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POCKET EVIDENCE LAW

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Pocket Evidence Law (PEL) analyses the operation of Uniform Evidence Law (UEL) in criminal proceedings in Victoria. It seeks to lighten the load on busy practitioners by identifying and concentrating on the "must read" UEL cases. Most cases cited in PEL are decisions of the HCA or the VSCA. Only if a particular point has not been covered by these courts, or there is conflicting authority in other UEL jurisdictions, are decisions of other intermediate appellate courts cited. Full citations are set out in the Table of Authorities at the end of PEL, where there is also a Table of Abbreviations.

PEL adopts the structure of the *Evidence Act 2008* (the Act) and the main focus is on Chapter 3 of the Act, which concerns the admissibility of evidence. The relevant sections of the Act are not reproduced, so read PEL with a copy of the Act at hand. References to sections and schedules and the Dictionary are to those in the Act unless otherwise indicated.

History of UEL

Some knowledge of the history of UEL is necessary if one is to appreciate, first, the relevance of various Law Reform Commission reports in interpreting UEL, second, the sources of case law on UEL and, third, the need for caution in using case law from other UEL jurisdictions due to changes made to UEL over time and some differences in UEL from one jurisdiction to another.

In 1979, the Federal Government asked the Australian Law Reform Commission to review the laws of evidence. The ALRC published an Interim Report in 1985 (ALRC 26, Volumes 1 & 2) and its Final Report in 1987 (ALRC 38). In 1995, both the Federal and NSW governments finally passed Evidence Acts that were essentially uniform. These acts operated in Federal Courts and in courts in the A.C.T. and NSW. In 2001, Tasmania adopted UEL, but its Act has more variations than most. In 2004, Norfolk Island adopted UEL. In 2005, the ALRC published the Joint Report (ALRC 102) reviewing the performance of UEL over the previous decade and recommending certain changes. In 2006, the VLRC published a report on implementing UEL in Victoria. In 2008, Victoria enacted UEL, incorporating amendments recommended in ALRC 102. On 1.1.2009, the amendments recommended by ALRC 102 commenced operation in the Federal Courts and in the A.C.T and NSW. On 1.1.2010, the Victorian version of UEL commenced operation. In 2011, the A.C.T., rather than continuing to operate under federal UEL, enacted its own UEL. The Northern Territory also enacted UEL legislation in 2011, which commenced operation on 1.1.2013.

UEL in the various jurisdictions contains provisions dealing with jury directions, in both civil and criminal trials. The *Jury Directions Act 2015* (Vic) (the JD Act), which came into operation on 29 June 2015, deletes (ss 20, 116, 116B) or amends (ss 165, 165A) such provisions in the Act, in the main restricting their operation to civil jury trials (cf s 115(7)). Hence, jury directions in criminal trials in Victoria are now mainly regulated by the JD Act.

UEL was intended to make substantial changes to the rules of evidence (*Hughes* at [13], *IMM* at [35], *Papakosmas* at [10]). Reference to the common law in trying to interpret

it may be unhelpful (*Papakosmas* at [8], cf *PNJ* at [8-9]). The HCA has cautioned trial judges against using their discretionary powers under Part 3.11 of the Act to re-instate the common law rules of evidence (*Papakosmas* at [97]).

CHAPTER 1 – PRELIMINARY

S 4 - Courts & proceedings to which Act applies

The Act applies to all proceedings in "Victorian courts", a term given an expansive definition in the Dictionary. Bail hearings, however, are not governed by the Act's rules regarding the admissibility of evidence because of the combined operation of s 8 of the Act and s 8(e) of the *Bail Act 1977*. The Act only applies to sentencing hearings if the court so directs (s 4(2), (3), (4)).

S 8 – Operation of Acts

By virtue of s 8, it is clear that the Act is not a code in that provisions of other Acts dealing with evidentiary issues continue to operate, eg, s 464H of the *Crimes Act 1958* governing tape recordings of confessions. Nor does the Act attempt to deal comprehensively with every matter that might be considered part of evidence law, eg, the rule in *Browne v Dunn,* which is only partially addressed by s 46.

The old *Evidence Act 1958* has been filleted and rebadged as the *Evidence (Miscellaneous Provisions) Act 1958* but it remains an important source of evidence law in Victoria.

Some significant evidentiary provisions have been inserted in the *Criminal Procedure Act 2009 ("CPA"),* eg, s 377 which permits evidence of complaint in child sex cases to be used as evidence of the truth of the complaint.

S 9 – Application of Common Law & Equity

There are conflicting views as to whether, having regard to the terms of s 56(1), Chapter 3 of the Act displaces the common law with respect to the admissibility of evidence. These conflicting views are discussed in *Haddara* in which Redlich and Weinberg JJA (especially at [53] & [65]; cf Priest JA at [162]) concluded, in obiter dicta, that a common law discretion to exclude evidence that would cause an unfair trial subsists and has not been displaced by Chapter 3.

