admissibility of evidence tendered to prove any such matters only without any need to rely on tendency or coincidence reasoning is controlled by the relevance provisions and ss 135, 136 and 137 (see, eg, *Conway v R* (2000) 98 FCR 204; [2000] FCA 461, [101] per the Court).

129. Evidence relevant to a person's state of mind has been admitted to show that the accused was aware of the $10,000 threshold under the *Cash Transactions Reports Act 1988* (*R v Leask* [1999] NSWCCA 33), to show the accused was aware of the risk that he was being used as a conduit for drug importation (*Lin v The Queen* [2018] VSCA 100), or the weight of cannabis being grown (*Ivanoff v The Queen* [2015] VSCA 116). In each case, the misconduct on a previous occasion was used to show that the accused must have had certain knowledge, rather than to show a pattern of behaviour or coincidences which made it more likely that the accused engaged in the alleged later conduct.

130. In the context of sexual offences, evidence of interactions between the accused and complainant is often characterised as 'context' evidence, which might be led for one of the following purposes:

- To provide the jury with essential background information, so that their assessment of the evidence does not occur in a vacuum;
- To explain why the complainant failed to complain, or why the complainant acted in a counter-intuitive manner;
- To counter the impression the jury might otherwise form that the alleged offending occurred 'out of the blue' (*Aleski v The Queen* [2020] VSCA 124, [51]).

131. Contextual uses of evidence of misconduct carries risks, and the admissibility of such evidence remains controversial, while the prevailing view in Victoria is that such evidence is admissible (*Aleski v The Queen* [2020] VSCA 124, [59]. See *Murillo v The Queen* [2020] VSCA 68 for an example of a case where purported 'context' evidence was held to be irrelevant).

132. The three uses of 'context' evidence described above are illustrations only of how evidence of acts on other occasions may be relevant. They are not exhaustive and should not be approached as if they were statutory grounds for admission in themselves (*Aleski v The Queen* [2020] VSCA 124, [61]). Instead, the admissibility must be determined by reference to the test of relevance and the exclusionary rules in the Act, especially s 137. For more information about uses of evidence for contextual purposes, see 4.20 Other forms of other misconduct evidence in the Victorian Criminal Charge Book.

133. If such evidence is admitted for a purpose other than a tendency or coincidence purpose, the evidence cannot then be used for a tendency or coincidence purpose (s 95) unless it satisfies the requirements of ss 97 or 98 and, in the case of prosecution evidence, s 101.

134. In contrast to many other offences, evidence of motive in relation to sexual offences will often involve tendency reasoning. Evidence of an accused's previous sexual acts towards a complainant is often led to show that the accused had a tendency to have a sexual interest in the complainant and a willingness to act on that interest. Such evidence is tendency evidence, and the prosecution cannot avoid the operation of Part 3.6 by seeking to characterise the evidence as evidence of motive (*ES v The Queen* [2010] NSWCCA 197, [38]–[39]; *Ritchie v The Queen* [2018] VSCA 31, [34]–[42]).

135. Evidence of an accused actually performing the relevant conduct is not tendency or coincidence evidence (*Davey v Tasmania* [2020] TASCCA 12, [18]–[20]; *Pattison v Tasmania* [2017] TASCCA 13, [75]). Instead, tendency and coincidence evidence involve the accused engaging in other conduct to provide a basis for an inference that the accused engaged in the charged conduct.

Jury directions

- Notes on jury directions are provided in the ***commentary attached to s 101***.

Last updated: 15 December 2023

s 99 – Requirements for notices

> Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of **court** made for the purposes of this section.

Requirements for notices

1. Section 99 requires that notices given under ss 97 or 98 be given in accordance with any regulations or rules of court made for the purposes of s 99.

2. The *Evidence Regulations 2019* provide that the notice must state the substance of the evidence and, if the evidence includes conduct of a person, the date, time place and circumstances of the conduct and the name of each person who perceived the conduct and, in civil proceedings, the address of each person named who perceived the conduct, if known (*Evidence Regulations 2019* r 8).

3. In the case of tendency evidence, parties should draft notices in a way that clearly identifies:

   - the relevant tendency or tendencies
   - the charge or charges that the tendency or tendencies relate to
   - the evidence said to establish the tendency or tendencies
   - whether the evidence to prove the tendency or tendencies involve other charged or uncharged acts, and whether it is from the complainant or other witnesses
   - whether the prosecution seeks to lead evidence of other charges as cross-admissible on a tendency basis (*R v Villella (Rulings 1-3)* [2022] VSC 535, [103]).

4. In *Clancy v Plaintiff A & Ors* [2022] NSWCA 119, the New South Wales Court of Appeal stated:

   > The requirement under the Evidence Act for notice of the asserted tendency to be provided is not a mere formality. It serves to give the party in respect of whom the tendency is asserted fair notice of the tendency that is sought to be established. That tendency needs to be articulated with clarity and precision because it supplies the framework for the Court's determination of whether the evidence will, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value (at [37]).

5. A failure to provide reasonable notice to another party of an intention to adduce tendency or coincidence evidence is not a minor matter (*Andelman v R* (2013) 38 VR 659; [2013] VSCA 25, [73]–[74]). However, where the other party is on notice of the proposed evidence, but there is a failure to use the prescribed form, that may be a situation which supports waiving the obligation to give notice, if there is no unfair prejudice (*Gan v Xie* [2023] NSWCA 163, [108]).

6. The need for the prosecution to give notice under s 99 is greater where the accused is not represented, as the court cannot expect to be assisted by the unrepresented accused (*Andelman v R* (2013) 38 VR 659; [2013] VSCA 25, [75]).

7. It is not appropriate for a court to reformulate a notice, or to rule on the admissibility of evidence by reference to a more narrowly drawn notice than the one which a party has provided. Where a notice is too broad, such that the evidence would lack significant probative value, it is the role of the party to provide the court with a different notice, rather than the court to rule on a more narrowly interpreted notice which aligns more closely with the evidence which will actually be adduced (see *TL v The King* [2022] HCA 35, [33]; *Sharman v The King* [2023] VSCA 56, [46]–[54]).

8. While modern judicial practice encourages dialogue between the bench and bar table, it is not the role of the judge to correct deficiencies in a party's case. Great caution is required if the judge is to step from identifying deficiencies in a tendency or coincidence notice to suggesting how those deficiencies, given the judge is ruling on the admissibility of contested evidence (*Sharman v The King* [2023] VSCA 56, [57]).

Last updated: 15 December 2023

s 100 – Court may dispense with notice requirements

(1) The **court** may, on the application of a party, direct that the **tendency rule** is not to apply to particular **tendency evidence** despite the party's failure to give notice under section 97.

(2) The **court** may, on the application of a party, direct that the **coincidence rule** is not to apply to particular **coincidence evidence** despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a **civil proceeding**, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction—

(a) is subject to such conditions (if any) as the **court** thinks fit; and

(b) may be given either at or before the hearing.

(6) Without limiting the **court**'s power to impose conditions under this section, those conditions may include one or more of the following—

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;

(b) a condition that the party give such notice only in respect of specified **tendency evidence**, or all **tendency evidence** that the party intends to adduce other than specified **tendency evidence**;

(c) a condition that the party give such notice only in respect of specified **coincidence evidence**, or all **coincidence evidence** that the party intends to adduce other than specified **coincidence evidence**.

Court may dispense with notice requirements

1. Section 100 allows a court to dispense with the requirement to give notice under ss 97 and 98 — that is, it allows a court (on the application of a party) to direct that the tendency rule or the coincidence rule does not apply to evidence despite a party's failure to give notice under either s 97 or s 98 (ss 100(1) and 100(2)).

When may an application under s 100 be made?

2. A s 100 application may be made either before or after the time by which the party would be required to give, or to have given, the notice (s 100(3)).

3. In a civil proceeding, a party may make an application under s 100 without notice of the application having been given to one or more of the other parties (s 100(4)).

Nature of direction under s 100

4. A direction under s 100 may be subject to such conditions (if any) as the court thinks fit (s 100(5)(a)).

Timing of giving of direction

5. A direction under s 100 may be given either at or before the hearing (s 100(5)(b)).

Potential conditions to which direction may be subject

6. A court's power to impose conditions on a direction given under s 100 is not limited (s 100(5)(a)). However, such conditions may include one or more of the following conditions:

    - that the party give notice of its intention to adduce the evidence to a specified party or to each other party other than a specified party;
    - that the party give such notice only in respect of specified tendency or coincidence evidence or all tendency or coincidence evidence the party intends to adduce other than specified tendency or coincidence evidence (s 100(6)).

Last updated: 19 April 2012

s 101 – Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a **criminal proceeding** and so applies in addition to sections 97 and 98.

(2) **Tendency evidence** about an accused, or **coincidence evidence** about an accused, that is adduced by the prosecution cannot be used against the accused unless the **probative value** of the evidence substantially outweighs any prejudicial effect it may have on the accused.

(3) This section does not apply to **tendency evidence** that the prosecution adduces to explain or contradict **tendency evidence** adduced by the accused.

(4) This section does not apply to **coincidence evidence** that the prosecution adduces to explain or contradict **coincidence evidence** adduced by the accused.

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

1. Section 101 applies only in criminal proceedings, and applies in addition to s 97 (the tendency rule) and s 98 (the coincidence rule). The onus is on the prosecution to satisfy the court that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

Exception: ss 101(3) and 101(4))

2. Section 101 does not apply to tendency or coincidence evidence adduced by the prosecution to explain or contradict tendency or coincidence evidence adduced by the accused (ss 101(3) and 101(4)).
3. In this case, the admissibility of the evidence adduced by:

    - the prosecution is determined by s 97 and s 98, and s 135 and s 137;
    - other parties is determined by s 97 and s 98, and s 135.

Test for use of tendency or coincidence evidence about the accused that is adduced by prosecution

4. Tendency evidence or coincidence evidence about an accused adduced by the prosecution cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect it may have on the accused.

5. This test arises only once the judge is satisfied the evidence will, by itself or having regard to other evidence adduced or to be adduced by the tendering party, have significant probative value (ss 97, 98; *R v Zhang* [2005] NSWCCA 437 (see especially [36]–[43] per Basten JA (in dissent)); affirmed in *PNJ v DPP* (2010) 27 VR 146; [2010] VSCA 88, [16] per the Court).

Prejudicial Effect

(i) Initial consideration

6. Initially the common law test outlined in *Pfennig v R* (1995) 182 CLR 461 was applied to the UEA — that is, evidence of tendency or coincidence could not be admitted unless there was no 'rational view of the evidence that is consistent with the innocence of the accused'. Only if that test were satisfied would the probative force of the evidence outweigh its prejudicial effect (per Mason CJ, Deane and Dawson JJ in *Pfennig*).

(ii) Present consideration of the test by the courts

7. In *R v Ellis* (2003) 58 NSWLR 700, the New South Wales Court of Criminal Appeal held that the *Pfennig* 'no rational view' test as the means of determining how it is that probative force and prejudicial effect should be balanced against each other was not necessarily applicable in the context of s 101(2) (see also *Murdoch (a Pseudonym) v R* (2013) 40 VR 451, [82] per Priest JA).

8. The Court found the formulation adopted in s 101(2) should operate in accordance with its terms. Where it requires the probative value of tendency or coincidence evidence to 'substantially outweigh' its prejudicial effect, that calls for a balancing exercise which can be conducted only on the facts of each case. It requires the court to make a judgment rather than exercise a discretion (*R v Ellis* (2003) 58 NSWLR 700; [2003] NSWCCA 319, [90], [95] per Spigelman CJ (Sully, O'Keefe, Hidden and Budding JJ agreeing)).

9. However, there may be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect unless the 'no rational explanation' test were satisfied (*R v Ellis* (2003) 58 NSWLR 700, [96] per Spigelman CJ (Sully, O'Keefe, Hidden and Buddin JJ agreeing). See also *CW v R* [2010] VSCA 288, [28] per the Court).

(iii) Balancing test

10. The balancing test under s 101(2) requires the court to consider the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh. In other words, it is a balancing exercise that can be conducted only on the facts of the case (*R v Ellis* (2003) 58 NSWLR 700; [2003] NSWCCA 319, [95] per Spigelman CJ (Sully, O'Keefe, Hidden and Budding JJ agreeing); see also *GBF v R* [2010] VSCA 135, [30] per the Court).

11. Depending on the facts of the case, there may be factors which can be considered either as affecting the probative value of the evidence, or the risk of unfair prejudice. Where this occurs, the judge may consider the factor for the purpose of assessing probative value and it will then not be necessary to consider the risk of 'unfair prejudice separately from and unassociated with the assessment of probative value' (*Hughes v R* (2015) 93 NSWLR 474, [212]).

12. In *Hughes*, the High Court identified potential forms of prejudice arising from tendency evidence. These included:

- The risk the jury will fail to consider the possibility that, despite having the tendency, the accused did not act on the tendency on the particular occasion;
- The risk that the jury will underestimate the number of other people who have a similar tendency;
- The risk that the jury's approach to the prosecution's onus of proof may be clouded by emotional responses to the tendency evidence;
- The prejudice that arises by requiring the accused to answer uncharged conduct stretching over many years (*Hughes v The Queen* (2017) 263 CLR 338, [17]).

13. A further form of unfair prejudice which may arise is the risk of a jury using the evidence for an impermissible purpose. In particular, where the prosecution only files a tendency notice, the risk of the jury using the evidence to support coincidence reasoning is a form of unfair prejudice which the court must weigh in the balance (see *Townsend v The King* [2022] VSCA 201, [144]–[145]).

14. In the case of sexual offending, there is a heightened risk of an emotional response because of the abhorrent nature of such offending. But it has been held that tendency evidence should not be routinely excluded because of the possibility of the jury having such an emotional response (*DPP v Pearson* [2021] VSCA 336, [93]; *Lambert v The King* [2023] VSCA 133, [75]).

15. Prior to *R v Bauer* [2018] HCA 40, a body of Victorian and New South Wales decisions had held that the test in s 101(2) was not likely to be satisfied in circumstances where a 'real possibility' of joint concoction or contamination between complainants exists (see, eg, *KRI v R* [2011] VSCA 127, [33], [62] per Hansen JA (Buchanan and Tate JJA agreeing)).

16. In *R v Bauer* [2018] HCA 40, the Court held that the possibility of joint concoction or contamination is not relevant to admissibility, unless the risk of joint concoction or contamination is so great that it would not be open to the jury acting rationally to accept the evidence: at [69].

17. Whether the probative value substantially outweighs the prejudicial effect is a judgment, and is not a discretionary exercise.

18. Interlocutory appeals in relation to decisions under s 101 are governed by the principles in *House v R* (1936) 55 CLR 499 (*KJM v R (No 2)* (2011) 33 VR 11, [9]–[14] per the Court (a five-member bench)), while on an appeal against conviction, the appellate court must decide on the probative value and risk of prejudice itself (see *McCartney v R* (2012) 38 VR 1; [2012] VSCA 268 at [31]–[51]; *Bray v R* (2014) 46 VR 623, [33]–[62]. See also *R v Bauer* (2018) 266 CLR 56, [61]).

19. In considering the admissibility of tendency and coincidence evidence that has satisfied ss 97 or 98, once s 101(2) has been applied to evidence adduced by the prosecution and the requirements of the section are satisfied, it is difficult to identify any work remaining for s 137 (Exclusion of prejudicial evidence in criminal proceedings). This is because the test under s 101(2) is more onerous than that under s 137. Therefore, if evidence does not meet the test under s 101(2), it will not be able to be used as tendency or coincidence evidence and s 137 will have no work to do.

20. Sections 97, 98 and 101 do not, however, apply to evidence of prior conduct tendered and relevant to prove other matters such as a relationship or the context of the conduct in question. The admissibility and use of that evidence is controlled by ss 55, 56 and 135–137.

Jury directions

21. If evidence is inadmissible to prove a tendency or coincidence, and the evidence has been admitted for a different purpose (for example, to prove the nature of a relationship or the context in which conduct occurred), the evidence cannot be used for a tendency or coincidence purpose (s 95).

22. The need for directions on tendency and coincidence evidence is governed by Part 3 of the *Jury Directions Act 2015*. The content of the directions is also governed by Division 2 of Part 4 of the *Jury Directions Act 2015*.

23. Short directions on the use of the relevant evidence should be given at the time the evidence is led. Detailed directions should then be given in the final charge (*R v Grech* [1997] 2 VR 609 per Callaway JA; *R v Beserick* (1993) 30 NSWLR 510, 516 per Hunt CJ at CL (Finlay and Levine JJ agreeing); *Qualtieri v R* [2006] NSWCCA 95, [80] per McClellan CJ at CL (Howie and Latham JJ agreeing)).

24. See generally, Victorian Criminal Charge Book, ***Chapter 4.15***.

Last updated: 15 December 2023

Part 3.7 – Credibility (ss 101A–108C)

Credibility evidence can impact on the reliability of a witness' evidence and so may affect the fact-finding process. However, because such evidence may not be directly relevant to the facts in issue, has the potential to be unfairly prejudicial, and could affect the efficiency and cost-effectiveness of a trial, its admissibility is limited both at common law and under the UEA.

Part 3.7:

- establishes a primary rule of exclusion (s 102);
- establishes a number of exceptions for witnesses, namely:
    - rules that operate during cross-examination (s 103 (this is the major exception), s 104 (additional provision for criminal proceedings))
    - rules that deal with rebuttal evidence (s 106), and
    - rules that operate during re-examination (s 108);
- provides for the credibility of person who are not witnesses (ss 108A, 108B);
- creates an exception for persons with specialised knowledge (s 108C).

The UEA credibility provisions bring together a number of common law rules. They retain both the common law principle that evidence relevant only to credibility is prima facie inadmissible and its converse, namely that evidence which is relevant to both credibility and to facts in issue and is admissible for that other purpose is not inadmissible because of its relevance to credibility (by s 101A such evidence is expressly excluded from the operation of the credibility rule in s 102).

Evidence which is admissible pursuant to a credibility exception remains subject to the discretions (ss 135–137).

Section 55(2) recognises that evidence is not to be taken as irrelevant because it relates only the credibility of a witness.

Last updated: 16 December 2009

Division 1 – Credibility evidence (s 101A)

Division 1 defines the evidence to which the credibility rule will apply (s 101A).

Last updated: 16 December 2009

s 101A – Credibility Evidence

> **Credibility** evidence, in relation to a **witness** or other person, is evidence relevant to the **credibility** of the **witness** or person that—
>
> (a) is relevant only because it affects the assessment of the **credibility** of the **witness** or person; or
>
> (b) is relevant—
>
> (i) because it affects the assessment of the **credibility** of the **witness** or person; and
>
> (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Meaning of 'credibility evidence'

1. Section 101A sets out the meaning of credibility evidence.
2. It is evidence that is relevant to the credibility of a witness or a person that:
   - is relevant to an ultimate fact in issue only because it affects the assessment of the credibility of the witness or person, *or*
   - is relevant to an ultimate fact in issue for a credibility purpose *and* another purpose but it is not admissible for that latter purpose (s 101A).
3. The consequence of s 101A is that if evidence impacts upon a person's credibility and is relevant and admissible for another reason, then it is not credibility evidence for the purposes of this section and is not subject to Part 3.7.
4. Section 101A was inserted in response *Adam v R* (2001) 207 CLR 96; [2001] HCA 57 which interpreted the original credibility rule very narrowly.
5. Sections 60 and 77 do not affect the application of paragraph (b) because they cannot apply to evidence that is yet to be admitted.

Meaning of 'credibility'

6. Credibility of a witness means the credibility of all or any part of the evidence of the witness, and includes the witness' ability to observe or to remember facts and events about which the witness has given, is giving, or is to give evidence (UEA Dictionary).

Meaning of 'credibility evidence' and joint trials

7. In joint trials, the definition of credibility evidence must be applied in a manner consistent with the principle of separate consideration. Evidence that is relevant and admissible in relation to a co-offender may be irrelevant or otherwise inadmissible against another accused. In such circumstances, even if the evidence supports the credibility or reliability of a witness, the evidence will remain credibility evidence and be excluded by the credibility rule. Evidence which is inadmissible against one offender in a joint trial cannot be made admissible through the indirect means of being used to bolster the credibility of a witness (*Destanovic & Tangaloa v R* (2015) 49 VR 276; [2015] VSCA 113).
8. In *Destanovic & Tangaloa v R* (2015) 49 VR 276; [2015] VSCA 113, V had been attacked by four people. The primary evidence against D1 was V's identification evidence. V also identified three other attackers. In the case of D2, this identification was supported by evidence that D2 was found in possession of a handgun which the prosecution contended had been used in the attack,

and D3 was found in possession of some of V's property. The trial judge ruled that the handgun and the property evidence was only admissible against D2 and D3 respectively. During deliberations, the jury asked whether they could use the gun and property evidence to reason that V was a more credible witness, as he had correctly identified two other offenders, and so was more likely accurate when he identified D1. Weinberg and Beach JJA (Maxwell P contra) held that this was impermissible, as it would amount to convicting D1 on the basis of evidence which was not admissible against him.

9. In joint trials where the prosecution case is based largely upon the credibility of a single witness, and that witness' evidence is supported by evidence admissible against only one accused, there may be a case for separate trials (*Destanovic & Tangaloa v R* (2015) 49 VR 276; [2015] VSCA 113, [135]).

Last updated: 7 August 2015

Division 2 – Credibility of witnesses (ss 102–108)

Division 2:

- establishes the credibility rule (s 102);
- provides exceptions for evidence which is:
  - adduced in cross-examination – subject to 'substantial effect' on the assessment of the credibility of the witness (s 103),
  - led to rebut denials made in cross-examination (s 106),
  - adduced in re-examination to re-establish credibility (s 108);
- provides additional protection for an accused person (s 104) (in addition to s 103).

Last updated: 18 January 2013

s 102 – The credibility rule

Credibility evidence about a **witness** is not admissible.

Scope of the credibility rule

1. Section 102 is a purposive rule (like s 60) which prohibits the admission of credibility evidence. The operation of the rule depends on the purpose for which an item of evidence is sought to be admitted.

2. In *Dupas v R*, the Court held that 'credibility' imports notions of both truthfulness and reliability' and as such, 'prima facie, evidence relevant to the reliability of a witness is not admissible' (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [265]).

3. Therefore, for the purposes of the credibility rule, there is no distinction between credibility and reliability, in relation to a witness and their testimony (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [266]).

4. In reaching this decision, the Court analysed the relevant definitions in the Dictionary to the Act, which define credibility of a witness as 'the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence'. The Court found that the use of the words 'includes the witness's [or person's, as the case requires] ability to observe or remember facts and events' could only be intended to refer to a person's reliability (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [265]).

5. As a result, the Court concluded (at [262]–[263]) that it was unable to accept the approach in *Peacock v R* [2008] NSWCCA 264, where Simpson J (McClellan CJ at CL agreeing) considered that:

> There is … a distinction … between evidence going to the credibility of a witness, and evidence going to the credibility of the evidence given by that witness (in this context it might be better to use the word "reliability"). Section 102 prohibits evidence going only to the former: it does not prohibit evidence going only to the latter of which an obvious example is evidence contradicting facts asserted by a witness. The reliability of evidence given by a witness might be challenged by evidence contradicting all, or part, of that witness's evidence. That contradictory evidence is not rendered inadmissible by s 102 (*Peacock v R* [2008] NSWCCA 264 at [57]).

Persons who are not witnesses

6. Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

Exceptions

7. The UEA provides the following exceptions to the credibility rule—

- evidence adduced in cross-examination (ss 103 and 104)
- evidence in rebuttal of denials (s 106)
- evidence to re-establish credibility (s 108)
- evidence of persons with specialised knowledge (s 108C)
- character of accused persons (s 110).

Last updated: 18 January 2013

s 103 – Exception: cross-examination as to credibility

(1) The **credibility rule** does not apply to evidence adduced in **cross-examination** of a **witness** if the evidence could substantially affect the assessment of the **credibility** of the **witness**.

(2) Without limiting the matters to which the **court** may have regard for the purposes of subsection (1), it is to have regard to—

(a) whether the evidence tends to prove that the **witness** knowingly or recklessly made a false **representation** when the **witness** was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Summary of continuity and change

- The common law collateral evidence rule does not apply during cross-examination of a witness.
- Section 103 retains this exception, but adds a formal limit on cross-examination which affects the assessment of the witness' credibility.

Exception to credibility rule – cross-examination as to credibility

1. Section 103(1) allows credibility evidence to be adduced during the cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
2. The requirement that the evidence could substantially affect the assessment of the credibility of the witness requires the party to demonstrate that the questions could have a real bearing, or a real and persuasive significance, on the overall credibility of the witness (*IW v The Queen* [2019] NSWCCA 311, [181], citing *R v El-Azzi* [2004] NSWCCA 455, [183] and *R v Castaneda (No 2)* [2015] NSWSC 979, [17]).
3. Without limiting the matters to which a court may have regard in determining whether evidence could substantially affect the assessment of the credibility of a witness, the court is to have regard to:
    - whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when he or she was under an obligation to tell the truth; and
    - the period of time that has elapsed since the acts or events to which the evidence relates were done or occurred (s 103(2)).
4. Prior to cross-examination, the court may need to rule as to whether the impugned evidence has substantial probative value. In *Montgomery v R* [2013] NSWCCA 73, the prosecution cross-examined a defence witness about his prior convictions. The Court of Criminal Appeal concluded that this cross-examination should never have occurred. Given that the witness's prior convictions occurred over 50 years ago, the evidence could not have substantial probative value (*Montgomery v R* [2013] NSWCCA 73 at [6] per Simpson J (McClellan CJ at CL agreeing). See also *Al-Salmani v The Queen* [2023] NSWCCA 83, [33]–[46] where it was considered improper to cross-examine an expert witness about whether they had been fired from a job approximately 20 years earlier without seeking an advance ruling).

Last updated: 15 December 2023

s 104 – Further protections: cross-examination as to credibility (criminal proceedings)

(1) This section applies only to **credibility evidence** in a **criminal proceeding** and so applies in addition to section 103.

(2) An accused must not be cross-examined about a matter that is relevant to the assessment of the **credibility** of the accused, unless the **court** gives leave.

(3) Despite subsection (2), leave is not required for **cross-examination** by the **prosecutor** about whether the accused—

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for **cross-examination** by the **prosecutor** under subsection (2) unless evidence adduced by the accused has been admitted that—

(a) tends to prove that a **witness** called by the **prosecutor** has a tendency to be untruthful; and

(b) is relevant solely or mainly to the **witness**'s **credibility**.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—

(a) the events in relation to which the accused is being prosecuted; or

(b) the investigation of the **offence** for which the accused is being prosecuted.

(6) Leave is not to be given for **cross-examination** by another accused unless—

(a) the evidence that the accused to be cross-examined has given includes evidence adverse to the accused seeking leave to cross-examine; and

(b) that evidence has been admitted.

Summary of continuity and change

- Under the previous Victorian statutory law (s 399(5) of the *Crimes Act 1958*), the regulation of the cross-examination of an accused with respect to issues of credit operates as a shield which is lost in only certain circumstances.
- Under the UEA, s 104 – which applies only in criminal proceedings – also provides additional and different safeguards. An accused may not be cross-examined about matters going to his or her credibility unless the court gives leave or the cross-examination is directed to a specified matter.
- There are also limits on the rights (with leave) of accused persons to cross-examine each other.

Further protections in criminal proceedings – cross-examination as to credibility

1. **Credibility evidence** is defined in s 101A.

2. As noted, s 103 provides a general exception to the credibility rule – namely that credibility evidence adduced in cross-examination is admissible if it could 'substantially affect' the assessment of the credibility of the witness.

3. Section 104 provides additional limits in criminal proceedings to evidence that might otherwise be admissible under the s 103 exception. It does not provide an independent exception to the credibility rule.

4. In criminal proceedings:

    - the accused may be cross-examined about matters relevant to his or her credibility only with leave of the court (s 104(2));
    - in deciding whether to grant leave, the court must have regard to the factors in s 192(2);
    - the court must not grant leave to the prosecution unless evidence adduced by the accused has been admitted that:
        - tends to prove a witness called by the prosecutor has a tendency to be untruthful, and
        - is relevant solely or mainly to the witness' credibility (s 104(4));
    - the court must not grant leave to another accused unless the evidence given by the accused who would be cross-examined includes evidence adverse to the accused seeking leave to cross-examine and that evidence has been admitted (s 104(6)).

5. A reference to evidence in s 104(4) does not include a reference to evidence of conduct in relation to the events in relation to which the accused is being prosecuted or in relation to the investigation of the offence for which the accused is being prosecuted (s 104(5)). Thus such evidence is outside the leave regime of ss 103 and 104.

When leave is not required

6. Leave is not required for cross-examination by a prosecutor about whether the accused:

    - is biased or has a motive to be untruthful
    - is, or was, unable to be aware of or recall matters to which his or her evidence relates, or
    - has made a prior inconsistent statement (s 104(3)).

Last updated: 28 April 2022

s 106 – Exception: rebutting denials by other evidence

(1) The **credibility rule** does not apply to evidence that is relevant to a **witness**'s **credibility** and that is adduced otherwise than from the **witness** if—

(a) in cross-examination of the witness—

(i) the substance of the evidence was put to the **witness**; and

(ii) the **witness** denied, or did not admit or agree to, the substance of the evidence; and

(b) the **court** gives leave to adduce the evidence.

(2) Leave under subsection (1)(b) is not required if the evidence tends to prove that the **witness**—

(a) is biased or has a motive for being untruthful; or

(b) has been convicted of an **offence**, including an **offence** against the **law** of a foreign country; or

(c) has made a prior inconsistent statement; or

(d) is, or was, unable to be aware of matters to which his or her evidence relates; or

(e) has knowingly or recklessly made a false **representation** while under an obligation, imposed by or under an **Australian law** or a **law** of a foreign country, to tell the truth.

Exception to credibility rule – rebutting denials by other evidence

1. The credibility rule does not apply to evidence from other witnesses which is adduced to rebut denials made by a witness in cross-examination (s 106(1)(a)).
2. Section 106(1)(a)(i) does not require each and every proposition from the rebuttal evidence to be put to the witness. Instead, the substance of the rebuttal evidence must be put (*RC v The Queen* [2022] NSWCCA 281, [88]).
3. Section 106(1)(a)(ii) describes three possible responses by the witness – denied; did not agree to; did not admit. A witness who remains mute, or who becomes argumentative and gives nonresponsive answers does not necessarily meet the requirements of denying, not agreeing to or not admitting the previous statement (see *RC v The Queen* [2022] NSWCCA 281, [90]–[104]).
4. The court's leave is required to adduce evidence of this kind (s 106(1)(b)) unless it falls within the categories provided by s 106(2).

Subsection (2) categories - when leave not required to adduce evidence rebutting denials made by a witness in cross-examination

5. The court's leave under s 106(1)(b) is not required if the evidence tends to prove that the witness:
    - is biased or has a motive to lie; or
    - has prior convictions; or
    - has made prior inconsistent statements; or

- is unable to be aware of or recall matters to which his or her evidence relates; or
- on a previous occasion has made a false representation while under an obligation to tell the truth.

6. Note: with respect to a prior inconsistent statement, the s 43 and s 45 procedural requirements apply.

Re-establishing credibility

7. If, under s 106, evidence relating to a witness (the first-mentioned witness) is adduced from another witness (the second-mentioned witness) to rebut a denial, the party who called the first-mentioned witness may do either or both of the following for the purpose of re-establishing the first-mentioned witness' credibility:
    - re-examine the first-mentioned witness under s 108(1);
    - cross-examine the second-mentioned witness.

Evidence must be in rebuttal

8. Section 106 requires the evidence already to have been put to the witness (usually in cross-examination). In turn, this requires that the procedural requirement of ss 103 and 104 already to have been met, including the s 103 test of 'substantially affect the assessment of the credibility of the witness'. If cross-examination evidence about a matter is not permitted then the witness does not have a rebuttal opportunity and credibility evidence on that matter cannot be adduced under s 106.

Last updated: 15 December 2023

s 108 – Exception: re-establishing credibility

(1) The **credibility rule** does not apply to evidence adduced in **re-examination** of a **witness**.

(2) * * * * *

(3) The **credibility rule** does not apply to evidence of a **prior consistent statement** of a **witness** if—

(a) evidence of a **prior inconsistent statement** of the **witness** has been admitted; or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the **witness** has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion—

and the **court** gives leave to adduce the evidence of the **prior consistent statement**.

Exception to credibility rule – re-establishing credibility

Re-examination

1. The credibility rule does not apply to evidence adduced in the re-examination of a witness (s 108(1)).

2. In re-examination, a witness may be questioned about matters arising out of evidence given by the witness in cross-examination and other questions may not be put to the witness without leave of the court (s 39).

3. Leave is not required to adduce evidence under s 108(1). The evidence sought to be adduced must, of course, satisfy the requirements of relevance to be admissible.

Prior consistent statements

4. The credibility rule does not apply to evidence of a prior consistent statement made by a witness if:

   - evidence of a prior inconsistent statement made by that witness has been admitted and the court gives leave to adduce the evidence of the prior consistent statement (s 108(3)(a)); or
   - it is, or will be, suggested that evidence given by the witness has been fabricated or re-constructed or is the result of suggestion and the court gives leave to adduce the evidence of the prior consistent statement (s 108(3)(b)).

5. In the same way as the exception to the hearsay rule may apply where evidence of prior consistent statements is sought to be admitted pursuant to s 66, that exception may also apply where such evidence is admitted pursuant to s 108(3)(b), for example, complaint evidence.

6. In either circumstance, where a party seeking to adduce evidence of prior consistent statements relies on s 66, the relevance of the evidence should not generally be confined, pursuant to s 136, to credibility. And in considering whether to limit the relevance of evidence to credibility, it is important that the preconditions to admissibility for credibility purposes under ss 108(3)(b) and 192 are satisfied (*ISJ v R* (2012) 38 VR 23; [2012] VSCA 321 at [60], [67]).

7. Where a prior consistent statement is introduced into evidence because a prior inconsistent statement is admitted, the two statements will not necessarily have the same probative value. In *Niaros v R* [2013] VSCA 249, Redlich JA noted:

> Where the same matter is addressed in both a prior consistent and inconsistent statement, the statements should not be evaluated as though they necessarily carry the same weight and have an equal and opposite effect on the credibility of the witness.
> An evaluation of the significance of any prior consistent or inconsistent statement to the credibility of a witness should ordinarily be undertaken by a discrete consideration of each statement. That is particularly so where the same matter is addressed in both types of statements. Rather, the separate evaluation should take account of the timing and circumstances in which the statement was made and the nature of the matter in issue. So, for example, the fact that a statement was made on oath in court proceedings may lead to it being given greater weight. Because a prior consistent statement is being admitted to meet a particular attack, the timing of the making of the statement, generally speaking, may assume more importance than the circumstances in which the statement was made (*Niaros v R* [2013] VSCA 249 at [98]–[99] per Redlich JA (Maxwell P agreeing)).

Particular matters relevant to the question of leave

8. In exercising the discretion under s 108(3) it is important to identify how the evidence relates to the statutory premise for its admission. Whether, if admissible, the evidence becomes evidence of the truth of what is asserted is *not* relevant to the exercise of the discretion to give leave under the section – the exercise of the discretion depends upon the *effect of the evidence on the witness' credibility* (*Graham v R* (1998) 195 CLR 606 at 609; [1998] HCA 61).

9. In other words, the critical criteria for the grant of leave under s 108(3) is whether the evidence will arguably address the attack (note discussion in e.g., *ISJ v R* (2012) 38 VR 23; [2012] VSCA 321 at [67]).

10. The fact that evidence of a prior consistent statement is to be led from a person other than the person who made the statement is relevant to the question of leave (*Leung v R* [2003] NSWCCA 51 at [86]).

11. The fact that evidence of a prior inconsistent statement was adduced by the same party that is seeking leave to adduce evidence of the prior consistent statement is relevant to the question of leave (*KNP v R* (2006) 67 NSWLR 227; [2006] NSWCCA 213 at [29]–[31]).

Last updated: 9 October 2013

Division 3 – Credibility of persons who are not witnesses (ss 108A–108B)

Division 3 controls the admissibility of evidence relevant to the credibility of the maker of a previous representation who does not give evidence in a proceeding. Such a person is not a witness, therefore the credibility rule in Division 2 (s 102) does not apply. Instead, these Division 3 rules (ss 108A and 108B) operate to impose the same criteria as Division 2 (see ss 103 and 106) to persons who are not witnesses but whose credibility has been made relevant by an out of court statement.

Division 3:

- provides credibility evidence about a non-witness who has made a previous representation is not admissible unless it could substantially affect the assessment of the person's credibility (s 108A);
- provides further protection for accused who have not or will not give evidence by requiring the same additional restrictions as those under s 104.

Last updated: 16 December 2009

s 108A – Admissibility of evidence of credibility of person who has made a previous representation

(1) If—

(a) evidence of a **previous representation** has been admitted in a proceeding; and

(b) the person who made the **representation** has not been called, and will not be called, to give evidence in the proceeding—

credibility evidence about the person who made the **representation** is not admissible unless the evidence could substantially affect the assessment of the person's **credibility**.

(2) Without limiting the matters to which the **court** may have regard for the purposes of subsection (1), it is to have regard to—

(a) whether the evidence tends to prove that the person who made the **representation** knowingly or recklessly made a false **representation** when the person was under an obligation to tell the truth; and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the **representation** related and the making of the **representation**.

Admissibility of evidence of credibility of person who has made a previous representation

1. If evidence of a previous representation has been admitted in a proceeding and the person who made it has not been, and will not be, called to give evidence, credibility evidence about that person is not admissible unless the evidence could substantially affect the assessment of the person's credibility (s 108A(1)).

2. Without limiting the matters to which the court may have regard in determining admissibility, the court is to have regard to:

   - whether the evidence tends to prove that the maker of the representation knowingly or recklessly made a false representation when under an obligation to tell the truth; and
   - the period of time between the commission of the act or the occurrence of the event to which the representation related and the time that the representation was made (s 108A(2)).

Use of section by prosecution

3. In a criminal proceeding, the prosecution may not know until after the close of its case whether the accused will give evidence and may therefore not be able to make use of s 108A.

4. However, if the accused is invited to disclose whether he or she will give evidence and either refuses or is unable to do so, that fact will be relevant to whether the Crown is permitted a case in reply (*R v Toai Siulai* [2004] NSWCCA 152 at [83]).

Last updated: 16 December 2009

s 108B – Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a **criminal proceeding** and so applies in addition to section 108A.

(2) If the person referred to in that section is an accused, the **credibility evidence** is not admissible unless the **court** gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the accused—

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her **previous representation** relates; or

(c) has made a prior inconsistent statement.

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the accused has been admitted that—

(a) tends to prove that a **witness** called by the prosecution has a tendency to be untruthful; and

(b) is relevant solely or mainly to the **witness**'s **credibility**.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—

(a) the events in relation to which the accused is being prosecuted; or

(b) the investigation of the **offence** for which the accused is being prosecuted.

(6) Another accused must not be given leave under subsection (2) unless the **previous representation** of the accused that has been admitted includes evidence adverse to the accused seeking leave.

Summary of continuity and change

- Section 108B provides further protections in relation to previous representations of an accused who is not a witness (which protections correspond to those imposed by s 104).
- The purpose is to ensure an accused is not unfairly disadvantaged by electing not to give evidence (especially when the opportunity to lead evidence relevant only to credibility arises because the prosecution has led evidence of a previous representation of that accused).

Further protections – previous representations of an accused who is not a witness

1. Section 108B imposes additional limits to that imposed by s 108A in relation to credibility evidence about an accused.
2. In that case, credibility evidence is not admissible without leave of the court (s 108B(2)).

3. A court must not give leave to an accused unless the previous representation that has been admitted includes evidence adverse to the accused seeking leave (s 108B(6)).

4. However, leave is not required if the evidence is about whether the accused:

   - is biased or has a motive to be untruthful; or
   - is, or was, unable to be aware of or recall matters to which his or her previous representation relates; or
   - has made a prior inconsistent statement (s 108B(3)).

5. The court must not give the prosecution leave unless evidence adduced by the accused has been admitted that:

   - tends to prove that a witness called by the prosecution has a tendency to be untruthful; and
   - is relevant solely or mainly to the witness' credibility (s 108B(4)).

6. Section 108B(4) does not apply to evidence in relation to the events in relation to which the accused is being prosecuted or the investigation of the offence for which the accused is being prosecuted (s 108B(5)).

Last updated: 28 April 2022

Division 4 – Persons with specialised knowledge (s 108C)

Division 4 is intended to facilitate evidence that is relevant to the fact-finding process. It overcomes the fact that evidence based on specialised knowledge is indirectly excluded by the other provisions of Part 3.7 (because it is either sought to be led in-chief or cannot be led in rebuttal because it is not appropriate to cross-examine on the issue).

Subsection (2) is specifically to ensure courts' acceptance of the fact that the development and behaviour of children is a matter of specialised knowledge outside the general knowledge of the community.

Last updated: 16 December 2009

s 108C – Exception: evidence of persons with specialised knowledge

(1) The **credibility rule** does not apply to evidence given by a person concerning the **credibility** of another **witness** if—

(a) the person has specialised knowledge based on the person's training, study or experience; and

(b) the evidence is evidence of an opinion of the person that—

(i) is wholly or substantially based on that knowledge; and

(ii) could substantially affect the assessment of the **credibility** of the **witness**; and

(c) the **court** gives leave to adduce the evidence.

(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 **child**ren and their 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 that kind, a reference to an opinion relating to either or both of the following—

(i) the development and behaviour of **child**ren generally;

(ii) the development and behaviour of **child**ren who have been victims of sexual **offence**s, or **offence**s similar to sexual **offence**s.

Summary of continuity and change

- At common law, with some exceptions, an expert cannot give evidence about the credibility of another witness.
- This provision creates the new exception that, subject to the satisfaction of two thresholds and the leave of the court, the credibility rule does not apply to the evidence of a person who has specialised knowledge. It is intended to prevent the misinterpretation of, or the drawing of inappropriate inferences from, witness behaviour.
- Subsection (2) recognises that the court may benefit from the admission of expert opinions relating to child development and sexual abuse of children.

Exception to credibility rule – evidence of persons with specialised knowledge

1. Section 108C provides an exception to the credibility rule to allow (with the court's leave) opinion evidence to be led in-chief on matters of credibility (s 108C(1)).
2. It will be relevant for the court to consider why the party tendering the evidence considers it relevant. In particular, it will be relevant to identify the finding which the tendering party wishes

the tribunal of fact to make from the proposed evidence (*MA v R* (2013) 40 VR 564; [2013] VSCA 20 at [31] per Osborn JA).

3. Section 108C may be utilised in cases where it is not possible or appropriate to ask a witness to self-diagnose.

4. The credibility rule does not apply to give evidence by a person about the credibility of another witness if:

    - the person has specialised knowledge; and
    - the specialised knowledge is based on the person's training, study or experience; and
    - the evidence is evidence of an opinion of the person:
        - that is wholly or substantially based on that knowledge; and
        - that could substantially affect the assessment of the credibility of the witness about whom the evidence is given; and
    - the court gives leave to adduce the evidence (s 108C(1)).

5. The exception created by s 108C is designed to address expert evidence which has substantial probative value and is relevant to assessing a witness's credibility or reliability as to facts in issue. Evidence admitted under s 108C will address the ability of a witness to give credible evidence, taking into account behavioural or other factors, such as environmental and cognitive factors, which may affect the witness' capacity to give accurate evidence (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [271]; *Audsley v R* (2014) 44 VR 506; [2014] VSCA 321 at [30]).

6. This type of evidence may be led to explain behaviour exhibited by a complainant which might otherwise be taken to adversely affect their credibility. Examples of such types of evidence include expert evidence as to:

    - aspects of a child's behaviour (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [272]; see also *CMG v R* [2011] VSCA 416);
    - the effect of a witness's personality disorder, where there is a rational base for that disorder undermining the witness's credibility;
    - the power of suggestion where a child is interviewed by someone in authority (see, e.g., *R v WR* [2010] ACTSC 89 at [30]–[33] per Refshauge J; *DPP (NSW) v JG* [2010] NSWCCA 222 at [124] per Basten JA, [160] per RS Hulme J); or
    - parental response and, in particular, maternal response to complaints by a child of sexual abuse (*MA v R* (2013) 40 VR 564; [2013] VSCA 20 at [51] per Osborn JA).

7. It is rarely appropriate to exclude defence evidence which meets the admissibility test under s 108C. Such evidence has already been found capable of substantially affecting the assessment of the credibility of a witness and should not be excluded unless there are counterveiling considerations of such weight as to require exclusion of the evidence despite its demonstrated utility (*Audsley v R* (2014) 44 VR 506; [2014] VSCA 321 at [45]–[47]).

8. As the Australian Law Reform Commission noted in the 1987 *Evidence* report ([1987] ALRC 38), the policy background to the Uniform Evidence law includes a recognition that rules of evidence must apply differently between the prosecution and the defence. This difference exists as part of the design of the Act to minimise the risk of wrongful convictions (*Evidence* [1987] ALRC 38 at [28], [41], [46]).

9. Specialist knowledge in relation to child development and child behaviour as well as children who have been the victims of sexual offences is specifically captured by s 108C(2).

10. Specialist evidence that the behaviour of a complainant is consistent with that of a child victim of sexual abuse should not be used as evidence that the child was, in fact, so abused. This may require the application of s 136 and the making of appropriate directions to the jury. For instance, if evidence that behaviour which is consistent with that of a victim of child sexual abuse is

admitted, the court may direct that the evidence be used only for the credibility purpose (and not to reason that the behaviour per se means the complainant was abused) (ALRC Joint Report 102 at [12.130]).

11. Alternatively, opinion evidence may be led as to factors affecting identification evidence. In *Dupas*, the defence sought to lead opinion evidence from an expert witness about identification evidence, delay and post-event information resulting in a so-called 'displacement effect'. At trial, the witness was allowed to give evidence about the 'displacement effect' generally, but was not allowed to give more specific evidence about its effect on the identification evidence given by the Crown witnesses, as he was unable to determine whether the specific Crown witnesses were affected by that effect. On appeal, the Court held that the trial judge's decision to limit the expert evidence to general observations only was correct (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [243]–[284]).

12. It has been noted that, in respect of expert evidence relevant to the credibility of a complainant, it would not usually be the case that an expert would be expected to express an opinion regarding the complainant's actual behaviour following the alleged offences, the reasons why the complainant's parent did not accept their child's claim or the child's reaction to their complaint being rejected. These questions are matters for the jury and an expert should rarely be asked to opine on the matter of the behaviour of the complainant or their parent, and whether such behaviour made a fact in issue more probable. Where a party seeks such an opinion from an expert, the trial judge's obligation to exclude evidence whose prejudicial effect outweighs its probative value may be more important (*MA v R* (2013) 40 VR 564; [2013] VSCA 20 at [100] per Redlich and Whelan JJA; *Woods v The Queen* [2021] VSCA 105, [106], [110]).

Last updated: 28 April 2022

Part 3.8 – Character (ss 109–112)

The purpose of Part 3.8 is to resolve uncertainties in the law. It applies only to criminal proceedings (s 109) but it is closely associated with Part 3.7 (Credibility). Most notably, it provides the hearsay, opinion, tendency and credibility rules do not apply to character evidence in criminal proceedings.

Part 3.8 provides:

- an exception to the four exclusionary rules that would otherwise prevent an accused from having general or specific evidence of good character admitted (hearsay, opinion, tendency, credibility) (s 110);
- an exception to the hearsay and opinion rules for evidence of expert opinion which is relevant to an accused's character where it is adduced on behalf of another accused (s 111);
- that an accused is not to be cross-examined about matters arising out of the foregoing evidence unless the court gives leave (s 112).

The practical effect of Part 3.8 is that in a criminal proceeding, if an accused or co-accused leads evidence of the kind referred to by the provisions, then it is the sections of this Part – and Part 3.11 – that need to be considered.

[For a discussion about how the uniform evidence legislation works as a 'grid system' (as opposed to a 'mass' of individual rules) see Clifford Einstein QC, 'Reining in the Judges'? – An Examination of the Discretions Conferred by the Evidence Acts 1995' (1996) *NSWLJ* 19(2), 268–280.]

Last updated: 16 December 2009

s 109 Application

This Part applies only in a **criminal proceeding**.

Application of provisions relating to character

1. The UEA provisions relating to character (ss 109–112) apply only in criminal proceedings.

Last updated: 16 December 2009

s 110 – Evidence about character of an accused

(1) The **hearsay rule**, the **opinion rule**, the **tendency rule** and the **credibility rule** do not apply to evidence adduced by an accused to prove (directly or by implication) that the accused is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that an accused is generally a person of good character has been admitted, the **hearsay rule**, the **opinion rule**, the **tendency rule** and the **credibility rule** do not apply to evidence adduced to prove (directly or by implication) that the accused is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that an accused is a person of good character in a particular respect has been admitted, the **hearsay rule**, the **opinion rule**, the **tendency rule** and the **credibility rule** do not apply to evidence adduced to prove (directly or by implication) that the accused is not a person of good character in that respect.

Evidence about character of accused persons

1. The Act does not contain any definition of 'character evidence'. It is, however, commonly treated as evidence of a person's inherent moral qualities or disposition, and includes evidence of the person's reputation (*Cooper v The King* [2023] VSCA 67, [47], citing *Melbourne v The Queen* (1999) 198 CLR 1, 15, 40).

2. Evidence adduced by an accused to prove (directly or by implication) that he or she is, either generally or in a particular respect, a person of good character is not subject to the hearsay rule, the opinion rule, the tendency rule or the credibility rule (s 110(1)).

3. If evidence has been adduced to prove that an accused is a person of good character (either generally or in a particular respect) and that evidence has been admitted, then the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not preclude cross-examination of the accused by the prosecution for the purpose of adducing evidence that the accused is *not* a person of good character (either generally or in a particular respect) (ss 110(2) and 110(3)).

4. The effect of excluding the tendency rule under ss 110(2) and (3) has not been clearly determined. One view which has been expressed is that the exclusion of the tendency rule means that rebuttal evidence can be used for a tendency purpose, even if does not meet the admissibility tests in Part 3.6. This approach is wider than the position under the common law, which limited the use of rebuttal evidence to neutralising good character evidence but did not allow the evidence to be used as directly relevant to guilt. In *Saw Wah v The Queen* [2014] VSCA 7, Weinberg JA, with whom Priest and Coghlan JJA agreed, endorsed the common law approach at footnote 20.

Evidence of good character

5. Evidence of good character is not merely evidence as to credit. It is evidence that 'could rationally affect (directly or indirectly) the assessment of the probability' that the accused committed the offences charged (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46 at [35] and [94]).

Example of evidence of good character in 'a particular respect'

6. 'In a particular respect' has been interpreted as relating to a particular characteristic, such as gentleness, generosity or good citizenship. It may also refer to a specific context in which the accused has acted in a particular way (*Bishop v R* (2013) 39 VR 642; [2013] VSCA 273 at [8] per Redlich JA (Coghlan JA agreeing)).

7. Evidence of good character 'in a particular respect' may also be evidence of good character generally, except in a particular respect. For example, an accused in a sexual assault trial may adduce evidence that he or she had no prior criminal convictions, except for minor unrelated offences (*Saw Wah v R* (2014) 45 VR 440; [2014] VSCA 7 at [89]–[90] per Weinberg JA (Priest and Coghlan JJA agreeing)).

8. An accused may lead evidence which specifically addresses good character relating to the charge or the lack of prior bad character in respect of the conduct which is the subject of the charge.

9. Where an accused chooses to lead evidence of good character in a particular respect, the prosecution 'will be confined to rebutting evidence in that particular respect' (*Bishop v R* (2013) 39 VR 642; [2013] VSCA 273 at [7] per Redlich JA (Coghlan JA agreeing)).

10. An example of evidence adduced to prove that an accused is a person of good character in a particular respect is evidence adduced to prove that the accused is a truthful person (*R v El-Kheir* [2004] NSWCCA 461).

11. Similarly, evidence of good character in respect of young children has been admitted to rebut allegations of sexual abuse (*R v PKS* (Unreported, NSWCCA, 1 October 1998 at 9–10 per Wood CJ at CL, Sully and Ireland JJ), cited with approval in *Bishop v R* (2013) 39 VR 642; [2013] VSCA 273 at [8] per Redlich JA (Coghlan JA agreeing)).

12. And a lack of prior sexual offences has also been admitted to counter allegations of sexual abuse (*R v Zurita* [2002] NSWCCA 22, cited with approval in *Bishop v R* (2013) 39 VR 642; [2013] VSCA 273 at [8] per Redlich JA (Coghlan JA agreeing); see also *Saw Wah v R* (2014) 45 VR 440; [2014] VSCA 7; *Parsons v R* [2016] VSCA 17 at [63])).

13. Where good character is led, it is not open to the prosecution to seek to undermine the relevance of the evidence by submitting in a closing address that the private nature of the offences means that a person may be outwardly perceived as being of good character while privately offending. Specifically in relation to child sexual offences, it is not permissible to argue that character evidence "can cut both ways" because, as a matter of common sense, people may use charitable work with children in order to access vulnerable children for the purpose of sexual offending. Such a submission impermissibly undermines the good character direction the court will give (*Hogg v The Queen* [2019] NSWCCA 323, [117]–[123]; *FB v The Queen* [2020] NSWCCA 137, [369]).

14. It is permissible, however, for the prosecution to cross-examine a character witness to suggest that the accused might have acted in a certain way when they were not present (*FB v The Queen* [2020] NSWCCA 137, [376]).

Admissibility of evidence to rebut evidence of good character

15. Subsections (2) and (3) displace the hearsay, opinion, tendency and credibility rules to evidence that the accused is not generally, or in the particular respect shown, of good character.

16. Notwithstanding the displacement of the tendency rule, in *Saw Wah v The Queen* [2014] VSCA 7, as mentioned above Weinberg JA, with whom Priest and Coghlan JJA agreed, endorsed the common law approach (at footnote 20) that bad character evidence adduced to rebut good character evidence may not be used to reason that the accused was more likely to have committed the offence because he was a person of bad character.

17. Evidence from a complainant regarding how the accused interacted with that complainant as an individual in a particular setting, and which does not seek to establish any general disposition outside that relationship, is not character evidence and is not dependent on subsections (2) and (3) for admissibility (see *Cooper v The King* [2023] VSCA 67, [48]). Instead, the admissibility of evidence of other interactions between the accused and the complainant depends on how the evidence is relevant, and whether any exclusionary rules apply (such as the tendency rule, and exclusion under s 137).

Grant of leave to rebut evidence of good character

18. The court may only give the Crown leave to cross-examine the accused about his or her evidence of good character if the accused intentionally and deliberately adduced evidence of his or her character (*Gabriel v R* (1997) 76 FCR 279; *R v Bartle & Ors* [2003] NSWCCA 329 at [115]–[146] per Mason P and Barr J (Smart AJ agreeing on this point); *PGM v R* [2006] NSWCCA 310 at [35] per Barr J (McClellan CJ at CL and Buddin J agreeing); *Huges v R* [2013] VSCA 338 at [24] per Priest JA (Coghlan JA and Lasry AJA agreeing)).

19. The test for determining whether the good character of the accused has been raised is not whether a reasonable jury would consider that this is the case, but whether the trial judge considers that this is so. When making this assessment, counsel's purpose in leading the evidence is relevant but not determinative (*Huges v R* [2013] VSCA 338 at [26] per Priest JA (Coghlan JA and Lasry AJA agreeing), citing *R v Thomas* [2006] VSCA 167 at [30] per Neave JA (Maxwell P and Mandie AJA agreeing)).

20. Where the threshold requirement for the admission of evidence of bad character is satisfied, the court retains a discretion to exclude it. In *Huges v R* [2013] VSCA 338, several reasons were given for why evidence of bad character should not have been admitted in that case. These included the highly prejudicial nature of the evidence, its low probative value, and the fact that, if the defendant denied the allegation in cross-examination, prosecution rebuttal evidence would be the last evidence the jury heard (*Huges v R* [2013] VSCA 338. See generally *R v Qaumi & Ors (No 61)* [2016] NSWSC 1192).

21. As subsection (3) states, where an accused leads evidence of character in a particular respect, the prosecution is limited to leading evidence to rebut that aspect of character. In assessing whether the evidence is relevant to rebut the aspect of character raised by the accused, the judge must determine the extent to which the accused's character is raised. This requires consideration of both the evidence, and the circumstances of the alleged offence. For example, in *Omot v R*, the accused called evidence to show he had no prior convictions for sexual offences. The prosecution was allowed to call evidence of the accused's convictions for violent offences in rebuttal, as the allegations in the case involved violent sexual assaults and without the rebuttal evidence, the character evidence would give a false impression of the accused (*Omot v R* [2016] VSCA 24 at [23]–[27]).

Last updated: 15 December 2023

s 111 – Evidence about character of co-accused

(1) The **hearsay rule** and the **tendency rule** do not apply to evidence of the character of an accused if—

(a) the evidence is evidence of an opinion about the accused adduced by another accused; and

(b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the **hearsay rule**, the **opinion rule** and the **tendency rule** do not apply to evidence adduced to prove that that evidence should not be accepted.

Evidence about character of co-accused

1. Section 111 permits the defence in a criminal proceeding to adduce expert opinion evidence about another accused in the proceeding (s 111(1)).
2. If such evidence is admitted, the other accused may adduce opinion evidence to prove that that evidence should not be accepted (s 111(2)).

Last updated: 16 December 2009

s 112 – Leave required to cross-examine about character of accused or co-accused

An accused must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the **court** gives leave.

Leave required to cross-examine about character of accused or co-accused

1. An accused must not be cross-examined by the prosecution or another accused about matters arising out of evidence of a kind referred to in this Part or in Part 3.7 (that is, evidence relating to his or her character or relating to the character of his or her co-accused) without leave of the court to do so (s 112).
2. In *Huges v R* [2013] VSCA 338 at [21]–[22], Priest JA explained the process a judge follows when deciding whether to grant leave:

> Thus in this case the trial judge was required to consider first whether, directly or by implication, the appellant had adduced evidence of good character (either generally or in a particular respect). If the appellant had adduced such evidence, when dealing with the application to cross-examine under s 112, the judge next had to consider whether to grant leave, and, if so, whether to place limitations on the grant of such leave. In so doing, the judge had to take account of the importance of the evidence, and the extent to which the grant of leave would be unfair to the appellant. With respect to both the cross-examination, and the evidence sought to be led in supposed rebuttal of good character, the judge had a discretion to refuse to admit the evidence if its probative value was substantially outweighed by the danger that it would be unfairly prejudicial, or to limit the use of the evidence if there was a danger that a particular use might be unfairly prejudicial to the appellant. Moreover, the judge had an overarching obligation – not a discretion – to exclude the evidence if its probative value was outweighed by the danger of unfair prejudice (*Huges v R* [2013] VSCA 338 at

[21] (footnotes omitted)).

Last updated: 2 June 2014

Part 3.9 – Identification evidence (ss 113–116)

The UEA identification evidence provisions respond to the fact that while *eyewitness* visual identification potentially has significant probative value, it is a 'notoriously problematic class of evidence' (for discussion of the issues, see ALRC Interim Report 26(1) at [419]–[422]; and Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.114.240]).

For this reason, the provisions are not intended to cover DNA, fingerprint or other forensic evidence (although there is no direct authority on the point of whether such evidence is, in fact, captured by the provisions – see ALRC Report 102 at [13.17]–[13.34]).

Part 3.9 governs the admissibility of identification evidence. Given eyewitness identification is rarely an issue in civil proceedings, the rules are limited to criminal proceedings. The rules:

- only apply to evidence adduced by the prosecution;
- replace the common law;
- establish exclusionary rules for visual and (specified) picture evidence; and
- create significant procedural requirements to ensure any such evidence put before a court is as reliable as possible. These requirements shift the focus of the consequences of identification evidence procedures from a question of weight to one of admissibility.

The effect of the rules is that identification parades are the primary source of identification evidence and picture evidence the secondary source.

Also, given that the reliability of identification evidence does not necessarily correlate with the degree of confidence of the testimony, another effect of this Part is largely to eradicate the difference between resemblance and positive identification evidence. Notably, both forms require jury directions. The weight to be accorded to the evidence remains with the tribunal of fact.

Within the criminal jurisdiction (s 113), this Part provides:

- visual identification evidence is excluded unless an identification parade was conducted before the identification was made and there was no intentional influence of the identifying witness. This exclusionary rule is subject to exceptions where it would not have been reasonable to hold such a parade or where the accused refused to take part in such a parade (s 114);
- a regime to control picture identification evidence made by means of police pictures (s 115).

This Part must be read in conjunction with the *Jury Directions Act 2015*, which provides for certain jury directions which may be given regarding identification evidence.

The Part 3.11 discretionary and mandatory exclusions are also available.

Unreliable exculpatory identification evidence (which is not covered by Part 3.9) may be excluded or limited by Part 3.11 or subject to jury warnings (*Jury Directions Act 2015* s 36).

Last updated: 7 August 2015

s 113 – Application

This Part applies only in a **criminal proceeding**.

Application of provisions relating to identification evidence

1. The UEA provisions relating to identification evidence (ss 113–116) apply only in criminal proceedings.

Identification evidence

2. Identification evidence is defined (see Dictionary) to:

- *require–*
    - an assertion of sameness or resemblance;
- *include–*
    - visual and other identification ('visually, aurally or otherwise')
    - both positive identification and resemblance evidence ('was, or resembles')
    - both in- and out-of-court assertions (the latter of which are subject to the hearsay rules)
- *exclude–*
    - non-human evidence – e.g. machine based identification (such as security camera footage, surveillance footage, facial recognition software), evidence based on an identification made by an animal (such as a working dog) ('an assertion by a person')
    - persons other than the defendant and things ('a defendant')
    - exculpatory evidence ('was, or resembles … a person who was, present at or near a place')
- *cover situations whereby the witness–*
    - does not see the defendant (as distinct from the perpetrator) directly – for instance by relying on a picture or recording.

3. In s 114, this definition is limited by the definition of 'visual identification evidence' in several key ways. For example, s 114:

    - excludes picture identification evidence; and
    - requires at least a partially visual basis to the identification (so wholly aurally based evidence is excluded).

4. This means such exclusions are not caught by the s 114 procedural requirements. However, picture identification evidence is covered by s 115 and, in all cases, Part 3.11 applies.

Relevance

5. In *Smith v R* (2001) 206 CLR 650; [2001] HCA 50, the majority held that positive identification evidence adduced as opinion evidence by two police officers was not relevant because, at the point the jury had to decide whether the person in the surveillance footage was the accused, the jurors were as well placed as the police officers to have a view on this fact.

6. On that basis, it was held that the officers' evidence could not 'rationally affect the assessment of the jury… of the probability of the existence of [the] fact [of the identity of the accused and the person in the photograph]… when the conclusion [of the officers' evidence] is based only on material that is not different in any substantial way from what is available to the jury' (*Smith v R* (2001) 206 CLR 650; [2001] HCA 50 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ) (Kirby J dissenting)). Because the evidence was not relevant, it was not admissible and the other admissibility provisions did not have to be considered.

7. The Court did clarify that there will be cases where identification evidence is relevant and, in such cases, 'further questions of admissibility would then arise' (*Smith v R* (2001) 206 CLR 650; [2001] HCA 50 at [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ) (Kirby J dissenting); see also *R v Drollet* [2005] NSWCCA 356 at [35], [46] per Simpson J (McClelland CJ at CL and Rothman J agreeing)). Such issues could include, for example, application of s 79 (opinion evidence) and whether the evidence could or should be excluded by Part 3.11.

Application of Part 3.11

8. For a discussion of how the meaning of "probative value" is relevant to identification evidence, see section 137 - Exclusion of prejudicial evidence in criminal proceedings and the Dictionary.

9. While identification evidence should not be regarded as 'presumptively unfair' (under Part 3.11), it does require warnings pursuant to both Parts 3.9 and 3.11; and such warning must be taken into account before concluding that any prejudice that does arise would be 'unfair' (*R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 at [74]–[75]).

Section 138

10. Police failure to comply with specified procedures with respect to the identification of suspects may enliven s 138.

Last updated: 26 July 2016

s 114 – Exclusion of visual identification evidence

(1) In this section, **visual identification evidence** means **identification evidence** relating to an identification based wholly or partly on what a person saw but does not include **picture identification evidence**.

(2) **Visual identification evidence** adduced by the **prosecutor** is not admissible unless—

(a) an identification parade that included the accused was held before the identification was made; or

(b) it would not have been reasonable to have held such a parade; or

(c) the accused refused to take part in such a parade—

and the identification was made without the person who made it having been intentionally influenced to identify the accused.

(3) Without limiting the matters that may be taken into account by the **court** in determining whether it was reasonable to hold an identification parade, it is to take into account—

(a) the kind of **offence**, and the gravity of the **offence**, concerned; and

(b) the importance of the evidence; and

(c) the practicality of holding an identification parade having regard, among other things—

(i) if the accused failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and

(ii) in any case—to whether the identification was made at or about the time of the commission of the **offence**; and

(d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the accused and the person who made the identification.

(4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the accused for such a parade to have been held.

(5) If—

(a) the accused refused to take part in an identification parade unless an **Australian legal practitioner** acting for the accused, or another person chosen by the accused, was present while it was being held; and

(b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such an **Australian legal practitioner** or person to be present—

it is presumed that it would not have been reasonable to have held an identification parade at that time.

(6) In determining whether it was reasonable to have held an identification parade, the **court** is not to take into account the availability of pictures or photographs that could be used in making identifications.

Visual identification evidence excluded subject to 'identification parade'

1. Visual identification evidence is identification evidence based 'wholly or partly on what a person saw but does not include picture identification evidence' (s 114(1)). Sensory identification evidence which is not at least partly based on sight is not captured.

2. The definition of identification evidence requires that the evidence contain an assertion that the accused "was" or "resembles" a person who was present at or near where the offence was committed or an act connected to the offence was committed (*Evidence Act 2008* Dictionary).

3. Evidence which describes the offender, without attempting to assert that the accused is that person, does not meet the definition of identification evidence. Thus, evidence of the clothing of the offender, or the offender's name (as heard spoken at the relevant time), will not constitute "identification evidence" or "visual identification evidence" (*Bass v R* [2016] VSCA 110 at [39]–[40]).

4. Similarly, evidence purporting to link a DNA sample with the accused is not identification evidence within the terms of the Act (*Allan v R* [2017] NSWCCA 6).

5. Under s 114(2), visual identification evidence is not admissible unless:

   - an identification parade was held; or
   - it would not have been reasonable to hold such a parade; or
   - the accused refused to take part in such a parade; and

   the identification was made without the person who made it having been intentionally influenced to identify the accused.

6. The reference to 'such a parade' in ss 114(2)(b) and 114(2)(c) means an identification parade which includes the accused and is held before the witness makes the identification (*Walford v Director of Public Prosecutions (NSW)* (2012) 82 NSWLR 215; [2012] NSWCA 290 at [69]–[75] per Hoeben JA).

7. The requirement that the identification was made without the person having been intentionally influenced to identify the accused applies to each of the three alternative circumstances identified in s 114(2) (*Fowkes v The King* [2023] VSCA 160, [36]).

8. In *Fowkes*, the Court of Appeal noted that s 114(2) was designed to address the risk of tainted identification processes and especially to reduce the risk of the police intentionally attempting to influence a person's identification. While it is not necessary to show that any attempted influence was the sole or predominant factor in the witness identifying the accused, the section will operate to exclude evidence where the intentional influence had a material effect on the witness (*Fowkes v The King* [2023] VSCA 160, [49]–[53]).

9. In applying s 114(2), the prosecution must establish the negative proposition that another person did not intentionally influence the witness. This is a mandatory rather than discretionary requirement, and the court must not admit the evidence unless the prosecution demonstrates that either:

   - There was no intentional influence exerted on the witness; or
   - Any attempt to intentionally influence the witness did not have any material effect on the identification (*Fowkes v The King* [2023] VSCA 160, [54]).

10. Informing a witness that a suspect will be present in the parade does not constitute 'intentional influence' (*R v To* [2002] NSWCCA 247 at [29]–[32]). However, given this expectation may affect a

witness's state of mind, it could affect the probative value of any identification (*R v Blick* [2000] NSWCCA 61 at [25] per Sheller JA).

11. In contrast, where the witness identifies the accused in an image after a third party claims that the accused is present in that particular image (whether a CCTV recording, or a particular Facebook page), it may be significantly more difficult for the prosecution to prove that the witness was not intentionally influenced in the identification (see *R v Hinder* [2019] ACTSC 26; *Fowkes v The King* [2023] VSCA 160).

12. While it has not been necessary to determine, it is doubtful that a person can 'intentionally influence' themselves, such as by limiting the information they consider before attempting the identification (see *Wilson v The King* [2022] VSCA 261, [87]).

13. Section 114(3) provides a non-exhaustive list of matters the court must take into account in determining whether it was reasonable to hold an identification parade.

14. Section 114(4) creates a presumption that an identification parade would not have been reasonable if it would have been unfair to the accused to hold one. This may occur where, for example, despite their reasonable efforts, police cannot find enough people of similar appearance to be present (*R v Tahere* [1999] NSWCCA 170).

15. In determining whether it was reasonable to hold an identification parade, the court must not take into account the availability of pictures or photographs that could be used in making identifications (s 114(6)).

16. However, the court may take into account the passage of time between the relevant event and when the witness would be viewing photos or a parade. In Cope v The Queen, the Court held that the fact the witness was attempting to identify an attacker from 30 years ago meant that an identification parade was not reasonable, while a photograph of the offender from 29 years ago could be used in a photoboard identification (*Cope v The Queen* [2018] VSCA 261, [32]).

17. Further, it may not be appropriate to hold an identification parade where a witness has seen a photograph of the suspect after the alleged offence. This is because such a viewing may lead to a 'displacement effect' (*Peterson (a Pseudonym) v R* [2014] VSCA 111 at [48] per Priest and Beach JJA).

18. Where there is a long delay between the relevant event and the viewing of a parade or photos, it is not appropriate to show the witness a photofit image compiled from the witness' descriptions at the time of the incident, as that may create an unacceptable risk that the witness will look for the person or image that best fits the photofit image (*Cope v The Queen* [2018] VSCA 261, [34]).

19. The 'displacement effect' can occur when a witness initially identifies a person from a photograph, and then subsequently identifies the same person at an identification parade. In such circumstances, the witness's memory of the photograph viewed may displace his or her memory of their original sighting of the offender. The witness may unwittingly compare the accused with the remembered photograph, rather than with his or her memory of the original sighting (*Alexander v R* (1981) 145 CLR 395; [1981] HCA 17; *R v Mendoza* [2007] VSCA 120).

In-court evidence captured

20. Section 114 applies to in-court identification evidence (*R v Tahere*, endorsing *R v Taufua* (Unreported, NSWCCA, 1996)). Thus, an identification parade is a necessary precondition to the admissibility of in-court identification (unless an exception to s 114 applies).

21. If an 'exception' applies, police are not obliged to obtain another form of out-of-court identification so that the in-court evidence is admissible.

Exculpatory visual identification evidence not captured

22. 'Identification evidence' (as defined) does not include exculpatory identification evidence. This means it does not capture evidence that the accused is *not* the perpetrator. This raises the issue of how to deal with unreliable evidence of this type.

23. *R v Rose* (2002) 55 NSWLR 701; [2002] NSWCCA 455 held there is nothing to preclude a general unreliability warning under s 165 being given with respect to visual identification evidence which falls outside the UEA definition of 'identification evidence' (at [286], [293]). In particular, the majority (Wood CJ at CL and Howie J) rejected the conclusion of Smart AJ that the s 165(1)(b) reference to 'identification evidence' intends that the section will not apply to other kinds of visual identification evidence (at [292]). This conclusion likely continues to apply to identification evidence directions under *Jury Directions Act 2015* s 36.

Last updated: 15 December 2023

s 115 – Exclusion of evidence of identification by pictures

(1) In this section, **picture identification evidence** means **identification evidence** relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of **police officer**s.

(2) **Picture identification evidence** adduced by the **prosecutor** is not admissible if the pictures examined suggest that they are pictures of persons in police custody.

