

Introduction to the Uniform Evidence Act in Victoria: Significant Changes

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Preliminary

1.1 Introduction

The *Evidence Act 2008* (Vic) is the principal Act introducing uniform evidence law into Victoria.

The *Evidence Act 2008* (Vic) is largely uniform with the *Evidence Act 1995* (Cth),¹ 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 there are a number of departures. These Acts have together become known as the Uniform Evidence Acts (the UEA).

The *Evidence Act 2008* will apply to all proceedings (both civil and criminal) in all Victorian courts.

The purpose of this publication is to provide the Victorian legal community with an introduction to the *Evidence Act 2008*. It considers the underlying policy of the Act and its structure and addresses areas of significant change for Victoria. It does not provide a comprehensive discussion of the laws of evidence nor is it intended to replace the valuable academic texts that are already available about uniform evidence law.

Flowcharts and examples are used to illustrate the operation of certain provisions of the UEA. Boxes highlight key principles and definitions. References to further reading are cited at the end of each part of this publication.

1.2 History

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.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 Final Report included draft provisions.

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.

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 was passed. Instead, the Standing Committee of Attorneys General facilitated consultation between these two jurisdictions that led to the development of uniform Bills.

1 The Evidence Act 1995 (Cth) applies to all proceedings in a federal court or a court of the Australian Capital Territory (s4) and extends to each external territory (s6).

2 Australian Law Reform Commission, Evidence, ALRC 26 (Interim) (1985), Terms of Reference.

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

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.

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.

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.

With a small number of exceptions, the *Evidence Act 2008* implements the model Uniform Evidence Bill.³ The overwhelming majority of provisions in the UEA are uniform.

The Explanatory Memorandum to the *Evidence Act 2008* states that the Act is the first of two Acts introducing uniform evidence law into Victoria. A second Act is required to amend the Victorian statute book consequential on the enactment of the *Evidence Act 2008*, for example, to deal with sections currently in operation across the Victorian statute book that provide for subject matter now addressed in the *Evidence Act 2008*.

The second Act is expected also to contain transitional provisions.

1.3 Terminology

In this publication, the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2008* (Vic) are collectively referred as the UEA. If reference is made to a specific Act, it is referred to as the Commonwealth UEA, NSW UEA or Victorian UEA.

The *Evidence Act 2008* (Vic) can be downloaded from the Victorian Legislation and Parliamentary Documents website at <http://www.legislation.vic.gov.au>.

³ The most notable exceptions are s41 (Improper questions) and the absence of Division 1A (Professional relationships privilege) and Division 1B (Sexual assault communications privilege) in Part 3.10.

1.3.1 Reports and papers

Relevant parts of the following reports and papers are cited at the end of each section of this publication as suggested further reading:

- 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).

Further reading

Joint Report (2005), [1.1] – [1.20]

1.4 Policy underlying the UEA

An understanding of the policy underlying the UEA is required to understand the changes made to the law and to interpret and apply the provisions of the UEA.

The policy behind the UEA in civil and criminal proceedings, while similar in a number of important respects, also draws important distinctions between them. As a result, many provisions differentiate between the two kinds of proceedings.

1.4.1 Civil trial

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 was of the view 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 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.

1.4.2 Criminal trial

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".

1.5 Key policy elements

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 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.

Further reading

ALRC Report 26, Vol 1, Chapter 3

ALRC Report 38, Chapter 3

Joint Report (2005), [2.45]–[2.56]

The Hon Justice Smith, 'The More Things Change the More They Stay the Same?

The Evidence Acts 1995 – an Overview' (1995) 18 UNSWLJ 1, 6–9

Using the Victorian UEA

2.1 Application of the UEA

The Victorian UEA applies to all proceedings in a *Victorian court* (s4).

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.

The Victorian UEA applies to the Victorian Civil and Administrative Tribunal only to the extent that it adopts the rules of evidence (*Victorian Civil and Administrative Tribunal Act 1998* (Vic) s98(1)(b)).

The UEA also applies to bail proceedings, interlocutory proceedings and matters heard in chambers (s4(1)(a), s4(1)(b) and s4(1)(c)).

The UEA will apply to sentencing only if the court directs that the law of evidence applies in the proceeding (s4(1)(d) and s4(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 (s4(3)). The court must also make such a direction if the court considers it appropriate to do so in the interests of justice (s4(4)).

2.2 Relationship with other legislation

The UEA does not affect the operation of the provisions of any other Act (s8). It therefore preserves the operation of various provisions across the statute book that relieve courts from the obligation to apply the laws of evidence, for example, s215 of the *Children, Youth and Families Act 2005* and s38 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1996*.

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

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).

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.

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 (s12), the admissibility of evidence (s56) and the standard of proof for deciding a question relating to the admissibility of evidence or any other question arising under the UEA (s142).

2.4 General powers of a court

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.

2.5 Structure of the UEA

The provisions of the UEA distinguish between adducing evidence, tendering evidence and admitting evidence. The structure of the UEA is influenced by this distinction.

The expressions are not defined and therefore retain their ordinary meanings. 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”.

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.

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

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.

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).

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).

Chapter 4 is about proof. The Chapter provides for:

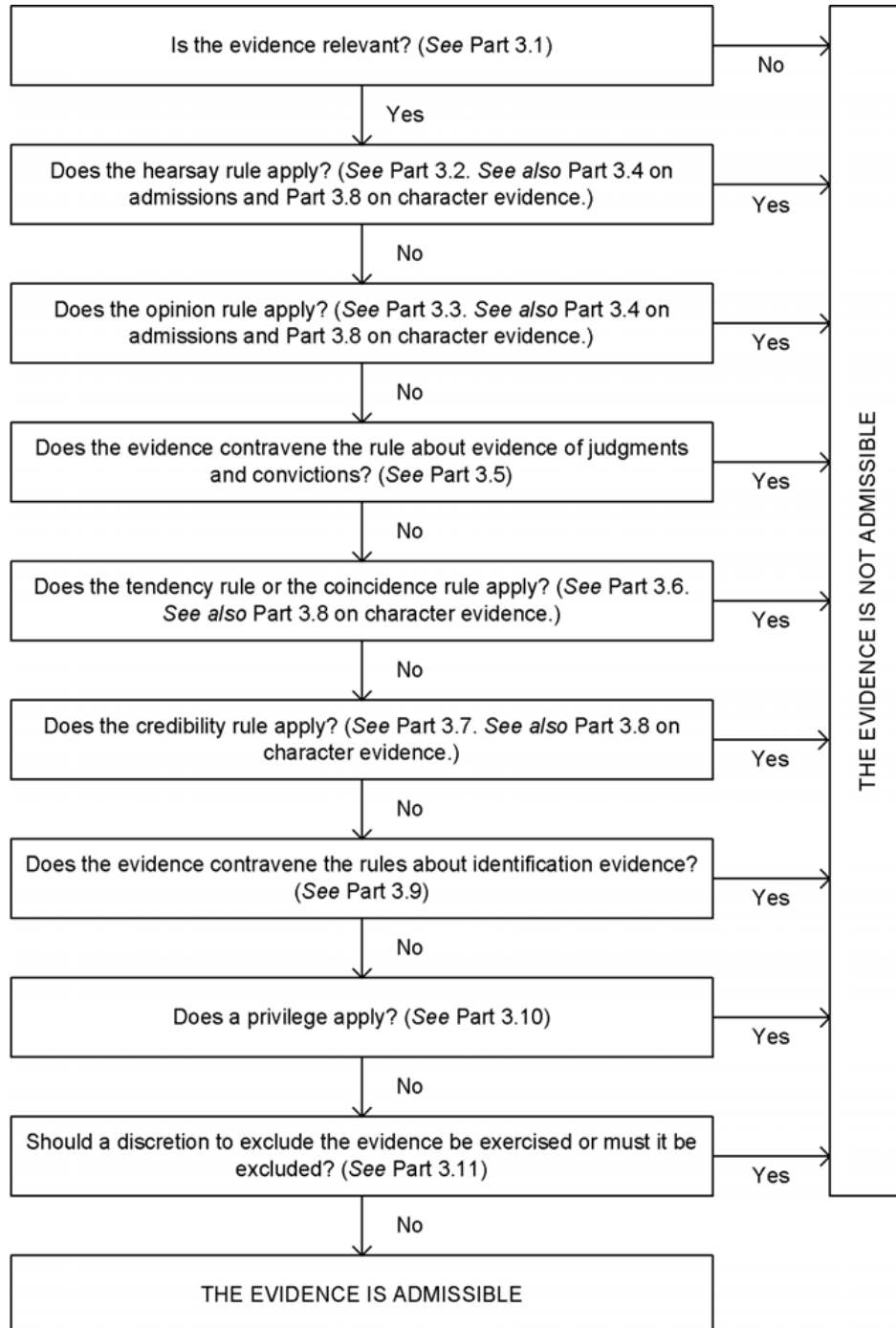
- the standard of proof (Part 4.1)
- the matters that do not require proof (Part 4.2)
- the facilitation of proof of the matters set out in the Part (Part 4.3)
- corroboration requirements in certain circumstances (Part 4.4)
- the giving of warnings and information by judges to juries about the potential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

Chapter 5 contains miscellaneous provisions that relate to matters such as inferences relevant to the authenticity of documents (s183), voir dire (s189), waiver of rules of evidence (s190) and agreements as to facts (s191).

2.6 Structure of the admissibility of evidence provisions

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.

The rules that may exclude relevant evidence are set out in the following diagram that appears at the beginning of Chapter 3 of the UEA.



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 (s59), the opinion rule (s76), the tendency rule (s97), the coincidence rule (s98) and the credibility rule (s102). This makes consideration of the purpose for which the evidence is adduced integral to the UEA.

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, s67 requires a party intending to adduce evidence under one of three exceptions to the hearsay rule (s63, s64 or s65) to give each other party notice of its intention to do so.

2.7 Discretions to exclude or limit use of evidence

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.

Part 3.11 is therefore central to the UEA. The discretions and exclusions it contains will be highly utilised and debated.

General discretion to exclude evidence

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 (s135).

General discretion to limit use of evidence

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 (s136).

Exclusion of prejudicial evidence in criminal proceedings

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 (s137).

Exclusion of improperly or illegally obtained evidence

Section 138 is a restatement (with some modifications) of 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 (s138). 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.

Further reading

Joint Report (2005), [2.1]–[2.18], [2.71]–[2.102]
Implementation Report (2006), [2.1]–[2.26]

Significant changes for Victoria: adducing evidence (UEA Chapter 2)

3.1 Witnesses

3.1.1 Competence and compellability

Division 1 of Part 2.1 (s12–s20) deals with the competence and compellability of witnesses. This Division operates as a code.

3.1.2 Competence

The common law test for psychological competence was based on understanding the nature and consequences of the oath. The UEA deals with that aspect of competence without isolating children for special treatment and without reference to age.

It is not necessary to establish competence under the UEA. The UEA presumes that every person is competent to give evidence in court (s12(a)).

The UEA addresses the psychological and physical competence of a person to be a witness. That is, it addresses whether a particular person who is legally competent to give evidence has the capacity to give evidence.

A person is not competent to give evidence if, for any reason (including a mental, intellectual or physical disability), the person does not have the capacity to understand a question about a fact or the person does not have the capacity to give an answer that can be understood to a question about a fact, and the incapacity cannot be overcome (s13(1)).

A witness may give sworn evidence if he or she understands that he or she is under an obligation to give truthful evidence. If the witness is incapable of understanding the obligation to give truthful evidence, he or she may give unsworn evidence (s13(3) and s13(4)).

Before being able to give unsworn evidence, he or she must be told by the court that:

- it is important to tell the truth
- he or she may be asked questions to which he or she does not know, or cannot remember, the answer and, if this happens, he or she should tell the court, and
- he or she may be asked questions that suggest certain statements are true or untrue and he or she should agree only with the statements he or she believes are true and should feel no pressure to agree with the statements he or she believes are untrue (s13(5)).

The section does not appear to require a formal warning. It appears the requirements of the section would be satisfied with an introductory exchange with the witness before the evidence is given, using a simple form of words such as: “Tell us all you can remember of what happened. Do not make anything up or leave anything out. If you can’t remember, say so. If you don’t agree with a statement, say so. This is very important.”

A witness may be competent to give evidence about some facts, but not about others (s13(2)). This is particularly important for children who may have differing language skills, differing abilities to draw conclusions or estimates or differing abilities to understand concepts such as time and spatial perspective. A child may understand questions about concrete matters, such as the colour of a car, but may not understand questions about the distance from a particular point.

In determining a question about competence, the court may “inform itself as it sees fit” and may draw on expert opinion (s13(8)).

The UEA contains specific provisions qualifying the legal competence of:

- judges and jurors to give evidence in a proceeding (s16)
- the defendant as a prosecution witness (s17(1) – s17(2))
- an associated defendant (defined term) (s17(3)).

3.1.3 Compellability

Subject to specified exceptions, a person who is competent to give evidence about a fact is compellable to give that evidence (s12(b)).

One of the main exceptions relates to defendants in criminal proceedings.

A defendant is not competent to give evidence as a witness for the prosecution (this is consistent with the current law). An associated defendant (defined term) is not compellable to give evidence for or against a defendant unless the associated defendant is being tried separately from the defendant. If an associated defendant is being tried jointly with the defendant, the court is to satisfy itself that the witness is aware that he or she is not compellable to give evidence for or against the defendant (s17).

Another of the exceptions relates to the compellability of spouses and others in criminal proceedings.

A spouse, de facto partner (defined in broad gender-neutral terms), parent or child (also broadly defined) of a defendant may object to giving evidence for the prosecution. If such an objection is made, the court must decide whether the nature and extent of the harm that is likely to be caused to the relationship between the witness and the defendant is outweighed by the desirability of having the evidence given (s18).

Currently, a similar discretion exists in s400 of the *Crimes Act 1958* (Vic) but the definitions used in the UEA give the discretion under the UEA a wider operation.

Another exception is that of reduced capacity.

A person is not compellable to give evidence on a matter if the court is satisfied that substantial cost or delay would be incurred in ensuring that 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 that adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources (s14).

3.1.4 Oaths and affirmations

A witness in a proceeding (other than a witness giving unsworn evidence under s13) must either take an oath, or make an affirmation, before giving evidence (s21(1) and s21(2)).

A witness is to take the oath, or make the affirmation, in accordance with the appropriate form in the Schedule or in a similar form (s21(4)).

An interpreter is also required to take an oath, or make an affirmation, before acting as an interpreter in a proceeding (s22(1)).

A person who is to be witness or act as interpreter may choose whether to take an oath or make an affirmation (s23(1)). The court is to inform that person of this choice unless the court is satisfied that the person already knows this is the case (s23(2)).

If a person who is to be a witness refuses to choose whether to take an oath or make an affirmation or it is not reasonably practicable for the person to take an appropriate oath, the court may direct the person to make an affirmation (s23(3)).