CHAPTER 2 – ADDUCING EVIDENCE

Chapter 2 is chiefly about procedure – how one "adduces" (ie, leads or tenders) evidence, the admissibility of which is determined by the application of the rules in Chapter 3. One should note that parties "adduce" evidence whereas witnesses "give" evidence (ALRC 38 at [59]). The party who is questioning a W (whether in XN or XXN) is adducing the evidence at that point in time (ALRC 26 at [515]). Evidence which is adduced may or may not be admitted.

S 12 - Competence and compellability

The Act operates as a Code in relation to competence and compellability. S 12 is an inclusionary rule – in summary, everyone is presumed competent &, therefore, compellable. Sections 13 to 19 create exceptions to this general rule.

S 13 – Competence – lack of capacity

S13(6) creates two presumptions - that a person is competent to: (a) give evidence; (b) which is sworn or affirmed (*GW* at [14]). Only if the Court is satisfied on the balance of probabilities to the contrary will these presumptions be displaced. As a result of reforms recommended in ALRC 102 ([4.3 - 4.89]), it is no longer a precondition for competence to give unsworn evidence that W understands the difference between the truth and a lie (though, pursuant to s 13(5)(a), W must be told to tell the truth): it is enough if W can understand the question(s) and give an answer that can be understood (s 13(1)).

S 18 – Compellability of spouses & others in criminal proceedings generally

Under s 18, a witness ("W") who is the spouse, de-facto partner, parent or child of a defendant/ accused ("D") is compellable by the prosecution ("P") but such a W can seek exemption from giving evidence in toto or from giving evidence of a communication between W & D. W must fit one of the relevant categories at the time they are required by P to give evidence (s 18). "Defacto partner" includes a homosexual partner. "Parent" and "child" are defined broadly in the Dictionary, eg, a person "in loco parentis" could be considered a parent.

If W has been excused from giving evidence under s 18, P may still be able to adduce evidence of what W said previously about the incident, pursuant to one of the exceptions to the hearsay rule set out in s 65 (*Fletcher* at [53], *Nicholls* at [21-22]).

S 20 – Comment on failure to give evidence

This section has been repealed by the Jury Directions Act 2015, which now regulates jury directions in criminal trials. The relevant provisions in the JD Act concerning directions on the failure to give evidence are ss 41 to 44.

S 32 – Attempts to revive memory in court

A document, from which W wishes to refresh memory, may have been made or adopted when the relevant event was "fresh in the memory" even though the document was made or adopted years after the event in question (*Roth* at [40])

S 38 – Unfavourable witnesses

S 38 replaces the common law rule in relation to hostile witnesses. Its operation in conjunction with s 60 (a broad exception to the exclusionary hearsay rule) is arguably the most significant change effected by UEL. S 38 creates an exception to the rule in s 37 that a party may not normally ask leading questions of its own W. The exception has the following elements:

- the evidence of W is "unfavourable" to the party or W is not making a genuine attempt to give evidence or W has made a prior inconsistent statement; &

- the Court gives leave to ask leading questions.

There is conflicting authority as to the meaning of "unfavourable" in this context. The narrow view is that W's evidence must detract from the case of the party who called W: it cannot be merely neutral (*Hadgkiss v CFMEU* at [9]).The broad view is that unfavourable simply means "not favourable", as opposed to "adverse" (*McRae* at [24]). ALRC 102, which was co-authored by the VLRC, favoured the broad view ([5.46]). In *Garrett*, the VSCA considered the conflicting authorities in detail and upheld the broad view ([69]), although this was *obiter* because, in *Garrett*, W's evidence was plainly adverse to P's case ([71]).

The court must have regard to certain criteria in deciding whether to grant leave to the party to cross examine its own W (ss 38(6)(a),(b),192; *Meyer* at [182]). Contrary to the position in NSW (eg, *Hogan* at [73]), the court in considering whether to grant leave under s 38 is not obliged to have regard to ss 135 and 137 (*Garrett* at [79]), nor, presumably, the common law unfairness discretion.

P may seek an advance ruling as to whether leave will be granted to cross examine its own W should W's testimony prove unfavourable to P (s 192A; *McRae*) Indeed, it is no bar to P utilising s 38 that it expects that W's testimony in response to non-leading questions will be unfavourable (*Adam* at [18-19], *Aslett* at [71], *McRae* at [20]).

As regards the scope of cross examination under s 38, it may include matters tending to show the plausibility of the version of events given by W in prior statements and the implausibility of the version of events given by W at trial (*Meyer* at [182], *Power* at [45]). The party utilizing s 38 may also tender documents containing favourable previous representations (eg police statements), even if W admits having made them (*Adam*, *McRae*): s 43 does not prevent this (*Aslett* at [76]). If W was a co-offender who has pleaded guilty, the s 38 cross examination may also extend to that fact and the acceptance by W of a summary of facts on the plea consistent with the version of the events which implicates D (*Power* at [51-53]). The scope of cross examination under s 38 may be regulated by s 103 (*Anyang (Ruling No 1)* at [20]) which only permits cross examination as to credibility if it will "substantially affect" the assessment of W's credibility.