(3) Subject to subsection (4), **picture identification evidence** adduced by the **prosecutor** is not admissible if—

(a) when the pictures were examined, the accused was in the custody of a **police officer** of the police force investigating the commission of the **offence** with which the accused has been charged; and

(b) the picture of the accused that was examined was made before the accused was taken into that police custody.

(4) Subsection (3) does not apply if—

(a) the appearance of the accused had changed significantly between the time when the **offence** was committed and the time when the accused was taken into that custody; or

(b) it was not reasonably practicable to make a picture of the accused after the accused was taken into that custody.

(5) **Picture identification evidence** adduced by the **prosecutor** is not admissible if, when the pictures were examined, the accused was in the custody of a **police officer** of the police force investigating the commission of the **offence** with which the accused has been charged, unless—

(a) the accused refused to take part in an identification parade; or

(b) the appearance of the accused had changed significantly between the time when the **offence** was committed and the time when the accused was taken into that custody; or

(c) it would not have been reasonable to have held an identification parade that included the accused.

(6) Sections 114(3), (4), (5) and (6) apply in determining, for the purposes of subsection (5)(c) of this section, whether it would have been reasonable to have held an identification parade.

(7) If **picture identification evidence** adduced by the **prosecutor** is admitted into evidence, the **judge** must, on the request of the accused—

(a) if the picture of the accused was made after the accused was taken into that custody—inform the jury that the picture was made after the accused was taken into that custody; or

(b) otherwise—warn the jury that they must not assume that the accused has a criminal record or has previously been charged with an **offence**.

Note

Division 4 of Part 4 of the **Jury Directions Act 2015** also deals with warnings about identification evidence

(8) This section does not render inadmissible **picture identification evidence** adduced by the **prosecutor** that contradicts or qualifies **picture identification evidence** adduced by the accused.

(9) This section applies in addition to section 114.

(10) In this section—

(a) a reference to a picture includes a reference to a photograph; and

(b) a reference to making a picture includes a reference to taking a photograph.

Exclusion of evidence of identification by pictures

1. Picture identification evidence means evidence of an identification made wholly or partly by a person after examining pictures kept by the police (s 115(1)).

2. Evidence of this kind is not admissible if the pictures examined suggest they are pictures of persons in police custody (s 115(2)).

3. A picture will suggest that it is a picture of a person in police custody if there is something in the picture itself which creates that impression. Provided the photographs themselves are innocuous, such as passport style photographs, they are not likely to create that impression (*Pace v R* [2014] VSCA 317 [23]–[25]; *Wilson v The King* [2022] VSCA 261, [69]).

4. While the Court of Appeal in *Pace v The Queen* spoke of the need for there to be "something in the nature of the photographs themselves" which creates the impression of police custody, this does not prevent a court from considering the implications of annotations on the photographs. However, when examining annotations, the court will not take into account any special knowledge of an informed reader. For example, in *Wilson v The King*, the court rejected an argument that the words "DHURRINGILE" on a photo suggested that the person was photographed at Dhurringile Prison, while accepting that this would have been apparent to an informed reader (compare *Wilson v The King* [2022] VSCA 261, [73] and [100]).

5. Section 115(2) only applies to police custody, and not other forms of custody, such as prison custody (*Wilson v The King* [2022] VSCA 261, [73]–[74]).

6. Picture identification evidence adduced by the prosecution is:

   - not admissible if, when the pictures were examined, the accused was in police custody and the picture was made before the accused was taken into police custody (s 115(3)); however,
   - it is admissible if the appearance of the accused changed significantly between the time the offence was committed and the time the accused was taken into custody or it was not reasonably practicable to make a picture of the accused after he or she was taken into custody (s 115(4)).

7. Picture identification evidence adduced by the prosecution is not admissible if, when the pictures were examined, the accused was in police custody, unless:

   - the accused refused to take part in an identification parade or
   - the appearance of the accused had changed significantly between the time the offence was committed and the time when the accused was taken into custody or

- (in retention of the preference for identification parades) it would not have been reasonable to have held an identification parade that included the accused (s 115(5)).

8. Section 115(5) does not apply if the person has been transferred from the custody of the police to the custody of Corrections Victoria. It is important that the prosecution, defence and the court are accurately informed about the accused's custodial status at the time of any photoboard identification, to determine whether section 115(5) applies (see *Pham v R* [2015] VSCA 263).

9. The exclusionary rule applies where the photograph of the accused examined by a person was one kept for the use of police officers by members of the same police force, was made before the defendant was taken into the particular police custody but he was in the custody of that police force when it was examined by the person. (DPP v Byrne [2016] VSC 345 at [22]–[28]).

10. If picture identification evidence adduced by the prosecution is admitted and if requested by the accused, the judge must inform the jury the picture was made after the accused was taken into custody (if that is the case) or otherwise warn the jury it must not assume the accused has a criminal history or has previously been charged with an offence (s 115(7)).

11. This section does not render inadmissible picture identification evidence adduced by the prosecution that contradicts or qualifies picture identification evidence adduced by the accused (s 115(8)).

12. The requirements of this section apply in addition to the requirements relating to visual identification evidence (s 115(9)).

Last updated: 15 December 2023

s 116 – Directions to jury

Note

Section 116 of the Commonwealth Act and the New South Wales Act requires the judge to give certain directions to the jury relating to identification evidence. Division 4 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to identification evidence that apply in criminal trials.

Summary – warnings about identification evidence

1. Section 116 previously required judges to give the jury a warning that there is a "special need for caution before accepting identification evidence" and to identify the reasons for that caution.

2. This obligation was repealed by the *Jury Directions Act 2015* and replaced with specific statutory directions in section 36 of that Act.

3. For information on those directions, see Victorian Criminal Charge Book, ***Chapter 4.11***.

Last updated: 7 August 2015

Part 3.10 – Privileges (Divisions 1–4, ss 117–134)

A privilege is a right to resist disclosure that is otherwise mandatory; it is a rule of substantive law. As Gummow J (in a common law context) observed, it is 'to be characterised as a bar to compulsory process for the obtaining of evidence rather than a rule of admissibility' (*Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 570, 566; [1997] HCA 3).

Privileges are generally established as a matter of public policy. For example: the common law legal professional privilege is based on the principle that it is desirable for the administration of justice that clients be free to make full disclosure to their legal representatives for the purpose of obtaining legal advice, or for the actual or anticipated conduct of litigation. The often complex instructions required for the purpose of legal advice and the increasing professional specialisation within the legal context

supported an extension of these privileges to third parties. These considerations must be balanced against the desire to have all of the relevant information before the court to assist in decision-making.

In Victoria, Part 3.10 contains four Divisions:

- Division 1 contains 'client legal privilege' (which renames the common law 'legal professional privilege' to reflect that the privilege attaches to the client), including advice privilege (s 118) and litigation privilege (s 119);
- Division 2 contains other privileges – a religious confessions privilege (s 127) and the privilege in respect of self-incrimination (see ss 128 and 128A);
- Division 3 deals with evidence which is protected from disclosure and tender by reason of other public interest considerations (see ss 129–131); and
- Division 4 deals with procedural aspects of privilege.

The Commonwealth, New South Wales and Tasmanian Acts differ from the Victorian Act:

- the Commonwealth and the New South Wales Acts also contain Division 1A which deals with professional confidential relationships, and which in the Commonwealth Act is restricted to communications with journalists; and
- the New South Wales Act alone contains Division 1B which provides a sexual assault communications privilege in limited civil proceedings.
- Division 2 of the Tasmanian Act contains a medical communications privilege and a sexual assault communications privilege (which is absolute in criminal proceedings) (s 127A and s 127B respectively).

The VLRC recommended the inclusion of Divisions 1A and 1B in the Victorian Act and there are indications that, subject to further review, this is the Government's intention (with respect to Div. 1A, see the Second Reading Speech, 26 June 2008, p2632 at p2636; with respect to Div.1B, see *Implementing the Uniform Evidence Act: Report*, Victorian Law Reform Commission, 2006 at p31–32).

Scope of Part 3.10 – Adducing of evidence only

(i) Anomaly with respect to law applicable to pre-trial procedures

In the original Uniform Evidence Act, because the provisions of Part 3.10 apply only to the adducing of evidence at trial (*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67), pre-trial procedures (where most legal advice privilege issues arise) remained subject to the common law. This includes procedures such as discovery, subpoenas and orders to deliver up documents; the execution of warrants; hearings before boards of inquiry and tribunals (and any disclosure processes issued by them); and enforcement of compulsory disclosure powers of government agencies.

A range of New South Wales courts and tribunals, and the Supreme Court of the Australian Capital Territory, made rules which applied the uniform evidence provisions in civil proceedings to a number of pre-trial processes. The Federal Court did not make rules, but a number of decisions adopted an approach which had the same effect. This approach was overturned by a majority decision of the Full Court and upheld by the High Court (see *Esso* above). The Federal Court has now adopted more limited rules than New South Wales and the Australian Capital Territory.

The Joint Report (ALRC 102) recognised that it was undesirable for a dual system of privilege to operate and acknowledged it had caused confusion. It proposed three approaches to resolve this issue but made no recommendation (ALRC 102 at [14.7]–[14.69]). The Commission's view was that, until a longer term solution is developed, those jurisdictions which have the uniform legislation will have to determine the means and extent to which the UEA privileges are to apply in pre-trial and other contexts (ALRC 102 at [14.42]).

(ii) *Mutatis mutandis* provision

Section 131A of the Victorian and New South Wales' Acts applies the provisions of this Part 'with any necessary modifications' to a 'disclosure requirement' in preliminary proceedings. A 'disclosure requirement' is any 'process or order of a court that requires the disclosure of information or a document'. This excludes statutory notices to produce which are issued in the investigation process though, in Victoria only, it expressly includes search warrants (s 131A(2)(g)).

The provision does not apply s 123 (Loss of client legal privilege–accused) and s 128 (Privilege in respect of self-incrimination in other proceedings) to preliminary proceedings. It is noted that s 131A is not strictly necessary for s 127 (Religious confessions) to operate in preliminary proceedings, as it gives the member of the clergy the right to refuse to divulge the confession and is not limited to the adducing of evidence.

Last updated: 20 May 2010

Division 1 – Client legal privilege (ss 117–126)

This Division provides for client legal privilege for communications (both oral and written) and for the provision of legal services relating to litigation. Its use of the 'dominant purpose' test predates *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67, but that decision had the effect of making the common law consistent with the UEA.

Note: Austin J, in *Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899, provides a useful summary of the principles governing claims to client legal privilege (at [14]).

Last updated: 20 May 2010

s 117 – Definitions

(1) In this Division—

client includes the following—

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

(b) an employee or agent of a client;

(c) an employer of a lawyer if the employer is—

(i) the Commonwealth or a State or Territory; or

(ii) a body established by a **law** of the Commonwealth or a State or Territory;

(d) if, under a **law** of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;

(e) if a client has died—a personal representative of the client;

(f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a **confidential communication** was made;

confidential communication means a communication made in such circumstances that, when it was made—

(a) the person who made it; or

(b) the person to whom it was made—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under **law**;

confidential document means a **document** prepared in such circumstances that, when it was prepared—

(a) the person who prepared it; or

(b) the person for whom it was prepared—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under **law**;

lawyer means—

(a) an **Australian lawyer**; and

(b) an **non-participant registered foreign lawyer**; and

(c) an **foreign lawyer** or a natural person who, under the **law** of a foreign country, is permitted to engage in legal practice in that country; and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c);

party includes the following—

(a) an employee or agent of a party;

(b) if, under a **law** of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;

(c) if a party has died—a personal representative of the party;

(d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a **confidential communication** was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

Definitions relating to client legal privilege

1. Section 117 provides definitions for the purposes of Division 1 of Part 3.10.

Definition of 'client'

2. This definition has been amended to allow that a 'client' can include a lawyer who engages or employs a lawyer. The previous exclusion of private lawyers was considered to be anomalous in an era of increasing specialisation when law firms too seek specialist legal advice (see Joint Report ALRC 102 at [14.71]–[14.81]).

3. This amended definition of client has meant that the Director of Public Prosecutions is the client of prosecuting solicitors and Crown Prosecutors (*DPP v Stanizzo* [2019] NSWCA 12, [22]–[25]; *R v Petroulias (No 22)* [2017] NSWSC 692; *Aouad v The Queen* [2013] NSWSC 760). But a lawyer acting for himself is not a "client" as defined in s 117 (*Guirina v DPP* [2020] VSCA 54, [27]).

4. It is not essential that there be a valid contract of retainer between the lawyer and the 'client' (*Hawksford v Hawksford* [2008] NSWSC 31 at [19] per White J).

Definition of 'confidential' (communication or document)

5. The obligation of confidentiality (which can be express or implied) had to exist at the time the communication or document was made or prepared. It will not be inferred from a mere failure to give permission to disclose (*Drabsch v Switzerland General Insurance Co Ltd* [1999] NSWSC 975 at [6]–[8] per Hamilton J).

6. Confidentiality does not attach to a final (rather than draft) affidavit or witness statement made for the purpose of use in a future proceeding (*Perish v R* [2015] NSWCCA 98, [51]; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469; [2009] NSWSC 225; *Morony v Reschke* [2014] NSWSC 359, [49]–[50]).

7. The presence of a third party at the time a communication is made may indicate the communication was not intended to be confidential (as at common law) (*R v Sharp* [2003] NSWSC 1117 at [34]–[37] per Howie J). However, the presence of a third party does not automatically prevent the communication or document being confidential, such as where the client has an interest in the third party knowing the advice (see *Edwards v Vic Land Rehabilitation Pty Ltd* [2012] VSC 188; *Slea Pty Ltd v Connective Services Pty Ltd* [2017] VSC 361).

8. A document which records a non-confidential communication may still be a confidential document (*Sugden v Sugden* (2007) 70 NSWLR 301; [2007] NSWCA 312 at [64]–[67], [69]).

9. Under the definitions, the obligation of confidentiality can be owed by either the maker or the recipient of the communication or document. It is not necessary to prove that both the maker and recipient were under the obligation (*Timbercorp Finance Pty Ltd (In Liq) v Tomes* [2019] VSC 445, [39]–[40], [107]).

10. With respect to the phrase 'under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law', the Full Federal Court observed it should not be read narrowly or confined to a solicitor/client relationship (*Carnell v Mann* (1998) 89 FCR 247 at 259 per Higgins, Lehane and Weinberg JJ).

11. Under s 122(5)(i), a party is not taken to have acted in a 'manner inconsistent' with preserving the privilege merely because the substance of the evidence is disclosed in a confidential document. Equally, however, disclosure of evidence on a confidential basis does not ensure that privilege is retained (*Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66).

Definition of 'lawyer'

12. This definition was amended following ALRC 102 to define a lawyer as a person who is admitted to the legal profession in an Australian jurisdiction or any other jurisdiction.

13. The amendment incorporates the view that it is the 'substance of the relationship' that is relevant, not whether or not a person who is admitted to practise holds a practising certificate (cf: the test at common law; see *Commonwealth v Vance* (2005) 158 ACTR 47; [2005] ACTCA 35). In that case, the court observed that, while a practising certificate may be a relevant consideration in determining whether an employed lawyer is providing independent professional legal advice, it would be an appellable error to make this factor a pre-condition for a claim for client legal privilege (*Commonwealth v Vance* (2005) 158 ACTR 47; [2005] ACTCA 35 at [30]).

14. Similarly, as in-house solicitors may have other roles than purely providing legal advice, Spigelman CJ considered 'the status of the legal practitioner is not irrelevant' (*Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [24]).

15. In any event, given the dominant purpose test remains the ultimate limitation on the operation of the client legal privilege, work by a lawyer which does not meet that test (for example, more broadly ranging policy work) will not be covered.

16. The inclusion of overseas lawyers recognises both the increasing level of international legal relationships and a broader community of lawyers who can be taken to have legal and ethical obligations which do not require comparisons with those of an Australian lawyer (see *Kennedy v Wallace* (2004) 142 FCR 185; [2004] FCAFC 337). In any unusual fact situation, it is open for a court to find that the dominant purpose test has not been made out or that the communication was not a 'confidential communication' (ALRC 102 at [14.99]).

Last updated: 16 November 2022

s 118 – Legal advice

> Evidence is not to be adduced if, on objection by a **client**, the **court** finds that adducing the evidence would result in disclosure of—
>
> > (a) a **confidential communication** made between the **client** and a lawyer; or
> >
> > (b) a **confidential communication** made between 2 or more lawyers acting for the **client**; or
> >
> > (c) the contents of a **confidential document** (whether delivered or not) prepared by the **client**, lawyer or another person—
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the **client**.

For commentary on s 118, see the commentary on s 119 below.

Last updated: 9 October 2013

s 119 – Litigation

> Evidence is not to be adduced if, on objection by a **client**, the **court** finds that adducing the evidence would result in disclosure of—
>
> > (a) a **confidential communication** between the **client** and another person, or between a lawyer acting for the **client** and another person, that was made; or
> >
> > (b) the contents of a **confidential document** (whether delivered or not) that was prepared—
>
> for the dominant purpose of the **client** being provided with professional legal services relating to an **Australian or overseas proceeding** (including the proceeding before the **court**), or an anticipated or pending **Australian or overseas proceeding**, in which the **client** is or may be, or was or might have been, a party.

Legally represented parties (ss 118, 119)

1. Section 118 of the Act provides a legal advice privilege which substantially reflects the common law legal professional privilege, although there are some differences. Section 119 is a litigation privilege and is slightly broader than both the s 118 advice privilege and the common law litigation privilege (see below).
2. There are both commonalities to, and differences between, s 118 and s 119. The key differences relate to:
   - the dominant purpose for which the communication is made or the document is prepared (legal advice or legal services relating to a proceeding or an anticipated or pending proceedings);
   - third party communications (such as an expert witness) are covered by s 119, but not s 118;
   - the approach to documents (see paragraphs 19–24 below).
3. These differences are marked in the ensuing discussion; otherwise, it has common application.

Legal advice privilege (s 118)

4. This section provides a privilege for confidential communications made for, and confidential documents prepared for, the *dominant purpose* of a lawyer (or lawyers) providing legal advice to a client. It covers:

    - confidential *communications* made between a client and a lawyer (or between two or more lawyers acting for a client) (s 118(a) and (b)); and
    - confidential *documents* prepared by a client, lawyer or third party (for example, a proposed expert witness or an accountant) (s 118(c)).

Litigation privilege (s 119)

5. This section provides a litigation privilege for:

    - confidential *communications* between the client and another person, or the client's lawyer and another person, made for; and
    - confidential *documents* prepared for (whether delivered or not),

    the *dominant purpose* of providing the client with legal services which relate to an Australian or overseas proceeding (current, pending or anticipated) in which the client is, or might be, a party.

6. There is authority to suggest that litigation funding agreements may, in some instances, be privileged pursuant to s 119 of the Act. Whether such an agreement satisfies the requirements of the section will depend on the terms of the particular agreement (*Re Global Medical Imaging Management Ltd (in liq)* [2001] NSWSC 476 at [6]–[8] per Santow J; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234 at [36] per Bergin J; *Matthews v SPI Electricity Pty Ltd & Anor (No 5)* [2013] VSC 285 at [33] per Derham AsJ; *CSR Ltd v Eddy* (2008) 70 NSWLR 725; [2008] NSWCA 83).

Application

7. While the terms of ss 118 and 119 apply only to the adducing of evidence, due to s 131A both also apply to specified pre-trial disclosure requirements, e.g. the production of documents pursuant to a subpoena or notice to produce (*Matthews v SPI Electricity Pty Ltd & Anor (No 5)* [2013] VSC 285 at [23] per Derham AsJ, citing *Priceline Pty Ltd v JHY Nominees Pty Ltd & Ors* [2010] VSC 61).

8. However, s 131A only extends the operation of these sections to the situation where the person who makes the objection is the person who was subject to the disclosure requirement (*Cargill Aus Ltd v Viterra Malt Pty Ltd (No 8)* [2018] VSC 193, [42]).

9. One consequence of this is that where a person wishes to invoke client legal privilege in relation to a document that would otherwise be disclosed by a third party (whether the person's lawyer, or otherwise), the matter must be determined under the common law, and not the Evidence Act (see *Cargill Aust Ltd v Viterra Malt Pty Ltd (No 8)* [2018] VSC 193, [42]; *Alphington Developments Pty Ltd v Amcor Ltd (No 2)* [2018] VSC 293, [22]–[26]).

Onus

10. The party claiming the legal advice or the litigation privilege bears the onus of establishing the basis of the claim, and the party seeking production does not bear the onus of excluding privilege (*Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332; [2002] VSCA 59; *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; *Giurina v DPP* [2020] VSCA 54, [20]).

11. The party claiming the privilege must establish the facts from which the court can determine that the privilege is capable of being asserted (*National Crime Authority v S* (1991) 29 FCR 203 at 211). The facts are to be proved on the balance of probabilities (s 142).

12. A claim of privilege requires sufficient particularity to justify the privilege claim. In requiring parties to provide sufficient particularity, a court must be careful not to require the party to reveal the contents of the material in question (*Regent 125 Pty Ltd v Brdar* [2019] VSC 177, [38]–[39]; *Hodgson v Amcor* [2011] VSC 204, [36]–[37]; *Quebani Pty Ltd & Anor v McDonald's Australia Ltd* [2023] VSC 16, [133]–[139]).

13. In *DB CT Management Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2021] FCA 512, Abrahams J explained that:

> The evidence should be focused and specific. A "bare or skeletal" claim, unsupported by evidence which enables the court to consider and make an informed decision about the correctness of the claim or whether it is supportable, will not suffice. The claimant must, by direct admissible evidence, set out the facts from which the court can consider whether the assertion or assertions concerning the purpose of the communication in respect of which privilege is claimed is properly made. The best evidence will be that given by the person whose purpose is in question (at [81]).

14. Several cases have drawn a distinction between evidence of the privilege, which is necessary, and a sworn assertion of the privilege, which is not sufficient. A person must lead evidence which allows a court to find the facts which support a conclusion of privilege, rather than leading evidence from a lawyer that, having reviewed the document, the lawyer considers that the documents are privileged (see *DB CT Management Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2021] FCA 512; *Hancock v Rinehart* [2016] NSWSC 12; *ACCC v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232; *Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604).

15. The level of detail required to support a claim of privilege is situation specific and varies depending on the nature of proceedings, the number of documents over which privilege is claimed, the number of and roles of the authors and recipients of the documents and whether the claim is for advice privilege or litigation privilege. For example, where a party claims litigation privilege, the need for evidence may be satisfied by proving the existence of current or anticipated legal proceedings, that the claimant is or will be a party to that proceeding and the identity of solicitors, counsel and associated third parties such as experts or witnesses (*Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604, [73], [84]).

16. In the case of in-house counsel, a person may give evidence about whether they were performing a legal or a non-legal role in relation to a particular document. Such a statement is neither conclusory, nor an opinion. It is, however, for the court to decide whether to accept that characterization, while recognising that the person who worked on the document may be best placed to identify their role (*Quebani Pty Ltd & Anor v McDonald's Australia Ltd* [2023] VSC 16, [98]).

'on objection by a client'

17. 'Client' is defined in s 117.

18. A court must be satisfied that a witness or a party is aware of any right he or she has under Part 3.10 (s 132).

19. The Joint Report (ALRC 102) notes that, in the absence of instructions to waive a legal advice or litigation privilege, a lawyer retains the normal obligation to claim the privilege on behalf of the client (ALRC 26:1 at [883]).

'disclosure'

20. In *Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899, Austin J noted that there must be a definite and reasonable foundation to a claim that confidential communications or documents would be disclosed:

> the question is whether what is disclosed by adducing the evidence explicitly reveals the confidential communication or the contents of the confidential document, or supports an inference of fact as to the content of the confidential communication or document, which has a definite and reasonable foundation. Disclosure does not occur

> if what is adduced in evidence merely causes the reader to 'wonder or speculate whether legal advice has been obtained and what was the substance of that advice (at [14], citing *AWB Ltd v Cole* (2006) 152 FCR 382; [2006] FCA 571 at [133] per Young J).

21. An approach requiring a more 'predictive' exercise was described by Campbell J in *Green v AMP Life* [2005] NSWSC 95:

> the notion of 'disclosure' involves something becoming revealed which was previously hidden, or known which was not previously known. There can, it seems to me, be disclosure of a matter, even if not everything concerning the matter is disclosed (*Green v AMP Life* [2005] NSWSC 95 at [18] per Campbell J).

'communication'

22. 'Communication' is not defined under the UEA. Its dictionary meaning includes 'the imparting' or interchange of thoughts, opinions, or information by speech writing or signs' (see *Macquarie Dictionary*).

23. Odgers notes that, for the purposes of determining whether client legal privilege attaches to a particular communication:

- if a communication refers to an earlier communication, each communication must be considered separately; and
- non-privileged material does not become privileged by later being included in a privileged communication (Odgers, *Uniform Evidence Law* (2022) at [118.180]).

24. A key difference between ss 118 and 119 is that s 118 does not cover communications with a third party, whereas s 119 does. This difference maintains the initial ALRC view that third party communications for legal advice should not be privileged (ALRC 26:1 at [882])).

25. McClellan CJ in Eq also notes that if the 'essential character' of a document is that of a communication, then subsection (c) does not apply and such a document must find its claim for privilege, if at all, under subsection (a) or (b) (*Telstra Corp v Australis Media Holdings* (1997) 41 NSWLR 147 at 149). Again, this approach accords with the initial ALRC view noted above.

26. If the essential character of a document is not a communication, then it is protected under subsection (c) and it will not lose that protection by being communicated.

Documents covered by ss 118(c) and 119(b)

27. The courts have generally adopted a restrictive approach to the confidential documents covered by these provisions. For instance, in *Telstra Corp v Australis Media Holdings* (1997) 41 NSWLR 147, s 118(c) was read down because a wide interpretation risked '[subsuming] most, if not all, documentary communications falling with para (a) and para (b)' (*Telstra Corp v Australis Media Holdings* (1997) 41 NSWLR 147 at 149 per McClelland CJ in Eq; see also *Meteyard v Love* (2005) 65 NSWLR 36; [2005] NSWCA 444 at [110] per Basten JA (Beazley and Santow JJA agreeing)).

28. Jeremy Gans and Andrew Palmer observe this applies also to s 119 (*Australian Principles of Evidence* (2nd ed, reprinted 2008), at 97).

29. In all cases, the documents must be confidential and prepared for the specified purpose.

30. The privilege will therefore not apply to original documents prepared independently of any legal proceedings without any circumstances of confidence (*Giurina v DPP* [2020] VSCA 54, [41]).

31. However, ss 118(c) and 119(b) are broader than the common law privilege, which only attaches to communications and not documents per se (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; [1997] HCA 3; *New Cap Reinsurance Corp (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [18]).

32. Instead, the Act applies to documents prepared for the required dominant purpose, even if the document is a draft or is not communicated to the client (*New Cap Reinsurance Corp (in liq) v*

Renaissance Reinsurance Ltd [2007] NSWSC 258 at [34]; see also *Matthews v SPI Electricity Pty Ltd & Ors (No 7)* [2013] VSC 553 at [15]).

33. A reference to a document includes 'any part of the document' and 'any copy, reproduction or duplicate of the document' and 'any part of such a copy, reproduction or duplicate' (see cl. 8, Part 2, UEA Dictionary).

'legal advice'

34. 'Legal advice' is interpreted broadly to include advice as to what can 'prudently and sensibly be done in the relevant legal context' (*Workcover Authority of NSW, General Manager v Law Society of NSW* (2006) 65 NSWLR 502; [2006] NSWCA 84 at [77], citing *Balabel v Air India* [1988] Ch 317; *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 4)* [2020] VSC 16, [16]). In this way, it can be understood in a pragmatic sense.

35. It can also include communications made for the purpose of ensuring both client and lawyer are properly informed about the matters which will be the subject of legal advice (*Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604, [96]).

36. Legal advice also extends to the organization and administrative arrangements in relation to the matter, such as research memoranda, summaries and chronologies, even if not provided to the client, as well as file structure and administrative task lists (*IOOF Holdings v Maurice Blackburn Pty Ltd* [2016] VSC 311, [47], [110]–[112]).

37. Importantly, however, the advice must be professional advice given by a lawyer who is acting in a legal capacity to provide legal advice. The advice may go beyond formal matters of the law, but it must relate to matters of law.

38. Legal advice privilege will not apply where the communications are passed to lawyers for a dominant purpose other than providing legal *advice*. For example, in *Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604, Daly AsJ noted that there were some instances where lawyers were enlisted in "more of a coordination role rather than an advisory role" and that other communications appeared to relate to advice for an employee of the company rather than the company itself (at [97], [105]).

39. The courts have also developed a requirement of professional independence, which Hamilton J described as 'the giving of independent advice by a person acting in the role of a legal adviser giving advice to a client' (*Australian Securities & Investments Commission v Rich* [2004] NSWSC 1017 at [18]).

40. Despite the requirement of independence, advice from employee solicitors of an organisation like the Office of the Commonwealth Director Public Prosecutions to the Director, or a Deputy Director, about the latter's exercise of their statutory function of instituting and maintaining prosecutions, can be treated as independent legal advice, both from the employee to the Director as client, and from the Director as lawyer to a third agency as client (*DPP v Kinghorn* (2020) 102 NSWLR 72, [64]–[65]).

41. Similarly, in-house lawyers are capable of exercising the necessary degree of independence, even if the in-house lawyer may also perform non-legal work for the employer on other occasions (see *Australian Hospital Care (Pindari) Pty Ltd v Duggan (No 2)* [1999] VSC 131; *Quebani Pty Ltd & Anor v McDonald's Australia Ltd* [2023] VSC 16, [92]–[97]).

42. In the context of a private firm, an employee solicitor may provide legal advice to the firm if the employee is consulted confidentially in his or her professional capacity, with the required degree of independence, in relation to a professional matter. In this situation, the firm itself may be the client, such as where a firm is investigating a possible class action (*IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, [47], [83]).

'purpose'

43. With respect to both s 118 and s 119:

- the purpose for which a communication is made or a document is created is a question of fact (*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67); see also *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 at 45 per Young J);
- the purpose must be determined objectively, with regard to all of the evidence (*AWB v Cole* (2006) 152 FCR 382; [2006] FCA 571 at [122]) but 'subjective purpose will always be relevant and often decisive' (*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [172] per Callinan J, cited by Spigelman CJ in *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [6] (Sheller JA and Campbell AJA agreeing). See also *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4)* [2014] FCA 796, [32]);
- communications made at the same time and in different parts of a document may have different purposes (see *Kennedy v Wallace* (2004) 142 FCR 185; [2004] FCAFC 337 at [157]–[159] per Allsop J);
- the purpose is to be determined at the time the communication was made or the document was created (*Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357; [2004] FCAFC 122; *Building Insurers' Guarantee Corp v A & MI Hanson Pty Ltd New South Wales v Jackson* [2007] NSWCA 279 at [67]–[69] per Giles JA); and
- the purpose cannot be proved by the mere assertion of a third party.

44. Usually, it is the purpose of the author of a document that is the relevant purpose. However, where another person, such as a solicitor, commissions the preparation of a document, the relevant purpose will be that of the person who calls the document into existence, rather than its author (*Matthews v SPI Electricity Pty Ltd & Ors (No 6)* [2013] VSC 422 at [53] per Derham AsJ, citing *Carter Holt Harvey Wood Products Australia Pty Ltd v Auspine Ltd* [2008] VSCA 59 at [2] per Maxwell P (for the Court)).

45. Where a document is produced for a corporation, the purpose for which a document is created may be that of a particular person or persons in the corporation's hierarchy. This person or persons may be someone other than the author or person who commissions the creation of a document (*Matthews v SPI Electricity Pty Ltd & Ors (No 6)* [2013] VSC 422 at [54] per Derham AsJ).

46. To ascertain this, the internal procedures of a corporation may need to be examined, or the objectives of a person in higher authority ascertained, in order to determine the purpose for which a document was prepared (*Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 at 66 per per Gleeson CJ, Gaudron and Gummow JJ; cited with approval in *Matthews v SPI Electricity Pty Ltd & Ors (No 6)* [2013] VSC 422 at [55] per Derham AsJ).

47. In assessing purpose, it may be necessary to separate a client's ultimate objective from its immediate purpose in seeking advice. A court must not conflate the client's ultimate objective with its dominant purpose for seeking advice (*IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, [92]).

48. With respect to s 119 only:

- the provision refers to 'the client being provided with professional legal services' (rather than the more narrow situation of a legal professional 'providing legal services' to the client). Thus it is not a requirement that any documents are prepared for the purpose of actually being used in a legal proceeding (*Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234 at [59] per Bergin J);
- there must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not (*New South Wales v Jackson* [2007] NSWCA 279 at [67]–[69]; citing *Mitsubishi Electric Australia Pty Ltd v Workcover Authority (Victoria)* (2004) 4 VR 332; [2002] VSCA 59 at [19]).

‘dominant purpose’

49. The dominant purpose of the communication must be determined objectively, with regard to all of the circumstances in which it was made and its nature (*Grant v Downs* (1976) 135 CLR 674 at 689 per Stephen, Mason and Murphy JJ). It is necessary to take an objective view of all of the evidence and to take into account the evidence of not only the author but also that of the person or authority under whose direction the document was prepared.

50. If the document would have been prepared irrespective of the intention to obtain professional legal services, then it will not satisfy the test (*Grant v Downs* (1976) 135 CLR 674 at 688 per Stephen, Mason and Murphy JJ).

51. However, a ‘but for’ test is not determinative – if two purposes are of equal weight, neither will fit the description of a 'dominant purpose' (*AWB Ltd v Cole* (2006) 152 FCR 382, [106]; *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, [47]).

52. A claim for privilege will not succeed if all that emerges is that the document is a commercial document or has been brought into existence in the ordinary course of business (unless the court is satisfied there is a dominant purpose in accordance with s 118 or s 119) (*Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899 at [14] per Austin J. See also *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 4)* [2020] VSC 16, [20]–[24]).

53. There is a two step approach to determining dominant purpose:

- first, the subjective purpose/s of the person/s making or commissioning the particular communication must be determined; and
- second, if the court determines that there was more than one purpose, and at least one of those purposes was capable of attracting legal professional privilege, the court must determine whether the party claiming the privilege has established that the privileged purpose was the dominant purpose (*Matthews v SPI Electricity Pty Ltd & Ors (No 6)* [2013] VSC 422 at [57] per Derham AsJ, citing *Carter Holt Harvey Wood Products Australia Pty Ltd v Auspine Ltd* [2008] VSCA 59 at [3] per Maxwell P (for the Court)).

54. The word ‘dominant’ has been interpreted as meaning that there must be ‘a “clear paramountcy” of purpose’ (*Perry v Powercor Australia Ltd* [2011] VSC 308 at [55] per Robson J, citing *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at 45 per Young J; [2006] FCA 1234; *Mitsubishi Electric Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at 337; [2002] VSCA 59 at [10] per Batt JA (Charles and Callaway JJA agreeing); *Waugh v British Railways Board* [1980] AC 521 at 543 per Edmund-Davies LJ; *Dick Smith Electronics Pty Ltd v Westpac Banking Corp* [2002] FCA 1040 at [34]–[35] per Beaumont J; *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47 at [7] per Spigelman CJ (Sheller JA and M W Campbell AJA agreeing)).

Inferences

55. A court may, in appropriate circumstances, draw an inference that a person knows or is aware of various matters, even if the likely source of that knowledge involves privileged communications (for the common law statement of this principle, see *Mead v Mead* [2007] HCA 25 at [10] per Gleeson CJ (other members of the Court agreeing)).

56. A court cannot, however, draw an adverse inference from the fact that a party makes a claim for privilege, and any jury should be so directed (see ALRC 26:1 at [862]).

Inspection of documents

57. Courts should be cautious before inspecting documents which are the subject of a privilege claim. Difficulties can arise if the inspection tends to support the claim, as the court would then be deciding the case on the basis of material which is not available to one party (*Timbercorp Finance Pty Ltd (In Liq) v Tomes* [2019] VSC 445, [28]–[30]).

58. Inspection is more appropriately done to adjudicate a claim of privilege which is supported by other evidence, rather than inspecting the documents to prove privilege (*Hancock v Rineheart* [2016] NSWSC 12; *Quebani Pty Ltd & Anor v McDonald's Australia Ltd* [2023] VSC 16, [149]).

59. Where the issue relates to the purpose of the document, the best direct evidence of purpose is evidence from the person who made the document (*Hancock v Rineheart* [2016] NSWSC 12).

Last updated: 15 December 2023

s 120 – Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the **court** finds that adducing the evidence would result in disclosure of—

(a) a **confidential communication** between the party and another person; or

(b) the contents of a **confidential document** (whether delivered or not) that was prepared, either by or at the direction or request of, the party—

for the dominant purpose of preparing for or conducting the proceeding.

(2) * * * * *

Legal privilege – unrepresented parties

1. Confidential communications between an unrepresented party and another person and the contents of confidential documents prepared at the direction or request of an unrepresented party for the dominant purpose of preparing for or conducting the proceeding are protected from disclosure (s 120).

Commonalities and differences with s 118 and s 119

2. Section 120 is very similar to ss 118 and 119 and the commentary for those sections also applies to s 120.

3. The key difference is that the s 120 dominant purpose is 'preparing for or conducting *the* proceeding' whereas under s 119 it is 'the client being provided with professional legal services' relating to *a* proceeding, or an anticipated or pending proceeding.

Last updated: 20 May 2010

s 121 – Loss of client legal privilege: generally

(1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in **law**, of a **client** or party who has died.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the **court** would be prevented, or it could reasonably be expected that the **court** would be prevented, from enforcing an order of an **Australian court**.

(3) This Division does not prevent the adducing of evidence of a communication or **document** that affects a right of a person.

Loss of client legal privilege – generally

1. Privilege may be lost generally if:
   - the evidence is relevant to a question concerning the intentions, or competence in law, of a client or a party who has died (s 121(1));
   - the court would be prevented from enforcing an order of an Australian court without the privileged evidence (s 121(2)); or
   - the evidence is of a communication or document that affects a right of a person (s 121(3)).
2. Section 189 deals with the general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced for inspection.
3. The 'burden of proof' is on the party who asserts privilege has been lost. The standard of proof is the balance of probabilities (s 142).

'question concerning … a client or party who has died': s 121(1)

4. There is little written about this provision. The initial ALRC proposal was to ensure the privilege would not apply to an issue between parties claiming through the same deceased client (ALRC 26:1, [884]). ALRC 38 clarified it would apply only in cases where the relevant intentions of a deceased person were in issue, and that it does not overrule the substantive law (at [196]).

'the court would be prevented from enforcing an order': s 121(2)

5. This section has been applied when the subject evidence was thought to disclose a plan by a child's parent to abduct the child and to prevent her return to the jurisdiction (*Director-General, Department of Community Services; Re Sophie* [2008] NSWSC 1268 at [2] per Brereton J).
6. His Honour describes this provision as the statutory successor *to R v Bell; Ex parte Lees* (1980) 146 CLR 141 but notes it is narrower than the 'public interest exception' described in that case (*Director-General, Department of Community Services; Re Sophie* [2008] NSWSC 1268 at [2] per Brereton J).

'a communication… that affects a right of a person': s 121(3)

7. This provision should be interpreted narrowly to apply to only those communications which affect rights directly (as opposed to those which are merely evidentiary as to rights created or affected otherwise) (*R v P* (2001) 53 NSWLR 664; [2001] NSWCA 473; *Green v AMP Life* [2005] NSWSC 95 at [24]–[31] per Campbell J; *QBH Commercial Enterprises Pty Ltd (in liq) v Dalle Projects Pty Ltd* [2018] VSC 383, [65]–[66]).
8. Otherwise, as observed by Hodgson CJ in Eq, the risk is the virtual elimination of 'the professional privilege as a ground for the non-admission of evidence' (*Talbot v NRMA* [2000]

NSWSC 602 at [3]; cited with approval in *Dunstan v Orr* (2008) 217 FCR 559; [2008] FCA 31 at [141] per Besanko J).

9. Examples of evidence that may fall within s 123(3) include

- Evidence from a solicitor whose client had died regarding how the client had disposed of the residue of his or her estate (*Green v AMP Life* [2005] NSWSC 95, [26]);
- A statement that a debtor had suspended payment of debts when relied on as an act of bankruptcy (*Green v AMP Life* [2005] NSWSC 95, [26]);
- Tender of a without prejudice letter to prove a party exercised an option in that letter (*Green v AMP Life* [2005] NSWSC 95, [26]);
- That a client had authorised solicitors to enter into a settlement, where the existence of the settlement was in dispute (*R v P* (2001) 53 NSWLR 664, [42]);
- 'defamatory statements, a contractual offer, an acceptance of an offer or exercise of an option or statements which constitute a binding election or waiver' (*KC v Shiley Inc* [1997] FCA 617 per Tamberlin J).

Last updated: 16 November 2022

s 122 – Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the **client** or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the **client** or party concerned has acted in a way that is inconsistent with the **client** or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a **client** or party is taken to have so acted if—

(a) the **client** or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the **client** or party.

(4) The reference in subsection (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the **client** or party or of a lawyer of the **client** or party unless the employee or agent was authorised by the **client**, party or lawyer to make the disclosure.

(5) A **client** or party is not taken to have acted in a manner inconsistent with the **client** or party objecting to the adducing of the evidence merely because—

(a) the substance of the evidence has been disclosed—

(i) in the course of making a **confidential communication** or preparing a **confidential document**; or

(ii) as a result of duress or deception; or

(iii) under compulsion of **law**; or

(iv) if the **client** or party is a body established by, or a person holding an office under, an **Australian law**—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the **law**, or part of the **law**, under which the body is established or the office is held; or

(b) of a disclosure by a **client** to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the **client** and the other person; or

(c) of a disclosure to a person with whom the **client** or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an **Australian court** or a **foreign court**.

(6) This Division does not prevent the adducing of evidence of a **document** that a **witness** has used to try to revive the **witness**'s memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in **court**) or 33 (Evidence given by **police officer**s).

Loss of client legal privilege – consent and related matters

1. Section 122 permits the adducing of evidence which would otherwise attract client legal privilege if a client or party:
    - consents (s 122(1)); or
    - has acted inconsistently with the maintenance of the privilege (s 122(2)).
2. Exceptions:
    - ss 122(4) and (5) provide a number of exceptions to this waiver rule; and
    - s 122(6) provides client legal privilege does not apply to documents used by a witness to revive memory pursuant to s 32 or s 33.
3. Section 189 deals with general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced to it for inspection.
4. The 'burden of proof' is on the party who asserts privilege has been lost. However, where a party claiming privilege relies on one of the qualifications to waiver of privilege which are contained in s 122(5), the burden of proof shifts to that party to prove that one of those qualifications apply (*Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors* (2011) 32 VR 568; [2011] VSC 269 at [13]–[22]).
5. That conclusion follows as a matter of construction and is supported by the reality that the matters referred to in s 122(5) are most likely to be matters which, in most cases, are solely within the knowledge of the party claiming privilege. Further, they are matters which the other party is not likely to be aware of and, usually, they would not be able to controvert them (*Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors* (2011) 32 VR 568; [2011] VSC 269 at [20]).
6. The standard of proof is the balance of probabilities (s 142).

Loss of privilege – consent: s 122(1)

7. Although s 122(1) refers only to 'consent', it has been held to include implied or imputed consent (*Perpetual Trustees (WA) v Equuscorp Pty Ltd* [1999] FCA 925; see also *Avanes v Marshall* [2006] NSWSC 191 at [30]–[31] per Gzell J).
8. However, these decisions predate – and anticipate – the later amendments to this provision (notably those in s 122(2), see Summary above). Despite those later changes, 'consent' continues to include imputed consent in circumstances analogous to common law waiver of privilege (*R v Sawyer-Thompson* [2016] VSC 316, [29–32]).
9. In any event, as Odgers notes, the current alignment in the approaches to consent under s 122(1) and (2) (notably the emphasis on 'inconsistency'), may change and the retention of s 122(1) means common law developments with respect to consent and waiver will continue to influence the application of s 122 (Odgers, *Uniform Evidence Law (2022)* at [EA.122.90]).

Loss of privilege – 'acted in a way that is inconsistent': s 122(2)

10. The underlying rationale for this provision is that client legal privilege 'should not extend beyond what is necessary and … voluntary publication by the client should bring the privilege to an end' (ALRC 26:1 at [885]; see also ALRC 102 at [14.146]).
11. The provision reflects the common law test articulated in *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66. Here, the Court noted privilege exists to protect confidential communications and that '[i]t is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver' (*Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ).
12. The Court continued, '[w]aiver may be express or implied' and 'what brings [it] about is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive,

between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large' (*Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ). For discussion of a file note containing a client's instructions to a forensic psychologist (*R v Sawyer-Thompson* [2016] VSC 316, [[33]–[36].

13. While s 122 is modelled on the common law, courts must apply the text of the Act, and not elaborations on the common law test. There is also no settled list of the kinds of actions which give rise to inconsistency. Each case must be determined on its own facts, and it may be dangerous to draw generalisations from other cases, as that may risk departing from the terms of the statute (*Viterra Malt Pty Ltd v Cargill Australia Ltd* (2018) 58 VR 333, [42]–[44], [72]).

14. Previous cases, which have asked whether the privileged material was central, or whether the communication materially affected or contributed to a party's state of mind, should be read as explaining the result in that case, rather than as propounding a test in language different to the statute (*Viterra Malt Pty Ltd v Cargill Australia Ltd* (2018) 58 VR 333, [74]–[75]).

15. Something more is required to establish inconsistency than the likelihood that the party received legal advice that is relevant to its state of mind (*Viterra Malt Pty Ltd v Cargill Australia Ltd* (2018) 58 VR 333, [78]–[79]; *Re Connective Services Pty Ltd (No 2)* [2018] VSC 128, [84]–[85]).

16. That 'something more' might arise where the privilege holder's state of mind is in issue, and the privilege holder has attempted to boost its case by relying on the advice, such as by justifying its position by reference to the substance or effect of the legal advice (*Seketa v Gadens Lawyers* [2021] VSC 245, [55], [58]).

17. A frequently cited description of when privilege will be waived is:

> It is sufficient to understand, I think, that in most undue influence cases (and in Thomason when its circumstances are appreciated) the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication (*DSE (Holdings) v Intertan Inc* (2003) 127 FCR 499; [2003] FCA 384, [58]).

18. If a party in its evidence redacts any mention of legal advice, and invites the court to draw conclusions from the non-privileged material, then there is no inconsistency or unfairness, at least where the redaction does not create ambiguity or render the material misleading (*Manor Central Nominees v Wyndham City Council (No 2)* [2020] VSC 271, [32]; *Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* (2009) 179 FCR 3232, [76], [79]).

19. Section 122(2) is taken to be satisfied if the requirements in s 122(3) are satisfied (*Lactalis Jindi Pty Ltd & Anor v Jindi Cheese Pty Ltd & Ors* [2013] VSC 475 at [30] per Almond J).

20. The High Court applied *Mann v Carnell in Osland v Secretary for the Department of Justice* (2008) 234 CLR 275; [2008] HCA 37. In that case, the Court observed that whether behaviour is 'inconsistent' with the maintenance of confidentiality 'will depend on the circumstances of the case … questions of waiver are a matter of fact and degree' (*Osland v Secretary for the Department of Justice* (2008) 234 CLR 275; [2008] HCA 37 at [49] per Gleeson CJ, Gummow, Heydon and Kiefel JJ; see also at [97] per Kirby J; see also *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [65] per Digby J).

21. As noted above, the *Mann v Carnell* test for inconsistency is directed to the maintenance of confidentiality and it may be informed by considerations of fairness but it is not based an overriding principle of fairness at large (*Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ).

22. One form of inconsistent conduct is the bringing of proceedings against a person which allege that that person held a particular state of mind, where the person's state of mind had been influenced by knowledge of the confidential communication. For example, in *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* [2015] VSCA 101, the plaintiff brought an action for the tort of inducing a breach of contract against the defendant. As part of the statement of claim, the plaintiff alleged

that staff of the defendant acquired knowledge of the terms of the relevant contract while working for the plaintiff. On appeal, Dixon AJA (Mandie and Beach JJA agreeing) held that this put in issue the knowledge which those same staff had of legal advice concerning the enforceability of the relevant contract. As a result, there was a relevant inconsistency which gave rise to waiver of privilege over that legal advice. The plaintiff could not rely only on the non-privileged information acquired by the staff in their previous employment.

23. In contrast, the act of a prosecuting agency bringing proceedings does not, by itself, involve inconsistent conduct. Principles which inform the prosecution's duty of disclosure do not inform whether there has been waiver of privilege. Instead, there must be something about the conduct of the prosecution itself, which is connected to the privileged material, which gives rise to waiver. Alternatively, if maintenance of privilege prevents the disclosure of material necessary for a fair trial, the duty of disclosure may be enforced by granting a stay, rather than imputing waiver (*DPP v Kinghorn* (2020) 102 NSWLR 72, [162]–[163], [171]–[172]).

24. The confidentiality of a document will not necessarily be lost merely because it is shared with a large number of people connected to the provider of the document. Whether confidentiality is retained will depend on the circumstances of a case (*Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors* (2011) 32 VR 568; [2011] VSC 269 at [33]–[36], citing *Talbot v NRMA Ltd* [2000] NSWSC 602; *Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allies Operations Pty Ltd* [1988] 13 NSWLR 689; *Lakatoi v Walker* [1999] NSWSC 156; *Associated Newspapers Ltd v His Royal Highness The Prince of Wales* [2006] EWCA CIV 1776).

25. Further, confidentiality can only be lost by the actions of the client or party. Where the disclosure is by a third party, the question will be whether the third party acted with the authority of the privilege holder (*Timbercorp Finance Pty Ltd (In Liq) v Tomes* [2019] VSC 445, [43]).

26. 'Disclosure waiver' is provided by s 122(3), and the tests are 'knowing and voluntary disclosure' or 'express or implied consent'. Even if its terms are not met, s 122(3) does not preclude more general waiver under s 122(2).

27. 'Issue waiver' cases have been described as 'particular manifestations of the principles applying to either waiver by disclosure or to implied consent to disclosure. They do not fall outside the purview of s 122' (*BT Australasia Pty Ltd v State of New South Wales (No 7)* (1998) 153 ALR 722 at 736 per Sackville J).

Loss of privilege: s 122(3)

28. By s 122(3), a client or party is taken to have acted inconsistently with the maintenance of client legal privilege if:

- the client or party knowingly and voluntarily disclosed the substance of the evidence to another person (s 122(3)(a)); or
- the substance of the evidence was disclosed with the express or implied consent of the client or party (s 122(3)(b)); and
- none of the circumstances of ss 122(4) or (5) applies.

29. Subsections (a) and (b) operate 'in tandem'. In this context, there 'does not appear to be any reason to distinguish disclosure by the client/party from disclosure by another person' (Odgers, *Uniform Evidence Law* (2022) at [EA.122.240]).

'knowingly and voluntarily disclosed': s 122(3)(a), (4), (5)

30. For privilege to be lost under this limb, the disclosure must be both knowing and voluntary. 'Knowing' could include by way of mistake, but this would be likely to impugn 'voluntary'. Inadvertent disclosure would not cause a loss of privilege (but would still be subject to the other provisions of this section).

31. 'Voluntary' has been interpreted to mean:

- something other than 'under compulsion of law' (as provided by s 122(5)(a)(iii)) (see *Ampolex Ltd v Perpetual Trustee Co Limited* (1996) 40 NSWLR 12);
- disclosure that is not made by way of mistake (see *Ampolex Ltd v Perpetual Trustee Co Limited* (1996) 40 NSWLR 12 at 22; followed in *BT Australasia Pty Ltd (No 8)* (1998) 154 ALR 202 at 208–09 per Sackville J)
- however, in circumstances of formal discovery, voluntary disclosure may include disclosure by mistake (*Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511).

32. In any event, 'knowing and voluntary' does not apply when 'everything indicates an intention to claim in respect of the document and what has gone wrong is attributable to sheer inadvertence or carelessness' (*Sovereign v Bevillesta* [2000] NSWSC 521 at [23] per Austin J; see also *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [97] per Digby J).

33. A legal practitioner providing a confidential document to an interviewee [or equally the interviewee's legal representative] for the sole purpose of verifying its accuracy, in circumstances where the recipient was not entitled to keep a copy was held not to constitute 'knowing and voluntary' disclosure. However, the privilege was lost when the record of interview was later provided to the witness for his own purposes and without a condition that it not be disclosed (*Newcastle Wallsend Coal Co Pty Limited v Court of Coal Mines Regulation* (1997) 42 NSWLR 351 at 389 per Powell JA (Meagher JA agreeing, Smart AJA dissenting)).

34. In contrast, a witness providing a draft witness statement and legal advice which informed that statement to another witness, with the potential to influence the second witness' evidence, can be inconsistent with the maintenance of the privilege, even if the first witness claimed the material was provided on a confidential basis (*Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174, [56]–[60]).

35. As the focus of s 122(3) is on the intention of the person claiming the privilege, the disclosure must be conscious and intentional before it may be established that there was a knowing disclosure. This is distinct from considering whether the person disclosing the information intended to waive any client legal privilege which would otherwise be available (*QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [94] per Digby J).

36. Given that s 122(3) focuses on whether the relevant person made the disclosure "knowingly", evidence of that person's state of mind may be relevant and admissible (*QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [95] per Digby J).

37. While the disclosure must be knowing and voluntary, this does not mean that the relevant person needs to understand or intend that disclosure will waive privilege (*QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [96] per Digby J).

38. Section 122(4) provides that knowing and voluntary disclosure does not include disclosure by an employee or agent of the client or party (or a lawyer of the client or party), unless the employee, agent or lawyer was authorised to make the disclosure.

39. One effect of this provision is that where a company is in liquidation, disclosure by the person who was previously a director of the company cannot give rise to waiver, unless that person was authorised to waive privilege by the liquidator (*QBH Commercial Enterprises Pty Ltd (in liq) v Dalle Projects Pty Ltd* [2018] VSC 171).

'disclosed with express or implied consent': ss 122(3)(b), 122(5)

40. There have been differences in the way the courts have interpreted the notion of consent. Unlike under s 122(1), it has been held that express or implied consent under ss 122(3)(b) and 122(5) does not extend to imputed consent; accordingly, the common law approach based on fairness is not applicable (*Sovereign v Bevillesta* [2000] NSWSC 521 at [28] per Austin J).

41. For there to be effective consent under s 122(3)(b), that consent must be given knowingly and voluntarily. This requires the informed consent of the client or party, because '[i]f the client or party does not know what it has consented to the resultant "consent" is not true consent' (*QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [110]–[111] per Digby J).

42. In *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 1070, Barrett J held that consent cannot be applied 'subsequently', it must in some way 'accompany or attach to the disclosure' (*Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 1070 at [24]).

43. That is, the consent must be prior or contemporaneous. His Honour held there was at least implied consent when a party's lawyers failed to object when they knew (or must be taken to have known) that such failure would result in inspection of the subject documents by the other party.

'substance of the evidence': s 122(3)

44. Various formulations of the test for the 'substance of the evidence' have been advanced, including:

- mere reference to the existence of legal advice will not waive privilege, but it is 'strongly arguable' that a public reference to supporting legal advice waives privilege with respect to the advice on that point (*Ampolex v Perpetual Trustee Co Limited* [1996] HCA 15 per Kirby J);
- important considerations include whether a party indicates it has acted on legal advice (thereby disclosing its 'substance') or makes a statement which summarises the advice (see *NRMA Ltd v Morgan (No 2)* [1999] NSWSC 694 at [9] per Giles J, and see [10]–[14] for a summary of relevant authorities. See also *Loielo v Giles* [2020] VSC 619);
- a quantitative test which asks whether, and how much, of the legal advice had been made apparent (which could result in waiver to those discrete parts) (*Adelaide Steamship Co Limited v Spalvins* (1998) 81 FCR 360 at 371; see also *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [80] per Digby J);
- a qualitative as well as quantitative test – such as if the nature of the advice on certain points has been disclosed (*Australian Competition and Consumer Commission v Australian Safeway Stores* (1998) 81 FCR 526 at 570 per Goldberg J);
- whether the 'effect' of the advice has been disclosed (*Ampolex v Perpetual Trustee Co Limited* (1996) 40 NSWLR 12 at 18,19 per Rolfe J; adopted in *BT Australasia Pty Ltd (No 7)* (1998) 153 ALR 722 per Sackville J).

45. The cases indicate it is important to have close regard to the terms of the material the substance of which is asserted to have been waived.

46. It has been suggested that, provided the communication has been knowingly and voluntarily, or consensually, disclosed, whether the substance of the evidence has been disclosed depends on the extent of disclosure (*Lactalis Jindi Pty Ltd & Anor v Jindi Cheese Pty Ltd & Ors* [2013] VSC 475 at [61] per Almond J).

47. A mere reference to the existence of legal advice will not be enough to constitute disclosure of the substance of the evidence (*NRMA Ltd v Morgan (No 2)* [1999] NSWSC 694 at [9]; *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* [1998] 83 FCR 397 at 401–402).

'another person': s 122(3)

48. 'Another person' has been held to mean another person other than the extended UEA meaning of 'client' or 'party' (*Lakotoi v Walker* [1999] NSWSC 156 at [31] per Rolfe J).

49. It does *not* include a court (*Macedonian Orthodox Community Church St Petka Include v His Eminence Petar* (2006) 66 NSWLR 112; [2006] NSWCA 160 at [45] per Beazley and Giles JJA) or officers within the same corporation (*Seven Network Ltd v News Ltd* [2005] FCA 864 at [56] per Graham J).

'disclosed … under compulsion of law': s 122(5)(a)(iii)

50. 'Compulsion of law' has been interpreted broadly to include both orders of court that require the disclosure of documents or information and some 'procedural directions' (see *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 551–52 per Mason P).

51. A disclosure satisfies 'under compulsion of law' even if the basis for the compulsion is later shown to be invalid (*Australian Competition & Consumer Commission v George Weston Foods Ltd* (2003) 129 FCR 298; [2003] FCA 601 at [45] per Conti J).

52. For a review of authorities with respect to documents filed and served, see *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 88 at [12]–[19] per Gordon J.

Joint clients: s 122(5)(b)

53. This provision largely reflects the common law in that a joint legal enterprise attracts joint privilege. However, by s 124 (Loss of client legal privilege – joint clients), joint clients may not maintain privilege against each other.

54. The Act does not provide for whether disclosure by one joint client results in a loss of privilege for the other. Odgers suggests the common law would apply (waiver by one joint client is insufficient to affect the other's privilege) (Odgers, *Uniform Evidence Law* (2010) at [EA.122.360]).

'common interest': s 122(5)(c)

55. Section 122(5)(c) recognizes that disclosure of confidential information to a person with whom the party has a common interest relating to the current, anticipated or pending proceeding does not automatically result in a loss of privilege. This provision is more accurately viewed as an exception to the rules concerning waiver by disclosure, rather than an independent source of privilege (*Timbercorp Finance Pty Ltd (In Liq) v Tomes* [2019] VSC 445, [47]–[48]).

56. Given the UEA does not define 'common interest', guidance may be sought from the common law (Odgers, *Uniform Evidence Law* (2022) at [EA.122.360]).

57. Common interest privilege was described in *Marshall v Pescott* [2013] NSWCA 152, [65], [62] as follows:

> Normally, disclosure of protected content by the holder of the privilege causes the privilege to be lost. This is because of the inherent inconsistency between failing to safeguard the confidentiality essential to privilege and, at the same time, seeking to maintain the immunity that the privilege confers. Where there is, in relation to actual or pending litigation (or its course or outcome), a commonality of interest between, on the one hand, a party to the litigation who is also the holder of the privilege and, on the other, the person to whom disclosure of the privileged content is made by that party for a purpose relevant to that litigation, the commonality of interest supplies a rational basis for inferring an intention that the party's confidentiality should continue and the party's privilege should be maintained, even though the subject matter of the disclosure has passed into the hands of the other person.
>
> …
>
> A presently existing common interest will not be destroyed by the circumstance that there is potential for a future divergence of interests.

58. In deciding whether the parties have a 'common interest', each case must be decided on its facts' (*Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234 at [56] per Bergin J).

59. The following general principles can be relevant to the determination of whether a common interest between parties exists:

- common interest is not a rigidly defined concept;
- parties do not need to have a common solicitor before a common interest may be found to exist between parties;
- insurers have a common interest with their insured in litigation brought against the insured because they, as underwriters of the insured's liability, have an interest in ensuring that the insured mounts the most effective defence;

- insurers have that interest even before they decide to accept indemnity because they become subject to steps taken earlier in the litigation when they accept indemnity;
- a common interest currently in existence will not be lost merely because it is possible that the parties' interests may diverge in the future (*Marshall v Prescott* [2013] NSWCA 152 at [60]–[62] per Barrett JA (McColl and Ward JJA agreeing)).

60. In *Marshall v Prescott*, the New South Wales Court of Appeal endorsed the following process for determining whether a common interest between parties exists:

- first, determine whether the document would be privileged when in the hands of the party communicating the information (assuming that no disclosure has been made);
- secondly, determine whether the relationship between the parties is sufficiently close that the transmission of the documents should not be held to be an implied waiver of the privilege:
- this should take into account the nature of the relationship between the parties, along with the nature and purpose of the disclosure and whether it could be concluded that, objectively assessed, the holder of the privilege intended to waive that privilege. In making this determination, it should be borne in mind that privilege should not be overborne lightly. Thus the ultimate question is whether it is reasonable in the circumstances to conclude that the privilege was impliedly waived. If such an implied waiver cannot be found, the court should not interfere (*Marshall v Prescott* [2013] NSWCA 152 at [63]–[64] per Barrett JA (McColl and Ward JJA agreeing), citing with approval *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420 at [53] per McKechnie J).

61. Relationships which the courts have often considered give rise to a common interest include an insured and an insurer, as well as parties in a common pursuit (*Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1; [2006] VSCA 201 at [34] per Chernov JA (Warren CJ agreeing)).

62. However, there are conflicting decisions on whether a litigant and a litigation financier have a sufficient common interest (compare *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1 and *Rickard Constructions Pty Ltd v Rickard Hails Horetti Pty Ltd* [2006] NSWSC 234; *Slea Pty Ltd v Connective Services Pty Ltd* [2017] VSC 361).

'try to revive the witness' memory': s 122(6)

63. By this provision, privilege does not apply to documents used to revive memory. It has been held that the test is no higher than the common law 'refreshment of memory' test (*MGICA (1992) Limited v Kenny & Good Pty Limited* (1996) 61 FCR 236 at 238 per Lindgren J; applied in *Spalding v Radio Canberra* (2009) 166 ACTR 14; (2009) 166 ACTSC 26 at [28]–[29] per Refshauge J).

64. Section 122(6) applies:

- only to those documents to which a witness refers for the purpose of giving evidence (including prior to giving the evidence); i.e., not to those documents for which there is general recourse for the purpose of the litigation or the framing of the case (*Grundy v Lewis* (unreported, Federal Court of Australia, Cooper J, 14 September 1998); see also *Spalding v Radio Canberra* (2009) 166 ACTR 14; (2009) 166 ACTSC 26 at [61]);
- whether or not cross-examination on the subject evidence has occurred (*Spalding v Radio Canberra* (2009) 166 ACTR 14; (2009) 166 ACTSC 26 at [50]);
- in the event of any attempt to revive memory (even if it is not successful) (*Spalding v Radio Canberra* (2009) 166 ACTR 14; (2009) 166 ACTSC 26 at [50]; see also *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1155 at [14] per Levine J).

65. Section 122(6) is not limited to the case where the witness was called by the party claiming the benefit of the privilege (*Fonterra Brands (Australia) Pty Ltd v Bega Cheese Ltd (No 6)* [2020] VSC 96).

Waiver and expert reports

66. Service of an expert report does not of itself waive privilege (*Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [13]–[15] per Biscoe AJ).

67. If material sent to an expert influences the content of the expert's report, then privilege may be lost. In such a case, the question is whether the extent of that influence is inconsistent with maintaining the privilege in the material (e.g., such that it would be unfair for the party to rely on the report without disclosure) (*New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [49] and [54] per White J).

Last updated: 16 November 2022

s 123 – Loss of client legal privilege: accused

In a **criminal proceeding**, this Division does not prevent an accused from adducing evidence unless it is evidence of—

(a) a **confidential communication** made between an **associated accused** and a lawyer acting for that person in connection with the prosecution of that person; or

(b) the contents of a **confidential document** prepared by an **associated accused** or by a lawyer acting for that person in connection with the prosecution of that person.

Loss of client legal privilege – accused

1. Section 123 only applies in a criminal proceeding to the adducing of evidence by an accused. The application of the section means that one or other of the privileges created by ss 118–120 is lost if evidence (of a communication or document) is adduced by a defendant in criminal proceedings, unless the evidence derives from an associated defendant.

2. The section enables 'an accused to use what would otherwise be privileged information if he has possession of it, but it does not in its own terms provide a vehicle for enforced production of such material' (*R v Wilkie* [2008] NSWSC 885 at [4] per Grove J, cited with approval in *DPP (Cth) v Galloway (a pseudonym) & Ors* (2014) 46 VR 809; [2014] VSCA 272).

3. Section 189 deals with general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced to it for inspection.

4. The 'burden of proof' is on the party who asserts privilege has been lost. The standard of proof is the balance of probabilities (s 142).

Limit – adducing of evidence only

5. Section 131A (Application of Division to preliminary proceedings of courts) excludes the operation of s 123 in preliminary proceedings. This exemption does not, for example, compel a person to produce material on a subpoena or under a notice to produce. It is limited to evidence to which the accused already has access.

When is evidence 'adduced', for the purposes of s 123?

6. The phrase 'adducing evidence', when used in s 123, refers to - and only to - the adducing of evidence by an accused that is already in his or her possession or knowledge (*DPP (Cth) v Galloway (a pseudonym) & Ors* (2014) 46 VR 809; [2014] VSCA 272 at [85] per the Court).

Last updated: 1 December 2014

s 124 – Loss of client legal privilege: joint clients

(1) This section only applies to a **civil proceeding** in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.

(2) This Division does not prevent one of those parties from adducing evidence of—

(a) a communication made by any one of them to the lawyer; or

(b) the contents of a **confidential document** prepared by or at the direction or request of any one of them—

in connection with that matter.

Loss of client legal privilege – joint clients

1. This provision applies only in civil proceedings. Client legal privilege is lost if two or more parties have jointly retained a lawyer in relation to the same matter and evidence is adduced of a 'communication' made by any one of the parties to the lawyer or relating to the contents of a 'confidential document' prepared at the direction of any one of the parties.

2. 'Same matter' is not defined and is to be interpreted by the courts. But,

> the section does not require that the proceedings only deal with the matter that is the subject of the advice, nor does it require a large or significant proportion of the proceedings to be in relation to the matter the subject of the advice. While the advice here may only be in connection with a small part of these proceedings … that is sufficient to attract the operation of s 124 (*Clarke & Ors v Great Southern Finance Pty Ltd & Ors* [2012] VSC 260 at [62] per Sifris J).

3. Whether there is a communication to or from a lawyer is to be determined objectively, and the lawyer must be acting in his or her capacity as a jointly retained lawyer (*Re Doran Constructions Party Ltd (in liq)* [2002] NSWSC 215 at [72]–[73] per Campbell J).

4. The requirement that a lawyer be 'jointly retained': does not require all of the joint privilege holders to expressly retain the lawyer:

> it encompasses cases where one joint privilege holder retains the lawyer for its benefit and for the benefit of the other joint privilege holders (*Great Southern Managers Australia Limited (recs & mgrs apptd) (in liq) v Clarke & Ors* (2012) 36 VR 308; [2012] VSCA 207 at [21]).

5. Further, two or more people may join together to communicate with a legal advisor for the purposes of retaining their services or obtaining their advice. The privilege which attaches to these communications belongs to all those who join in seeking the service or obtaining the advice. Thus, the privilege is a joint privilege (*Farrow Mortgage Services Pty Ltd (in liquidation) v Webb* (1996) 39 NSWLR 601 at 608B-C per Sheller J (Waddell AJA agreeing); cited with approval in *Great Southern Managers Australia Limited (recs & mgrs apptd) (in liq) v Clarke & Ors* (2012) 36 VR 308; [2012] VSCA 207 at [22]).

6. The same considerations apply where one of a group of people who are in a formal legal relationship communicates with a legal advisor about something which the members of the group share an interest in. Examples of such situations include where a partner communicates about the business of a partnership or a trustee communicates about the business of the trust. These relationships involve an implicit duty or obligation to disclose to the other parties the content of such communications. Thus, joint clients cannot claim privilege against one another in respect of such communications (*Farrow Mortgage Services Pty Ltd (in liquidation) v Webb* (1996) 39 NSWLR 601 at 608B-C per Sheller J (Waddell AJA agreeing); cited with approval in *Great Southern*

Managers Australia Limited (recs & mgrs apptd) (in liq) v Clarke & Ors (2012) 36 VR 308; [2012] VSCA 207 at [22]).

7. Parties or clients with a common interest under s 122(5) may be joint clients for the purposes of s 124.

8. Section 189 deals with general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced to it for inspection.

9. The 'burden of proof' is on the party who asserts privilege has been lost. The standard of proof is the balance of probabilities (s 142).

10. It has been suggested that the 'classic' case in which s 124 will apply is where two joint venturers fall out after jointly receiving legal advice regarding their joint venture (*Clarke & Ors v Great Southern Finance Pty Ltd & Ors* [2012] VSC 260 at [60] per Sifris J).

Last updated: 29 May 2013

s 125 – Loss of client legal privilege: misconduct

(1) This Division does not prevent the adducing of evidence of—

(a) a communication made or the contents of a **document** prepared by a **client** or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an **offence** or the commission of an act that renders a person liable to a **civil penalty**; or

(b) a communication or the contents of a **document** that the **client** or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, **offence** or act, or the abuse of power, isa fact in issue and there are reasonable grounds for finding that—

(a) the fraud, **offence** or act, or the abuse of power, was committed; and

(b) a communication was made or **document** prepared in furtherance of the commission of the fraud, **offence** or act or the abuse of power—

the **court** may find that the communication was so made or the **document** so prepared.

(3) In this section, **power** means a power conferred by or under an **Australian law**.

Loss of client legal privilege – misconduct

1. By s 125, client legal privilege is lost for confidential communications made, and documents prepared:
   - in furtherance of a fraud, offence, or act that renders a person liable to a civil penalty; or
   - for a deliberate abuse of statutory power.

2. Section 189 deals with general procedure for determining whether evidence should be admitted. Section 133 permits a court to order a document to be produced to it for inspection.

3. The 'burden of proof' is on the party who asserts privilege has been lost. The standard of proof is the balance of probabilities (s 142).

4. However, the fact that a party only needs to show that there are reasonable grounds to find fraud implicitly abrogates the caution that is usually attached to a finding of fraud. Instead, the

section recognises that a decision may need to be made in less than perfect circumstances and on less than perfect material (*Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 4)* [2020] VSC 16, [56]; c.f. *Evidence Act 2008* s 140(2)).

'commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty': s 125(1)(a)

5. Privilege will be lost where the client is knowingly involved in the fraud, offence or other act rendering a person liable to a civil penalty (*Amcor Ltd v Barnes* [2011] VSC 341 at [49]–[51] per Kyrou J). A client will be knowingly involved in the act of another person by:

    - conspiring with that person to commit the act;
    - being a knowing participant in the other person's act; or
    - knowingly providing other forms of assistance to that person in relation to the act.

6. Privilege will also be lost where a client obtains legal advice in order to assist another person to commit a fraud, offence or act rendering a person liable to a civil penalty (*Amcor Ltd v Barnes* [2011] VSC 341 at [52] per Kyrou J; *Talacko v Talacko* [2014] VSC 328 at [15] per Elliott J).

7. In the context of a claim of malicious prosecution, a privilege in confidential materials held by the Director of Public Prosecutions is not lost merely by showing that witnesses made false statements to prosecutors. It is necessary to demonstrate that the Director (as client), or at least the lawyers, were party to the fraud by being aware (or ought reasonably to have known) that the evidence was false (*DPP v Stanizzo* [2019] NSWCA 12, [41]–[46]).