It is not necessary that a religious text be used in taking an oath (s24(1)).

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 (s24(2)).

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 (s24A(1)). The form of oath need not include a reference to a god and may instead refer to the basis of the person's beliefs in accordance with a form prescribed by the regulations (s24A(2)).

3.1.5 Rules about giving evidence

Division 3 of Chapter 2 (s26–s36) provides the general rules about giving evidence.

Divisions 4 and 5 of Chapter 2 (s37–s46) deal with evidence in chief, re-examination and cross-examination.

3.1.6 Evidence in narrative form

A party may question a witness in any way the party thinks fit, except as limited by Chapter 2 (adducing evidence) or as directed by the court (s29(1)).

A court, either of its own motion or on the application of the party who called the witness, may direct a witness to give evidence wholly or partially in narrative form (s29(2)).

The expression “narrative form” appears to refer to the witness giving evidence as a continuous story in his or her own words, uninterrupted by questions.

While this section is likely to be used for expert witnesses, giving evidence in narrative form may also be more culturally appropriate for some witnesses and may assist child witnesses.

3.1.7 Effect of calling for production of documents

Section 35 abolishes the rule in *Walker v Walker* (1937) 57 CLR 630 by providing that a party is not 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 (s35(1)). 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 (s35(2)).

3.1.8 Unfavourable witnesses

The UEA introduces a new regime for the examination of a witness who gives evidence that is unfavourable to the party who called him or her. This replaces the common law hostile witness rule.

A court may allow a party who called a witness to cross-examine the witness about:

- evidence given by the witness that is unfavourable to the party or
- a matter about which the witness may be reasonably supposed to have knowledge and about which it appears to the court that the witness is not, in examination in chief, making a genuine attempt to give evidence about or
- whether the witness has made a prior inconsistent statement (s38).

Further, with the court's leave, the party questioning the witness may ask the witness questions that are relevant only to the witness's credibility (s38(3)).

The High Court has held that s38 allows a party to call a witness the party knows is unfavourable to it in order to cross-examine the witness (subject to being granted leave to do so) and thereby have a prior inconsistent statement admitted into evidence under s38(1)(c). Further, the prior inconsistent statement made by the unfavourable witness may be admissible under s60, notwithstanding the hearsay rule, to prove the facts contained in it: *Adam v The Queen* (2001) 207 CLR 96.

3.1.9 Vulnerable witnesses

The Victorian UEA confers a discretion on the court to disallow an *improper question or improper questioning* of any witness in cross-examination (s41(1)).

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) (s41(3)).

Section 41 is one of the few variations between the Victorian UEA and the *Model Uniform Evidence Bill*. The Model Bill requires the court to prohibit certain kinds of questions put to any witness and sets out some of the matters the court may consider in so deciding.

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 (s41(2)).

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 (s41(4)).

Further reading

Joint Report (2005), Chapters 4 and 5

3.2 Documents

3.2.1 Definition of document

Document is broadly defined in the UEA to mean any record of information and includes anything from which sounds, images or writings can be reproduced with or without the aid of anything else. The definition therefore appears to include electronic and audiovisual media.

3.2.2 Proof of contents of documents

Subject to some exceptions, the common law rule has been that original documents should be tendered in evidence to prove their contents. This is described as the “original document rule”. The UEA abolishes this rule (s51).

Under the UEA, 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 (s48(1)(a))
- tendering a copy of a document (s48(1)(b))
- tendering a transcript of a recording (s48(1)(c))
- tendering a document produced by use of a device (s48(1)(d))
- tendering an extract from a business record (s48(1)(e))
- tendering an authorised copy of a public document (s48(1)(f)).

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 (s48(4)).

Part III of the *Evidence Act 1958* (Vic) currently also provides for proof of documents and proof of facts by documents.

3.2.3 Documents in foreign countries

The UEA provides for the proof of documents in foreign countries (s49). The section provides that the methods for proof of the contents of documents referred to above (other than the method under s48(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 s48 applies.

3.2.4 Voluminous or complex documents

A court may (on the application of a party) direct that the party may adduce evidence of the contents of two or more documents by way of a summary if an application to this effect is made to the court and the court is satisfied that it is not otherwise possible conveniently to examine the documents because of their volume or complexity (s50(1)).

In order for the court to make a direction under s50, the party making the application must serve on each other party a copy of the summary and give each other party a reasonable opportunity to examine or copy the documents to which the summary relates (s50(2)).

The opinion rule (see below under “Opinion”) does not apply to evidence adduced in accordance with a direction under s50.

3.2.5 Requests to produce documents or call witnesses

Division 1 of Part 4.6 governs requests to produce documents or call witnesses to determine questions relating to documents or things. The Division contains a procedure to protect parties against whom evidence may be adduced or admitted under Part 2.2 (Documents), Part 3.2 (Hearsay) or Part 3.5 (Evidence of judgments and convictions).⁴

A party may make a reasonable request to another party for the purpose of determining a question relating to:

- a previous representation
- evidence of a conviction of a person for an offence
- the authenticity, identity or admissibility of a document or thing (s167)

Section 168 sets out time limits for making certain kinds of requests. If a party gives another party notice of its intention to adduce evidence of a previous representation, the other party may make a request to the party relating to the representation only if it is within 21 days after the notice was given. A court may give leave to make a request after the 21-day period if it is satisfied that there is good reason to do so.

Section 169 specifies the consequences of a party's failure or refusal to comply with a request. If a party has failed or refused (without reasonable excuse) to comply with a request, the court may make one or more orders of the kind described in subsection (1). Section 169 also provides for the procedural aspects of making an application for orders of that kind, the circumstances that may constitute reasonable cause for failing or refusing to comply and the matters a court may take into account in deciding whether to make orders of the kind referred to above.

⁴ Part 3.5 abrogates the rule in *Hollington v Hewthorn* [1943] KB 587 that evidence of a conviction was inadmissible in civil proceedings to prove the facts to which the conviction relates.

3.2.6 Authenticity inferences

A court may examine a document or thing and draw any reasonable inferences from it to determine its relevance (s57 and s58) and whether a provision of the UEA applies to it (s183).

This allows the court to draw inferences about document authenticity and removes the common law requirement of calling a witness to authenticate the document. The practical realities of a case may, however, require that evidence. For example, a court may draw the inference that a book of receipts forms part of a business' records in order to admit the evidence under the business records exception to the hearsay rule in s69. The practical realities of a case may, however, require that evidence.

3.2.7 Processes, machines and other devices

The UEA facilitates the authentication of evidence produced by a device or process, including computer-produced evidence (s146 and s147).

Section 146 establishes a presumption that if it is reasonably open to find that the device or process used to produce a document or thing is one that, or is of a kind that, if properly used, ordinarily produces the outcome asserted by the party producing the document or thing, that in producing the document or thing on the occasion in question, the device or process in fact produced that outcome.

Example

It would not ordinarily be necessary initially to call evidence to prove that a photocopier normally worked and was working properly when it copied a particular document.

Section 147 establishes a similar presumption to that established by s146, but in relation to processes, machines and other devices used in the course of business.

This presumption applies in the absence of sufficient evidence to raise doubt in relation to it. However, the presumption does not apply to the contents of a document that was produced for the purpose of conducting, or in contemplation or in connection with, an Australian or overseas proceeding or in connection with an investigation relating or leading to a criminal proceeding.

Evidence of a kind to which either of these presumptions applies will often be the subject of a provisional finding of relevance under s57.

Example

The relevance of the contents of a document that is produced by a particular machine (as contemplated by s146 and s147) is dependant on a court finding that the machine produced the outcome ordinarily expected of the machine (s146(2) and s147(2)). Accordingly, the document may be provisionally admitted pending a finding by the court as to the production of the document by the machine.

See also Division 2A of Part III of the *Evidence Act 1958*.

3.2.8 Official records

Part 4.3 also facilitates authentication of certain public documents and provides rebuttable presumptions regarding the authenticity of:

- official seals and signatures (s150)
- documents produced from proper custody that are or purport to be more than twenty years old (s152)
- official gazettes (by whatever name called) of Victoria, the Commonwealth, another State, a Territory or a foreign country (s153)
- parliamentary publications (s154)
- official records of the Commonwealth, Victoria, another State or a Territory (s155)
- public documents (s156 and s158)
- public documents relating to court processes (s157)
- official statistics (s159).

3.2.9 Postal and electronic communications

Division 3 of Part 4.3 of the UEA provides rebuttable presumptions regarding:

- the receipt of pre-paid mail at an address in Australia four working days after being posted (s160)
- the transmission and receipt of electronic communications (s161)
- the receipt of lettergrams and telegrams 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram (s162).

Each presumption is rebuttable if there is evidence sufficient to raise doubt about its validity. See also s49 of the *Interpretation of Legislation Act 1984* (Vic) which deals with service by post.

Further reading

Joint Report (2005), Chapter 6

3.3 Other evidence

3.3.1 Views (demonstrations, experiments and inspections)

A judge may, on the application of a party, order that a demonstration, experiment or inspection be held (s53).

Section 53 provides a non-exhaustive list of matters a court is to take into account in deciding whether to make an order under the section. These are:

- whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence
- 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
- the extent to which a demonstration will properly reproduce the conduct of event to be demonstrated
- the extent to which the place or thing to be inspected has materially altered (s53(3)).

The section does not apply to demonstrations, experiments or inspections conducted inside a courtroom: *Evans v The Queen* [2007] HCA 59. However, an experiment is not to be conducted in the course of the court's deliberations (s53(4)).

The section does not apply in relation to the inspection of an exhibit by the court or jury (s53(5)).

The court or jury may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration (s54).

Significant changes for Victoria: admissibility of evidence (UEA Chapter 3)

4.1 Relevance

Section 56 sets out the primary rule of admissibility. It provides:

- (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.

All relevant evidence is admissible except as otherwise provided in the UEA (s56).

Evidence is relevant where, 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 (s55(1)). Evidence is not to be taken to be irrelevant only because it relates to the credibility of a witness, the admissibility of other evidence or a failure to adduce evidence (s55(2)).

This definition requires a minimal logical connection between the evidence and the fact in issue.

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 it to be capable of affecting the probability of the existence of the fact.

Unlike the position at common law, s55 does not require legal relevance. The common law uses this requirement as a tool to exclude evidence with very little probative value. Under the UEA, the equivalent tool is the general discretion to exclude evidence set out in s135.

Section 135 confers on a court a discretion to refuse to admit evidence 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.

The first step in determining admissibility is to ascertain if the evidence is relevant. If it is not, it should be excluded. If it is relevant, it is admissible unless an exclusionary rule applies or the court exercises a discretion to exclude it.

4.1.1 Provisional relevance

Another important provision of general application is s57 which deals with provisional relevance.

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:

- if it is reasonably open to make that finding or
- subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding (s57).

Section 57 will need to be considered whenever the relevance of evidence adduced by a party depends on the court making a finding of fact on the basis of which the court can find that the evidence is relevant. It also sets out the standard to be applied, namely, whether it is reasonably open to so find (s57 and s58).

An example of evidence that may be the subject of provisional relevance is physical evidence such as an alleged weapon, the relevance of which will depend on evidence linking it to the alleged crime.

4.2 Hearsay

The UEA provides a basic exclusionary rule for hearsay evidence and that rule is made subject to a number of exceptions. The exceptions under the UEA are generally broader than existing common law and statutory exceptions.

4.2.1 The hearsay rule

The exclusionary rule set out in s59(1) is referred to as the hearsay rule. It provides that:

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.

The Dictionary defines a *previous representation* to mean a representation made other than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

Further, *representation* is defined to include:

- an express or implied representation (whether oral or in writing) or
- a representation to be inferred from conduct or
- a representation not intended by its maker to be communicated to or seen by another person or
- a representation that for any reason is not communicated.

The basic exclusionary rule set out in s59 equates to the position at common law but provides greater clarity about its application to implied assertions by excluding only those representations that it can reasonably be supposed that a person intended to assert.

Section 59 also provides guidance on the determination of intention. In order to ascertain whether the requisite intention is present, the court may have regard to the circumstances in which the representation was made (s59(2A)).

Section 59(2A) requires the application of an objective test in determining the issue of intention to assert a fact. This test was inserted into s59 in response to the decision of the Supreme Court of New South Wales in *R v Hannes* (2000) 158 FLR 359 in which the court adopted a potentially far-reaching approach to this issue.

4.2.2 Hearsay rule exceptions

The UEA (Part 3.2) contains the following exceptions to the hearsay rule:

- Evidence relevant for a non-hearsay purpose (s60)
- First-hand hearsay
- Civil proceedings if maker not available (s63)
- Civil proceedings if maker available (s64)
- Criminal proceedings if maker not available (s65)
- Criminal proceedings if maker available (s66)
- Contemporaneous statements about a person's health etc. (s66A)
- Business records (s69)
- Contents of tags, labels and writing (s70)
- Electronic communications (s71)
- Aboriginal and Torres Strait Islander traditional laws and customs (s72)
- Reputation as to relationships and age (s73)
- Reputation of public or general rights (s74)
- Interlocutory proceedings (s75).