If P is permitted under s 38 to cross examine P's own W in re-examination, D should be given the opportunity to further cross examine W at the conclusion of P's re-examination (*Meyer* at [182]; note also s 38(4)).

The greater capacity of P under s 38 to cross examine its own unfavourable Ws makes it more difficult for P to justifiably decline to call a material W (*Kanaan* at [84-85]).

S 41 – Improper Questions

Section 41 is not an exhaustive statement of what are improper questions. Other statutory provisions in the Act, other Acts and the common law must be considered. For example, under the common law, it is improper to ask W whether another W is lying (*Reeves* at [74-78]) but, if that happens, strong directions to the jury may cure the impropriety (*Reeves* at [35]).

S 42 – Leading Questions

D may be precluded from asking P's W leading questions in cross examination if the facts would be "better ascertained" by non-leading questions (s 42(3)).

CHAPTER 3 – ADMISSIBILITY OF EVIDENCE

The scheme of Chapter 3 involves an inclusionary rule ("Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding": s 56(1)) followed by numerous exclusionary rules (eg, the rule excluding irrelevant evidence (s 56(2)), the hearsay rule in s 59 and the opinion rule in s 76) and exceptions to these exclusionary rules. Sometimes the exclusionary rules and the relevant exception appear in discrete sections: other times they are rolled up together in the one section (eg, ss 97 & 98). Relevant evidence may "engage" several exclusionary rules: if it does, exceptions must be found for each exclusionary rule if the evidence is to be admissible (*Lithgow City Council v Jackson* at [19]). It must also survive the exercise of the discretions in Part 3.11 and, according to Redlich and Weinberg JJA in *Haddara*, the exercise of the common law unfairness discretion. But what if no objection is taken to the admissibility of otherwise inadmissible evidence? Does that make it admissible? Although obiter, *Velkoski* at [199] suggests it does not, despite NSW authority for the opposing view.

PART 3.1 - RELEVANCE

S 55 – Relevant Evidence

Relevance is the key to applying the rules of evidence in Chapter 3 of the Act. If one is able to articulate the basis or, better still, bases on which a piece of evidence is relevant, one has done much of the work required for determining whether any exclusionary rules are engaged and, if so, whether any exceptions are available.

S 55 sets out the test for relevance. In short, the test is whether the evidence, if accepted, could logically make a fact in issue more or less likely, however slightly (*Paulino* at [65-68]).

In s 55, "a fact in issue" refers to an ultimate fact in issue (Odgers (12th ed) at [EA.55.90]) and is not limited to facts in issue that are disputed (ALRC 26 at [641]). One identifies the ultimate facts in issue by reference to the elements of: (a) the offence(s); (b) any mode of complicity relied upon by P; & (c) any defence(s) "open" to D.

In assessing relevance, one assumes the evidence will be accepted by the trier of fact ("if it were accepted": s 55). There are conflicting views as to what that assumption involves when assessing the relevance of evidence of previous representations (PRs) (Odgers (12th ed) at [EA.55.240]). The "restrictive" view is that one assumes that the trier of fact will accept not only that the PR was made but also the fact(s) asserted in the PR (*Adam* at [22-23,44]). The alternative view is that one merely assumes that the trier of fact will accept that the PR was made (*Papakosmas* at [31], [52-58]). The preponderance of authority supports the restrictive view.

Evidence which is consistent with P or D's case is not necessarily relevant. One must be able to identify a process of reasoning by which, logically, the evidence makes the existence of a fact in issue more or less likely. The relevance of DNA evidence seemingly implicating the accused received close attention from the VSCA in *Wise* and *Paulino* and, most recently, *Ramaros*. In *Wise* and *Paulino,* the evidence was excluded as irrelevant but a different result ensued in *Ramaros* ([30-47]).

If no reasonable jury could accept the evidence in question, the evidence will not pass the test of relevance, because the evidence could not rationally affect the probabilities of the existence of the fact(s) in issue (*IMM* at [39]).

PART 3.2 - HEARSAY

Part 3.2 begins with the relevant exclusionary rule (59(1)) and is followed by numerous exceptions to that rule. Common law hearsay exceptions are no longer available (*Schanker* at [48-49]). The broadest statutory exception is found in s 60 but that only comes into play where the relevant previous representation (PR) is admissible for a non hearsay purpose. The exceptions set out in ss 65 and 66 are the main gateways now for the admission of complaint evidence but, in that connection, s 108(3), which is concerned with credibility evidence in the form of prior consistent statements, is also an important provision.