8. Section 125 does not require a court to find that a fraud, offence or act rendering a person liable to a civil penalty has been committed. Instead, a court must be satisfied on the balance of probabilities that there are reasonable grounds for making such a finding (*Amcor Ltd v Barnes* [2011] VSC 341 at [32] per Kyrou J; *Talacko v Talacko* [2014] VSC 328 at [15] per Elliott J).

9. New South Wales courts have imputed a requirement of dishonesty into s 125(1)(a) (*Van Der Lee v New South Wales* [2002] NSWCA 286 at [61] per Hodgson JA; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 222 at [63] per Hodgson CJ in EQ).

10. The correctness of this approach has, however, been doubted in Victoria. In *Amcor Ltd v Barnes* [2011] VSC 341, Kyrou J, referring to principles deriving from common law privilege, concluded that misconduct includes equitable fraud falling short of actual dishonesty (*Amcor Ltd v Barnes* [2011] VSC 341 at [40]–[47]; see also *Talacko v Talacko* [2014] VSC 328). Further, a breach of fiduciary duty and certain forms of unconscionable conduct can constitute fraud for the purpose of this provision (*Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174, [102], [104]; *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 4)* [2020] VSC 16, [58]).

11. In applying this provision, courts have adopted a broad concept of fraud that is not limited to 'legal fraud' in a narrow sense (*Kang v Kwan* [2001] NSWSC 698 at [37] (9) per Santow J; *ATH Transport v JAS (International)* [2002] NSWSC 956 at [12] per Barrett J).

12. Evidence of prior wrongdoing is not sufficient. There must be an intention to facilitate a current or future fraud (*Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151 at [25] per Brereton J, citing *Watson v McLernon* [2000] NSWSC 306 at [116] per Hodgson CJ at CL; *Zamanek v Commonwealth Bank of Australia* (unreported, Federal Court of Australia, Hill J, 2 October 1997)).

13. The privilege is not lost if a third party caused a communication or document to be made. It will be lost, however, if either a client or lawyer or both knew, or ought reasonably to have known, that the communication or document was prepared in furtherance of the commission of a deliberate abuse of power (*Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151 at [21]–[24] per Brereton J).

'… a deliberate abuse of power': s 125(1)(b)

(i) Relevance of s 11(2)

14. The UEA does not affect the powers of a court with respect to abuse of process in a proceeding (s 11(2)). These powers include the power to receive evidence and may override privilege (*Van Der Lee v New South Wales* [2002] NSWCA 286; see Odgers, *Uniform Evidence Law* (2022), [EA.125.120]).

(ii) Scope

15. For an act to be 'deliberate', a person must know that the impugned acts constitute an abuse of power. It is not sufficient for a person to deliberately perform acts, which of themselves constitute an abuse of power if that person does not know that this is so (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 222 at [64] per Einstein J).

16. Power is defined under s 125(3) as 'a power conferred by or under an Australian law'. Bringing or defending legal proceedings constitutes the exercise of a power that is 'conferred by or under an Australian law'. Thus, any dishonest communication to a court, that is done in order to further a purpose that is beyond the scope of the relevant legal process and therefore constitutes an abuse of process would constitute a deliberate abuse of a power for the purposes of s 125(1)(b) (*Kang v Kwan* [2001] NSWSC 698 at [37] and [42] per Santow J).

17. This conclusion was subsequently supported by the New South Wales Court of Appeal in *Van Der Lee v State of New South Wales* [2002] NSWCA 286. In that case, the Court held that the power to bring a cross-claim (as a procedural right sourced in the Supreme Court Act 1970 (NSW)) is sufficiently specific to fall within s 125 (*Van Der Lee v State of New South Wales* [2002] NSWCA 286 at [24] per Mason P; at [68] per Santow J (Hodgson JA dissenting)).

18. Privilege will be lost if a client causes a communication to be made or a document to be prepared that offends s 125 (and the lawyer was unaware of this purpose) (*Kang v Kwan* [2001] NSWSC 698 at [45] per Santow J).

'if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue': s 125(2)

19. The reasonable grounds standard in s 125(2) only applies where the commission of the fraud, offence, act or abuse of power is a fact in issue in the substantive proceeding. This avoids the need for the judge to prejudge the final proceedings when determining the admissibility of evidence (ALRC Interim Report No 26, Volume 1, [441]).

20. The fact in issue requirement is only met when matter is a fact in issue in the substantive proceeding. If the fraud, offence or otherwise is not a fact in issue in the substantive proceeding, then it must be established on the level of a prima facie case (*Amcor Ltd v Barnes* [2011] VSC 341, [67]–[68]), or perhaps on the balance of probabilities, to the extent that there is a difference (*DPP v Kinghorn* (2020) 102 NSWLR 72, [115]).

21. The fact in issue requirement is not met where the facts are undisputed, but there is an outstanding question of law whether those facts, if proved, amount to an offence. A party seeking to invoke s 125 must do more than raise an arguable case that, if established, the facts constitute the commission of fraud, offence, abuse of power or otherwise (*DPP v Kinghorn* (2020) 102 NSWLR 72, [118]–[119]).

'In furtherance of': s 125(2)(b)

22. The word 'furtherance' means 'the act of being helped forward; the action of helping forward; advancement, aid, assistance' (*Amcor Ltd v Barnes* [2011] VSC 341 at [59] per Kyrou J; *Talacko v Talacko* [2014] VSC 328 at [15] per Elliott J; *Kaye v Woods* [2016] ACTSC 87, [38]).

23. This concept may incorporate conduct which occurs after a fraud, offence or act is committed (*Amcor Ltd v Barnes* [2011] VSC 341 at [58]–[61] per Kyrou J; *Talacko v Talacko* [2014] VSC 328 at [15] per Elliott J; c.f. *Watson v McLernon* [2000] NSWSC 306, [116]). However, legal advice and any related matters which are relevant to a past fraud do not fall within the bounds of the concept of 'in furtherance of' (*Amcor Ltd v Barnes* [2011] VSC 341 at [62] per Kyrou J).

Last updated: 16 November 2022

s 126 – Loss of client legal privilege: related communications and documents

> If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a **document**, those sections do not prevent the adducing of evidence of another communication or **document** if it is reasonably necessary to enable a proper understanding of the communication or **document**.

Loss of client legal privilege – related communications and documents

1. If client legal privilege is lost over a communication or document, then any such privilege over other, related communications or documents is lost if those other communications or documents are reasonably necessary to enable a proper understanding of the first communication or document (s 126; see also *Matthews v SPI Electricity Pty Ltd & Ors (No 7)* [2013] VSC 553 at [16], citing *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577; [2007] NSWSC 859 at [45]–[46]).

'another communication or document'

2. A document includes a reference to any part of the document (see cl 8(a), Part 2, UEA Dictionary).

3. Odgers argues privilege may thus be lost for that part of a document that is needed to understand another non-privileged part (Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.1.11760]).

4. However, other commentators consider the provision does not operate to require disclosure of a privileged part of a document when a non-privileged part of that document cannot reasonably be understood without access to the privileged part (Anderson, Williams, Clegg, The New Law of Evidence (2nd ed, 2009), p567; see also the commentators listed in Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.1.11760]).

5. In *Tirango Nominees v Dairy Vale Foods Ltd* (1998) 83 FCR 397, a case concerning the application of s 122, Mansfield J held that the calling of an expert witness does not of itself amount to disclosure of the substance of the instructions provided to the witness. However, his Honour acknowledged that there will be cases where the nature of the issue being addressed may produce such a conclusion. The court must consider whether the instructions provide the foundation for the expert's report (which may affect whether the evidence is admissible under ss 55–57), or if the report would be misleading or confusing without the underlying instructions (which may lead to exclusion under s 135). In addition, Mansfield J stated that there will be cases where the operation of s 126 will require that materials provided to the expert be disclosed, notwithstanding that they may be the subject of client legal privilege (*Tirango Nominees v Dairy Vale Foods Ltd* (1998) 83 FCR 397 at 400–1).

'reasonably necessary to enable a proper understanding'

6. In *Towney v Minister for Land and Water Conservation (NSW)* (1997) 76 FCR 401 (cited with approval in *Matthews v SPI Electricity Pty Ltd & Ors* and *SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd)* [2013] VSC 33 at [42]), Sackville J made a number of observations

about relevant tests for s 126 (*Towney v Minister for Land and Water Conservation (NSW)* (1997) 76 FCR 401 at 412–4). They include:

- while there may be overlap between common law tests with respect to waiver of privilege and those relevant to the loss of client legal privilege, s 126 is to be assessed according to its terms and not as if it reflects the pre-existing common law (see also *Sugden v Sugden* (2007) 70 NSWLR 301; (2007) NSWCA 312 at [93] per McDougall J (Mason P and Ipp JA agreeing));
- the test regarding whether a communication or document is required for a 'proper understanding' of the source document is an objective test (as opposed to an assessment of the likely understanding of a particular individual) (see also *Sugden v Sugden* (2007) 70 NSWLR 301; (2007) NSWCA 312 at [94]);
- 'proper understanding ' is a broad concept, and when a privileged document is voluntarily disclosed for forensic purposes and a 'thorough' apprehension of character, significance or implications of the document requires the disclosure of source documents, s 126 will ordinarily be satisfied (see also *Whitfield v Law Society of New South Wales* [1998] NSWSC unreported, Dunford J, 16 July 1998);
- mere reference to a privileged source document will not ordinarily result in a loss of privilege, and the court must be satisfied in the particular circumstances of each case (see also *Sugden v Sugden* (2007) 70 NSWLR 301; (2007) NSWCA 312 at [95], [107]–[110]).

Last updated: 2 June 2014

Division 1C - Journalist privilege (ss 126J–126K)

Division 1C sets out a privilege that prevents a journalist (or their employer) from being compelled to give evidence that would disclose the identity of the journalist's informant.

The Division consists of two sections:

- section 126J, which provides for key definitions for the purposes of the Division; and
- section 126K, which contains the privilege itself and the public interest exception to the privilege.

Division 1C was inserted into the *Evidence Act 2008* by the *Evidence Amendment (Journalist Privilege) Act 2012* and came into operation on 1 January 2013. It applies to all hearings commenced on or after that date, but its provisions do not extend to those hearings that were commenced before 1 January 2013 and which continue on or after that date or those hearings that were adjourned before 1 January 2013 and continue on or after that date (clause 18, Schedule 2, *Evidence Act 2008*).

Prior to Victoria introducing a journalist privilege, privilege provisions had been incorporated into the Uniform Evidence Acts of NSW and the Commonwealth. The privilege scheme adopted in these jurisdictions are not uniform with each other or with Victoria's scheme. The NSW provisions are quite similar to those in Victoria, while the Commonwealth Act differs in a few more significant respects. Comments have been made on these differences where they are notable.

Last updated: 1 January 2013

s 126J – Definitions

(1) In this Division—

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium;

journalist means a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium;

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news.

(2) For the purpose of the definition of journalist, in determining if a person is engaged in the profession or occupation of journalism regard must be had to the following factors—

(a) whether a significant proportion of the person's professional activity involves—

(i) the practice of collecting and preparing information having the character of news or current affairs; or

(ii) commenting or providing opinion on or analysis of news or current affairs— for dissemination in a news medium;

(b) whether information, having the character of news or current affairs, collected and prepared by the person is regularly published in a news medium;

(c) whether the person's comments or opinion on or analysis of news or current affairs is regularly published in a news medium;

(d) whether, in respect of the publication of—

(i) any information collected or prepared by the person; or

(ii) any comment or opinion on or analysis of news or current affairs by the person—

the person or the publisher of the information, comment, opinion or analysis is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice.

General comments

1. Section 126J contains definitions for the purposes of Division 1C of Part 3.10.

Definition of 'informant'

2. A person is an informant if they give ‘information’ to a journalist 'in the normal course of the journalist's work'. Thus, where a person gives information to a journalist in the expectation that the information may be published in a news medium but the journalist, at that time, is not engaged in the normal course of his or her work as a journalist, that person will not come within the definition of informant and the protection will not be available.

3. Issues may arise where a journalist is engaged at the time on a second job not associated with journalism or plainly not ‘working’. The onus of proving that the protection applies will rest with the person claiming the protection (s 126K).

4. A person will only be an informant if they give the information to a journalist 'in the expectation that the information may be published in a news medium' (see discussion below). Thus, there must some kind of anticipation or belief on the part of the informant that the information may be published.

Definition of 'journalist'

5. A person is a journalist if they are 'engaged in the profession or occupation of journalism'. It may be noted that a journalist need not be 'employed' but may simply be ‘engaged’. Clause 3 of the Explanatory Memorandum to the *Evidence Amendment (Journalist Privilege) Bill 2012* notes that:

> The definition of journalist uses the term "engaged" in the "profession" or "occupation" of journalism, and is intended to be slightly broader than "employed" as it can also mean "occupied". When determining whether a person is a journalist, regard must be had to a number of indicative factors, including whether the practice of journalism constitutes a significant proportion of the person's work, whether the person's journalistic work is regularly published in a news medium, and whether the person or the publisher is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice.

6. Thus, it appears that freelance journalists may fall within the definition of 'journalist' even where they are not ‘employed’. There must also, however, be a ‘connection’ between such engagement and the publication of information, comment, opinion or analysis in a ‘news medium’ (see discussion of meaning below).

7. The definition of ‘journalist’ is also limited by the words 'profession or occupation of journalism'. Amateur bloggers or users of social networking sites may not be caught by this definition, as they are generally not engaged in a 'profession or occupation' and it was not intended that the definition would catch those persons: Explanatory Memorandum to the *Evidence Amendment (Journalist Privilege) Bill 2012*, clause 3.

8. Differences in the definitions in the Commonwealth and New South Wales legislation may point to potential issues that could arise. The definition of ‘journalist’ in the Commonwealth Act differs to that adopted in Victoria. Under the Commonwealth Act, a ‘journalist’ is:

> a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium (*Evidence Act 1995* (Cth) s 126G(1)).

9. It is clear that the Commonwealth definition is wider, in some respects. It does not, for example, require a journalist to be engaged in a ‘profession or occupation’ but rather to be ‘engaged or active in the publication of news’. In the Victorian legislation, however, the occupation of the journalist is not confined to ‘news’. Accordingly, the Commonwealth definition may extend to amateur bloggers and users of social networking websites, whereas it appears that the Victorian definition is not intended to do so (as noted above).

10. The definition of ‘journalist’ in the Victorian Act is arguably broader than that which is contained in the NSW Act. The Victorian Act refers to ‘a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis…’. The NSW Act refers only to ‘a person engaged … with the publication of information…’. Whether this is held to be narrower may depend upon whether ‘comment, opinion and analysis’ are held to come within ‘information’.

11. In determining a claim for journalist privilege, s 126J(2) must be borne in mind. It sets out a non-exhaustive list of ‘factors’ that must be considered in determining whether a person is 'engaged in the profession or occupation of journalism'. This section has no corollary in the Commonwealth or NSW Acts.

Definition of 'news medium'

12. As ‘news medium’ appears in the definitions of 'journalist' and 'informant', the definition of 'news medium' impacts on the construction of both concepts.

13. While quite broad, the definition of ‘news medium’ in the Victorian Act differs from the Commonwealth Act. The Victorian Act refers to 'a medium', while the Commonwealth Act refers to 'any medium'. The word 'any' was included in the Commonwealth Act pursuant to an amendment moved by the Greens in the Senate, who sought to 'ensure that protection is proffered to those operating in independent and alternative media': Report of the Committee, Additional Comments, paragraph 1.9. Thus, questions may arise as to how widely a ‘medium’, in the context of the Victorian Act, is to be construed. Clause 3 of the Explanatory Memorandum to the *Evidence Amendment (Journalist Privilege) Bill 2012* notes that any ‘medium by which news or observations on the news are disseminated to the public’ will satisfy the definition of a news medium for the purposes of the Act.

14. The definition of ‘news medium’ in the *Evidence Act 2006* (NZ) is the same as the definition adopted by the Victorian Act. The New Zealand High Court has interpreted that definition to include a blog that is used for the purpose of disseminating news (*Slater v Blomfield* [2014] NZHC 2221 at [54] per Asher J).

15. A blog will be used for that purpose when, ‘at the relevant time with reasonable frequency’, it provided new or recent information of public interest (*Slater v Blomfield* [2014] NZHC 2221 at [65]).

16. The Court also noted that the following factors would indicate against finding a blog to be a news medium:

    - the blog publishes only a few news articles (at [54]);
    - the blog only comments on news (at [61]);
    - the blog produces articles of low quality, including consistent inaccuracy or deceit (at [61]); or
    - the blog is not widely read or consumed (at [55], [64]).

17. The fact that a publication has a particular perspective (political, for example) does not, of itself, mean that it is not a news medium (at [64]).

Last updated: 1 December 2014

s 126K - Journalist privilege

(1) If a journalist, in the course of the journalist's work, has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.

(2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs—

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

(3) An order under subsection (2) maybe made subject to such terms and conditions (if any) as the court thinks fit.

Journalist privilege: s 126K(1)

1. Section 126K(1) sets out the journalist privilege. The following prerequisites must be met:

(a) a journalist made a promise to an informant;

(b) that promise was made in the course of the journalist's work; and

(c) the promise made was that the journalist would not disclose the informant's identity.

2. The phrase 'in the course of the journalist's work' is absent from the NSW and Commonwealth Acts. Together with the definition of 'informant' (which requires the relevant information to be given to a journalist 'in the normal course of the journalist's work'), this phrase confirms that journalists who receive relevant information while operating in another capacity cannot rely on the privilege.

3. Under the provision, the privilege may be claimed by a journalist or their employer if called upon to give evidence of it. Note, however, that s 131A extends the application of the journalist privilege provisions to preliminary proceedings of courts, such as summons or subpoenas, pre-trial or non-party discovery, interrogatories, notices to produce and search warrants.

4. The Explanatory Memorandum to the *Evidence Amendment (Journalist Privilege) Bill 2012* (clause 3) explains the rationale for the journalist privilege as follows:

> In a democratic society, journalists play an important role in the provision of information and opinion to the public. To fulfil this role, journalists require access to sources of information. The journalists' Code of Ethics requires journalists to be cautious in promising anonymity to sources, but where a promise is made, it must be respected. Journalists can face an ethical dilemma if required by a court to reveal the identity of a source.

5. The provision is expressed in terms of compellability ('neither the journalist nor his or her employer are compellable...'), although the provision is contained in Chapter 3 of the Act (relating to admissibility). The practical significance of that choice of words appears to be that a journalist (or their employer) may consent to giving evidence identifying an informant without requiring an explicit exception to the privilege (as one can consent to give evidence that cannot otherwise be compelled, but such consent would be ineffective if the evidence was 'inadmissible' under this provision). Further, as the privilege does not appear to be able to be claimed by an informant or other witnesses, it would appear that the section woud not enable a journalist, or his or her employer, to stop the informant or other witnesses disclosing the identity of the informant.

Public interest exception: s 126K(2)

6. The privilege set out in s 126K(1) is not absolute, being subject to the public interest exception set out in s 126K(2). For the court to make an order that the privilege does not apply, the following prerequisites must be satisfied:

(a) a party has applied for the order;

(b) there is a public interest in disclosing the identity of the informant; and

(c) having regard to the issues to be determined in the proceeding, that public interest outweighs:

- any likely adverse effect of the disclosure on the informant or any person (ss(2)(a); and
- the public interest in the news media communicating facts and opinion to the public and in the ability of the news media to access sources of facts (2)(b).

7. Thus, the court must weigh up the public interest in disclosing the informant's identity and the public interest matters that may support non-disclosure identified to in s 126K(2)(a) and (b). Even if satisfied that the public interest in disclosure outweighs the public interest in nondisclosure, the court 'may' (not 'must') order that the privilege does not apply, and thus retains a residual discretion not to make the order.

8. In determining whether the public interest in disclosure outweighs the public interest in nondisclosure, relevant factors may include:

(a) whether the proceeding is criminal or civil;

(b) the seriousness of the charge in a criminal proceeding;

(c) the importance of the evidence in the proceeding

(d) the accused's right to know relevant information to protect their right to a fair hearing;

(e) the nature of the information obtained from the informant;

(f) the manner in which the information was obtained from the informant;

(g) whether the informant's evidence can be obtained without compelling the journalist to give evidence;

(h) the probative value of the information obtained from the informant, as well as the probative value of the informant's identity; and

(i) the deterrent effect of ordering disclosure.

This list is based on the analysis of Randerson J in *Police v Campbell* [2010] 1 NZLR 483, which is cited in the Explanatory Memorandum to the *Evidence Amendment (Journalist Privilege) Bill 2012*. The Evidence Act itself contains lists of possible relevant factors in sections that involve the weighing of public interest (see, for instance, s 130(5)). Note that s 126K(3) empowers a court to make an order under s 126K(2) subject to whatever terms and conditions it thinks appropriate.

Burden and standard of proof

9. The burden of establishing that the privilege applies will lie on the journalist or the journalist's employer who is being sought to be compelled to give evidence. The journalist or the employer must persuade the court, that the prospective witness is a journalist and that he or she has, in the course of the journalist's work, promised an informant not to disclose the informant's identity.

10. The standard of proof required is the balance of probabilities: s 142(1).

11. When the court considers an application by a party under s 126K(2) to override the privilege, the burden is on that party to satisfy the court, on the balance of probabilities, that the requirements of the provision are satisfied.

Last updated: 1 January 2013

Division 2 – Other privileges (ss 127–128A)

This Division makes provision for three additional privileges from disclosure. These are:

- Confessional privilege;
- Privilege in respect of self incrimination in other proceedings; and
- Privilege against self incrimination by compliance with a disclosure order.

Last updated: 20 May 2010

s 127 – Religious confessions

(1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply -

(a) if the communication involved in the religious confession was made for a criminal purpose; or

(b) in a proceeding for an offence against section 184 of the *Children, Youth and Families Act 2005*; or

(c) in a proceeding for an offence against section 327(2) of the *Crimes Act 1958*.

(3) This section applies even if an Act provides—

(a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or

(b) that a person is not excused from answering any question or producing any **document** or other thing on the ground of privilege or any other ground.

(4) In this section, **religious confession** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

Religious confessions

1. A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession that was made, to him or her when a member of the clergy.
2. This section applies even if another Act provides that:
   - the rules of evidence do not apply; or
   - a person or body is not bound by the rules of evidence; or
   - a person is not excused from answering a question of producing a document because of privilege or any other reason (s 127(3)).
3. However, the privilege will not apply if the communication involved in the confession was made for a criminal purpose (s 127(2)).

Application and limit

4. Unlike other Part 3.10 privileges, s 127 is not limited to the adducing of evidence and thus applies also in non-hearing contexts.

5. The privilege is limited to communications made as religious confessions (s 127(4)).

6. Unlike s 28(1) of the *Evidence Act 1958*, the person who made the confession cannot consent to the member of the clergy disclosing the confession.

7. Unlike client legal privilege, there is no express provision for the loss of this privilege, though the privilege will not apply in the three circumstances listed in s 127(2).

8. The circumstances in which the privilege will not apply were expanded by *Children Legislation Amendment Act 2019* s 18, which added subparagraphs (b) and (c) to s 127(2).

Last updated: 16 November 2022

s 128 – Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a **witness** objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the **witness**—

(a) has committed an **offence** against or arising under an **Australian law** or a **law** of a foreign country; or

(b) is liable to a **civil penalty**.

(2) The **court** must determine whether or not there are reasonable grounds for the objection.

(3) Subject to subsection (4), if the **court** determines that there are reasonable grounds for the objection, the **court** is not to require the witness to give the evidence and is to inform the **witness**—

(a) that the **witness** need not give the evidence unless required by the **court** to do so under subsection (4); and

(b) that the **court** will give a certificate under this section if—

(i) the **witness** willingly gives the evidence without being required to do so under subsection (4); or

(ii) the **witness** gives the evidence after being required to do so under subsection (4); and

(c) of the effect of such a certificate.

(4) The **court** may require the **witness** to give the evidence if the **court** is satisfied that—

(a) the evidence does not tend to prove that the **witness** has committed an **offence** against or arising under, or is liable to a **civil penalty** under, a **law** of a foreign country; and

(b) the interests of justice require that the **witness** give the evidence.

(5) If the **witness** either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the **court** must cause the **witness** to be given a certificate under this section in respect of the evidence.

(6) The **court** is also to cause a **witness** to be given a certificate under this section if—

(a) the objection has been overruled; and

(b) after the evidence has been given, the **court** finds that there were reasonable grounds for the objection.

(7) In any proceeding in a **Victorian court** or before any person or body authorised by a **law** of this State, or by consent of parties, to hear, receive and examine evidence—

(a) evidence given by a person in respect of which a certificate under this section has been given; and

(b) evidence of any information, **document** or thing obtained as a direct or indirect consequence of the person having given evidence—

cannot be used against the person. However, this does not apply to a **criminal proceeding** in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If an accused in a **criminal proceeding** for an **offence** is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the accused for the same **offence** or a trial of the accused for an **offence** arising out of the same facts that gave rise to that **offence**.

(10) In a **criminal proceeding**, this section does not apply in relation to the giving of evidence by an accused, being evidence that the accused—

(a) did an act the doing of which is a fact in issue; or

(b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.

(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(13) For the purposes of subsection (12), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.

(14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.

Notes

1 Bodies corporate cannot claim this privilege. See section 187

2 Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

3 Section 128(12) to (14) of the Commonwealth Act gives effect to certificates in relation to self-incriminating evidence under this Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.

4 Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* [2017] HCA 12 (22 March 2007).

Privilege in respect of self-incrimination in other proceedings

1. Section 128 applies if a witness objects to giving particular evidence or evidence on a particular matter because doing so may tend to prove the witness has committed an offence against, or arising under, an Australian law or a law of a foreign country, or is liable to a civil penalty (s 128(1)). It details a procedure which both protects the witness claiming the privilege and enables the proceeding in which the witness is called to have the benefit of his or her evidence.

2. If the court considers that a witness or party may have grounds for applying or objecting under this Part, it must satisfy itself that the witness or party is aware of the effect of s 128 (s 132).

3. If the court takes the precaution of warning a possible co-offender or alternative suspect of the availability of the privilege, it is prudent to do so in the absence of the jury (*KH v R* [2014] NSWCCA 294 at [35]). Similarly, any application for a s 128 certificate should be determined in the absence of the jury (*Spence v The Queen* [2016] VSCA 113, [55]).

4. If the court determines there are reasonable grounds for the objection, it must inform the witness:

    - that he or she need not give the evidence unless required by the court to do so under s 128(4); and
    - that the court will give a certificate under s 128 if:
        - the witness willingly gives the evidence without being required to do so; or
        - the witness gives the evidence after being required by the court to do so; and
    - of the effect of the certificate (s 128(3)).

5. The court may require the witness to give the evidence if it is satisfied that the interests of justice require the witness to give the evidence, provided that the evidence does not tend to prove that the witness has committed an offence or is liable to a civil penalty under a law of a foreign country (s 128(4)).

6. The following cannot be used against a person who gave the evidence in any proceeding in a Victorian court or before any person or body authorised by a law of Victoria, or by consent of parties, to hear, receive and examine evidence:

    - evidence given by the person in respect of which a certificate has been given; and
    - any information, document or thing obtained as a direct or indirect consequence of the person having given that evidence (s 128(7)).

7. This protection does not apply to a criminal proceeding in respect of the falsity of the evidence (s 128(7)). Nor does it apply to proceedings which are a retrial of the accused for the same offence, or a trial of the accused for an offence arising out of the same facts that gave rise to that offence (s 128(9)).

8. The section does not apply in criminal proceedings where an accused gives evidence that he or she:

    - did an act, the doing of which is a fact in issue; or
    - had a state of mind, the existence of which is a fact in issue (s 128(10)).

Section 128 and the common law

9. While the common law privilege against self-incrimination can apply to both judicial and non-judicial proceedings, along with associated procedures like discovery and interrogatories, s 128 is limited to a witness who objects to giving evidence in court (*DPP v Peters* (2019) 59 VR 203, [74], [114]).

10. Within its sphere of operation, s 128 ousts the common law. Thus, where the issue concerns the privilege against self-incrimination for a witness giving or about to give evidence in court, there is no room for common law principles to apply (*DPP v Peters* (2019) 59 VR 203, [88]–[89], [114]).

Application and no adverse inference

11. Absent specific provision in other legislation, s 128 applies only in proceedings to which the Act applies. Also, it is implicit that it applies only in respect of 'testimonial disclosure' at a hearing (in all other contexts the common law applies). This is reinforced by s 131A which applies most of Part 3.10 to pre-trial processes but specifically excepts ss 123 and 128.

12. One consequence of the structure of s 128, and its application to hearings, is that the section only applies when the witness is giving evidence. A witness cannot refuse to enter the witness box on the basis of the privilege (*Chong v CC Containers Pty Ltd* (2015) 49 VR 402; [2015] VSCA 137 at [236]–[237]).

13. As at common law, no adverse inference should be drawn from the fact that privilege is claimed under s 128 (*Versace v Monte* [2001] FCA 1572 at [6] per Tamberlin J (citing ALRC 26:1 at [862])).

14. However, it is likely that claiming the privilege under s 128 does not provide an adequate explanation for a failure to call evidence in civil proceedings. This means that the rule in *Jones v Dunkel* may apply to a defendant in a civil proceeding who claims the s 128 privilege (see *Chong v CC Containers Pty Ltd* (2015) 49 VR 402; [2015] VSCA 137 at [221]–[229] and cases cited).

'… if a witness objects to giving particular evidence, or evidence on a particular matter …': s 128(1)

(i) 'witness'

15. A witness includes a party, a person called by a party to give evidence and an accused (see clause 7, Part 2, UEA Dictionary). However, it does not include:

- an accused who gives evidence with respect to either an act done by him- or herself, which act is a fact in issue or a state of mind the existence of which is a fact in issue (s 128(10)); or
- an accused in voir dire proceedings (s 189(6)).

16. The section protects only the witness. It does not protect the interests of other persons, including a spouse. The possible unreliability of such evidence should affect its weight rather than its admissibility (ALRC 26:1 at [862]).

17. In any event, s 18 (Compellability of spouses and others in criminal proceedings generally) allows a spouse, de facto partner, parent or child of an accused to object to giving evidence as a prosecution witness.

18. The High Court, in heavily qualified obiter dicta in *Cornwell v R* questioned whether a witness (including an accused) who wishes to reveal some criminal conduct in evidence in chief, because of the forensic advantage in doing so, should receive the benefit of s 128. The dicta considered whether such a witness' objection may be regarded as objecting to giving evidence. The possible forensic advantages identified for the accused in *Cornwell* was avoiding the risk of not being asked questions about the matter in cross-examination and, if asked, having to do so in circumstances less favourable to his interests (*Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12 at [111]–[112]).

19. The Court expressed concern about straining the meaning of the words 'object' in s 128(1) and 'require' in s 128(5), when dealing with a party who is a witness and who clearly wishes to adduce the evidence, but seeks the protection of a certificate. There is, however, no explicit requirement in s 128(1) for the judge to consider the motives behind the objection. These are more likely to be relevant under s 128(4) when considering whether to compel the witness to give the evidence.

20. In *Song v Ying*, the NSW Court of Appeal held that any witness who is compellable to give evidence may object to giving evidence without the protection of a certificate at any stage. This includes examination-in-chief and re-examination (*Song v Ying* (2010) 79 NSWLR 442; [2010] NSWCA 237 at [20] per Hodgson JA (Giles and Basten JJA agreeing); see also *Aitken v Murphy* [2011] FamCA 785 at [114] per Young J).

21. However, the NSW Court of Appeal held that s 128 does not apply where a party gives evidence-in-chief, or in re-examination, in response to questions from his or her own lawyer. This is because such evidence is not evidence which the party is compelled to give. A party who wants to give evidence, but only if he or she has the protection of a s 128 certificate, does not 'object' to giving that evidence, within the meaning of s 128(1) 'because there is no element of compulsion or potential compulsion which makes the expression 'objects' apposite' (*Song v Ying* (2010) 79 NSWLR 442; [2010] NSWCA 237 at [28] per Hodgson JA (Giles and Basten JJA agreeing). See also *Re Lime Gourmet Pizza Bar (Charlestown) Pty Ltd (formerly under administration)* [2014] NSWSC 1898; *Que Noy v Qadir* [2020] NTSC 73, [74]; *Clayton Utz (a Firm) v Dale* (2015) 47 VR 48, [164]–[180]).

22. While a body corporate may not claim the privilege, an individual officer of that body, speaking in his or her own right (as opposed to as a representative of the body corporate), may claim the privilege on his or her own behalf (see *Environmental Protection Authority v Caltex* (1993) 178 CLR 477; [1993] HCA 74).

(ii) 'particular evidence, or evidence on a particular matter'

23. The 2007 amendments to this provision expanded the scope of evidence from 'particular evidence' also to include 'evidence on a particular matter'. This overcomes the need to invoke the s 128 process with respect to each question to ensure it can apply to the 'subject matter' of the questions (see ALRC 102 at [15.95], [15.106]).

24. The phrase 'particular evidence, or evidence on a particular matter' has been interpreted broadly (*Ferall v Blyton* [2000] FamCA 1442; *Ollis v Melissari* [2005] NSWSC 1016).

25. The provision deliberately avoids distinguishing between giving oral and documentary evidence (ALRC 26:1 at [862]; ALRC 38 at [214]).

26. While courts originally required the maker of an affidavit to give oral evidence and raise an objection under s 128, later decisions have held that a witness who is compelled to make an affidavit may raise the objection without giving oral evidence (see *AMP General Insurance Ltd v Prasad* [1999] NSWSC 349 per Hamilton J; *Ross v Internet Wines* (2004) 60 NSWLR 436; [2004] NSWCA 195 per Giles JA, (Spigelman CJ and McColl JA agreeing); compare *HPM Industries Pty Ltd v Graham (No 2)* [1996] NSWSC unreported, 27 August 1996 per Young CJ in Eq).

27. It is uncertain, however, whether s 128 can apply when a witness is not compelled to make an affidavit. Traditionally, courts have allowed a witness or a party to volunteer incriminating statements in an affidavit while simultaneously asserting the privilege under s 128 (see *Ferrall v Blyton; A-G* (Cth) (Intervener) [2000] FamCA 1442 at [89]–[90], where the witness objected to filing the affidavit without a certificate; *Sheikholeslami v Tolcher* (2009) 75 NSWLR 418; [2009] NSWSC 920).

28. Section 128 does not apply at a pre-trial stage (s 131A). When a person objects to making an affidavit, the court must consider whether he or she is 'a witness' and whether the potential affidavit is for the purpose of giving evidence. The court should not fashion an artificial procedure to compel a person to become a deponent or a witness who is giving evidence, and subvert the operation of the common law privilege against self-incrimination (*Ross v Internet Wines* (2004) 60 NSWLR 436; [2004] NSWCA 195; *Pathways Employment Services v West* [2004] NSWSC 903). However, see s 128A on disclosure affidavits under freezing or search orders.

'tend to prove … has committed an offence against or arising under an Australian law or a law of a foreign country': s 128(1)(a)

29. Section 128 only applies to evidence that may tend to prove the witness has committed an offence. It is therefore limited to evidence of past offences, and cannot apply to an offence a witness will commit by giving evidence, such as where the witness will commit answer untruthfully and commit perjury (*DPP v Peters* (2019) 59 VR 203, [78], [114]–[115]).

30. The offence may arise under a written or unwritten law of the Commonwealth, a State or a Territory, or the written or unwritten law of a foreign country.

31. 'Tends to prove' means the evidence sought to be adduced need not prove in fact the commission of an offence or liability. It is sufficient if there are reasonable grounds for objecting on the ground that the evidence may tend to prove the commission of an offence (*Application concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [20]–[24] per Brownie JA).

32. Evidence will be sufficient to 'tend to prove' the commission of an offence by the witness even if it provides only a 'link in the chain' (*Application concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [35]–[36] per Brownie JA).

'is liable to a civil penalty': s 128(1)(b)

33. 'Civil penalty' means a penalty arising under proceedings under an Australian or foreign law excluding criminal proceedings (refer clause 3, Part 2, UEA Dictionary).

34. The common law distinguishes a penalty ('punishment') from damages ('compensation').

35. The common law privilege has been applied in relation to disciplinary penalties imposed by statute (*Police Service Board v Morris* (1985) 156 CLR 397; [1985] HCA 9).

36. The privilege is not available for matters that might tend to 'disgrace' a witness, to show him or her to be guilty of forfeiture or adultery or liable to ecclesiastical censure (ALRC 26:1 at [862]).

'reasonable grounds for the objection': s 128(2)

37. The Act does not define or offer guidance regarding the term 'reasonable grounds'.

38. A witness' own apprehension that there is a risk of incrimination is not sufficient to establish reasonable grounds. The court must be able to see that there are reasonable grounds for the objection. This is a matter that must be decided judicially and can require evidence (*Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5)* [2018] VSC 338, [26]; *Sorby v Commonwealth* (1983) 152 CLR 281, 289; *Jackson v Gamble* [1983] 1 VR 552, 555).

39. The words of the provision are 'reasonable grounds for objection' and not reasonable grounds for the conclusion that the evidence may tend to prove the witness has committed an offence (*R v Bikic* [2001] NSWCCA 537 at [13] per Giles JA (Sully and Levine JJ agreeing)).

40. His Honour, referring to *R v Boyes* (1861) 121 ER 730 (at 738) (as cited in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289 per Gibbs CJ; [1983] HCA 10), observed that the terms of s 128 recall those used at common law. And at common law, a witness could not refuse to answer a question which tended to show he or she had committed a crime for which he or she could not be convicted or punished (*R v Bikic* [2001] NSWCCA 537 at [14] per Giles JA (Sully and Levine JJ agreeing)).

41. His Honour went on to hold that 'reasonable grounds for objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence' (*R v Bikic* [2001] NSWCCA 537 at [15] per Giles JA (Sully and Levine JJ agreeing)).

42. This requires the court to consider whether there is a real prospect of criminal prosecution based on the evidence. Factors such as limitations periods, or the improbability of the answers either directly incriminating, or leading to a trail of investigation which might ultimately lead to prosecution, are relevant to deciding whether there are reasonable grounds for the objection (*Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5)* [2018] VSC 338).

43. The burden of proving there are 'reasonable grounds' lies with person seeking protection of the provision. By s 142, the standard is the 'balance of probabilities'.

'If the court determines there are reasonable grounds for the objection, the court is to inform the witness … ': s 128(3)

44. If the court finds there are reasonable grounds for a witness' objection under ss 128(1), 128(3) requires the court to:

- inform the witness that he or she need not give evidence unless required by the court (s 128(3)(a));
- inform the witness that whether he or she gives evidence willingly or by the court's direction under s 128(4), he or she will be issued with a certificate (s 128(3)(b)); and
- explain the effect of such a certificate (s 128(3)(c)).

45. There is no express provision for the loss of this privilege. Odgers suggests that questions of waiver may be considered in this context of determining 'reasonable grounds' and it would be relevant to refer to common law principles (Odgers, *Uniform Evidence Law* (2022) at [EA.128.450]).

'The court may require the witness to give the evidence if the court is satisfied …': s 128(4)

46. Section 128(4) allows the court to compel a witness to give evidence and so subjects the protection against self-incrimination to the exercise of a judicial discretion. If s 128(4) is applied, s 128(5) requires the court to issue a certificate of immunity. A certificate provides the protection set out in s 128(7).

47. Section 128(4) requires the terms of both paragraphs (a) and (b) to be met.

48. In determining whether to admit the evidence, the court must be satisfied that the interests of justice require admission, not merely that the evidence is relevant. This is consistent with the fact that the Act essentially abrogates a common law right (*Gedeon v R* [2013] NSWCCA 257 at [286] per Bathurst CJ (Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing)).

(i) 'the evidence does not tend to prove … an offence against … or is liable to a civil penalty … under … a law of a foreign country': s 128(4)(a)

49. ALRC 102 explains that, as a person may be compelled to give evidence and an Australian court cannot guarantee that any certificate issued by it will be respected in a foreign jurisdiction, a legitimate claim to privilege in this context should not be overruled. Thus, a court's ability to compel answers in the interests of justice ought not be removed when it cannot guarantee protection against the risk of incrimination in relation to offences in foreign jurisdictions (at [15.104]).

50. This requirement is discussed in *In the Marriage of Atkinson* (1997) 136 FLR 347; (1997) 21 Fam LR 279 where Baker J (at 288) and Lindenmayer J (at 315–16) disagree on the facts of the case about whether its terms have been met.

51. In *R v Lodhi* [2006] NSWSC 638, Whealy J was not satisfied the evidence sought to be adduced by the Crown did not tend to prove an offence under a foreign law (*R v Lodhi* [2006] NSWSC 638 at [29], [31]–[39] per Whealy J).

(ii) 'the interests of justice' require the witness to give evidence: s 128(4)(b)

52. The Act does not provide any guidance as to the meaning of 'the interests of justice'. It is for the party seeking to have the witness compelled to give evidence to satisfy the court that the interests of justice 'require' the evidence to be adduced.

53. In determining whether the interests of justice require such action in any given case, it is important to consider the scope and purpose of the provision, as well as what is its real objective. Often, the real purpose of the legislature in using such broad wording is to give the judicial officer scope to give effect to his or her 'view of the justice of the case', while remaining cognisant of the general purpose of the legislation (see *Rich v Attorney General (NSW)* [2013] NSWCA 419 at [19]–[20] per Leeming JA (Bathurst CJ and Beazley P agreeing), citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 per Dixon CJ; [1963] HCA 54).

54. In *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187, Sheller JA observed the term should be 'should be construed broadly and would permit questions to be put going to credit' (*Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [37] per Sheller JA).

55. In *Lodhi*, Whealy J notes this limb requires consideration of 'complex of matters which, by their nature, tend to pull in different directions' (*R v Lodhi* [2006] NSWSC 638 at [40] per Whealy J).

56. Odgers (Uniform Evidence Law (2022), [EA.128.540] suggests that the following factors may be considered when determining whether to admit evidence

- the importance of the evidence in the proceeding (*R v Lodhi* [2006] NSWSC 638 at [41]–[46]; *Gedeon v R* [2013] NSWCCA 257 at [289]–[290]; *Turco v HP Mercantile Pty Ltd* (No 2) [2009] NSWCA 209 at [24]–[25] per Hodgson JA, at [30] per Campbell JA);
- the likelihood that the evidence will be unreliable even if a certificate is given (*R v Lodhi* [2006] NSWSC 638 at [56]; *R v Collisson* [2003] NSWCCA 212; compare *Turco v HP Mercantile Pty Ltd* (No 2) [2009] NSWCA 209 at [19]–[23], [27]–[28], [30]; see also *The Honourable Tim Smith QC, 'The More Things Change the More They Stay the Same? The Evidence Acts 1995 – An Overview' (1995) 18 UNSWLJ 1* at 30–31 and *In the Marriage of Atkinson* (1997) 136 FLR 347 at 355–57 per Baker J);
- if the proceeding is a criminal proceeding – whether the party seeking to adduce the evidence is a defendant or the prosecutor;
- the nature of the offence, cause of action or defence alleged in the proceeding (*R v Lodhi* [2006] NSWSC 638 at [47]);
- the nature of the offence or liability to penalty to which the evidence relates;
- the likelihood of any proceeding being brought to prosecute the offence or impose the penalty (*R v Lodhi* [2006] NSWSC 638 at [41]–[57]);
- any resulting unfairness to a party (e.g., unfairness arising from the party being forced to disclose potentially incriminatory conduct which would not be protected by a certificate for tactical reasons) (*R v Lodhi* [2006] NSWSC 638 at [36]; *Gedeon v R* [2013] NSWCCA 257 at [292]);
- the likely effects of requiring the evidence to be given, and the means available to limit its publication (*R v Lodhi* [2006] NSWSC 638 at [41]–[57] per Whealy J; see also *Attorney-General (NSW) v Borland* [2007] NSWCA 201 which considered a similar provision in the *Coroners Act 1980* (NSW));
- whether the substance of the evidence has already been published;
- where a charge/s has/have already been brought arising out of the events to which the evidence relates, whether the charge/s have been finally dealt with (*R v Collisson* [2003] NSWCCA 212);
- if the witness will not be required to give evidence, the way in which the refusal to give evidence is to be approached by the tribunal of fact (thus, in a jury trial, the content of anticipated directions to the jury regarding the approach to any refusal to give evidence) (*R v Hore* [2005] NSWCCA 3 at [218]–[219]).

57. It may be appropriate to consider the question of whether 'the interests of justice require that the witness give the evidence' on a topic by topic basis (*Rich v Attorney General* (NSW) [2013] NSWCA 419 at [45]–[49] per Leeming JA (Bathurst CJ and Beazley P agreeing)).

Giving a certificate: ss 128(5), 128(6)

58. Regulation 9 of the *Evidence Regulations 2009* (Vic) provides that a certificate for the purposes of ss 128 and 128A of the Act may be in the form set out in Form 1 of the Schedule to those Regulations.

Effect of a certificate: ss 128(7), 128(9)

59. Section 128(7) confers both a use and a derivative use immunity with respect to evidence which is the subject of a certificate in any proceeding:

- in a Victorian court (see UEA Dictionary); and
- before any person or body authorised by a Victorian law, or by consent of parties, to hear, receive and examine evidence.

60. The second limb, bodies authorised to hear, receive and examine evidence, was added to the Uniform Evidence Law following an ALRC recommendation in 2005 (see ALRC 102 at [15.119]–[15.121], and Recommendation 15-9). This was designed to ensure that the certificate was effective in proceedings where the rules of evidence do not apply, such as tribunals.

61. A certificate does not prevent the tender of evidence in criminal proceedings relating to the falsity of the evidence.

62. In addition, pursuant to ss 128(12)–(13) of the *Evidence Act 1995* (Cth), the use of evidence covered by a Victorian certificate is prohibited in Federal and ACT courts, in any proceeding for an offence against a law of the Commonwealth or the ACT or for recovery of a civil penalty under a law of the Commonwealth or the ACT. A Victorian certificate will not prohibit the use of the evidence in other State courts or overseas jurisdictions.

63. 'Proceeding' is not defined but, given the inclusion of both courts and tribunals, can be taken to cover any step in an action or suit where there is an issue in dispute between parties and which includes evidence to be adduced, whether or not under the rules of evidence.

64. In *Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12, the High Court held that a retrial was not a 'proceeding' to which s 128 (as it then was) applied (and so the second trial judge was not bound by a decision made by the first trial judge).

65. The Court observed that, traditionally at a retrial, parties were able to tender evidence of admissions made at the first trial and there were no clear words in s 128 (as it then was) to negate that possibility.

66. Section 128(9) was inserted expressly to provide that the prosecution in a criminal trial would, in a retrial (or a trial of the accused for an offence arising from the same facts), be able to tender evidence of admissions made by the accused under the protection of a certificate at the first trial. While this amendment preserves the result of *Cornwell*, the High Court's construction of 'proceeding' remains available.

67. With respect to use of the evidence in cross-examination as opposed to admitting it in the proceeding, in *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538; [1999] NSWSC 815 it was observed that 'there is a plausible view that s 128(7) would not prevent the use of the [evidence the subject of a certificate] in cross-examination' (*Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538; [1999] NSWSC 815 at [53] per Austin J).

68. However, as Odgers observes, such use is 'use against the person' within the terms of the provision (Odgers, *Uniform Evidence Law* (2022) at [EA.128.600]).

Challenge etc to the giving of a certificate: s 128(8)

69. Section 128(8) responds to another issue raised in *Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12 – in this instance, when the validity of the certificate is called into question.

70. In *Cornwell*, the Court considered a range of circumstances whereby it would be 'absurd' if the witness were not to receive the protection of a certificate – for instance, 'merely because the witness and the registry lost all copies of the certificate' (*Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12 at [91] per Gleeson CJ, Gummow, Heydon and Crennan JJ).

71. A certificate has effect irrespective of the outcome of any challenge to its validity (s 128(8)). Section 128(8) recognises that the grant of a certificate under s 128 is not the same as any other

evidential ruling. To ensure the policy behind s 128 is effective, the witness must be certain of being able to rely on a certificate in future proceedings, including even if the certificate was given in error.

Exception – evidence of an accused: s 128(10)

72. This subsection provides that, in criminal proceedings, s 128 does not apply to the giving of evidence which goes to either an act or a state of mind which is a fact in issue.

73. This is not limited to 'direct evidence'; it extends to 'the giving of evidence by the defendant of facts from which the doing of the act or the having of the state of mind can be inferred' (*Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12 at [84]).

74. Section 189(6) provides that s 128(10) does not apply to a hearing to decide a preliminary question under s 189 (The voir dire). Section 189(1) defines a preliminary as a question about whether evidence should be admitted. This means an accused may rely on the privilege against self-incrimination when giving evidence under s 189.

Last updated: 16 November 2022

s 128A – Privilege in respect of self-incrimination: exception for certain orders etc

(1) In this section—

disclosure order means an order made by a **Victorian court** in a **civil proceeding** requiring a person to disclose information, as part of, or in connection with a freezing or search order under the Rules of the Supreme Court but does not include an order made by a **court** under the Proceeds of Crime Act 2002 of the Commonwealth or the **Confiscation Act 1997**;

relevant person means a person to whom a disclosure order is directed.

(2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person—

(a) has committed an **offence** against or arising under an **Australian law** or a **law** of a foreign country; or

(b) is liable to a **civil penalty**—

the person must—

(c) disclose so much of the information required to be disclosed to which no objection is taken; and

(d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the *privilege affidavit*) and deliver it to the **court** in a sealed envelope; and

(e) file and serve on each other party a separate affidavit setting out the basis of the objection.

(3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the **court**.

(4) The **court** must determine whether or not there are reasonable grounds for the objection.

(5) Subject to subsection (6), if the **court** finds that there are reasonable grounds for the objection, the **court** must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.

(6) If the **court** is satisfied that—

(a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an **offence** against or arising under, or is liable to a **civil penalty** under, an **Australian law**; and

(b) the information does not tend to prove that the relevant person has committed an **offence** against or arising under, or is liable to a **civil penalty** under, a **law** of a foreign country; and

(c) the interests of justice require the information to be disclosed—

the **court** may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

(7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the **court** must cause the relevant person to be given a certificate in respect of the information referred to in subsection (6)(a).

(8) In any proceeding in a **Victorian court**—

(a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and

(b) evidence of any information, **document** or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information—

cannot be used against the person. However, this does not apply to a **criminal proceeding** in respect of the falsity of the evidence concerned.

(9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a **document**—

(a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order; and

(b) that was in existence before the order was made.

(10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(11) If a person has been given a certificate under a prescribed State or Territory provision in respect of information of a kind referred to in subsection (6)(a), the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(12) For the purposes of subsection (11), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.

(13) Subsection (11) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.

Privilege in respect of self-incrimination – exception for certain orders etc.

1. Section 128A provides a process for dealing with objections on the grounds of self-incrimination when complying with a disclosure order (an order made by a Victorian court in a civil proceeding requiring a person to disclose information, s 128A). The privilege is available only to a natural person and orders under proceeds of crime legislation are excepted.

2. If a person subject to a disclosure order objects to providing the information, that person must prepare a *privilege affidavit* (containing the required information to which objection is taken) and

deliver it in a sealed envelope to the court, and file and serve on each other party a separate affidavit which sets out the basis of the objection (s 128A(2)).

3. If the court finds there are reasonable grounds for the objection, unless the court requires the information to be provided pursuant to s 128A(6), then the court must not require disclosure of the information and must return it to the person (s 128A(5)).

4. If the court is satisfied the interests of justice require the information to be disclosed, and the information may tend to prove the person has committed an offence or liable to a civil penalty under Australian law, but not the law of a foreign country, the court may require the whole or any part of the privilege affidavit to be filed and served on the parties (s 128A(6)).

5. Similarly to s 128, provision is made for the giving of a certificate (s 128A(7)). However, the privilege does not extend to information disclosed by a document that was in existence before an order of the court under s 128A(6) (s 128A(9)). A body corporate cannot claim privilege against self-incrimination (s 187).

6. Given s 128A is in similar terms to s 128, the commentary on s 128 is relevant to s 128A. The commentary below details the differences.

'the interests of justice require the information to be disclosed': s 128A(6)(c)

7. While this provision is similar to s 128(4)(b), it operates in different circumstances and what 'the interests of justice require' must be determined in that different context.

8. Under s 128(4)(b), the context is whether the witness is to be required to give the evidence in court to provide information relevant to the determination of a fact in issue. Under s 128A(6)(c), the context is that the court will know the content of the information and must determine whether the information must be disclosed, including that disclosure would result in the giving of a certificate (s 128A(7)). The court's power to limit the disclosure of information is also relevant. This different context means the authorities under s 128(4)(b) must be considered accordingly, including the extent of the protection that would be afforded by the certificate.

Documentary annexures and exhibits: s 128A(9)

9. This provision clarifies that the protection conferred by s 128A does not apply to information contained in documents annexed to a privilege affidavit which documents were in existence before the search or freezing order was made.

10. This distinction is based on the policy difference between 'a witness testifying or preparing a document in response to an order (for example, an affidavit) and orders for the production of documents already in existence' [which some case law recognises as 'real evidence which is not protected by the privilege] (ALRC 102 at [15.144], citing *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 493 per Mason CJ and Toohey J; [1993] HCA 74).

Challenge to giving of a certificate: s 128A(10)

11. This provision means a s 128A certificate has effect regardless of the outcome of any challenge to its validity. Like s 128(8), this provision is in response to the decision of *R v Cornwell* (2007) 231 CLR 260; [2007] HCA 12 and serves the same function.

Last updated: 20 May 2010

Division 3 – Evidence excluded in the public interest (ss 129–131)

There is a self-evident public interest in an effective and credible trial system. The production of all relevant evidence enables litigation to be decided on the basis of a genuine attempt to find the facts

and helps to ensure a fair trial for all parties. Thus this aspect of public interest includes that as much relevant material as possible comes before the court.

Privilege is the right to withhold information from a judicial tribunal which information may assist in ascertaining facts relevant to a fact in issue. For this reason, a privilege must be justifiable – for example, for reasons related to the administration of justice or to some other public interest.

This Division contains:

- s 129 (Exclusion of evidence of reason for judicial etc. decisions);
- s 130 (Exclusion of evidence of matters of state); and
- s 131 (Exclusion of evidence of settlement negotiations).

With respect to s 129, ALRC 26:1 identified several policy reasons for preventing the disclosure in evidence of the reasons for decisions of judges, juries and arbitrators, other than published reasons – to promote finality in decision making, to protect jurors in particular from exposure to potential pressure in terms of explaining their decisions, to maintain the independence and authority of the judge and confidence in the decisions of the process (at [873]).

With respect to 'public interest immunity' [also known as 'state interest privilege', 'Crown privilege'], the policy motive relates to potential risks and public interest considerations that are usually outside of the trial process itself. While public interest immunity is ordinarily considered to be part of the law of privilege, it differs from the rules of privilege in two main ways.

Firstly, it is an exception to the requirement that the person concerned to protect the information must claim the privilege. In this instance, notwithstanding that the privilege is not claimed by the state, both at common law and under the UEA a court retains an obligation to satisfy itself that disclosure of the information would not be contrary to the public interest (ALRC 26:1 at [847]; UEA s 130). This means that it differs from other privileges also in that it cannot be waived by the person who enjoys it.

Secondly, the decision making process for the court is different; a court must balance two public interests on a case by case basis and if a claim for privilege is valid then it must be upheld (no matter what the interests of any other party). By s 131A, Division 3 applies also to pre-trial disclosure requirements. There is no policy reason to justify the non-application of this Division to those requirements. The section minimises the operation of two laws of privilege in legal proceedings.

Last updated: 20 May 2010

s 129 – Exclusion of evidence of reasons for judicial etc. decisions

(1) Evidence of the reasons for a decision made by a person who is—

(a) a **judge** in an **Australian or overseas proceeding**; or

(b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration—

or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.

(2) Such evidence must not be given by tendering as evidence a **document** prepared by such a person.

(3) This section does not prevent the **admission** or use, in a proceeding, of published reasons for a decision.

(4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another **Australian or overseas proceeding**, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury.

(5) This section does not apply in a proceeding that is—

(a) a prosecution for one or more of the following **offence**s—

(i) attempt to pervert the course of justice;

(ii) perverting the course of justice;

(iii) subornation of perjury;

(iv) embracery;

(v) bribery of public official;

(vi) misconduct in public office;

(vii) an **offence** against section 52A of the **Summary Offences Act 1966** (Offence to harass witness etc.);

(viii) an **offence** against section 66 (Offences by officials) or 78 (Confidentiality of jury's deliberations) of the **Juries Act 2000**;

(ix) an **offence** connected with an **offence** mentioned in subparagraphs (i) to (viii), including an **offence** of conspiring to commit such an **offence**; or

(b) in respect of a contempt of a **court**; or

(c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a **court**; or

(d) by way of review of an arbitral award; or

(e) a **civil proceeding** in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Exclusion of evidence of reasons for judicial and other decisions

1. This provision prohibits oral and documentary evidence of the reasons and deliberations of judges, jurors, arbitrators and persons under their direction or control (ss 129(1), (2)).

2. Exceptions to this prohibition are the published reasons for a decision (s 129(3)) and evidence with respect to specified 'administration of justice' offences – for example, attempting to pervert the course of justice or perverting the course of justice (s 129(5)).

Application

3. While the terms of s 129 indicate it applies only in a hearing context, by s 131A it applies also to specified pre-trial disclosure requirements.

'Decision': s 129(1)

4. Section 129(1) applies to a 'decision'. In *Ryan v Watkins* [2005] NSWCA 426, Campbell AJA observes a 'decision' is 'not merely an intermediate mental process but reflects a determination or judgment of a substantive or procedural issue' (*Ryan v Watkins* [2005] NSWCA 426 at [105] per Campbell AJA).

Exceptions – 'This section does not apply in a proceeding that': s 129(5)

5. These exceptions allow relevant evidence to be admitted about certain 'administration of justice' offences. Each UEA jurisdiction's provision differs in that it lists the administration of justice offences under its own laws.

6. Paragraph s 129(5)(c) prevents the section applying in a proceeding that is 'by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court'. On its face, this paragraph has potentially wide application.

7. However, in *Karmas v New South Wales Land and Housing Corporation* [1999] NSWSC 157, the paragraph was given limited operation. Dunford J held that while it has been long held that while the formal act or orders of a judge can be proved when appropriate, 'no evidence can be given or can be required to be given of the thought processes or deliberations or a judge or arbitrator in reaching a decision, nor can the production of any notes recording his or her thoughts or deliberations in that process be produced.'

8. In this context it is also noted that s 9(2)(a) preserves the common law with respect the admission or use of evidence of the reasons for a decision or the deliberations of a member of a jury in a proceeding by way of appeal. Section 16 deals with competence and compellability of judges and jurors in a proceeding.

Last updated: 20 May 2010

s 130 – Exclusion of evidence of matters of state

(1) If the public interest in admitting into evidence information or a **document** that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or **document**, the **court** may direct that the information or **document** not be adduced as evidence.

(2) The **court** may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

(3) In deciding whether to give such a direction, the **court** may inform itself in any way it thinks fit.

(4) Without limiting the circumstances in which information or a **document** may be taken for the purposes of subsection (1) to relate to matters of state, the information or **document** is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—

(a) prejudice the security, defence or international relations of **Australia**; or

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an **offence**; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the **law**; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a **law** of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(5) Without limiting the matters that the **court** may take into account for the purposes of subsection (1), it is to take into account the following matters—

(a) the importance of the information or the **document** in the proceeding;

(b) if the proceeding is a **criminal proceeding**—whether the party seeking to adduce evidence of the information or **document** is an accused or the **prosecutor**;

(c) the nature of the **offence**, cause of action or defence to which the information or **document** relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or **document**, and the means available to limit its publication;

(e) whether the substance of the information or **document** has already been published;

(f) if the proceeding is a **criminal proceeding** and the party seeking to adduce evidence of the information or **document** is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to a Territory.

Exclusion of evidence of matters of state

1. If the public interest in admitting information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to that information or document, the court may direct that the information or document not be adduced as evidence (s 130(1)). This is essentially a restatement of the common law public interest immunity, and common law authorities continue to inform the operation of the exclusion (*Ryan v State of Victoria* [2015] VSCA 353). However, the UEA provides a non-exhaustive formulation to balance competing interests (s 130(5)).
2. This is essentially a restatement of the common law public interest immunity, and common law authorities continue to inform the operation of the exclusion (*Ryan v State of Victoria* [2015] VSCA 353). However, the UEA provides a non-exhaustive formulation to balance competing interests (s 130(5)).
3. Section 130 is only engaged if the information or document is otherwise compellable. See ***13.20.7 - Specific Bases for Challenging Subpoenas*** in the Victorian Criminal Proceedings Manual for a discussion of challenges to subpoenas, especially the discussion of a court's power to set aside a subpoena on the basis that there is no legitimate forensic purpose to the subpoena.
4. Section 130(4) states:

   (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—

   (a) prejudice the security, defence or international relations of Australia; or

   (b) damage relations between the Commonwealth and a State or between 2 or more States; or

   (c) prejudice the prevention, investigation or prosecution of an offence; or

   (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

   (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

   (f) prejudice the proper functioning of the government of the Commonwealth or a State.
5. The effect is that this provision creates an inclusive, rather than exclusive, list of circumstances that qualify as "matters of state" for the purpose of s 130. Thus, if there is a real risk that release of the information may give rise to one of the harms listed in s 130(4), the information may relate to a matter of state (see *The Queen v Peters* [2018] VSCA 115, [48]).
6. Without limiting the matters the court may take into account in determining a claim of privilege, the court is to take into account:
   - the importance of the information or the document in the proceeding (s 130(5)(a));

- if the proceeding is a criminal proceeding, whether the party seeking to adduce evidence of the information or document is an accused or a prosecutor (s 130(5)(b));
- the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding (s 130(5)(c));
- the likely effect of adducing evidence of the information or document, and the means available to limit its publication (s 130(5)(d));
- whether the substance of the information or document has already been published (s 130(5)(e));
- if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused, whether the direction is to be made subject to the condition that the prosecution be stayed (s 130(5)(f)).

7. Other factors relevant to determination of a claim to public interest immunity include:
   - whether the objection to disclosure is a class claim (a claim based on the class of information or document to which the particular information or document belongs, not the particular contents of the information or document) or a content claim (a claim based on the particular contents of the document or information);
   - whether a government representative has supported nondisclosure of the information or document;
   - the subject matter of the information or document, e.g., whether it relates to national security or, on the other hand, commercial matters;
   - whether the information or document relates to Cabinet deliberations or lower levels of government;
   - whether the information or document has contemporary importance or is only of historical interest; and
   - whether the information or document was required on the basis that it would be kept confidential (*Murdesk Investments Pty Ltd v The Secretary of the Department of Business and Innovation* [2011] VSC 436 at [23] per Dixon J; cited with approval in *Winky Pop Pty Ltd & Anor v Mobil Refinery Australia Pty Ltd & Anor* [2013] VSC 315 at [19] per Digby J).

8. The obligation to balance different public interests only applies to interests that are genuinely engaged in the circumstances of the case. This requires parties to articulate with rigor and precision the basis for the immunity, and provide evidence to demonstrate that the issue is current and sensitive, so as to demonstrate a 'compelling case for secrecy' (*State of Victoria v Brazel* (2008) 19 VR 553, [68], quoted with approval in *Madaffari v The Queen* [2021] VSCA 1, [43]).

9. Section 130 may be invoked on the application of 'any person' (who need not be a party) or on the court's own initiative (s 130(2)). The court may inform itself in any way it sees fit (s 130(3)) and may inspect any document (s 133). The section does not confer absolute immunity on information relating to matters of state or a right on persons to protect the information (ALRC 26:1 at [866], fn 58).

Principles applicable to claim - summary

10. Common law principles appear to continue to inform the consideration of a claim under uniform evidence legislation (New South Wales Land and Environment Court in *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2003] NSWLEC 322 at [19] per McLellan CJ; cited with approval in *Winky Pop Pty Ltd & Anor v Mobil Refinery Australia Pty Ltd & Anor* [2013] VSC 315 at [22]–[23] per Digby J; *Ryan v State of Victoria* [2015] VSCA 353).

11. At common law, the following principles have been held to apply to a claim for public interest immunity:

- the public interest has two aspects: the protection of government from the harm which may be caused by disclosure and the interest in ensuring that justice can be effectively administered (*Sankey v Whitlam* (1978) 142 CLR 1 at 38; *Conway v Rimmer* [1968] AC 910 at 940);
- the court must weigh the competing elements of the public interest (*Sankey v Whitlam* [1978] (1978) 142 CLR 1 at 43, 60–64, 98–99);
- the general rule is that a court will not order the production of a document although relevant and otherwise admissible if disclosure would harm the public interest;
- there is a 'rough, but acceptable' division of public interest immunity claims into 'class' and 'contents' claims (*Matthew v SPI Electricity (No 11)* [2014] VSC 65, [24]);
- a claim for immunity for a class of documents as opposed to a claim in relation to individual documents will be upheld only if it is really necessary in the public interest or the proper functioning of the public service (*Sankey v Whitlam* (1978) 142 CLR 1 at 39);
- in weighing the competing public interests, the Court must give weight to an assertion by a responsible representative of government that there is a public interest that would be placed in jeopardy by the production of the document (*Matthews v SPI Electricity (No 11)* [2014] VSC 65, [24]);
- there is no absolute immunity from production and inspection of cabinet documents (*Sankey v Whitlam* (1978) 142 CLR 1 at 43, 58–59, 95–96; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616; [1993] HCA 24). In this context "cabinet documents" extends to:
    - Cabinet minutes or other records of Cabinet discussions and records of discussions between departmental heads;
    - Cabinet submissions;
    - any documents which relate to the framing of government policy at a high level (*Sankey v Whitlam* (1978) 142 CLR 1 at 39);
- documents recording the actual deliberations of Cabinet are more likely to attract immunity than documents prepared outside Cabinet such as reports or submissions for the assistance of Cabinet (*Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614–615; [1993] HCA 24);
- documents relating to a topic which is current or controversial will attract a high level of confidentiality. A topic may remain current or controversial even if many years have passed since the document was created, or there have been changes of government (*Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617–618; [1993] HCA 24; *Matthews v SPI Electricity (No 11)* [2014] VSC 65, [24]);
- documents in relation to historical matters attract a lesser level of confidentiality, as do documents which may have been already published;
- a court may inspect the documents in order to determine any claim, but the circumstances in which that power should be exercised is unclear. If the documents clearly fall into a class which attracts immunity they should not be inspected (*Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617; [1993] HCA 24);
- if the documents do not fall into a protected class, then the court will normally need to inspect the documents to decide whether to uphold the claim (*Ahmet v Chief Commissioner of Police* [2014] VSCA 265 at [32]);
- the intended use of documents, particularly if required to found a defence to a criminal charge, is a relevant consideration. Where a person's liberty is at stake production is more likely to be ordered (*Sankey v Whitlam* (1978) 142 CLR 1 at 42 and 61– 62);
- it is unlikely that disclosure of the records of Cabinet deliberations upon current matters would be appropriate in civil proceedings (*Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618; [1993] HCA 24);

- documents and communications between a Minister and his or her departmental head relating to cabinet proceedings and material prepared for Cabinet are likely to be protected (*Sankey v Whitlam* (1978) 142 CLR 1 at 99);
- reports relating to important policy matters of policy between public servants and Ministers or between senior public servants also warrant a high level of protection (*Sankey v Whitlam* (1978) 142 CLR 1 at 99).

Application of provision

12. While the terms of s 130 indicate that it applies only in a hearing context, by s 131A it applies also to specified pre-trial disclosure requirements.

13. In applying the provision, the onus lies on the party seeking to prevent disclosure of information to show that the public interest in preserving secrecy or confidentiality outweighs the public interest in producing the material (*DPP v Debono* [2012] VSC 476, [28], quoted with approval in *Madafferi v The Queen* [2021] VSCA 1, [43]; *Zirilli v The Queen* [2021] VSCA 2, [123])

'the public interest in admitting into evidence … is outweighed … by the public interest in preserving secrecy or confidentiality ': s 130(1)

14. The Act does not define 'public interest' but some relevant considerations are provided by s 130(5). It has been observed that the proper balancing of the test requires a judge to 'identify with precision, and then balance fairly and sensibly, the two competing public interests to which subs(1) makes reference' (*Attorney-General v Kaddour* [2001] NSWCCA 456 at [15] per Sully J (Spigelman CJ and Adams J agreeing)).

15. The UEA balancing task reflects that at common law. The initial ALRC proposal described it as a balance between 'the nature of the injury which the nation or public service is likely to suffer, and the evidentiary value and importance of the documents in the particular litigation' (*Evidence (Interim Report)* [1985] ALRC 26 at [866]; citing *Alister v R* (1983) 154 CLR 404 at 412 per Gibbs CJ).

16. The Commission continued:

> [i]n conducing this task, the relevant public interests must be borne in mind and in determining the 'nature of the injury' that may follow from disclosure, regard will be had not only to the harm involved in the actual disclosure but also to the effect generally of the disclosure on the way government is conducted.

17. The common law principle that a court is to accord weight to a responsible government representative assertion that public interest would be at risk in the event of disclosure is retained under the UEA (see *Sankey v Whitlam* (1978) 142 CLR 1 at 44, 46 per Gibbs ACJ, at 59–60 per Stephen J, at 96 per Mason J; *State of New South Wales v Ryan* (1998) 101 LGERA 246 per Burchett, Hill and Madgwick JJ).

18. However, a party asserting a public interest in preserving secrecy or confidentiality should identify with precision the "character of the particular information in issue and the nature of the particular litigation" in which the public interest issue arises (*State of Victoria v Brazel* (2008) 19 VR 553; [2008] VSCA 37). General assertions that the information is confidential, or that the makers of statements may not want the statements disclosed may not be sufficient. "[W]here the claim for immunity is a "contents" claim, that exercise will normally require the judge to inspect the documents for the purpose of making a decision on whether or not the claim is made out" (*Ahmet v Chief Commissioner of Police* [2014] VSCA 265 at [26]–[28], [32]).

19. A court may have powers pursuant to other legislation to limit publication, and this is a specified consideration under s 130(5).

20. Other public interest considerations (some from the common law) include, but are not limited to:

- the proper administration of justice requires that evidence necessary to elucidate the facts be available (*Chapman v Luminis (No 5)* (2001) 123 FCR 62; [2001] FCA 1106 per von Doussa J);
- the public interest in preserving the confidentiality of documents (*Attorney-General v Kaddour* [2001] NSWCCA 456);
- assessment of the evidentiary value and importance of the documents in the particular litigation (*Alister v R* (1983) 154 CLR 404 at 44–45 per Gibbs CJ); and
- the accused's right to a fair trial (*Alister*).

21. Some of these considerations are included in the (non-exhaustive) list under s 130(5).

22. In assessing the evidentiary value of the material, the court is assessing the likely weight of the evidence. This exercise is broader than an assessment of probative value (compare s 138(3)(a)), as it allows the court to consider issues of reliability and credibility, and the impact of contrary evidence, which are factors excluded from the assessment of probative value (*R v Westbrook* [2020] VSC 472, [95]–[97]).

23. The public interest in preserving confidentiality varies according the nature of the information in issue and the rationale for its protection– for example, the rationale for protecting Cabinet documents is different to that for protecting police informants. The common law has distinguished between class claims (such as Cabinet deliberations) and content claims. A court is more likely initially not to consider disclosure in the case of class documents and to inspect those argued on the basis of contents, but there is no absolute immunity (*Sankey v Whitlam* (1978) 142 CLR 1; see also *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616, 618; [1993] HCA 24).

'information or a document that relates to matters of state': ss 130(1), 130(4)

24. The scope of this provision is restricted to matters of state. The term is defined inclusively by s 130(4).

25. The court must decide whether disclosing the information or document would give rise to a real risk of one or more of the harms identified in s 130(4). For this purpose, "the facts giving rise to the unacceptable risk must themselves be established on the balance of probabilities but not the prospect of the eventuation of the risk itself" (*R v Peters* [2018] VSCA 115, [48]).

26. Given the ALRC's intention that this provision was substantially to reflect common law 'public interest immunity' (ALRC 26:1 at [864]), 'matters of state' is likely to be accorded a similar interpretation (see ALRC 26:1 at [863]).