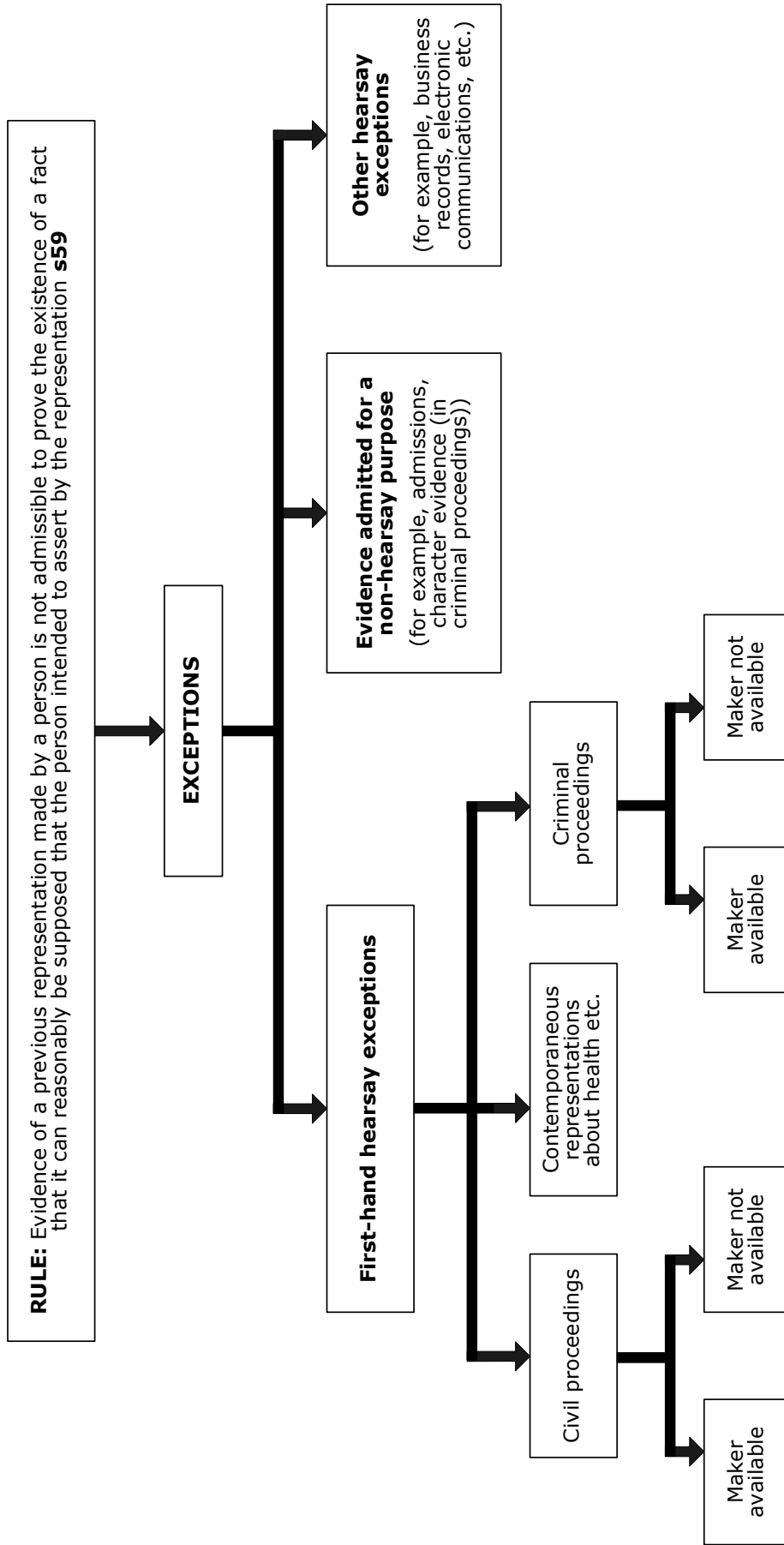
4.2.3 Exceptions dependant on competency

The exceptions to the hearsay rule depend on competency (s61).

The exceptions to the hearsay rule do not allow the use of a previous representation (other than a contemporaneous 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 that fact because of s13(1) (Competence – lack of capacity).

Section 66A provides for contemporaneous representations and does not require the person who made the contemporaneous representation to have been competent to give evidence at the time of making it.

HEARSAY OVERVIEW



Note: See also discretionary and mandatory exclusions **Part 3.11**

4.2.4 First-hand hearsay

“First-hand” hearsay is evidence of a *previous representation* made by a person who had personal knowledge of an asserted fact (s62(1)).

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 something the person saw, heard or otherwise perceived (s62(2)).

The exception does not extend to “personal knowledge” based on a previous representation made by another person about a fact (s62(2)).

The first-hand hearsay exceptions are contained in four provisions that deal separately with civil and criminal proceedings (s63 – s66) and an additional provision that may be applied in either civil or criminal proceedings (s66A).

The separate treatment of civil and criminal proceedings reflects the UEA’s underlying policy framework which recognises the different nature and purpose of civil and criminal trials. A common feature however, is reliance on a distinction between the situation where the maker of the original statement is available to give evidence and the situation where the maker is not. In the exceptions for criminal proceedings, a distinction is also drawn between the position of the prosecution and the position of the accused.

The availability of a witness to testify is relevant to a number of the first-hand hearsay exceptions.

Clause 4 of Part 2 of the Dictionary provides that a person is not available to give evidence if:

- the person is dead or
- the person is not competent to give evidence (other than by reason of s16 (Competence and compellability – judges and jurors)) or
- it would be unlawful for the person to give the evidence or
- a provision of the UEA prohibits the person from giving the evidence or
- the person cannot be located or served after reasonable steps or
- the person could not be compelled to give evidence.

4.2.5 Civil proceedings – exceptions if the maker of the previous representation is not available

If a person has made a previous representation concerning an act of which he or she had personal knowledge and that person is not available to give evidence, the hearsay rule does not apply to:

- evidence of that representation if it is 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 (s63).

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 (s67).

4.2.6 Civil proceedings – exceptions if the maker of the previous representation is available

If a person has made a previous representation concerning an act of which he or she had personal knowledge and that person is available to give evidence, the hearsay rule does not apply to—

- evidence of that representation if it is 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—

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 (s64).

Reasonable notice in writing is required of a party's intention to adduce the evidence (s67).

A party may object to the failure to call a witness on the grounds of undue expense or delay or impracticability (s68). 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.

4.2.7 Criminal proceedings – exceptions if the maker of the previous representation is not available

The exceptions to the hearsay rule are narrower in criminal proceedings, particularly if the maker of the representation is not available for cross-examination.

If in a criminal proceeding 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 or
- it was made shortly after the asserted fact occurred and in circumstances where it was unlikely to be a fabrication or
- it was made in circumstances that make it highly probable that it was reliable or
- it was against the interests of the maker at the time it was made and was made in circumstances that make it reliable (s65(2)) or
- if the previous representation was made in another legal proceeding and the defendant (in that proceeding) cross-examined the person who made the representation or had a reasonable opportunity to do so (s65(3)). However, evidence admitted in these circumstances in a proceeding in which there is more than one defendant cannot be used against a defendant who did not cross-examine, and who did not have a reasonable opportunity to cross-examine, the person about the representation (s65(4)) or
- if evidence of a previous representation is adduced by a defendant, and if the evidence is admitted, to evidence adduced by another party on the same matter (s65(8) and s65(9)).

The exception for hearsay evidence adduced by a defendant allows a defendant to present evidence that may exonerate him or her. It will be for the finders of fact to accord the appropriate level of weight to the evidence.

Notice requirements must be complied with in relation to this exception (s67).

4.2.8 Criminal proceedings – exceptions if the maker of the previous representation is available

If the maker of a previous representation about a matter of which he or she had personal knowledge is to be called as a witness, the hearsay rule does not apply to evidence of the representation that is given by that person or by another person who also has personal knowledge of the representation if, when it was made, the occurrence of the fact asserted in it was fresh in the memory of the person who made it (s66).

In Graham v The Queen (1998) 195 CLR 606, the High Court interpreted “fresh in the memory” to mean “recent” or “immediate”, being hours or days.

The UEA was amended to return the concept to its original intent. It directs the court that it may consider the nature of the event together with the age and health of the person and the amount of time between the occurrence of the asserted fact and the making of the representation (s66(2A)).

4.2.9 Other exception – Division 3 of Chapter 3: business records

There are several other exceptions. One of them is the business records exception. It is the most commonly used of these other exceptions. Business is broadly defined in Clause 1 Part 2 of the Dictionary to include the conduct of a profession or trade, government activities, statutory offices, parliamentary activities and non-profit organisations and businesses conducted outside Australia.

The business records exception applies to documents 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.

The hearsay rule does not apply to such a document so far as it contains a representation that was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or that was made by a person on the basis of information supplied by someone with that knowledge (s69).

The exception does not apply to documents prepared for court proceedings or criminal investigations.

A court may also waive the hearsay rule with the consent of the parties (s190).

See also s55 of the *Evidence Act 1958*.

4.2.10 Procedural protections

A court may determine before trial whether one party can request another party to call the maker of a previous representation as a witness and whether hearsay evidence can be admitted (s166-s169).

4.2.11 Evidence relevant for a non-hearsay purpose

At common law, hearsay evidence admitted for a non-hearsay purpose (not admitted as evidence of the asserted fact) cannot be used for a hearsay purpose.

Under s60, 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 (s60(1)). This exception applies whether or not the person who made the representation had personal knowledge of the asserted fact (s60(2)). In this context, “personal knowledge” has the meaning given by s62(2).

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

This exception does not apply to evidence of admissions (see below under “Admissions”) in criminal proceedings.

While s60 lifts the hearsay rule in certain circumstances, the discretions conferred by s135 (General discretion to exclude evidence), s136 (General discretion to limit use of evidence) and s137 (Exclusion of prejudicial evidence in criminal proceedings) provide controls to ensure fairness is maintained.

Example 1

At common law when a prior inconsistent statement is admitted into evidence, instructions are given to the jury that they can use the statement in their assessment of the credibility of the witness, but not as evidence of the facts stated in it.

Under the UEA, when a prior inconsistent statement is admitted on the issue of credit it may also be used as evidence of facts unless a successful application is made to limit its use under s136. For example, where a witness does not ‘swear up’ to a statement for fear of the accused, evidence of the prior inconsistent statement may be admitted both as evidence of the witness’s credibility and of the truth of the original statement (see also s38 regarding unfavourable witnesses).

Example 2

While the common law allows evidence to identify the factual basis of an expert's opinion, the hearsay rule prevents this evidence being used as proof of the facts stated in it, unless no objection is taken to the use of the evidence in this way. Ill-defined exceptions attempted to deal with the problem of accumulated data and knowledge of experts.

Under the UEA, when evidence is admitted to identify the basis of an expert's opinion it may also be used as evidence of the truth of the facts asserted, unless a successful application is made to limit its use under s136.

For example, if a patient's medical history is admitted as evidence of the basis of the doctor's report or opinion, that history could then be used for a hearsay purpose i.e. as evidence of the truth of those representations (e.g. the cause of injury). If, however, the admission of the evidence would be unfairly prejudicial to a party then the court may limit its use, for example, when there was no opportunity to cross-examine the plaintiff.

The following flow-charts illustrate the best way to determine whether an exception to the hearsay rule applies in civil and criminal proceedings. One applies to civil proceedings and one to criminal proceedings. One should ask whether the hearsay evidence is first-hand hearsay. If it is, the applicable section can be found by asking whether the maker of the representation is available. Otherwise, it is a matter of checking the list of other exceptions.

Further reading

Joint Report (2005), Chapters 7 and 8

HEARSAY IN CIVIL PROCEEDINGS

RULE: 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 **s59**

EXCEPTIONS

Restriction to first-hand hearsay **s62**

Maker not available
Cl. 4, Pt. 2 of Dictionary

Hearsay rule does not apply **s63**

Notice required **s67**

Maker available
Cl. 4, Pt. 2 of Dictionary

Hearsay rule does not apply if it would cause undue expense or delay or not be reasonably practicable to call the maker of the representation to give evidence **s64(2)**

Notice required **s67**

A party may object to the tender of the evidence **s68**

Hearsay rule does not apply if the maker of the representation is to be called to be called **s64(3)**

Hearsay rule does not apply **s66A**

Contemporaneous representations about health etc. **s66A**

Other exceptions

- Evidence relevant for a non-hearsay purpose (not admissions) **s60**
- Business records **s69**
- Tags and labels in the course of business **s70**
- Electronic communications re identity, date, destination **s71**
- ATSI traditional laws and customs **s72**
- Reputation as to relationships, age and family history **s73**
- Reputation of public or general rights **s74**
- Interlocutory proceedings if source identified **s75**
- Admissions **s81**
- Judgments and convictions **s92**

Discretionary and mandatory exclusions **Part 3.11**

Note: The maker of a representation must have been competent for the evidence to be admissible **s61** (but note **s66A**)

The court may waive the hearsay rule in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

Evidence relevant to the admissibility of evidence to which **s63**, **s64**, **s69**, **s70** or **s71** applies can be given by affidavit or written statement **s170-s173**

HEARSAY IN CRIMINAL PROCEEDINGS

RULE: 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 **s59**

EXCEPTIONS

Restriction to first-hand hearsay **s62**

Other exceptions

Maker not available
Cl. 4, Part 2 of Dictionary

Maker available
Cl. 4, Part 2 of Dictionary

Contemporaneous representations about health etc.
s66A

Evidence relevant for a non-hearsay purpose (not admissions) **s60**

Business records **s69**

Tags and labels in the course of business **s70**

Electronic communications re identity, date, destination **s71**

ATSI traditional laws and customs **s72**

Reputation as to relationships, age and family history **s73**

Reputation of public or general rights **s74**

Interlocutory proceedings if source identified **s75**

Admissions **s81**

Judgments and convictions **s92**

Character evidence **s110 and s111**

Hearsay rule does not apply to evidence of previous rep. made:

- under duty
- shortly after or when facts occurred and in circumstances that make fabrication unlikely
- in circumstances that make it highly probable it is reliable
- made against interests and in circumstances that make it likely to be reliable **s65(2) and s65(7)**

Hearsay rule does not apply to evidence of previous rep. made when giving evidence in another proceeding if defendant cross-examined maker, or had opportunity to do so, in that proceeding - transcript or recording may be tendered **s65(3)-s65(6)**

Hearsay rule does not apply to evidence of previous rep. adduced by a defendant and, if so adduced, evidence adduced by another party on the same matter **s65(8)-s65(9)**

Hearsay rule does not apply to evidence of previous rep. that was made about a fact fresh in the memory of the maker, on the proviso that the maker is called to give evidence **s66 (see exception in s66(3))**

Hearsay rule does not apply **s66A**

Notice required **s67**

Discretionary and mandatory exclusions **Part 3.11**

Note:

Evidence relevant to the admissibility of evidence to which s65, s69, s70 or s71 applies can be given by affidavit or written statement **s170-s173**
See also notes to Hearsay in Civil Proceedings diagram above

4.3 Opinion

With some exceptions, witnesses are not permitted under the common law to express opinions about facts. It is the role of the court to draw inferences from the facts, not the witness.

Under the common law, evidence of a witness' opinion is inadmissible unless it falls within an exception, in particular lay opinion or expert opinion. The UEA clarifies and makes significant changes to the law.

4.3.1 Opinion rule

Section 76 of the UEA expresses the opinion rule as follows:

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

The UEA provides a number of exceptions to this rule.

4.3.2 Exception – opinion evidence with multiple purposes

Evidence of an opinion may be 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 (s77).

If opinion evidence is admitted for another purpose, s77 allows it to be used to also prove the facts about which the opinion is expressed (as with the hearsay rule under s60). However, the discretionary power in s136 allows the court to limit the use of the evidence.

4.3.3 Exception – lay opinions

Evidence of a lay opinion is permitted by s78 if it is relevant (s55) and it is based on what the person saw, heard or otherwise perceived about a matter or event and the evidence is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

Example

A witness may give evidence that an assailant was over 6 feet tall and aged between 20 and 30 based on his observation and perception rather than actual measurement or knowledge.

4.3.4 Exception – opinion evidence based on specialised knowledge

Opinion evidence is admissible as an exception to the opinion rule if it is relevant (s55) and satisfies the requirements of s79 that is:

- the person must have specialised knowledge and
- the specialised knowledge must be based on the person's training, study or experience and
- the opinion must be wholly or substantially based on that specialised knowledge.