S 59 – The hearsay rule – exclusion of hearsay evidence

"Representation" & PR are defined in the Dictionary. The word "representation" is used instead of "statement" because a representor (R) can assert something by conduct, eg, a gesture. S 59(1) is only engaged if evidence of the PR is adduced to prove an asserted fact (AF), that is, a fact that it can reasonably be supposed that R intended to assert in making the PR (s59(2)). Some implied facts may be AFs.

S 60 – Exception – evidence relevant for a non-hearsay purpose

If evidence of a PR is admissible for a non hearsay purpose (eg, complaint evidence adduced for a credibility purpose), it is admissible for a hearsay purpose, subject to any "limited use" order under s 136 or exclusion under ss 135 or 137 (*Schanker* at [84]). Whether evidence of a PR was admitted for a non hearsay purpose is to be determined objectively (*Schanker* at [100]). As mentioned above, s 60 assumes particular importance when it operates in tandem with s 38.

S 62 – Restriction to "first hand" hearsay

There are several exceptions to the hearsay rule in respect of first hand hearsay (FHH); relevantly, the exceptions created by ss 65, 66, 66A.

The test under the Act for FHH is whether the facts asserted by R were facts within R's personal knowledge, ie, facts perceived by R (s 62(1)).

S 62(1) does not require the W giving evidence of R's PR to have perceived the PR being made but this requirement is picked up by the wording of most of the exceptions (see, eg, the opening words of ss 65(2) & 66(2) but *cf* s 65(3)).

S 65 – Exception – criminal proceedings if maker not available

There are actually seven different exceptions to the hearsay rule in s 65, each with their own criteria or elements. The exception under s 65(8), which has the least onerous criteria, is only available to D.

Unavailability

For all these exceptions in s 65, R must be "unavailable" as defined in the Dictionary. There are several categories of unavailability (Dictionary, Pt 2, cl 4(1) (a) to (g)). If R does not fit one of these statutory categories, R is deemed to be "available" to give evidence about the AFs (Dictionary, Pt 2, cl 4(2)).

Darmody indicates the breadth of the concept of "unavailability." V, who was undergoing sentence, refused to testify at D's trial but indicated he would testify once he was paroled in a few weeks. The VSCA upheld the TJ's ruling that V was unavailable under what is now cl 4(1)(g) of Part 2 of the Dictionary.

If R is excused under s18 from giving evidence against D, R is "unavailable" for the purposes of s65 (*Fletcher* at [53], *Nicholls*) because R cannot be compelled to give evidence.

During P's case, D may seek to adduce evidence of self-serving statements made by D to P's witnesses but s 65 is not the gateway for such evidence because D is "available" to give evidence in his case (*Parkes* at [50]): s 66 may be the gateway if D testifies (*Constantinou* at [177-188]).

The test of "unavailability" will not always be easy to satisfy. Both *Rossi* and *ZL* indicate that where P claims R is unavailable pursuant to cl 4(1)(e) – namely, P asserts that all reasonable steps have been taken to find R or secure R's attendance but without success – the courts will demand proof of strenuous attempts to find R, especially where R is important to P's case (*Rossi* at [26], *ZL* at [32]).

The circumstances in which the PR was made

In relation to the exceptions in s 65(2)(b), (c) & (d), there are conflicting views as to the circumstances which may be taken into account in determining whether the PR is "unlikely to be a fabrication", "highly reliable" or "reliable". The narrow view is that only circumstances or events existing at the time of the PR may be taken into account. The broad view, which has the least support, is that all circumstances & events bearing on the reliability of the PR, whenever occurring, may be considered. The third or middle view, which has the most support, is that some prior or subsequent circumstances or events (such as other PRs by R) may be considered insofar as they bear on the circumstances in which the PR was made (*Azizi* at [46-50]). In *Sio*, the HCA confirmed that other PRs by R are relevant to the reliability assessment ([71]) but stressed the importance of focusing on the particular PR which contains the alleged AF ([51-58]). It is the objective circumstances in which that PR was made which determine whether the relevant criteria for admissibility are satisfied ([70]). *Sio* concerned the exception under s65(2)(d) and suggests that PRs by accomplices will ordinarily not pass the test of reliability even though they are also adverse to the interests of R ([73]). *Asling*, however, which was decided by the VSCA post *Sio*, is an example of PRs by an accomplice being admitted under s 65(2)(d): the relevant PRs were made by R to a friend (not to police, as in *Sio*) and ascribed the major role in a joint criminal enterprise with D to R.

Notice requirements

There are written notice requirements if P or D plans to adduce hearsay evidence where R is unavailable (s 67) (*Azizi* at [32]). Notices serve at least two purposes – the other party can investigate whether R is really unavailable and, if so, gather evidence to challenge R's credibility and reliability at the hearing. The required contents of notices are set out in the regulations. A court may dispense with the notice requirements (s 67(4); *Darmody*).