27. Spigelman CJ observes the common law doctrine is confined to 'the conduct of governmental functions' and that this is reflected in the words 'that relates to matters of state' in s 130. His Honour states the 'public interest' to which common law's immunity refers requires a dimension that is 'governmental in character', and not merely a 'circumstance in which exclusion should be supported on the grounds of public policy' (*R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166, [54]–[55]; *Gardiner v Attorney-General (Victoria)* [2020] VSC 224, [46]).

28. It is not determinative whether or not documents are brought into existence by the Crown. Even if documents are not, the relevant consideration is whether their production would be harmful to the public interest (*Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 591 per Mason J). And if documents are brought into existence by the Crown, it does not necessarily mean they relate to 'matters of state' (*R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166 at [58] per Spigelman CJ).

29. A statutory office, like the Victorian Ombudsman, established to provide oversight into administrative actions of authorities, may be able to claim public interest immunity, on the basis that disclosure may have a detrimental effect on the functioning of government, even if the Ombudsman's work does not involve 'matters of state'. Whether the immunity arises will

depend, however, on whether disclosure would have a detrimental effect (*Allon v RMIT University* [2018] VSC 167, [45], [73]).

(i) 'prejudice the prevention, investigation or prosecution of an offence': s 130(4)(c)

30. This limb can include information about police methodology, and, where appropriate, the identity of undercover police operatives.

31. While identity of an undercover operative must be disclosed if necessary to prevent a miscarriage of justice, such a formulation does not provide a practical test. Instead, the identity of undercover operatives should be disclosed if 'there is good reason to think that disclosure of the … identity may be of substantial assistance to the defendant in answering the case'. The use of the term 'may' indicates that it is sufficient if the operative's identity 'could' be of substantial assistance and it is not necessary to show that it 'would' be of substantial assistance (*Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 89–90; *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 188; *DPP v Anderson* [2021] VSC 311, [8]).

(ii) 'prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law': s 130(4)(d)

32. ALRC 38 explains that this provision is to clarify that 'matters of state' includes both the prevention and detection of criminal activity and breaches of legislation which give rise to civil penalties (at [221]).

(iii) disclose etc a 'confidential source of information relating to the enforcement or administration of a law': s 130(5)(e)

33. This subsection recognises a state's interest in protecting, inter alia, the identity of police informers. At common law, it is recognised that unless the identity of such persons is protected, important sources of information would 'dry up and the prevention and detection of crime would be hindered' (*R v Smith* (1996) 86 A Crim R 308 at 312 per Gleeson CJ, Clarke and Sheller JJA; *Madafferi v The Queen* [2021] VSCA 1, [32]).

34. In *Smith*, the New South Wales Court of Criminal Appeal also observed that the State is entitled to rely on the 'high importance' of this particular immunity and the 'generally accepted reasons for that importance' (*R v Smith* (1996) 86 A Crim R 308 at 312).

35. Against that, courts have recognised that public interest immunity should not be upheld, and disclosure is required, where there is good reason to think that disclosure may be of substantial assistance to the accused (*Madafferi v The Queen* [2021] VSCA 1, [32]; *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84; *AB v CD & EF* [2017] VSCA 338, [59]).

36. The debate about whether the requirement of substantial assistance is a threshold requirement, or a circumstance in which disclosure must be ordered, has been described as:

> a sterile one, having regard to the need to carry out a balancing exercise. Where the non-disclosure of evidence may substantially impair the ability of a defendant to answer the prosecution case in a criminal trial, the balance is very likely to favour disclosure, even where the identity of a police informer is in issue. Conversely, where there is no good reason to think that the disclosure of the identity of a police informer may be of substantial assistance to the defence, the balance is unlikely to favour disclosure. It is accepted that there is a strong public interest in protecting the anonymity of police informers, given the importance of intelligence to policing and the 'chilling effect' that disclosing identities may have on such intelligence gathering (*Madafferi v The Queen* [2021] VSCA 1, [40]).

37. The balancing exercise must be carried out even in circumstances where the confidential source is a lawyer informing on his or her own client. While that circumstance will usually weigh heavily in favour of disclosure, there may be competing considerations in particular circumstances (*Madaffari v The Queen* [2021] VSCA 1, [102]).

38. In criminal proceedings, the Chief Commissioner of Police decides whether to assert a s 130 claim in relation to material that would otherwise be disclosed to the parties. The accepted practice in Victoria is that the prosecution does not play any part in resolving a contested s 130 claim. In particular, the prosecution does not receive the material on a confidential basis in order to consider whether it affects the conduct of the prosecution. Such a process would create a risk of the prosecution securing an unfair advantage, if the material is not ultimately disclosed to the defence (*DPP v Westbrook* [2020] VSC 290; c.f. *R v Lipton* (2011) 82 NSWLR 123).

(iv) 'prejudice the proper functioning of the government of the Commonwealth or a State': s 130(4)(f)

39. Odgers describes this category as, in some respects, the broadest of those under s 130(4) (Stephen Odgers, Uniform Evidence Law (1 February 2013) Thomson Reuters – Legal Online).

40. The question under s 130(4)(f) is whether the adducing of the information or the document, and the concomitant breach of confidentiality, will adversely affect the proper functioning of government. It is not necessary for the information or the document to be in the possession of the government.

41. This category is not limited to the highest levels of government. Instead, it applies to the workings of government, including the proper functioning of executive government (*R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166; *Ryan v State of Victoria* [2015] VSCA 353 at [114]).

42. This includes protecting the workings of the police, such as police methods and instructions. This reflects the role of police in maintaining social peace and order (*Ryan v State of Victoria* [2015] VSCA 353 at [105], [119]).

43. It may also protect Aboriginal cultural information where the information was provided on the basis that it was necessary for governmental functions 'at the highest level and for the benefit of the public in general, was provided and received in confidence, and disclosure would be likely to impair the future performance of those functions, such as by inhibiting informants from providing similar information (*Gardiner v Attorney-General (Victoria)* [2020] VSC 224, [59], [62]).

44. The type of agency which holds the information will often be relevant under this ground. For some agencies, it will be easier to anticipate how release of information may the prejudice to the proper functioning of the Commonwealth or a State than for other agencies (*Ryan v State of Victoria* [2015] VSCA 353 at [121]).

'Without limiting the matters the court may take into account for the purposes of subsection (1) …': s 130(5)

45. Section 130(5) lists the matters the court must take into account for the purposes of s 130(1). These matters are set out below.

46. It is important to note that this list is not exhaustive. Where a case involves serious criminal charges against an accused, a more 'liberal' approach to the production of documents in respect of which public interest immunity is claimed should be taken than for civil cases (*R v Debono* [2012] VSC 476 at [23], citing with approval *R v Cox* [2005] VSC 249 at [9]; *Sankey v Whitlam* (1978) 142 CLR 1 at 42, 61–2; *Alister v R* (1984) 154 CLR 404 at 414, 431, 437–8, 456; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618; [1993] HCA 24).

47. Another relevant matter to consider is whether the information or document the subject of the claim for public interest immunity has contemporary importance or only has historical interest (*R v Debono* [2012] VSC 476 at [24]; see also *Sankey v Whitlam* (1978) 142 CLR 1 at 41–2; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618; [1993] HCA 24; *Victoria v Brazel* (2008) 19 VR 553;

[2008] VSCA 37 at [49], [68]; *Public Transport Ticketing Corporation v Integrated Transit Solutions* [2011] NSWCA 60 at [52], [82]).

48. Further, courts should 'consider the forensic purpose for which the information is intended to be used in the proceeding and to assess its potential forensic significance' (*R v Debono* [2012] VSC 476 at [25]).

49. As part of the process of deciding whether to permit disclosure of the relevant material the court may need to consider appointing a contradictor. The need for a contradictor will depend on the complexity of the public interest claim and the complexity of the material. Where the claim is obvious, the role of the court is more limited and it may not be necessary for event the court to inspect the documents. But for more complex and disputed claims, the court may need to consider appointing either counsel for the opposing party (subject to appropriate confidentiality undertakings) or a third party *amicus curie* as contradictor. Alternatively, the court may inspect a representative sample before determining what further steps to take. The decision of whether a contradictor is required and, if so, who, requires an examination of the facts and circumstances of the case, the importance of the issue, the risk of inadvertent disclosure if the information is provided to representatives for a party and the seriousness of any consequences if inadvertent disclosure occurs. Other matters which may be relevant include the efficient use of court time, and the desirability of fashioning a fair process which will give a disappointed litigant confidence in the outcome (see *Goussis v The King* [2022] VSCA 255, [16]–[29]; *Arico v The King* [2023] VSCA 132, [28]–[33]; *Commonwealth v Northern Land Council* (1993) 176 CLR 604).

50. In deciding whether counsel for a party can, with appropriate undertakings, perform the role of contradictor, the court should consider two recognised drawbacks of that approach. First, it may create difficulty for the practitioner in their ongoing representation of the client, if there is information they cannot use. Second, if the proceedings are protracted, there may be a risk of inadvertent use or disclosure. These considerations are, however, more relevant in a trial context than an appeal context (see *Goussis v The King* [2022] VSCA 255, [18], [25], quoting *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 638 (per Toohey J) and *Jackson v Wells* (1985) 5 FCR 296, 307–308).

51. The court may also take into account the identity of the party seeking the evidence, and whether that reduces the risk which revealing the evidence would otherwise pose. For example, in Robinson v Victoria, where a serving police officer was seeking production of various police training manuals, the Court accepted that the plaintiff's duties as a serving police officer reduced the risks compared to disclosure to the general public (*Robinson v Victoria* [2018] VSC 470, [29]).

52. The court should consider ways to reduce the risks associated with release of a document or the damage to a party's fair trial rights when deciding whether to uphold an objection. For example, where the substance of the evidence, as it applies in the trial, can be the subject of an agreed statement of facts under s 191, it may not be necessary to reveal the underlying information (see, e.g., *R v Yucel (No 6)* [2018] VSC 371, [15]–[17], [26]).

(i) 'the importance of the information or document in the proceeding': s 130(5)(a)

53. This is an important consideration. In *State of New South Wales v Ryan* (1998) 101 LGERA 246, the trial judge was held to have erred because, inter alia, of a failure to

> weigh any significance the material in question might have had for the advancement of justice in the litigation against the public interest in the withholding from disclosure of cabinet documents (*State of New South Wales v Ryan* (1998) 101 LGERA 246 at 252).

54. Common law considerations include that there must be a legitimate forensic purpose in having access to the material (something more than 'fishing') (*Alister v R* (1984) 154 CLR 404) – including when the material may assist for the purposes of cross-examination on credibility (*R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166 at [129] per Beazley J); and that the degree of relevance of the information or document can inform the balancing exercise (*Australian National Airlines Commission*

v Commonwealth (1975) 132 CLR 582 at 592–93 per Mason J; *Ryan v State of Victoria* [2015] VSCA 353 at [129]–[134]).

(ii) in criminal proceedings, 'whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor': s 130(5)(b)

55. '[T]he court must attach special weight to the fact that the [information or] documents may support the defence of an accused person in criminal proceedings' (*R v Alister* (1984) 154 CLR 404 at 414).

(iii) 'the likely effect of adducing evidence of the information or document, and the means available to limit its publication': s 130(5)(d)

56. As noted in paragraph 12 above, a court should consider both the immediate and the general effects of disclosure on the way government is conducted.

57. There are likely to be various options available to the court to limit the effect of adducing evidence – for instance, the court may use any other legislation which confers power to limit publication, the court may permit only part of the evidence to be adduced, the court may be closed, or disclosure could be limited to specified persons. If any such option is sufficient to protect the state's interests, this would obviate the need to make a direction under s 130.

58. However, the implied Harman undertaking not to disclose materials obtained through compulsory court proceedings for a collateral purpose does not provide an effective protection against disclosure. There remains uncertainty about whether the undertaking comes to an end when the documents are adduced in evidence. Further, limiting disclosure of documents to counsel, rather than the party, is inconsistent with the nature of the relationship between counsel and client and would unduly limit the ability of counsel to give full and frank advice (*Ryan v State of Victoria* [2015] VSCA 353 at [171]–[172]; *Seymour v Price* [1998] FCA 1224).

(iv) 'whether the substance of the information or document has already been published': s 130(5)(e)

59. It has been observed that, because a claim of public interest immunity is directed to the protection of confidentiality, 'publication' is to be considered as a loss of this confidentiality (*Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 284 at [28] per Levine J).

60. If publication (full or partial) has occurred, the court will need to consider the extent of that publication. For example:

- disclosure to the other party's legal representatives and the subsequent return of all of the material was held not to be significant as there was no general unrestricted publication of the documents concerned (*Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 151 at [34] per Nicholson J);
- while publication of a 'true copy' of a document would mean the document should be produced or given in evidence, 'publication by an unauthorized person of something claimed to be a copy of an official document, but unauthenticated and not proved to be correct, would not in itself lend any support to a claim that the document in question ought to be produced (*Sankey v Whitlam* (1978) 142 CLR 1 at 45 per Gibbs ACJ);
- documents supplied to the court in answer to a subpoena are not a publication in the sense of a loss of confidentiality noted above (*Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 284 at [28] per Levine J).

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s 131 – Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of—

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a **document** (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if—

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or **document** in evidence in another **Australian or overseas proceeding**, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or **document** included a statement to the effect that it was not to be treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the **court** unless evidence of the communication or **document** is adduced to contradict or to qualify that evidence; or

(h) the communication or **document** is relevant to determining liability for costs; or

(i) making the communication, or preparing the **document**, affects a right of a person; or

(j) the communication was made, or the **document** was prepared, in furtherance of the commission of a fraud or an **offence** or the commission of an act that renders a person liable to a **civil penalty**; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the **document** was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of subsection (2)(j), if commission of the fraud, **offence** or act is a fact in issue and there are reasonable grounds for finding that—

(a) the fraud, **offence** or act was committed; and

(b) a communication was made or **document** prepared in furtherance of the commission of the fraud, **offence** or act—

the **court** may find that the communication was so made or the **document** so prepared.

(4) For the purposes of subsection (2)(k), if—

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or **document** prepared in furtherance of the abuse of power—

the **court** may find that the communication was so made or the **document** was so prepared.

(5) In this section—

(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an **Australian or overseas proceeding**; and

(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a **criminal proceeding** or an anticipated **criminal proceeding**; and

(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and

(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and

(e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section, **power** means a power conferred by or under an **Australian law**.

Exclusion of evidence of settlement negotiations

1. The UEA excludes evidence of communications in settlement negotiations as well as documents prepared in connection with settlement negotiations (s 131).

2. The section closely resembles the common law 'without prejudice' privilege, which existed to allow parties to communicate freely and without such negotiations potentially being admitted in evidence (*Gonzalez v The Queen* (2022) 68 VR 620; [31]; *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285, 291–2).

3. Section 131(2) sets out an exhaustive list of exceptions to this general rule, including when:

- the persons in dispute consent to the evidence being adduced in the proceeding (s 131(2)(a)); or
- the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute (s 131(2)(b)); or

- the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced (s 131(2)(c)); or
- the communication or document included a statement to the effect that it was not to be treated as confidential (s 131(2)(d)); or
- the evidence tends to contradict or to qualify already admitted evidence about the course of an attempt to settle the dispute (s 131(2)(e)); or
- already adduced evidence, or an inference from already adduced evidence, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence (s 131(2)(g)); or
- the communication or document is relevant to determining liability for costs (s 131(2)(h)); or
- making the communication, or preparing the document affects a right of a person (s 131(2)(i)); or
- the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence (s 131(2)(j)); or
- a person in the dispute, or an employee or agent of such a person, knew or ought reasonably to have known that communication was made or the document was prepared in furtherance of a deliberate abuse of power (s 131(2)(k)).

4. The dispute being settled must be a civil dispute (s 131(5)(b)).

5. Notwithstanding the list of exceptions provided by s 131(2), the reach of s 131(1) is broad because it prohibits evidence which falls within its terms (subject to the exceptions) from being adduced in any subsequent proceedings (including criminal proceedings) and not merely proceedings in relation to which the negotiations occurred.

6. There is no judicial discretion with respect to the list at s 131(2). It should be noted, however, that, where there has been partial disclosure of the substance of the evidence with relevant consent, the privilege is lost where full disclosure of the evidence is reasonably necessary to enable a proper understanding of the evidence that has been adduced.

Application and procedure

7. While the terms of s 131 indicate that it applies only in a hearing context, by s 131A it applies also to specified pre-trial disclosure requirements.

8. As at common law, the s 131 privilege extends to subsequent litigation related to the same subject matter. It also applies to evidence of settlement negotiations with a different party in the same litigation (Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.13880]).

9. While s 131 may apply to communications and documents related to a formal mediation, the admissibility of communications made and documents prepared for the purpose of court ordered mediation is subject to the specific provisions which enabled the mediation order.

10. If it appears to a court that a witness may have grounds for an objection under s 131, the court must ensure a witness is aware of these rights (s 132). A court may order the production of, and inspect, any document for the purpose of determining a question about the document which arises under s 131 (s 133).

11. If an application or objection is made, it should be made in accordance with s 189.

‘dispute’: ss 131(1), 131(5)(a)

12. A dispute must be ‘of a kind in respect of which relief may be given in an Australian or overseas proceeding’ (s 131(5)).

13. While s 131 is clearly based on a dispute which is in existence at the time of the communication or preparation of the document, it is not necessary for proceedings to be on foot at that time (see *Brown v Commissioner of Taxation* [2001] FCA 240 at [22] per Emmett J; *Glass v Demarc* [1999] FCA 482 per Emmett J).

‘communication between persons in dispute’: s 131(1)(a), 131(5)(a), 131(5)(c)

14. The UEA does not define ‘communication’, but interpretation ought to be consistent with the policy rationale to promote the settlement of disputes. As at common law, it would cover both oral and written communications (*Seven Network Ltd v News Ltd* (2006) 151 FCR 450; [2006] FCA 343 at [44] per Graham J).

15. Evidence of ‘objective facts’ may be adduced subject to s 131(1)(b) and other provisions of the Act.

16. Subsection (5) provides that a reference to a communication by a person includes a reference to communication by an employee or agent of such a person.

‘third party’: s 131(1)(a)

17. This provision extends to communications made between one or more persons in dispute (or their employees or agents) and a third party if those communications were made in an attempt to negotiate the settlement of a dispute. The UEA does not define ‘third party’, but it would include parties such as mediators and doctors.

‘document (whether delivered or not) that has been prepared in connection with …’: s 131(1)(b)

18. ‘Document’ is defined by clause 8, Part 2 of the UEA Dictionary. It is broadly defined to capture any part or any copy of a document.

19. ‘Prepared in connection with’ is not defined, and its scope is not clear. In *Seven Network Ltd v News Ltd* (2006) 151 FCR 450; [2006] FCA 343, Graham J suggested this paragraph ought to be restricted to documents other than those contemplated by paragraph s 131(1)(a) (which includes those referred to in s 131(2)(a)) and which are also referable to the attempt to negotiate a settlement of a dispute, such as working papers.

‘in connection with an attempt to negotiate settlement of the dispute’: ss 131(1)(a)–(b)

20. This section is concerned solely with communications between parties in an attempt to settle, and does not address the terms of settlement. Like the common law position, a contract or deed of settlement is not covered by the privilege (*Gonzalez v The Queen* (2022) 68 VR 620, [32], [38]–[45]).

21. It excludes attempts to negotiate the settlement of a criminal proceeding or an anticipated criminal proceedings (s 131(5)(b)).

22. It has been suggested that the term ‘negotiate’, in the context of this section, means to ‘communicate or confer (with another or others) for the purposes of arranging some matter by mutual agreement’ (*Kong v Kang & Ors* [2014] VSC 28 at [56] per Derham As J, citing the definition contained in the New Shorter Oxford English Dictionary).

23. ‘In connection with’ has been held to mean ‘directly’ connected and not merely ‘in any way connected’ (*GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225 at 226 per Young J; see also *Kong v Kang & Ors* [2014] VSC 28 at [63] per Derham As J for an example of a case where the

parties' mere assertion of their positions did not attract privilege; *Galafassi v Kelly* (2014) 87 NSWLR 119; [2014] NSWCA 190 at [132] per Gleeson JA, where privilege was held not to apply to a communication in which a party expressed 'hope' that a dispute would be resolved).

24. In order to determine whether an attempt to negotiate a settlement has been made, the communications made need to be analysed, taking into consideration the content of each communication and the context in which they were made (*Kong v Kang & Ors* [2014] VSC 28 at [60] per Derham As J, citing *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* (2011) 193 FCR 479; [2011] FCA 276 at [31]).

25. The section has been considered to broaden the category of communications covered from that at common law (*Brown v Commissioner of Taxation* [2001] FCA 596 at [173] per Emmett J; agreed in *Brown v Commissioner of Taxation* (2002) 119 FCR 269; [2002] FCA 318 at [103] per Sackville and Finn JJ).

26. In *GPI Leisure Corporation Ltd (in liq) v Yuill*, Young J considered that 'in connection with an attempt' is a question of nexus. His Honour considered general comments which moot that 'certain things may happen and if those certain things happen, the dispute might be settled' not to be within the ambit of the provision. However, an 'opening shot' in negotiations is covered and 'it is not necessary for there to be an offer which is capable of acceptance' (*GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225 at 226–27 per Young J).

27. Whether a particular communication forms part of a protected negotiation does not depend on the description given to the communication. Rather, it is the parties' intention, based on the objective evidence (usually the nature of the discussions and negotiations between them) that matters (*Kong v Kang & Ors* [2014] VSC 28 at [61] per Derham As J).

28. Thus, the use of the words 'without prejudice' is indicative but not determinative or conclusive of an attempt to negotiate a settlement (*GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225 at 226 per Young J; see also *Kong v Kang & Ors* [2014] VSC 28 at [61] per Derham As J).

29. It is a 'question of fact' (*Sved v Council of the Municipality of Woollahra* (Unreported, Supreme Court of New South Wales Common Law Division Construction List, Giles CJ Comm D, 15 April 1998).

30. Nor is the context of a settlement conference determinative or conclusive of an attempt to negotiate a settlement (*Nodnara Pty Ltd v Commissioner of Taxation* (1997) 140 FLR 336 at 340–41 per Young J).

31. It has also been suggested it is sufficient if only one of the parties was attempting to settle the dispute (*Nodnara Pty Ltd v Commissioner of Taxation* (1997) 140 FLR 336 at 340–41 per Young J).

32. Odgers notes that a question has been raised as to whether the references to 'persons in dispute' in s 131(1)(a) and 'dispute' in (1)(b) are references to the dispute before the court or other litigation (Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.13860]).

33. In *Moran v Moran (No 3)* [2000] NSWSC 151, Kirby J commented that while there is no policy reason to confine 'dispute' to matters before the court in which the current litigation is on foot, a key consideration with respect to 'a dispute' litigated in another court is whether that litigation is complete (because it may be important to preserve the confidential nature of negotiations) (*Moran v Moran (No 3)* [2000] NSWSC 151 at [15] per Kirby J).

34. In relation to that argument, it may be relevant to consider whether there will be situations where to achieve a settlement it will be necessary or desirable to be able to canvass other disputes under the protection of the privilege. Odgers notes that s 131(5)(a) defines a dispute as being 'of a kind in respect of which relief may be given in an Australian or overseas proceeding', and this imports a requirement only with respect to the nature of the dispute and nothing with respect to the timing of that dispute. Finally, the legislation could have expressly limited ss 131(1)(a)–(b) to a single dispute, or a matter that is currently before the courts, but it does not do so.

Exceptions: s 131(2)

35. The list of exceptions in s 131(2) is exhaustive, and there is no judicial discretion to overcome unlisted circumstances (*Brown v Commissioner of Taxation* [2001] FCA 596 at [180] per Emmet J; *Moran v Moran (No 3)* [2000] NSWSC 151 at [8] per Kirby J).

36. Unlike the common law, s 131(2) does not provide an exception where delay is in issue (*Hoefler v Tomlinson* (1995) 60 FCR 452 at 453–55 per Spender J (Sackville and Kieffel JJ agreeing)).

37. However, s 131(2) is not intended 'to negative' the intention of s 131 as a whole, namely that 'settlement should not be discouraged by the possibility that communications made in connection with an attempt at settlement might be tendered against a party to those communications' (*Brown v Commissioner of Taxation* [2001] FCA 596 at [180] per Emmett J).

38. His Honour also observed that it is appropriate to consider the exceptions in light of the common law (*Brown v Commissioner of Taxation* [2001] FCA 596 at [183] per Emmett J).

(i) Consent and disclosure: ss 131(2)(a)–(c)

39. These provisions mean that, if all of the 'persons in dispute' expressly or impliedly consent, then evidence falling within the privilege in s 131(1) may be adduced. For the purposes of such consent 'persons in dispute' includes the employee or agent of a person in dispute (s 131(5)(d)).

40. Each paragraph contemplates a form of disclosure. Under paragraph (c), partial disclosure may result in loss of the privilege.

41. 'Consent' is used in other sections of the Act (for example, s 122) and, in those sections, has been constructed as to require "deliberately informed waiver of statutory rights" (*Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 520 at [11]–[15] per Young CJ in Eq). His Honour left open the issue of whether and in what circumstances silence could amount to consent.

42. It has been said, that 'the disclosure to which s 131(2)(b) refers, is a disclosure other than on the voir dire but in circumstances which make it unnecessary or (possibly) unfair to maintain the confidentiality which the section is designed to protect' (*Kosciusko Thredbo Pty Ltd v New South Wales* [2002] NSWSC 329 at [22] per Adams J).

43. In that case, evidence was given on voir dire in circumstances where there was no public disclosure and on the understanding that confidentiality orders would be made.

(ii) 'statement to the effect that it was not to be treated as confidential': s 131(2)(d)

44. This provision permits the admission of open offers of settlement.

45. It is not clear whether a statement to the effect that the communication or document is confidential in one situation but not another would be effective. However, given the definition of 'document' includes 'any part of a 'document' (see cl 8, Part 2 of the UEA Dictionary), it would seem such a statement may be made with respect to only a part of a document and, by extension, with respect to one communication but not another made on the same occasion.

(iii) 'the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute': s 131(2)(e)

46. The ALRC 26:1 considered the protection should be lost 'where to do so could enable a party to deceive a court about the course of an attempt to settle the dispute (where some evidence may have been admitted)' (at [892]).

(iv) 'the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle

the dispute, or a proceeding in which the making of such an agreement is in issue': s 131(2)(f)

47. Two exceptions are created by this provision. If either applies, the privilege does not prevent communications or documents that show a settlement was reached or that establish the terms of a settlement agreement from being admitted. Section 131(2)(f) thus applies in proceedings to enforce a settlement agreement or where the making of such an agreement is in dispute. It has been held not to apply in proceedings seeking to set aside an agreement (*Asciak v Australian Secured & Managed Mortgages Pty Ltd (ACN 112 603 219)* [2008] FCA 753 at [31] per Goldberg J).

48. Barrett J observed that the connection between s 131(1) and this provision is the dispute and, in proceedings which meet the terms of this provision, it 'allows the introduction of evidence of all or any communications made in the course of any one or more such attempts as have been made to settle that dispute' (*SWV Pty Ltd v Spiroc Pty Ltd* [2006] NSWSC 668 at [42]).

(v) 'evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence': s 131(2)(g)

49. This provision seeks to ensure the privilege cannot be misused to mislead a court – for example, by a party asserting a case which is inconsistent with evidence otherwise excluded by s 131(1).

50. The exception will apply only when the court is likely to be misled as to the existence or contents of an excluded communication or document (*KC v Shiley* (unreported, Fed Court of Australia, Tamberlin J, 11 July 1997); *Brown v Commissioner of Taxation* [2001] FCA 596 at [185] per Emmett J).

51. In *Brown*, his Honour also noted it is not sufficient that the evidence sought to be adduced simply qualifies or contradicts evidence already adduced (*Brown v Commissioner of Taxation* [2001] FCA 596).

52. A broader test was applied by Young CJ in Eq to permit evidence of a settlement offer by one party to provide more factual context in order not to be misled by the case being put by the other party (*Mulkearns v Chandos Developments Pty Ltd (No 4)* [2005] NSWSC 511 at [67]).

53. The question as to whether the broader or narrower test applies under the Victorian Evidence Act 2008 has not been authoritatively determined (see *Simply Irresistible Pty Ltd v Couper* [2010] VSC 505; *Edwards v Transport Accident Commission* [2013] VSC 557 at [30]–[34]).

(vi) 'the communication or document is relevant to determining liability for costs': s 131(2)(h)

54. This provision enables communications and documents relevant to the issue of costs and otherwise inadmissible under s 131(1) to be admitted into evidence on that issue. Such communications and documents do not become admissible pursuant to s 131(2)(h), rather the provision removes the prohibition against their admissibility.

55. Section 131(2)(h) applies whether or not there has been an express reservation with respect to the possibility of tender on a later question of costs. In this respect, it differs from the common law which allows 'without prejudice' communications to be received into evidence on costs only if the possible tender of those communications on as subsequent costs issue is expressly reserved (see *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133 at [7]–[8] per Powell JA (Priestley JA and Sheppard AJA agreeing)).

56. Whether a communication or document is relevant to determining liability for costs is to be considered pursuant to s 55 and by the application of legal principle and not 'the decision of the parties' (*Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (No 3)* [2002] FCA 1294 at [18] per Goldberg J, see also generally at [4]–[19]).

57. As noted by Odgers, because s 131(2)(h) relates only to 'costs' the privilege would continue to apply in situations which, although similar (for example, interest on damages), are nonetheless not 'costs' unless the argument that the offer is relevant to determining costs were accepted or a use analysis were applied (see Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.14000]).

(vii) 'making the communication, or preparing the document, affects a right of a person': s 131(2)(i)

58. ALRC 26:1 stated this privilege should not apply to 'communications which are of a criminal or tortious nature, or are capable of affecting rights and liabilities (such as acts of bankruptcy, defamatory statements, illegal threats, the election of alternative courses of action)' (at [891]).

59. This provision ought to be interpreted narrowly to apply to existing rights and is not satisfied by reason of a right coming in to existence by the making of an offer (*Glass v Demarco* [1999] FCA 482 at [10] per Emmet J).

60. The debtor in the proceedings before his Honour argued that, on the basis of an offer in other proceedings, he had a right to accept the offer and thereby create a contract of compromise in the instant proceedings. His Honour found the offer did not satisfy s 131(2)(i) in the proceedings before the court.

61. *Glass v Demarco* was followed in *Asciak v Australian Secured & Managed Mortgages Pty Ltd(ACN 112 603 219)* [2008] FCA 753 at [33] per Goldberg J, wherein his Honour also held that there is a requirement for there to be a 'fairly direct' affect on the actual rights, 'and perhaps also duties', of a person (citing *Talbot v NRMA Ltd* [2000] NSWSC 602 at [3] per Hodgson CJ in Eq).

(viii) 'the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty': ss 131(2)(j), 131(3)

62. These two provisions should be read together; s 131(3) facilitates the task of establishing the precondition of paragraph (j).

63. In *Bhagat v Global Custodians Ltd* [2002] NSWCA 160, it was held that 'there were 'reasonable grounds for finding a contempt had been committed [by the sending of certain letters] and, accordingly, that there was a relevant offence within s 131(3) and, therefore, within s 131(2)(j) and that the letter had been sent in furtherance of the offence' (*Bhagat v Global Custodians Ltd* [2002] NSWCA 160 at [34] per Spigelman CJ (Ipp and Brownie AJJA agreeing)).

64. In *Lawcover Pty Ltd v Commissioner of Police* [1997] NSWSC 590, Hodgson J observed that s 131(2)(j) applies only to communications made and documents prepared for the furtherance of the commission of a fraud or offence etc. His Honour states the provision is 'curious' because it makes the documents affected by the improper purpose admissible even if the 'innocent' party objects, and makes inadmissible the communications and documents emanating from the 'innocent' party even if that party consents because the 'guilty' party may object.

65. Odgers comments that in the first instance, evidence not excluded by s 131 may be excluded by s 135 and in the second instance, 'it is not clear why' a document that is privileged by s 131(1) and not caught by s 131(2)(j) should be admissible 'on the basis that objection to it is taken by a party who has … acted improperly in relation to another communication or document' (Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.14040]).

66. Section 125 is a comparable provision in relation to client legal privilege. The New South Wales Court of Appeal has held that, while there are differences, the word 'fraud' has the same meaning in both provisions (*Van Der Lee v State of New South Wales* [2002] NSWCA 286).

(ix) 'one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known, that the communication was made,

or the document was prepared, in furtherance of a deliberate abuse of power': ss 131(2)(k), 131(4)

67. These two provisions should be read together; s 131(4) facilitates the task of establishing the precondition of paragraph (k).

68. Section 125 is a comparable provision in relation to client legal privilege. The New South Wales Court of Appeal has held that, while there are differences, the words 'a power' has the same meaning in both provisions (*Van Der Lee v State of New South Wales* [2002] NSWCA 286).

69. That Court also held that the powers of a court to deal with abuse of process, preserved by s 11(2), include its powers to receive evidence and may override the privilege (*Van Der Lee v State of New South Wales* [2002] NSWCA 286 at [62]).

Last updated: 15 December 2023

Division 4 – General (ss 131A–134)

This Division includes a number of provisions to clarify and facilitate the application of the preceding provisions of this Part 3.10.

The main provision is s 131A. As noted in the introductory commentary to this Part, most of the privilege provisions in Part 3.10 apply to the adducing of evidence. Consequently, common law privileges continue to apply to pre-trail disclosure procedures and in matters outside court. This 'dual system' raises a number of issues which are discussed in some detail in ALRC 102 at [14.7]–[14.42]. That Report did not make specific recommendations on this issue.

The VLRC recommended a single *mutatis mutandis* provision which, on a limited basis, extends the operation of the privileges in the Part to pre-trial stages of civil and criminal proceedings (except those in s 123 (Loss of client legal privilege – accused) and s 128 (Privilege in respect of self-incrimination in other proceedings)). It extends the operation, for example, to discovery, subpoenas and warrants. The privileges are not extended to non-curial contexts. The Commission recommended that, with respect to compulsory processes outside court proceedings, extension of the UEA provisions be achieved through amendment of the Acts in which the disclosure powers are located (see VLRC Report: *Implementing the Uniform Evidence Act*, pp 37–44).

Last updated: 20 May 2010

s 131A – Application of Division to preliminary proceedings of courts

(1) If—

(a) a person is required by a disclosure requirement to give information, or to produce a **document**, which would result in the disclosure of a communication, a **document** or its contents or other information of a kind referred to in Division 1, 1C or 3; and

(b) the person objects to giving that information or providing that **document**—

the **court** must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the **document** were an objection to the giving or adducing of evidence.

(2) In this section, *disclosure requirement* means a process or order of a **court** that requires the disclosure of information or a **document** and includes the following—

(a) a summons or subpoena to produce **document**s or give evidence;

(b) pre-trial discovery;

(c) non-party discovery;

(d) interrogatories;

(e) a notice to produce;

(f) a request to produce a **document** under Division 1 of Part 4.6;

(g) a search warrant.

Application of certain provisions relating to privilege to preliminary proceedings

1. Section 131A of the UEA extends the application of Part 3.10 (Privileges), other than s 123 (Loss of client legal privilege-accused) and s 128 (Privilege in respect of self-incrimination), to preliminary proceedings of courts such as summons or subpoenas, pre-trial discovery, non-party discovery, interrogatories, notices to produce and search warrants.

2. However, s 131A only applies where the person producing the document is the person who objects to access. Where, for example, the holder of the privilege objects to a third party producing a document, the court must determine the objection in accordance with the common law and not the UEA statement of the relevant privilege (*Singtel Optus Pty Ltd v Weston* (2011) 81 NSWLR 526; *Lazar v The Queen* [2021] NSWCCA 132; *Adanguidi v The King* [2023] NSWCCA 91, [19]).

Comparison of Commonwealth, New South Wales and Victorian provisions

3. While largely the same, there are some differences between the Commonwealth, the New South Wales and the Victorian provisions.

4. The Commonwealth provision applies only to Division 1A of that Act (which Division includes a journalists' privilege) and only to 'a court process or court order that requires disclosure of

information or a document'. That is, it does not include investigatory and other non-curial processes such as search warrants.

5. The NSW provision applies to all of the Part 3.10 privileges except those in s 123 and s 128. It applies to 'a process or order of a court'.

6. The Victorian provision differs from the NSW provision in two ways: (i) the Victorian Act does not include a Division 1A or 1B and so these are not incorporated by s 131A; and (ii) the Act expressly includes search warrants.

7. In the NSW and Victorian provisions, it is not certain whether the word 'process' is qualified by the words 'of a court'. In the Victorian case, this is clarified by the Explanatory Memorandum which states '[t]he privileges are not extended to non-curial contexts.' There is no such clear guidance for the NSW Act.

8. It is also unclear whether or not the NSW provision includes search warrants. While there are arguments both ways, Odgers has argued that given the identical language of 'disclosure requirement' in the NSW and Victorian provisions, 'it is desirable that they be given the same meaning. He argues that the better view is that neither extends the privileges in Part 3.10 to non-curial contexts and the failure of the NSW provision to refer expressly to search warrants reflects the fact that some search warrants in NSW are non-curial' (Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.131A.90]).

'other than sections 123 and 128'

9. Section 123 provides that in a criminal proceeding an accused may (with several exceptions) adduce evidence protected by client legal privilege. Given that the s 131A extension to pre-trial processes excludes s 123, privilege over relevant pre-trial information and documents will not be lost on the basis it is sought by an accused in a criminal trial. Thus an accused can rely on s 123 only to adduce evidence in the criminal proceeding and not to compel disclosure of such evidence.

10. Section 128 provides privilege in respect of self-incrimination in other proceedings, and s 128A provides that the privilege against self-incrimination under the *Evidence Act 2008* applies to a search order or a freezing order in civil proceedings. In both cases, the court determines whether there are reasonable grounds for a witness' claim to privilege and, if so satisfied, gives a certificate. As s 128 is excluded from the s 131A extension, privilege over relevant evidence or pre-trial information and documents will remain to be determined by application of the common law (unless s 128A applies).

Meaning of 'produce'

11. In an ex-tempore judgement in *Waugh Asset Management v. Merrill Lynch* [2010] NSWSC 197, MacDougall J construed the section as applying only 'at the stage of production' of a document and not 'at the stage of subsequent use'. As a result, he concluded that any claim of privilege in respect of the documents subpoenaed in that case would be dealt with by applying the common law and not the Act.

12. In doing so, he relied upon a judgement of Brereton J in *Carbotech – Australia Pty Ltdv Yates* [2008] NSWSC 1151. That decision concerned the operation of the Act prior to the inclusion of s 131A and the interpretation and application of r 1.9 of the NSW *Uniform Civil Procedure Rules*. It involved a departure from earlier decisions cited in that case, a departure justified on the basis that attention did not appear to have been directed in those cases to the 'distinction between producing a document to the Court and granting access for the purpose of inspection to a document already produced' (*Carbotech – Australia Pty Ltdv Yates* [2008] NSWSC 1151 at [9] per Brereton J).

13. MacDougall J does not appear to have had the benefit of competing submissions on this issue of construction. Such submissions might have been expected to cover a number of relevant matters, in particular:

    - the purpose of the section;

- the meaning of 'produce' in s 131A(1);
- the relevance of the Rules of Court to the construction of the section; and
- whether the construction adopted;
    - accords with the natural and ordinary meaning of the word 'produce' (e.g. to present to view or notice, to show or provide for consideration inspection or use; Oxford Internet Dictionary – not to place in someone's custody and no more);
    - requires the insertion of the words 'to the court' after the word 'produce'; and
    - prevents the section having its intended effect.

Last updated: 15 December 2023

s 132 – Court to inform of rights to make applications and objections

> If it appears to the **court** that a **witness** or a party may have grounds for making an application or objection under a provision of this Part, the **court** must satisfy itself (if there is a jury, in the absence of the jury) that the **witness** or party is aware of the effect of that provision.

Court to inform of rights to make application and objections

1. Section 132 operates to ensure fairness to the witness or party who has a basis for making an objection (*R v Ahmed* [2001] NSWCCA 450 at [37] per Bell JJ (Heydon JA and Dowd J agreeing)).
2. Informing a witness or a party in the presence of the jury infringes the section (*R v Parkes* [2003] NSWCCA 12 at [95]–[99] per Ipp JA (Hulme and Bell JJ agreeing)).

Last updated: 20 May 2010

s 133 – Court may inspect etc. documents

> If a question arises under this Part relating to a **document**, the **court** may order that the **document** be produced to it and may inspect the **document** for the purpose of determining the question.

Court may inspect etc. documents

1. Section 133 gives a court the right to order the production of, and to inspect, any document for the purpose of determining any question arising under Part 3.10.
2. Inspection is discretionary and whether a court will use this provision will depend on the circumstances (*Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 at [66]).
3. The court should not be hesitant to exercise the power (*Priest v State of New South Wales* [2006] NSWSC 1281 at [24] per Johnson J; citing *Re Southland Coal Pty Ltd* [2006] NSWSC 899 at [14k]; citing *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 70 per Gleeson CJ, Gaudron and Gummow JJ; [1999] HCA 67).
4. In *In the Marriage of Bradford* (1995) 120 FLR 75, Mushin J held that s 133 gives the court a discretion to inspect a document for the purpose of determining admissibility under s 131, and rejected the notion that such an inspection would predispose the judge to prejudice.
5. The provision permits comparison of documents (*Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 at [66]; and inspection notwithstanding that a party may not have access to the documents: *New South Wales v Jackson* [2007] NSWCA 279, see [23], [25] per Giles JA).

Last updated: 20 May 2010

s 134 – Inadmissibility of evidence that must not be adduced or given

> Evidence that, because of this Part, must not be adduced or given in a proceeding is not admissible in the proceeding.

Evidence that must not be adduced or given is inadmissible

1. It is noted that the intention of this provision may be better understood if the word 'evidence' is substituted by the word 'material' (Anderson, Williams, Clegg, *The New Law of Evidence* (2nd ed, 2009), [134.1]).
2. Section 134 assists in the understanding of the word 'adduce' in s 119 (*Anstee v Coltis Pty Ltd* (1995) 12 NSWCCR 491; [1995] NSWCC 35 per Neilson J).

Last updated: 20 May 2010

Part 3.11: Discretionary and Mandatory Exclusions (ss 135–139)

Introduction

Part 3.11 of the *Evidence Act 2008* contains discretionary and mandatory exclusions. It provides:

- a general discretion to exclude evidence (s 135);
- a general discretion to limit the use of evidence (s 136);
- for the exclusion of prejudicial evidence in criminal proceedings (s 137);
- for the exclusion of improperly or illegally obtained evidence (s 138);
- what constitutes improper questioning for the purposes of s 138 (s 139).

These provisions are applied as a safety net, after applying, in order, the threshold relevance test, the exclusionary rules, and the exceptions to those rules. The safety net is needed because of the lower threshold test of relevance (namely logical relevance to a fact in issue (s 55)) and the relaxation of some exclusionary rules (for example, hearsay and opinion).

Part 3.11 was intended to exhaustively list the matters a court must ultimately consider when excluding or limiting evidence on policy grounds (ALRC 26:1 at [643]; ALRC 102 at [16.1]–[16.5]). If the terms of these provisions are satisfied, the court may or must exclude otherwise admissible evidence or may limit its use.

The provisions of Part 3.11 are not unfettered or arbitrary; they must be exercised in accordance with the words of the statute and legal principle, and are subject to appellate review.

It has been stated the provisions 'are to be applied on a case by case basis because of considerations peculiar to the evidence in particular case' (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [97] per McHugh J; see also at [40] per Gleeson CJ and Hayne J) McHugh J added that it is not for a judge to abrogate the effect of the legislation by exercising the discretions in a way to make the Act conform with common law notions of relevance or admissibility (see also at [39] per Gleeson CJ and Hayne J).

Sections 135 and 137 compared

There are commonalities and differences between these two important provisions, including the following.

(i) The concept of probative value

The phrase 'probative value' appears in ss 135, 137 and 138 and arises to be considered in s 136.

(ii) The concept of unfair prejudice

The concept of 'unfair prejudice' appears in ss 135, 136 and 137. While s 137 refers to the 'danger of unfair prejudice' and s 135 refers to 'the danger that the evidence might… be unfairly prejudicial', in practical terms nothing turns on that different language (*DPP (NSW) v JG* [2010] NSWCCA 222 per Basten JA at [70]). Its meaning is the same in each section (*R v BD* (1997) 94A Crim R 131 at 139; *Ainsworth v Burden* [2005] NSWCA 174 at [99] per Hunt CJ at CL (Handley and McColl JJ agreeing)).

(iii) The weighing exercise

Both s 135 and s 137 require the court to weigh the probative value of evidence against any unfair prejudice that may arise from admitting that evidence. Two key differences are that:

- s 135 encompasses the danger of unfair prejudice against any party and therefore applies in both civil and criminal proceedings, whereas s 137 is directed only to unfair prejudice arising from evidence adduced by the prosecution against an accused and so only applies, and provides further protection to the accused, in criminal trials; and
- s 135 imposes a considerably greater onus for excluding evidence than s 137 as it requires probative value to be substantially outweighed by the danger that the evidence might be unfairly prejudicial.

(iv) Relationship between s 135 and s 137

Because of the higher standard required to exclude evidence under s 135 noted above, when s 137 applies, it displaces the work of s 135 (see e.g. *Li, Wing Cheong v R* [2010] NSWCCA 40 at [62]).

(v) Discretionary versus mandatory operation

The term 'may' is used in ss 135 and 136, whereas 'must' is used in s 137. Thus, ss 135 and 136 are discretionary. In contrast, there is no residual discretion pursuant to s 137. In that case, if the danger of unfair prejudice to the accused outweighs the probative value, then the trial judge must exclude the evidence (*Em v R* (2007) 232 CLR 67; [2007] HCA 46 at [95], [102]).

This difference is diminished in practice by the fact that it is unlikely that a judge who has concluded that the probative value of evidence is substantially outweighed by its prejudicial effect would nevertheless admit that evidence.

As Odgers observes, 'the real discretion conferred by ss 135 and 137 is the balancing exercise specified in each provision. The major difference … is that the balancing process in s 135 is weighted in favour of admission of the evidence' (Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.135.90]).

(vi) Acting on own motion

Where a party seeking exclusion under these provisions objects, the court may exclude evidence under these provisions. Where no objection is made, there is no general rule requiring a judge to act on their own motion to consider whether to reject evidence pursuant to s 137 (*FDP v R* (2008) 74 NSWLR 645; [2008] NSWCCA 317 at [27]–[30] (a case where the accused was legally represented, declining to follow *Steve v R* [2008] NSWCCA 231 at [60], preferring the views in *R v Reid* [1999] NSWCCA 258 at [3]–[5] and *Dhanhoa v R* (2003) 217 CLR 1; [2003] HCA 40 at [18]–[22], [53], [91]). See also *Samuels-Orunmwense v R* [2015] VSCA 152, at [35]).

However, in criminal proceedings there remains an obligation to intervene in appropriate cases to alert the parties to such issues (*R v Slack* [2003] NSWCCA 93 at [37]; *R v Lewis* [2003] NSWCCA 180 at [68]).

(vii) Onus

In practice, the party seeking exclusion or limitation of evidence bears the onus of proof in relation to the grounds of exclusion or limitation.

(viii) Warnings and limiting directions

The potentially mitigatory effects of a warning or limiting direction should be taken into account in considering whether to exclude evidence pursuant to ss 135 or 137 or to limit its use pursuant to s 136.

(ix) Appellate review

Appellate review of discretionary decisions pursuant to ss 135, 136, and 138 must accord with the principles enunciated in *House v King* (1936) 55 CLR 499 at 504–05; [1936] HCA 40. In contrast, the standard of review for decisions made under s 137 varies between interlocutory appeals and appeals from final decisions. In the case of an interlocutory appeal, the principles in *House v King* apply, while on an appeal from a final order, the court must decide for itself whether the decision was correct (see commentary under s 137).

Last updated: 26 July 2016

s 135 – General discretion to exclude evidence

The **court** may refuse to admit evidence if its **probative value** is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time; or

(d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

Note This section does not limit evidence of family violence that may be adduced under Part IC of the **Crimes Act 1958**.

General discretion to exclude evidence

1. Section 135 applies in both civil and criminal proceedings. It operates to exclude evidence that is logically probative and so satisfies s 55 (Relevant evidence) but insufficiently probative when considered against one or more of the following three policy concerns:
   - unfair prejudice to a party (s 135(1)(a));
   - it is misleading or confusing (s 135(1)(b)); or
   - it may cause or result in undue waste of time (s 135(1)(c)); or
   - it will unnecessarily demean the deceased in a criminal proceeding for a homicide offence (s 135(1)(d)).
2. Section 135 is not limited to excluding evidence which is otherwise admissible under Part 3 of the uniform evidence legislation. It may also apply to evidence otherwise admissible at common law (*Evans v R* (2007) 235 CLR 521; [2007] HCA 59 at [113] per Kirby J; at [225] per Heydon J).
3. The party seeking exclusion under s 135 bears a considerable onus, as they must demonstrate that the probative value of the evidence would be 'substantially' outweighed by the danger of its unfair prejudicial effect.

Procedure

4. In applying this provision, the court must:

   - assess the probative value of the evidence;
   - decide whether there is a risk that, if admitted, the evidence might have one or more of the identified consequences; and
   - determine whether the probative value of the evidence is substantially outweighed by the risks identified (see *Capital Securities XV Pty Ltd v Calleja* [20187] NSWCA 26, [115]).

5. As to whether the court may apply this provision on its own motion, see point (vi) under the heading *Sections 135 and 137 Compared* in the ***Introduction to this Part 3.11***.

The weighing exercise

6. In the weighing exercise (for ss 135 and 137), the court should consider the extent to which problems associated with admitting the evidence may be mitigated by actions other than exclusion, including limiting the use of the evidence or by appropriate jury directions (see ALRC 26:1 at [644]; ALRC 102 at [16.34]; *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 at [72], [74], [77] referring to *R v BD* (1997) 94 A Crim R 131 at 151 (Simpson and Adams JJ agreeing)).

Probative value

7. 'Probative value' is defined as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' (see UEA Dictionary). The meaning in s 135 is similar to that in the criminal context of s 137. The relevant commentary is detailed at s 137.

Substantially outweighed

8. The requirement that the specified dangers 'substantially outweigh' the probative value of evidence before that evidence might be excluded has been described as requiring that the probative value be 'well outweighed' by the prejudicial effect (*R v Clarke* [2001] NSWCCA 494 at [163] per Heydon JA (Dowd and Bell JJ agreeing)). That risk of danger must be more than one of mere possibility (*R v Lisoff* [1999] NSWCCA 364).

Unfairly prejudicial: s 135(a)

9. 'Unfair prejudice' has the same meaning in ss 135, 136 and 137 (*R v BD* (1997) 94 A Crim R 131 at 139; *Ainsworth v Burden* [2005] NSWCA 174 at [99] per Hunt CJ at CL (Handley and McColl JJ agreeing)). Relevant commentary is detailed at s 137.

10. However, under s 135 'unfair prejudice' may be accorded a wider scope than that provided by s 137 to ensure a fair trial for accused persons." (*R v Qaumi & Ors (No 24)* [2016] NSWSC 505 at [47]).

(i) Unfair prejudice in proceedings with judge alone

11. 'Unfair prejudice' most often arises when there is a risk that the tribunal of fact will misuse the evidence in some way. Thus 'unfair prejudice' is particularly relevant to jury trials, but not trials by judge sitting alone, where it would be unlikely for the judge to exclude evidence on the basis that they would misapply it (*Ordukaya v Hicks* [2000] NSWCA 180; *Ainsworth v Burden* [2005] NSWCA 174 at [99]; *Seven Network Ltd v News Ltd (No 8)* [2005] FCA 1348 at [21] per Sackville J; *ASIC v McDonald* [2008] NSWSC 995 at [12] per Gzell J; *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87 per Bell J at [63]).

(ii) Procedural unfairness

12. Despite early views that 'unfair prejudice' did not extend beyond misuse of evidence by the tribunal of fact to procedural unfairness, it is now generally accepted that procedural considerations may constitute unfair prejudice. Relevant commentary is detailed at s 137.

Misleading or confusing: s 135(b)

13. Section 135(b) is included in order to exclude evidence when there is a danger the jury will unduly focus on the evidence and accord it more significance than it deserves (see ALRC 26:1 at [644]). These concerns overlap with those addressed in s 135(a) (see paragraph 35 under the commentary on 'unfair prejudice' at s 137). It has been observed that, notwithstanding their separate listing, these categories need not be considered mutually exclusive (ALRC Discussion Paper 69 at [14.31]).

14. An example of evidence which can mislead or confuse is that of raw percentage results in DNA tests. Unqualified or unexplained percentage results can be misleading or confusing, as well as prejudicial (*R v GK* (2001) 53 NSWLR 317; [2001] NSWCCA 413; *R v Galli* [2001] NSWCCA 504 at [72]).

15. However, in Aytugrul v R [2010] NSWCCA 272, the majority limited those cases, stating that GK and Galli were not authority for the proposition that DNA percentage results must always be excluded under ss 135 or 137 (Aytugrul v R [2010] NSWCCA 272 at [196]).

16. The NSW Court of Criminal Appeal allowed the evidence to be presented as a percentage result. The High Court upheld that finding, unanimously holding that, presented as it was, the DNA exclusion percentage was not unfairly prejudicial (*Aytugrul v R* (2012) 247 CLR 170; [2012] HCA 15).

17. In *R v MK* [2012] NSWCCA 110, Beech-Jones J rejected a proposition that DNA evidence that was sought to be admitted in that case verged on being unreliable and meaningless. The Court noted that, following the decision in *Aytugrul v R*, it was incorrect to suggest that DNA evidence expressed in terms of an exclusion percentage was necessarily prejudicial, and that such evidence could be accurately explained to a jury in a manner which they were capable of understanding. The same also applied, and with even greater force, to DNA evidence expressed as a frequency ratio (*R v MK* [2012] NSWCCA 110 at [47] per Beech-Jones J (Hoeben JA and Hidden J agreeing).

18. Another example is *Reading v ABC* [2003] NSWSC 716 (ALRC Discussion Paper 69 at [14.30]). In this (defamation) case, in circumstances where an audio-visual record of the subject program existed, Shaw J excluded a transcript of a television program because it risked undue focus on words alone and removed them from their full, 'as-spoken' context, including tone, gesture, setting, etc.

19. It is highly unlikely that, in a trial before a judge alone, there will be a danger that evidence will be misleading or confusing. As Campbell J noted:

> There is something bizarre in submitting to a judge sitting alone that he or she should reject evidence on the ground that it might mislead or confuse him or her. I propose to trust myself, so far as that is concerned (*Re GHI (A protected person)* [2005] NSWSC 466 at [8]; cited with approval in *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35)* [2014] VSC 59 at [60]).

Cause or result in undue waste of time: s 135(c)

20. Given the breadth of the relevance test, this ground may be used to exclude needless duplication of evidence (*Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (2000) 100 FCR 90 at 107; [2000] FCA 876).

21. Because the evidence must not cause only a waste of time, but an 'undue' waste of time, the duplication must be clearly needless. Odgers observes that the tautology is to ensure a high threshold for exclusion under this ground – minimal probative value would not be sufficient but

it might 'if it added complexity without assisting resolution of the facts in issue' (Odgers, Thomson Reuters, *Uniform Evidence Law* (online at 10 September 2021), [EA.135.210]).

22. Further, it is not sufficient for time to be 'taken'; it must be 'wasted'.

23. The reference to 'undue' also means it is relevant for the court to consider the importance of the evidence in the context of the case (ALRC 26:1 at [644], fn 9).

24. Odgers lists a range of factors that may provide context for considering whether particular evidence is an 'undue waste' of time. These include:

- whether the evidence has/may have incremental value;
- whether it is needlessly duplicative;
- what value the evidence has for the jurors;
- whether admission of the evidence will require other evidence to be admitted to evaluate it; and
- whether exclusion might result in inappropriate jury speculation (see Odgers, Thomson Reuters, *Uniform Evidence Law* (online at 10 September 2021), [EA.135.210])

25. In *Matthews v SPI Electricity & Ors (Ruling No 21)* [2013] VSC 219, counsel for the plaintiff sought to tender 18 audit reports. The Court rejected the tender of these reports on the basis that, if the reports were tendered, the potential cost and delay to the trial caused by their tender was so great that it clearly outweighed the probative value of the reports (*Matthews v SPI Electricity & Ors (Ruling No 21)* [2013] VSC 219).

26. In reaching this conclusion, J Forrest J noted:

> [T]hat the probative value of the reports as a group is insignificant … the audits are irrelevant to the Valley Span and its inspections by USC. Insofar as they establish the underlying material for proving an asserted systemic problem with inspections of pole top assets, the audit summaries demonstrate that point. The only remaining point … is whether any of the particular inspections were indicative of inspector recidivism in relation to pole top inspections. That issue can be resolved without the tender of the reports at this point of time. It is known that a number of employees of SPI and USC will be called who have a familiarity with the auditing system and its application in the field; undoubtedly, they can be questioned as to the number of inspectors who repeatedly failed the pole top inspection aspect of the audit (*Matthews v SPI Electricity & Ors (Ruling No 21)* [2013] VSC 219 at [21]).

(i) Adjournment

27. The issue of adjournment was considered in *Dyldam Developments Party Ltd v Jones* [2008] NSWCA 56. On the penultimate day of the trial, the appellant produced evidence that should have been produced 12 months earlier. The dilemma for the trial judge was that the probative value of the evidence was unknown – to admit untested evidence could be to admit unfairly prejudicial material and/or evidence of little probative value; but if an adjournment were granted to test it then this would result in a substantial delay caused by the flagrant misconduct of one party. The Court of Appeal found that, in all of the circumstances, the trial judge was 'entitled to give considerable weight to this waste of time' (at [50]–[51] per Hodgson JA (Giles and Basten JJA agreeing)).

(ii) Examples

28. Expert evidence about a matter which is known to all would, although admissible, normally be a waste of time and excluded pursuant to s 135 (*Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 159 FCR 397; [2007] FCAFC 70 at [55]).

29. In *R v Taylor* [2003] NSWCCA 194, Bell J approved the trial judge's exclusion of evidence under s 135 (at [12]–[13] (Spigelman CJ and Miles AJ agreeing)). Her Honour had considered the fact that

there was other evidence to prove the same matter, and that admitting the evidence would result in an already lengthy cross-examination being further prolonged and further evidence being called.

30. *R v Smith* [2000] NSWCCA 388 was an appeal seeking a new trial on the basis of fresh (expert opinion) evidence. Smart AJ noted'[t]he research would have to be investigated and evaluated and tests may have to be conducted' and then the jury would still have to assess the identification in issue. His Honour held that the relevant points had been put before the jury and the evidence should be excluded (at [69]–[70] (Foster AJA and Dunford J agreeing)).

Unnecessarily demean the deceased: s 135(d)

31. Subsection 135(d) was introduced in order to exclude evidence that unnecessarily demeans a deceased victim. It applies only to criminal proceedings involving a homicide offence. It is in response to the reality that a deceased victim is absent from court and unable to respond to attacks against their character.

32. The provision is not intended to exclude evidence that is admitted for a legitimate forensic reason: Explanatory Memorandum to the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, clause 9. It does not limit evidence of family violence that may be adduced under Part IC of the *Crimes Act 1958*.

33. Subsection 135(d) applies to all trials commencing from 1 November 2014, regardless of when the alleged offence occurred.

Appellate review

34. A discretionary decision by a trial judge to exclude evidence under s 135 would, on appeal, be reviewed on the basis of the ordinary rules in relation to discretionary decisions as stated in *House v The King* (1936) 55 CLR 499 at 504–5; [1936] HCA 40 (*Collaroy Services Beach Club Ltd v Haywood* [2007] NSWCA 21 at [49]; *Insurance Australia Limited t/as NRMA Insurance v John Checchia* (2011) 80 NSWLR 1; [2011] NSWCA 101 at [179]).

Last updated: 10 September 2021

s 136 – General discretion to limit use of evidence

> The **court** may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing.

General discretion to limit use of evidence

1. Section 136 applies in both civil and criminal proceedings. It permits a court to limit the use of evidence that is relevant for more than one purpose if there is a danger a particular use might be:
   - unfairly prejudicial to a party (s 136(a)); or
   - misleading or confusing (s 136(b)).
2. The provision can be used to overcome the prejudicial effect of evidence to the extent the probative value is no longer outweighed by the danger of unfair prejudice (s 137) or substantially outweighed by that danger (s 135).

3. The language of s 136 implicitly acknowledges that, because the use of the evidence in question will be restricted in some particular way, the evidence will be admitted into evidence, and will properly be able to be used in some other permissible way. Thus, 'limiting' evidence by, for example, redacting an admissible transcript, would involve excluding admissible evidence and so be a misconceived use of s 136. In such a case, the proper approach is to invoke the discretion in either s 135 or s 137 (see e.g., *L'Estrange v R* [2011] NSWCCA 89, at [69]–[71]).

Application in general

4. Section 136 requires discretionary judgment in each case. It does not offer any guidance as to the weight to be afforded to evidence, including expert evidence (*Commissioner of Police v Brady* [2004] NSWCA 98 at [14] per Beazley JA (Sheller and Bryson JJA agreeing)).

5. In *Shanker v The Queen* [2018] VSCA 94 at [103]–[104], the court implied that, if a previous representation was admissible for a hearsay purpose, but not solely under s 60, that would militate against making a limiting order under s 136.

6. The Court also indicated at [103] –[104] that, in considering whether to make a limiting order under s 136, it was permissible to have regard to credibility issues (in that instance, the risk of fabrication).

7. Presumably, consideration of credibility issues informs the assessment of the danger of unfair prejudice, in terms of the risk of the jury overvaluing the evidence if they are permitted to use it for a hearsay purpose as well as non hearsay purpose.

8. The High Court rejected the suggestion that in a category of cases (namely, complaint evidence in sexual assault cases) a direction under s 136 should be made as a matter of course. The Court reasoned that, while the facts and circumstances of a particular case may enliven the discretion, such a general rule would subvert the policy of the legislation (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [39]–[40] per Gleeson CJ and Hayne J; at [74] per McHugh J).

9. The court should consider the extent to which the dangers of a particular use may be reduced by other action – such as, in a jury trial, directions regarding the permissible and impermissible use/s of the evidence, or warnings about the potential unreliability of the evidence. The court may also balance this against the difficulty of the jury properly applying a limited use direction, especially in relation to hearsay evidence (*Schanker v The Queen* [2018] VSCA 94, [108]–[110]).

10. Section 136 will be more readily exercised to limit the use of otherwise admissible evidence when there is a jury. This is because a judge sitting alone will mitigate the danger of unfairness – e.g., a judge will attribute less weight to hearsay evidence which remains untested by cross-examination (*Seven Network Ltd v News Ltd (No 8)* [2005] FCA 1348 at [21] per Sackville J).

Need for direction

11. When s 136 is enlivened to restrict a particular use of evidence because of the risk of unfair prejudice, a strong jury direction with respect to the limited use to which the evidence may be put should be given both at the time of the tender and in the summing up (*Ainsworth v Burden* [2005] NSWCA 174 at [103] per Hunt AJA (Handley and McColl JJA agreeing)).

12. If such direction cannot overcome the danger of unfair prejudice, the evidence should be excluded altogether.

'… if there is a *danger* that a particular use of the evidence *might*'

13. The court 'does not have to be satisfied that a particular use of evidence *will* be unfairly prejudicial,' but only that the there is a *danger* that it *might* be (Seven *Network Ltd v News Ltd (No 8)* [2005] FCA 1348 at [16] per Sackville J).

‘Unfairly prejudicial’: s 136(a)

14. ‘Unfair prejudice’ has the same meaning in s 136 as in ss 135 and 137 (*R v BD* (1997) 94 A Crim R 131 at 139). Unlike ss 135 and 137, however, s 136 does not require a balancing test. Relevant commentary is detailed at s 137.

‘Misleading or confusing’: s 136(b)

15. ‘Misleading or confusing’ is substantially the same concept in s 136 as in s 135, and relevant commentary is provided at s 135. The exercise of the discretion in s 136 will be affected by the fact that it relates to the limited use of evidence, whereas s 135 relates to exclusion.

Evidence admitted as an exception to an exclusionary rule

16. The uniform evidence legislation exclusionary rules apply to evidence sought to be used in a particular way. However, ss 60 and 77 operate to exclude the application of the hearsay and opinion rules in respect of evidence which is relevant and admitted for another purpose.

17. In this way, evidence may be used for a purpose for which it would otherwise be inadmissible. Where this is the case, s 136 may be utilised to limit the use of the evidence in one or more ways, provided that the terms of the section are satisfied.

18. While s 136 is available to limit the use of evidence, where s 60 or s 77 is enlivened, s 136 should not be routinely utilised to limit the use of the evidence and thereby undermine the policy intent which underpins s 60 or s 77 respectively (*Seven Network Ltd v News Ltd* (No 8) [2005] FCA 1348 at [21] per Sackville J).

19. Rather, where a party seeks to apply s 136 to evidence which is otherwise prima facie admissible under the Act, a court should be satisfied ‘there is a good and substantial reason to depart from the policy’ of the Act (*Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 654 at [18] per Barrett J).

20. Where s 136 might be exercised in response to the application of ss 60 or 77, Odgers notes that ‘the considerations that found the general rule of inadmissibility’ (i.e., the reasons why the evidence could not be used but for ss 60 or 77) are particularly relevant to determining whether the discretion under s 136 should be exercised.

21. In cases where it is suggested that the use that may be made of a prior consistent statement be limited to credibility, pursuant to s 136, it is important that the preconditions to admissibility of credibility evidence under s 108(3)(b) and s 192 are not circumvented. Among them will be the capacity of the statement to respond to the attack made on the complainant’s credibility (*ISJ v R* (2012) 38 VR 23; [2012] VSCA 321 at [67]).

22. Ultimately:

> Whatever the gateway by which the evidence is sought to be admitted, once the trial judge has under consideration limiting the use of the evidence to credit, the judge should be satisfied that the preconditions laid down under the Act are satisfied (*ISJ v R* (2012) 38 VR 23; [2012] VSCA 321 at [67]).

(i) Under section 60

23. The policy for s 60 recognises the difficulty under the old law that evidence admitted for a non-hearsay purpose could not be used for a hearsay purpose, even though the evidence was also relevant for that latter purpose.

24. Consistently with that recognition, the two major areas where the interaction between s 60 and s 136 has been considered are:

- prior representations (consistent and inconsistent) tendered in relation to credibility, and
- previous representations admitted to show the factual basis of an expert’s opinion.

Hearsay evidence relevant to the credibility of a witness

25. Evidence of a previous representation may be relevant to a witness' credibility. If such evidence is admitted as an exception to the credibility rule in Part 3.7, s 60 will operate to allow the evidence to be used for a relevant hearsay purpose, unless s 136 is invoked to prohibit that use.

26. A warning under s 165 (or *Jury Directions Act 2015* s 32) should, ordinarily, be sufficient to alert the jury to the dangers of hearsay evidence. For that reason, s 136 should be invoked only in cases where the danger could not be cured by such a warning (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [94] per McHugh J citing *R v BD* (1997) 94 A Crim R 131 at 139–40 per Hunt CJ at CL; 151 per Bruce J).

27. In *Papakosmas*, McHugh J considered (sexual assault) complaint evidence that was relevant for its hearsay purpose and for its credibility purpose. He noted that a judge would be more likely to limit such evidence to its credibility use, where it has been admitted as an exception to the credibility rule, as opposed to when it has been admitted as an exception to the hearsay rule. Nevertheless, he also noted that s 136 should still not be applied as a matter of course or where the dangers of unfair prejudice to a party can be corrected by a warning (*Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [94]; see also *ISJ v R* (2012) 38 VR 23; [2012] VSCA 321 at [57]–[61]).

28. In another case, it was held that statements by a complainant to the police and an examining doctor about a sexual assault shortly after the events in issue should have been permitted to be used as evidence of their truth (*Thorne v R* [2007] NSWCCA 10 at [41] per Howie J (Sully and Hall JJ agreeing)).

Hearsay evidence relevant to show the basis of expert opinion

29. Under s 60, out-of-court representations of fact which are admitted to prove the basis of an opinion may also be used to prove the existence of those facts, unless otherwise limited by s 136.

30. Where the operation of s 60 would cause unfair prejudice, it may be appropriate to limit the use of the evidence to testing the basis of the specialised knowledge of the expert to whom the communications were made. Matters to be considered include:

- whether the maker of the representation is to be called to give evidence and whether the other party has had a real opportunity to test the accuracy of the facts asserted (*Daniel v State of Western Australia* [2001] FCA 223 per Nicholson J);
- the circumstances in which the representations were made;
- the character of the representations (*Daniel v State of Western Australia* [2001] FCA 223 per Nicholson J);
- whether the representations were within the personal knowledge of the maker (*ASIC v Rich* [2005] NSWSC 149 at [262] per Austin J);
- the likelihood or otherwise that the representations have been fabricated; and
- compliance with the expert witness guidelines of the court (refer s 79).

(ii) Under section 77

31. Section 77 (Exception – evidence relevant otherwise than as opinion evidence) may apply when, in the course of the events in issue, a person expresses an opinion that is relevant for other purposes (e.g., to show another person's response to what was said).

32. When evidence is led for other purposes and it contains opinion evidence, s 136 may be applied to limit the use of the evidence to the parameters set by s 76 (The opinion rule).

Appellate review

33. Appellate review of a trial judge's decision under s 136 occurs on the basis of the ordinary rules in relation to discretionary decisions, as stated in *House v R* (1936) 55 CLR 499 at 504–5; [1936] HCA 40 (*South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 at [133] per McColl JA; *GBF v R* [2010] VSCA 135 at [61]–[62]).

Last updated: 10 September 2021

s 137 – Exclusion of prejudicial evidence in criminal proceedings

> In a **criminal proceeding**, the **court** must refuse to admit evidence adduced by the **prosecutor** if its **probative value** is outweighed by the danger of unfair prejudice to the accused.

Exclusion of prejudicial evidence in criminal proceedings

1. Section 137 applies only to evidence adduced by the prosecution in criminal proceedings. A court must refuse to admit such evidence if its probative value is outweighed by the danger of unfair prejudice to the accused.

Procedure

2. A judge must first ascertain that an item of evidence is relevant in accordance with s 55 and consider whether any of the exclusionary rules applies (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [37]–[41]).

3. Then, if the evidence is relevant and not otherwise inadmissible and objection is taken, s 137 requires the court to undertake a balancing exercise between the probative value of the evidence and the 'danger of unfair prejudice' to the accused.

4. This balancing exercise requires the judge to separately assess the probative value of the evidence, followed by the danger of unfair prejudice, before weighing these two matters (*Marsh v R* [2015] NSWCCA 154 at [72]; *R v Burton* [2013] NSWCCA 335 at [134], [182]).

5. In undertaking this evaluation of probative value, the High Court majority in *IMM* (French CJ, Kiefel, Bell and Keane JJ) explained:

> The enquiry for the purposes of s 55 is whether the evidence is capable of the effect described at all. The enquiry for the purposes of determining the probative value of evidence is as to the extent of that possible effect. But the point is that in both cases the enquiry is essentially the same; it is as to how the evidence might affect findings of fact. An assessment of the extent of the probative value of the evidence takes that enquiry further, but it remains an enquiry as to the probative nature of the evidence. The assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [43]–[44]).

6. This exercise itself requires a clear identification of what "fact in issue" the evidence is relevant to prove, as that identifies the subject matter of the probative value of the evidence (R v Burton [2013] NSWCCA 335 at [148]).

7. The majority in *IMM v R* (French CJ, Kiefel, Bell and Keane JJ) stated that:

> The use of the term "probative value" and the word "extent" in its definition rest upon the premise that relevant evidence can rationally affect the assessment of the probability of the existence of a fact in issue to different degrees. Taken by itself, the evidence may, if accepted, support an inference to a high degree of probability that

> the fact in issue exists. On the other hand, it may only, as in the case of circumstantial evidence, strengthen that inference, when considered in conjunction with other evidence. The evidence, if accepted, may establish a sufficient condition for the existence of the fact in issue or only a necessary condition. The ways in which evidence, if accepted, could affect the assessment of the probability of the existence of a fact in issue are various. Within the framework imposed by the statute and, in particular, the assumption that the evidence is accepted, the determination of probative value is a matter for the judge (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [45]).