The expression "specialised knowledge" is not defined in the UEA. Nor does the UEA require the specialised knowledge to be in a field of expertise established by reference to certain criteria. Therefore, in cases where the opinion is in an area of new and developing knowledge and it is in issue, admissibility may be ultimately determined by the application of the discretion provisions.

It is necessary to establish that the person purporting to have specialised knowledge, in fact has that knowledge, in relation to each opinion given.

Section 79 encompasses specialised knowledge based on experience. People who have acquired expertise in a particular area may qualify as an expert and give opinion evidence, regardless of whether they have formal qualifications in the area. Experience will need to be demonstrated and the witness will be required to stay within his or her area of expertise.

4.3.5 Evidence of opinion based on specialised knowledge relating to children

Specialised knowledge relating to the development and behaviour of children can be relevant to a range of matters, including competence, a fact in issue or the credibility of a child witness. Courts have on occasion demonstrated a reluctance to admit such evidence because it is considered to be within ordinary experience.

In s79, the meaning of specialised knowledge, while not defined, specifically 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 the abuse).

Section 79 does not require identification and proof of the factual basis of an expert opinion for evidence given in accordance with that section to be admissible. However, failure to identify and prove the underlying facts will affect the weight that will be given to the opinion and may give rise to consideration of the discretions.

4.3.6 Ultimate issue and common knowledge rules abolished

Generally speaking, the common law does not allow an expert witness to give evidence about the central question the court has to decide – that is, the ultimate issue in the proceeding, because doing so is said to displace the function of the court.

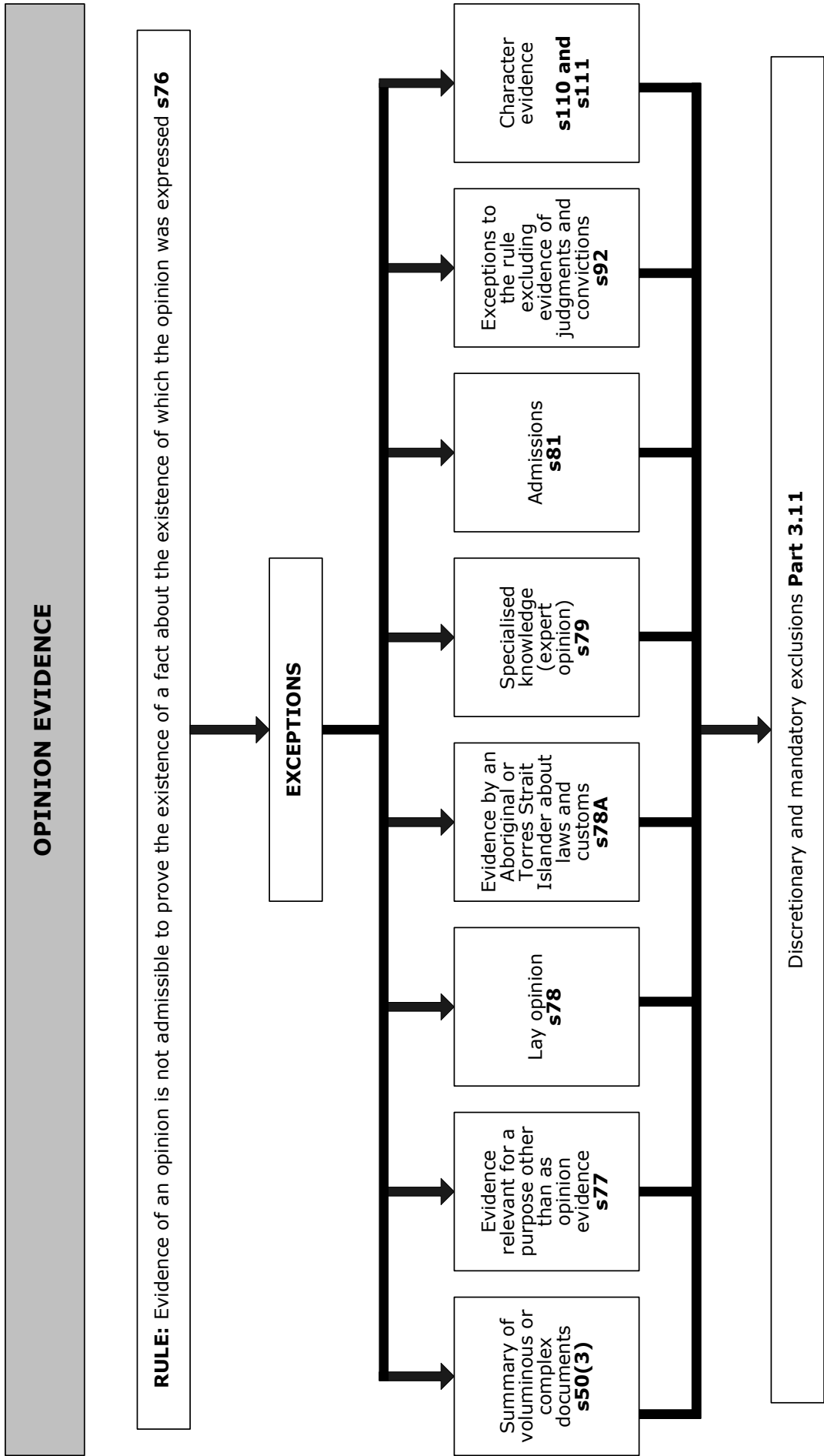
Expert evidence about matters said to be common knowledge is also excluded by the common law.

Section 80 abolishes these common law rules by providing that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue or a matter of common knowledge.

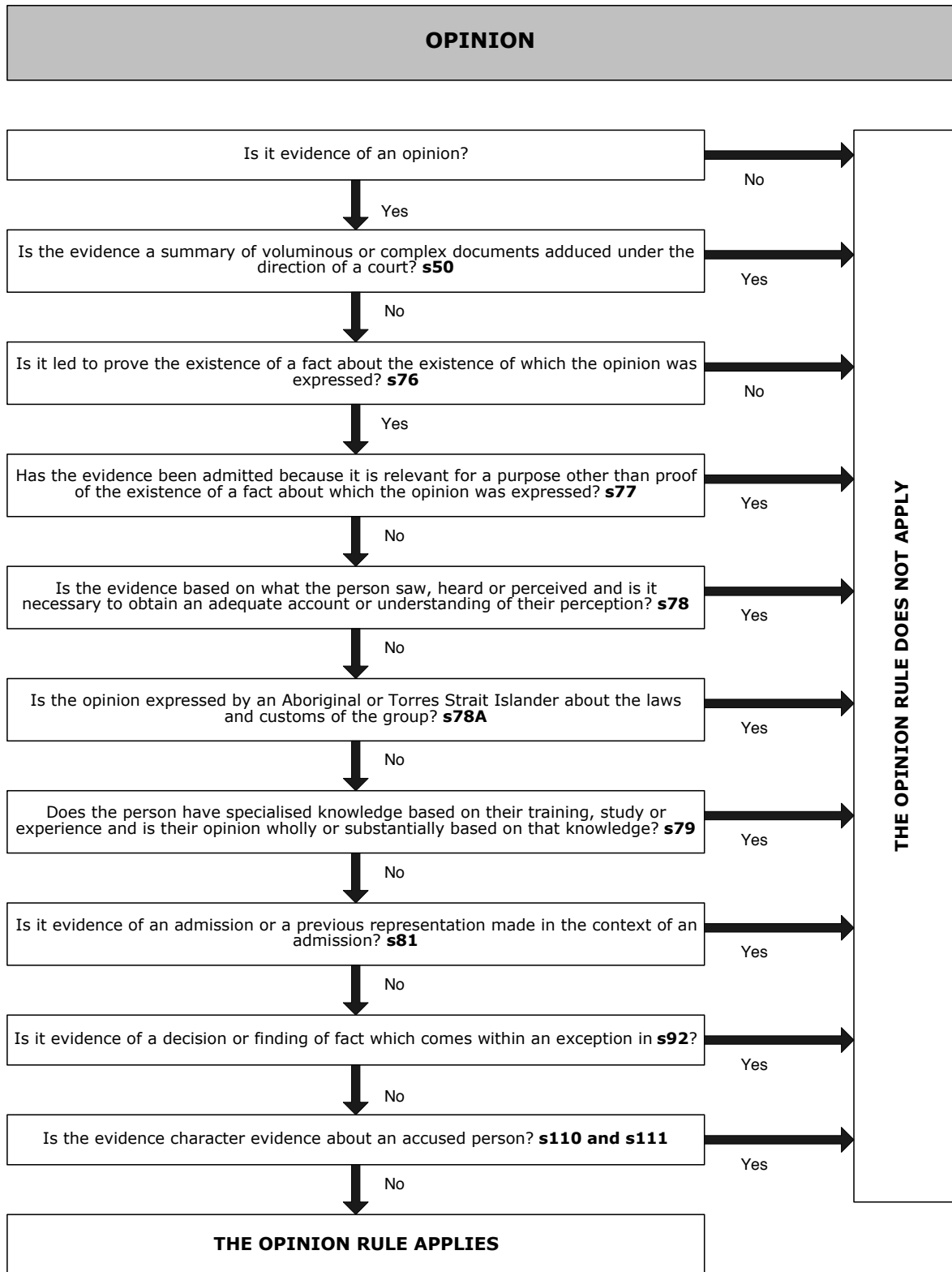
4.3.7 Other opinion rule exceptions

The opinion rule does not apply to:

- evidence of summaries of voluminous or complex documents (s50(3))
- evidence expressed by a member of an Aboriginal or Torres Strait Islander group about the traditional laws and customs of the group (s78A)
- evidence of admissions (s81)
- evidence of the grant of probate or letters of administration or convictions (s92(3))
- evidence adduced by a defendant about his or her character or about the character of another defendant (s110 and s111).



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**
A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**



Note: See also discretionary and mandatory exclusions **Part 3.11**

A party may make a request to another party for a specified person to be called as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

4.3.8 Opinion – special case 1 - competence

Opinion evidence may be adduced to assist the court to determine whether a witness is competent to give evidence (s13(8)).

4.3.9 Opinion – special case 2 – credibility

Opinion evidence may be adduced (with leave of the court) concerning the credibility of a witness if the evidence could substantially affect the assessment of the credibility of that witness (s108C).

Further reading

Joint Report (2005), Chapter 9

4.4 Admissions

The Dictionary at the end of the UEA defines admission as a previous representation that is made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding) and that is adverse to the person's interest in the outcome of the proceeding.

See also s464H of the *Crimes Act 1958*.

4.4.1 Hearsay and opinion rule exceptions

Section 81 provides (as does the common law) an exception to the hearsay and opinion rules for admissions and related representations.

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 and to which it is reasonably necessary to refer in order to understand the admission (s81).

Example

A admits to B that she caused a serious injury to C. In A's trial for that offence, the prosecution may lead evidence from B that A made the admission to B, and it may be used as proof of the facts asserted and that B formed the opinion that A was sane when she made the admission.

The exception under s81 is limited to first-hand hearsay. The hearsay rule applies unless the evidence is given by someone who saw, heard or otherwise perceived the admission being made, or the evidence is a document in which the admission is made (s82).

Section 60 (Evidence relevant for a non-hearsay purpose) does not apply in a criminal proceeding to evidence of an admission.

The hearsay exception for admissions does not extend to the case of a third party unless the third party consents to the use of the evidence in its entirety (s83). A third party is someone other than a person who made the admission or who adduced evidence of the admission. Consent must be given in relation to the whole of the admission.

4.4.2 Admissibility in civil and criminal proceedings – violence and other conduct exclusions

An admission is not admissible unless the court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct, or a threat of such conduct (s84).

This provision applies only if the party against whom the evidence is adduced raises the issue of improper influence. The conduct or threats may be directed towards the defendant or another person.

This provision is applicable in civil and criminal proceedings.

4.4.3 Admissibility in civil and criminal proceedings – improperly obtained admissions

Section 138 confers a discretion on the court to exclude evidence that was obtained improperly, unlawfully or in contravention of an Australian law.

Evidence of this kind is not admissible unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence given the manner in which it was obtained.

Without limiting the discretion, the evidence is taken to have been obtained improperly if the person conducting the questioning:

- did, or omitted to do, an act in the course of questioning that he or she knew or ought reasonably to have known was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning or
- made a false statement in the course of the questioning that he or she knew or ought reasonably to have known was false and that it was likely to cause the person being questioned to make an admission (s138(2)).

The section also sets out a non-exhaustive list of factors which the court may take into account in deciding whether to exercise the discretion (s138(3)).

The section alters the common law discretion known as the rule in *Bunning v Cross* (1978) 141 CLR 54. The section differs from the common law in that it applies in civil as well as criminal proceedings. It also reverses the onus; that is, the party adducing the evidence must persuade the court that the evidence should be admitted where an impropriety or contravention has occurred.

4.4.4 Admissibility in criminal proceedings – defendant admissions – replacement of voluntariness rule

Under the common law, an admission is excluded if it was not made voluntarily (the voluntariness rule). The common law also allows the exclusion of an admission because of unfairness (the unfairness discretion), which includes illegal conduct not affecting the voluntariness of the admission and the exclusion of admissions obtained illegally or improperly.

Section 149 of the *Evidence Act 1958* modified the common law by providing that evidence of a confession shall not be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge is of the opinion that the inducement was ‘really calculated to cause an untrue admission of guilt to be made’.

The UEA retains an unfairness discretion (s90) and sets out a new statutory regime to replace the voluntariness rule. This includes s84 (above). It also makes provision in relation to the reliability of admissions by defendants in criminal proceedings (s85). The UEA also contains other safeguards to control the admissibility of admission evidence (e.g. see s139 (Cautioning of persons)).

Turning to s85, it applies to evidence of an admission made in either of the following circumstances:

- 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 (previously “in the course of official questioning” – the section was amended in response to the decision of the High Court in *Kelly v The Queen* (2004) 218 CLR 216 which narrowly interpreted the expression “official questioning”) or
- as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

The section provides that evidence of an admission made in either of these two circumstances is not admissible unless the court is satisfied that the circumstances in which the admission was made make it unlikely that the truth of the admission was adversely affected (s85(2)).

The section applies only in a criminal proceeding.

4.4.5 Discretion to exclude admissions for unfairness

Under s90, the court may refuse to allow the prosecution to adduce evidence of an admission or refuse to admit evidence of that kind to prove a particular fact, if the adducing or admission of the evidence would be unfair to the defendant having regard to the circumstances in which the admission was made.

4.4.6 Records of oral admissions

A documentary record of an oral admission made by a defendant 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 defendant has acknowledged the document is a true record of the question, representation or response (s86). The defendant may provide that acknowledgement by signing, initialling or otherwise marking the document.

Section 86 applies only in a criminal proceeding.