Unfair Prejudice

If hearsay evidence adduced by P is admissible under s 65, D may nonetheless seek exclusion of the evidence under s137, or under the residual common law unfairness discretion (*Bray*, *Haddara*). It may be submitted that because R is unavailable to be cross examined, the evidence will not be properly tested and the jury, despite directions by TJ, may overvalue the evidence. While each case has to be assessed on its own facts, such submissions have been rejected by the VSCA in *Bray, BB & QN* (see especially [21]) and *Darmody*, all cases where D had an opportunity to cross examine R at a committal.

S 66 – Exception – criminal proceedings if maker available

Evidence of complaint by V, and not just in sex cases, is often adduced under this exception to the hearsay rule. PRs by D consistent with innocence may also be adduced under this exception, provided D testifies (*Ashley* at [53-55], *Constantinou* at [179-188]).

Available

This exception only applies if R is "available" to give evidence about an AF. If R does not fit one of the statutory categories of "unavailability" (Dictionary, Pt 2, cl 4(1)(a) to

(g)), R is deemed to be available to give evidence about the AF (Dictionary, Pt 2, cl 4(2)).

In *Singh* ([15]), R was treated as "available" to give evidence about the AF in her proximate complaint to her son (namely, that she had been raped by a taxi driver), even though she subsequently had no recollection of the alleged rape, having been intoxicated at the time of the taxi ride. Evidence of her PR to her son was admitted under s66.

R will be treated as available to give evidence about an AF even if R makes no mention of the PR in giving evidence and/or there is a difference between the content of the PR and R's testimony. In *Miller* ([48-51]), where R gave no evidence of having complained to her sister, W, the evidence of the PR given by W was held to be admissible under s 66 even though the AF of the PR was that D had touched her whereas R's testimony was that D had penetrated her (see also *Velkoski* at [246-249]).

R must give evidence

For the s 66 exception to apply, not only must R be available to give evidence, R must actually give evidence (s66(2)) (*Constantinou* at [183]). Evidence of the PR may be given by R or a person who perceived the PR being made.

Fresh in the memory (unless PR made by V when V was under 18)

This exception to the hearsay rule requires the occurrence of the AF to have been "fresh" in R's memory when the PR was made, unless the relevant PR was made by V when V was under 18 (s66(2)(b)). This qualification to the freshness requirement was introduced on 1 October 2017 (note the transitional provisions in Schedule 2, Part 7) and replaces a narrower hearsay exception previously found in s 377 of the *Criminal Procedure Act 1991*.

As for assessing freshness, the passage of time is now only one consideration (s66(2A), inserted after ALRC 102). In *Bauer* [2018] at [89-100], the HCA, dealing with the pre 2017 version of s 66, held that a complaint made by V when she was about 15 regarding repeated sexual offending by D against her was 'fresh' and admissible on all counts, even though the first charged offence allegedly occurred when V was 5 and the complaint was not referrable to any specific count or year. Indeed, the HCA said that, in the circumstances, the AFs could be expected to remain fresh in V's memory for 'years to come': [92]. In *LMD* at [22-25], the VSCA held that two complaints made by V between 7 to 11 years after the alleged molestation by her uncle were fresh, notwithstanding that V was very young (7 or 8) when first molested. In *Clay*, the VSCA quoted Odger's criticisms of *LMD* at length and the court said at [50] that it was not open to find that certain complaints of childhood sexual abuse made approximately 20 years after the event were made when fresh in the memory. In *Pate*, a complaint of childhood sexual abuse made some 12 years after the alleged offending was held not to be fresh in the memory but the VSCA acknowledged that there is no rigid time limit (see especially [62-66], [136], [145-146]). In *Boyer*, a complaint made between 7 and 9 years after the alleged offence was held not to be fresh in the memory and, at [73], the VSCA expressed reservations about *LMD* and suggested it turned on its "unusual facts."

S 66(3) limits the operation of s 66(2) by wholly or partially shutting out formal or informal "proofs" of evidence (eg, police statements). In *Esposito* at p34, R's answers in a record of interview were treated as an informal "proof" of evidence caught by the qualification in s 66(3) because R said repeatedly that what he was telling police was evidence he would be prepared to give against D.

S 66A – Exception – contemporaneous statements about a person's health etc

This exception (which, prior to the amendments suggested by ALRC 102, was located in s 72) is particularly useful where a party wishes to adduce evidence of a person's declarations of intent to ground an inference that they acted on that intent. ALRC 102 at [8.158 – 8.174] and *Karam* at [58, fn11] indicate that the courts have to date refrained from a broad construction of this exception because of its potential to undermine the utility of the exclusionary hearsay rule.

S 69 – Exception – business records

S 69 is not limited to FHH. The term "business records" is broadly defined. For example, records concerning a particular child kept by the Department of Human Services in the course of carrying out their child protection duties can fall within the definition of business records (*Lancaster* at [14-19]). Remote hearsay contained in such records may be admissible under s 69(2) (*Lancaster at* [22-27]).