(i) Mandatory exclusion

8. Notwithstanding this application of judgment, it has been said that the application of s 137 is not a discretion (*Em v R* (2007) 232 CLR 67; [2007] HCA 46 at [95], [102] per Gummow and Hayne JJ).

(ii) Acting on own motion

9. In *Steve v R* [2008] NSWCCA 231 (in which case the accused was represented at trial), s 137 was interpreted to require a trial judge to exclude evidence when its probative value is outweighed by the danger of unfair prejudice, notwithstanding that no objection has been taken to the evidence during the trial.

10. This decision was subsequently considered but not followed in a criminal trial where the accused was represented (*FDP v R* (2008) 74 NSWLR 645; [2008] NSWCCA 317 at [21]–[30]). The Court reviewed the decisions and noted the interpretation of s 137 in *Steve v R* was not strictly necessary for the decision. There remains an obligation to alert the parties in appropriate cases. See point (vi) under the heading *Sections 135 and 137 Compared* to the Introduction to this Part 3.11.

(iii) Onus

11. The accused bears the onus to persuade a trial judge that the danger of unfair prejudice from the evidence outweighs its probative value (*R v Polkinghorne* [1999] NSWSC 704 per Levine J; *Gilmour v EPA; Tableland Topdressing v EPA* (2002) 55 NSWLR 593; [2002] NSWCCA 399 at [46]; *R v DG; DG v R* (2010) 28 VR 127; [2010] VSCA 173 per Buchanan, Weinberg and Bongiorno JJA at [52]–[54]; *Kuehne v R* [2011] NSWCCA 101 at [21] per Hislop J (McColl JA and RS Hulme J agreeing)).

The weighing exercise

12. Courts have noted that the weighing exercise is difficult because it requires incommensurables for which there is no standard of comparison to be balanced – probative value goes to proof of issue, and prejudicial effect goes to fairness of the trial and, in criminal trials, to the risk of the misuse of the evidence by the jury (*Pfennig v R* (1995) 182 CLR 461; [1995] HCA 7 per McHugh J in respect of propensity evidence at [39]; *R v DG; DG v R* (2010) 28 VR 127; [2010] VSCA 173 per Buchanan, Weinberg and Bongiorno JJA at [51]).

13. In the weighing exercise (for ss 135 and 137), the court should consider the extent to which the problems of admitting the evidence may be mitigated by actions other than exclusion – for example, by limiting the use of the evidence under s 136 or by jury directions (see ALRC 26:1 at [644]; ALRC 102 at [16.34]; *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 at [72], [74], [77] referring to *R v BD* (1997) 94 A Crim R 131 at 151 (Simpson and Adams JJ agreeing); *DPP (NSW) v JG* [2010] NSWCCA 222 at [115]).

Probative value

(i) Definition

14. 'Probative value' is defined in the UEA Dictionary as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.

15. The meaning of 'probative value' must be assessed in its legal and factual context. The:

> factors to be taken into account in determining whether a piece of evidence has the requisite degree of probative value or results in a degree of unfair prejudice will vary depending on the type of evidence and the context in which it is sought to be adduced (ALRC 102 at [3.31]).

16. That is, the probative value of evidence varies according to the fact in issue which it is being used to prove and the reasoning relied on to prove that fact. For this reason, it has been described as a 'floating standard' (especially with respect to credibility, tendency and/or coincidence evidence, which work to relate to other evidence rather than being directly associated with a fact in issue) (see ALRC 102 at [3.31], [3.35]).

17. The definition uses concepts similar to those used in the test for relevance – namely, whether the evidence 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding' (s 55)) – but it is expressed in terms of degree. Therefore, the probative value of evidence is assessed at least in part by reference to its degree of relevance to a fact in issue (*R v Lockyer* (1996) 89 A Crim R 457 at 459).

18. In assessing the probative value of evidence, the court must not consider the evidence in isolation. Evidence may support a conclusion by itself to a high degree, or may strengthen an inference when considered in conjunction with other evidence (*IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14, [45]; *DPP v Wearn* [2018] VSCA 39, [48]).

19. For example, in *R v ST* [2022] VSC 450, Taylor J considered the probative value of DNA evidence found on a knife which was highly likely used to stab the deceased. Surrounding evidence showed that there were 10 people in the group that might have handled the knife. DNA evidence appeared to exclude 8 of those people, and there was nothing to suggest that one of the remaining people had inflicted the wound. The result was that the DNA evidence had moderate probative value, even though the likelihood ratio was very low (at [86], [92]).

20. The probative value of evidence must be distinguished from the importance of the evidence. Evidence may be important, in the sense that it is tendered to prove an important fact in the party's case, and there is no other evidence to prove that fact, while lacking probative value (*Volpe v The Queen* [2020] VSCA 268, [70]).

(ii) Notions of reliability and credibility

21. For the purpose of assessing probative value under s 137, the general rule is that the court must assume the evidence is accepted as credible and reliable. The Court must take the evidence at its highest and consider the extent to which the evidence can affect the probability of the existence of the facts in issue (*IMM v The Queen* (2016) 257 CLR 300, [48]–[49]; *The Queen v Bauer* (2018) 266 CLR 56, [95]).

22. There may, however, be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance (*IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14, [39]).

23. Further, as the majority in *IMM* noted "the circumstances surrounding the evidence may indicate that its highest level is not very high at all" (*IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14, [50]. See also *DPP v Lyons & Lyons (Ruling No 3)* [2018] VSC 224, [47]).

24. The rule of taking evidence at its highest was reiterated in the unanimous judgment in *R v Bauer* (2018) 266 CLR 56 at [95]:

> [I]t is not for a trial judge to say what probative value a jury should give to evidence but only what probative value the jury acting rationally and properly directed could give to the evidence. Hence, unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value of the evidence must be assessed, for the purposes of s 137, at its highest

25. Prior to *IMM* several associated issues were identified as potentially affecting the assessment of probative value. These were:

- where the issues of credibility and reliability are so fraught that it would not be open for the jury to rationally use the evidence (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [39]; *PG v R* [2010] VSCA 289 at [62]). Post-*IMM*, it is clear that in extreme cases, issues of credibility or reliability may deprive evidence of probative value;
- the possibility of joint concoction (see *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [59] and compare *BSJ v R* (2012) 35 VR 475; [2012] VSCA 93; *AE v R* [2008] NSWCCA 52; *PNJ v DPP* (2010) 27 VR 146; [2010] VSCA 88). Post-*Bauer*, the risk of joint concoction is relevant only if the risk is so great that it would not be open to the jury, acting rationally, to accept the evidence (*R v Bauer* (2018) 266 CLR 56, [69]);
- where the evidence is disputed (*AE v R* [2008] NSWCCA 52 at [44]; see also *Dupas v The Queen* (2012) 40 VR 182; [2012] VSCA 328 at [165]). Post-IMM the better view is that it is immaterial that the evidence is disputed. Instead, one applies the general rule and assumes the evidence is credible and reliable, unless one of the two exceptions identified above apply (inherently incredible or fanciful evidence, or where the surrounding circumstances indicate the highest level is not very high at all); and
- competing inferences arising from the evidence and alternative explanations for conduct exist (*DSJ v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [78]; see also *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [169]–[172]). In Bauer, the High Court held that competing inferences are significant only in determining whether the evidence can rationally affect the assessment of the probability of a fact in issue and that this must be done by taking the evidence at its highest (*R v Bauer* (2018) 266 CLR 56, [69]).

Reliability, credibility and identification evidence; assessing probative value

26. In the course of the decision in *IMM* the majority considered an example of identification evidence given by JD Heydon QC where the identification was made "briefly in foggy conditions and in bad light by a witness who did not know the person identified". The majority stated:

> As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence ([50]. See also *Bayley v The Queen* [2016] VSCA 160, [51]–[55]).

27. The focus of the 'foggy night' example is on the circumstances in which the witness was able to observe the other person, and the nature of the identification which the witness performed. The nature of the identification process includes factors such as the weaknesses inherent in photoboard identification, and the witness' expressed level of confidence in the identification, and whether the witness asserted that the person identified was, or merely looked like, the alleged offender. However, a reluctance to participate in the identification process is a matter of credibility or reliability that is not relevant for the purpose of s 137 (*Dempsey v The Queen* [2019] VSCA 224, [127]–[131]. See also *R v Dickman* (2017) 261 CLR 601, [43]).

28. Cases have taken different approaches to the significance of previous mistaken identifications by the witness. In *R v Dickman*, the High Court accepted that the fact that the witness had

identified a different person was relevant to the probative value of the identification evidence. Similarly, in *Fowkes v The King*, the fact that a third party has told the witness the name of the accused, and invited them to look up the accused on Facebook was held relevant to the probative value of the evidence. In contrast, in *DPP v Wearn*, the Court of Appeal held that a witness' history of failing to identify the accused for over 20 years (including twice failing to identify the accused at identification parades, giving evidence at committal hearing that he did not know who the attacker was, and the matter attracted substantial media publicity and a sizeable reward, before ultimately saying that the accused was the attacker and previous statements were false and a product of fear of reprisals), were matters of credibility or reliability which were irrelevant when assessing probative value for the purpose of s 137 (*R v Dickman* (2017) 261 CLR 601, [43]; *Fowkes v The King* [2023] VSCA 160; *DPP v Wearn* [2018] VSCA 39, [26]–[28]).

29. It has been suggested that the 'foggy night' example recognises an exception to the general principle of taking the witness' evidence at its highest which applies to 'the particular circumstances of the witness and to his or her perception of the matter to which the evidence relates' (*Snyder v The Queen* [2021] VSCA 96, [62]–[63]). This may mean that the obligation to assume the witness is accepted as credible and reliable does not apply where the suggested weakness arises from the witness' capacity to observe. In contrast, weaknesses that are relevant to the nature or quality of the witness' memory require the court to assume the witness is accepted as credible and reliable.

Reliability, credibility and previous representations – assessing probative value.

30. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the majority considered the probative value of the complainant's previous representation and concluded:

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant ([73]).

Reliability, credibility and tendency evidence-assessing probative value

31. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [61]–[63], the majority held that the complainant's account of an uncharged act did not have significant probative value because it came from the complainant and there were no special features to lend it support.

32. This approach was qualified in *R v Bauer* (2018) 266 CLR 56 as confined to cases where the uncharged act was remote in time and of significantly different gravity to the charged acts. Where the alleged offending occurred over a period, and the uncharged acts relate to conduct of a similar character that was committed at the same time, there is no need for special features before the evidence is significantly probative in relation to offences against that complainant ([48]–[62]).

33. See, further, ***s 97, s 98 – Civil and criminal proceedings: the tendency rule and the coincidence rule***.

Reliability and scientific evidence – assessing probative value

34. Assessment of the reliability of scientific evidence, such as evidence of validation studies, does not form part of the assessment of probative value for the purpose of s 137 (*Xie v The Queen* [2021] NSWCCA 1, [300]; *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14; C Maxwell, 'Preventing Miscarriages of Justice: The Reliability of Forensic Evidence and the Role of the Trial Judge as Gatekeeper (2019) 93(8) *Australia Law Journal* 642, 642–43).

35. However, the existence of competing explanations for the significance of certain evidence, where there is no basis on which to prefer one explanation over another, may allow the court to exclude such evidence due to the risk of unfair prejudice, or due to the evidence having no or minimal probative value (see, e.g., *Volpe v The Queen* [2020] VSCA 268, [70]–[79]; *DPP v Wise* [2016] VSCA 173, [54]–[71]; *DPP v Paulino* [2017] VSCA 38, [3]–[4], [98]–[104], [109]).

36. Whether the admission of supposedly unvalidated scientific evidence is capable of causing unfair prejudice for the purpose of s 137 is a matter that courts have mentioned, but not decided (see *Xie v The Queen* [2021] NSWCCA 1, [301]).

37. Further, evidence may be excluded as lacking probative value when it is so lacking in credibility or reliability that a properly instructed rational jury could not accept it (*R v Bauer* (2018) 266 CLR 56, [95]). This approach to the exclusionary rule provides a limited basis for a court to reject scientific evidence which is completely lacking reliability.

Reliability and hypnosis – assessing probative value

38. At common law, there were significant concerns about the reliability of evidence from witnesses who had undergone hypnosis. This concern was especially acute, and could lead to exclusion of evidence, where there was no record of what the witness could recall prior to the hypnosis, or where there was a significant discrepancy between the recollection of the witness before and after the hypnosis treatment. This concern also extended to the treatment known as EMDR (eye movement desensitisation and reprocessing) (see *R v Jenkyns* (1993) 32 NSWLR 712; *R v Tillott* (1995) 38 NSWLR 1; *R v McFelin* [1985] 2 NZLR 750; *Christophers v The Queen* (2000) 23 WAR 106).

39. Since the enactment of the Evidence Act, courts have affirmed that hypnotically affected or recovered memory can be inadmissible, but much depends on the circumstances (see *DPP v JG* [2010] NSWCCA 222; *Kassab v The Queen* [2021] NSWCCA 46, [295]–[314]).

Danger of unfair prejudice

(i) Meaning of 'unfair prejudice'

40. 'Unfair prejudice' is not defined in the Act. ALRC 26:1 indicates it is intended to cover evidence which could introduce adverse and 'irrational' considerations or cause jurors to accord other evidence more probative value than it deserves (at [644]).

41. Subsequent consideration of whether to provide a legislative definition led the Commissions to conclude that to do so risks narrowing the grounds of exclusion under ss 135 and 137 and thereby fettering the application of the sections (ALRC Discussion Paper 69 at [14.47], [14.60]).

42. Part 3.11 requires not 'prejudice' but 'unfair prejudice'. Unfair prejudice will arise if there is real risk it 'will be misused by the jury in some unfair way' (*R v BD* (1997) 94 A Crim R 131 at 139 per Hunt CJ at CL; approved in *Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37 at [91] per McHugh J). This is consistent with the approach taken at common law (*Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [175]).

43. Circumstances in which concerns regarding 'unfair prejudice' may arise include where there is a danger that the jury will misjudge the weight to be given to particular evidence or engage in an illegitimate form of reasoning because, for example, of the prejudicial impact of evidence of other criminal acts. The risk of unfair prejudice can also arise where there is an inability to test the evidence, or where the evidence will be incomplete (*Norris v The Queen* [2018] VSCA 137, [45]; *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [175], citing *R v Darmody* (2010) 25 VR 209; [2010] VSCA 41; *DPP (NSW) v JG* [2010] NSWCCA 222 at 121 per Basten JA; *DPP v Kerr* [2015] VSC 65 at [17]; *Addenbrooke Pty Ltd v Duncan (No 5)* [2014] FCA 625, [102]).

44. Evidence will not be unfairly prejudicial merely because it increases the likelihood of an accused person being convicted (see, e.g., *FMJ v R* [2011] VSCA 308 at [56] per Weinberg JA (Hansen JA and Beach AJA agreeing); *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [175]).

45. While considerations of reliability generally form no part of the assessment of probative value, it is unclear whether reliability considerations are relevant to assessing the danger of unfair prejudice. This matter has not been clearly resolved following *IMM* (see *IMM v The Queen* (2016) 257 CLR 300, [57]–[58]; *Xie v The Queen* [2021] NSWCCA 1, [301]).

(ii) 'The danger'

46. The danger cannot be merely a risk or a possibility – there must be a real danger of unfair prejudice arising in the event that the evidence is admitted. There 'must be a real risk that the evidence will be misused by the jury in some way and that that risk will exist notwithstanding proper directions' (*R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 at [72] per Spigelman CJ; *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [175]).

47. In *Papakosmas v R* (1999) 196 CLR 297; [1999] HCA 37, the Court emphasised that the mere fact that evidence would not have been admissible at common law does not create unfair prejudice of itself.

(iii) Procedural unfairness

48. It has been readily accepted in Victoria that procedural considerations may constitute unfair prejudice (*R v Darmody* (2010) 25 VR 209; [2010] VSCA 41, [45]; *DPP v Curran (Ruling No 1)* [2011] VSC 279, [53]).

49. One form of procedural unfairness of note is an inability to test evidence because it would require disclosing irrelevant and prejudicial information about the accused. This can include evidence of family violence which might give a motive to fabricate evidence (*East v The King* [2022] VSCA 214, [59]), a history of criminal association which might taint an identification exercise (*Wilson v The King* [2022] VSCA 261, [111]–[120]), or an inability to explore the circumstances of an identification where those circumstances indicate the identification was heavily compromised (*Moreno v The King* [2023] VSCA 98, [103]–[104]).

50. However, unfair prejudice is not so wide as to cover all notions of an unfair trial. Evidence may fall between the protections of ss 90, 137 and 138 and yet admission of such evidence may give rise to a risk of an unfair trial. In such circumstances, the court has a residual common law discretion to exclude evidence in order to ensure a fair trial (*Haddara v R* (2014) 43 VR 53; [2014] VSCA 100; see also *Police v Dunstall* (2015) 256 CLR 403; [2015] HCA 26 and ***s 11 - General powers of a court***). Examples of such evidence may include the use of an accused's statements in a record of interview for the purpose of voice comparison, where the accused did not have the intellectual capacity to exercise the right to silence (*Haddara v R* (2014) 43 VR 53; [2014] VSCA 100) or evidence that controverts a previous acquittal (*Ulutui v R* (2014) 41 VR 676; [2014] VSCA 110).

Where hearsay evidence cannot be cross-examined

51. A degree of prejudice is inevitable where hearsay evidence cannot be cross-examined. However, an inability to cross-examine the maker of a hearsay statement is not of itself necessarily so unfairly prejudicial that it outweighs the probative value of the evidence, or makes the trial unfair (*Bray v R* (2014) 46 VR 623; [2014] VSCA 276; cited in *Fletcher v R* (2015) 45 VR 634; [2015] VSCA 146) [81]- [85]).

52. Thus an inability to cross-examine the maker of a hearsay statement does not of itself justify excluding the evidence (*Ordukaya v Hicks* [2000] NSWCA 180 at [38]–[41] per Sheller JA (Meagher JA concurring); *R v Sutekski* (2002) 56 NSWLR 182; [2002] NSWCCA 509 at [126]–[127] per Wood CJ at CL).

53. Instead, each case must be determined on its facts, with regard to the nature of the evidence and extent to which the other party would be unfairly prejudiced by its admission (*R v Sutekski* (2002) 56 NSWLR 182; [2002] NSWCCA 509 at [126]–[127] per Wood CJ at CL; *Galvin v R* [2006] NSWCCA 66 at [40] per Howie J (McClelland CJ at CL and Latham J agreeing)).

54. In assessing the risk of unfair prejudice associated with hearsay evidence which cannot be cross-examined, the Court may take into account the extent to which cross-examination of other witnesses can assist in challenging the hearsay evidence (*R v Tai* (2016) 93 NSWLR 404; [2016] NSWCCA 207 at [44]–[45]).

55. The Full Federal Court has suggested that, in a limited range of cases, an inability to 'effectively' cross-examine may constitute unfair prejudice. However, the Court also suggested

that ordinary risks associated with cross-examination, including the possibility of helping an opponent make out their case, are simply strategic risks, and not forensic disadvantages (*La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [66]–[73]).

56. A related issue may arise where a witness gives evidence through a VARE recording, and then asserts an inability to remember the relevant facts at the time of trial. An inability to test the witness' evidence because of a purported loss of memory does not necessarily lead to exclusion, but must be assessed on the facts of the case (see *Solis v The Queen* [2018] VSCA 275, [86]–[91]; *R v Debresay (Ruling No 1)* [2016] VSC 487, [52]–[60]).

(iii) Other provisions to mitigate unfair prejudice

57. With respect to ss 137 and 135, the potential for unfair prejudice should be considered in the context of whether it could be mitigated by other action such as:

- limiting the way the evidence can be used (s 136) (see *TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46 at [47] per Gaudron J);
- a strong jury direction (*Jury Directions Act 2015* s 32) (see *Symss v R* [2003] NSWCCA 77; *R v BD* (1997) A Crim R 131; *R v Cook* [2004] NSWCCA 52; *Daniels v R* [2016] VSCA 291);
- limiting how the evidence is led, such as by providing a summary of events rather than detailed documentary evidence in proof of the event. However, care must be taken to ensure this mitigation does not lead to an incomplete or misleading picture of the evidence (see *Daniels v R* [2016] VSCA 291 at [37]–[38]).

58. When deciding whether jury directions can reduce the risk of unfair prejudice, courts operate on the theory that juries usually follow instructions (*Gilbert v The Queen* (2000) 201 CLR 414, [13], [31]). However, in some cases, the court may conclude that a real risk of misuse may remain despite any directions the judge might give. This may require the court to consider what probative value the jury could reasonably assign to the evidence and the risk that, notwithstanding appropriate warnings, the jury may give the evidence more weight than it should receive (*Dupas v The Queen* (2012) 40 VR 182; [2012] VSCA 328, [177]; *Ramaros v The Queen* [2018] VSCA 143, [27]; *R v Ibrahim* [2001] NSWCCA 72, [33]).

Appellate review

59. Section 137 requires a weighing process/evaluation, the outcome of which determines whether or not the evidence is admissible (i.e. the provision is not a discretion). The standard of appellate review of decisions under this section varies depending on whether the review is carried out on an interlocutory appeal or an appeal from a final decision.

60. In *R v Ford* [2009] NSWCCA 306, the NSW Court of Criminal Appeal held that where the facts have been established or are undisputed:

> an appellate court is in as good a position as the trial judge to make that particular decision and thus conclude that the trial judge was in error (*R v Ford* [2009] NSWCCA 306, citing *Warren v Coombes* (1979) 142 CLR 531 at 551; [1979] HCA 9).

61. This decision was upheld as correctly stating the approach to review of a decision on a final appeal in Victoria in *McCartney v R* (2012) 38 VR 1; [2012] VSCA 268 (see also *Riley v R* [2011] NSWCCA 238 at [161]–[162] per McClellan CJ at CL (Hoeben J and Grove AJ agreeing)).

62. However, where a decision under s 137 is challenged on an interlocutory appeal, the trial judge's evaluation must be reviewed in accordance with the principles from *House v The King* (*KJM v R (No 2)* (2011) 33 VR 11; [2011] VSCA 268; *DAO v R* (2011) 81 NSWLR 568; [2011] NSWCCA 63; see also *MA v R* (2011) 31 VR 203; [2011] VSCA 13; *Singh v R* (2011) 33 VR 1; [2011] VSCA 263).

Last updated: 15 December 2023

s 138 – Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained—

(a) improperly or in contravention of an **Australian law**; or

(b) in consequence of an impropriety or of a contravention of an **Australian law**—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an **admission** that was made during or in consequence of questioning, and evidence obtained in consequence of the **admission**, is taken to have been obtained improperly if the person conducting the questioning—

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an **admission**.

(3) Without limiting the matters that the **court** may take into account under subsection (1), it is to take into account—

(a) the **probative value** of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant **offence**, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a **court**) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an **Australian law**.

Note

> The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth.

Exclusion of illegally or improperly obtained evidence

1. Section 138 provides that, when an impropriety or contravention in obtaining evidence is established (in civil or criminal proceedings), the party adducing the evidence must persuade the court that the evidence ought still to be admitted.

2. The section applies to both evidence obtained improperly or in contravention of an Australian law and evidence obtained in consequence of an impropriety or of a contravention of an Australian law. The existence of a causal link between an earlier unlawful or improper act and later discovery of evidence will engage s 138. However, the strength of that causal connection can affect the weight of the public interest in not giving curial approval to unlawful conduct (*Kadir & Grech v The Queen* [2020] HCA 1, [40]–[41]).

3. Section 138 does not enact the American doctrine requiring exclusion of the 'fruit' of official illegality unless it was obtained 'by means sufficiently distinguishable to be purged of the primary taint'. Instead, it requires the court to engage in a balancing exercise to determine whether the public interest in admitting the evidence outweighs the public interest in excluding the evidence (*Kadir & Grech v The Queen* [2020] HCA 1, [40]).

Procedure

4. Section 138 requires a two-stage test. The court must:

   - first, determine whether the evidence sought to be adduced was, in fact, obtained improperly or illegally in the sense of ss 138(1)(a) or (b) – that is, whether the evidence was obtained by or in consequence of such contravention or impropriety; and, if so
   - decide whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way the particular evidence was obtained, having regard to the considerations in s 138(3) and any other relevant non-mandatory matters. Unless that question is answered affirmatively, the evidence must not be admitted (*R v Dalley* [2002] NSWCCA 284 at [16] per Simpson J (Spigelman CJ and Blanch AJ agreeing); see also *Parker v Comptroller-General of Customs* [2007] NSWCA 348 at [57]–[58] per Basten J (Mason P and Tobias JA agreeing); and *Employment Advocate v Williamson* (2001) 111 FCR 20; [2001] FCA 1164 at [78] per Branson J).

5. The qualified proscription 'the evidence is not to be admitted unless' indicates the importance of according appropriate weight to the effect of any impropriety or unlawfulness (*Parker v Comptroller-General of Customs* [2007] NSWCA 348 at [57]–[58] per Basten JA).

6. Because s 138 is not confined to criminal proceedings, the public interests which must be weighed as part of the discretion are broader than those recognised in *Bunning v Cross*:

   > The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally (*Kadir & Grech v The Queen* [2020] HCA 1, [13]).

7. However, in criminal proceedings where the evidence is the product of wrongdoing by a law enforcement agency, the balancing of public interests requires the court to consider the desirability of convicting wrongdoers and the undesirability of giving curial approval or encouragement to illegal conduct by those responsible for law enforcement (*Kadir & Grech v The Queen* [2020] HCA 1, [13]; *Bunning v Cross* (1978) 141 CLR 54).

Onus and burden of proof

8. The onus is:

- initially on the party seeking to exclude the evidence to establish that it falls within the terms of s 138 (*R v Coulstock* (1998) 99 A Crim R 143 at 147; *Willis v R* [2016] VSCA 176 at [111]–[116]);
- then, if that onus is met, the party seeking admission must persuade the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the circumstances in which it was obtained (see *Robinson v Woolworths* (2005) 64 NSWLR 612; [2005] NSWCCA 426 at [33] per Basten JA; see also *DPP v Marijancevic; DPP v Preece; DPP v Preece* (2011) 33 VR 440; [2011] VSCA 355 at [17]); *Gedeon v R* [2013] NSWCCA 257; *Wu & Phan v The Queen* [2020] VSCA 94, [45]).

9. In carrying out that balancing exercise, the court must take into consideration the criteria in s 138(3) (*Gedeon v R* [2013] NSWCCA 257 at [174] per Bathurst CJ (Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing)).

10. In *Parker v Comptroller-General of Customs* [2009] HCA 7, French CJ described the two stage onus as follows:

> The party seeking to exclude the evidence has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. There is thus a two stage process. The party seeking admission of the evidence has the burden of proof of facts relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained (at [28]).

11. The ALRC commented on the policy justification for the onus:

> policy considerations supporting the non-admission of the evidence suggest that, once the misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained (ALRC 26:1 at [964]).

12. The onus of proving illegality or impropriety is on the party objecting to the evidence even where the alleged illegality or impropriety is the breach of a statutory obligation, such as the police cautionary rules in ss 464A(2), 464A(3) and s 464G (*Willis v R* [2016] VSCA 176 at [111]–[116]).

13. The burden of proof is the balance of probabilities (ss 140, 142).

Subsection 138(1)

‘evidence that was obtained … improperly or [unlawfully] or, … in consequence of impropriety or an [illegality]’

(i) Causal connection

14. For s 138 to apply the evidence must have been obtained in one of the two proscribed ways and that proscribed conduct must have caused the evidence to be obtained (either directly or in consequence) (*R v Dalley* [2002] NSWCCA 284 at [86]; *R v Cornwell* (2003) 57 NSWLR 82; [2003] NSWSC 97 at [25]).

15. The causal connection may be direct or indirect. For example, A may come to the attention of police due to the illegal search of B. Evidence against A would then be obtained ‘in consequence of’ the illegal search, even if all the evidence against A was obtained properly (*Slater v The Queen* [2019] VSCA 213, [23]–[25]; *DPP v Kaba* (2014) 44 VR 526, [336]–[337]. See also *R (Cth) v Petroulias (No 8)* [2007] NSWSC 82, [25]).

16. The causal connection is usually established by asking whether the evidence would not have been obtained 'but for' the illegal or improper conduct (*Employment Advocate v Williamson* (2001) 111 FCR 20, [79]). However, the 'but for' test may not be appropriate where the illegal or improper conduct causes the commission of a subsequent offence (such as where a person resists arrest in response to an improper arrest). In that situation, questions of degree will arise as to whether the evidence of the subsequent offence is obtained 'in consequence of' the illegality or impropriety (see *DPP (NSW) v Carr* (2002) 127 A Crim R 151, [68]–[70]).

17. While the existence of a causal connection is a threshold requirement for engaging s 138, the strength of that causal connection may be relevant to the balancing exercise in deciding whether to admit or exclude the evidence. An attenuation of the causal connection is a factor in favour of admitting illegally or improperly obtained evidence. However, this does not involve laying down general rules for how the balancing exercise must be performed (*Slater v The Queen* [2019] VSCA 213, [44]–[46]; *Kadir & Grech v The Queen* [2020] HCA 1, [41]).

18. In *R v Haddad and Regalia* [2000] NSWCCA 351 at [72]–[76], the NSWCCA in obiter entertained the possibility of s 138 applying to evidence obtained before the relevant illegality or impropriety. In *Slater v The Queen* [2019] VSCA 213 at [54], the prosecution argued that the conduct of a particular investigating official which occurred after the evidence was obtained lacked a causal connection (because it post-dated the obtaining of the evidence) and so had no relevance. The Court noted the force of that argument, but found it inapplicable, as s 138 was engaged by earlier misconduct, and the Court held that a later impropriety can be relevant to the balancing exercise.

(ii) 'Improperly or in contravention'

19. 'Impropriety' is not defined under the uniform evidence legislation. Where the case involves police conduct, impropriety is determined by reference to minimum standards of acceptable police conduct (*Kadir & Grech v The Queen* [2020] HCA 1, [14]; *Ridgeway v The Queen* (1995) 184 CLR 19, 37).

20. In *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426 the majority noted that in the absence of a legislative definition of impropriety, the common law principles explained in *Ridgeway* should be applied. On this basis, establishing impropriety requires:

- firstly, identifying what, in a particular context, may be viewed as 'the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement'. While the Court considered what more could have been done by the officers it noted that "the fact that more could have been done is not the test".
- secondly, the conduct in question must not merely blur or contravene those standards in some minor respect, it must be 'quite inconsistent with' or 'clearly inconsistent with' those standards;
- thirdly, where entrapment is alleged, the concepts of 'harassment' and 'manipulation' suggest some level of encouragement, persuasion or importunity in relation to committing an offence (as opposed to mere 'opportunity' (*Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426 at [23], [46] per Basten JA).

21. The NSW court of Appeal noted these principles should inform the determination of what constitutes 'improperly' obtained evidence or 'impropriety' for the purposes of s 138. Where there is no unlawfulness on the part of any law enforcement officer, 'mere doubts' about the desirability or appropriateness of particular conduct will not be sufficient to demonstrate impropriety (*Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426 at [36]).

22. The Court also noted that *Ridgeway* refers to 'the public interest in the fair and proper exercise of law enforcement powers' and improper conduct of authorities rather than to unfairness to the accused (notwithstanding the fine line between these concepts) (*Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426).

23. In *R v Cornell* (2003) 57 NSWLR 82; [2003] NSWSC 97, Howie J observed:

> [n]ot every defect, inadequacy, or failing in an investigation should result in a finding

> that the section applies merely because it may be considered that, as a result of those defects, inadequacies or failings, the investigation was not properly conducted or that the police did not act properly in a particular respect. On the other hand, the terms of s 138(3)(e) … make it clear that the conduct need not necessarily be wilful or committed in bad faith or as an abuse of power' (*R v Cornell* (2003) 57 NSWLR 82; [2003] NSWSC 97 at [20]).

24. Although determining whether evidence has been improperly obtained does not depend on establishing intentional conduct or conscious impropriety, it will be relevant in assessing impropriety (*Director of Public Prosecutions v AM* [2006] NSWSC 348 at [38]–[40] per Hall J).

25. There may also be a fine line between impropriety and an acceptable degree of 'deception and trickery' (see *R v Swaffield; Pavic v R* (1998) 192 CLR 159; [1998] HCA 1 (citing *Ridgeway*)).

26. The right to silence will be infringed only when it was another person who caused the accused to make the statement and when that other person was acting as an agent of the State at the time the accused made the statement (*Pavitt v R* [2007] NSWCCA 88 at [70]).

(iii) Illegal conduct

27. Whether this arm of s 138 is enlivened requires discrete consideration of whether the conduct is illegal under other law, often with respect to legislation on such matters as warrants, arrests, searches and surveillance.

28. In *R v Ladocki* [2004] NSWCCA 336, Mason P held that not every act done in breach of the *Law Enforcement (Controlled Operations) Act 1997* (NSW) (enacted to overcome *Ridgeway*, 'the LECO Act') (or its Code of Conduct) means a particular Authority under the *LECO Act* is invalid (*R v Ladocki* [2004] NSWCCA 336 at [59] (Sully and Sperling JJ agreeing)).

29. If a particular Authority is invalid, then the shield of the *LECO Act* is removed, which may enliven s 138 but only to the extent that substantive evidence sought to be adduced by the Crown is obtained illegally or improperly (*R v Ladocki* [2004] NSWCCA 336 at [52]).

30. In *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120; [2008] HCA 43 (at [46]–[58]), the High Court did not make a finding with respect to s 138, but did note the scope for its operation diminishes when the LECO Act is complied with and increased when there is non-compliance (at [12]).

'is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way the evidence was obtained'

(i) 'desirability'

31. ALRC 26:1 at [958] identifies two public interests which support admission of improperly obtained evidence:

> Public Interests Supporting Admission: There is a public interest that reliable evidence of an accused person's guilt be admitted into the trial and considered by the tribunal of fact. This interest may be seen from two different perspectives:
> • Accurate Fact Determination. There is a public interest in accurate determination of facts in criminal (as well as civil) trials. A legal system lacks legitimacy if it does not operate on an accurate assessment of material facts.
> • Crime Control. There is a public interest in punishing criminals and deterring crime. From the perspective of crime control the legal system should effectively, and efficiently, apprehend, convict and punish the guilty (and screen out the innocent at as early a stage as possible). Ultimately, the claim of the crime control consideration is that the criminal process is a positive guarantor of social freedom.
> This public interest supports relevant evidence of an accused person's guilt being admitted into the trial to form the basis for the necessary factual determination. If the

> evidence is excluded for reasons not associated with the fact finding process, then this interest is sacrificed.

(ii) 'undesirability'

32. ALRC 26:1 at [959] discusses the following considerations favouring exclusion:

- disciplining police for illegality or impropriety;
- deterring future illegality;
- protecting individual rights;
- fairness at trial;
- executive and judicial legitimacy; and
- encouraging other methods of police investigation.

33. The balancing exercise is discussed in *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66 and *Bunning v Cross* (1978) 141 CLR 54.

Subsection 138(2): Admissions

(i) General

34. An admission is taken to be improperly obtained if it is obtained through questioning or in consequence of questioning and the conditions of either paragraph in ss 138(2)(a) or (b) are met. If so, then s 138(1) is engaged. Whereas s 138(2)(a) is concerned with coercive conduct, s 138(2)(b) is concerned with deceptive conduct (ALRC 26:1, [965]).

35. Section 138 operates in addition to the rules in Part 3.4. However, unlike the rules in Part 3.4, most of which relate to the likely truthfulness of an admission, or s 90, which is concerned with ensuring a fair trial, the focus of s 138(2) is on balancing competing public interests (see *R v Em* [2003] NSWCCA 374 at [74]–[75] per Howie J; *R v Mallah* [2005] NSWSC 358 at [102]–[140] per Wood CJ at CL; ALRC 26:1, [965]).

36. Fact situations where s 138(2) needs to be considered will often also require Part 3.4 to be considered (especially ss 84, 85 and 90) (*Em v R* (2007) 232 CLR 67; [2007] HCA 46 at [91]–[125] per Gummow and Hayne JJ).

37. In any event, each provision of the Act must be applied in its own terms (*R v Swaffield*; *Pavic v R* (1998) 192 CLR 159; [1998] HCA 1 at [74] per Toohey, Gaudron and Gummow JJ; at [128] per Kirby J).

(ii) 'False statement'

38. In *R v Weaven (Ruling No 1)* [2011] VSC 442, Weinberg JA considered the argument that 'false statements' made as part of a 'scenario' investigation technique would enliven s 138. He considered that 'a deception of that kind seemed unlikely to fall within the description of a 'false statement' of the kind to which s 138 is directed' (at [64]). Further, it:

> would be strange to conclude that an investigative technique of a kind that has received the specific approval of the High Court should be characterised as 'improper' merely because it involves the use of a legitimate deception on the part of the police (*R v Weaven (Ruling No 1)* [2011] VSC 442 at [64]).

39. Weinberg JA in *R v Weaven (Ruling No 1)* went on to find that, if there had been impropriety (such as through a false statement about the strength of the evidence held by police in the course of the 'scenario'), the prosecution had discharged its onus of proving that the evidence should be admitted (*R v Weaven (Ruling No 1)* [2011] VSC 442, [64]–[69]).

Subsection 138(3): Matters the court must take into account

40. Section 138(3) specifies factors that must be considered, but does not identify whether factors weigh in favour or against admission. Further, no factor is determinative and the list is not exhaustive. The court must consider the listed factors, emphasising that it 'must find a positive reason for exercising the discretion in favour of admissibility' (ALRC 102 at [16.93]).

41. The court must engage in the weighing process in relation to each piece of evidence. This reflects the fact that the balancing of public interests may operate differently between several pieces of evidence which have been obtained illegally or improperly (*Kadir & Grech v The Queen* [2020] HCA 1, [42]; *Slater v The Queen* [2019] VSCA 213, [45]).

Statutory guidance

(i) Weighing the factors

42. In weighing the various factors:

> [N]o preponderance is ascribed to any of the matters identified … over others; each, if applicable, is to be weighed in the balance in favour of or against the exercise of the discretion (*ASIC v Macdonald (No 5)* [2008] NSWSC 1169 at [27] per Gzell J; see also *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575 at [148] per J Forrest J).

43. An important reason for there not being any legislative guidance as to the exercise of the balancing test is that the weight to be accorded any particular factor will vary depending on which of the other factors arise in the context of a particular case (ALRC 102 at [16.93]).

44. In criminal proceedings, a comparison of the gravity of the offence/s with the gravity of the misconduct in the particular case will form part of the balancing process required by s 138(3) (*Gedeon v R* [2013] NSWCCA 257 at [180] per Bathurst CJ (Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing)).

45. For more detailed discussion of the factors, see ALRC 26:1 at [964].

(ii) 'the probative value of the evidence': s 138(3)(a)

46. 'Probative value' is defined as the 'extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' (see Dictionary).

47. The greater the probative value of evidence, the greater the interest in its admission (*R v Camilleri* (2007) 68 NSWLR 720; [2007] NSWCCA 36 at [35]; *R v Helmhout* [2001] NSWCCA 372 at [52]). The ALRC explains this is because:

> [e]xclusion of an item of evidence is more likely to endanger accurate fact finding if the evidence is highly probative than if it is of minimal relevance (ALRC 26:1 at [964]).

48. In assessing the probative value of the evidence the court must assume that the evidence would be accepted by the jury and must take the evidence at its highest (*DPP v Riley* [2020] NSWCCA 283, [120]).

49. Material suggesting that, due to the illegality or impropriety, the evidence may have been tampered with is a reliability consideration for the jury, at least where it would be open to the jury to reject the possibility of tampering (*DPP v Riley* [2020] NSWCCA 283, [123]–[125]).

(iii) 'the importance of the evidence in the proceeding': s 138(3)(b)

50. Evidence may have high probative value but not be important where there is other equally probative evidence available to the prosecution (see *Kadir & Grech v The Queen* [2020] HCA 1, [42]).

(iv) 'the nature of the relevant offence, cause of action or defence … and the proceeding': s 138(3)(c)

51. ALRC 26:1 states '[t]here is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime' (at [964]). The Report cited the common law authority of *Bunning v Cross* (1978) 141 CLR 54 at 80 (per Stephen and Aicken JJ) (see also *Pollard v R* (1992) 176 CLR 177 at 203–4 (per Deane J)).

52. This has found support in the case law, where it has been accepted that the public interest in convicting and punishing offenders may be given greater weight in respect of crimes of greater gravity (*Wu & Phan v The Queen* [2020] VSCA 94, [88]; *R v Dalley* [2002] NSWCCA 284 at [1]–[7] per Spigelman CJ and Blanch AJ).

53. In contrast, Simpson J argued that the legislation did not express the ALRC view, either explicitly or implicitly, Further, it is wrong to accept the general proposition because there may be cases where the fact that the charge is a serious one will result in a more rigorous insistence on compliance with statutory provisions about obtaining evidence (*R v Dalley* [2002] NSWCCA 284 at [96]–[97] per Simpson J (dissenting)).

54. Civil matters raise different and various public interest issues. In *Employment Advocate v Williamson* (2001) 111 FCR 20; [2001] FCA 1164, Branson J noted that, in addition to being about freedom of association, relevant considerations included that the matter was a civil proceeding and that it had been brought in the exercise of a statutory function (*Employment Advocate v Williamson* (2001) 111 FCR 20; [2001] FCA 1164 at [95]).

(v) 'the gravity of the impropriety or contravention': s 138(3)(d)

55. This consideration requires the court to consider the gravity of the specific impropriety or contravention involved in the case. It is not appropriate to treat this consideration by reference to the impropriety or contraventions generally. One contravention may be more or less serious than another (*McElroy & Wallace v The Queen* (2018) 55 VR 450, [124]).

56. The integrity of the justice system is at the core of this concern. The ALRC notes relevant considerations include the seriousness of the misconduct, whether there is a pattern of misconduct and whether any relevant legislation itself impliedly forbids the use of facts or things obtained in breach of its terms (ALRC 26:1 at [964]).

57. This factor may overlap with whether the contravention was deliberate or reckless (s 138(3)(e)) and the difficulty of obtaining the evidence lawfully (s 138(3)(f)) (*Kadir & Grech v The Queen* [2020] HCA 1, [37]).

58. The gravity of impropriety is greater when it is committed deliberately, with a view to assembling evidence which cannot be acquired legally, for the purpose of supporting a prosecution (*Kadir & Grech v The Queen* [2020] HCA 1, [37]).

59. In contrast, a contravention will be less serious when it involves an honest but erroneous belief in the existence of lawful authority to commit the relevant act. However, if that belief is widespread among the relevant group (such as police), then that will be a factor which makes the contravention more serious (see *McElroy & Wallace v The Queen* (2018) 55 VR 450, [128]–[134]).

60. A court may require evidence to determine whether a practice is widespread. This may require more than the opinion of one or two police officers involved in the present case (which may fail to meet the admissibility requirements under s 79), or assertions from the Bar Table (see *McElroy & Wallace v The Queen* (2018) 55 VR 450, [131]–[132], [158]).

61. Evidence arising from serious, deliberate or entrenched police illegality or impropriety will frequently be excluded (*Ridgeway v R* (1995) 184 CLR 19 at 38–39; [1995] HCA 66 per Mason CJ, Deane and Dawson JJ).

62. In *R v Gilham* [2008] NSWSC 88, Howie J noted:

> the more egregious the illegality or the impropriety accompanying the obtaining of

> the evidence, the more likely it is that the balance will fall in favour of the exclusion of the evidence (*R v Gilham* [2008] NSWSC 88 at [22]).

63. In *DPP v Marijancevic* (2011) 33 VR 440; [2011] VSCA 335, the Victorian Court of Appeal was particularly damning of the 'endemic' practice of not requiring the accuracy and truthfulness of affidavits in support of warrants to be sworn to on oath or by affirmation.

64. However it did note that it was not an impropriety of the highest order, giving examples of varying levels of improprieties in the following way:

> At the least serious end of the spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct (*DPP v Marijancevic* (2011) 33 VR 440; [2011] VSCA 335 at [68]; cited with approval in *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575 at [196] per J Forrest J).

65. It is therefore important for the court to examine a police officer's state of mind and motivations for their conduct (*R v Gallagher & Burridge* [2015] NSWCCA 228 at [53]–[54]).

66. However, the 'fact that a police officer has acted lawfully, honestly and with integrity does not prevent [an] impropriety being serious' (*DPP v Carr* [2002] NSWSC 194 at [82] per Smart AJ). That case involved a person's arrest for a minor offence when the defendant's name and address were known to police and there was no risk of the defendant departing and there was no reason to believe a summons would not be effective.

67. Contraventions and improprieties are likely to be more serious if they breach procedures established to protect rights, for example, warrants (*R v Burrell* [2001] NSWSC 120, [21]–[25]) or if they fail to comply with a statutory scheme designed to protect vulnerable persons (*R v Helmhout* [2000] NSWSC 208 at [19] per Bell J, affirmed in *R v Helmhout* [2001] NSWCCA 372), or fail to comply with scheme which regulates controlled operations which authorise otherwise unlawful conduct (*Wu & Phan v The Queen* [2020] VSCA 94, [79]–[83]).

68. When considering the gravity of a contravention of a scheme designed to protect a class of vulnerable persons, the court should take into account the characteristics of the individual and their personal degree of vulnerability (see *R v Helmhout* [2001] NSWCCA 372, [12], [39]–[41], [50], but c.f. [62]–[63]).

69. Where there is a breach of legislation governing controlled operations, it will be relevant to consider whether the conduct could have been permitted under a properly granted controlled operation. The possibility that police could have engaged in the relevant conduct while complying with controlled operations legislation may mitigate the gravity of the breach. This will be different, however, if the police deliberately did not apply for protection under the controlled operation legislation because they feared rejection (*Wu & Phan v The Queen* [2020] VSCA 94, [91]–[106]).

(vi) 'whether the impropriety or contravention was deliberate or reckless': s 138(3)(e)

70. ALRC 26:1 notes that an officer's mental state is relevant in terms of both discipline and deterrence. In a case of an officer's mistaken belief, there is less need for discipline and there is less taint on the judicial system, but deterrence is concerned with the future. Also, such mistake is largely irrelevant to the person whose rights were infringed (at [964]).

71. At common law, the degree of deliberation in a breach is a key factor in the exercise of the discretion (see, for example, *Bunning v Cross* (1978) 141 CLR 54 per Stephen and Aicken JJ).

72. The Act does not define 'reckless'. Courts have interpreted the term in various ways, ranging from:

- relatively wide tests of 'failure to give any thought' to whether there was a risk of a search being illegal (*DPP v Leonard* (2001) 53 NSWLR 227; [2001] NSWSC 797 at [103] per James J), or 'careless disregard' (*DPP v Carr* [2002] NSWSC 194 at [79] per Smart AJ); to
- a requirement for 'serious disregard of the relevant procedures amounting to a deliberate undertaking of the risk that the rights of a suspect will be substantially prejudiced' (*DPP v Nicholls* [2001] NSWSC 523 at [23] per Adams J; see also *R v Camilleri* (2007) 68 NSWLR 720; [2007] NSWCCA 36 at [27]–[29] per McClellan CJ at CL). Evidence obtained in deliberate, willful or reckless disregard of someone's civil rights is likely to be a strong factor against admitting the evidence (*Parker v Comptroller-General of Customs* [2007] NSWCA 348 at [65] per Basten JA; *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575 at [222] per J Forrest J).

73. In *DPP v Marijancevic* (2011) 33 VR 440; [2011] VSCA 355, the Court of Appeal concluded that:

> Conduct would be reckless if the officer had foresight that it might be illegal but proceeded with indifference as to whether that was so. What is described as an alternative of a 'don't care' attitude expressed in… *Helmhout* must be understood as meaning that the offender, recognising that the conduct might be illegal, did not care whether it was (*DPP v Marijancevic* (2011) 33 VR 440; [2011] VSCA 355 at [85]).

74. This approach to recklessness has been subsequently upheld in *R v Gallagher & Burridge* [2015] NSWCCA 228. See also Wu & Phan v The Queen [2020] VSCA 94, [53]. Recklessness must be distinguished from negligence or carelessness (*R v Gallagher & Burridge* [2015] NSWCCA 228, [51]–[52]).

75. Where a private individual engages in illegal or improper conduct to investigate criminal offending and gather evidence to pass on to a prosecuting body, this consideration will operate differently between each party. Evidence gathered by the private individual will likely involve intentional wrongdoing. Subsequent evidence gathered by the prosecuting body will engage s 138 as it is derived from the earlier illegality. However, the evidence gathered by the prosecuting body will not involve deliberate or reckless wrongdoing if the prosecuting body was not aware and had no reason to suspect that the earlier actions of the private individual involved intentional wrongdoing (*Kadir & Grech v The Queen* [2020] HCA 1, [41], [46]–[48]).

76. The common law has also observed that evidence admitted notwithstanding 'isolated' and 'accidental non-compliance' with statutory provisions 'does not demean the court as a tribunal whose concern is in upholding the law' (*Bunning v Cross* (1978) 141 CLR 54 at 78 per Stephen and Aicken JJ).

77. Similarly, there are decisions under the Act which consider that a police breach of statutory duty which represents 'inexperience' and a 'lack of training' rather than 'reckless' or 'dishonest' conduct is 'a significant matter affecting the s 138 judgment' (in favour of admission) (*R v Dalley* [2002] NSWCCA 284 at [93] per Simpson J).

78. If a breach is innocent and the alleged offence is serious, then this is a powerful argument against rejection; and high probative value will favour admission (*R v Camilleri* (2007) 68 NSWLR 720; [2007] NSWCCA 36 at [27]–[29], [35] per McClellan CJ at CL (Bell and Howie JJ agreeing)).

(vii) 'whether the impropriety or contravention was contrary to or inconsistent with.. the International Covenant on Civil and Political Rights': s 138(3)(f)

79. ALRC 26:1 notes that, while infringement of individual rights may be seen as an aspect of seriousness of the misconduct, the high level of public interest in these rights means it is 'more appropriate' to deal with their infringement separately (at [964]).

80. In *R v Swaffield; Pavic v R* (1998) 192 CLR 159; [1998] HCA 1, Kirby J referred to Article 14.3(g) (in relation to the privilege against self-incrimination and the right to silence) of the International Covenant on Civil and Political Rights (ICCPR) (*R v Swaffield; Pavic v R* (1998) 192 CLR 159; [1998]

HCA 1 at [135], fn178; see also *Employment Advocate v Williamson* (2001) 111 FCR 20; [2001] FCA 1164 at [95]–[96]).

81. The ICCPR includes a right to privacy. Unauthorised surveillance may be a breach of an individual's right to privacy. The significance of the intrusion will be relevant to the weight of this factor. Where the surveillance is limited to outdoor areas of a person's property, used for a commercial purpose (rather than an individual's home), this factor will attract no particular weight (*Kadir & Grech v The Queen* [2020] HCA 1, [47]).

82. A copy of the ICCPR as it applies in Australia is set out in Schedule 2 of the *Human Rights and Equal Opportunity Act 1986* (Cth).

(viii) 'whether any other proceeding… has been or is likely to be taken in relation to the impropriety or contravention': s 138(3)(g)

83. As the court noted in *R v Gallagher & Burridge* [2015] NSWCCA 228, the fact that no other proceedings will be taken in relation to the contravention is a factor in favour of rejecting the evidence, as this will be the only way to mark the contravention (at [45]. See also *Wu & Phan v The Queen* [2020] VSCA 94, [114]–[115]; *McElroy & Wallace v The Queen* (2018) 55 VR 450, [137]).

84. This affirms the ALRC's view that

> [t]he availability of alternatives to evidentiary exclusion should be an important factor in the exercise of the judicial discretion … [including] civil actions, criminal prosecutions and internal and external disciplinary procedures (ALRC 26:1 at [964]).

85. Further:

> If the action [is] disowned by those in higher authority and appropriate action taken, it would be unlikely that 'considerations of public policy relating to the integrity of the administration of criminal justice' would require exclusion of the evidence in question (*Ridgeway v R* (1995) 184 CLR 19 at 53, 64; [1995] HCA 66; cited in *Nicholas v R* (1998) 193 CLR 175 at [76] per Gaudron J).

86. Basten JA has observed that an 'incongruity' may exist between a situation where an officer is disciplined for misconduct and so the evidence is not excluded, and convicting a person on the basis of evidence obtained by that misconduct. Further, it is not always possible to know whether disciplinary procedures will be taken against an officer (sometimes this decision is left until proceedings are completed). And in some instances, a finding in a judgment of a contravention or impropriety in obtaining evidence may, itself, lead to disciplinary action, irrespective of whether the evidence was excluded (*Parker v Comptroller-General of Customs* [2007] NSWCA 348 at [64]).

(ix) 'the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law': s 138(3)(h)

87. ALRC 26:1 notes relevant considerations for this element include:

- circumstances of urgency – including whether it can be demonstrated that the evidence could not have been obtained at all but for the misconduct – for example, if there had been a delay in securing it; and
- ease of compliance – whether it would have been easy to comply with other legal requirements or standards of behaviour. This could support or detract from an argument for exclusion. For instance, a 'deliberate cutting of corners' would support exclusion, especially for its deterrent value. Equally, however, failure to comply with a rule which could have been easily complied with may suggest the rule is trivial and therefore the misconduct not serious.

88. The significance of this matter is closely connected with whether the illegality or impropriety were deliberate or reckless. Leaving aside circumstances of urgency, where the wrongdoing was deliberate or reckless, difficulty of obtaining the evidence lawfully will ordinarily weigh against admission. In contrast, where the wrongdoing is neither deliberate nor reckless, difficulty of obtaining the evidence lawfully will likely be a neutral consideration (*Kadir & Grech v The Queen*

[2020] HCA 1, [20], [37]. See also *Wu & Phan v The Queen* [2020] VSCA 94, [118]–[122]; *Mann v The King* [2023] NSWCCA 256, [103]).

Other considerations

89. The list of factors under s 138(3) is not exhaustive. Thus, there is scope for courts to consider others.

(i) Unfairness to a defendant

90. Neither s 138(1) nor s 138(3) refers to 'unfairness' to a defendant. Section 90 (Discretion to exclude admissions) does so refer but it is restricted to admissions.

91. The concept of unfairness has been expressed in the 'widest possible form' in ss 90 and 138 and reflects the 'policy discretion' developed by the common law (*R v Swaffield* (1998) 192 CLR 159; [1998] HCA 1 at [67]–[68] per Toohey, Gaudron and Gummow JJ); *Pavitt v R* [2007] NSWCCA 88 at [30]).

92. However, the discretion to admit evidence under s 138 is distinct and separate from that arising under s 90. Section 138 seeks to balance two public interests (the desirability of admitting reliable evidence and the undermining of public confidence in the administration of justice).

93. McHugh J has suggested (in obiter) that fairness to the accused is 'almost irrelevant' to 'high public policy' considerations. On the other hand, in *Pollard v R* (1992) 176 CLR 177, Deane J observed that fairness to an accused can readily intersect with considerations of high public policy in the administration of criminal justice (at 407). In *DPP v Farr* [2001] NSWSC 3, Smart AJ acknowledged that it is the policy of the law that a trial be fair (at [86]).

94. More recent authority suggests that, while relevant, fairness to the accused is not 'paramount' (*R v Em* [2003] NSWCCA 374 at [74] per Howie J (Ipp JA and Hulme J agreeing)). That Court held that the trial judge's discretion miscarried by according too much weight to fairness to the accused.

95. Odgers observes that fairness to the accused is 'not determinative' under s 138. But when improper methods create a significant danger that evidence is unreliable, it will be a 'powerful consideration' favouring the conclusion that the 'desirability' of admitting evidence is outweighed by the 'undesirability' of doing so (see Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.15020]; see also *R v Syed, Islam, Mahmood* [2008] NSWCCA 37 at [37] per Hulme J (McClelland CJ at CL and Harrison J agreeing)).

(ii) Other factors

96. The ALRC cites other potentially relevant factors as the public interest in convicting the guilty (see ALRC 26:1 at [958]); the mental state of the relevant law officer; and the urgency with which officers acted (see ALRC 26:1 at [964]; see also *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* (2013) 42 VR 513; [2013] VSC 575 in the context of a civil claim for damages).

97. The interviewee's personal circumstances are relevant under s 138, as the terms of s 138(2) refer to the subjective impact on the interviewee's ability to respond rationally to the questioning (*DPP v MD* (2010) 29 VR 434; [2010] VSCA 233 at [33]–[44]).

98. Other potentially relevant factors identified in the common law include:

- whether police illegality/impropriety is entrenched (see *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66 at [28], [36]);
- the legislature's intention when misconduct breaches a statutory provision (see *Bunning v Cross* (1978) 141 CLR 54 at [42] per Stephen and Aicken JJ);
- whether the police conduct is the principal offence of, or is integral to, the charged offence (*Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66 at [28], [36]; *Nicholas v R* (1998) 193 CLR 173; [1998] HCA 9 per Gaudron J);

- whether disciplinary action is taken (*Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66 at [28], [36]; *Nicholas v R* (1998) 193 CLR 173; [1998] HCA 9 per Gaudron J);
- the role of the unlawfulness or impropriety in inducing the charged offence (*R v Haughbro* (1997) 135 ACTR 15 at 15 per Miles J, applying *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66);
- whether the rights of the accused have already been compromised by illegality or impropriety (see *R v Malloy* [1999] ACTSC 118 at [22]); and
- whether it can be inferred that Parliament 'applied its mind' and intended to provide that certain conduct should not be unlawful (see *Scanruby Pty Ltd v Caltex Petroleum Pty Ltd* [2000] NSWIRComm 89).

Appellate review

99. Like s 137, s 138 is not discretionary but requires an evaluation, the outcome of which determines whether the evidence is admissible. Consistently with the approach to s 137, the current approach to appellate review of decisions under s 138 requires an applicant to demonstrate error in accordance with House v R principles. However, this is not finally settled (*Gedeon v The Queen* (2013) 237 A Crim R 326; *Kadir & Grech v The Queen* [2020] HCA 1, [8]–[9]).

Last updated: 15 December 2023

s 139 – Cautioning of persons

(1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

(a) the person was under arrest for an **offence** at the time; and

(b) the questioning was conducted by an **investigating official** who was at the time empowered, because of the office that he or she held, to arrest the person; and

(c) before starting the questioning the **investigating official** did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

(a) the questioning was conducted by an **investigating official** who did not have the power to arrest the person; and

(b) the statement was made, or the act was done, after the **investigating official** formed a belief that there was sufficient evidence to establish that the person has committed an **offence**; and

(c) the **investigating official** did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any **Australian law** requires the person to answer questions put by, or do things required by, the **investigating official**.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an **investigating official** for the purpose of being questioned, if—

(a) the official believes that there is sufficient evidence to establish that the person has committed an **offence** that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if—

(a) the official is performing **function**s in relation to persons or goods entering or leaving **Australia** and the official does not believe the person has committed an **offence** against a **law** of the Commonwealth; or

(b) the official is exercising a power under an **Australian law** to detain and search the person or to require the person to provide information or to answer questions.

Cautioning of persons

1. Section 139 is a deeming provision that applies in civil and criminal proceedings (*Em v R* (2007) 232 CLR 67; [2007] HCA 46 at [105] per Gleeson CJ; [117]–[118] per Gummow and Hayne JJ).

2. It provides that, if a person was 'under arrest' for an offence at the time an investigating official conducted questioning and that official failed to caution the person in the ordinary way, then evidence of a statement made or an act done by the person during that questioning is taken to have been obtained improperly for the purpose of s 138(1).

Application

3. A court must determine whether s 139 is engaged on the basis of the facts and circumstances before it. If s 139 is engaged (with the result that ss 139(1) and (2) require the court to find that an impropriety in accordance with s 138(1) has occurred), then this is so notwithstanding that, on the facts and circumstances before it, the court might not have considered that the evidence was improperly obtained or obtained as a result of an impropriety.

4. If by s 139, a statement is taken to have been improperly obtained, s 138 operates so that the evidence is only admitted if the court is persuaded that the desirability of admitting it outweighs the undesirability of doing so.

5. Section 139 does not exhaustively state when a caution must be administered – for instance, a failure to establish that evidence was improperly obtained under s 139 does not preclude such a finding under s 138. (Nor does it preclude a finding that it would be unfair to admit evidence of an admission pursuant to s 90 (Discretion to exclude admissions)). In particular, an investigating official should caution a person if the official ought reasonably suspect that the person had committed an offence. Failure to caution in that circumstance may give rise to impropriety for the purpose of s 138 (*R v FE* [2013] NSWSC 1692, [100]. See also *R v Dunn* [2020] VSC 372, [134]–[142]).

'Investigating official'

6. Investigating official is defined (see UEA Dictionary) to include police officers (other than those engaged in lawful covert investigations) and persons appointed by or under an Australian law whose functions include preventing or investigating offences (other than those engaged in lawful covert investigations).

'Questioning': s 139(1), (2)

7. The obligation to 'caution' under these subsections arises only when there is 'questioning'.

8. Subsection (2) was amended by changing from 'official questioning' to 'questioning' (see *Evidence Amendment Act 2008* (Cth) and *Evidence Amendment Act 2007* (NSW)). Clause 65 of the Explanatory Memorandum to the former Act describes this amendment as consequential to the amendment to s 85. It explains that it is designed to address the majority view in *Kelly v R* (2004) 218 CLR 216; [2004] HCA 12, which interpreted 'official questioning' in s 8 of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) narrowly.

9. Nevertheless, despite the widening from 'official questioning' to 'questioning', in *R v Naa* (2009) 76 NSWLR 271; [2009] NSWSC 851, Howie J thought that 'questioning' would not extend to general conversation. In respect of 'questioning', His Honour stated that:

> I do not believe that the word means 'a conversation during which questions are asked'. Clearly to my mind the section was aimed at formal or informal interrogation of a suspect by a police officer for the purpose of the officer obtaining information... (*R*

v Naa (2009) 76 NSWLR 271; [2009] NSWSC 851 at [98]).

10. In Victoria, the obligation to caution is subject to *Crimes Act 1958* s 464A(3), which allows an investigating official to ask for the person's name and address before giving the caution. There is, therefore, no impropriety in taking an accused's name and address before giving a caution (*Vyater v The Queen* [2020] VSCA 32, [26]).

11. More generally, *Evidence Act 2008* s 8 provides that the Act does not affect the operation of the provisions of any other Act. It is likely that if there is any inconsistency between the *Evidence Act 2008* and another Act regarding the obligation of investigating officials to caution a suspect, then the other Act takes precedence.

'Under arrest': ss 139(1)(a)–(b); and see ss 139(2), (5), (6)

12. There is a distinction between an investigation official who has arrest powers (s 139(1) and one who does not (s 139(2)).

13. Section 139(1) deems that evidence of a statement will be taken to have been improperly obtained when an investigating officer with arrest powers had a person under arrest (see s 139(5)–(6)), but did not caution that person prior to questioning.

14. Section 139(5) deems arrest to have occurred in a range situations, while s 139(6) provides a limitation with respect to questioning about Commonwealth offences.

15. Section 139(2) deems evidence of a statement to have been improperly obtained when an investigating officer without arrest powers had formed the belief there was sufficient evidence to establish the person had committed an offence but did not caution that person prior to questioning.

16. Section 139(2) requires the court to consider whether the investigating official had a subjective belief that there was sufficient evidence to establish the person committed an offence. The question is not whether there was evidence on which an investigating official could reasonably form that belief (*Moir v Stokes & Anor* [2016] VSC 218).

17. Section 139 does not mean it is improper for police to fail to caution a person who they reasonably believe to be a crime victim and who claims to have shot himself (*R v Hinton* [1999] ACTSC 20 per Higgins J).

18. In *R v Patsalis; R v Spathis (No 3)* [1999] NSWSC 718, Patsalis attended a police station and handed over notes about a murder he claimed to have witnessed before he was cautioned (for which murder he was subsequently charged). Kirby J held, on the facts, that the absence of a warning may have amounted to an impropriety in four circumstances:

- under s 139(1)(a) if Patsalis had already been arrested;
- under s 139(5)(a) if, before the notes were handed over, there was sufficient evidence to establish he had committed an offence the subject of questioning;
- under s 139(5)(b) if, before the notes were handed over, police would not have allowed him to leave the police station had he wished to do so; and
- under s 139(5)(c) if, before the notes were handed over, police gave him reasonable grounds for believing he could not leave had he wished to do so (at [13]).

Communicating the caution: s 139(3)

19. This section is 'purposive'. It:

> operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence (*R v Deng* [2001] NSWCCA 153 at [17] per Greg James J).

20. However, s 139(3) does not refer to a requirement that the person understand or comprehend the caution. This raises the question of whether the section requires the court to be satisfied the person understood the caution or merely that the caution accorded with the terms of the section.

21. In *R v Taylor* [1999] ACTSC 47, Higgins J observed that 'the caution will fail to satisfy s 139(3) if the circumstances are such that the officer knows, or ought to know, that the caution has not been understood' (at [19]). This supports the conclusion that the caution must be understood.

22. However, his Honour also noted that:

> there is no such failure if a reasonable person in the position of the officer, acting with proper respect for the rights of suspects, did not and could not reasonably have been expected to perceive that the suspect did not understand the caution (*R v Taylor* [1999] ACTSC 47 at [19]).

23. Higgins J also notes that there may be circumstances requiring further investigation than merely obtaining the suspect's acknowledgement, in order to establish whether they have heard and understood the caution (*R v Taylor* [1999] ACTSC 47 at [20]).

24. Such circumstances may include whether the person is Aboriginal (see *R v Anunga* (1976) 11 ALR 412), has only a partial grasp of English (see *DPP v Natale* [2018] VSc 339, [82]–[83]) or is intoxicated or cognitively impaired.

Last updated: 10 September 2021

4 Proof

Chapter 4 deals with the proof of matters in a proceeding. It provides for:

- the standard of proof in civil and criminal proceedings (Part 4.1)
- judicial notice (Part 4.2)
- facilitation of the proof of matters (Part 4.3)
- requirements with respect to the corroboration of evidence (Part 4.4)
- requirements with respect to warnings to juries about the potential unreliability of certain types of evidence (Part 4.5)
- procedures for proving certain other matters (Part 4.6).

Chapter 4 does *not* deal with a number of topics which are sometimes connected with the law of evidence on the basis they are considered to be matters or substantive law (Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.Ch.4.30]. Such topics include:

- the allocation the burden of proof with respect to facts in issue (see ALRC 26:1 at [33], [36]);
- evidential burdens (see ALRC 26:1 at [35]);
- a number of presumptions (see ALRC 26:1 at [36], [44]);
- the doctrines of *res judicata* and issue estoppel, the parol evidence rule and the admissibility of extrinsic evidence to assist in the interpretation of wills, deeds and other instruments (see ALRC 26:1 at [32]); and,
- with only one or two exceptions, the UEA does not deal with the drawing of inferences from evidence or from the absence of evidence.

Last updated: 10 August 2010

Part 4.1 – Standard of Proof (ss 140–142)

Part 4.1 specifies the standard of proof in civil and criminal proceedings. It also specifies that the civil standard applies when a court makes findings of fact regarding the admissibility of evidence.

Last updated: 10 August 2010

s 140 – Civil proceedings: standard of proof

(1) In a **civil proceeding**, the **court** must find the **case** of a party proved if it is satisfied that the **case** has been proved on the balance of probabilities.

(2) Without limiting the matters that the **court** may take into account in deciding whether it is so satisfied, it is to take into account—

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

Standard of proof in civil proceedings

1. Section 140 specifies that the standard of proof in civil proceedings is the balance of probabilities. This standard applies to the facts which a party has a legal burden of proving.

2. The Act does not specify when a party has a legal burden of proving a fact. This is a matter of substantive law, not the law of evidence (ALRC 26: 1 at [33]).

3. A 'civil proceeding' is a proceeding other than a criminal proceeding (*Evidence Act 2008*, Dictionary).

4. Determining whether a proceeding is civil or criminal may depend on the language of the relevant legislation and whether the proceeding seeks a 'conviction' or the provision creates an 'offence' (*CEO of Customs v Labrador Liquor Wholesale* (2003) 216 CLR 161; [2003] HCA 49 at [2] per Gleeson CJ and [137]–[138] per Hayne J).

Matters to consider when determining proof

5. Section 140(2) requires a court to consider the following matters when determining whether a case is proved on the balance of probabilities:

   - the nature of the cause of action or defence; and
   - the nature of the subject matter of the proceeding; and
   - the gravity of the matters alleged.

6. In assessing the nature of the cause of action or defence, the court may take into account the gravity of the consequences which flow from a particular finding (*Morley v Australian Securities & Investments Commission* [2010] NSWCA 331 at [742]).

7. Thus, the graver the consequences of a particular finding, the stronger the evidence needs to be in order to conclude that the allegation is established on the balance of probabilities (*Morley v Australian Securities & Investments Commission* [2010] NSWCA 331 at [746]).

8. The 'gravity of the matters alleged' examines the particular factual allegations in the case, and does not examine the cause of action or issues at a level of abstraction (*Qantas Airways Limited v Gama* (2008) 167 FCR 537; [2008] FCAFC 69 at [137] per Branson J; *Granada Tavern v Smith* (2008) FCA 646 at [95]).

9. The three matters specified in s 140(2) do not exhaustively state the matters the court may take into account when deciding whether a matter is proven on the balance of probabilities. A court may, for example, take into account the inherent unlikelihood of the alleged conduct, and common law principles concerning weighing evidence (*Qantas v Gama* (2008) 167 FCR 537; [2008] FCAFC 69 at [138] per Branson J).

10. Where a civil proceeding involves allegations of criminal conduct, the standard of proof remains the balance of probabilities. Judicial statements that clear, cogent or strict proof is required to establish serious matters such as fraud do not address the standard of proof. Instead, the statement reflects the conventional view that people do not ordinarily engage in criminal conduct and courts should not lightly make such findings (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66).

11. Similarly, in a civil proceeding involving circumstantial evidence to prove allegations of criminal conduct, it is not necessary to exclude all other rational explanations. The direction in criminal cases that the prosecution must exclude all rational explanations consistent with innocence is a function of the higher standard of proof and does not apply in civil proceedings (see *Chong v CC Containers Pty Ltd* (2015) 49 VR 402; [2015] VSCA 137 at [52]–[54]; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 at [34]).

Section 140(2) and the common law

12. Section 140(2) reflects the principles Dixon J set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–62 that 'reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding' are relevant to deciding whether a matter is proved on the balance of probabilities (*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132).

13. However, courts should not allow the use of terms deployed in other cases, or the common law, to distract from the statutory standard. Terms such as clear, cogent, compelling or convincing proof cannot be used as substitutes for the civil standard of 'balance of probabilities' (*GP Building Holdings Pty Ltd v Voitin* [2022] VSCA 210, [89]; *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, [82]–[87]).

14. Similarly, s 140 and its common law predecessor in *Briginshaw* do not create a third standard of proof. The standard remains the balance of probabilities, but the degree of satisfaction required to achieve that standard may vary according to the seriousness of the allegations (*Qantas Airways Ltd v Gama* (2008) 167 FCR 537, [110]).

Standard of proof and 'actual persuasion'

15. The standard of proof on the balance of probabilities requires the fact finder to reach a state of 'actual persuasion of the occurrence or existence of the fact in issue before it can be found' (*NOM v DPP* (2012) 38 VR 618; [2012] VSCA 198 at [124]; see also *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [136] per Spigelman CJ; *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246; *Ballard v Multiplex* [2012] NSWSC 426 at [123]–[127] per McDougall J; *Morley & Ors v Australian Securities and Investments Commission* [2010] NSWCA 331 at [749]–[753]; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 at [34]).

16. A '[m]ere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact' (*NOM v DPP* (2012) 38 VR 618; [2012] VSCA 198 at [124]; see also *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431).

17. Odgers criticises this approach, arguing that requiring actual persuasion is inconsistent with the intention of the ALRC that 'a belief that the facts in issue were as alleged is not and should not be required' (Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016) [EA.140.60]; ALRC 26 at [995]–[999]).