4.4.7 Evidence of silence as an admission

Section 89 prohibits the drawing of an unfavourable inference (including an inference as to consciousness of guilt or credibility) 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.

Evidence of silence is not admissible if its only 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, for example in contempt proceedings.

The section applies only in a criminal proceeding.

4.4.8 Proof of admissions

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 admission (s88).

4.4.9 Admissions made with authority

The UEA makes provision for the admissibility of admissions made with authority.

In 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:

- 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) the person had with the party or one or more persons including the party (s87(1)).

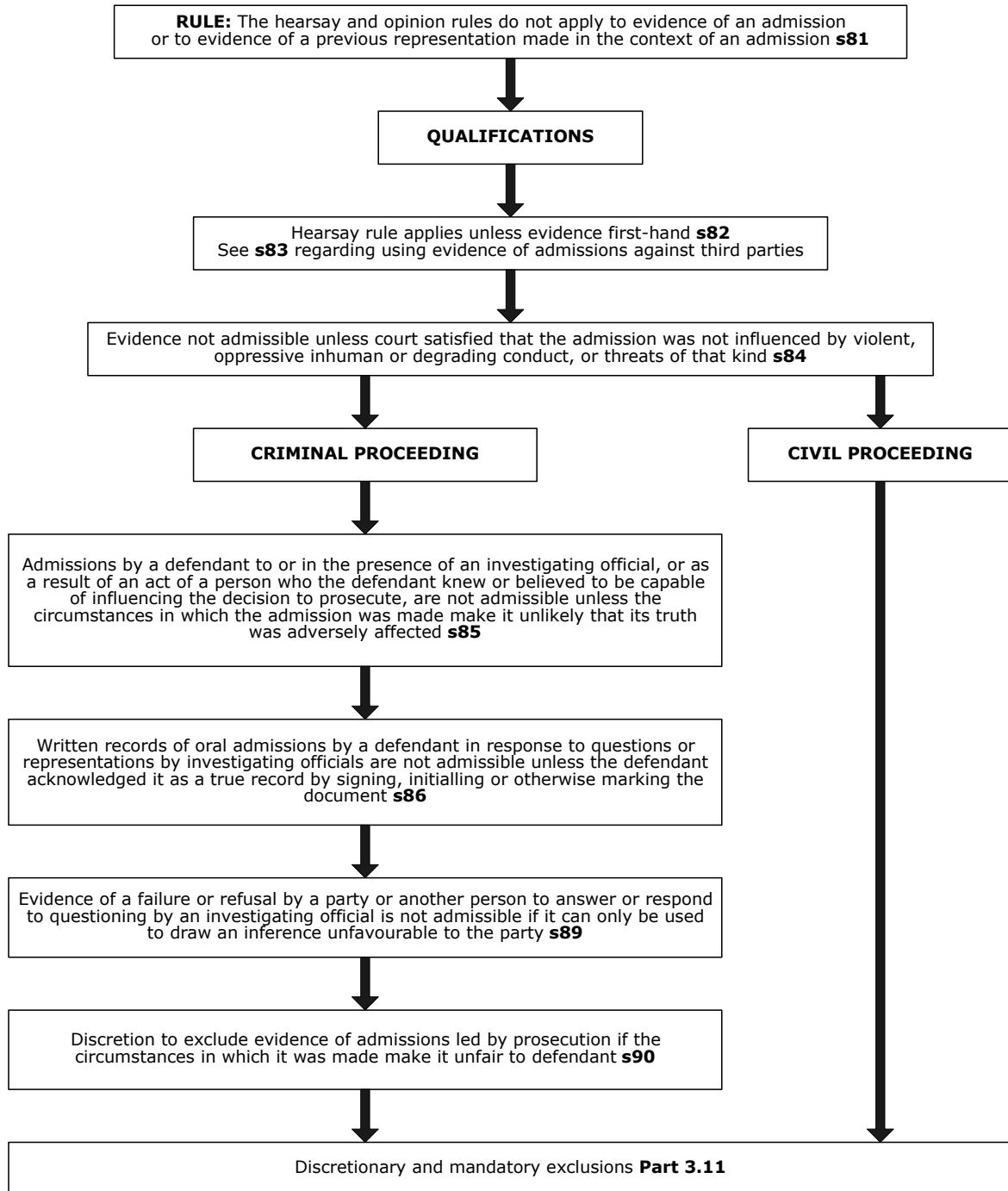
For the purposes of s87, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

- 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 (s87(2)).

Further reading - Joint Report (2005), Chapter 10

ADMISSIONS

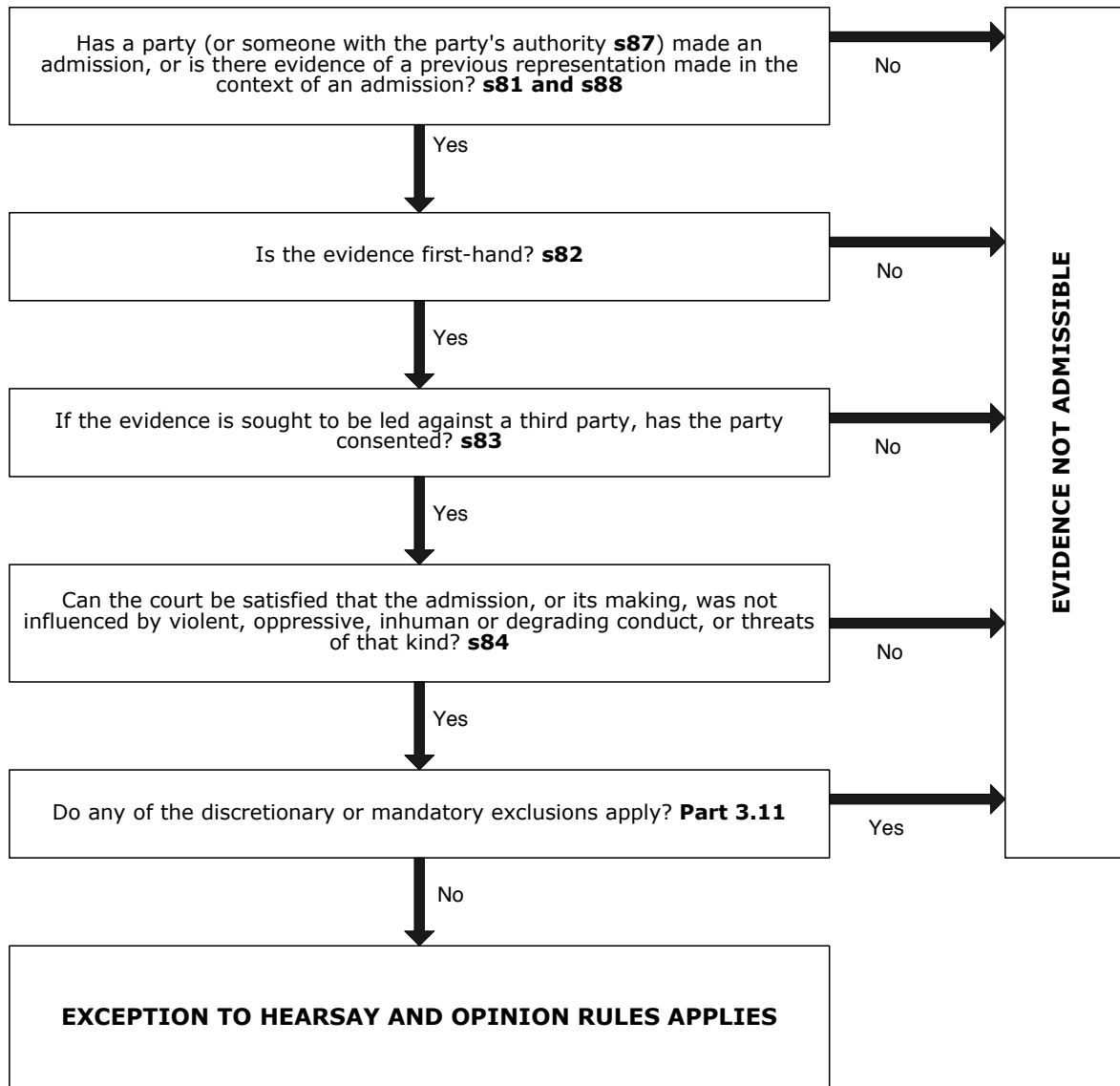
Admission means a previous representation made by a party to a proceeding (or someone with their authority s87) that is adverse to the party's interest in the outcome of the proceeding



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

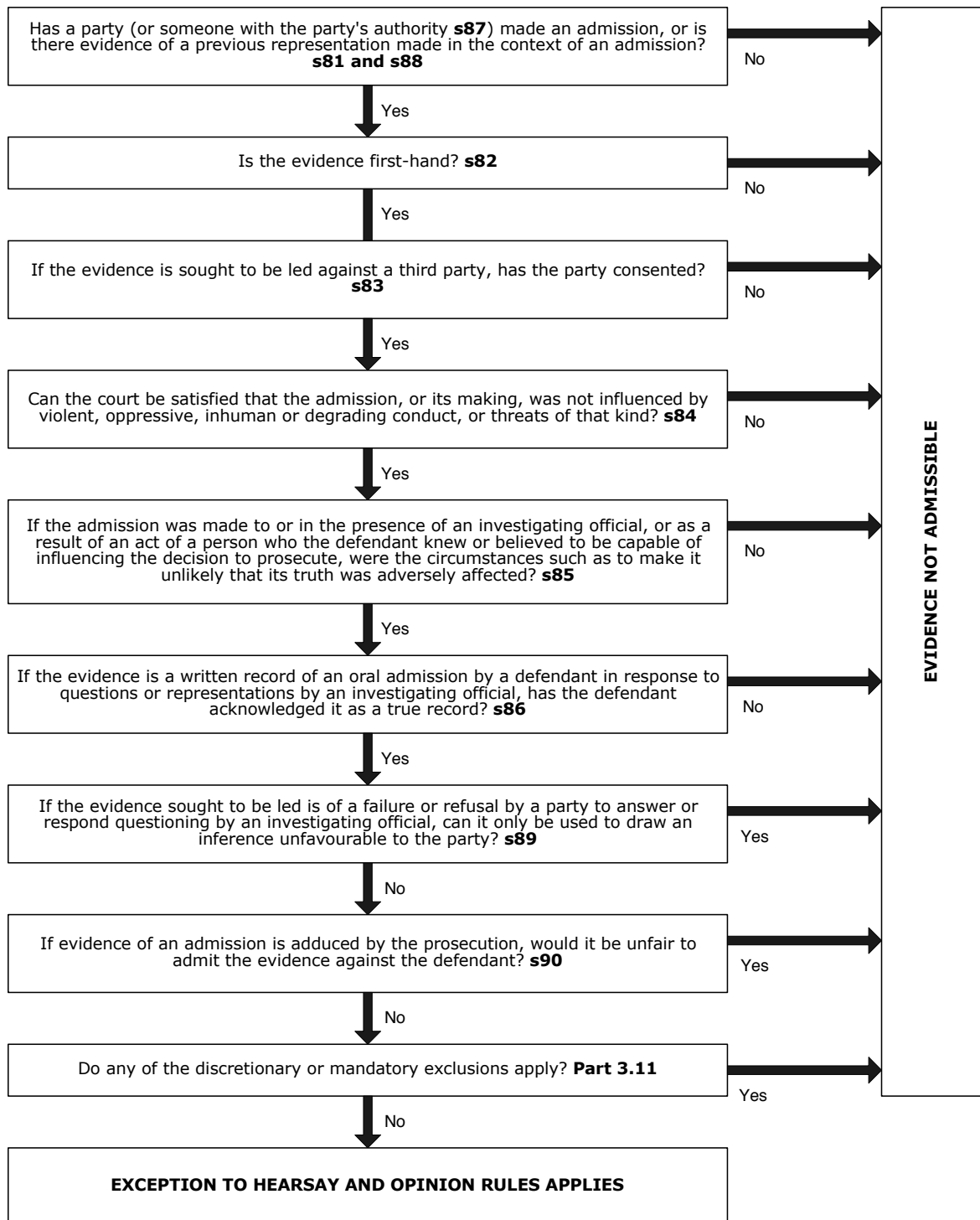
ADMISSIONS AS EXCEPTION TO HEARSAY AND OPINION RULES IN CIVIL PROCEEDINGS



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

ADMISSIONS AS EXCEPTION TO HEARSAY AND OPINION RULES IN CRIMINAL PROCEEDINGS



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

4.5 Tendency and coincidence

Evidence of character, reputation, prior conduct or events that is tendered to prove a person has a tendency to act or think in a particular way or to disprove a coincidence is known as propensity or similar fact evidence at common law.

Propensity evidence can be highly prejudicial and its probative value overestimated. It will usually disclose previous discreditable behaviour, inviting a person to be judged by such behaviour and conclusions drawn about his or her personality and character rather than the evidence relating to the event in question.

This type of evidence is governed by Part 3.6 of the UEA and is referred to as tendency and coincidence evidence.

Currently, the admissibility of propensity evidence in criminal proceedings in Victoria is governed by s398A of the *Crimes Act 1958* which provides that such evidence is admissible if the court considers that, in all the circumstances, it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.

Section 398A was introduced to overcome the restrictive common law test for the admission of tendency and coincidence evidence set by the High Court in *Hoch v The Queen* (1988) 165 CLR 292 and *Pfennig v The Queen* (1995) 182 CLR 461. In those cases the court held that such evidence could not be admitted unless there was no “rational view of the evidence that is consistent with the innocence of the accused”. Only if this test were satisfied would the probative force of the evidence outweigh its prejudicial effect (per Mason CJ, Deane and Dawson JJ in *Pfennig*).

The UEA introduces new rules for the admission of tendency and coincidence evidence in civil and criminal proceedings (s97 and s98) and limits the admission of such evidence adduced by the prosecution in criminal proceedings (s101).

4.5.1 Definitions of tendency and coincidence evidence

Tendency evidence is evidence of the character, reputation or conduct of a person. It is also evidence that a person has or had a tendency (because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind (s97).

Coincidence evidence is used to prove a person did a particular act or had a particular state of mind on the basis that it is improbable that two or more events occurred coincidentally because of similarities in the events or the circumstances surrounding them (s98).

4.5.2 Admissibility in civil and criminal proceedings – rule of admissibility

Under the UEA, tendency and coincidence evidence is not admissible unless:

- the evidence has significant probative value and
- reasonable written notice of the intention to adduce the evidence has been given to the other parties to the proceedings – the court may however, on application, dispense with this requirement (s100)).

The probative value of evidence 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”.

To have significant probative value evidence must be more than merely relevant, but it need not meet the higher test of having a substantial degree of relevance – it must be important or of consequence (*R v Lockyer* (1996) 89 A Crim R 457).