PART 3.3 - OPINION

Part 3.3 contains one exclusionary rule (s 76) and, relevantly, three exceptions to that rule (ss 77,78,79).To paraphrase s 76, an opinion about a fact is not admissible to prove the fact. The three relevant exceptions are for certain lay opinions (s 78), expert opinions (s 79) and opinions (lay or expert) which are admissible for another purpose (s 77: cf s 60). As indicated in the notes to s 76, there are more exceptions to the opinion rule elsewhere in the Act.

Practice Notes, such as *Practice Note SC CR 3 - Expert Evidence in Criminal Trials* which came into force on 30 January 2017, may also regulate the admissibility of expert evidence.

The starting point for determining the admissibility of opinion evidence, like any other evidence, is relevance (*Honeysett* at [25]). If the assumed facts on which an opinion is based are not proved by admissible evidence, it will fail that test. If the facts proved are dissimilar to the facts assumed, but not too dissimilar, the evidence might be relevant but the weight of the opinion could be significantly reduced.

S 80 expressly abolishes the common law exclusionary rules known as the ultimate issue and common knowledge rules but this does not open the floodgates. The exceptions to the opinion rule control the inflow of opinion evidence, along with the "discretions" in Part 3.11 of the Act.

There is greater scope under the Act for adducing expert evidence on the impact of sexual abuse on child development and behavior (ss 79(2) & 108C, *MA* [2013]). There

is also scope now for the defence to adduce opinion evidence as to the dangers associated with identification evidence (*Dupas*, *Smith* (2000)).

S 76 - The opinion rule

The elements of the exclusionary rule created by s 76 are: (i) the evidence is evidence of an opinion; & (ii) the evidence is relied upon to prove a fact about which the opinion is expressed.

"Opinion" is not defined in the Act. An opinion is an inference from observed data (*Honeysett* at [21], *Patrick* [2014] at [39], *Lithgow City Council v Jackson* at [10]). ALRC 102 at [9.2] also speaks of an opinion as "a conclusion, usually judgmental or debatable, reasoned from facts."

Statements of fact and opinion form a continuum. It is not always easy to distinguish one from the other (eg, "That's the man I saw"). If a statement is not an opinion, the opinion rule is not engaged.

S 78 – Exception – lay opinions

The elements of the exception created by s 78 are: (i) W's opinion is based on what W perceived about a matter or event; & (ii) admission of W's opinion is <u>necessary</u> to understand his or her perception.

Examples of opinion evidence covered by this exception include opinions as to age, sobriety and speed. In Victoria, voice identification or recognition evidence may also be admissible under s 78 (*Tran & Chang, Kheir*). A striking example of the breadth of s 78 is *Harvey*, a sex case. W gave evidence that when she entered D's office, she saw V standing near D who had what W described as "a look of like sexual gratification – that's the best way I can express it." The NSWCCA held this evidence was admissible pursuant to s 78. An example of an opinion not admissible under this exception was V's interpretation of what D, her father, meant when he said to her that he was sorry for what he had done: she interpreted it as an apology for having sexually abused her as a child (*Patrick* [2014]).

In *Smith* (2001), a case in which the HCA decided that evidence of two police officers identifying D from CCTV footage of a bank robbery was irrelevant (because their minimal prior dealings with D made them no better equipped than the jury to say whether it was him in the footage), Kirby J treated the evidence as relevant opinion evidence caught by the exclusionary opinion rule in s 76. He then turned to consider the exception for lay opinion evidence under s 78. He said at [60] that ALRC 26 "makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses". In his opinion, the words "matter or event" in s 78(a) referred to the bank robbery (which the police did not witness), not stills from the CCTV footage. ALRC 102 at [9.14] noted that Kirby J's analysis has attracted criticism but the ALRC did not reject it or recommend any change to s 78. The HCA in *Lithgow City Council v Jackson*

endorsed Kirby J's analysis at [41], thus significantly limiting the scope of the exception in s 78 (cf *Kheir* at [65]).

S 79 – Exception – opinions based on specialised knowledge

The elements of the exception created by s 79 are: (i) W has specialised knowledge based on W's training, study or experience; & (ii) W's opinion is wholly or substantially based on that knowledge (*Honeysett* at [23]).

In *Makita (Australia) Pty Ltd v Sprowle,* a case in which a woman sued her employer after injuring herself at work on what her expert (a physicist) asserted was an unacceptably slippery stair, Heydon JA, discussing s 79, said at [85]:

> "In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

This analysis was endorsed by the plurality in the HCA case of *Dasreef Pty Ltd v Hawchar* at [37].