18. Under s 140, a party will not have proven its case if the likelihood of the plaintiff's case and defendant's case is perfectly balanced (*Carney v Newton* [2006] TASSC 4 at [61]).

19. Similarly, a plaintiff will not succeed merely be establishing that his or her case is more likely than the defendant's. The plaintiff must show that his or her case is more likely than not (*Jackson v Lithgow City Council* [2008] NSWCA 312 at [9]–[10] per Allsop P; *Carney v Newton* [2006] TASSC 4 at [52]).

Standard of proof for inferences

20. When a case relies on circumstantial evidence, the party bearing the burden of proof must establish that the more probable inference supports the case alleged. The court cannot choose between several, equally likely, possibilities where the competing possibilities can only be resolved by conjecture (*Jackson v Lithgow City Council* [2008] NSWCA 312 at [9] per Allsop P; see also *Holloway v McFeeters* (1956) 94 CLR 470; *Bradshaw v McEwans Pty Ltd* (unreported, High Court of Australia, 27 April 1951)).

21. In some cases, it will be dangerous to examine merely whether the case put forward by one party is more likely than that of the other party. Such an approach is only suitable when the respective cases address all possible explanations (*Guest v The Nominal Defendant* [2006] NSWCA 77 at [5] per Mason P).

Last updated: 15 December 2023

s 141 – Criminal proceedings: standard of proof

(1) In a **criminal proceeding**, the **court** is not to find the **case** of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a **criminal proceeding**, the **court** is to find the **case** of a defendant proved if it is satisfied that the **case** has been proved on the balance of probabilities.

Standard of proof in criminal proceedings

1. The ALRC sought to preserve the status quo regarding the standard of proof in criminal trials. Section 141 therefore imposes the 'beyond reasonable doubt' standard on the prosecution and the 'balance of probabilities' standard on the defence.

2. The standard of 'beyond reasonable doubt' is the highest standard known to the law:

3. The phrase is a composite expression, and a judge should not attempt to define the three words separately (*R v Chatzidimitriou* (2000) 1 VR 493; [2000] VSCA 91).

4. Whether a doubt is reasonable is a matter for the jury. Each juror must consider the evidence and apply the judge's directions to decide whether he or she is satisfied beyond reasonable doubt that the prosecution has proven its case (*Green v R* (1971) 126 CLR 28; *R v Southammavong; R v Sihavong* [2003] NSWCCA 312; *Thomas v R* (1960) 102 CLR 584).

5. Attempts to further explain the meaning of the phrase 'beyond reasonable doubt' are fraught with danger. Any explanations may be unhelpful, or may obscure the point that the accused is entitled to the benefit of any doubt the jury considers reasonable (*Thomas v R* (1960) 102 CLR 584; *Green v R* (1971) 126 CLR 28).

Standard of proof and circumstantial evidence

6. When the prosecution's case is based on circumstantial evidence, the standard of proof requires that the accused's guilt be the only rational inference from the proven facts (*Shepherdv R* (1990) 170 CLR 573; [1990] HCA 56; *Chamberlain v R (No 2)* (1984) 153 CLR 521; [1984] HCA 7; *Barca v R* (1975) 133 CLR 82).

7. The jury must acquit the accused if there is another inference open that is consistent with innocence (*Peacock v R* (1911) 13 CLR 619; [1911] HCA 66; *Barca v R* (1975) 133 CLR 82; *Doney v R* (1990) 171 CLR 207; [1990] HCA 51).

8. The courts commonly draw a distinction between:

   - cases in which the accused's guilt is proved by an accumulation of detail ('strands in a cable'); and
   - cases in which the accused's guilt is proved by sequential reasoning ('links in a chain').

9. In a case that depends on sequential reasoning, the jury must be satisfied beyond reasonable doubt of every essential intermediate fact that leads to the conclusion of guilt. In contrast, the jury does not need to be satisfied beyond reasonable doubt regarding individual facts if the case against the accused relies on an accumulation of detail (*Shepherd v R* (1990) 170 CLR 573; [1990] HCA 56).

Defence standard of proof

10. Under s 141(2), the civil standard of proof applies to matters where the defence carries the legal burden of proof.

11. For example, the defence carries the legal burden:

    - to prove the defence of mental impairment; or
    - to disprove deemed possession of a drug of dependence under s 5 of the *Drugs, Poisons and Controlled Substances Act 1981*.

Last updated: 10 August 2010

s 142 – Admissibility of evidence: standard of proof

(1) Except as otherwise provided by this Act, in any proceeding the **court** is to find that the facts necessary for deciding—

(a) a question whether evidence should be admitted or not admitted, whether in the **exercise** of a discretion or not; or

(b) any other question arising under this Act—

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters that the **court** must take into account include—

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question.

Standard of proof for admission of evidence

1. Unless another provision specifies otherwise, a court may make findings of fact in relation to a question arising under the *Evidence Act 2008* if satisfied of that fact on the balance of probabilities.

2. This standard applies in both civil and criminal proceedings. The ALRC considered and rejected the option of imposing the standard of beyond reasonable doubt for evidentiary findings in

criminal proceedings, preferring the variable civil standard which considers the importance of the evidence (ALRC 26: 1 at [1005]–[1006]).

3. When deciding whether to make such a finding of fact, the court must consider the importance of the evidence in the proceeding and the gravity of the matters alleged in relation to the question.

4. Section 142(2) incorporates the principles from *Briginshaw v Briginshaw* (1938) 60 CLR 336 when the court must make findings of fact to resolve questions under the Act (*R v Petroulias (No 8)* [2007] NSWSC 82 at [15]–[18]).

5. See s 140 for further discussion of the *Briginshaw* principles.

Need for fact-finding

6. Section 142 only applies to deciding questions that arise under the *Evidence Act 2008*. This includes matters such as:

- whether the maker of a previous representation is unavailable (ss 63–66);
- whether a person has specialised knowledge based on training, study or experience (s 79);
- whether an admission and the making of an admission was not influenced by violent, oppressive, inhuman or degrading conduct, or threats of such conduct (s 84);
- whether it was not reasonable to hold an identification parade, or whether the accused refused to take part in an identification parade (ss 114, 115);
- whether evidence was obtained improperly or due to an impropriety (s 138).

7. Some sections of the Act specify that a different standard of proof applies, including:

- section 57 (Evidence is provisionally relevant if it is *reasonably open* to make that finding);
- section 87 (The court may find that an admission was made with authority if that finding is *reasonably open*);
- section 88 (For the purpose of determining the admissibility of an admission, it must be *reasonably open* for the court to find that a person made the admission);
- section 125 (The court may fraud, an offence, an act that exposes a person to a civil penalty or an abuse of power for the purpose of loss of client legal privilege if there are *reasonable grounds* for that finding);
- section 131 (The court may find that a communication or document was made or prepared in furtherance of a deliberate abuse of power if there are *reasonable grounds* for that finding).
- section 146 (It must be *reasonably open* to find that a device ordinarily produces a particular outcome)

Last updated: 10 August 2010

Part 4.2 – Judicial Notice (ss 143–145)

Judicial notice is the notable exception to the (relatively modern) rule that a tribunal of fact must, in coming to a decision, rely upon only those facts which are formally proved. In policy terms, it benefits both the parties and the court with respect to time, effort and expense. Importantly, these considerations must not be delivered at the expense of procedural fairness and predictability in the trial system (see ALRC 26:1 at [969]).

Judicial notice covers two broad types of facts – matters of such common knowledge that they are rarely contentious and matters the court may be assumed to know by virtue of its stature and expertise (for example the validity of legislation put before it).

Part 4.2 provides for judicial notice in matters of:

- law (s 143)
- common knowledge (s 144)
- matters of state (s 145).

These provisions are intended to reflect and to clarify and extend the common law (ALRC 26 at [476–87], [970–78]).

Last updated: 10 August 2010

s 143 – Matters of law

(1) Proof is not required about the provisions and coming into operation (in whole or in part) of—

(a) an Act, an Imperial Act in force in **Australia**, a Commonwealth Act, an Act of another State or an Act or Ordinance of a Territory; or

(b) a regulation, rule or by-law made, or purporting to be made, under such an Act or Ordinance; or

(c) a proclamation or order of the **Governor-General**, the **Governor of a State** or the Administrator or Executive of a Territory made, or purporting to be made, under such an Act or Ordinance; or

(d) an instrument of a legislative character (for example, a rule of court) made, or purporting to be made, under such an Act or Ordinance, being an instrument that is required by or under a **law** to be published, or the making of which is required by or under a **law** to be notified, in any **government or official gazette** (by whatever name called).

(2) A **judge** may inform himself or herself about those matters in any way that the **judge** thinks fit.

(3) A reference in this section to an Act, being an Act of an **Australian Parliament**, includes a reference to a private Act passed by that Parliament.

Note

Section 5 of the Commonwealth Act extends the operation of the equivalent Commonwealth section to proceedings in all **Australian court**s.

Judicial notice – matters of law

1. Under the UEA, proof about matters of Australian legislation (including the process by which a statute comes into operation) is not required.

2. In this context, legislation includes statutes, subordinate legislation and executive government proclamations and orders.

'A judge may inform himself of herself about those matters in any way that the judge thinks fit': s 143(2)

3. A court may inform itself by reference to the *Government Gazette* (see *Attorney-General v Foster* (1999) 84 FCR 582; [1999] FCA 81 per von Doussa, O'Loughlin and Mansfield JJ; *Helslehurst v Government of New Zealand* [2000] FCA 1311 per Branson J).

Last updated: 10 August 2010

s 144 – Matters of common knowledge

(1) Proof is not required about knowledge that is not reasonably open to question and is—

(a) common knowledge in the locality in which the proceeding is being held or generally; or

(b) capable of verification by reference to a **document** the authority of which cannot reasonably be questioned.

(2) The **judge** may acquire knowledge of that kind in anyway the **judge** thinks fit.

(3) The **court** (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The **judge** is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Matters of common knowledge

1. A court may, without formal proof, accept 'knowledge' that is not reasonably disputable provided the knowledge:
   - relates to matters of general or local knowledge (s 144(1)(a)), or
   - is capable of verification by authoritative documentary sources (s 144(1)(b)).
2. If knowledge does fall within the definition of subsection (1), then the judge and any jury is obliged to take that knowledge into account (s 144(3)).
3. It has been suggested the provision widens the scope for permissible judicial notice of well-known and medical facts from the common law (see *Cooper v Human Rights and Equal Opportunity Commission & Coffs Harbour Council* (1999) 93 FCR 481; [1999] FCA 180 per Madgwick J; *Owens v Repatriation Commission* (1995) 59 FCR 559 per Davies, Einfeld and Drummond JJ).
4. For example, s 144(2) permits a judge to acquire this knowledge in any way he or she thinks fit.
5. It is now accepted that this provision covers the field in relation to judicial notice of facts (*Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697; [2013] NSWCA 145; Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.144.60]).

'knowledge'

6. Under the Act, 'knowledge' is limited to those facts that are certain. It does not include mere beliefs and opinions (see ALRC 26:1 at [972]).
7. The New South Wales Court of Appeal has cautioned that, while this evaluation will be based on many factors including the judge's life experience and training, it 'must be in respect of proved facts. A trial judge is not entitled to used personal experience to make findings of fact or to draw inferences unless that personal experience satisfies the prescription for the use of matters of common knowledge…[as] governed by s 144 …' (*Coombes v Roads and Traffic Authority* [2006] NSWCA 229 at [68]–[69] per Beazley JA (Ipp and Basten JJA agreeing)).
8. It has been noted that 'knowledge' taken into account by virtue of s 144 is not 'evidence strictly so called' (*R v Henry* (1999) 46 NSWLR 346; [1999] NSWCCA 111 at [76] per Spigelman CJ).

'… knowledge that is not reasonably open to question': ss 144(1)(a), (b)

9. In the context of medical facts, 'not reasonably open to question' has been described as a 'fact will be proved or known when it [is] accepted by those expert in the relevant discipline' (*Jenkins v Repatriation Commission* (1996) 137 ALR 729 per Heerey J).

10. His Honour also noted that while the 'degree of acceptance required to make an opposing hypothesis 'not reasonable' may be difficult … to define in a priori terms, … it is.. a high one'. That is, 'minority' views are 'not lightly to be discarded'.

11. Conversely, where there are competing expert opinions on the topic, then purported knowledge on that topic will not meet this description (see *McGregor v McGregor* [2012] FamCAFC 69 at [71]).

'common knowledge in the locality in which the proceeding is being held or generally': s 144(1)(a)

12. 'Common knowledge' includes common local and common general knowledge. It refers to a fact that is not reasonably open to question (*Owens v Repatriation Commission* (1995) 59 FCR 559 per Davies, Einfeld and Drummond JJ).

13. The basic requirement is that the fact is to be 'of a class that is so generally known as to give rise to the presumption that all persons are aware of it'. 'Particular facts', including the judge's own personal knowledge, are not part of common knowledge (*Properjohn v Gaughan* [1998] ACTSC 26 at [13] per Gallop J).

14. In the application of s 144 it is critical accurately to determine when facts are sufficiently indisputable to be classifiable as 'knowledge'. In the event there is opposing information of some credence, then s 144 will not apply and the 'facts' must be proved by evidence in the same manner as ordinary contested facts (*Owens v Repatriation Commission* (1995) 59 FCR 559 per Drummond J).

15. A judge 'must be cautious to see that no reasonable doubt exists' (*Properjohn v Gaughan* [1998] ACTSC 26 at [13] per Gallop J).

16. **Examples** of common knowledge in the locality of the proceeding or generally include:

- Canberra winter mornings are such that water in areas open to the elements can freeze over (*Sadler v Leda Commercial Properties Pty Limited* [2004] ACTSC 15 at [28] per Harper M);
- on 25 August 1995 many judges of the Federal Court, including the presiding judge, attended a national conference of that court (*Re Ly Ty Tran Cao; Ex parte Dixon v Ly Ty Tran Cao* (1995) 62 FCR 432 per Beazley J);
- that the NRMA is sole authorised insurer of motor vehicles in the Australian Capital Territory (*Wyer v Hunt* [2005] ACTSC 15 at [22] per Harper M);
- the unavailability of courts for civil jury trials at Parramatta (*Combined Excavations & Supplies v Bowis* [2000] NSWCA 298).

17. **Examples** of information that have been held not to meet the requirements of s 144(1)(a) are:

- the fact that institutions such as Westpac used *a particular* standard form of guarantee at any particular time (*Gattellaro v Westpac Banking Corp* [2004] HCA 6);
- the contents of the standard form of guarantee used at any particular time by an institution such as Westpac (*Gattellaro v Westpac Banking Corp* [2004] HCA 6).

'capable of verification by reference to a document the authority of which cannot be reasonably questioned': s 144(1)(b)

18. ALRC 26:1 notes common law instances where artificial distinctions are drawn between knowledge that is indisputable and knowledge that is considered to be disputable (at [972]).

Section 144(1)(b) is intended to ensure such distinctions are not available under the Act. While s 144 may permit the court to 'know' a wider range of facts than at common law (see *Owens v Repatriation Commission* (1995) 59 FCR 559 per Drummond J), material cannot be proven or considered 'known' merely because current knowledge (in this case, scientific) would support a particular opinion to a high degree of probability.

19. **Examples** of a document the authority of which cannot be reasonably questioned include:

- a meteorological document to prove the time the sun rose on a particular day;
- the *Macquarie Dictionary* (*Applicant S1983 of 2003 v Minister for Immigration & Citizenship* [2007] FCA 854 at [27] per Branson J);
- the *Commonwealth Gazette* (*Prentice v Cummins (No 5)* (2002) 124 FCR 67; [2002] FCA 1503 at [82] per Sackville J);
- historical records and texts (*Minister for Mineral Resources v Brantag Pty Ltd* [1997] NSWCA 206 per Mason P, Stein JA and Sheppard AJA).

'the judge may acquire knowledge of that kind in any way the judge thinks fit': s 144(2)

20. The provision makes it clear a judge has discretion in the steps that may be taken to acquire knowledge under s 144. For example, ALRC 26:1 notes judges may 'know' the outcome of other cases and information the subject of formal evidence (at [972]).

21. An appellate court may take judicial notice of relevant facts even if the trial court did not (*Australian Municipal Administrative Clerical & Services Union v Great Lakes Community Resources Inc* (Unreported, Industrial Relations Court of Australia, Wilcox CJ, Marshall and Madgwick JJ, 15 August 1996)).

22. A jury is not authorised to conduct its own inquiries (ALRC 26:1 at [977]; *Juries Act 2000* s 78A).

'the court (including, if there is a jury, the jury) is to take knowledge of that kind into account': s 144(3)

23. This provision obliges a judge and any jury to take into account knowledge that is within the ambit of s 144(1).

24. For a judge, such an obligation includes – in appropriate cases – informing the jury it is required to acknowledge certain facts if jurors think those facts are material (ALRC 26:1 at [977]).

'The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced': s 144(4)

25. The ALRC adopted a 'wider approach' to the scope of judicial notice by allowing judges and juries to apply their general knowledge and reasoning (ALRC 26:1 at [974]–[977]). Section 144(4) is included to remove any potential disadvantage by ensuring parties have an opportunity to address and to refer to relevant information on any given issue.

26. A failure to afford the parties the s 144(4) opportunity means the court cannot make use of judicial notice (*Crown Glass & Aluminium Pty Ltd v Ibrahim* [2005] NSWCA 195 at [134] per McColl J, citing *Gattellaro v Westpac Banking Corp* [2004] HCA 6).

27. The process of taking notice of matters of common knowledge, and the associated obligation to give the parties an opportunity to make submissions only applies to facts that a party seeks to assert as a matter of common knowledge or a judicial officer is considering relying on such

knowledge and without evidentiary support adducing and using. It does not apply to inferences from evidence, or assumptions made for an illustrative purpose (*Chaplin v Lane* [2016] TASFC 8 at [12], [49], [53]).

Last updated: 15 September 2017

s 145 – Certain Crown certificates

> This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

Certain Crown certificates

1. The UEA preserves principles and rules of common law and equity relating to the effect of a Crown certificate with respect to matters of international affairs.
2. ALRC 26:1 notes the policy context for this provision is that a reference under the law of evidence is not the proper place to examine the conclusiveness of certificates supplied by the Crown in matters of international affairs; rather, such an examination should occur in the context of a reference on international and constitutional law (at [977]).

Last updated: 10 August 2010

Part 4.3 – Facilitation of Proof (Division 1–3, ss 146–163)

Part 4.3 contains a series of provisions designed to facilitate proof, primarily in the form of rebuttable presumptions.

These presumptions go to the reliability of evidence including:

- processes and devices, machines, documents, seals and signatures (Div. 1; ss 146–152)
- official documents (Div. 2; ss 153–159)
- post and communications (Div. 3; ss 160–163).

Importantly, merely satisfying these provisions does not make evidence admissible. Admissibility remains to be determined in accordance with the provisions of Chapter 3.

Also, in the event of other statutes which contain provisions the purpose of which is to facilitate proof of certain matters, judges must consider whether the generality of the *Evidence Act 2008* gives way to the specificity of a particular Act (*see Implementing the Uniform Evidence Act Report*, Victorian Law Reform Commission (2006), [4.9]; also commentary to s 8).

Role of Division 2 of Part 4.6

Evidence of a fact that is to be proved under any provision of Part 4.3 may, by s 170 (of Div. 2 of Part 4.6), be given by a person permitted under s 171 to give such evidence.

Last updated: 10 August 2010

Division 1 – General (ss 146–152)

Last updated: 10 August 2010

s 146 – Evidence produced by processes, machines and other devices

(1) This section applies to a **document** or thing—

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the **document** or thing, the device or process has produced a particular outcome.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the **document** or thing on the occasion in question, the device or process produced that outcome.

Evidence produced by processes, machines and other devices

1. Section 146 creates, in effect, a rebuttable presumption of accuracy in respect of documents or things created by ordinarily reliable devices or process (see ALRC 26:1 at [988]; ALRC 102 at [6.15]–[6.16]).

2. This 'presumption of accuracy' operates both when the evidence is sought to be adduced and at the conclusion of the proceedings (ALRC 26:1 at [988]). It means the party tendering the evidence is not required to call evidence that the process or device is working to prove the inference that party is seeking to draw.

3. 'Document' is widely defined (see Part 1 and clause 8 of Part 2 of the UEA Dictionary). It has been held to include a computer hard disk (see *Lewis v Nortex Pty Ltd (in liq); Lamru Pty Ltd v Kation Pty Ltd* [2002] NSWSC 337) and CD ROMS and electronic back-up tapes upon which records are stored (see *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2003) 129 FCR 472; [2003] FCA 532).

Rebutting the presumption

4. The presumption is rebutted when a party raises sufficient evidence to raise doubt about the presumption. Where evidence raises a doubt, it 'does not need to be of the same quality or of the same probative strength as evidence that is required to satisfy the civil standard' (*North Sydney Leagues' Club Limited v Synergy Protection Agency Pty Limited* (2012) 83 NSWLR 710; [2012] NSWCA 168 at [60] per Beazley JA (Macfarlan and Whealy JJA agreeing)).

5. Once rebutted, there is no residual benefit from the presumption and the party who seeks to tender the evidence must prove the accuracy, reliability or competence of the process or device in the usual manner.

6. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

Judicial notice powers under Part 4.2

7. The wide judicial notice powers under Part 4.2 assist a judge to determine the accuracy or otherwise of a process or device that has produced the evidence.

‘if it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used ordinarily produces that outcome …’ (s 146(2))

8. In the case of some processes and devices, it may be possible to rely on the process being a matter of common knowledge (see s 144) to its accuracy or otherwise – for example, photographs (and the distortion of distance etc).

Last updated: 16 August 2012

s 147 - Documents produced by processes, machines and other devices in the course of business

(1) This section applies to a **document**—

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the **document**, the device or process has produced a particular outcome.

(2) If—

(a) the **document** is, or was at the time it was produced, part of the records of, or kept for the purposes of, a **business** (whether or not the **business** is still in existence); and

(b) the device or process is or was at that time used for the purposes of the **business**—

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the **document** on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a **document** that was produced—

(a) for the purpose of conducting, or for or in contemplation of or in connection with, an **Australian or overseas proceeding**; or

(b) in connection with an investigation relating or leading to a **criminal proceeding**.

Note

Section 182 of the Commonwealth Act gives section 147 of the Commonwealth Act a wider application in relation to **Commonwealth record**s and certain Commonwealth **document**s.

Documents produced by processes, machines and other devices in the course of business

1. This provision operates similarly to s 146 but applies specifically to business records – that is, a party who tenders a business document can rely on the presumption that the copy of the business document is accurate.

2. This 'presumption of accuracy' operates both when the evidence is sought to be adduced and at the conclusion of the proceedings (ALRC 26:1 at [988]).

3. Both 'document' and 'business' are widely defined (see UEA Dictionary, for 'document' see Part 1 and cl 8 of Part 2).

Rebutting the presumption

4. Also like s 146, the presumption is rebutted when another party adduces evidence sufficient to raise a doubt about the presumption and, once rebutted, there is no residual benefit from the presumption.

5. The wide judicial notice powers under Part 4.2 assist a judge to determine the accuracy or otherwise of a process or device that has produced the evidence.

6. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

Court may draw reasonable inference

7. In determining the application of s 147, a court may examine a document and draw a reasonable inference from it (s 183).

Commonwealth records

8. By s 182 of the Commonwealth Act, s 147 applies to evidence of Commonwealth records and certain Commonwealth documents in proceedings in all Australian courts.

Last updated: 10 August 2010

s 148 – Evidence of certain acts of justices, Australian lawyers and notaries public

> It is presumed, unless the contrary is proved, that a **document** was attested or verified by, or signed or acknowledged before, a justice of the peace, **Australian lawyer** or notary public, if—
>
> (a) an **Australian law** requires, authorises or permits it to be attested, verified, signed or acknowledged by a justice of the peace, an **Australian lawyer** or a notary public, as the case may be; and
>
> (b) it purports to have been so attested, verified, signed or acknowledged.

This provision

1. Section 148 provides that when a document is required to be attested etc by a justice of the peace and purports to be so attested, verified, signed or acknowledged, it is presumed that the document is so attested, verified, signed or acknowledged.

2. 'Document' is widely defined (see Part 1 and cl8 of Part 2 of the UEA Dictionary).

Last updated: 10 August 2010

s 149 – Attestation of documents

It is not necessary to adduce the evidence of an attesting **witness** to a **document** (not being a testamentary **document**) to prove that the **document** was signed or attested as it purports to have been signed or attested.

Note

Section 182 of the Commonwealth Act gives section 149 of the Commonwealth Act a wider application in relation to **Commonwealth record**s and certain Commonwealth **document**s.

Attestation of documents

1. Pursuant to s 149 it is not necessary to adduce the evidence of an attesting witness to prove the document was attested or signed as it purports so to be.

Commonwealth records

2. Pursuant to s 182 of the Commonwealth Act, s 149 applies to evidence of Commonwealth records and certain Commonwealth documents in proceedings in all Australian courts.

Last updated: 10 August 2010

s 150 – Seals and signatures

(1) If the imprint of a **seal** appears on a **document** and purports to be the imprint of—

(a) the Public Seal of the State; or

(b) a Royal Great Seal; or

(c) the Great Seal of **Australia**; or

(d) another **seal** of the Commonwealth; or

(e) a **seal** of another State, a Territory or a foreign country; or

(f) the **seal** of a body (including a court or a tribunal), or a body corporate, established by or under Royal Charter or by an **Australian law** or the **law** of a foreign country—

it is presumed, unless the contrary is proved, that the imprint is the imprint of that **seal**, and the **document** was duly sealed as it purports to have been sealed.

Note

The Commonwealth Act has a different subsection (1).

(2) If the imprint of a **seal** appears on a **document** and purports to be the imprint of the **seal** of an office holder, it is presumed, unless the contrary is proved, that—

(a) the imprint is the imprint of that **seal**; and

(b) the **document** was duly sealed by the office holder acting in his or her official capacity; and

(c) the office holder held the relevant office when the **document** was sealed.

(3) If a **document** purports to have been signed by an office holder in his or her official capacity, it is presumed, unless the contrary is proved, that—

(a) the **document** was signed by the office holder acting in that capacity; and

(b) the office holder held the relevant office when the **document** was signed.

(4) In this section, office holder means—

(a) the Sovereign; or

(b) the **Governor-General**; or

(c) the **Governor of a State**; or

(d) the Administrator of a Territory; or

(e) a person holding any other office under an **Australian law** or a **law** of a foreign country.

(5) This section extends to **document**s sealed, and **document**s signed, before the commencement of this section.

Notes

1 Section 5 of the Commonwealth Act extends the operation of this section of the Commonwealth Act to proceedings in all **Australian court**s.

2 **Australian law** is defined in the Dictionary.

This provision

1. Section 150 provides a presumption of validity in relation to the imprint of certain Australian seals, unless the contrary is shown.

Differences between provisions

2. To deal with different seals, s 150(1) differs as between the Commonwealth Act and the New South Wales and Victorian Acts – in the Commonwealth Act it is narrower in relation to State bodes (see s 150(1)(f)) than to the bodies specified in s 150(1)(e).

Scope

3. For constitutional reasons, this provision may, in its extended application under s 5 of the Commonwealth Act in proceedings in a State court exercising State jurisdiction, have to be read down – the issue being whether s 51(xxv) of the Constitution goes so far as to permit Commonwealth laws in this field.

Last updated: 10 August 2010

s 152 – Documents produced from proper custody

If a **document** that is or purports to be more than 20 years old is produced from proper custody, it is presumed, unless the contrary is proved, that—

(a) the **document** is the **document** that it purports to be; and

(b) if it purports to have been executed or attested by a person—it was duly executed or attested by that person.

Note

Section 182 of the Commonwealth Act gives section 152 of the Commonwealth Act a wider application in relation to **Commonwealth record**s and certain Commonwealth **document**s.

Documents produced from proper custody

1. Under this provision, a document more than 20 years old which is produced from proper custody is presumed to be that which it purports to be and to have been validly executed and attested.

Commonwealth records

2. Pursuant to s 182 of the Commonwealth Act, s 152 applies to evidence of Commonwealth records and certain Commonwealth documents in proceedings in all Australian courts.

Last updated: 10 August 2010

Division 2 – Matters of official record (ss 153–159)

The provisions of this Division create presumptions with respect to certain matters of official record.

Last updated: 10 August 2010

s 153 – Gazettes and other official documents

(1) It is presumed, unless the contrary is proved, that a **document** purporting—

(a) to be any **government or official gazette** (by whatever name called) of this State, the Commonwealth, another State, a Territory or a foreign country; or

(b) to have been printed by the Government Printer of this State, or by the government or official printer of the Commonwealth or of a State or Territory; or

(c) to have been printed by authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country—

is what it purports to be and was published on the day on which it purports to have been published.

(2) If—

(a) there is produced to a **court**—

(i) a copy of any **government or official gazette** (by whatever name called) of this State, the Commonwealth, another State, a Territory or a foreign country; or

(ii) a **document** that purports to have been printed by the Government Printer of this State, or by the government or official printer of the Commonwealth or of a State or Territory; or

(iii) a **document** that purports to have been printed by authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country; and

(b) the doing of an act—

(i) by the **Governor-General** or by the **Governor of a State** or the Administrator of a Territory; or

(ii) by a person authorised or empowered to do the act by an **Australian law** or a **law** of a foreign country—

is notified or published in the copy or **document**—

it is presumed, unless the contrary is proved, that the act was duly done and, if the day on which the act was done appears in the copy or **document**, it was done on that day.

Note

Section 5 of the Commonwealth Act extends the operation of section 153 of the Commonwealth Act to proceedings in all **Australian court**s.

Gazettes and other official documents

1. Section 153 facilitates proof of Gazettes and certain other official documents and the occurrence of certain acts notified in such documents.

2. The presumptions in ss 153(1) and (2) arise 'unless the contrary is proved'.

Scope

3. For constitutional reasons, this provision may, in its extended application under s 5 of the Commonwealth Act in proceedings in a State court exercising State jurisdiction, have to be read down – the issue being whether s 51(xxv) of the Constitution goes so far as to permit Commonwealth laws in this field.

Last updated: 10 August 2010

s 154 – Documents published by authority of Parliaments etc

> It is presumed, unless the contrary is proved, that a **document** purporting to have been printed by authority of an **Australian Parliament**, a House of an **Australian Parliament**, a committee of such a House or a committee of an **Australian Parliament**—
>
> (a) is what it purports to be; and
>
> (b) was published on the day on which it purports to have been published.

Documents published by authority of Parliaments etc

1. Section 154 creates a presumption that a document which purports to have been printed by the authority of an Australian Parliament is that which it purports to be.

Scope

2. For constitutional reasons, this provision may, in its extended application under s 5 of the Commonwealth Act in proceedings in a State court exercising State jurisdiction, have to be read down – the issue being whether s 51(xxv) of the Constitution goes so far as to permit Commonwealth laws in this field.

Last updated: 10 August 2010

s 155 – Evidence of official records

(1) Evidence of a **Commonwealth record** or of a **public document** of this State, another State or a Territory may be adduced by producing a **document** that—

(a) purports to be such a record or **document** and to be signed or sealed by—

(i) a Minister of the Commonwealth, or a Minister of this or another State or a Territory, as the case requires; or

(ii) a person who might reasonably be supposed to have custody of the record or **document**; or

(b) purports to be a copy of or extract from the record or **document** that is certified to be a true copy or extract by—

(i) a Minister of the Commonwealth, or a Minister of this or another State or a Territory, as the case requires; or

(ii) a person who might reasonably be supposed to have custody of the record or **document**.

(2) If such a **document** is produced, it is presumed, unless evidence that is sufficient to raise doubt about the presumption is adduced, that—

(a) the **document** is the record, **public document**, copy or extract that it purports to be; and

(b) the Minister of the Commonwealth, Minister of this or that other State or the Territory or person—

(i) signed or sealed the record; or

(ii) certified the copy or extract as a true copy or extract—

as the case requires.

Note

This section differs from section 155 of the Commonwealth Act. The Commonwealth provision refers to evidence of a "public record" of a State or Territory rather than evidence of a "**public document**" of a State or Territory.

Evidence of official records

1. Evidence of either a Commonwealth record or a ‘public record’ of an Australian State or Territory may be adduced by producing a document that purports to be such a record, or a certified copy or extract from the record or document, and signed and sealed by the relevant Minister, or the person who has custody of the record or document (s 155(1)).
2. There is a rebuttable presumption that the document produced pursuant to this section is the record, copy or extract it purports to be and that it was signed, sealed or certified by the Minister or person (s 155(2)).
3. ‘The effect of s 155 is to facilitate proof of records which are otherwise admissible. Section 155 is not a general exception to Chapter 3 … in relation to admissibility of evidence’ (*Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069 at [64] per Hely J; followed in

Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2003) 133 FCR 190; [2003] FCA 1263 per French J; see also ALRC 102 at [6.66]–[6.72]).

'… might be reasonably be supposed'

4. It is not necessary for the party adducing the evidence to satisfy the court of a number of facts – it is enough that such facts 'might reasonably be supposed' to exist. (For commentary on 'might reasonably be supposed', see Division 2 of Part 3.2 (First-hand hearsay)).

Rebutting the presumption

5. Like ss 146 and 147, the presumption is rebutted when another party adduces evidence sufficient to raise a doubt about the presumption and, once rebutted, there is no residual benefit from the presumption.

6. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

Last updated: 10 August 2010

s 156 – Public documents

(1) A **document** that purports to be a copy of, or an extract from or summary of, a **public document** and to have been—

(a) sealed with the **seal** of a person who, or a body that, might reasonably be supposed to have the custody of the **public document**; or

(b) certified as such a copy, extract or summary by a person who might reasonably be supposed to have custody of the **public document**—

is presumed, unless the contrary is proved, to be a copy of the **public document**, or an extract from or summary of the **public document**.

(2) If an officer entrusted with the custody of a **public document** is required by a **court** to produce the **public document**, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the **public document** if it purports to be signed and certified by the officer as a true copy or extract.

(3) It is sufficient production of a copy or extract for the purposes of subsection (2) if the officer sends it by prepaid post, or causes it to be delivered, to—

(a) the proper officer of the **court** in which it is to be produced; or

(b) the person before whom it is to be produced.

(4) The **court** before which a copy or extract is produced under subsection (2) may direct the officer to produce the original **public document**.

Note

Section 182 of the Commonwealth Act gives section 156 of the Commonwealth Act a wider application in relation to **Commonwealth record**s.

Public documents

1. By s 156, a document that purports to be a sealed or certified copy of copy of a public document is presumed to be that which it purports to be.

2. 'Document' is broadly defined (see Part 1 and cl 8 of Part 2 of the UEA Dictionary). 'Public document' is defined in Part 1.

Commonwealth records

3. Pursuant to s 182 of the Commonwealth Act, in proceedings in all Australian courts s 156 applies to evidence of public documents that are Commonwealth records.

Last updated: 10 August 2010

s 157 – Public documents relating to court processes

Evidence of a **public document** that is a judgment, act or other process of an **Australian court** or a **foreign court**, or that is a **document** lodged with an **Australian court** or a **foreign court**, may be adduced by producing a **document** that purports to be a copy of the **public document** and that—

(a) is proved to be an examined copy; or

(b) purports to be sealed with the **seal** of that court; or

(c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

Note

Section 5 of the Commonwealth Act extends the operation of section 157 of the Commonwealth Act to proceedings in all **Australian court**s.

Public documents relating to court processes

1. By s 157, evidence of a public document that is a judgment or other process of a court may be adduced by producing a document that purports to be a copy of such a public document if it is proved to be an examined copy or it is properly sealed by the court or it is signed by a proper officer of the court.

2. The purpose of s 157 is to address methods available to prove the existence of judgments, acts and process of a court and documents lodged with a court. It does not address admissibility, and such evidence remains subject to the ordinary rules of admissibility.

Scope

3. For constitutional reasons, this provision may, in its extended application under s 5 of the Commonwealth Act in proceedings in a State court exercising State jurisdiction, have to be read down – the issue being whether s 51(xxv) of the Constitution goes so far as to permit Commonwealth laws in this field.

Last updated: 10 August 2010

s 158 – Evidence of certain public documents

(1) If—

(a) a **public document**, or a certified copy of a **public document**, of another State or a Territory is admissible for a purpose in that State or Territory under the **law** of that State or Territory; and

(b) it purports to be sealed, or signed and sealed, or signed alone, as directed by the **law** of that State or Territory—

it is admissible in evidence to the same extent and for that purpose in all **Victorian court**s—

(c) without proof of—

(i) the **seal** or signature; or

(ii) the official character of the person appearing to have signed it; and

(d) without further proof in every case in which the original **document** could have been received in evidence.

(2) A **public document** of another State or a Territory that is admissible in evidence for any purpose in that State or Territory under the **law** of that State or Territory without proof of—

(a) the **seal** or signature authenticating the **document**; or

(b) the judicial or official character of the person appearing to have signed the **document**—

is admissible in evidence to the same extent and for any purpose in all **Victorian court**s without such proof.

(3) This section only applies to **document**s that are public records of another State or a Territory.

Evidence of certain public documents

1. A public document which is admissible under the law of another State or Territory is admissible to the same extent and for the same purpose in all Victorian courts.

2. 'Document' is broadly defined (see Part 1 and cl8 of Part 2 of the UEA Dictionary). 'Public document' is defined in Part 1.

Last updated: 10 August 2010

s 159 – Official statistics

A **document** that purports—

(a) to be published by the **Australian Bureau of Statistics**; and

(b) to contain statistics or abstracts compiled and analysed by the **Australian Statistician** under the Census and Statistics Act 1905 of the Commonwealth—

is evidence that those statistics or abstracts were compiled and analysed by the **Australian Statistician** under that Act.

Note

Section 5 of the Commonwealth Act extends the operation of section 159 of the Commonwealth Act to proceedings in all **Australian court**s.

This provision

1. By this provision, a document which purports to be published by the Australian Statistician and to contain statistics analysed by the Australian Statistician is evidence that those statistics were analysed by the Australian Statistician under the *Census and Statistics Act 1905* (Cth).

Last updated: 10 August 2010

Division 3 – Matters relating to post and communications (ss 160–162)

s 160 – Postal articles

(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a **postal article** sent by prepaid post addressed to a person at a specified address in **Australia** or in an external Territory was received at that address on the seventh working day after having been posted.

(2) This section does not apply if—

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

(3) In this section, **working day** means a day that is not—

(a) a Saturday or a Sunday; or

(b) a public holiday or a bank holiday in the place to which the **postal article** was addressed.

Note

Section 182 of the Commonwealth Act gives section 160 of the Commonwealth Act a wider application in relation to **postal article**s sent by a Commonwealth agency.

Postal articles

1. Section 160 creates a presumption that a postal article sent by prepaid post (from within Australia) to an Australian address is received at that address on the seventh working day after posting.
2. 'Postal article' is defined in the UEA Dictionary to have the same meaning as in the *Australian Postal Corporation Act 1989* (Cth).

Rebutting the presumption

3. This presumption:

- is rebuttable by evidence sufficient to raise a doubt (s 160(1)). In *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2008] FCA 1311, Stone J considered that sworn statements to the effect that the relevant document had not been received were sufficient to raise a sufficient doubt, but his Honour did not accept unsworn statements for the same purpose without supporting documentation.
- is subject to any conflicting contractual terms between the parties (s 160(2)); and
- may be dispelled by judicial notice (see *Bayeh v Deputy Commissioner of Taxation* (1999) 100 FCR 138; [1999] FCA 1194 per Beaumont J). His Honour was willing to infer that a letter sent from a suburb of Sydney to the Sydney CBD would arrive in no more than two days.

4. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

'was received at that address'

5. Section 160 only creates a presumption that the letter was received at the address in question and does not create a presumption that a person at the address received or was served with the letter. A person who wishes to rely on service by post must use other statutory provisions, such as *Interpretation of Legislation Act 1984* s 49 (*Repatriation Commission v Goulding* (2008) 173 FCR 546; [2008] FCA 1858 at [30]).

Letters posted by Commonwealth agencies

6. Section 163 of the Commonwealth Act provides a presumption in relation to the date of posting for letters sent by Commonwealth agencies.

7. Section 182 of the Commonwealth Act operates to apply s 160 to all postal articles sent by Commonwealth agencies in respect of 'all proceedings in an Australian court'.

Last updated: 10 August 2010

s 161 – Electronic communications

(1) If a **document** purports to contain a record of an **electronic communication** other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication—

(a) was sent or made in the form of **electronic communication** that appears from the **document** to have been the form by which it was sent or made; and

(b) was sent or made by or on behalf of the person by or on whose behalf it appears from the **document** to have been sent or made; and

(c) was sent or made on the day on which, at the time at which and from the place from which it appears from the **document** to have been sent or made; and

(d) was received at the destination to which it appears from the **document** to have been sent; and

(e) if it appears from the **document** that the sending of the communication concluded at a particular time—was received at that destination at that time.

(2) A provision of subsection (1) does not apply if—

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) the provision is inconsistent with a term of the contract.

Note

Section 182 of the Commonwealth Act gives section 161 of the Commonwealth Act a wider application in relation to **Commonwealth record**s.

Electronic communications

1. Section 161 creates presumptions with respect to the sending and receipt, and the source and destination of, electronic communications.

2. 'Electronic communications' are defined in the Dictionary to have the same meaning as in the *Electronic Transactions (Victoria) Act 2000*.

Rebutting the presumption

3. The presumption is rebutted by evidence sufficient to raise a doubt (s 161(1))

4. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

Hearsay

5. Section 71 provides an exception to the hearsay rule for representations contained in a document recording an electronic communication.

Commonwealth records

6. Pursuant to s 182 of the Commonwealth Act, s 161 applies to evidence of public documents that are Commonwealth records in proceedings in all Australian courts.

Last updated: 10 August 2010

s 162 – Lettergrams and telegrams

(1) If a **document** purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.

(2) This section does not apply if—

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

Note

Section 182 of the Commonwealth Act gives section 162 of the Commonwealth Act a wider application in relation to **Commonwealth record**s.

Lettergrams and telegrams

1. Section 162 creates a presumption that a lettergram or a telegram was received 24 hours after it was delivered to a post office for transmission.

Rebutting the presumption

2. The presumption is rebuttable by evidence sufficient to raise a doubt (s 162(1)).

3. A party seeking to rebut the presumption may utilise the power to call for the production of a document or witness under ss 166–169 or seek an order for discovery, inspection or disclosure under s 193.

Commonwealth documents and records

4. Pursuant to s 182 of the Commonwealth Act, s 162 applies to evidence of public documents that are Commonwealth records in proceedings in all Australian courts.

Last updated: 10 August 2010

Part 4.4 – Corroboration (s 164)

The common law is generally concerned with the quality rather than the quantity of evidence. However, in a small number of exceptional cases in criminal trials, the common law developed rules of law or practice which focused on the existence of supporting or corroborating evidence.

In the case of perjury, the common law permitted the jury to convict only where the falsity of the statement in question was proved either by two witnesses, or by a single witness with corroboration.

In a number of other circumstances, the common law permitted convictions on the basis of uncorroborated evidence, but required the judge to warn the jury about the dangers of convicting in the absence of corroboration. This requirement was originally imposed in relation to the following classes of evidence or witnesses:

- Accomplices;
- Complainants alleging sexual offences; and
- Unsworn evidence of children.

The law relating to corroboration was often complex and technical, raising difficult issues regarding what evidence qualifies as 'corroboration'. In addition, legislation in most states had reformed corroboration requirements in relation to sexual offence complainants and children.

Sections 164 and 165 of the Uniform Evidence Law replace previous corroboration requirements with a guided discretionary approach to jury directions which focuses on the needs of the case. The Act, however, preserves corroboration requirements in relation to perjury (ALRC 26 at [1015]–[1023]).

Following the commencement of the *Jury Directions Act 2015* on 29 June 2015, corroboration directions are prohibited in all cases except those such as perjury where corroboration continues to be required as a matter of law. Prior to these changes, the *Evidence Act 2008* permitted but did not require corroboration directions. This gave rise to difficulties in cases where judges gave erroneous corroboration directions and concerns about inconsistent practices regarding when judges would choose to give corroboration directions.

Last updated: 7 August 2015

s 164 – Corroboration requirements abolished

(1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the **offence** of perjury or a similar or related **offence**.

(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the **judge**—

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or

(b) give a direction relating to the absence of corroboration.

(4) Subject to subsection (5), if there is a jury in a criminal proceeding, the judge must not-

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or

(b) direct the jury regarding the absence of corroboration.

(5) In a criminal proceeding for the offence of perjury or a similar or related offence, the judge must direct the jury that it may find the accused guilty only if it is satisfied that the evidence proving guilt is corroborated.

(6) The principles and rules of the common law that relate to jury directions or warnings on corroboration of evidence, or the absence of corroboration of evidence, in criminal trials to the contrary of this section are abolished.

Note

Subsections (4), (5) and (6) do not appear in the Commonwealth Act and New South Wales Act.

Corroboration requirements abolished

1. With the exception of perjury, s 164 abolishes any requirement that evidence be corroborated. This applies to both rules of law and rules of practice which required judges to give corroboration warnings.
2. Following amendments by the *Jury Directions Act 2015*, the section also prohibits warnings about the need for or the absence of corroboration in all cases other than perjury.

Last updated: 7 August 2015

Part 4.5: Warnings & Information (ss 165–165B)

Part 4.5 of the *Evidence Act 2008* contains two sections concerning a judge's obligation to warn a jury about weaknesses in the evidence. in civil proceedings The sections cover:

- Evidence of a kind that may be unreliable (s 165); and
- Evidence of children (s 165A).

The sections, especially s 165, modify the common law approach by providing a guided discretionary approach to the need for a warning and the content of the warning. The Act seeks to avoid a rigid or technical approach and to prohibit judicial directions that are based on misinformed or outdated assumptions.

Following amendments by the *Jury Directions Act 2015*, Part 4.5 only applies to civil proceedings. Directions regarding potentially unreliable evidence and the evidence of children in criminal proceedings are governed by Division 3 of Part 4 of the *Jury Directions Act 2015*.

Consistent with the goal of maintaining the Evidence Act as an Act of general application, Part 4.5 has never dealt with warnings in relation to particular types of offences. In ALRC 102, the law reform commissions rejected suggestions that the Act should preclude generalised warnings regarding sexual assault complainants or cognitively impaired witnesses.

In 2001, NSW diverted from the uniform scheme by adding provisions which prohibited warnings or directions to juries that children are a class of unreliable witness and regulated the warnings a judge could give based on the age of the child. Following ALRC 102, ss 165A and 165B were added to the Uniform Evidence Law. The Commissions were concerned that judicial and community understandings regarding the value of children's evidence were outdated and did not accurately reflect the strengths and weaknesses of such evidence. In addition, the VLRC and the ALRC were concerned that common law warnings arising out of *Longman v R* (1989) 168 CLR 79 risked 'reinstating traditional beliefs and prejudices about sexual assault complainants' and 'created significant difficulties in practice for trial judges and appellate courts' (ALRC 102 at [18.74]). These provisions have now been repealed in Victoria and replaced by provisions in the *Jury Directions Act 2015*.

Last updated: 7 August 2015

s 165 – Unreliable evidence

(1) This section applies to evidence in a civil proceedings that is evidence of a kind that may be unreliable, including the following kinds of evidence—

(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;

(b) **identification evidence**;

(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;

(g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

Note

Subsection (1) differs from section 165(1) of the Commonwealth Act and New South Wales Act

(2) If there is a jury and a party so requests, the **judge** is to—

(a) warn the jury that the evidence may be unreliable; and

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The **judge** need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the **judge** to give a warning to, or to inform, the jury.

(6) Subsection (2) does not permit a **judge** to warn or inform a jury in proceedings before it in which a **child** gives evidence that the reliability of the **child**'s evidence may be affected by the age of the **child**. Any such warning or information may be given only in accordance with section 165A(2) and (3).

Note

This section applies only to civil proceedings. Divisions 3 and 4 of Part 4 of the **Jury Directions Act 2015** contain provisions relating to unreliable evidence and identification evidence that apply in criminal trials.

Unreliable evidence

1. Section 165 was designed to replace the common law rules regarding jury directions on corroboration and unreliable evidence by providing a more flexible regime (ALRC 102 at [18.29]).

2. In *Ewen v R* [2015] NSWCCA 117, Basten JA suggested at [16] a list a reasons for evidence being unreliable, and noted that section 165 does not distinguish between these different bases:

> Evidence may be "unreliable" for a number of reasons, including (a) difficulties surrounding initial perception (bad light or poor eyesight); (b) difficulties with accurate recall (due to delay, subsequent events or psychological reconstruction of memory); (c) the conditions under which recollection is reported (such as the courtroom environment); (d) falsification, including denial of recollection, invention and omission.

3. A mere assertion of unreliability is not sufficient to require a warning to be given pursuant to s 165. There must be some evidence of unreliability. Otherwise, warnings may be given as a routine matter and without careful thought as to whether one is necessary in the instant case (*Allen v R* (2013) 39 VR 629; [2013] VSCA 263 at [18] per the Court).

4. A request for a warning must relate to 'evidence of a kind that may be unreliable'. The request must state what the 'kind' of evidence is, why it is unreliable and what the content of the warning should be (*Allen v R* (2013) 39 VR 629; [2013] VSCA 263 at [18] per the Court, citing *Evans v R* (2007) 235 CLR 521; [2007] HCA 59 at [232] per Heydon J (Crennan J agreeing)).

5. There remains an unresolved division of judicial opinion on the judge's task when determining whether evidence is of a kind that may be unreliable. On the narrow approach, the judge must determine whether the witness's reliability "may be affected" by some matter listed in s 165(1), though this does not require the judge to make a finding that the evidence is unreliable. On the wider approach, the judge should give a requested direction for types of evidence listed in s 165(1), provided the courts have special knowledge of the deficiencies with the evidence which may not be apparent to the jury (*Boyer v R* (2015) 47 VR 640; [2015] VSCA 242, [37]–[38]; *Allen v R* (2013) 39 VR 629; [2013] VSCA 263).

6. This difference in approach has not been resolved in either Victoria or New South Wales (see *Allen v R* (2013) 39 VR 629; [2013] VSCA 263).

7. Even where no request is made, the trial judge may consider that the evidence may be unreliable and determine that a warning ought to be given (*Allen v R* (2013) 39 VR 629; [2013] VSCA 263 at [18] per the Court, citing *R v Williams* [1999] NSWCCA 9 at [34] per Wood CJ at CL (Spigelman CJ and McInerney J agreeing); *R v Andelman* (2013) 38 VR 659; [2013] VSCA 25 at [57] per the Court).

8. The discretion to give a warning, and the content of any such warning, 'remains a largely unfettered discretion informed as always by the need to ensure that there is no perceptible miscarriage of justice' (*Allen v R* (2013) 39 VR 629; [2013] VSCA 263 at [18] per the Court).

9. For more information on the principles which have developed in relation to the analogous provisions applicable in criminal trials, see ***Victorian Criminal Charge Book, 4.21 – Unreliable Evidence Warning***.

Last updated: 26 July 2016

s 165A – Warnings in relation to children's evidence

(1) A **judge** in any civil proceeding in which evidence is given by a **child** before a jury must not do any of the following—

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;

(c) give a warning, or suggestion to the jury, about the unreliability of the particular **child**'s evidence solely on account of the age of the **child.**

Note

Subsection (1) differs from section 165A(1) of the Commonwealth Act and New South Wales Act.

(2) Subsection (1) does not prevent the **judge**, at the request of a party, from—

(a) informing the jury that the evidence of the particular **child** may be unreliable and the reasons why it may be unreliable; and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular **child** and the weight to be given to it—

if the party has satisfied the **court** that there are circumstances (other than solely the age of the **child**) particular to the **child** that affect the reliability of the **child**'s evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a **judge** to give a warning to, or to inform, the jury.

Note

This section applies only to civil proceedings. Division 3 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to children's evidence that apply in criminal trials.

Warnings in relation to a child's evidence

1. Section 165A prohibits certain warnings in proceedings where a child gives evidence. The judge must not:
   - warn or suggest that children as a class are unreliable witnesses;
   - warn or suggest that the evidence of children as a class is inherently less credible or reliable, or must be scrutinised with greater care, than evidence of adults;
   - warn or suggest that the particular child witness' evidence is unreliable solely because of the child's age.
2. A judge may not give a warning under s 165 on the basis that the evidence of a child may be unreliable because of the child's age (s 165(5)).

3. Any warnings regarding the evidence of a child based on the child's age must comply with the requirements of s 165A.

4. In criminal proceedings, warnings in relation to children are governed by ss 33 and 44N of the *Jury Directions Act 2015*. For more information on these provisions, see Criminal Charge Book, ***4.2 Child Witnesses***.

5. The following commentary is predominantly based on the application of the earlier versions of this provision in criminal proceedings. It is likely that the principles developed in that context continue to inform the application of the section in civil proceedings.

Quality of children's evidence

6. Section 165A prohibits the jury from being warned, in any way, that children are an unreliable class of witnesses.

7. Traditionally, the common law considered that children:

- were prone to fantasy and unable to distinguish fact from imagination;
- have poor powers of observation and memory;
- are highly suggestible;
- are likely to give inaccurate evidence
- may make false accusations for malicious motives;
- often have little understanding of the obligation to speak the truth (ALRC 84, *Seen and Heard: Priority for Children in the Legal Process* (1997) at [14.15]).

8. Research into child development and child psychology suggests that the gulf between the reliability of evidence of a child and an adult appears to have been exaggerated. Children are able to remember and recall events they have personally experienced, are able to distinguish between fact and fantasy and are not inherently more likely to lie than adults. However, the research also confirms that children are suggestible, have a poor sense of dates and times, are more likely to falsely retract a story, and that interviewers need to be careful to avoid leading questions. Repeating a question in an interview may lead to a child giving a different answer, out of a belief that the repetition indicates that the first answer was wrong or unacceptable. A child's memory is also more likely to be adversely affected by long delays (ALRC 84 at [14.19]–[14.24]).

Permissible warnings

9. Section 165A permits the judge to:

- inform the jury that the evidence of a particular child may be unreliable;
- inform the jury of the reasons why the evidence of a particular child may be unreliable;
- warn or inform the jury of the need for caution when determining whether to accept the child's evidence;
- warn or inform the jury of the need for caution when determining the weight to attach to a child's evidence (s 165A(2))

10. Before any such information or warning is given, a party must:

- request the information or warning; and
- must satisfy the court that there are circumstances other than just the age of the child that:
  - affect the reliability of the child's evidence; and
  - warrant giving the information or warning.

11. The standard of proof for satisfying the judge of these matters is the balance of probabilities (*Evidence Act 2008* s 142).

12. In addition, the judge must be satisfied that the circumstances do affect the reliability of the child's evidence. It is not sufficient that the circumstances *might* affect the child's evidence.

13. Section 165A(2) states that a judge may either 'warn' or 'inform' the jury. This suggests that a judge may phrase any direction on the unreliability of a child's evidence as a comment, rather than a direction of law.

14. A direction under s 165A(2) must not contain any of the prohibited directions listed under s 165A(1). For example, while a judge may inform the jury of the need for caution regarding the evidence of a particular child witness, the judge must not warn or suggest that children, as a class, are unreliable witnesses.

15. Like the other warning provisions in the *Evidence Act 2008*, a party must apply for the warning.

16. In *Clarke v R*, Maxwell ACJ rejected the trial judge's statement that '[children's] memories can become blurred' and that '[t]hey can potentially … misinterpret things' as being contrary to the legislative policy behind s 165A (*Clarke v R* [2013] VSCA 206 at [21]–[22] per Maxwell ACJ).

17. His Honour concluded that this statement appeared 'to have had the effect of placing the evidence of child witnesses … in a special category because of their age' (*Clarke v R* [2013] VSCA 206 at [24] per Maxwell ACJ).

18. Any submission or direction which is intended to invite greater scrutiny of the evidence of a child than if he or she was an adult or because his or her evidence was recorded, thus treating the evidence as falling in a special category, is likely to contravene s 165A(1). These provisions preclude 'a judge or a party from expressing any generalised concern to the jury about the tape recording procedure or the reliability of children's evidence' (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377 at [85] per Redlich JA (Maxwell P and Neave JA agreeing). See also *Jury Directions Act 2015* s 33).

Circumstances that may permit a warning

19. An unreliability warning must not be given in respect of the evidence of a child witness unless there are circumstances (other than solely the age of the child) particular to the child that warrant it (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377 at [85] per Redlich JA (Maxwell P and Neave JA agreeing)).

20. Mere reliance on the fact that a child is 'particularly' young will not be sufficient for a warning to be warranted. Such a submission relies 'solely on the age of the child' as the reason why a warning is warranted (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377 at [89] per Redlich JA (Maxwell P and Neave JA agreeing)).

21. This does not exclude the possibility that there are circumstances common to persons of a particular age which affect the reliability of their evidence. The explanatory memorandum for the Commonwealth amending Act states that the following matters may justify a warning:

- characteristics of individuals of the witness's age (e.g. suggestibility);
- characteristics unique to that child (e.g. disability); and
- historical or current circumstances unique to that child (e.g. the manner in which the investigation was conducted, the manner in which the child was questioned).

22. Consistent with the research cited in ALRC 84, the following matters may also be relevant:

- defects in memory due to long delay; and
- inability to recall dates and times, or to recount events in an accurate chronological order.

23. The research cited in ALRC 84 indicates that, while the evidence of children is undervalued and the presumed gulf between the evidence of children and adults has been exaggerated, there are

matters that undermine the reliability of a child's evidence that do not generally operate to the same extent on adults.

Last updated: 7 August 2015

s 165B – Delay in prosecution

Note

The Commonwealth Act and New South Wales Act include a section requiring the judge to give certain directions to the jury relating to delay and forensic disadvantage. Division 5 of Part 4 of the **Jury Directions Act 2015** contains provisions relating to delay and forensic disadvantage that apply in criminal trials.

Delay in prosecution

1. Prior to 1 July 2015, this section regulated directions on criminal trials regarding an accused's forensic disadvantage due to a delay in prosecution. Following the commencement of the *Jury Directions Act 2015*, this provision has been repealed and forensic disadvantage warnings are now governed by Division 5 of Part 4 of the *Jury Directions Act 2015*.
2. For more information on the operation of these warnings, see Criminal Charge Book, ***Chapter 4.8.3***.

Last updated: 7 August 2015

Part 4.6: Ancillary Provisions (Divisions 1–4, ss 166–181)

Last updated: 10 August 2010

Division 1 – Requests to produce documents or call witnesses (ss 166–169)

This Division provides a 'request' based process for statutory discovery in respect of documents or things relevant to determining questions relating to:

- previous representations;
- evidence of a person's conviction for an offence; and
- authenticating, identifying or admitting a document or thing

The policy imperative of these provisions is to provide a safeguard to protect parties against whom hearsay or documentary evidence or evidence of a conviction might be adduced (see ALRC 38 at [241]).

This Division:

- defines the party actions that may be 'requested' under this Division (s 166);
- invests parties with the right to make a reasonable request to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction, or the authenticity or identity or admissibility of a document or thing (s 167);
- sets time limits for requests under this Division (s 168); and
- provides for a court, on application, to make remedial orders (s 169).

It has been noted that the Division can be difficult to apply in criminal cases. The Tasmanian Court of Criminal Appeal has noted:

> the reasonableness of a request has to be assessed in the context of where the burden of proof lies as to the ultimate issue, and who it is who proffers the evidence. Where there is incriminating evidence in the form of business records or other documents or things to which s 167 applies, the provisions provide important procedural safeguards. At the same time as care needs to be exercised to ensure that the safeguards are available to an accused person, care must be taken to avoid the situation where an accused can stultify or frustrate a prosecution by use of the request procedure. However, it has to be borne in mind that a person under caution, or having been charged with an offence, has the privilege against self-incrimination and is under no obligation to assist in the investigation or prosecution (*Lin v Tasmania* [2012] TASCCA 9 at [141] per Tennant and Porter JJ).

Application

The provisions apply in both civil and criminal proceedings and also apply in interlocutory proceedings (*Telstra Corp v Australis Media Holdings* NSWSC, 18 March 1997, unreported per McClelland CJ in Eq (rejecting an argument that s 167 has no application to an interlocutory proceeding to which s 75 applies)).

The provisions do not to apply to the tender of a document under s 1274(4C) of the Corporations Law (now the *Corporations Act 2001* (Cth)) (*Commissioner of Taxation (Cth) v Karageorge* (1996) 22 ACSR 199; 34 ATR 196).

There is a link between these request provisions and s 67 (notice requirement for certain first-hand hearsay evidence), but the request processes operate in contexts where there is no requirement for notice to be given. In the context of business records it has, however, been held that exhaustion of the requests process is not a condition of admissibility under s 69 (*Australian Petroleum Pty Ltd v Parnell Transport Industries Pty Ltd* (1998) 88 FCR 537).

Commonwealth records and certain Commonwealth documents

Pursuant to s 182 of the Commonwealth Act, ss 166–169 of that Act apply in proceedings in all Australian courts to Commonwealth records and certain Commonwealth documents.

Last updated: 10 August 2010

s 166 – Definition of request

In this Division, **request** means a request that a party (the requesting party) makes to another party to do one or more of the following—

(a) to produce to the requesting party the whole or a part of a specified **document** or thing;

(b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified **document** or thing;

(c) to call as a **witness** a specified person believed to be concerned in the production or maintenance of a specified **document** or thing;

(d) to call as a **witness** a specified person in whose possession or under whose control a specified **document** or thing is believed to be or to have been at any time;

(e) in relation to a **document** of the kind referred to in paragraph (b) or (c) of the definition of *document* in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the **document** and the way in which it was produced and has been kept;

(f) in relation to evidence of a **previous representation**—to call as a **witness** the person who made the **previous representation**;

(g) in relation to evidence that a person has been convicted of an **offence**, being evidence to which section 92(2) applies—to call as a **witness** a person who gave evidence in the proceeding in which the person was so convicted.

Definition of request

1. Section 166 provides that, in Division 1 of Part 4.6, a 'request' means a request one party makes to another for that other party to do one or more of a number of specified things, including producing a specified document and inspection of such a document.

2. Section 166 thus sets the scope of the things a party may be requested to do in a request pursuant to s 167 (*Trimcoll Pty Limited v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [32] per Basten JA (Spigelman CJ and Ipp JA agreeing)).

3. 'Document', 'previous representation' and 'representation' are defined terms.

Last updated: 10 August 2010

s 167 – Requests may be made about certain matters

A party may make a reasonable request to another party for the purpose of determining a question that relates to—

(a) a **previous representation**; or

(b) evidence of a conviction of a person for an **offence**; or

(c) the authenticity, identity or admissibility of a **document** or thing.

Requests may be made about certain matters

1. Section 167 allows a party to make a reasonable request to another party in order to determine a question that relates to a previous representation (s 167(1)); evidence of a conviction (s 167(2)); or the authenticity, identity or admissibility of a document or thing (s 167(3)).

2. 'Request' is defined by s 166 and a party may be requested to do any of the things specified in that provision.

3. The phrase 'relates to' indicates that the connection between the question and the previous representation, evidence of prior convictions or the authenticity, identity or admissibility of a document or thing may be broad. Further, considerations such as 'the authenticity or accuracy of the evidence' as contained in s 169(5) are inconsistent with according a narrow scope to a request pursuant to s 167 (*Lin v Tasmania* [2012] TASCCA 9 at [136] per Tennant and Porter JJ).

4. Thus, s 167 is not confined to questions going to admissibility. It may also apply to questions regarding credibility and weight (*Trimcoll Pty Limited v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [64]–[65] per Basten JA (Spigelman CJ and Ipp JA agreeing)).

5. However, the distinction between admissibility and credibility or weight of evidence may be relevant to the exercise of the s 169 discretion.

'reasonable'

6. The request must be reasonable in the view of the court. One matter bearing upon whether a request is reasonable is whether there is a 'genuine dispute' about a representation contained in the given document or record (*Deputy Commissioner of Taxation v Trimcoll Pty Ltd* [2005] NSWSC 1324 at [45] per Hall J).

7. How a request relates to 'a previous representation(s) or the authenticity or identity or admissibility of a document(s) or thing(s)' are matters the court 'should' consider. In some cases, the court will consider 'the manner and form of a request including its specificity or lack of specificity' (*Deputy Commissioner of Taxation v Trimcoll Pty Ltd* [2005] NSWSC 1324 at [59] per Hall J).

8. It has been noted that a request must relate to the proceedings in question (*Deputy Commissioner of Taxation v Trimcoll Pty Ltd* [2005] NSWSC 1324 at [65] per Hall J).

9. While the New South Wales Court of Appeal allowed an appeal against Hall J's ruling (because the pleadings were unsatisfactory and this meant there was 'reasonable cause' not to comply with the request), the Court did not explicitly disapprove of the principles enunciated by Hall J (*Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307).

10. This Court of Appeal also observed that it is 'sufficient for the purposes of ss 166–169 that there are previous representations which are likely to be relied [upon] during the trial in order to render a request under s 167 reasonable' (*Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [61] per Basten JA (Spigelman CJ and Ipp JA agreeing)).

'… for the purpose of determining a question that relates to …'

11. With respect to the requirement that the request 'relates' to a previous representation or evidence of a conviction or the authenticity, identity or admissibility of a document or thing, the New South Wales Court of Appeal also observed:

> '[t]he application of the provision is conveniently addressed by identifying the 'question', the determination of which must be 'the purpose' of the request. In doing so, it is necessary to bear in mind that the connection between the question and the document need not be direct and immediate. The purpose of the request need not be to determine the authenticity of a document, for example, but merely to determine a question that 'relates to' the authenticity of the document (*Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [26] per Basten JA (Spigelman CJ and Ipp JA agreeing)).

'the authenticity, identity or admissibility of a document or thing' (s 167(c))

12. There is no clear dividing line between questions of authenticity and identity, and each may provide a basis for admissibility (*Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [30]).

13. A document that is of unknown origin and unauthenticated may be inadmissible (*Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25).

14. Section 167(c) is not limited to exceptions to the hearsay rule and 'may therefore cover characteristics of documents which do not contain previous representations and which are not tendered pursuant to an exception to the hearsay rule' (*Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 at [33]).

Last updated: 29 May 2013

s 168 – Time limits for making certain requests

(1) If a party has given to another party written notice of its intention to adduce evidence of a **previous representation**, the other party may only make a request to the party relating to the **representation** if the request is made within 21 days after the notice was given.

(2) Despite subsection (1), the **court** may give the other party leave to make a request relating to the **representation** after the end of that 21 day period if it is satisfied that there is a good reason to do so.

(3) If a party has given to another party written notice of its intention to adduce evidence of a person's conviction of an **offence** in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made within 21 days after the notice is given.

(4) Despite subsection (3), the **court** may give the other party leave to make a request relating to evidence of the conviction after the end of that 21 day period if it is satisfied that there is good reason to do so.

(5) If a party has served on another party a copy of a **document** that it intends to tender in evidence, the other party may only make a request relating to the **document** if the request is made within 21 days after service of the copy.

(6) If the copy of the **document** served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the **document** is to be tendered to prove the contents of another **document**, the other party may only make a request relating to the other **document** if the request is made within 21 days after service of the copy.

(7) Despite subsections (5) and (6), the **court** may give the other party leave to make a request relating to the **document**, or other **document**, after the end of the 21 day period if it is satisfied that there is good reason to do so.

Time limits for making certain requests

1. If a party has given written notice of its intention to adduce evidence of a previous representation or evidence of a person's conviction to prove a fact in issue, or has served a copy of a document which the party intends to tender, s 168 imposes a 21 day time limit on a request by any other party.

2. Thus, even when notice is not strictly required under the *Evidence Act*, the time limit created by giving notice provides incentive for a party to give notice of any intention to adduce evidence of the kind provided by s 167.

Court may give leave for a late request

3. Once notice is given, the 21 day deadline applies. If the deadline is exceeded and no extension is granted by the court, no request can be made.

4. A court may, in its discretion, give leave to make a late request if it is satisfied there is good reason to do so.

Last updated: 10 August 2010

s 169 – Failure or refusal to comply with requests

(1) If the party has, without reasonable cause, failed or refused to comply with a request, the **court** may, on application, make one or more of the following orders—

(a) an order directing the party to comply with the request;

(b) an order that the party produce a specified **document** or thing, or call as a **witness** a specified person, as mentioned in section 166;

(c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;

(d) such order with respect to adjournment or costs as is just.

(2) If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.

(3) The **court** may, on application, direct that evidence in relation to which a request was made is not to be admitted in evidence if an order made by it under subsection (1)(a) or (b) is not complied with.

(4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if—

(a) the **document** or thing to be produced is not available to the party; or

(b) the existence and contents of the **document** are not in issue in the proceeding in which evidence of the **document** is proposed to be adduced; or

(c) the person to be called as a **witness** is not available.

(5) Without limiting the matters that the **court** may take into account in relation to the **exercise** of a power under subsection (1), it is to take into account—

(a) the importance in the proceeding of the evidence in relation to which the request was made; and

(b) whether there is likely to be a dispute about the matter to which the evidence relates; and

(c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the **document** the contents of which are, sought to be proved; and

(d) whether there is a reasonable doubt as to the authenticity of the **document** or thing that is sought to be tendered; and

(e) if the request relates to evidence of a **previous representation**—whether there is a reasonable doubt as to the accuracy of the **representation** or of the evidence on which it was based; and

(f) in the case of a request referred to in paragraph (g) of the definition of *request* in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and

(g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and

(h) the nature of the proceeding.

Note

Clause 5 of Part 2 of the Dictionary is about the availability of **document**s and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.

Failure or refusal to comply with requests

1. Section 169 provides for when a party, without reasonable cause, fails or refuses to comply with a request made under s 167. In these circumstances and upon application, the court may, having regard to the circumstances of s 169(5) and other relevant matters, make one or more of the orders detailed in s 169(1).

2. If the party making a request receives notice that the other party refuses to comply with the request, within a reasonable time of the request being made, the requesting party must apply to the court within a 'reasonable time after being so informed' (s 169(2)).

3. If the court makes an order under ss 169(1)(a) or (b) and that order is not complied with, the court may, on application and having regard to the requirements of s 192, direct that the evidence not be admitted.

4. An order may be made only if the recipient of the request has, without reasonable cause, failed or refused to comply with the request. Certain circumstances are deemed to constitute a 'reasonable cause to fail to comply with a request'. These include where a document or a thing to be produced is unavailable – (s 169(4)(a)); where the existence and contents of a document are not in issue (s 169(4)(b)); or where a person to be called as a witness is unavailable (s 169(4)(c)).

5. Thus, the three preconditions for the exercise of a s 169 discretion are:

   - a s 167 request is made;
   - the party to whom the request is directed fails or refuses, without reasonable cause, to comply with the request; and
   - the applicant applies to the court for an order that the evidence related to the request not be admitted into evidence.

6. The applicant:

   bears the onus of showing that the request under s 167 was a reasonable one. However, whilst the onus would be also on an applicant to ultimately persuade a court that an order should be made under s 169, once the reasonableness of the request had been established, the onus would lie on the party of whom the request had been made, to demonstrate that there was reasonable cause for the failure or refusal to comply (*Lin v Tasmania* [2012] TASCCA 9 at [131] per Tennant and Porter JJ).

Example

7. In *Woodgate v Fawcett* [2008] NSWSC 786 the plaintiffs sought an order under s 169(3) that a report not be admitted into evidence because the defendant had not complied with an order made by the court under s 169(1)(a) that it comply with a request by the plaintiffs under s 166. Hammerschlag J held the court was not empowered to make an order under s 169 because the

request was not a request within the meaning of s 166 (the request was for the defendant to identify the author of a particular document which is not a matter within s 166 – rather it is a matter for an interrogatory). Accordingly, his Honour would not exercise his discretion to direct the report not be admitted into evidence. He did, however, give leave to the plaintiffs to administer an interrogatory.