The provisions relating to tendency and coincidence (Part 3.6) do not apply to:

- evidence that relates only to the credibility of a witness (s94(1)) or
- evidence of the character, reputation or conduct of a person or to evidence of a tendency that a person has or had, if that character, reputation, conduct or tendency is a fact in issue (s94(3)).

The provisions do not apply in so far as a proceeding relates to bail or sentencing (s94(2)).

4.5.3 Admissibility in civil and criminal proceedings – use of evidence adduced for a different purpose

If evidence is inadmissible because of either the tendency or coincidence rules, 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 (s95). This approach is in contrast to that taken with the hearsay and opinion rules.

If a jury hears such evidence, the judge must direct the jury to make limited use of the evidence: *R v AH* (1997) 42 NSWLR 702 at 708.

4.5.4 Evidence adduced by the prosecution in criminal proceedings

An additional restriction is imposed on the admissibility of tendency and coincidence evidence about the defendant that is adduced by the prosecution.

Tendency or coincidence evidence adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant (s101(2)).

This restriction does not apply to tendency or coincidence evidence adduced by the prosecution to explain or contradict tendency evidence adduced by the defendant (s101(3) and s101(4)).

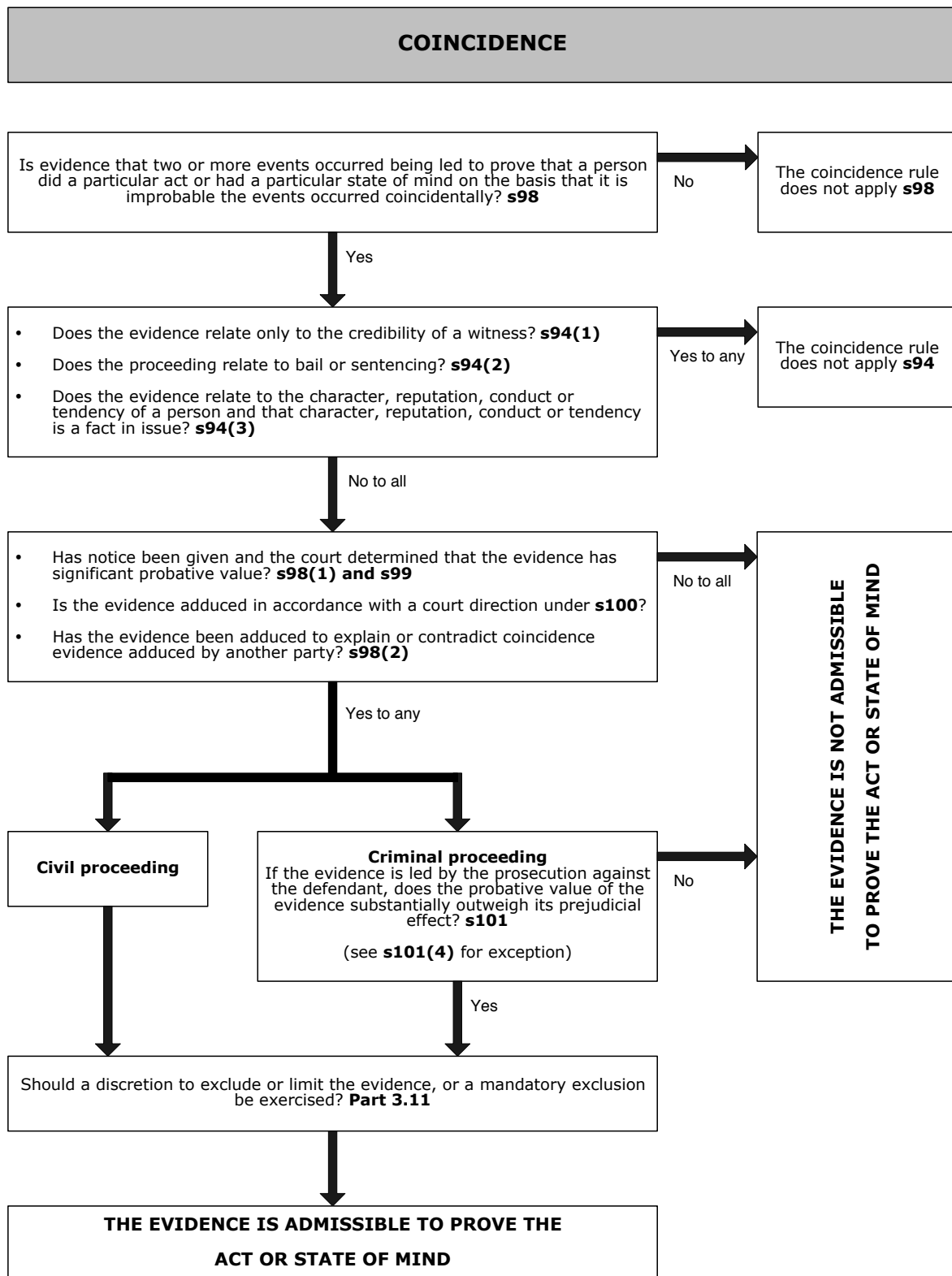
As to the issue of prejudicial effect, initially the test outlined above in *Pfennig* was applied to the UEA. However, in *R v Ellis* (2003) 58 NSWLR 700, the New South Wales Court of Criminal Appeal held that the balancing exercise required under *Pfennig* was not necessarily applicable in the context of s101(2). The balancing test required for the purposes of s101(2) is that the court must 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.

4.5.5 Other controls – civil and criminal proceedings – discretions and exclusions

The general discretion to exclude evidence (s135), the general discretion to limit the use of evidence (s136), the exclusion of prejudicial evidence in criminal proceedings (s137) and the exclusion of improperly obtained evidence (s138) may also operate to limit the admissibility or use of evidence in the context of evidence of tendency or coincidence.



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

4.6 Credibility

Credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness' ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence (UEA Dictionary).

Credibility evidence (in relation to a witness) means evidence that is relevant to the credibility of a witness or a person that is relevant only because it affects the assessment of the credibility of the witness or person or because it is relevant for that purpose and for some other purpose for which it is not admissible (s101A).

Credibility evidence is relevant because it can affect the reliability of a witness' evidence and therefore the fact-finding process. However, because such evidence may not be directly relevant to the facts in issue and has the potential to be prejudicial, its admissibility is limited both at common law and under the UEA.

Section 101A was inserted as a response to the decision of the High Court in *Adam v The Queen* (2001) 207 CLR 96 in which the credibility rule (see below) was interpreted very narrowly.

Evidence relevant only to the credibility of a witness is generally inadmissible both at common law and under the UEA. The UEA, however, takes a more flexible approach to the exceptions allowed.

4.6.1 The credibility rule

The credibility rule (s102) excludes credibility evidence about a witness by providing that credibility evidence about a witness is not admissible.

4.6.2 Exceptions to the credibility rule

The UEA provides a number of exceptions to the credibility rule.

The major exception to the credibility rule is for evidence adduced in cross-examination that could substantially affect the assessment of the credibility of the witness (s103).

Special provisions deal with the questioning of defendants in criminal proceedings.

Currently, under s399(5) of the *Crimes Act 1958*, a defendant in a criminal proceeding cannot be asked or required to answer any question tending to show that he or she has committed, or been convicted of, or been charged with, any offence other than that with which he or she is charged, or that he or she is of bad character unless one of four situations is met.

These four situations include where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (other than his wife or former wife or her husband or former husband, as the case may be). The court retains a discretion not to allow cross-examination even where this exception applies.

The UEA provides a different regime.

If the witness to be cross-examined is a defendant in a criminal proceeding, then leave to cross-examine the defendant about matters relevant to his or her credibility must be given by the court (s104(2)).

The court must not grant leave to the prosecution unless:

- evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and
- that evidence is relevant solely or mainly to the witness' credibility (s104(4)).

The court must not grant leave to another defendant unless the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine and that evidence has been admitted (s104(6)).

Leave is not required for cross-examination by a prosecutor about whether the defendant:

- 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 evidence relates or
- has made a prior inconsistent statement (s104(3)).

The credibility rule does not preclude cross-examination of a defendant by the prosecution for the purpose of adducing evidence that the defendant is not a person of good character if the defence has adduced evidence to prove good character and such evidence has been admitted (s110(2) and s110(3)). In this case, leave is still required to cross-examine the defendant, but the requirements of s104 need not be met.

The court must refuse to admit evidence adduced by a prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant (s137).

Further, in deciding whether to grant leave to cross-examine, the court may take into account the extent to which to do so would be unfair to a party or to a witness (s192(2)(b)).

4.6.3 Rebutting denials

The credibility rule does not apply to rebutting (by other evidence) denials made by a witness in cross-examination (s106(1)(a)). However, the court's leave is required to adduce evidence of this kind (s106(1)(b)).

Leave is not required to lead evidence to rebut a denial if that evidence tends to prove that the witness is biased or has a motive to lie, has a prior conviction, has made a prior inconsistent statement, 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 (s106(2)).

Section 106 can be used not only to rebut a denial by the first witness in cross-examination, but also to rebut a denial in cross-examination of any matter put to a witness called in rebuttal under s106.

4.6.4 Re-establishing credibility

The credibility rule does not apply to evidence adduced in the re-examination of a witness (s108(1)). On 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 (s39).

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 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 (s108(3)).

However, leave of the court is required to adduce the evidence of the prior inconsistent statement (s108(3)).

4.6.5 Admissibility of evidence of credibility of a person who is not a witness who has made a previous representation

If evidence of a previous representation has been admitted in a proceeding and the person who made it has not, 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 (s108A(1)).

In determining admissibility, the court may consider (in addition to other factors):

- 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 the representation was made (s108A(2)).

If the person against whom credibility evidence is to be led is a defendant in a criminal proceeding, the credibility evidence is not admissible without leave of the court (s108B(2)). However, leave is not required if the evidence is about whether the defendant:

- 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 (s108B(3)).

The court must not give the prosecution leave unless evidence adduced by the defendant 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 (s108B(4)).

These provisions limit the risk of the defendant having credibility evidence being led against him or her which would not be admissible if he or she gave evidence.

4.6.6 Specialised knowledge exception

The common law exception that allows credit to be re-established by calling expert evidence, for example, to explain the behaviour of victims of long-term family violence, is replicated by the expert opinion exception under the UEA.

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 without the need to put matters to the witness.

The section may be utilised in cases where it is not possible or appropriate to ask the witness to self-diagnose.

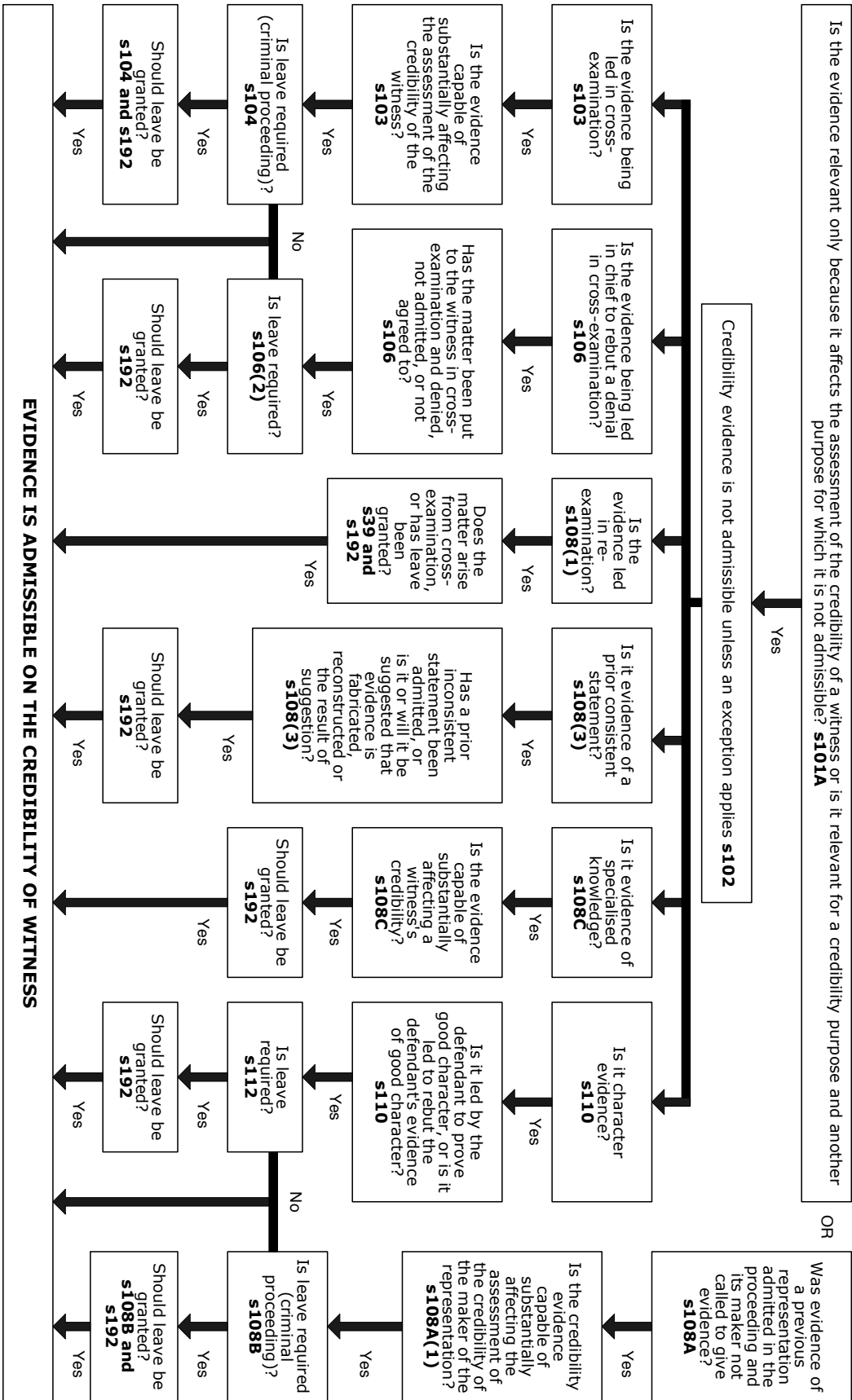
Example

Evidence of this kind may be led to explain the behaviour exhibited by complainants that might otherwise be taken adversely to affect their credibility. Alternatively, opinion evidence may be led as to factors affecting identification evidence.

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 s108C(2).

In determining whether to grant leave under s108C, the court is to take into account the matters set out in s192 which provides that leave, permission or direction given under the UEA may be conditional.

CREDIBILITY EVIDENCE



4.7 Identification evidence

Identification evidence is evidence that identifies the defendant as being or resembling (visually, aurally or otherwise) someone who was at or near a place where the offence (or an act connected to the offence) being prosecuted was committed and must be based on what the person making the identification saw, heard or otherwise perceived at that place and time (UEA Dictionary).