In *Tuite*, the VSCA held that the question of the reliability of an expert's opinion is to be considered under s137 (or s135), not under s 79. The test of reliability when applying s 137 (or s135) to expert scientific opinion evidence is not general acceptance within the relevant scientific community but proof of validation, thereby facilitating the admissibility of new science but not "junk" science (*Tuite* at [11], [77], [101 -106]). Since *Tuite,* the HCA has said in *IMM* that one should assume credibility and reliability when assessing the probative value of evidence. What this means for the application of s 137 to expert opinion evidence is unclear.

Specialised knowledge

The parameters of "specialised knowledge" are unclear. "Knowledge" is more than subjective belief or unsupported speculation (*Honeysett* at [23]) but the word, at least in this context, does not imply reliability (*Tuite* at [70]). It includes not only a body of facts but ideas inferred from such facts on good grounds (*Tuite* at [72]) "Specialised knowledge" is more than ordinary or common knowledge (*Honeysett* at [23], *Velevski* at [82] per Gaudron J) but it is not only scientific or technical knowledge (*Meade* at [147ff], *Honeysett* at [23]).

The breadth of the concept of "specialised knowledge" is perhaps best indicated by the cases dealing with ad hoc "experts", eg, voice identification cases where witnesses (eg, police, interpreters) opine as to the identity of speakers heard on telephone intercepts or listening devices, based on repeated listening to the tapes and comparison with undisputed recordings of D's voice (eg, in a record of interview) (*Leung & Wong; Li*). The HCA has noted this broad approach to the concept of specialised knowledge (*Honeysett* at [48]) but has yet to positively endorse it. In *Kheir*, the VSCA preferred to admit such evidence under s 78 rather than s 79, indicating at [66] that identification evidence which also qualifies as opinion evidence is not normally regarded as expert evidence (see also *Tran & Chang)*.

Wholly or substantially based on specialised knowledge

"Substantially" is not defined. In the draft Bill included in ALRC 26, the proposed wording in the draft provision (cl 68) was "wholly or partly" which was changed to "wholly or substantially" in the draft Bill (cl 67) included with ALRC 38 but the meaning to be given to "substantially" was not discussed in ALRC 38 (cf [151]) or in ALRC 102. "Substantially" must mean more than "partly" but it is unclear whether it means "mainly" or "predominantly." OED definitions of "substantially" include "in the main" & "strongly." It may be that the juxtaposition of "substantially" & "wholly" in s 79 implies that "substantially" in s 79 means "predominantly" or "in the main": this was the view of the Federal Court in *Commissioner for Superannuation v Scott* with regard to the phrase "wholly or substantially dependent" in superannuation legislation. The HCA in *Honeysett* at [24] emphasised that the opinion must be given in form which makes it possible to determine whether the opinion is, at least, substantially based on specialised knowledge.

The HCA decisions of *Honeysett* and *Dasreef Pty Ltd v Hawchar* indicate the care which must be taken in determining whether a W, who may be highly qualified, is actually expressing an opinion based on specialised knowledge. In *Honeysett*, the HCA found that the evidence of a Professor of Anatomy engaged by P, who compared CCTV footage of an offender with images of D in custody, merely "gave the unwarranted appearance of science to the prosecution case that the appellant and [the offender] share a number of physical characteristics"(*Honeysett* at [45]), a comparison the jurors could make themselves. In *Dasreef* , an expert who was a chartered chemist, chartered

professional engineer, and retired senior lecturer in chemical engineering and industrial chemistry was permitted at trial to give an opinion as to the amount of silica dust that a worker was likely to have inhaled in the course of his work: the HCA held his expertise did not extend to making such calculations.

The HCA in *Dasreef Pty Ltd v Hawchar* at [41-42] indicated that the requirement that the opinion be wholly or substantially based on specialised knowledge does not import a "basis rule" into Part 3.3 of the Act (ie,, a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence) but, if a proper factual foundation is not laid for the opinion evidence, the opinion will be irrelevant.

PART 3.4 – ADMISSIONS

"Admission" is defined in the Dictionary. The weight of authority favours the view that an "admission", as defined by the Act, includes a statement which, on its face, may appear exculpatory but actually inculpates D (eg,a false alibi) (*Esposito*). Where a recorded interview with D is adduced solely for voice comparison purposes, the interview is not an admission and D may not rely on Part 3.4 of the Act to try and exclude the interview (*Haddara* at [2,127 – 131]).

Four major exclusionary rules relevant to admissions are to be found in ss 84, 85, 137 & 138. In summary, these rules exclude any admission which:

- may have been "influenced by" violent, oppressive, inhuman or degrading ("V.O.I.D.") conduct (s 84);
- is possibly unreliable and was made to or in the presence of an investigating official or "caused" by a person capable of influencing D's prosecution (s 85);
- is more prejudicial than probative (s 137);
- was illegally or improperly obtained and public policy considerations favour exclusion (s 138).

S 90 also gives a court a discretionary power to exclude evidence of an admission which it would be unfair to use against D (*EM*).

S 84 – Exclusion of admissions influenced by violence and certain other conduct.