8. In *Lin v Tasmania* [2012] TASCCA 9, the prosecution relied on business records which did not identify the makers of the relevant representations. The defence requested that the makers be called as witnesses. The Court held that the prosecution had not established reasonable cause not to comply with the request and noted:

> [T]he prosecution would need to show reasonable cause for failing to call the witnesses. If the asserted basis is that the prosecution does not know the identity of the makers, evidence to that effect, and evidence as to what steps had been taken to establish their identity might be expected. That may include evidence of efforts made to have the accused identify the makers, and whether the accused was under caution or had been charged would be relevant to such efforts. If reasonable cause is shown on that basis, a pre-condition to orders under s 169 is not met. It might be expected that at least ordinarily, an inference that the accused had actual or available knowledge could not of itself establish reasonable cause.
>
> The evidence might show that the prosecution has made reasonable but fruitless inquiries, and that there are no means of identifying the makers independently of the accused; or to put it another way, the accused exclusively has the relevant knowledge or the ability to readily acquire it. We observe that an accused with exclusive actual or available knowledge has a choice of informing the prosecution of the identity of the makers, so that they can be called in the trial for cross-examination, or of calling the persons himself, or do nothing about the witnesses and argue the weight which should be attributed to the representations. Alternatively it is conceivable that the prosecution cannot show reasonable cause, but that the court concludes that the accused has actual or available knowledge. That may impact on the ultimate exercise of the discretion …
> In any of the postulated scenarios the weight to be attributed to the state of the accused's knowledge may need to be measured having regard to one aspect of the competing considerations which we earlier mentioned. That is, the fact that the proceedings are criminal ones and that the accused is under no obligation to assist in an investigation, at least to the extent of self-incrimination. Much would depend on the circumstances of the case; in particular the nature of the representations, and of the documents containing them, which are the subject of the request (*Lin v Tasmania* [2012] TASCCA 9 at [143]–[145] per Tennant and Porter JJ).

Last updated: 13 May 2013

Division 2 – Proof of certain matters by affidavits or written statements (ss 170–173)

This Division encourages the use of written evidence, in the form of affidavits and statements, to prove routine matters. It:

- permits evidence of facts that need to be proved in relation to specified documents or things to be given by affidavit or written statement which are served a 'reasonable time' before the hearing (s 170);
- prescribes the people who are permitted to make the affidavit or statement (s 171);
- provides that the evidence may be based upon knowledge, information or belief provided the source is detailed in the affidavit or statement (s 172);
- provides that another party may insist that the deponent be called to give evidence (s 173), which enables him or her to be cross-examined.

Other provisions in the UEA which assist in the proving of documents and things include **ss 58**, **156** and **183**.

Commonwealth records and certain Commonwealth documents

Pursuant to s 182 of the Commonwealth Act, ss 170–173 of that Act apply in proceedings in all Australian courts to Commonwealth records and certain Commonwealth documents.

Last updated: 10 August 2010

ss 170–173 – Proof by affidavits and written statements

170 Evidence relating to certain matters

(1) Evidence of a fact that is, because of a provision of this Act referred to in the Table, to be proved in relation to a **document** or thing may be given by a person permitted under section 171 to give such evidence.

Note

The Table to section 170 of the Commonwealth Act includes a reference to section 182 (**Commonwealth record**s) of that Act.

Provisions of this Act	Subject-matter
Section 48	Proof of contents of **document**s
Sections 63, 64 and 65	Hearsay exceptions for "first-hand" hearsay
Section 69	Hearsay exception for **business** records
Section 70	Hearsay exception for tags, labels and other writing
Section 71	Hearsay exception for telecommunications
The provisions of Part 4.3	Facilitation of proof

(2) Evidence may be given by affidavit or, if the evidence relates to a **public document**, by a written statement.

171 Persons who may give such evidence

(1) Such evidence may be given by—

(a) a person who, at the relevant time or afterwards, had a position of responsibility in relation to making or keeping the **document** or thing; or

(b) except in the case of evidence of a fact that is to be proved in relation to a **document** or thing because of section 63, 64 or 65—an authorised person.

(2) Despite subsection (1)(b), evidence must not be given under this section by an authorised person who, at the relevant time or afterwards, did not have a position of responsibility in relation to making or keeping the **document** or thing unless it appears to the **court** that—

(a) it is not reasonably practicable for the evidence to be given by a person who had, at the relevant time or afterwards, a position of responsibility in relation to making or keeping the **document** or thing; or

(b) having regard to all the circumstances of the case, undue expense would be caused by calling such a person as a **witness**.

(3) In this section, **authorised person** means—

(a) a person before whom an affidavit may be sworn and taken in a country or place outside the State under section 21 of the *Oaths and Affirmations Act 2018*; or

(b) a member of the police force above the rank of sergeant; or

(c) a person authorised by the Attorney-General for the purposes of this section.

Note

The Commonwealth Act and New South Wales Act contain a different definition of **authorised person**.

172 Evidence based on knowledge, belief or information

(1) Despite Chapter 3, the evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that that person has.

(2) An affidavit or statement that includes evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

173 Notification of other parties

(1) A copy of the affidavit or statement must be served on each party a reasonable time before the hearing of the proceeding.

(2) The party who tenders the affidavit or statement must, if another party so requests, call the deponent or person who made the statement to give evidence but need not otherwise do so.

Evidence relating to certain documents or things: s 170

1. Section 170 permits evidence in respect of certain documents or things to be given by a person described in s 171.

2. Evidence of a fact is covered by this provision if it falls within one of six categories of fact that must be proved because of a provision listed in a Table annexed to s 170. They include:

    - The proof of the contents of a document under s 48
    - Documentary hearsay exceptions under ss 63, 64, 65, 69, 70, 71; and
    - The provisions of Part 4.3 concerned with facilitation of proof.

3. Evidence may be given under this section by affidavit

4. Evidence relating to a public document (as defined in the UEA Dictionary) may be given by a written statement.

Persons who may give s 170 evidence: s 171

5. Section 171 details the persons who may provide an affidavit or statement pursuant to s 170.

6. The preferred witness under s 171, and the only permissible witness in respect of evidence arising under the first hand-hearsay categories, is a person who occupied a position of responsibility in relation to making or keeping the document or thing (ss 171(1)(a)) and 171(2)).

7. If it is not reasonably practicable or would cause undue expense to call such a person, then an 'authorised person' (as defined in s 171(3)) can make the s 170 affidavit or statement, unless it concerns first-hand hearsay (ss 171(1)(b)) and 171(2).

8. An authorised person has no power to make an affidavit or statement relating to facts to be proved because of ss 63, 64 or 65.

9. In the Victorian Act s 171(3) contains a definition of 'authorised person' that differs from the Commonwealth and the New South Wales Acts. The Victorian Act implements the recommendation of the Victorian Law Reform Commission (see VLRC, *Implementing the Uniform Evidence Act*, Report, February 2006 at [2.104]–[2.108].

10. In Victoria, an authorised person is defined as:

    - A person before whom an affidavit may be sworn outside Victoria under s 124 of the *Evidence (Miscellaneous Provisions) Act 1958*;
    - A member of the police force above the rank of sergeant; or
    - A person authorised by the Attorney-General for the purpose of the section.

Evidence based on knowledge, belief or information: s 172

11. Section 172 allows a permitted person's affidavit or statement to be based on knowledge, belief or information provided the source is set out in the affidavit or statement.

Notification of other parties: s 173

12. Section 173 requires a copy of an affidavit or statement under Division 2 to be served on each party a reasonable time before the hearing. Another party may then request that the deponent or maker be called to enable cross-examination.

13. This section does not contain any requirement to give pre-trial notice of request to call the deponent or maker.

Last updated: 10 August 2010

Division 3 – Foreign Law (ss 174–176)

Unlike domestic law, foreign law is proved in the same manner as facts – that is, by admissible evidence.

Prior to the UEA, foreign law could be proved only by a suitably qualified expert. Now, in addition to proving foreign law in this way, the UEA provides, that:

- evidence of the statutes, proclamations, treaties or acts of state of a foreign country may be adduced by producing official publications or other reliable sources of information (s 174);
- evidence of unwritten or common law of a foreign country and the interpretation of statutes may be proved by adducing certain books containing reports of court judgments (s 175); and
- questions of foreign law are to be decided by the judge alone (s 176).

Last updated: 10 August 2010

s 174 – Evidence of foreign law

(1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing—

(a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by the authority of the government or administration of the country; or

(b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the **court** to be a reliable source of information; or

(c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or prove, the statute, proclamation, treaty or act of state; or

(d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.

(2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

Foreign law

1. The section is permissive. It does not contain an exhaustive list of the types of documents which may be used to prove foreign law (*Mokbel v R* (2013) 40 VR 625; [2013] VSCA 118 at [24] per the Court).
2. The Act does not define the term 'foreign country'. As a result, in *Mokbel*, the Court of Appeal doubted whether the European Convention on Human Rights could be 'evidence of a statute, proclamation, treaty or act of State of a foreign country', given that the Convention itself is a product of the Council of Europe, not any of its individual member States or the European Union. However, the question was not ultimately determined by the Court (*Mokbel v R* (2013) 40 VR 625; [2013] VSCA 118 at [25] per the Court).

Last updated: 9 October 2013

s 175 – Evidence of law reports of foreign countries

175 Evidence of law reports of foreign countries

(1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.

(2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

s 176 – Questions of foreign law to be decided by judge

If, in a proceeding in which there is a jury, it is necessary to ascertain the **law** of another country which is applicable to the facts of the case, any question as to the effect of the evidence adduced with respect to that **law** is to be decided by the **judge** alone.

Evidence of foreign law: s 174

1. By s 174, evidence of foreign law, including statutes, proclamations, treaties or acts of state of a foreign country, may be adduced by producing certain official or other reliable documents.

2. In *Optus Networks Pty Limited v Gilsan (International) Limited* [2006] NSWCA 171, it was held that a Benchmark Order made by the US Federal Communications Commission (which established benchmark rates for certain telephony services) was a 'regulation' within the meaning of s 174(2), (at [89] per Hodgson JA (Beazley and McColl JJA agreeing)). The Order was proved by production of the Order itself and the fact that the Order was validly made was proved by the production of a decision of the US Court of Appeals.

3. It has been considered that the websites of the Legislative Assembly of the State of Georgia and that of the State of Minnesota are reliable sources of information with respect to the relevant laws in those jurisdictions as to service of documents: *Rasmussen v Eltrax Systems Pty Ltd (No 4)* [2006] NSWIRComm 225 per Marks J, citing *MindShare Communications Ltd v Orleans Investments Pty Ltd* [2000] FCA 521 per Katz J.

Evidence of law reports of foreign countries: s 175

4. By s 175, evidence of both the unwritten or common law of a foreign country and the interpretation of a statute of a foreign country may be adduced by producing law reports that would be used in the courts of the subject country.

5. In some cases it may be necessary to adduce expert evidence to prove such a matter: *Optus Networks Pty Limited v Gilsan (International) Limited* [2006] NSWCA 171 at [87] per Hodgson JA (Beazley and McColl JJA agreeing).

6. In some cases it may be possible to take judicial notice of the fact that a particular book which contains reports of court judgments 'is or would be used in the courts of the [foreign] county', for example the Federal Reporter which reports decisions of the United States Court of Appeals: *Optus Networks Pty Limited v Gilsan (International) Limited* [2006] NSWCA 171 at [87] per Hodgson JA (Beazley and McColl JJA agreeing).

Questions of foreign law to be decided by judge: s 176

7. By s 176, questions of foreign law are to be decided by the judge alone.

8. Unless by consent of the parties or with respect to a sufficiently well known fact, foreign law cannot usually be the subject of judicial notice: *Khademollah v Khademollah* [2000] FamCA 1045.

9. An appeal court has a duty to examine the evidence of a foreign law which has been adduced in the trial court for the purpose of itself determining the correctness of the trial judge's conclusions on that evidence: *R v Truong* (1996) 86 A Crim R 188 (ACTSC) per Miles CJ.

Last updated: 10 August 2010

Division 4 – Procedures for proving other matters (ss 177–181)

This Division provides for certain matters to be proved by certificate or affidavit. It provides that:

- evidence of a person's opinion may be tendered by certificate or affidavit, in which case a copy and notice must be served on the other party 21 days in advance of the hearing. In such cases, the other party may call the party who signed the certificate as a witness (s 177);
- evidence of a conviction, acquittal, sentencing, court order or the fact of pending proceedings can be proved by certificate (s 178);
- affidavit evidence may be given by a State or Territory police officer who is a fingerprint expert (s 179);
- affidavit evidence may be given by an employee or special member of the Australian Federal Police who is a fingerprint expert (s 180);
- the service or giving or sending under an Australian law of a written notification, notice, order or direction may be proved by affidavit by the person who served, gave or sent it. Such a person may be called to attend cross-examination (s 181).

Last updated: 10 August 2010

s 177 – Certificates of expert evidence

(1) Evidence of a person's opinion may be adduced by tendering a certificate (*expert certificate*) signed by the person that—

(a) states the person's name and address; and

(b) states that the person has specialised knowledge based on his or her training, study or experience as specified in the certificate; and

(c) sets out an opinion that the person holds and that is expressed to be wholly or substantially based on that knowledge.

(2) Subsection (1) does not apply unless the party seeking to tender the expert certificate has served on each other party—

(a) a copy of the certificate; and

(b) a written notice stating that the party proposes to tender the certificate as evidence of the opinion.

(3) Service must be effected not later than—

(a) 21 days before the hearing; or

(b) if, on application by the party before or after service, the **court** substitutes a different period—the beginning of that period.

(4) Service for the purposes of subsection (2) may be proved by affidavit.

(5) A party on whom the **document**s referred to in subsection (2) are served may, by written notice served on the party proposing to tender the expert certificate, require the party to call the person who signed the certificate to give evidence.

(6) The expert certificate is not admissible as evidence if such a requirement is made.

(7) The **court** may make such order with respect to costs as it considers just against a party who has, without reasonable cause, required a party to call a person to give evidence under this section.

Certificates of expert evidence

1. Section 177 applies to both civil and criminal proceedings. It provides a procedure to enable expert opinion to be adduced by certificate or affidavit – that is, without the expert necessarily being required to attend court. The only exception to this may arise under s 177(5) (see below).
2. The provision is directed to the tender of expert opinion in documentary form and has no application to evidence which is led orally: *R v Madigan* [2005] NSWCCA 170 at [106].
3. There is no particular form for the certificate, but it must comply with the requirements of s 177(1).
4. Notice must be served on the other parties not later than 21 days before the hearing unless the court, upon application, substitutes a different period (s 177(3)).

Other parties may require expert to give evidence: s 177(5)

5. By s 177(5), other parties may respond by requiring the expert to attend court to give evidence. In such a case, the expert certificate is not admissible.

6. A party who requires an expert to attend without reasonable cause may be order to pay costs (s 177(7)).

Last updated: 10 August 2010

s 178 – Convictions, acquittals and other judicial proceedings

(1) This section applies to the following facts—

(a) the conviction or acquittal before or by an applicable court of a person charged with an **offence**;

(b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court;

(c) an order by an applicable court;

(d) the pendency or existence at any time before an applicable court of a **civil** or **criminal proceeding**.

(2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or registrar or other proper officer of the applicable court—

(a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and

(b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and

(c) stating the title of the applicable court.

(3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular **offence** or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.

(4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.

(5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section—

acquittal includes the dismissal of the charge in question by an applicable court;

applicable court means an **Australian court** or a **foreign court**.

Note

Section 91 excludes evidence of certain judgments and convictions.

Convictions, acquittals and other judicial proceedings

1. Section 178 provides that evidence of convictions, sentences and other court orders may be given by means of a certificate signed by a judge or other proper officer of the applicable court. It describes the ways in which such evidence may be given.

2. The provision ought to be read in conjunction ss 91–93 which, with exceptions, limit the admissibility of evidence of decisions and factual findings in previous civil and criminal cases as evidence of facts that were in issue in those proceedings.

Last updated: 10 August 2010

s 179 – Proof of identity of convicted persons: affidavits by members of State or Territory police forces

(1) This section applies if a member of a police force of a State or Territory—

(a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and

(b) states in the affidavit that he or she is a fingerprint expert for that police force.

(2) For the purpose of proving before a **court** the identity of a person alleged to have been convicted in that State or Territory of an **offence**, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification—

(a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an **offence**; and

(b) was convicted of that **offence**; and

(c) was convicted of any other **offence** of which he or she is stated in the affidavit to have been convicted.

(3) For the purposes of this section, if a Territory does not have its own police force, the police force performing the policing **function**s of the Territory is taken to be the police force of the Territory.

Proof of identity of convicted persons—affidavits by members of State or Territory police forces

1. Section 179 provides for affidavit evidence to be given by a State or Territory police officer who is a fingerprint expert to prove the identity of a person alleged to have been convicted of an offence in that State or Territory.

Last updated: 10 August 2010

s 180 – Proof of identity of convicted persons: affidavits by members of Australian Federal Police

(1) This section applies if a **member** of the Australian Federal Police—

(a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and

(b) states in the affidavit that he or she is a fingerprint expert for the Australian Federal Police.

(2) For the purpose of proving before a **court** the identity of a person alleged to have been convicted of an **offence** against a **law** of the Commonwealth, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification—

(a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an **offence**; and

(b) was convicted of that **offence**; and

(c) was convicted of any other **offence** of which he or she is stated in the affidavit to have been convicted.

Proof of identity of convicted persons—affidavits by members of Australian Federal Police

1. Section 180 provides for affidavit evidence to be given by a Australian Federal Police officer (including employees and special members) who is a fingerprint expert to prove the identity of a person alleged to have been convicted of a Commonwealth offence.

Last updated: 10 August 2010

s 181 – Proof of service of statutory notifications, notices, orders and directions

(1) The service, giving or sending under an **Australian law** of a written notification, notice, order or direction may be proved by affidavit of the person who served, gave or sent it.

(2) A person who, for the purposes of a proceeding, makes an affidavit referred to in this section is not, because of making the affidavit, excused from attending for **cross-examination** if required to do so by a party to the proceeding.

Proof of service of statutory notifications, notices, orders and directions

1. Under s 181, the service, giving or sending of a written notification, notice, order or direction can be proved by an affidavit sworn by the person who served, gave or sent it.

Last updated: 10 August 2010

5 Miscellaneous

Chapter 5 contains general provisions to effect policies underlying the UEA such as the facilitation of the conduct of hearings.

The Chapter deals with such matters as:

- admitted and agreed facts (ss 184, 191);
- the conduct of a voir dire (s 189); and
- mandatory considerations when granting leave, permission or a direction (s 192).

Last updated: 13 April 2010

s 183 – Inferences

> If a question arises about the application of a provision of this Act in relation to a **document** or thing, the **court** may—
>
> (a) examine the **document** or thing; and
>
> (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.
>
> Note
>
> Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act a wider application in relation to **Commonwealth record**s and certain Commonwealth **document**s.

Inferences that can be made about a document or thing when a question arises about the application of the Act

1. Section 183 applies when 'a question arises about the application of a provision of this Act in relation to a document or thing'.
2. This includes when the court must determine the admissibility of a document, such as by inspecting it to determine if it is a business record (see *Roads and Traffic Authority of New South Wales v Tetley* [2004] NSWSC 925; *Dowling v Commonwealth Bank of Australia* [2008] FCA 59; *Yisheng Construction Pty Ltd v City Garden Australia Pty Ltd* [2022] NSWCA 269, [50]–[52]; *Knight v Mayart Pty Ltd* [2022] VSCA 36, [95]–[97]).

Interaction with other sections

3. Section 58 allows a court to examine a document or thing and to draw inferences to determine its relevance. Section 183 is broader – it allows a court to draw inferences for the purpose of any provision of the *Evidence Act 2008*.

Last updated: 15 December 2023

s 184 – Accused may admit matters and give consents

(1) In or before a **criminal proceeding**, an accused may—

(a) admit matters of fact; and

(b) give any consent—

that a party to a **civil proceeding** may make or give.

(2) An **admission** made by or a consent given by the accused is not effective for the purposes of subsection (1) unless—

(a) the accused has been advised to do so by the **Australian legal practitioner** of the accused; or

Note

Paragraph (a) differs from the Commonwealth Act and New South Wales Act.

(b) the **court** is satisfied that the accused understands the consequences of making the **admission** or giving the consent.

Admissions of fact

1. At common law, a party to a civil proceeding may admit any matter, or state that, for the purposes of the proceeding, a particular fact may be taken as proven.
2. Section 184 applies only in criminal proceedings and confers the same general power on an accused.
3. It is not necessary for the accused to have personal knowledge of the admitted fact: *R v Longford* (1980) 17 FLR 37.

Use of formal admissions

4. Formal admissions are a valuable tool for limiting the issues in dispute: *R v Mitchell* [1971] VR 46; *R v Maes* [1975] VR 541.
5. A formal admission binds only the accused who makes it. If a co-accused does not admit the same fact, the prosecution is required to lead evidence to prove that fact against the co-accused: *R v Maes* [1975] VR 541.

Requirement for use of formal admission

6. An admission of fact or a consent under s 186 is effective only if:
   - the accused was advised to do so by his or her legal practitioner or counsel; or
   - the court is satisfied that the accused understands the consequences of making the admission or giving the consent.

Admissions of fact and special hearings

7. A court should be cautious when the accused makes an admission of fact in a 'special hearing' under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. While the accused can make the admissions on the advice of his or her legal practitioner or counsel, the court is especially

reliant on the professionalism of the accused's counsel: *R v Zvonaric* (2001) 54 NSWLR 1; [2001] NSWCCA 505 per Spigelman CJ and Sully J (Adams J contra).

Ability to lead further evidence

8. The prosecution is not required to lead further evidence to establish an admitted fact. If the fact is an element of the offence, the judge is not required to, but may, direct the jury regarding that element: *R v Frazer* [2002] NSWCCA 59.

9. A formal admission of fact, or the offer to make a formal admission, does not prevent the prosecution leading further evidence on the same subject: *R v JGW* [1999] NSWCCA 116; *R v Smith* [1981] 1 NSWLR 193; *R v Popovic*, Unreported, NSWCCA, 25 March 1996 per McInerney and Abadee JJ (Hulme J not deciding).

10. Stephen Odgers states it is arguable that further evidence of an admitted fact is not admissible because the evidence is irrelevant. The author notes, however, that courts have not taken this approach (Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.184.20]).

11. The court can control prosecution attempts to lead evidence on the same issue through the provisions for mandatory and discretionary exclusion: *R v Smith* [1981] 1 NSWLR 193, *Evidence Act 2008* ss 135, 137.

Giving consent

12. An accused may also give any consent a party in a civil proceeding may give. This includes consenting to giving evidence that is protected by client legal privilege and dispensing with the rules of evidence.

Admissions and agreed facts

13. Section 191 allows the parties to a proceeding to make a statement of agreed facts. This can provide another way for the parties, by consent, to limit the issues in dispute and to dispense with the need to prove particular facts.

Last updated: 13 April 2010

s 187 – No privilege against self-incrimination for bodies corporate

(1) This section applies if, under a **law** of the State or in a proceeding, a body corporate is required to—

(a) answer a question or give information; or

(b) produce a **document** or any other thing; or

(c) do any other act whatever.

(2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the **document** or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

Note

This section differs from the Commonwealth Act.

Privilege against self-incrimination or exposure to penalty does not apply

1. Under s 187, a body corporate cannot refuse to answer a question, to give information, to produce a document or to do any other act on the basis the conduct might tend to incriminate the body corporate or to make the body corporate liable to a penalty.
2. This provision applies to any requirement under a law of Victoria or in a proceeding that requires a body corporate to:
   - answer a question or give information; or
   - produce a document or any other thing; or
   - do any other act.
3. This may include:
   - responding to a demand under a statute for information: *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74;
   - filing a defence: *Construction, Forestry, Mining and Energy Union of Australia v Alfred* (2004) 135 FCR 459; [2004] FCAFC 36;
   - giving discovery: *Duma v Mader International Pty Ltd* [2007] FMCA 1494;
   - filing witness statements: *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96; *Project 28 v Barr& Ors* [2007] NSWSC 715;
   - responding to a subpoena to produce documents: *R v Ronen* (2004) 62 NSWLR 707; [2004] NSWCCA 67.
4. Despite the general terms of s 187, once legal proceedings have commenced an investigative body requires clear statutory authorisation to use compulsory evidence-gathering powers against a corporation. Without clear provisions to the contrary, general evidence-gathering powers do not authorise contempt of court: *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456; [2008] NSWCCA 252.

Interaction between corporate entities and individuals

5. A corporation cannot claim the privilege against self-incrimination or exposure to a penalty on behalf of an individual. The privilege is a personal right that must be claimed by the person who seeks to exercise it: *ASIC v ABC Fund Managers* [2001] VSC 92; *Project 28 v Barr & Ors* [2007] NSWSC 715.

6. An individual's privilege protects only the individual. A person cannot refuse to give evidence on the basis it would incriminate another person, such as a body corporate: *Microsoft Corporation v CX Computer Pty Ltd* (2002) 116 FCR 372; [2002] FCA 3.

7. It is unclear whether an individual who controls a single person company can be compelled to produce incriminating corporate information. While Spigelman CJ and Mason P split on this issue in *R v Ronen* (2004) 62 NSWLR 707; [2004] NSWCCA 67, their remarks were obiter. In most cases, it is the corporation which must respond to the demand for information and if the usual custodian of records could claim the privilege against self-incrimination, the corporation must act through another agent.

Last updated: 13 April 2010

s 188 – Impounding documents

> The **court** may direct that a **document** that has been tendered or produced before the **court** (whether or not it is admitted in evidence) is to be impounded and kept in the custody of an officer of the **court** or of another person for such period, and subject to such conditions, as the **court** thinks fit.

Impounding documents

1. This section authorises a court to direct that a document be impounded and kept in the custody of a person chosen by the court.

2. This power may be exercised whether or not the document is admitted in evidence.

Last updated: 13 April 2010

s 189 – The voir dire

(1) If the determination of a question whether—

(a) evidence should be admitted (whether in the **exercise** of a discretion or not); or

(b) evidence can be used against a person; or

(c) a **witness** is competent or compellable—

depends on the **court** finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) If there is a jury, a preliminary question whether—

(a) particular evidence is evidence of an **admission**, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies; or

(b) evidence of an **admission**, or evidence to which section 138 applies, should be admitted—

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether an **admission** made by an accused should be admitted into evidence (whether in the **exercise** of a discretion or not) in a **criminal proceeding**, the issue of the **admission**'s truth or untruth is to be disregarded unless the issue is introduced by the accused.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the **court** so orders.

(5) Without limiting the matters that the **court** may take into account in deciding whether to make such an order, it is to take into account—

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the accused; and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and

(c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a **criminal proceeding**, a hearing in relation to sentencing).

(6) Section 128(10) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a **witness** at the hearing unless—

(a) it is inconsistent with other evidence given by the **witness** in the proceeding; or

(b) the **witness** has died.

Application

1. Section 189 applies to both civil and criminal proceedings.

Meaning of 'preliminary question'

2. For the purposes of this provision, a 'preliminary question' is a question regarding the:
   - admission of evidence, or
   - use of evidence, or
   - competence or compellability of a witness
   - which relies on the existence of a particular fact.
3. The fact to be determined on a hearing for a preliminary question is treated as a fact in issue for the purpose of Chapter 3. This modifies the general rule that 'fact in issue' means an ultimate fact in issue (s 55).

Standard of proof

4. The existence of 'a fact in issue' in a particular hearing must be determined on the balance of probabilities (s 142).

Nature of a voir dire

5. Subject to the expanded definition of 'fact in issue' in s 189(7), the rules of evidence apply to a voir dire.
6. A voir dire is part of the trial itself. It is not an interlocutory hearing for the purpose of s 75 ([Hearsay] Exception – interlocutory proceedings): *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 637.
7. Section 189(6) provides that s 128(10) does not apply on a voir dire. Section 128(10) removes an accused's privilege against self-incrimination in criminal proceedings when he or she gives evidence and is questioned about a fact in issue in the proceeding. Therefore, an accused may claim the privilege against self-incrimination on a voir dire regarding the facts in issue in the trial.

Limits on a voir dire

8. A party must identify the preliminary question with sufficient specificity and show there is a significant issue to be determined before the court will hold a voir dire: *R v Lars* (1994) 73 A Crim R 91.
9. A jury:
   - must not be present on a hearing to determine a preliminary question regarding the admissibility of an admission or whether evidence is an admission for the purpose of the Act;
   - may be present when determining any other preliminary question only if the court orders that the jury be present. Courts rarely allow the jury to be present at these hearings because of the risk jurors will hear inadmissible material.

10. Under s 189(3), on a hearing to determine a preliminary question regarding the admissibility of an accused's admission, the truth or falsity of the admission is irrelevant unless the accused introduces the issue.

11. Section 189(8) prohibits a party from adducing evidence of what a witness said or did during a preliminary hearing if the jury was not present unless:

    - the evidence is inconsistent with other evidence the witness has given in the proceeding; or
    - the witness has died.

12. On its terms, s 189(8), applies only to a witness' statements during a hearing to determine a preliminary question. The prohibition does not directly apply to evidence given in other hearings, such as on an application to stay the proceeding, or an application for an adjournment: *R v Rich (Ruling No 26)* [2009] VSC 159.

Status of evidence on a voir dire in civil proceedings

13. Evidence taken on a voir dire in a civil proceeding without a jury is, provided it is relevant and not rendered inadmissible by an exclusionary rule, evidence in the proceeding itself unless the court makes an order qualifying the admission or use of the evidence, such as under ss 135 or 136. There is no need for the court specifically to rule that individual pieces of evidence are admitted in the substantive hearing or for the witness to repeat the evidence (as is necessary when there is a jury): *ASIC v Rich* [2004] NSWSC 1062; *Brown v Commissioner of Taxation* (2001) 119 FCR 269; [2002] FCA 318; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419. (See discussion in Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.189.120]).

Last updated: 13 April 2010

s 190 – Waiver of rules of evidence

(1) The **court** may, if the parties consent, by order dispense with the application of any one or more of the provisions of—

(a) Division 3, 4 or 5 of Part 2.1; or

(b) Part 2.2 or 2.3; or

(c) Parts 3.2–3.8—

in relation to particular evidence or generally.

(2) In a **criminal proceeding**, a consent given by an accused is not effective for the purposes of subsection (1) unless—

(a) the accused has been advised to do so by the **Australian legal practitioner** or **legal counsel** of the accused; or

Note

Paragraph (a) differs from the Commonwealth Act and New South Wales Act.

(b) the **court** is satisfied that the accused understands the consequences of giving the consent.

(3) In a **civil proceeding**, the **court** may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if—

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the **court** may take into account in deciding whether to **exercise** the power conferred by subsection (3), it is to take into account—

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding; and

(c) the **probative value** of the evidence; and

(d) the powers of the **court** (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Rules of evidence that may be waived by consent: s 190(1)

1. With the consent of the parties, the court may waive only the following rules of evidence:
    - Part 2.1
        - Division 3 – General rules about giving evidence (ss 26–36);
        - Division 4 – Examination in chief and re-examination (ss 37–39);

- Division 5 – Cross examination (ss 40–46);
- Part 2.2 – Documents (ss 47–51);
- Part 2.3 – Other evidence (including views) (ss 52–54);
- Parts 3.2 – 3.8 (including Hearsay, Opinion, Admissions, Evidence of Judgments and Convictions, Tendency and Coincidence, Credibility, and Character) (ss 59–112).

2. While the parties may consent to waiving many of the strict rules of evidence, there are some rules, such as the prohibition on calling the accused in criminal proceedings, that cannot be waived. A court that permits a party to breach these rules falls into jurisdictional error by failing to observe the limits on its powers: *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.

Consent to waiver of rules of evidence in criminal proceedings: s 190(2)

3. An accused's consent to waiving rules of evidence is not effective unless:
   - the accused has been advised to give the consent by his or her legal practitioner or counsel; or
   - the court is satisfied the accused understands the consequences of giving the consent.
4. These are alternative bases for upholding the accused's consent. The court does not need to determine that the accused understands the consequences of giving the consent after being advised to do so by a legal practitioner.
5. It was held that the requirements of s 190(2)(b) were met when a trial judge had directly asked the (unrepresented) accused whether he understood that, if he did not object, the relevant statement would become evidence and the accused had said he did understand: *Clark v R* [2008] NSWCCA 122 at [121].
6. An accused may be competent to consent to waiving the rules of evidence even if he or she is not fit to be tried: see *R v Minani* (2005) 63 NSWLR 490; [2005] NSWCCA 226; *R v Zvonaric* (2001) 54 NSWLR 1; [2001] NSWCCA 505. In such proceedings, the court must rely on the professionalism of the accused's legal representation.

Waiver of rules of evidence in civil proceedings: s 190(3)

7. In a civil proceeding, a court may, either on application or its own motion, waive one or more of the provisions listed in s 190(1): s 190(3). This does not require the consent of the parties.
8. The court may exercise the s 190(3) power only if:
   - the matter in question is not genuinely in dispute; or
   - the application of particular rules of evidence would cause or involve unnecessary expense or delay.
9. The court must provide a fair hearing for the parties. When evidence is significant and genuinely disputed and the adducing party is on notice that the evidence is disputed, it is generally not appropriate to waive the rules of evidence to facilitate admission of the evidence: see, for example, discussion in *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCA 406 [144]–[152]. See also *Pearce v Button* (1986) 8 FCR 408; *Crimson SRL v Claudia Shoes (No 3)* [2007] FMCA 1555.
10. However, when it is fair to the parties, the rules of evidence must be applied flexibly: *Edmunds-Jones v Australian Women Hockey Association* [1999] NSWSC 285.
11. A court will need to consider the conduct of the parties and the history of the litigation to determine whether a matter is genuinely in dispute before waiving the rules of evidence under s 190(3)(a): *Rataplan Pty Ltd v Commissioner of Taxation* [2004] FCA 674.

Matters a court must consider before waiving rules of evidence: s 190(4)

12. Before waiving a rule of evidence under s 190(3), a court must consider the following matters:

    - the importance of the evidence; and
    - the nature of the cause of action or defence, and the nature of the subject-matter of the proceeding; and
    - the probative value of the evidence; and
    - any powers of the court to adjourn the hearing, to make another order or to give a direction in relation to the evidence (s 190(4)).

13. The court should also consider whether one party gave sufficient notice to the other party and that a party has chosen not to dispute the issue: *Williams Advanced Materials Inc v Target Technology* [2004] FCA 1405.

Waiver and failure to object

14. There is a line of authority suggesting that, in the context of the UEA, 'not admissible' means 'not admissible over objection'. The court is not required to make orders dispensing with the rules of evidence every time a party fails to object to potentially inadmissible evidence (with respect to criminal proceedings, see *WC v R* [2015] NSWCCA 52 at [20]; *FDP v R* (2008) 74 NSWLR 645; [2008] NSWCCA 317 and *Gonzales v R* [2007] NSWCCA 321; with respect to civil proceedings, see *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 and *City Elevators Pty Ltd v Burrows* [2004] NSWCA 26).

15. There is also authority that several provisions of the UEA are expressed in mandatory terms and are not contained in the list of provisions that may be waived by consent under s 190 – see, for example, ss 55 and 56 (Relevance), s 137 (Mandatory exclusion of evidence in criminal proceedings) and s 192 (Leave may be given on terms). Admission of evidence in breach of such mandatory provisions may give rise to a substantial miscarriage of justice (and potentially a jurisdictional error) in criminal trials (*Steve v R* [2008] NSWCCA 231; *R v Le* (2002) 54 NSWLR 474; [2002] NSWCCA 186. Note also *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1 re the competence of witness provisions. See also discussion in Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), [EA.190.60]).

16. Judicial officers must be alert, particularly in criminal trials, to the potential application of the mandatory provisions and, in such situations and if no objection is initially taken, draw the attention of the parties to the need to establish whether objection has not been taken because the party who might object chose not to do so and the reason for that view and, if appropriate, consider the need for consent or an application under s 190 (see *R v Lewis* [2003] NSWCCA 180 at [68]).

Last updated: 10 June 2015

s 191 – Agreements as to facts

(1) In this section, **agreed fact** means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding—

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact—

unless the **court** gives leave.

(3) Subsection (2) does not apply unless the agreed fact—

(a) is stated in an agreement in writing signed by the parties or by **Australian legal practitioners** or **prosecutors** representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the **court**, is stated by a party before the **court** with the agreement of all other parties.

Agreed facts

1. Parties to a civil or criminal proceeding may agree that a particular fact shall not be disputed in the proceeding.
2. The effect of this agreement is that the agreed fact is taken as proven and a party must obtain leave from the court before leading evidence to prove the agreed fact or to contradict or to qualify the agreed fact.

Procedural requirements

3. A statement of agreed facts must:
   - be in writing, signed by the parties or their legal practitioners and adduced in evidence; or
   - if the court gives leave, be orally stated by a party before the court with the agreement of all other parties.

Use of agreed facts

4. Like formal admissions, statements of agreed facts are valuable tools to limit the issues in dispute and dispense with the need for formal proof of uncontentious issues.
5. No clear practice has emerged on how a court should treat a statement of agreed facts:
   - one view is that an accused who is prepared to admit facts should not be prejudiced by that admission being recorded in permanent form for the jury to read and re-read during deliberations;
   - the other approach is that a statement of agreed facts should be treated as any other exhibit: compare *DPP v Thomas (Ruling No 12)* [2006] VSC 253 and *Quach v R* [2008] NSWCCA 284.

Leave to depart from agreed facts

6. Courts are generally reluctant to grant leave to depart from a statement of agreed facts. In *EPA v Ramsey Food Processing Pty Ltd* [2009] NSWLEC 152, Biscoe J notes there must be incentive for parties to agree upon facts and allowing parties to abandon such agreements does not encourage them to make the agreement in the first place. His Honour also notes there is, in a general sense, prejudice to a party when allowing a departure from what that party reasonably thought was agreed: *EPA v Ramsey Food Processing Pty Ltd* [2009] NSWLEC 152.

7. The court will consider the process which led to the agreed statement of facts and the stage of proceedings when the party seeks to withdraw the agreement: *EPA v Ramsey Food Processing Pty Ltd* [2009] NSWLEC 152.

Last updated: 13 April 2010

s 192 – Leave permission or direction may be given on terms

(1) If, because of this Act, a **court** may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the **court** thinks fit.

(2) Without limiting the matters that the **court** may take into account in deciding whether to give the leave, permission or direction, it is to take into account—

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

(b) the extent to which to do so would be unfair to a party or to a **witness**; and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought; and

(d) the nature of the proceeding; and

(e) the power (if any) of the **court** to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

Leave, permission or direction may be given on terms

1. Section 192 allows a court to give leave, permission or a direction on any terms the court thinks fit.

2. If a court does grant leave, it must advert to this provision when doing so.

Mandatory considerations

3. Courts must consider the factors listed in ss 192(2)(a)–(e) if those factors are relevant to the decision.

4. In *R v Reardon* [2002] NSWCCA 203, Hodgson JA explained that this provision can apply to at least 24 different applications under the Act and that some of these matters need to be resolved quickly with limited argument.

5. It is not necessary expressly to refer to all of these matters in a ruling on whether to give leave, permission or direction. Unless the circumstances imply the contrary, appellate courts may assume that a judge hearing a case will always be considering the s 192 factors: *R v Reardon* [2002] NSWCCA 203; *R v Stevens* [2001] NSWCCA 330.

6. It is the responsibility of the parties to bring relevant matters to the court's attention: *R v MDB* [2005] NSWCCA 354.

Other considerations

7. The list of matters in s 192(2) is not exhaustive of the matters a court needs to consider.

8. A court must also consider any other matters that are relevant to the issue it must decide. Failure to take a relevant consideration into account will vitiate a decision: *Stanoevski v R* (2001) 202 CLR 115; [2001] HCA 4.

Last updated: 13 April 2010

s 192A – Advance rulings and findings

Where a question arises in any proceedings, being a question about—

(a) the admissibility or use of evidence proposed to be adduced; or

(b) the operation of a provision of this Act or another **law** in relation to evidence proposed to be adduced; or

(c) the giving of leave, permission or direction under section 192—

the **court** may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

Provision designed to improve efficiency of trials

1. Section 192A permits a court to give an advance ruling on:
   - the admissibility or use of evidence, or
   - the operation of a law in relation to evidence, or
   - the giving of leave, permission or direction.
2. It allows a court to rule on the admissibility of evidence before a trial commences, as well as to indicate how the court would exercise a discretion to allow or to reject certain evidence (see *ACCC v Allphones Retail (No 3)* [2009] FCA 1075).
3. While s 192A overturns the effect of *TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46, courts should still consider the dangers of advance rulings identified by the High Court. While advance rulings have the potential to improve the efficiency of a criminal trial significantly, there may be a risk that making advance rulings will facilitate tactical decisions that may mean the trial judge is not seen to be impartial.
4. An advance ruling made on a hypothetical basis relies on counsel's ability to predict how the evidence will emerge and what other relevant evidence will be led. In some cases, a provisional ruling may be available to indicate how a discretion would be exercised if the factual evidence were to correspond with the hypothetical.
5. The power to make advance rulings may be particularly useful in cases where an accused is contemplating raising good character in a particular respect, or considering attacking the character of a prosecution witness (*Uniform Evidence Law (ALRC 102)* (Australian Law Reform Commission, 2006) at [16.104], cited in *Huges v R* [2013] VSCA 338 at [52] per Lasry AJA).
6. Advance rulings are also very important where one accused seeks to call evidence which may be unfairly prejudicial to a co-accused (*R v Qaumi & Ors (No 24)* [2016] NSWSC 505).

Last updated: 4 July 2017

s 193 – Additional powers

(1) The powers of a **court** in relation to—

(a) the discovery or inspection of **document**s; and

(b) ordering disclosure and exchange of evidence, intended evidence, **document**s and reports—

extend to enabling the **court** to make such orders as the **court** thinks fit (including orders about methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect **document**s of the kind referred to in paragraph (b) or (c) of the definition of *document* in the Dictionary.

(2) The power of a person or body to make rules of courts extends to making rules, not inconsistent with this Act or the regulations, prescribing matters—

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) Without limiting subsection (2), rules made under that subsection may provide for the discovery, exchange, inspection or disclosure of intended evidence, **document**s and reports of persons intended to be called by a party to give evidence in a proceeding.

(4) Without limiting subsection (2), rules made under that subsection may provide for the exclusion of evidence, or for its **admission** on specified terms, if the rules are not complied with.

Purpose of provision

1. Section 193 confers jurisdiction on the court to make the specified orders and rules, including with respect to regulating discovery and inspection of items defined as 'documents' in the Dictionary. The ALRC stated that the proposal was designed to extend discovery rules to all media including tapes, discs, microfilms and computer systems, and to enable the party against whom evidence is to be led to access and examine all such media and systems (ALRC 26:1 at [716]).

Inspection of documents

2. The dictionary defines 'document' as 'any record of information', including:

- anything upon which there is writing;
- anything upon which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- anything from which sounds, images or writings can be reproduced; and
- maps, plans, drawings or photographs.

3. Section 193(1) allows the court to make any additional orders it thinks fit with respect to the inspection of documents described in paragraphs (b) and (c) above to ensure the specialised nature of such documents is accessible to the opposing party (for instance, to be able properly to interpret or to inspect the information and the systems producing it or to reproduce the sounds, images or writings).

Scope of rules

4. Sections 193(2)–(4) give the court power to make rules regarding the operation of the Act. This may include rules regarding discovery, inspection and disclosure of documents and may provide for the exclusion or limited admission of evidence if a party fails to comply with the rules.

5. Courts may, for example, specify that an affidavit is inadmissible if the deponent fails to attend for cross-examination when required by the opposing party: *Chang v Su* [2002] FamCA 156.

6. The words 'or for its admission on specified terms' in s 193(4) are a qualification of the subsection's earlier words which allow rules regarding the exclusion of evidence, and is not an independent power to make rules allowing a court to receive evidence that is not admissible under the Act: *Lane v Jurd* [No 2] (1995) 40 NSWLR 708.

Last updated: 13 April 2010

s 194 – Witnesses failing to attend proceedings

(1) If, in a **civil** or **criminal proceeding**, a **witness** fails to appear when called and it is proved that the **witness** has been—

(a) bound over to appear; or

(b) duly bound by recognisance or undertaking to appear; or

(c) served with a summons or subpoena to attend and a reasonable sum of money has been provided to the **witness** for his or her costs in so attending—

the **court** may—

(d) issue a warrant to apprehend the **witness** and bring him or her before the **court**; or

(e) order the **witness** to pay a fine of not more than 5 penalty units; or

(f) take any other action against the **witness** that is permitted by **law**.

(2) If a subpoena or summons has been issued for the attendance of a **witness** on the hearing of a **civil** or **criminal proceeding** and it is proved, on application by the party seeking to compel his or her attendance, that the **witness**—

(a) is avoiding service of the subpoena or summons; or

(b) has been duly served with the subpoena or summons but is unlikely to comply with it—

the **court** may issue a warrant to apprehend the **witness** and bring the **witness** before the **court**.

(3) In issuing a warrant under this section, the **court** may endorse the warrant with a direction that the person must, on arrest, be released on bail as specified in the endorsement.

(4) An endorsement under subsection (3) must fix the amounts in which the principal and the sureties (if any) are bound and the amount of any money or the value of any security to be deposited.

(5) The person to whom the warrant to arrest is directed must cause the person named or described in the warrant when arrested—

(a) to be released on bail in accordance with any endorsement on the warrant; or

(b) if there is no endorsement on the warrant, to be brought before the **court** which issued the warrant; or

(c) to be discharged from custody on bail in accordance with the **Bail Act 1977**.

(6) Matters may be proved under this section orally or by affidavit.

(7) A **witness**, who under subsection (1)(e) has been ordered to pay a fine, is not exempted from any other proceedings for disobeying the subpoena or summons.

Note

This section differs from the New South Wales Act. The Commonwealth Act does not include an equivalent provision to section 194. There are provisions to the same effect in federal court rules and Australian Capital Territory legislation applying to proceedings before federal courts and Australian Capital Territory courts.

Issue of warrant

1. Section 194(1) gives the court three options when a witness fails to appear when called and it is proved that the witness:
    - Was bound over to appear;
    - Was under a recognisance or undertaking to appear; or
    - Had been validly served with a summons or subpoena, along with any necessary conduct money.
2. When any of these conditions are met, the court may:
    - issue a warrant to apprehend the witness and bring him or her before the court;
    - order the witness to pay a fine of not more than 5 penalty units; or
    - take any other action permitted by law.
3. Under s 194(7), issuing a fine does not prevent any further proceedings for failing to comply with the subpoena or summons, such as proceedings for contempt of court
4. Section 194(2) allows the court to issue a warrant to apprehend a witness and bring him or her before court if a summons or subpoena has been issued and it is proved that the witness:
    - is avoiding service; or
    - has been duly served but is unlikely to comply with the summons or subpoena.

Standard of proof

5. The standard of proof for the purpose of s 194 is unclear. In *Harris/D-E Pty Ltd v McClelland's Coffee & Tea Pty Ltd* [1999] NSWSC 36, Hodgson CJ in Eq left open whether the standard of proof was the balance of probabilities or beyond reasonable doubt. His Honour was concerned that the High Court's decision in *Witham v Holloway* (1995) 183 CLR 525 affected this issue. In *Witham v Holloway*, the High Court held that any form of contempt of court must be proven beyond reasonable doubt. Given that failure to attend court when required to do so can constitute contempt, it is arguable that this decision affects the operation of s 194. In contrast, Crockett J in *R v Raymar; re Papal* [1973] VR 843 held that the standard of proof under the previous Victorian provisions was the balance of probabilities. This decision, however, predates *Witham v Holloway* and was decided at a time when some forms of contempt of court could be proven on the balance of probabilities.

Exercise of discretion

6. A court should be slow to conclude that a person has deliberately refused to comply with a subpoena without just cause. Where the person has no history of failing to comply with court orders, and has not refused to give evidence, the court should not automatically issue a warrant to arrest the witness on the basis of the witness' non-appearance: *Photi v Target Australia (No 2)* [2007] NSWDC 302.

Last updated: 13 April 2010

s 195 – Prohibited question not to be published

A person must not, without the express permission of a **court**, print or publish—

(a) any question that the **court** has disallowed under section 41 (Improper questions); or

(b) any question that the **court** has disallowed because any answer that is likely to be given to the question would contravene the **credibility rule**; or

(c) any question in respect of which the **court** has refused to give leave under Part 3.7 (Credibility).

60 penalty units.

Scope of prohibition

1. Section 195 imposes a general ban on printing or publishing any of the following questions:
   - questions the court has disallowed under s 41;
   - questions the court has disallowed because an answer would contravene the credibility rule; or
   - questions for which the court refused to give leave under Part 3.7.
2. Under Part 3.7, the court must generally grant leave before a party may ask the following questions:
   - cross-examination of an accused regarding his or her credibility (s 104);
   - questions seeking to rebut a witness' denial of a matter by leading evidence from another witness (s 106);
   - questions regarding a prior consistent statement (s 108);
   - questions regarding the credibility of an accused who made a previous representation (s 108B);
   - questions of a third party regarding the credibility of a witness who gave evidence of an opinion based on specialised knowledge (s 108C).

Last updated: 13 April 2010

s 197 – Regulations

(1) The Governor in Council may make regulations for or with respect to any matter or thing that is required or permitted to be prescribed or necessary to be prescribed to give effect to this Act.

(2) The regulations—

(a) may be of general or limited application; and

(b) may differ according to differences in time, place or circumstance.

Note

This section differs from the Commonwealth Act and New South Wales Act.

Evidence Regulations 2009

1. The *Evidence Regulations 2009* prescribe the following matters:

- the content of notices in respect of hearsay evidence;
- the content of notices in respect of tendency and coincidence evidence;
- the prescribed forms for certifications regarding self-incriminating evidence and the result of other judicial proceedings;
- the prescribed forms for affidavits regarding fingerprint identification evidence by State and Territory police officers and Australian Federal Police officers.

Last updated: 13 April 2010

Schedule 1 – Oaths and Affirmations

This section reproduces without commentary Schedule 1 of the *Evidence Act 2008*.

Sections 21(4) and 22(2)

Oaths by witnesses

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Last updated: 13 April 2010

Schedule 2 – Transitional Provisions

The two following section reproduce without commentary Parts 1 and 2 of Schedule 2 of the *Evidence Act 2008*.

Last updated: 13 April 2010

Part 1 - General

1 Definitions

In this Schedule—

commencement day means the day this Act (other than Part 1 and the Dictionary) commences.

2 Application of this Act on commencement day

(1) Except as otherwise provided by this Schedule, this Act applies to any proceeding (within the operation of section 4) commenced on or after the commencement day.

(2) Except as otherwise provided by this Schedule, in the case of any proceeding (within the operation of section 4) that commenced before the commencement day, this Act applies to that part of the proceeding that takes place on or after the commencement day, other than any hearing in the proceeding that commenced before the commencement day and—

(a) continued on or after the commencement day; or

(b) was adjourned until the commencement day or a day after the commencement day.

3 Application of section 128A

Section 128A does not apply to an order made before the commencement day that would, if it were made after the commencement day, be a disclosure order within the meaning of that section.

4 Application of Part 3.10 to disclosure requirements

(1) Part 3.10 does not apply in respect of—

(a) a process or order of the court that requires the disclosure of information or a document issued or ordered before the commencement day that would, if it were issued or ordered after the commencement day, be a disclosure requirement within the meaning of section 131A; or

(b) a summons or subpoena issued on or after the commencement day to give evidence or produce documents at a hearing to which clause 2(2)(a) or (b) applies.

(2) Despite subclause (1)(a), Part 3.10 applies to a summons or subpoena to give evidence issued before the commencement day if the evidence is to be given at a hearing to which this Act applies.

5 Identifications already carried out

(1) Section 114 does not apply in relation to an identification made before the commencement day.

(2) Section 115 does not apply in relation to an identification made before the commencement day.

6 Documents and evidence produced before commencement day by processes, machines and other devices

(1) Section 146 has effect on and from the commencement day with respect to the production of a document or thing that occurred before the commencement day.

(2) Section 147 has effect on and from the commencement day with respect to the production of a document that occurred before the commencement day.

7 Documents attested and verified before the commencement day

(1) Section 148 has effect on and from the commencement day with respect to the attestation, verification, signing or acknowledgement of a document that occurred before the commencement day.

(2) Section 149 has effect on and from the commencement day with respect to the attestation or signing of a document that occurred before the commencement day.

8 Matters of official record published before the commencement day

(1) Section 153 has effect on and from the commencement day with respect to the publication of a document referred to in that section that occurred before the commencement day.

(2) Section 154 has effect on and from the commencement day with respect to the publication of a document referred to in that section that occurred before the commencement day.

(3) Section 155 has effect on and from the commencement day with respect to the signing and sealing or certification of a document referred to in that section that occurred before the commencement day.

(4) Section 156 has effect on and from the commencement day with respect to the sealing or certification of a document referred to in that section that occurred before the commencement day.

(5) Section 157 has effect on and from the commencement day with respect to the sealing or signing of a document referred to in that section that occurred before the commencement day.

(6) Section 158 has effect on and from the commencement day with respect to the sealing or signing and sealing of a public document referred to in that section that occurred before the commencement day.

(7) Section 159 has effect on and from the commencement day with respect to the publication of a document referred to in that section that occurred before the commencement day.

9 Agreed facts

The reference in section 191(3)(a) to an agreement is taken on and from the commencement day to include a reference to an agreement entered into before the commencement day under section 149AB(3) of the **Evidence Act 1958**, as in force immediately before its repeal.

10 Application of Act to improperly or illegally obtained evidence

Section 139 does not apply in relation to a statement made or an act done before the commencement day.

Last updated: 13 April 2010

Part 2 – Application of Notification Provisions

11 Notification provisions

(1) If, before the commencement day, a document of a kind referred to in a notification provision is given or served—

(a) in the circumstances provided for in that provision; and

(b) in accordance with such requirements (if any) as would apply to the giving or serving of the document under that provision on and after its commencement—

on and from the commencement day the document is taken to have been given or served in accordance with that provision.

(2) The following sections are notification provisions for the purposes of subclause (1)—

(a) section 33(2)(c);

(b) section 49(a);

(c) section 50(2)(a);

(d) section 67(1);

(e) section 68(2);

(f) section 73(2)(b);

(g) section 97;

(h) section 98;

(i) sections 168(1), (3), (5) and (6);

(j) section 173(1);

(k) sections 177(2) and 177(5).

12 Notice of intention to adduce hearsay evidence

If a notice given before the commencement day is taken, by the operation of clause 11, to have been given under section 67(1), the period for an objection to be made under section 68 to the tender of evidence to which the notice relates is the later of the period ending—

(a) 7 days after the commencement day; or

(b) 21 days after the notice was given to the party concerned.

13 Notice of intention to adduce evidence as to tendency or coincidence

(1) References in sections 97(1)(a) and 98(1)(a) to giving notice are taken to include references to giving notice of the kind referred to in those sections before the commencement day.

(2) Despite clause 11(1)(b), a notice of a kind referred to in section 97 or 98 given before the commencement day is taken to have been given in accordance with any regulations or rules made for the purposes for section 99.

14 Time limits for making requests

(1) A request made before the commencement day that would, if it were made after the commencement day be a request under section 167, is taken to be such a request.

(2) If a notice given before the commencement day is taken, by the operation of clause 11, to have been given under section 168(1) or (3), the period for a request to be made under section 168(1) or (3) is the later of the period ending—

(a) 7 days after the commencement day; or

(b) 21 days after the notice was given to the party concerned.

(3) If a copy of a document served before the commencement day is taken, by the operation of clause 11, to have been served under section 168(5) or (6), the period for a request to be made under section 168(5) or (6) is the later of the period ending—

(a) 7 days after the commencement day; or

(b) 21 days after the document was served on the party concerned.

(4) If a request made under section 168 was received before the commencement day, in determining what is a reasonable time after receiving a request for the purposes of section 169(2), the court may take into account time passed before the commencement day.

15 Requests under section 173

A request made before the commencement day that would, if it were made after the commencement day be a request under section 173(2), is taken to be such a request.

16 Proof of voluminous or complex documents

If a court has given a direction under section 42B of the **Evidence Act 1958**, as in force immediately before its repeal, and a party has been provided with a copy of the evidence in the form specified in that direction, the party is taken, for the purposes of section 50(2)(b), to have been given a reasonable opportunity to examine or copy documents.

Last updated: 13 April 2010

Part 3—Transitional provisions for Evidence Amendment (Journalist Privilege) Act 2012

17 Definitions

In this Part—

2012 Act means the Evidence Amendment (Journalist Privilege) Act 2012.

18 Application of Division 1C of Part 3.10

(1) Except as otherwise provided by this Schedule, the amendment made to Part 3.10 of this Act by section 3 of the 2012 Act applies to any proceeding commenced on or after the commencement of that section.

(2) Except as otherwise provided by this Schedule, in the case of any proceeding that commenced before the commencement of section 3 of the 2012 Act, the amendment made to Part 3.10 of this Act by that section applies to that part of the proceeding that takes place on or after the commencement of that section, other than any hearing in the proceeding that commenced before the commencement of that section and—

(a) continued on or after the commencement of that section; or

(b) was adjourned until the commencement of that section or a day after the commencement of that section.

19 Application of Division 1C of Part 3.10 to disclosure requirements

(1) The amendment made to Part 3.10 of this Act by section 3 of the 2012 Act does not apply in respect of—

(a) a disclosure requirement issued or ordered before the commencement of section 3 of that Act; or

(b) a disclosure requirement issued or ordered on or after the commencement of section 3 of that Act to give evidence or produce documents at a hearing to which clause 18(2)(a) or (b) applies.

(2) Despite subclause (1)(a), the amendment made to Part 3.10 of this Act by section 3 of the 2012 Act applies to a disclosure requirement issued or ordered before the commencement of section 3 of that Act if the evidence is to be given at a hearing to which the amendment made by section 3 of that Act applies.

(3) In this section, disclosure requirement has the same meaning as in section 131A.

20 Certificate given to a witness before commencement

(1) The amendment made to section 128 by section 4(3) and (4) of the 2012 Act has effect on and from the commencement of that section with respect to the giving of a certificate under a prescribed State or Territory provision that has occurred before the commencement of that section.

(2) The amendment made to section 128A by section 5 of the 2012 Act has effect on and from the commencement of that section with respect to the giving of a certificate under a prescribed State or Territory provision that has occurred before the commencement of that section.

Part 5 —Transitional provision for Crimes Amendment (Abolition of Defensive Homicide) Act 2014

22 Transitional—Crimes Amendment (Abolition of Defensive Homicide) Act 2014

This Act as amended by Part 3 of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 applies to a trial that commences (within the meaning of section 210 of the Criminal Procedure Act 2009) on or after the day on which Part 3 of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 comes into operation, irrespective of when the offence is alleged to have been committed.

Part 6 —Transitional provisions for Jury Directions Act 2015

23 Application of Act as amended

This Act as amended by Division 2 of Part 10 of the Jury Directions Act 2015 applies to a trial that commences (within the meaning of section 210 of the Criminal Procedure Act 2009) on or after the day on which Division 2 of Part 10 of that Act comes into operation.

Part 7 —Transitional provision for Jury Directions and Other Acts Amendment Act 2017

24 Application of section 66 as amended

Section 66 as amended by section 17 of the Jury Directions and Other Acts Amendment Act 2017 applies to—

(a) a trial that commences (within the meaning of section 210 of the Criminal Procedure Act 2009) on or after the day on which section 17 of the Jury Directions and Other Acts Amendment Act 2017 comes into operation; and

(b) a summary hearing held on or after the day on which section 17 of the Jury Directions and Other Acts Amendment Act 2017 comes into operation if no evidence has been given in that hearing before that day.

Dictionary

A number of expressions used in *Evidence Act 2008* are defined in 'the Dictionary at the end of the Act' (the UEA Dictionary). These expressions have the meanings given to them in the Dictionary (s 3(1)).

The UEA Dictionary forms part of the Act (s 3(2)).

Part 1 - Definitions

Part 1 of the Dictionary has been divided into 6 alphabetical groups.

A–B

admission means a previous representation that is—

(a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and

(b) adverse to the person's interest in the outcome of the proceeding;

asserted fact is defined in section 59;

associated accused, in relation to an accused in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for—

(a) an offence that arose in relation to the same events as those in relation to which the offence for which the accused is being prosecuted arose; or

(b) an offence that relates to or is connected with the offence for which the accused is being prosecuted;

Australia includes the external Territories;

Australian court means—

(a) the High Court; or

(b) a court exercising federal jurisdiction; or

(c) a court of a State or Territory; or

(d) a judge, justice or arbitrator under an Australian law; or

(e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or

(f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence;

Australian law means a law of the Commonwealth, a State or a Territory;

Note: See clause 9 of Part 2 of this Dictionary for the meaning of law.

Australian or overseas proceeding means a proceeding (however described) in an Australian court or a foreign court;

Australian Parliament means the Parliament, the Parliament of the Commonwealth or another State or the Legislative Assembly of a Territory;

Australian-registered foreign lawyer has the meaning it has in the Legal Profession Uniform Law (Victoria);

Australian Statistician means the Australian Statistician referred to in section 5(2) of the Australian Bureau of Statistics Act 1975 of the Commonwealth, and includes any person to whom the powers of the Australian Statistician under section 12 of the Census and Statistics Act 1905 of the Commonwealth have been delegated;

business is defined in clause 1 of Part 2 of this Dictionary;

C

case of a party means the facts in issue in respect of which the party bears the legal burden of proof;

child means a child of any age and includes the meaning given in clause 10(1) of Part 2 of this Dictionary;

civil penalty is defined in clause 3 of Part 2 of this Dictionary;

civil proceeding means a proceeding other than a criminal proceeding;

client is defined in section 117;

coincidence evidence means evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection;

coincidence rule means section 98(1);

Commonwealth owned body corporate means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the Corporations Act 2001 of the Commonwealth, be—

(a) a wholly-owned subsidiary of the Commonwealth; or

(b) a wholly-owned subsidiary of another body corporate that is, under this definition, a Commonwealth owned body corporate because of the application of paragraph (a) (including the application of that paragraph together with another application or other applications of this paragraph);

Commonwealth record means a record made by—

(a) a Department within the meaning of the Public Service Act 1999 of the Commonwealth; or

(b) the Parliament, a House of the Parliament, a committee of a House of the Parliament or a committee of the Parliament; or

(c) a person or body, other than a Legislative Assembly, holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth; or

(d) a body or organisation other than a Legislative Assembly, whether incorporated or unincorporated, established for a public purpose—

(i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or

(ii) by the Governor-General; or

(iii) by a Minister of the Commonwealth; or

(e) any other body or organisation that is a Commonwealth owned body corporate—

and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), (d) or (e), but does not include a record made by a person or body holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth if the record was not made in connection with holding the office concerned, or exercising the power concerned;

confidential communication is defined in section 117;

confidential document is defined in section 117;

court means Victorian court;

Notes:

1 Victorian court is defined in this Dictionary.

2 The Commonwealth Act does not include this definition.

credibility of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation;

credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence;

credibility evidence is defined in section 101A;

credibility rule means section 102;

criminal proceeding means a prosecution for an offence and includes—

(a) a proceeding for the committal of a person for trial or sentence for an offence; and

(b) a proceeding relating to bail—

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the Taxation Administration Act 1953 of the Commonwealth;

cross-examination is defined in clause 2(2) of Part 2 of this Dictionary;

cross-examiner means a party who is cross-examining a witness;

D–H

de facto partner is defined in clause 11 of Part 2 of this Dictionary;

document means any record of information, and includes—

(a) anything on which there is writing; or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph;

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of document.

electronic communication has the same meaning as it has in the Electronic Transactions (Victoria) Act 2000;

examination in chief is defined in clause 2(1) of Part 2 of this Dictionary;

exercise of a function includes performance of a duty;

fax, in relation to a document, means a copy of the document that has been reproduced by facsimile telegraphy;

federal court

Note: The Commonwealth Act includes a definition of this term.

foreign court means any court (including any person or body authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the person or body is empowered to require the answering of questions or the production of documents) of a foreign country or a part of such a country;

foreign lawyer has the same meaning it has in the Legal Profession Uniform Law (Victoria);

function includes power, authority or duty;

government or official gazette includes the Government Gazette;

Note: The definition of this term in the Commonwealth Act and New South Wales Act differs from this definition.

Governor of a State includes any person for the time being administering the Government of the State;

Governor-General means Governor-General of the Commonwealth and includes any person for the time being administering the Government of the Commonwealth;

Note: The Commonwealth Act does not include definitions of Governor of a State and Governor-General. These definitions are covered by sections 16A and 16B of the Acts Interpretation Act 1901 of the Commonwealth.

hearsay rule means section 59(1);

I–L

identification evidence means evidence that is—

(a) an assertion by a person to the effect that an accused was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where—

(i) the offence for which the accused is being prosecuted was committed; or

(ii) an act connected to that offence was done—

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or

(b) a report (whether oral or in writing) of such an assertion;

investigating official means—

(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior); or

(b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences;

joint sitting means—

(a) in relation to the Parliament of the Commonwealth—a joint sitting of the members of the Senate and of the House of Representatives convened by the Governor-General under section 57 of the Commonwealth Constitution or convened under any Act of the Commonwealth; or

(b) in relation to a bicameral legislature of a State—a joint sitting of both Houses of the legislature convened under a law of the State;

judge, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held;

law is defined in clause 9 of Part 2 of this Dictionary;

leading question means a question asked of a witness that—

(a) directly or indirectly suggests a particular answer to the question; or

(b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked;

Legislative Assembly means any present or former Legislative Assembly of a Territory, and includes the Australian Capital Territory House of Assembly;

M–P

member of the Australian Federal Police includes a special member or a staff member of the Australian Federal Police;

non-participant registered foreign lawyer has the same meaning as it has in Schedule 3 to the Legal Profession Uniform Law (Victoria);

NSW court

Note: The New South Wales Act includes this definition.

offence means an offence against or arising under an Australian law;

opinion rule means section 76;

parent includes the meaning given in clause 10(2) of Part 2 of this Dictionary;

picture identification evidence is defined in section 115;

police officer means—

(a) a member of the Australian Federal Police; or

(b) a member of the police force of a State or Territory;

postal article has the same meaning as in the Australian Postal Corporation Act 1989 of the Commonwealth;

previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced;

prior consistent statement of a witness means a previous representation that is consistent with evidence given by the witness;

prior inconsistent statement of a witness means a previous representation that is inconsistent with evidence given by the witness;

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

prosecutor means a person who institutes or is responsible for the conduct of a prosecution;

public document means a document that—

(a) forms part of the records of the Crown in any of its capacities; or

(b) forms part of the records of the government of a foreign country; or

(c) forms part of the records of a person or body holding office or exercising a function under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country; or

(d) is being kept by or on behalf of the Crown, such a government or such a person or body—

and includes the records of the proceedings of, and papers presented to—

(e) an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament; and

(f) a legislature of a foreign country, including a House or committee (however described) of such a legislature;

Probative value of evidence

(i) Definition

1. 'Probative value' is defined in the UEA Dictionary as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.

2. The meaning of 'probative value' must be assessed in its legal and factual context. The:

> factors to be taken into account in determining whether a piece of evidence has the requisite degree of probative value or results in a degree of unfair prejudice will vary depending on the type of evidence and the context in which it is sought to be adduced (ALRC 102 at [3.31]).

3. That is, the probative value of evidence varies according to the fact in issue which it is being used to prove and the reasoning relied on to prove that fact. For this reason, it has been described as a 'floating standard' (especially with respect to credibility, tendency and/or coincidence evidence, which work to relate to other evidence rather than being directly associated with a fact in issue) (see ALRC 102 at [3.31], [3.35]).

4. The definition uses concepts similar to those used in the test for relevance – namely, whether the evidence 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding' (s 55)) – but it is expressed in terms of degree. Therefore, the probative value of evidence is assessed at least in part by reference to its degree of relevance to a fact in issue (*R v Lockyer* (1996) 89 A Crim R 457 at 459).

(ii) Notions of reliability and credibility

5. Intermediate appellate courts have taken two divergent approaches to the interpretation of the term 'probative value' and whether the court must take the reliability of evidence into account.

   - Under the Victorian approach, a trial judge must assume that the jury will accept the evidence as 'truthful', but is not required to assume that the jury will accept the evidence as reliable; the judge must therefore take matters affecting the reliability of the evidence into account when assessing probative value.
   - Under the New South Wales approach, a trial judge should assume the evidence will be accepted as credible and reliable and assess the probative value of the evidence on that basis.

6. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, a majority of the High Court (French CJ, Kiefel, Bell and Keane JJ) held that the New South Wales approach is correct. The Court must take the evidence at its highest and consider the extent to which the evidence can affect the probability of the existence of the facts in issue (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [47]).

7. The majority stated that the Uniform Evidence Law "was intended to make substantial changes to the common law rules of evidence. The statute's language is the primary source, not the pre-existing common law" (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14, [35]). Further, the majority stated that when assessing the probative value of evidence, the judge must assume that the evidence is accepted and, as a result, that the evidence is both credible and reliable (at [48]) and "no question as to credibility of the evidence, or the witness giving it can arise. For the same reason, no question as to the reliability of the evidence can arise" ([39], [52]).

8. However, the majority recognised that there may be: a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance ([39]).

9. The majority noted, however, that "taken by itself … evidence may, if accepted, support an inference to a high degree of probability that the fact in issue exists" or "may only strengthen the inference when considered in conjunction with other evidence" ([45]).

10. In the course of its overall assessment of the probative value of the two items of evidence in question in that case (the "tendency'' and " complaints" evidence), the majority looked at other evidence received in the trial which was relevant to the probative value of the evidence in question (see, e.g., [62]–[64], [68]–[70] and [73]). It did not, however, indicate whether such other evidence also had to be assumed to be reliable and credible when making this assessment.

11. Prior to *IMM* several associated issues were identified as potentially affecting the assessment of probative value. These are:

- where the issues of credibility and reliability are so fraught that it would not be open for the jury to rationally use the evidence (*IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [39]; *PG v R* [2010] VSCA 289 at [62]). Post-*IMM*, it is clear that in extreme cases, issues of credibility or reliability may deprive evidence of probative value;
- the possibility of joint concoction (see *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [59] and compare *BSJ v R* (2012) 35 VR 475; [2012] VSCA 93; *AE v R* [2008] NSWCCA 52; *PNJ v DPP* (2010) 27 VR 146; [2010] VSCA 88). The status of this factor was questioned but not determined in *IMM* ([59]);
- where the evidence is disputed (*AE v R* [2008] NSWCCA 52 at [44]; see also *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [165]). The relevance of this factor is currently unclear; and
- competing inferences arising from the evidence and alternative explanations for conduct exist (*DSJ v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [78]; see also *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 at [169]–[172]). The relevance of this factor is also currently unclear.

Reliability, credibility and identification evidence; assessing probative value

12. In the course of the decision in *IMM* the majority considered an example of identification evidence given by JD Heydon QC where the identification was made "briefly in foggy conditions and in bad light by a witness who did not know the person identified". The majority stated:

> As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence ([50]).

13. This example was also cited with approval by the Gageler J in his dissenting judgment in *IMM v R* (see [92] per Gageler J) and similar concerns identified by Nettle and Gordon JJ at [147]. The example was also adopted by the Victoria Court of Appeal in *Bayley v R* [2016] VSCA 160 at [51]–[55]. See also *East v The King* [2022] VSCA 214.

14. It follows that in relation to identification evidence, an assumption of reliability in relation to the evidence in question does not require the judge to overlook other evidence that points to flaws in the evidence in question in assessing its probative value - for example, in relation to identification evidence, evidence of a risk of displacement or suggestion, the witness' uncertainty about the accuracy of their identification, features of the person observed that are inconsistent with other evidence of the relevant person and features of the event described which are inconsistent with other evidence (if there is reason to doubt that the witness is recalling the same event).

Reliability, credibility and previous representations – assessing probative value.

15. In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the majority considered the probative value of the complainant's previous representation and concluded:

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant ([73]).

16. This process of considering the content of the evidence, the distress and the timing of the complaint suggest that there are limits to how the assumption of reliability and credibility of evidence operates in relation to previous representations.