The rules controlling the admissibility of identification evidence are set out in Part 3.9 of the UEA. They impose procedural requirements on the way identification evidence is obtained to improve its reliability. The result is to make identification parades the primary source of identification evidence and picture identification the secondary source.

The provisions relating to identification evidence apply only in criminal proceedings (s113) and only to evidence adduced by the prosecution (s114(2) and s115(2)).

4.7.1 Visual identification evidence

Visual identification evidence is identification evidence that is based wholly or partly on what a person saw but does not include picture identification evidence (s114(1)).

Evidence of this kind is not admissible unless:

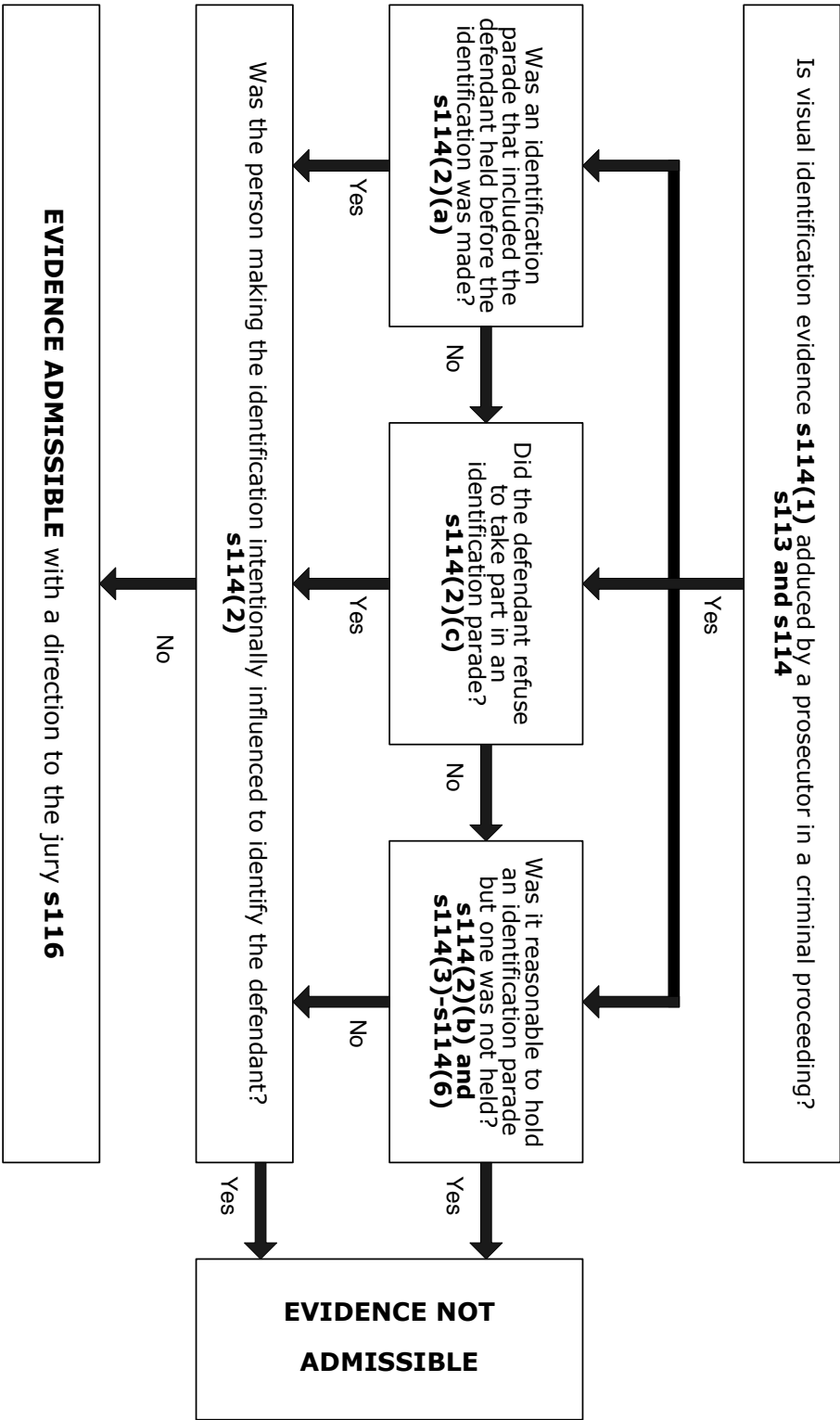
- an identification parade was held or
- it would not have been reasonable to hold an identification parade or
- the defendant refused to take part in one

and the identification was made without the person who made it having been intentionally influenced to identify the defendant (s114(2)).

Section 114(3) provides a non-exhaustive list of matters the court is to take into account in determining whether it was reasonable to hold an identification parade.

Section 114(4) creates a presumption that it would not have been reasonable to hold an identification parade if it would have been unfair to the defendant to do so. For example, if police could not find enough people of similar appearance to be present despite reasonable efforts (*R v Tahere* [1999] NSWCCA 170). The court is not to take into account the availability of pictures or photographs that could be used in making identifications in determining whether it was reasonable to hold an identification parade (s114(6)).

IDENTIFICATION EVIDENCE - VISUAL



Note: See also discretionary and mandatory exclusions **Part 3.11** and unreliable evidence **s165**

4.7.2 Picture identification evidence

Picture identification evidence means evidence of an identification made wholly or partly by a person after examining pictures kept by the police (s115(1)).

Evidence of this kind is not admissible if the pictures examined suggest they are pictures of persons in custody (s115(2)).

Picture identification evidence adduced by the prosecution is not admissible if, when the pictures were examined, the defendant was in police custody and the picture was made before the defendant was taken into police custody (s115(3)). However, the evidence is admissible if the defendant's appearance had changed significantly between the time the offence was committed and the time the defendant was taken into custody or it was not reasonably practicable to make a picture of the defendant after he or she was taken into custody (s115(4)).

Picture identification evidence adduced by the prosecution is not admissible if, when the pictures were examined, the defendant was in police custody, unless:

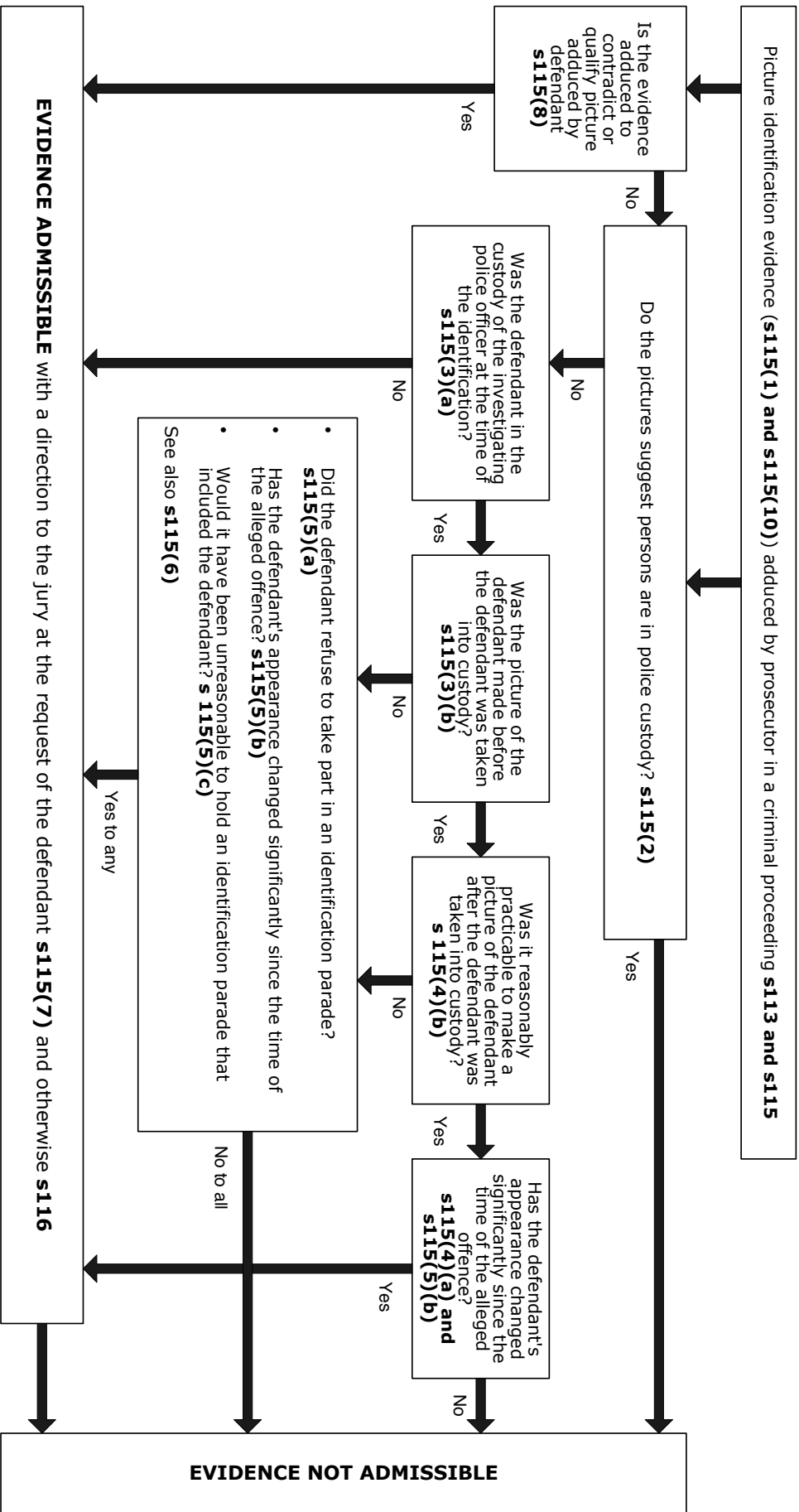
- the defendant refused to take part in an identification parade or
- the defendant's appearance had changed significantly between the time the offence was committed and the time the defendant was taken into custody or
- it would not have been reasonable to have held an identification parade that included the defendant (s115(5)).

If picture identification evidence adduced by the prosecution is admitted into evidence, the judge must, on the request of the defendant, inform the jury that the picture was made after the defendant was taken into custody (if that is the case) or otherwise warn the jury that they must not assume that the defendant has a criminal history or has previously been charged with an offence (s115(7)).

The section does not render inadmissible picture identification evidence adduced by the prosecution that contradicts or qualifies picture identification evidence adduced by the defendant (s115(8)).

The requirements of the section apply in addition to the requirements relating to visual identification evidence (s115(9)).

IDENTIFICATION EVIDENCE - PICTURE



Note: See also discretionary and mandatory exclusions **Part 3.11** and unreliable evidence **s165**

4.7.3 Jury directions

If identification evidence of any kind is admitted, the judge is to inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for that need for caution, both generally and in the circumstances of the case (s116(1)). No particular form of words is required (s116(2)).

Also, if there is a jury and a party so requests, the judge is to warn the jury that the identification evidence may be unreliable, inform the jury of matters that may cause it to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (s165(1)(b) and s165(2)). The judge need not comply with such a request if there are good reasons for not doing so (s165(3)).

The section does not affect any other power of the judge to give a warning to, or to inform, the jury (s165(5)).

See also s135, s137 and s138 (Discretionary and mandatory exclusions).

Further reading

Joint Report (2005), Chapter 13

4.8 Privilege

The UEA provides for the following privileges:

- client legal privilege (s117-s126)
- religious confessions (s127)
- privilege in respect of self-incrimination (s128 and s128A).

It also provides for the exclusion of the following evidence in the public interest:

- reasons for judicial decisions (s129)
- matters of state (s130)
- settlement negotiations (s131).

The court may inspect a document to determine whether it is privileged (s133).

The court must ensure that witnesses and parties are aware of their right to object, or make an application, under the privilege provisions (s132).

4.8.1 Client legal privilege

Client legal privilege has the same policy foundation as common law legal professional privilege — that is, to encourage clients to provide full and frank disclosure to their lawyers, to ensure legal advice is provided on the basis of full instructions and, as a corollary of the adversary system, to preserve the confidentiality of the materials prepared by lawyers to assist the client. The differences between the two privileges have lessened since the adoption of the “dominant purpose” test at common law.

Client legal privilege under the UEA encompasses:

- legal advice privilege (s118) which deals with confidential communications between a client and a lawyer (or more than one lawyer), and documents prepared by a lawyer or client, for the dominant purpose of the lawyer providing legal advice to the client. The privilege extends to documents prepared by a third party (for example, a proposed expert witness)
- litigation privilege (s119) which deals with confidential communications between the client and another person or the client’s lawyer and another person, and documents prepared for the dominant purpose of the client being provided with legal services relating to an Australian or overseas proceeding (current, pending or anticipated) in which the client is or might be a party. The privilege extends to communications with, and documents prepared by, a third party.

Confidential communications between an unrepresented party and another person, and the contents of confidential documents that were prepared at the direction or request of an unrepresented party, for the dominant purpose of preparing for or conducting the proceeding, are also protected from disclosure (s120).

4.8.2 Loss of privilege

Client legal privilege may be lost in numerous ways, including by express or implied waiver. The common law test for waiver of privilege is whether the person asserting the privilege has acted inconsistently with its maintenance. This will ordinarily involve disclosure of the material over which privilege is claimed. Traditionally, waiver may be implied if the circumstances make it unfair for the client to claim the contrary.

The approach under the UEA is similar to the common law. Client legal privilege may be lost where a client or party has acted inconsistently with the maintenance of the privilege (s122(2)), such as where:

- the client or party knowingly and voluntarily disclosed the substance of the evidence to another person (s122(3)(a)) or
- the substance of the evidence has been disclosed with the express or implied consent of the client or party (s122(3)(b)).

There are a number of exceptions to the waiver rule. For example, privilege will not be waived merely because the substance of the evidence is disclosed in the course of making a confidential communication, preparing a confidential document or because of duress, deception or under compulsion of law (s122(5)).

In a criminal proceeding, client legal privilege is lost if a defendant adduces evidence of confidential communications or documents unless it is evidence of a confidential communication between an associate defendant (defined term) and his or her lawyer (s123).