Reliability, credibility and tendency evidence-assessing probative value

17. As noted in s 97, s 98 – Civil and criminal proceedings: the tendency rule and the coincidence rule, the majority in *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 stated at [61]–[63] that in respect of the tendency evidence:

> It may be accepted for present purposes that the evidence was relevant as it was capable of showing that the appellant had a sexual interest in the complainant, as the trial judge ruled. This is not put in issue by the appellant. But s 97(1)(b) requires more. It requires that the evidence have significant probative value.
> In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.
> Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

18. This suggests that despite the assumption of reliability and credibility, the requirement of significant probative value in ss 97 and 98 requires something more than an unsupported assertion from the complainant whose credibility is in question, at least in relation to uncharged acts.

19. However, this aspect of the decision is confined to the use of evidence as tendency evidence. There is nothing in the decision to suggest that the admissibility of evidence as "context" is affected (see also *R v Murdoch* (2013) 40 VR 451; [2013] VSCA 272 per Redlich and Coghlan JJA; *R v IMM (No 3)* [2013] NTSC 45).

Reliability and scientific evidence – assessing probative value

20. Prior to *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the Victorian Court of Appeal held that the reliability of opinion evidence does not form part of the assessment of whether the evidence is admissible under an exception to the opinion rule, such as s 79. Instead, reliability is relevant in an assessment in considering the admissibility of scientific opinion evidence under sections 135 or 137 (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148).

21. In *Tuite v R* the Court acknowledged the risk of a jury being misled by junk science: Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves (*R v Mohan* [1994] 2 SCR 9, 21).

22. To address this risk, the focus of the court's attention in assessing the reliability should be proof of validation. "Ideally there should be proof of both in-house validation and independent external validation", though the commercialisation of forensic science can make external validation difficult (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [101]–[102]).

23. When discussing reliability in this context, it is important to distinguish between the reliability of the underlying science and the reliability of the particular methodology or theory which is the basis for the expert's opinion (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [90]). In that case, it was held that evidence of validation of both was relevant to the issue of the reliability of the opinion (at [11]).

24. Requiring validation has the following advantages:

- It ensures that scrutiny of scientific evidence in the judicial process will apply the rigour which science itself requires;
- The judge can assess the adequacy of validation without needing to acquire particular expertise in the field;
- Evidence of validation will assist the judge and jury to evaluate the evidence;
- It avoids the difficulties inherent in adopting a 'general acceptance' test (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [103]–[104]).

25. Where evidence is sought to be led on the basis of so-called 'new science', then the party seeking to lead the evidence will need to call appropriate evidence of reliability to show that the science is sufficiently reliable to be used by a court (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [106] citing *R v Trochym* [2007] 1 SCR 239, [33]).

26. Validation studies may need to address questions such as (see *DPP v Tuite* [2014] VSC 662, [60]–[78] and *Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [117–118]):

- Is there a sound scientific basis in theory for what is proposed?
- Does the proposed method accurately implement the relevant theory?
- Does the method generate results which can be validated against other known methods?

27. As the Victorian Court of Appeal (Maxwell P, Redlich and Weinberg JJA) stated in *Tuite v R*:

> The lack of validation is at the forefront of the critique of forensic science advanced by Professor Edmond and others. The concerns expressed in the reports referred to earlier must be taken very seriously. We note, in particular, the 2009 conclusion of the US National Academy of Sciences that with the exception of nuclear DNA analysis, … no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source (*Tuite v R* (2015) 49 VR 196; [2015] VSCA 148, [107] (footnotes omitted)).

28. The reasoning in Tuite depended, in part, on the principle from *Dupas v R* (2012) 40 VR 182; [2012] VSCA 328 that considerations of reliability affect the assessment of probative value of the evidence of a witness. The High Court stated in *IMM v R* [51]–[52] that:

> At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility …
> Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accepted completely in proof of the facts stated. There can be no disaggregation of the two – reliability and credibility – as Dupas v R may imply. They are both subsumed in the jury's acceptance of the evidence.

29. However, it is clear from *IMM* that evidence of certain matters which were traditionally considered matters of reliability can affect, and be relevant to, the assessment of the probative value of the evidence in question (see, e.g., *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [50]). The majority also recognised a "limiting case" where the weaknesses in the evidence are so great that it has no probative value (see *IMM v R* (2016) 257 CLR 300; [2016] HCA 14 at [39]). The High Court therefore confirmed the ability of trial judges to reject evidence (including scientific evidence) where no jury acting rationally could act on the evidence.

Last updated: 15 December 2023

Q–Z

re-examination is defined in clause 2(3) and (4) of Part 2 of this Dictionary;

representation includes—

(a) an express or implied representation (whether oral or in writing); or

(b) a representation to be inferred from conduct; or

(c) a representation not intended by its maker to be communicated to or seen by another person; or

(d) a representation that for any reason is not communicated;

seal includes a stamp;

tendency evidence means evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection;

tendency rule means section 97(1);

traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group;

Victorian court means—

(a) the Supreme Court; or

(b) any other court created by Parliament—

and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence;

Note: The Commonwealth Act and New South Wales Act do not include this definition.

visual identification evidence is defined in section 114;

witness includes the meaning given in clause 7 of Part 2 of this Dictionary.

Part 2 – Other Expressions

Part 2 of the Dictionary contains definitions for the following 12 expressions and matters of reference.

1 – References to businesses

(1) A reference in this Act to a business includes a reference to the following—

(a) a profession, calling, occupation, trade or undertaking;

(b) an activity engaged in or carried on by the Crown in any of its capacities;

(c) an activity engaged in or carried on by the government of a foreign country;

(d) an activity engaged in or carried on by a person or body holding office or exercising power under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);

(e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;

(f) the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature.

(2) A reference in this Act to a business also includes a reference to—

(a) a business that is not engaged in or carried on for profit; or

(b) a business engaged in or carried on outside Australia.

2 – References to examination in chief, cross-examination and re-examination

(1) A reference in this Act to examination in chief of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re examination.

(2) A reference in this Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.

(3) A reference in this Act to re-examination of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party.

(4) If a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to the questioning of the witness by that party before the witness is questioned by another party.

3 – References to civil penalties

For the purposes of this Act, a person is taken to be liable to a civil penalty if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country.

4 – Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if—

(a) the person is dead; or

(b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence about the fact; or

(c) the person is mentally or physically unable to give the evidence and it is not reasoanbly practicable to overcome that inability; or

(d) it would be unlawful for the person to give evidence about the fact; or

(e) a provision of this Act prohibits the evidence being given; or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or

(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

1. A witness who is not compellable to give particular evidence meets the definition in paragraph (f). This includes a witness who successfully applies to be excused under s 18 (*DPP v Nicholls* [2010] VSC 397. See also *Fletcher v R* (2015) 45 VR 634; [2015] VSCA 146).

2. Similarly, a witness who is called and refuses to give evidence, whether through an exercise of privilege or under threat of contempt, is not available under paragraph (f) (*R v Suteski* (2002) 56 NSWLR 182; [2002] NSWCCA 509; *R v Alchin* [2006] ACTSC 53; *R v Darmody* (2010) 25 VR 209; [2010] VSCA 41; *Mindshare Communications Ltd Taiwan Branch v Orleans Investments Pty Ltd* [2007] NSWSC 976).

3. Paragraphs (e) and (f) require the party to have taken 'all reasonable steps'. This must be applied strictly before the court will take the significant step of considering a witness unavailable. Relevant considerations will include whether the party took timely steps to secure the witness' attendance, especially where the party was on notice that the witness may not attend (*Sio v R* (2016) 259 CLR 47; [2016] HCA 32; *Tasmania v Dolega* [2016] TASSC 65 at [12]–[15]).

4. Reasonable steps, for the purpose of paragraph (f), will usually involve issuing a subpoena to attend. The fact that the witness, or their guardian, states they will resist, or not comply with, a subpoena does not mean that a subpoena is not necessary as a 'reasonable step' (*Clancy v Plaintiff A & Ors* [2022] NSWCA 119, [69]).

5. Similarly, the fact that giving evidence may be detrimental to a witness' health does not make the witness unavailable within the meaning of the Act. Such a risk is one to be managed by the court after the subpoena has been issued, such as in an application to set the subpoena aside (*Clancy v Plaintiff A & Ors* [2022] NSWCA 119, [70]).

6. For the purpose of paragraph (g), reasonable steps may include the provision of a witness assistance officer, an out of court conversation between counsel and the witness to try to overcome the witness' reluctance, an application for the court to warn the witness of the

possibility of contempt and an application for an adjournment so the witness can obtain legal advice about possibility of contempt proceedings (*RC v The Queen* [2022] NSWCCA 281, [119]).

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5 – Unavailability of documents and things

For the purposes of this Act, a document or thing is taken not to be available to a party if and only if—

(a) it cannot be found after reasonable inquiry and search by the party; or

(b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person; or

(c) it would be impractical to produce the document or thing during the course of the proceeding; or

(d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence; or

(e) it is not in the possession or under the control of the party and—

(i) it cannot be obtained by any judicial procedure of the court; or

(ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or

(iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.

6 – Representations in documents

For the purposes of this Act, a representation contained in a document is taken to have been made by a person if—

(a) the document was written, made or otherwise produced by the person; or

(b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

7 - Witnesses

(1) A reference in this Act to a witness includes a reference to a party giving evidence.

(2) A reference in this Act to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.

(3) A reference in this clause to a party includes an accused in a criminal proceeding.

8 – References to documents

A reference in this Act to a document includes a reference to—

(a) any part of the document; or

(b) any copy, reproduction or duplicate of the document or of any part of the document; or

(c) any part of such a copy, reproduction or duplicate.

8A – References to offices, etc

In this Act—

(a) a reference to a person appointed or holding office under or because of an Australian law or a law of the Commonwealth includes a reference to an APS employee within the meaning of the Public Service Act 1999 of the Commonwealth; and

(b) in that context, a reference to an office is a reference to a position occupied by the APS employee concerned, and a reference to an officer includes a reference to a Secretary, or APS employee, within the meaning of the Act.

9 – References to laws

(1) A reference in this Act to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.

(2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia.

10 – References to children and parents

(1) A reference in this Act to a child of a person includes a reference to—

(a) an adopted child or ex-nuptial child of the person; or

(b) a child living with the person as if the child were a member of the person's family.

(2) A reference in this Act to a parent of a person includes a reference to—

(a) an adoptive parent of the person; or

(b) if the person is an ex-nuptial child—the person's natural father; or

(c) the person with whom a child is living as if the child were a member of the person's family.

11 – References to de facto partners

(1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.

(2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.

(3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case—

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(d) the ownership, use and acquisition of their property;

(e) the degree of mutual commitment to a shared life;

(f) the care and support of children;

(g) the reputation and public aspects of the relationship.

(4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.

(5) For the purposes of subclause (3), the following matters are irrelevant—

(a) whether the persons are different sexes or the same sex;

(b) whether either of the persons is legally married to someone else or in another de facto relationship.

(6) Despite subclauses (3) and (4), a person is in a de facto relationship with another person if those two persons are in a registered relationship within the meaning of the Relationships Act 2008.

Note: The Commonwealth Act and New South Wales Act do not include subclause (6).

Appendix A: Child Witnesses: Testing Competency and Questioning – A Practical Guide

Purpose

- This document has been jointly developed by the **Judicial College of Victoria** and the **Child Witness Service**.
- The purpose of the document is to provide a practical, accessible, 'on-the-bench' guide both to testing the competency, and to more general questioning, of children. The document details overall principles that relate to all child witnesses and provides age-specific sample scripts.
    - The document notes that, to assist a child witness to give his/her best evidence, there may be occasions during the proceedings when it is appropriate for the judicial officer to revisit preliminary explanations of court procedures and/or instructions about giving evidence.

- This document is intended to complement other works which more comprehensively cover this area – for instance:
    - Bench Book for Children Giving Evidence in Australian Courts – published by the Australasian Institute of Judicial Administration Incorporated;
    - Equality Before the Law Bench Book – Section 6: Children and young people, published by the Judicial Commission of New South Wales.

How to use this document

- For each witness, the judicial officer ought to consider each of the three components of this document, namely–
    - **Part I** which attaches a summary of relevant legislative material; and
    - **Part II** which outlines overarching principles to guide all questioning of all child/young witnesses; and
    - **Part III** which provides age-specific guidance for questioning children:
        - Section A ought to be considered for all child witnesses who are aged up to and including 15 years
        - Sections B-F details age-specific material and, for all witnesses who are aged up to and including 15 years, ought to be applied in addition to Section A
        - Section F pertains to witnesses who are aged 16 years or over:
- If a witness' presentation is less mature than his/her chronological age would ordinarily indicate, then the witness should be considered in the group to which his/her developmental age appears to relate.

Part I – Legislative Context

- For a summary of the relevant provisions under the *Uniform Evidence Act 2008*, refer **Attachment A**.
- It is noted that, while these provisions do not specify a requirement to understand the difference between the truth and not the truth, as a matter of logic an understanding of an obligation to tell the truth relies on an understanding of that difference.

Part II – Overarching Principles For Questioning Children

A. Introduction

The judicial officer speaking to a child/young witness is in a position to make the environment less intimidating and the witness more forthcoming. There are a number of overarching principles that ought to guide which questions could or might be asked of children, including in the determination of whether the child has the capacity to answer a question about a fact and understands the obligation to tell the truth. While a number of points made in this document may appear to be minor to an adult, each has the potential to have a big impact on a child witness.

(1) Overarching Principle

Notwithstanding the specific examples and scripting detailed in Part III, in any given instance of the questioning of a child witness the overarching principles ought to prevail over specified wording.

Trauma can impact upon development, and a witness' developmental level may not correspond to his/her chronological age.[1]

(2) Pre-court role of Child Witness Service

Prior to any appearance in court, each young witness should have received court orientation from his/her Child Witness Service ('CWS') worker (who is often the person sitting with the child as a support person).

B. General

(1) Things to do

1. Young witnesses often say they liked the fact that a Judge or a Magistrate spoke directly to them.
2. When making initial contact, it is important that the judicial officer:
    - make direct eye contact with the child witness and introduce him/herself using his/her title;
    - thank the witness for coming to court – this acknowledges the role the witness will play and how important it is to the court's work.
3. It is also important to thank the witness at the conclusion of their evidence.
4. Explain that the questions will be about *what happened*, about what the witness saw and remembers. This helps to overcome the fact that, for a child, questioning is often experienced as a test whereby he/she needs 'to get the right answer' as opposed just to telling what did happen.
5. Instruct the witness *to listen carefully* to the questions and inform him/her that he/she should answer only if he/she understands the question, that he/she will not get in trouble if he/she does not understand a question or if he/she disagrees with a proposition put to him/her.
6. Keep the script as simple as possible – for instance, whenever possible, one concept at a time.
7. Consider whether the child speaks English as a first language at home. If not, even though the witness may sound like other children his/her age, his/her language skills may be less developed than those for whom English is a first language.
8. When referring to the support person, use his/her first name because that is how the child will know this person.
9. Ensure understanding
    - Children and young people with cognitive or learning impairment can present well and appear to understand what is said to them.
    - Whether or not the witness does, in fact, understand can be investigated by asking the child to explain in his/her own words what is being discussed.
10. Breaks
    - Be mindful that children and young witnesses generally have a shorter attention span than adults and are likely to find a court appearance more stressful than an adult. Therefore, it is important to ensure sufficient breaks. The younger the child, the more breaks that may be necessary.

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[1] Lyon T, Saywitz K 'Young Maltreated Children's Competence to Take the Oath' (1999) Applied Developmental Science (3) pp 16–27.

- While some children will ask for a break, others will not (even if they have been advised it is acceptable to do so). This may be because they do not feel confident enough to ask or because they cannot identify that a break might be appropriate. It is important to watch for signs of wandering concentration and/or stress, particularly during cross-examination.

(2) Things to avoid

1. Avoid legal terminology.
2. Avoid double negatives.
3. Avoid confrontational questioning – while this is a common cross-examination technique for adults, in children it is often experienced as intimidation and may cause a child to 'shut down' or to become distressed and break down.
4. Avoid questions that include *where* the child lives, goes to school or works because a witness may be anxious about these places being identified and known to the defendant.

(3) Establishing the 'rules of court'

1. School is sometimes used as a reference point to establish that there are (also) rules in court. However, even for this purpose, school can be a problematic reference point for children. This is because:
    - it assumes the child attends school but this is not always the case. When the assumption is made but it is not in fact the case, it may make the child feel as though he/she has failed or disappointed an implied standard and so impact upon his/her confidence. Also, asking the child directly whether he/she attends school risks the same impact because he/she then has to answer 'no' and this could be experienced as an admission of failure; and
    - even for those children who do attend school
        - they are usually asked questions in two types of circumstances: (a) to ascertain whether they know 'the right answer' and/or (b) to determine whether or not they are 'in trouble'. Therefore, this comparison can be counterproductive; and
        - many children do not have a positive experience of school in any event.
    - It is noted that a reference to sport may raise the same issues because not all children play sport but it is a high 'kudos/stigma' arena.
2. For these reasons it is recommended that a neutral forum be used to establish the concept of rules in court – such as **road rules** (everybody uses the roads in one way or another, and there is no stigma in this forum). A suggested judicial script is provided in each age category at the point this issue would be raised in court.
3. Young witnesses:
    - require context to adequately understand their job of being a witness;
    - experience less anxiety if they know the rules in advance because this provides them with a framework that applies to everybody;
    - benefit otherwise from understanding that everyone in the courtroom is subject to the same rules because it helps to 'level the playing field' between the witness and the court.
4. Experience indicates judicial endorsement of these court rules/concepts:
    - adds significant weight and validation (note the concepts have already discussed in the court orientation provided by CWS);
    - can create an increased sense of proficiency, as it is something with which the witness is already familiar.

5. It is recommended that for most age groups the judicial officer encourage the child to verbalise/practise saying these rules. Using a consistent format between each question builds repetition, a sense of competency, and the confidence that the phrases are acceptable in court.

6. **Note:** in the case of a witness who is aged 16 or over, the judicial officer should assess the witness individually to consider whether the witness is sufficiently mature that he/she does not need to rehearse what he/she will say as detailed below. This can be achieved through general conversation, observations of his/her reactions, answers to questions, and/or consultation with CWS. In such cases, the witness may lose interest if he/she feels the process is patronising. If the judicial officer considers this to be the case, there is an alternative suggested script in Section F.

(4) Children and the rule in Browne v Dunn

1. In *Ward v R* [2017] VSCA 37 at [96]–[135], Maxwell P and Redlich JA extensively reviewed case-law, law reform reports and other reference material on the questioning of children. At [100], their Honours observed that:

> A child's immaturity necessarily limits their capacity to understand the process in which they are participating and to appreciate the importance of what they say when subjected to cross-examination. The UK Bench Book records that 'children have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised.' The ability of the child to process questions will vary according to the maturity and intelligence of the child and the manner and content of the questions asked. As the Queensland Law Reform Commission reported in 2000, if the cross-examination is inappropriate in form or content, the child's evidence may become distorted and the child may wrongly be perceived as an unreliable and untruthful witness.

2. Their Honours also (at [114]) quoted with implicit approval the Inns of Court College of Advocacy report 'Raising the Bar: the handling of vulnerable witnesses, victims and defendants in court' which suggests that the following types of questions should be avoided:

> *Tag questions* make a statement then add a short question inviting confirmation, for example, 'John didn't touch you, did he?' or 'John didn't touch you, right?'. They are powerfully suggestive and linguistically complex. Judicial guidance recommends that this form of question be avoided with children and that a direct question be put instead, e.g. 'Did John touch you?'; 'How did John touch you?'
>
> *Questions requiring a yes/no response*: A series of propositions or leading questions inviting repetition of either 'yes' or 'no' answers is likely to affect accuracy. These questions carry a risk that an acquiescent person (i.e. someone with a tendency to answer 'yes', regardless of the question) will adopt a pattern of replies 'cued' by the questioner and will cease to respond to individual questions, leading to inaccurate replies. If only 'yes'/'no' questions are asked, it is difficult to determine if the person is having problems with the questions.
>
> *Questions in the form of statements (assertions)*. For example, 'You're not telling the truth, you wanted Jim out of your house', may not be understood as requiring a response. Better alternatives include: 'Did you want Jim out of your house?'
>
> *Questions/assertions repeated by authority figures*: Whether asked/stated consecutively or interspersed with others, these risk reducing the overall accuracy of a vulnerable person or someone with communication needs. For questions, this is because the person is likely to conclude that their first answer is wrong or unsatisfactory because somebody in authority is repeating the question. This may make the person 'go along' with the suggested answer, even if the person disagrees with it. If a question must be repeated (even with changed wording) for clarity, explain that you just want to check your understanding of what the person said, without implying the first answer was wrong: for example, 'Thank you, but I want to be

> sure I understand. Tell me again.' (followed by the question). As to assertions, when someone in a position of authority formally suggests that something is a fact, it becomes extremely difficult for a person to disagree if necessary and to maintain verbally what they believe to be true. The person is likely to have a particular problem with an assertion in the form of a statement, viewing this as a comment and not appreciating that it requires a response.
>
> *Forced choice (closed) questions*: these questions (for example, 'When you went to the flat, did John or Bill open the door?') create opportunities for error if the correct alternative may be missing. If asked open, free recall questions (e.g. 'What happened?'), vulnerable people or those with communication needs can provide accounts with accuracy rates broadly similar to the general population. In instances where forced choice questions are necessary, offer 'I don't know' as a last alternative.
>
> *Questions containing one or more negatives*: these questions make it harder to decipher the underlying meaning. Negatives increase complexity and the risk of unreliable responses.
>
> *Questions suggesting the witness is lying or confused*: these questions are likely to have an adverse impact on concentration and accuracy of responses because of the heightened anxiety often associated with vulnerable people.

3. Maxwell P and Redlich JA noted that the purpose of cross-examination is to "'cast doubt upon the accuracy of the evidence in chief given against' that party" (at [119]), but that this includes the obligation to put matters in controversy to the witness so that the court can assess the witness' response. In the case of adult witnesses, puttage which contains suggestions or assertions about particular facts are acceptable. However, in the case of child witnesses, there is a risk that the witness is suggestible and so will give an answer which is apparently contradictory. Discharge of counsel's obligations "requires that the child be given a fair opportunity to make clear whether he or she adheres to the account given in the VARE" (at [122]).

4. As Maxwell P and Redlich JA explained at [122]–[127], "in the case of a child witness whose age or capacity renders them vulnerable":

> In our view, discharge of these obligations will ordinarily require counsel to address those specific allegations made by the child which the defence disputes. Simply to 'put' matters which the child accepts will be unlikely, for the reasons already explored, to discharge either obligation. As we have said, a child cannot be expected to respond to option-posing, suggestive or assertive questions in an explanatory or expansive way. Thus, acceptance of a proposition by the child may not result in any forensic gain to the cross-examiner. As Maxwell P observed during oral argument, it will not ordinarily be fair unless the cross-examiner in an appropriate way asks the child whether what she has said is true or whether the alleged act occurred. If that is not done, the child is not given the opportunity to make their position clear. Although it is ordinarily a matter for counsel how they choose to cross-examine, fairness dictates that counsel should only ask questions in a form that is appropriate to the age of the child.
>
> As to compliance with the rule in *Browne v Dunn*, if counsel does not give the child a fair opportunity to respond to the attack that is to be made on their evidence, counsel runs the risk that their opponent, or the judge, will take the view that there has been a breach of the rule. Moreover, if they do not give the child the opportunity to state whether they maintain their initial account, the tribunal's ability to assess the merits of the issue is thereby diminished. As a result, counsel will not have satisfied their forensic purpose, which is to elicit evidence which may cause the tribunal to doubt the child's primary allegations.
>
> Of course, to ask the child whether their allegation is true, or whether the event they have described actually happened, may result in the child confirming the allegation.

> But that is a risk which always inheres in the discharge of the rule with every witness, whether adult or child. In the case of an adult, however, leading questions, and direct 'puttage', are permitted because the law presumes that the adult witness is able to understand that their account is challenged and can respond accurately to such a form of question.
>
> If counsel employ indirect or subtle methods in order to produce arguable inconsistencies with the child's primary allegations, the risk remains, as Whelan JA observed on the hearing of the appeal, that the jury will not be persuaded that the nature of the inconsistencies is such as to cause them to doubt the child's account. Counsel still have considerable latitude in the way in which they can explore the child's primary evidence. But, if the questions are unclear, or move suddenly from the specific to the general, or are suggestive or assertive, the jury may treat the evidence in chief (the VARE) as untouched by the cross-examination and hence as the witness's accurate and reliable account. The same risk exists if the answers elicited are ambiguous or can be viewed as not definitively stating the child's position on a matter of controversy.

5. Maxwell P and Redlich JA also considered (at [132]–[133]) the role of a trial judge in controlling cross-examination and ensuring a fair trial. Their Honours noted that some judges conduct pre-trial hearings regarding child and cognitively impaired witnesses and that this process can be valuable in setting the parameters for questioning which is adapted to the child's development without needing to intervene during cross-examination.

6. Finally, if counsel in cross-examination does not directly ask the child whether the child maintains their initial account, then it will be appropriate for the party which called the child to ask on re-examination whether particular statements made in-chief are true or false (at [135]).

7. In *Duesbury v The Queen* [2022] VSCA 117, the Court of Appeal considered an argument that the prosecution had acted improperly by inviting the jury to prefer the evidence-in-chief of a complainant over her evidence given in cross-examination, without having re-examined the complainant in a way that drew the conflict to the witness' attention. In rejecting that argument, the Court noted that the witness intermediary report stated the complainant became disengaged and ceased communicating effectively when anxious. Further, the complainant had shown difficulty recalling the relevant events when giving evidence at the special hearing. On that basis, the Court considered the prosecutor made a proper forensic decision not to re-examine the complainant, taking into account the potential for distress, and the existence of independent supporting evidence.

(5) When questioning about understanding of the obligation to tell the truth

1. The age specific sections include suggested judicial script for testing a witness' understanding of the obligation to tell the truth. The following commentary applies to all age groups.

2. It is recommended that the child not be asked what would happen if they told a lie or did not tell the truth in court. The reasons for this include:

   - the question is both complex in its formulation and requires a complex response;
   - it suggests the child is expected to tell a lie and therefore creates a sense of negativity about him/herself and the process, and may contribute to the egocentric sense of blame he/she may already feel.
   - Also, children in the younger age ranges usually will not have the expressive language capacity to adequately answer this question.

3. Phrase the same concept 'positively, and in such a way that enables the child simply to demonstrate his/her understanding. For example:

   - Do you know that everyone, including me, must tell the truth in court?
   - Will you tell the truth here today? Do you promise? Or–

- Do you promise to tell the truth here today?

C. Developmentally Focussed Considerations

(1) Language

1. The younger the witness, the more concrete should be the language and examples used, and the more separated should be concepts and ideas (preferably one at a time).
2. As a general rule, the number of words in a sentence should not exceed the age of the child – for example, eight words per sentence for an 8 year old child.
3. Children have better developed receptive language than they do expressive language.
    - This means that, while a child may understand something, he/she may have difficulty expressing it verbally.
    - Expressive language increases between 10 and 12 years of age to a point where the child becomes more capable of explaining conceptual ideas.
4. Language that is too complex for a child may cause him/her to respond more frequently with 'I don't know', 'I don't remember' or silences, and/or to present confused or contradictory evidence.
5. Young children often have trouble identifying when they do not comprehend, and have limited abilities to cope with or manage this, especially when they are speaking to an adult.[2]
6. A child is more likely to give more complete and accurate answers to questioning when he/she feels supported and when the language used is non-threatening and developmentally appropriate.[3]

(2) Concepts of truth and a promise

1. Children's understanding of truth and lies emerges early in their development.[4]
2. For children aged under 9 years, a promise tends to be understood as a true statement, irrespective of whether it relates to past or future action.[5] [5], [6].
3. Children aged 9 years and over have a more complex understanding of what it means to make a promise, for instance - promising to tell the truth. They tend to link making a promise with the

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[2] Saywitz KJ 'Developmental Underpinnings of Children's Testimony' in *Children's Testimony* Westcott HL, Davies GM, Bull RHC (eds) (2002) England: John Whiley and Sons Ltd, p 5.

[3] Carter CA, Bottoms B, Levine M, 'Linguistic Socio-emotional Influences on the Accuracy of Children's Reports' (1996) *Law and Human Behaviour* (20:3) pp. 335–6.

[4] Talwar V, Lee K, Nicholas B, Lindsay RCL 'Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviours: Implications for Court Competence Examinations' (2002) *Law and Human Behaviour* (26: 4), pp 395–415.

[5] Astington JW 'Children's Understanding of the Speech Act of Promising (1988) Journal of Child Language (15) pp 157–73; Maas FK, Abbeduto L 'Young Children's Understanding of Promising: Methodological Considerations' (1998) Journal of Child Language (25) pp 203–14.

actual act of following through –promising to take someone to the park is a promise if he or she then takes that person to the park.[6] [7], [8].

(3) Impact of stress/trauma

1. There is a wide spectrum of development between children of similar chronological age:

   - trauma significantly influences a child's development across a number of areas. This can result in a child presenting with deficits his/her peers may not exhibit and/or experience;[7]
   - situational stress, such as that associated with appearing in court, can also impact upon a child's ability to process complex information. It is therefore safer to assume a child is going to function less well in a court setting than in most other contexts.

(4) Experiences are understood egocentrically

1. Children and young people are often developmentally egocentric in their thinking and, as a result, often take on misplaced responsibility and blame. Therefore:

   - it is important to be clear about the young person's role and to reinforce that he/she is not in trouble. This reinforcement is especially important when he/she is engaging with the court (the significant gravity of which can be overwhelming for a child witness);
   - it is preferable to put questions in the positive rather than the negative – for example, 'why is it important to tell the truth?' as opposed to 'do you know what will happen if you do not tell the truth?'

D. Cross-Examination

1. Research shows that many children and young people feel they were unable to convey their full evidence in court because of the way they were questioned – they were confused by the language and the framing of the questions, they were interrupted, and/or were told 'just answer the question asked'.[8]
2. Restrictions on admissibility can lead to a situation where a child witness has to answer a question without context and this can be difficult.

E. Potentially Embarrassing/Difficult Questions

1. Young witnesses often become embarrassed or upset when giving evidence about difficult topics, particularly sexual assault. The details of their evidence are often difficult to share, especially in a formal setting with adult strangers. The process is often counter-intuitive for children/young people. It is appropriate to acknowledge this to the child prior to him/her commencing his/her evidence.
2. Children and young people are often reassured when told that although some of the evidence may be distressing for them,

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[6] Astington JW 'Children's Understanding of the Speech Act of Promising (1988) Journal of Child Language (15) pp 157–73; Maas FK, Abbeduto L 'Young Children's Understanding of Promising: Methodological Considerations' (1998) Journal of Child Language (25) pp 203–14.

[7] Lyon T, Saywitz K (1999) 16–27.

[8] Judicial Commission NSW, Equality before the Law Bench Book- Children and Young People (Section 6), p 6308.

- it is alright to 'pace' him/herself, to ask for a break if he/she wants one, and
- that the judicial officer him/herself, counsel and the support person are not embarrassed by 'the things that everyone needs to talk about today'.

3. Developmentally, these issues should be viewed in light of a child/young person's:
   - rapidly developing sexual awareness and sexuality;
   - concerns about peers finding out about the offences;
   - feelings of responsibility and blame;
   - confused and enmeshed feelings for the accused person;
   - possibly confused or idiosyncratic language for body parts.
4. When it is necessary to ask a child witness a potentially embarrassing or difficult question:
   - it is important **not to**:
     - use indirect language – this can be confusing, contribute to the child/young person feeling less proficient as a witness, and serve to reinforce a sense that the topic is embarrassing;
   - it is important **to**:
     - use clear language that accords with the everyday language of the witness;
     - reassure the witness that it is OK to use language that otherwise might get them into trouble – for example, swear words or 'rude' words;
     - preface the question with a comment such as 'We don't want to embarrass you, but we need to understand what happened';
     - use a 'low-key' tone and matter-of-fact delivery of the question. This is as important as the content of the question and, in fact, can make the embarrassing content manageable for the witness;
     - ask the question directly – for example, 'Did he do anything with his penis?' [If 'yes'], 'What was that?'

F. Sexual Abuse Accommodation Syndrome

1. Sexual Abuse Accommodation Syndrome[9] has been accepted and documented in related professions for several decades.
2. Based on both the general vulnerabilities of children and those which are specific to sexual assault, the syndrome identifies five typical reactions of children to sexual assault:
   (a) helplessness – due to the fundamental power imbalance between children and adults, and because child sexual assault often involves a breach of trust by an adult;
   (b) secrecy – due to the effects of grooming from the offender and feelings of self-blame;
   (c) entrapment and accommodation – often caused by the effects of being in a relationship of dependence with the offender and, if the abuse is ongoing, because 'acceptance' is often experienced as the only option;

[9] Summit RC 'The Child Sexual Abuse Accommodation Syndrome' (1983) *Child Abuse and Neglect* (7) pp 177–93.

(d) delayed and unconvincing disclosure – due to fears of not being believed and because disclosures are often made impulsively. Typically, children will also initially disclose the least severe incident of abuse in order to 'test' the other person's reactions; and

(e) disclosure retraction – often due to not being believed, feelings of blame, and not receiving appropriate support.

G. Older Children

1. While older children (ie: 16 years and over) can be assumed to understand the difference between the truth and not the truth, it is important to enquire with counsel or CWS whether the witness has any known cognitive or learning impairment. This may reveal that it is necessary to test that understanding.
2. In any event it is still recommended that a limited preamble be applied in the initial contact between the young person and the court – this assists to settle the young person and provides context with respect to what is about to happen.
3. Subject specific topics can still cause confusion because even young adults can lack appropriate context - for instance, not accurately understanding the role of defence counsel or a jury.[10] [12].

Part III. Further Context and Sample Scripts

- This Part commences with a brief description of some of the basic developmental milestones for each age category, and (b) details age specific material and sample questions which could or might be asked to determine whether a child witness understands an obligation to give truthful evidence.
- Children develop across six domains:
    - physical/motor skills; emotional; cognition; language; social relationships; and personality.
- Developmental psychologists often categorise child development into five 'milestone' groups:
    - 5 years and under; 6–8 years, 9–12 years; 13–15 years; 16 years and over.
- In some instances, these domains develop differentially – for example, the social relationship skill set of a child may be within normal range but his/her language development may be delayed.
- Note: Trauma can often impact on development across one or more domains, resulting in a potentially less mature witness who does not function on a par with peers. This is not always obvious as young people are often adept at disguising such deficits and have a vested interest in hiding their vulnerabilities

A. Children Aged 5 Years and Under

Click here to download a copy of the sample script

General

Children in this age group:

[10] Crawford E and Bull R 'Teenagers Difficulties with Key Words Regarding the Criminal Court Process' (2006) Psychology, Crime & Law Journal (12:6) pp 653–67.

- are developing those emotions which require a sense of self – for example, pride, shame, embarrassment – and usually have them established by age 2 years;
- are extremely concrete thinkers and, although they have the ability to engage in imaginative play, are not able to understand abstract concepts;
- reflect their concrete thinking in their use of language, but comprehension and incorporation of language rules improve as they reach the top end of this age range;
- are not able to discuss concepts such as time, distance, weights, measurements, and their understanding of the world around them is based almost solely on what they can see and experience;
- have primary attachments that are typically with their primary carer/s, although secondary attachments form as they get older – for instance with siblings, peers and significant other adults.[11]
- For example: in a recent case, a witness in this age group who had just given evidence about a fact was asked by defence counsel 'Has your Mum told you to say that?'. It was necessary for the judicial officer to clarify this question for this child because, especially in this age group, her answer could be 'yes' on the (concrete) basis that her mother had told her she was to come to court for the purpose of answering questions (as opposed to anything about the content of her answers).

In all instances, sentences should be kept as short and simple as possible for this age group.

Understanding of the difference between the truth and not the truth

A witness in this age group can have an understanding of the difference between truth and lies/not the truth, but not the language to express that understanding.

To test his/her understanding of this difference, unambiguous and concrete examples ought to be used (as opposed to more complex and abstract questions which, in this age range, would be more a test of language skills).[12]

It is recommended that at least four examples be used with the witness. Research suggests that, for this age group, there is only a 6% likelihood of a child answering these questions correctly by chance.[13]

Avoid making the child the subject of demonstrative questions because this can lead to increased anxiety associated with identifying him/herself as lying, suppress responsiveness, and make him/her appear less capable.[14]

It is recommended that:

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[11] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 242.

[12] Lyon T, Carrick N, & Quas JA 'Young Children's Competency to Take the Oath: Effects of Task, Maltreatment and Age' in Law and Human Behaviour (2009).

[13] Lyon T and Saywitz, K (1999) p 19.

[14] Bala N, Lee K, Lindsay R, Talwar V 'A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' in Osgoode Hall Law Journal (2001) (38:3), pp. 409–451.

- two negative (ie: the response to which would be 'that is a lie'/'that is not the truth'), questions be asked;
- two positive (ie: the response to which would be 'that is the truth') questions be asked; and
- the judicial officer reinforce correct answers with words to the effect, 'Yes, that is right.'

The judicial officer could choose to acknowledge the uniquely odd, sometimes comic, nature of such questions.

Further questioning to establish capacity to answer (if required)

If the judicial officer seeks more specific confirmation about the witness' competence to respond to questions about facts in issue, the following is noted:

- it is always preferable to start 'softly' to allow the child time to settle and to build confidence (and so the questions above are still recommended as starting point),
- questions are always best asked in their appropriate 'context' (and it is noted the child would not have given even evidence-in-chief at this point).

When asking additional questions, the judicial officer needs to avoid questions that could raise issues of a prior inconsistent statement once the witness' formal evidence commences.

Taking an Oath or making an Affirmation (if giving sworn evidence)

The CWS orientation usually includes a developmentally appropriate explanation of taking an oath or making an affirmation. The court should have been informed of the child's preference prior to the hearing.

The relevance of an oath or affirmation for a witness in this age group is more about the content of the promise. Thus the language used to contextualise the promise is more important than the actual formality of the distinction between oath and affirmation.

Explain the process to the witness

Children usually better understand the process of giving evidence if it is broken into discrete sections. The judicial officer should outline what the witness should expect will be involved in giving evidence.

Sample Script

General Introduction

I am the Judge/Magistrate. I am the boss of/in charge of the court today. My job is to make sure everyone follows the rules.

If the witness is in the same room–

You have come today to answer some questions about what happened.

If in the witness is in the remote witness room–

You are in a different place to me. You have [first name of support person] sitting with you. You have come today to answer some questions about what happened.

Introduction of counsel

There are some other people here (if remote - with me). Some of them will talk to you today. I will tell you who some of them are.

[*Name of prosecution counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of prosecution counsel*]. His/her job is to prove what happened. You may have met him/her before.

[*Name of defence counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of defence counsel*]. His/her job is to speak for [*name of accused*].

Mention of defendant

Also in the courtroom here today is [*name of defendant*].

He/she is the person you told the police about.

If the witness is in the same room–

I will not let him/her talk to you today.

If witness is remote–[15]

He/she is sitting where you cannot see him/her. I will not let him/her talk to you today.

Establishing the 'rules of court'

I would like to talk a little bit about rules with you.

In court, there are rules that everyone must follow. It's a bit like when we use the roads – as you probably already know, when anyone crosses the road or drives on the road, they must follow the rules.

[*Choose one of the following*:]

- Can you tell me one of the rules when you cross the road?
- Can you tell me what the rule is when you are driving and you see a red light?
    - What about a green light?

Depending on the witness response –

That's good. The same thing applies in court – there are rules that everyone must follow, including me.

Rules of being a witness

In court, the most important rule is that everyone must tell the truth – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

Soon, I will ask you to make a special promise to tell the truth. You must tell the truth even if you think your answer might get you or someone else into trouble.

So, what will you do here today?

[*Name of prosecution counsel*] and [*Name of defence counsel*] are going to ask you some questions today. It's ok if you don't understand a question. I want you to tell me. All you have to say is 'I don't understand'.

And if you don't understand, what you will say?

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

So if you don't know an answer, what you will say?

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you can't remember an answer, what will you say?

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[15] If the witness is remote and his/her age or maturity is not sufficiently developed, this comment could be confusing because of the lack of visibility of the defendant. If that is the case, judicial officers should carefully consider whether it is necessary to mention that the accused is present.

If you do know the answer to a question, though, you must tell us.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You will not get into trouble for saying that someone is wrong. You could just say 'No', or 'That's wrong' or 'That's not right'.

If someone says something that you think is wrong, what will you say?

Sometimes people need to have a rest. If you want a rest, just tell me or [first name of support person]. It's OK to say 'I want a rest'.

So, if you do want a rest what will you say to me or to [first name of support person]?

Capacity to give an answer

I'm going to give you some practice questions. First, I'll ask questions about you.

What is your name?

How old are you, [name of child]?

What do you like to watch on TV?

What is your favourite food?

[Name of child], do you have any pets?

Can you tell me a little bit about your pet/s?

Understanding of the difference between the truth and not the truth

Now I'm going to ask you some questions about what I'm doing.[16]

Negative:

Am I wearing a red hat?

Am I holding a bunch of flowers?

Am I wearing a pink dress?

Am I standing up?

Positive:

Is this a [name an object which is being held up (choose an object large enough for the child easily to see)]?

[If using remote witnessing] Can you see me on a TV screen?

[If hands are held up/hand is waving] Am I holding my hands up/waving my hand?

[If wearing glasses] Am I wearing glasses?

Further questioning to establish capacity to answer (if required)[17]

Do you know why you are here today?

Do you know what is going to happen today?

Taking an Oath or making an Affirmation (if giving sworn evidence)[18]

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[16] The following questions are designed to test the child's ability to understand truth and lies in practical terms. Judicial officers should select two positive questions and two negative questions. The judicial officer should reinforce correct answers by telling the witness "Yes, that is right".

[17] Note: if the witness is not able to answer these questions it may cause him/her to lose confidence or to become anxious. In this case, judicial officer ought to explain that he/she will be explaining the process soon.

Introduction for all witnesses

When people talk to the court, we ask them to make a special promise. It is a special promise to tell the truth.

[*Name of support person*] has told me that you want to make your special promise by: using the Bible / the Qu'oran / other religious text OR using special words that make a promise for court.

Additionally – depending on location of child and tipstaff

Witness is remote and tipstaff is in court

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. You will see him/her on your TV screen in a moment. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.[19] [9]

Witness and tipstaff both in the court

This person here [*indicate tipstaff*] is going to help you to make your promise. All you need to do is say what he/she says. That will make your special promise to tell the truth today.

Witness and tipstaff are both remote

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. He/she is in the room with you now. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.

Explain the process to the witness

We are now ready for you to start telling the court what happened and what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

Where VARE is being used –

We will also watch the video you made with the police.

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said. I will help you to remember.

B. Children Aged 6–8 Years

Click here to download a copy of the sample script

General

The emotional self of children in this age group is continuing to develop, although their ability to express this to others is limited. Children up to this age range, and often beyond, are egocentric in their thinking. They:

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[18] The Child Witness Service should have provided a developmentally appropriate explanation of making an Oath or Affirmation.

[19] Note: it is important that either the judicial officer or the tipstaff check that the child can hear and see the person who is about the administer the Oath or Affirmation.

- are beginning to understand logical reasoning, although this remains closely tied to concrete experience;
- are in the early stages of developing an understanding of time, distance, measurements, etc; however, they have little mastery over this until later years;
- are beginning to develop gender roles in a context that is more social;
- are developing internal moral beliefs and their sense of conscience is increasing;
- often emotionally attribute blame to themselves that is misplaced and ill-founded, making them vulnerable to feelings of shame, embarrassment and guilt.[20]

Questions judging capacity to give an answer

The questions should be unambiguous, unlikely to generate further anxiety in the child, and familiarises the witness with verbalising answers to questions put by the court.

These questions are an opportunity to build rapport with the child, and to get him/her comfortable talking in and to the court.

Understanding of the difference between the truth and not the truth

In this age group, a witness may have a conceptual understanding of the difference between truth and lies/not the truth, but not the language to express that understanding.

It is recommended that at least four examples also be used with a witness of this group.

Avoid making the child the subject of such demonstrative questions because this can lead to increased anxiety associated with identifying him/herself as lying.

It is suggested that:

- two negative (ie: 'that is a lie'/'that is not the truth'), questions be asked;
- two positive (ie: 'that is the truth') questions be asked; and
- the judicial officer reinforce correct answers with words to the effect, 'Yes, that is right.'

The judicial officer may choose to acknowledge the uniquely odd, sometimes comic, nature of such questions.

Further questioning to establish capacity to answer (if required)

If the judicial officer seeks more specific confirmation about the witness' competence to respond to questions about facts in issue, the following is noted:

- it is always preferable to start 'softly' to allow the child time to settle and to build confidence (and so the questions above are still recommended as starting point),
- questions are always best asked in their appropriate 'context' (and it is noted the child would not have given even evidence-in-chief at this point).

When asking additional questions, the judicial officer needs to avoid questions that could raise issues of a prior inconsistent statement once the witness' formal evidence commences.

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[20] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 318.

Making an Oath or Affirmation (if giving sworn evidence)

The CWS orientation usually includes a developmentally appropriate explanation of taking an oath or making an affirmation. The court should have been informed of the child's preference prior to the hearing.

The relevance of an oath or affirmation for a witness in this age group is more about the content of the promise. Thus the language used to contextualise the promise is more important than the actual formality of the distinction between oath and affirmation.

Explain the process to the witness

Children usually better understand the process of giving evidence if it is broken into discrete sections. The judicial officer should outline what the witness should expect will be involved in giving evidence.

Sample Script

General Introduction

I am the Judge/Magistrate. I am the boss of/in charge of the court today. My job is to make sure everyone follows the rules.

If the witness is in the same room–

You have come today to answer some questions about what happened.

If in the witness is in the remote witness room–

You are in a different place to me. You have [*first name of support person*] sitting with you. You have come today to answer some questions about what happened.

Introduction of counsel

There are some other people here (if remote - with me). Some of them will talk to you today. I will tell you who some of them are.

[*Name of prosecution counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of prosecution counsel*]. His/her job is to prove what happened. You may have met him/her before.

[*Name of defence counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of defence counsel*]. His/her job is to speak for [*name of accused*].

Mention of defendant

Also in the courtroom here today is [*name of defendant*].

He/she is the person you told the police about.

If the witness is in the same room–

I will not let him/her talk to you today.

If witness is remote–[21]

He/she is sitting where you cannot see him/her. I will not let him/her talk to you today.

Establishing the 'rules of court'

I would like to talk a little bit about rules with you.

---

[21] If the witness is remote and his/her age or maturity is not sufficiently developed, this comment could be confusing because of the lack of visibility of the defendant. If that is the case, judicial officers should carefully consider whether it is necessary to mention that the accused is present.

In court, there are rules that everyone must follow. It's a bit like when we use the roads – as you probably already know, when anyone crosses the road or drives on the road, they must follow the rules.

[*Choose one of the following:*]

- Can you tell me one of the rules when you cross the road?
- Can you tell me what the rule is when you are driving and you see a red light?
    - What about a green light?

Depending on the witness response –

That's good. The same thing applies in court – there are rules that everyone must follow, including me.

Rules of being a witness

In court, the most important rule is that everyone must tell the truth – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

Soon, I will ask you to make a special promise to tell the truth. You must tell the truth even if you think your answer might get you or someone else into trouble.

So, what will you do here today?

[*Name of prosecution counsel*] and [*Name of defence counsel*] are going to ask you some questions today. It's ok if you don't understand a question. I want you to tell me. All you have to say is 'I don't understand'.

And if you don't understand, what you will say?

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

So if you don't know an answer, what you will say?

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you can't remember an answer, what will you say?

If you do know the answer to a question, though, you must tell us.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You will not get into trouble for saying that someone is wrong. You could just say 'No', or 'That's wrong' or 'That's not right'.

If someone says something that you think is wrong, what will you say?

Sometimes people need to have a rest. If you want a rest, just tell me or [first name of support person]. It's OK to say 'I want a rest'.

So, if you do want a rest what will you say to me or to [first name of support person]?

Capacity to give an answer

I'm going to give you some practice questions. First, I'll ask questions about you.

How old are you [name of child]?

What are some things that you watch on TV?

What is your favourite food?

[Name of child], do you have any pets?

Can you tell me a little bit about your pet/s?

Understanding of the difference between the truth and not the truth

Now I'm going to ask you some questions about what I'm doing. You might think some of my questions are silly. But I want you to do your best to answer them.[22]

Negative:

Am I wearing a red hat?

Am I holding a big ball?

Am I wearing a pink dress?

If I said that my brother hit me but really he didn't, would that be telling the truth?

Positive:

Is this a [name an object which is being held up (choose an object large enough for the child easily to see)]?

[If using remote witnessing] Can you see me on a TV screen?

[If hands are held up/hand is waving] Am I holding my hands up/waving my hand?

[If wearing glasses] Am I wearing glasses?

Further questioning to establish capacity to answer (if required)[23]

Do you know why you are here today?

Do you know what is going to happen today?

Making an Oath or Affirmation (if giving sworn evidence)[24]

Introduction for all witnesses

When people talk to the court, we ask them to make a special promise. It is a special promise to tell the truth.

[*Name of support person*] has told me that you want to make your special promise by: using the Bible / the Qu'oran / other religious text OR using special words that make a promise for court.

Additionally – depending on location of child and tipstaff

Witness is remote and tipstaff is in court

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. You will see him/her on your TV screen in a moment. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.[25]

Witness and tipstaff both in the court

This person here [*indicate tipstaff*] is going to help you to make your promise. All you need to do is say what he/she says. That will make your special promise to tell the truth today.

---

[22] The following questions are designed to test the child's ability to understand truth and lies in practical terms. Judicial officers should select two positive questions and two negative questions. The judicial officer should reinforce correct answers by telling the witness "Yes, that is right".

[23] Note: if the witness is not able to answer these questions it may cause him/her to lose confidence or to become anxious. In this case, judicial officer ought to explain that he/she will be explaining the process soon.

[24] The Child Witness Service should have provided a developmentally appropriate explanation of making an Oath or Affirmation.

[25] Note: it is important that either the judicial officer or the tipstaff check that the child can hear and see the person who is about the administer the Oath or Affirmation.

Witness and tipstaff are both remote

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. He/she is in the room with you now. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.

Explain the process to the witness

We are now ready for you to start telling the court what happened and what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

Where VARE is being used –

We will also watch the video you made with the police.

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said. I will help you to remember.

C. Children Aged 9–12 Years

Click here to download a copy of the sample script

General

- Children in this age group:
    - are better able to project their thinking into the future, and by the upper end have a more complex ability to predict their world;
    - have a more refined capacity to predict emotions, intentions and reaction in others.[26]
- Also during this time:
    - puberty usually commences;
    - social status among peers can often take on more importance.

Questions judging capacity to give an answer

The questions should be unambiguous, unlikely to generate further anxiety in the child, and familiarises the child with verbalising answers to questions put by the court.

These questions are an opportunity to build rapport with the child, and to get him/her comfortable talking in and to the court.

Understanding of the difference between the truth and not the truth

In this age group, expressive language is still catching up to receptive language, although that development is obviously more progressed. So while a witness in this group may have a conceptual understanding of the difference between truth and lies/not the truth, he/she may still not have the language to express that understanding.

Also, trauma can impede development and the pressure of being in court can of itself impact upon a child's performance.

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[26] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 318.

Therefore, to test the understanding of the conceptual difference between truth/not the truth, unambiguous and concrete examples should still be used but they can be coupled with questions to assist the child to identify the opposite to truth or lies.

Avoid making the child the subject of such demonstrative questions because this can lead to increased anxiety associated with identifying themselves as lying.

It is suggested that:

- two negative (ie. 'that is a lie'/'that is not the truth'), questions be asked, and
- two positive (ie. 'that is the truth') questions be asked.[27]

The judicial officer may choose to acknowledge the uniquely odd, sometimes comic, nature of such questions.

Further questioning to establish capacity to answer (if required)

If the judicial officer seeks more specific confirmation about the witness' competence to respond to questions about facts in issue, the following is noted:

- it is always preferable to start 'softly' to allow the child time to settle and to build confidence (and so the questions above are still recommended as starting point),
- questions are always best asked in their appropriate 'context' (and it is noted the child would not have given even evidence-in-chief at this point).

When asking additional questions, the judicial officer needs to avoid questions that could raise issues of a prior inconsistent statement once the witness' formal evidence commences.

Making an Oath or Affirmation (if giving sworn evidence)

The CWS orientation usually includes a developmentally appropriate explanation of making an Oath or Affirmation. The court should have been informed of the child's preference prior to the hearing.

Explain the process to the witness

Children usually better understand the process of giving evidence if it is broken into discrete sections. The judicial officer should outline what the witness should expect will be involved in giving evidence.

Sample Script

General Introduction

I am the Judge/Magistrate. I am the boss of/in charge of the court today. My job is to make sure everyone follows the rules.

If the witness is in the same room–

You have come today to answer some questions about what happened.

If in the witness is in the remote witness room–

You are in a different place to me. You have [*first name of support person*] sitting with you. You have come today to answer some questions about what happened.

Introduction of counsel

---

[27] Lyon T and Saywitz, K (1999), p 19.

There are some other people here (if remote - with me). Some of them will talk to you today. I will tell you who some of them are.

[*Name of prosecution counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of prosecution counsel*]. His/her job is to prove what happened. You may have met him/her before.

[*Name of defence counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of defence counsel*]. His/her job is to speak for [*name of accused*].

Mention of defendant

Also in the courtroom here today is [*name of defendant*].

He/she is the person you told the police about.

If the witness is in the same room–

I will not let him/her talk to you today.

If witness is remote–[28]

He/she is sitting where you cannot see him/her. I will not let him/her talk to you today.

Establishing the 'rules of court'

I would like to talk a little bit about rules with you.

In court, there are rules that everyone must follow. It's a bit like when we use the roads – as you probably already know, when anyone crosses the road or drives on the road, they must follow the rules.

[Choose one of the following:]

- Can you tell me one of the rules when you cross the road?
- Can you tell me what the rule is when you are driving and you see a red light?
    - What about a green light?

Depending on the witness response –

That's good. The same thing applies in court – there are rules that everyone must follow, including me.

Rules of being a witness

In court, the most important rule is that everyone must tell the truth – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

Soon, I will ask you to make a special promise to tell the truth. You must tell the truth even if you think your answer might get you or someone else into trouble.

So, what will you do here today?

[*Name of prosecution counsel*] and [*Name of defence counsel*] are going to ask you some questions today. It's ok if you don't understand a question. I want you to tell me. All you have to say is 'I don't understand'.

And if you don't understand, what you will say?

---

[28] If the witness is remote and his/her age or maturity is not sufficiently developed, this comment could be confusing because of the lack of visibility of the defendant. If that is the case, judicial officers should carefully consider whether it is necessary to mention that the accused is present.

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

So if you don't know an answer, what you will say?

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you can't remember an answer, what will you say?

If you do know the answer to a question, though, you must tell us.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You will not get into trouble for saying that someone is wrong. You could just say 'No', or 'That's wrong' or 'That's not right'.

If someone says something that you think is wrong, what will you say?

Sometimes people need to have a rest. If you want a rest, just tell me or [*first name of support person*]. It's OK to say 'I want a rest'.

So, if you do want a rest what will you say to me or to [first name of support person]?

Capacity to give an answer

I'm going to give you some practice answering questions. First, I'll ask questions about you.

What is your name?

How old are you, [name of child]?

What is your favourite TV show?

What is your favourite food?

[Name of child], do you have any pets?

Do you barrack for a football team?

Do you follow a sports team?

Do you like music?

Understanding of the difference between the truth and not the truth

Now I'm going to ask you some questions about other things. Some of these questions might sound strange. But it is important you do your best to answer them.[29][4]

Negative

Is today Christmas Day?

If I said that my brother hit me but really he didn't, would that be telling the truth?

If someone bought a bar of chocolate for $1.00 but said they paid $2.00, would that be telling the truth or a lie?

If someone saw a thief take some money but they told the police they saw a car accident, would that be telling the truth or a lie?

What is the opposite to the truth?

Positive

Is this a [name an object which is being held up (choose an object which is large enough for the child easily to see)]?

---

[29] The following questions are designed to test the child's ability to understand truth and lies in practical terms. Judicial officers should select two positive questions and two negative questions.

[If witness is remote] Can you see me on a TV screen?

[If witness is remote] Is there someone else in the room with you?

Am I holding my hands up?

Is it true or not true that I am in charge of the court today?

What is the opposite to a lie?

Further questioning to establish capacity to answer (if required)[30]

Do you know why you are here today?

Do you know what is going to happen today?

Making an Oath or Affirmation (if giving sworn evidence)[31]

Introduction for all witnesses

When people talk to the court, we ask them to make a special promise to tell the truth.

[*Name of support person*] has told me that you want to make your special promise by making what is an [Oath/Affirmation].

Additionally – depending on location of child and tipstaff

Witness is remote and tipstaff is in court

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. You will see him/her on your TV screen in a moment. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.[32]

Witness and tipstaff both in the court

This person here [*indicate tipstaff*] is going to help you to make your promise. All you need to do is say what he/she says. That will make your special promise to tell the truth today.

Witness and tipstaff are both remote

I am going to ask [*indicate name of tipstaff*] to help you to make your promise. He/she is in the room with you now. All you need to do is to say what he/she says. That will make your special promise to tell the truth today.

Explain the process to the witness

We are now ready for you to start telling the court what happened and what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

Where VARE is being used –

We will also watch the video you made with the police.

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

---

[30] Note: if the witness is not able to answer these questions it may cause him/her to lose confidence or to become anxious. In this case, judicial officer ought to explain that he/she will be explaining the process soon.

[31] The Child Witness Service should have provided a developmentally appropriate explanation of making an Oath or Affirmation.

[32] Note: it is important that either the judicial officer or the tipstaff check that the child can hear and see the person who is about the administer the Oath or Affirmation.

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said. I will help you to remember.

D. Children Aged 13–15 Years

Click here to download a copy of the sample script

General

Children in this age range:

- pubertal growth is at its peak, emotions can be less stable, and conflict with parents more likely;
- individuation is underway, where the adolescent begins the process of defining his/her potential adult self which is less reliant on his/her parent/s;
- adolescence is often a period marked by risk taking, when boundaries and limits are tested;
- complex language and conceptual thought is much more possible, and systematic reasoning is used in a more sophisticated manner;
- peer relations often take on even greater importance, as does an interest in (the majority of cases) the opposite sex. Adolescents are often concerned about how others perceive them and do not want faults and vulnerabilities widely known.[33]

Understanding of the difference between the truth and not the truth

Witnesses in this age range will usually have a greater conceptual understanding of the difference between truth and lies and the expressive language to explain it. They may require some prompting questions to assist them.

Further questioning to establish capacity to answer (if required)

If the judicial officer seeks more specific confirmation about the witness' competence to respond to questions about facts in issue, the following is noted:

- it is always preferable to start 'softly' to allow the child time to settle and to build confidence (and so the questions above are still recommended as starting point),
- questions are always best asked in their appropriate 'context' (and it is noted the child would not have given even evidence-in-chief at this point).

When asking additional questions, the judicial officer needs to avoid questions that could raise issues of a prior inconsistent statement once the witness' formal evidence commences.

Making an Oath or Affirmation (if giving sworn evidence)

Part of the CWS orientation includes a developmentally appropriate explanation of making an Oath or Affirmation.

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[33] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 432.

Explain the process to the witness

Children usually better understand the process of giving evidence if it is broken into discrete sections. It is recommended that the judicial officer explain the process.

Sample script

General Introduction

I am the Judge/Magistrate. I am the boss of/in charge of the court today. My job is to make sure everyone follows the rules.

If the witness is in the same room–

You have come today to answer some questions about what happened.

If in the witness is in the remote witness room–

You are in a different place to me. You have [*first name of support person*] sitting with you. You have come today to answer some questions about what happened.

Introduction of counsel

There are some other people here (if remote - with me). Some of them will talk to you today. I will tell you who some of them are.

[*Name of prosecution counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of prosecution counsel*]. His/her job is to prove what happened. You may have met him/her before.

[*Name of defence counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of defence counsel*]. His/her job is to speak for [*name of accused*].

Mention of defendant

Also in the courtroom here today is [*name of defendant*].

He/she is the person you told the police about.

If the witness is in the same room–

I will not let him/her talk to you today.

If witness is remote–[34]

He/she is sitting where you cannot see him/her. I will not let him/her talk to you today.

Establishing the 'rules of court'

I would like to talk a little bit about rules with you.

In court, there are rules that everyone must follow. It's a bit like when we use the roads – as you probably already know, when anyone crosses the road or drives on the road, they must follow the rules.

- [Choose one of the following:]
- Can you tell me one of the rules when you cross the road?
- Can you tell me what the rule is when you are driving and you see a red light?
    - What about a green light?

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[34] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 432.

Depending on the witness response –

That's good. The same thing applies in court – there are rules that everyone must follow, including me.

Rules of being a witness

In court, the most important rule is that everyone must tell the truth – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

Soon, I will ask you to make a special promise to tell the truth. You must tell the truth even if you think your answer might get you or someone else into trouble.

So, what will you do here today?

[*Name of prosecution counsel*] and [*Name of defence counsel*] are going to ask you some questions today. It's ok if you don't understand a question. I want you to tell me. All you have to say is 'I don't understand'.

And if you don't understand, what you will say?

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

So if you don't know an answer, what you will say?

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you can't remember an answer, what will you say?

If you do know the answer to a question, though, you must tell us.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You will not get into trouble for saying that someone is wrong. You could just say 'No', or 'That's wrong' or 'That's not right'.

If someone says something that you think is wrong, what will you say?

Sometimes people need to have a rest. If you want a rest, just tell me or [*first name of support person*]. It's OK to say 'I want a rest'.

So, if you do want a rest what will you say to me or to [first name of support person]?

Capacity to give an answer

I'm going to give you some practice answering questions. First, I'll ask questions about you.[35]

What is your name?

How old are you, [name of child]?

What is your favourite TV show?

What is your favourite food?

[Name of child], how do you like to spend your spare time?

Do you have any pets?

Are you interested in music?

Understanding of the difference between the truth and not the truth

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[35] This occasion is also an opportunity to build rapport with the child, and to get him/her comfortable talking in/to the court

At the start I said the most important rule in court is that everyone must tell the truth – including me and including you.

When I say 'tell the truth', what do you think that means?

What do you think is the opposite to telling the truth?

What do you think is the difference between telling the truth and telling a lie?

If the child's responses are inadequate, the judicial officer may choose to test the child's understanding by asking the child to distinguish between the following true and false statements.

I'm now going to ask you a few questions about telling the truth.

Negative

If I said that my brother hit me but really he didn't, would that be telling the truth?

If I borrowed my friend's car but said I didn't, would that be telling the truth or telling a lie?

If someone saw a thief take some money but they told the police they saw a car accident, would that be telling the truth or a lie?

Positive

Is this a [name an object which is being held up (choose an object which is large enough for the child easily to see)]?

[If witness is remote] Can you see me on a TV screen?

[If witness is remote] Is there someone else in the room with you?

If I said you have come to court today to give evidence, would that be the truth or a lie?

Is it true or not true that I am in charge of the court today?

What is the opposite to a lie?

Further questioning to establish capacity to answer (if required)[36]

Do you know why you are here today?

Do you know what is going to happen today?

Making an Oath or Affirmation (if giving sworn evidence)[37]

Introduction for all witnesses

When people talk to the court, we ask them to make a special promise to tell the truth.

I understand that [*name of support person*] has explained to you the two types of special promise to the court – the Oath and the Affirmation - and the difference between them.

Is that correct?

So you know that both ways are ok – the important thing is that both are special promises by you to tell the truth here today.

If CWS has already informed the court of the witness' preference

[*Name of support person*] has told me that you want to make your special promise by [Oath/Affirmation].

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[36] Note: if the witness is not able to answer these questions it may cause him/her to lose confidence or to become anxious. In this case, judicial officer ought to explain that he/she will be explaining the process soon.

[37] The Child Witness Service should have provided a developmentally appropriate explanation of making an Oath or Affirmation.

Is that correct?

If CWS has not informed the court of the witness' preference

It is up to you to decide which one you want to do.

So, what would you like to do today – to take an Oath or to make an Affirmation?

This person, [*indicate tipstaff/clerk*] is going to help you to take an Oath/make and Affirmation. All you need to do is repeat what he/she says and that will make the promise.

Explain the process to the witness

We are now ready for you to start telling the court what happened and what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

Where VARE is being used –

We will also watch the video you made with the police.

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said. I will help you to remember.

E. Children Aged 16 years and over

Click here to download a copy of the sample script

General

Adolescents in this age range:

- are young adults who are further defining their place in the world;
- have emotions that typically stabilise, experience declining conflict with primary carer/s, and are usually further defining their independence;
- experience more embedded ethical and moral reasoning, can understand sophisticated conceptual ideas, and commonly are able to engage in complex rational thought;
- usually better understand social norms and are more equipped to navigate complex social dynamics. Young adults may enter into young adulthood still consolidating these developmental gains.[38]

Rules of court and rules of being a witness

Young witnesses often require context to adequately understand their job of being a witness, and often benefit from understanding that everyone in the courtroom is subject to the same rules.

Making an Oath or Affirmation

Part of the CWS orientation usually includes a developmentally appropriate explanation of making an Oath or Affirmation.

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[38] Peterson C Looking Forward Through the Lifespan: Developmental Psychology (2004) Australia: Pearson Education, p 432.

Explain the process to the witness

All young witnesses better understand the process of giving evidence if it is broken into discrete sections. It is recommended that the judicial officer explain the process at this point.

Sample script

General Introduction

[Name of witness] thank you for coming to court today. I am the Judge/Magistrate. I am in charge of the court today. My job is to make sure everyone follows the rules.

You have come today to answer some questions about what happened.

Introduction of counsel

I'm going to introduce you to some of the other people here (if remote - with me). Some of them will talk to you today. I will tell you who some of them are.

[*Name of prosecution counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of prosecution counsel*]. His/her job is to prove what happened. You may have met him/her before.

[*Name of defence counsel*], please stand and say hello to [*name of witness*]. [*Name of witness*], this is [*first name and surname of defence counsel*]. His/her job is to speak for [*name of accused*].

Mention of defendant

Also in the courtroom here today is [*name of defendant*].

He/she is the person you told the police about.

If the witness is in the same room–

I will not let him/her talk to you today.

If witness is remote–[39]

He/she is sitting where you cannot see him/her. I will not let him/her talk to you today.

Rules of court and rules of being a witness

In court, the most important rule is that everyone must tell the truth. All the other rules are also about telling the truth.

In court, everyone must follow the rules – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

Soon, I will ask you to make a special promise to tell the truth. You must tell the truth even if you think your answer might get you or someone else into trouble.

If you don't understand a question, that's no problem, just tell me. All you have to say is 'I don't understand'. Then I can help you to understand what is being asked.

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you do know the answer to a question, though, you must tell us.

---

[39] If the witness is remote and his/her age or maturity is not sufficiently developed, this comment could be confusing because of the lack of visibility of the defendant. If that is the case, judicial officers should carefully consider whether it is necessary to mention that the accused is present.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You should not agree with anything you think is wrong or not quite right. You will not get into any trouble for this. You could just say 'No', or 'That's wrong' or 'That's not right'.

But if you do agree with something then you should say that too, even if you are embarrassed or if you think it makes you or some else look bad. You are not going to get into trouble here today.

These rules are very important.

Would you like me to go through them again? Are there any you would like me to explain a bit more?

Also, sometimes witnesses need to have a break. If you want a break, just tell me or [first name of support person] who is sitting next to you. It's OK to ask for a break, we can easily organise that.

Making an Oath or Affirmation (16 years and over)

When people talk to the court, we ask them to make a special promise to tell the truth.

I understand that [name of support person] has explained to you the two types of special promise to the court – the Oath and the Affirmation - and the difference between them.

Is that correct?

So you know that both ways are ok – the important thing is that both are special promises by you to tell the truth here today.

If CWS has already informed the court of the witness' preference

[*Name of support person*] has told me that you want to make your special promise by [Oath/Affirmation].

Is that correct?

If CWS has not informed the court of the witness' preference

It is up to you to decide which one you want to do.

So, what would you like to do today – to take an Oath or to make an Affirmation?

This person, [*indicate tipstaff/clerk*] is going to help you to take an Oath/make and Affirmation. All you need to do is repeat what he/she says and that will make the promise.

Explain the process to the witness

We are now ready for you to start telling the court what happened and what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

Where VARE is being used –

We will also watch the video you made with the police.

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said and I will help you to remember.

Attachment A

Competence under the Evidence Act 2008

1. The competence rules for the purpose of giving evidence are the same for children and adults: ss 12, 13.

2. All persons are presumed to be competent to give evidence (s 12). A person is not competent to give evidence about a fact if he/she does not have the capacity to understand a question about that fact or does not have the capacity to give a comprehensible answer to a question about the fact (s 13(1)).

3. To give sworn evidence a witness is required to understand he/she is under an obligation to give truthful evidence (s 13(3)).

4. However,

   - if the witness does not understand that obligation to give truthful evidence, and
   - the court has told him/her (i) it is important to tell the truth, and (ii) he/she should tell the court if he/she is asked a question to which he/she cannot remember or does not know the answer, and (iii) he/she should agree with only those statements he/she believes to be true and should feel no pressure to agree with statements he/she believes to be untrue,

   then the witness may give **unsworn** evidence (ss 13(3), (4), (5)).

5. While these provisions do not specify a requirement to understand the difference between the truth and not the truth, as a matter of logic it would seem that an understanding of an obligation to tell the truth relies on an understanding of that difference.

6. It may be necessary to determine a child's capacity on more than one occasion because a person may be capable of giving evidence about certain facts but not about others (s 13(2)).

   - For example, a child might be able to give an answer that can be understood to a simple factual question but not to a question that requires the child to draw an inference (ALRC 26, vol 1, para 522).

7. Under the *Evidence Act 2008*, there is a general requirement that a witness (or interpreter) be sworn by oath or affirmation, but there is an overall move away from reliance on religious belief:

   - there is a requirement that sworn evidence be on oath or affirmation (s 21);
   - a witness has a choice of an oath or an affirmation (s 23);
   - it is not necessary to use a religious text be used for an oath; and an oath is effective even if the person who takes it does not have a religious belief or does not understand the nature and consequences of the oath (s 24);
   - a person who has does not believe in a god may take an oath (s 24A).

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About this Manual

The *Uniform Evidence Manual* provides judicial officers, the legal profession and interested members of the community with a practical guide to the interpretation and application of the *Evidence Act 2008* ('the Act').

The main features of the Manual are as follows.

- The Manual provides commentary on each substantive section of the Act, drawing on the interpretation of these provisions in the established uniform evidence jurisdictions.
- Following a brief introduction to the legislation, the structure of the Manual follows the structure of the Act. That is, the Manual contains five Chapters which, in turn, broadly reflect the narrative of a trial.
- Each Chapter (and Part or Division) commences with a brief policy introduction. These introductions recognise the significant role of policy in both the development of the statutory provisions and their interpretation and application.
- Where a section of the Act produces a moderate or major change to the existing law, the commentary identifies and summarises this change.
- Where relevant, the commentary includes a summary of key authorities, but it does not provide detailed case analyses.
- The Manual omits a small number of sections concerned with formal matters only. The Manual also omits reference to the small number of provisions which are found in the uniform evidence legislation of other jurisdictions but not in the Victorian Act.
- Each section of the Manual includes a reference to the relevant paragraphs in Stephen Odgers, *Uniform Evidence Law* (12th ed, 2016), Sydney, Thomson Reuters.

Flowcharts

The following flowcharts provide overviews and decision paths for a number of key matters for determination under the *Evidence Act 2008*.

- Admissibility of Evidence
- Hearsay Overview
- Hearsay in Civil Proceedings
- Hearsay in Criminal Proceedings
- Opinion
- Opinion Evidence
- Admissions
- Tendency
- Coincidence
- Credibility Evidence
- Identification Evidence - Visual
- Identification Evidence - Picture
- Client Legal Privilege
- Privilege Against Self-Incrimination

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The flowcharts published in this Manual were originally published in *Introduction to the Uniform Evidence Act in Victoria: Significant Changes* (Judicial College of Victoria, 2009). They were produced jointly by the College and the Victorian Law Reform Commission, and are reproduced here by permission.