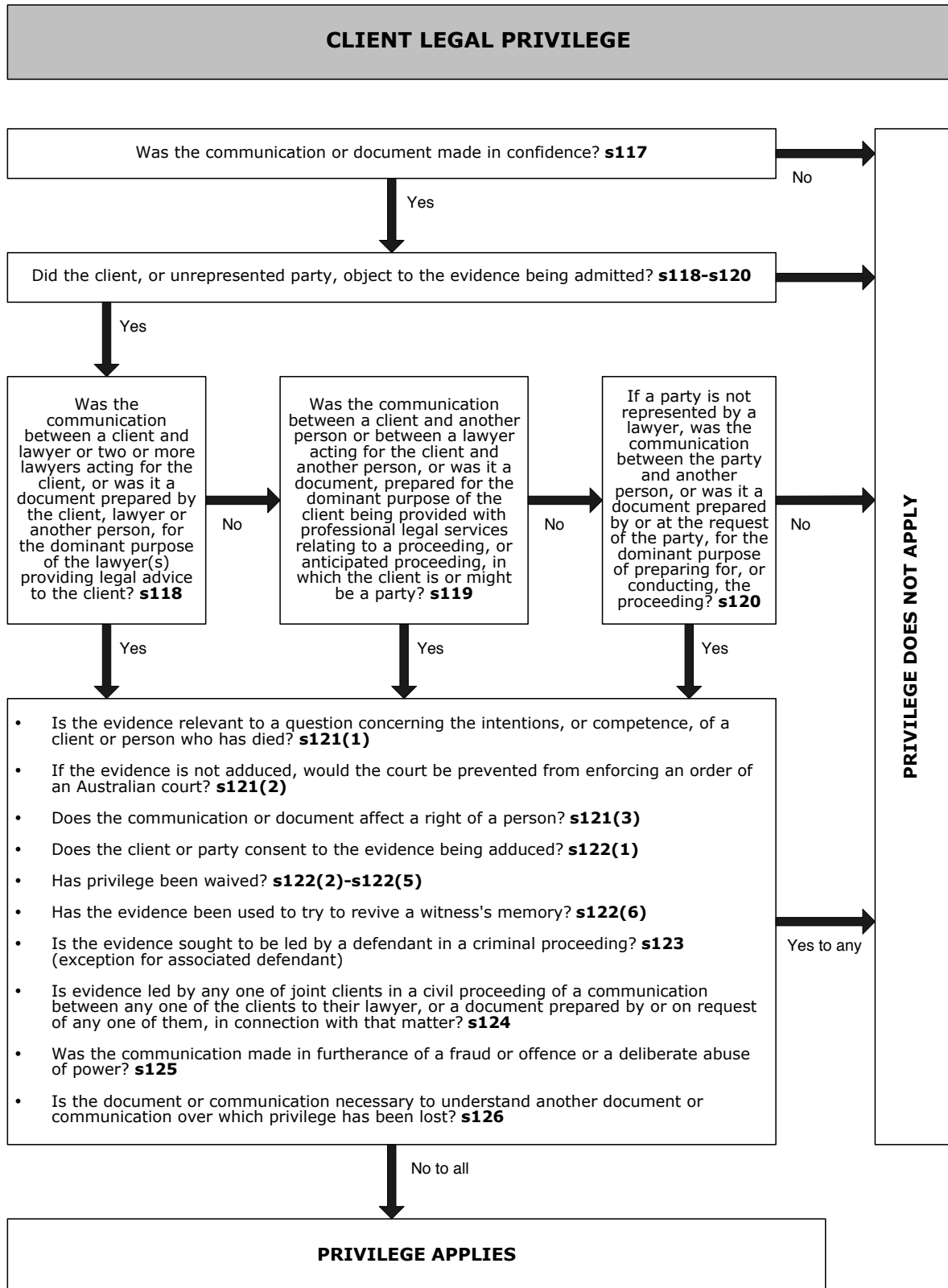
In a civil proceeding, client legal privilege is lost if two or more parties have jointly retained a lawyer in relation to the same matter and evidence is adduced of a communication made by any one of the parties to the lawyer or relating to the contents of a document prepared at the direction of any one of the parties (s124).

Client legal privilege is also 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 a deliberate abuse of statutory power (s125).

If client legal privilege is lost over a communication or document, privilege will not extend to communications or documents related to that first non-privileged communication if they are reasonably necessary to enable a proper understanding of that first communication (s126).

Privilege may also 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 (s121(1))
- the court would be prevented from enforcing an order of an Australian court without the privileged evidence (s121(2))
- the evidence is of a communication or document that affects a right of a person (s121(3)).



Note: See also discretionary and mandatory exclusions **Part 3.11**

4.8.3 Religious confessions privilege

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 him or her when a member of the clergy (s127).

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 (s127(3)).

However, the privilege will not apply if the communication involved in the confession was made for a criminal purpose (s127(2)).

4.8.4 Privilege in respect of self-incrimination

The UEA preserves, but significantly modifies, the common law privilege against self-incrimination.

A special procedure is set out in section 128. It applies if a witness objects to giving particular evidence on the ground that the evidence 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 (s128(1)). The procedure is intended to provide protection to the witness claiming the privilege while at the same time enabling the proceeding in which the witness is called to have the benefit of that person's evidence.

If the court determines there are reasonable grounds for the objection, the court is to inform the witness:

- he or she need not give the evidence unless required by the court to do so and
- the court will give a certificate under s128 if the witness willingly gives the evidence without being required to do so or the witness gives the evidence after being required to do so and
- of the effect of the certificate (s128(3)).

If a witness objects to giving evidence, the court may require the witness to give the evidence if the court is satisfied:

- the evidence does not tend to prove that the witness has committed an offence or is liable to a civil penalty and
- the interests of justice require that the witness give the evidence (s128(4)).

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:

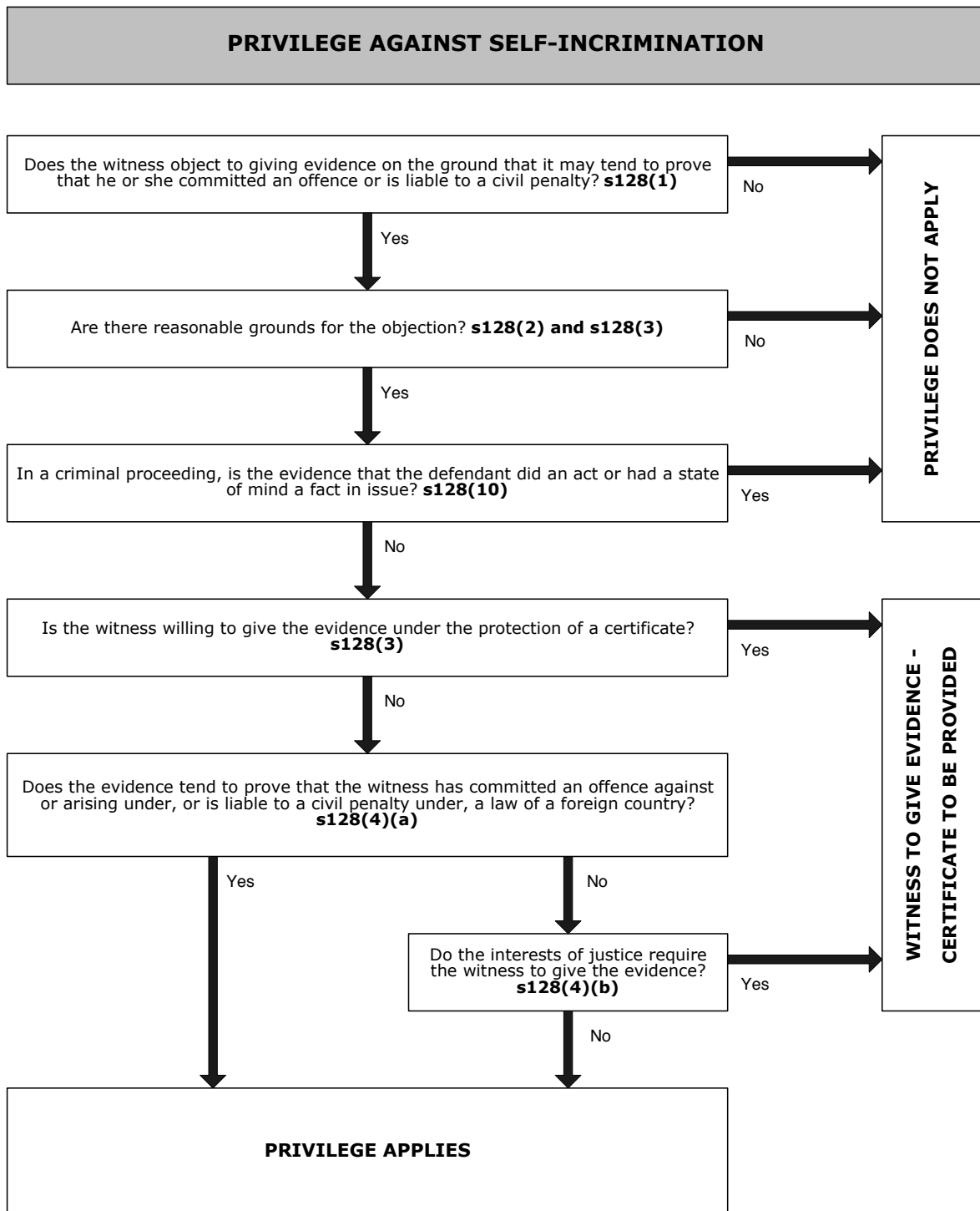
- evidence given by the person in respect of which a certificate has been given and
- any information, document or thing obtained as a direct or indirect consequence of the person having given that evidence (s128(7)).

This protection does not apply to a criminal proceeding in respect of the falsity of the evidence (s128(7)) or in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence (s128(9)).

The section does not apply in a criminal proceeding to the giving of evidence by a defendant that the defendant 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 (s128(10)).

The UEA 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 under s128A). Similar to s128, provision is made for the giving of a certificate (s128A(7)). However, the privilege does not extend to information disclosed by a document that was in existence before an order of the court under s128A(6) (s128A(9)).

A body corporate cannot claim privilege against self-incrimination (s187).



Note: See **s128A** (exceptions to the privilege with respect to disclosure orders)
See also discretionary and mandatory exclusions **Part 3.11**

4.8.5 Settlement negotiations

The UEA excludes evidence of communications in settlement negotiations as well as documents prepared in connection with settlement negotiations but provides some exceptions (s131), including where:

- the persons in dispute consent to the evidence being adduced in the proceeding (s131(2)(a))
- the communication or document included a statement to the effect that it was not to be treated as confidential (s131(2)(d))
- the evidence tends to contradict or qualify already admitted evidence about the course of an attempt to settle the dispute (s131(2)(e))
- 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 (s131(2)(g))
- the communication or document is relevant to determining liability for costs (s131(2)(h))
- the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence (s131(2)(j)).

4.8.6 Exclusion of evidence of matters of state – public interest immunity

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 (s130(1)).

This is essentially a restatement of the common law public interest immunity, however the UEA provides a non-exhaustive formulation to balance competing interests (s130(5)).

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
- if the proceeding is a criminal proceeding, whether the party seeking to adduce evidence of the information or document is a defendant or a prosecutor
- 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
- the likely effect of adducing evidence of the information or document, and the means available to limit its publication
- whether the substance of the information or document has already been published
- if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant, whether the direction is to be made subject to the condition that the prosecution be stayed (s130(5)).

For the purposes of this provision, circumstances in which information or a document may be taken to relate to matters of state include where adducing evidence of the information or document would:

- prejudice Australia's security, defence or international relations or
- damage relations between the Commonwealth and a State or between two or more States or
- prejudice the prevention, investigation or prosecution of an offence or
- 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
- 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
- prejudice the proper functioning of the government of the Commonwealth or a State (s130(4)).

4.8.7 Application of UEA

privilege provisions to preliminary proceedings of courts

Until recently, the UEA was limited in its application, regulating only the use of evidence in trials. The common law continued to operate to preliminary proceedings, creating a dual regime.

Section 131A of the UEA extends the application of Part 3.10 (Privileges), other than s123 (loss of client legal privilege-defendants) and s128 (privilege in respect of self-incrimination) to preliminary proceedings such as summonses or subpoenas, pre-trial discovery, non-party discovery, interrogatories, notices to produce and search warrants.

Further reading

Joint Report (2005), Chapters 14 and 15

Significant changes for Victoria: corroboration and warnings (UEA Chapter 4)

5.1 Introduction

Chapter 4 of the UEA regulates proof of matters in a proceeding. In particular, Part 4.4 addresses corroboration requirements and Part 4.5 makes provision with respect to warnings and information.

5.2 Corroboration

5.2.1 Corroboration requirements abolished

Under the UEA, it is not necessary that evidence upon which a party relies be corroborated (s164(1)), or that a judge warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect or to give a direction relating to the absence of corroboration (s164(3)).

5.3 Warnings

5.3.1 Warnings regarding unreliable evidence

Any party in a proceeding (civil or criminal) in which there is a jury may request the judge to warn the jury about the unreliability of certain evidence, inform it about the matters that may cause the evidence to be unreliable and to warn it of the need for caution in determining whether to accept the evidence and the weight to give it (s165(2)).

However, a judge may not warn or inform a jury in a proceeding in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Warnings of this kind may be given only in accordance with s165A (see below).

A judge need not comply with a request to warn the jury about the unreliability of certain evidence if there are good reasons for not doing so (s165(3)), nor is it necessary that a particular form of words be used (s165(4)).

Section 165 sets out the following non-exhaustive list of the kinds of evidence to which the section applies:

- hearsay evidence or evidence of admissions
- identification evidence
- evidence, the reliability of which may be affected by age, ill health, injury or the like
- evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings
- evidence given in a criminal proceeding by a witness who is a prison informer
- oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant
- 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.

The section does not affect any other power of the judge to give a warning to, or to inform, the jury (s165(5)).

The courts have, under s165(5), brought in a number of common law warnings developed in recent times. The UEA sought to address problems created by those warnings.

5.3.2 Children's evidence

In any proceeding in which evidence is given by a child before a jury a judge must not:

- warn the jury, or suggest to the jury, that children as a class are unreliable witnesses
- 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
- 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
- in the case of a criminal proceeding, give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child (s165A(1)).

However, if a party so requests, a judge may inform the jury that the evidence of the particular child may be unreliable and the reasons it may be unreliable and warn or inform the jury of the need for caution in determining whether to accept the child's evidence and the weight to be given to it (s165A(2)).

A judge may so inform and warn the jury only if he or she is satisfied there are circumstances (other than the child's age alone) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or information (s165A(2)).

5.3.3 Delay warnings

If, in a criminal proceeding in which there is a jury, the court is satisfied the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must (on application by the defendant) inform the jury of the nature of that disadvantage and of the need to take that disadvantage into account when considering the evidence (s165B(1) and s165B(2)).

The judge need not comply with such a request if there are good reasons for not doing so (s165B(3)).

It is not necessary that a particular form of words be used in informing the jury. However, the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of delay (s165B(4)).

Although the section does not affect any other power of the judge to give any warning to or to inform the jury, the judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with the section (s165B(5)).

Section 165B replaces the common law relating to warnings of this kind reflected in *Longman v The Queen* (1989) 168 CLR 79.

See also s61 of the *Crimes Act 1958* in relation to jury warnings to be given in trials relating to offences under Subdivisions (8A), (8B), (8C), (8D) or (8E) of Part I of that Act (Sexual offences).

Further reading

Joint Report (2005), Chapter 18