When s 84 is properly raised (s 84(2)), the onus is on P to establish, on the balance of probabilities (s 142), that the making of the admission was not "influenced by" V.O.I.D. conduct (or the threat thereof) towards D or another. The conduct in question need not have been carried out by the police. "Influenced by" connotes a minimal causative link (Odgers (12th ed) at [EA.84.60]).

The precise boundaries of "oppressive conduct" are unclear. It is not limited to physical or threatened physical conduct but includes psychological pressure (*Higgins* (2007)). Unlike the common law notion of "oppression", it is not necessary for D's will

to be 'overborne' in order for the admission to be inadmissible under s 84 (*Ul-Haque,* [119]). "Inhuman conduct" is conduct contrary to the human rights recognised in the International Covenant on Civil and Political Rights. "Degrading conduct" is conduct which involves significant humiliation (Odgers (12th ed) at [EA.84.60]).

S 85 – Criminal proceedings - reliability of admissions made by accused

S 85 deals with possibly unreliable admissions made to investigating officials or persons capable of influencing the prosecution (s 85(1)(a) & (b)).

Despite the absence of a provision equivalent to s 84(2), D must discharge an evidential burden that there is a real issue as to the reliability of the admission before s 85 is engaged (*FMJ,* [48]). S 85(3) lists some matters that bear on the question of reliability.

In relation to s 85(1)(a), 'investigating official' is defined in the Dictionary and specifically excludes a police officer engaged in covert investigations under the orders of a superior.

In relation to s 85(1)(b), the Act does not define who is a person "capable of influencing the decision whether a prosecution should be brought or continued" (herein called "a person of influence"). The concept is obviously broader than investigators as they are covered by s 85(1)(a). Vs will in most cases fit the description (*Lieske; TJF*) Whether others qualify, such as a parent of a young V (*FMJ* at [40]), is likely to depend on the degree of influence in each case. D must also show that he or she "knew or reasonably believed" that the individual who caused the admission to be made was a person of influence: in *FMJ,* the mother of V held herself out to D as capable of influencing whether the prosecution was instigated.

Under s 85(1)(b), there must also be a causal link between the conduct of the person of influence and the making of the admission by D, a link more substantial than that required under s 85(1)(a).

S 90 - Discretion to Exclude Admissions

S90 operates as a "safety net" in that other relevant provisions of the UEA are to be applied first and matters specifically dealt with under those provisions are not to be taken into account in applying s90 (*EM* at [109], *Hinton* at [5-7]). For example, if s 85 is engaged but the evidence of the admission clears that hurdle, the alleged unreliability of the admission is not relevant to the application of s90.

PART 3.6 - TENDENCY AND COINCIDENCE

Tendency evidence, like coincidence evidence (T&C evidence), must, by itself or in combination with other evidence, have significant probative value to be admissible (s 97(1)(b) & s 98(1)(b)). If the T&C evidence is adduced by P, its probative value must also substantially outweigh its prejudicial effect (s 101) unless it is led in rebuttal of T&C evidence adduced by D (s 101(3) & (4)). Reasonable written notice has to be given if a party wishes to rely on T&C evidence. Provision of a proper notice is "no minor

matter"(*Andelman* at [73]). The Evidence Regulations 2009 (reg 7) stipulate the matters that must be addressed in a notice. A court may waive the notice requirement (s 100).

The T&C rules in Part 3.6 of the Act are purpose based: evidence which discloses other misconduct but which is led for a non T&C purpose is not regulated by Part 3.6 (eg, evidence adduced only for context: *Ashley* (VSCA) at [83], *Martin* at [102-107], *Hothnyang* at [20], *WFS* at [38]). Evidence that D acquired relevant knowledge from previous misconduct (*Ivanoff* at [19-20]) or had a continuous state of mind rather than a tendency to have a state of mind (*Higgins* [2016] at [20]) may not be regulated by the T&C rules.

Whilst evidence of an adult's sexual interest in a child might theoretically be viewed as motive evidence, in practice it is viewed as tendency evidence and is regulated by Part 3.6 (*Ritchie* at [33-43]), unless it is adduced solely for a context purpose.

Tendency reasoning and coincidence reasoning are different forms of reasoning, even though there is an overlap (*Page* at [42-66]). Tendency reasoning usually relies on similarities in a person's conduct and/or the circumstances surrounding their conduct to show that the person had a propensity to think or act in a particular way, thus supporting the inference that they thought or acted in that way on the occasion in question. Coincidence reasoning relies on the improbability of mere coincidence as an explanation for the similarities between the relevant events and/or circumstances to support the inference that a person had a certain state of mind or engaged in certain conduct on the occasion in question. In many cases, both forms of reasoning may be open but not always (ALRC 26,Vol 1, at [400-401]).

One event is capable of establishing a tendency (*Reeves* at [56]) but two or more events are required for coincidence evidence (s 98). T&C evidence may be constituted by charged (*Gentry* at [42]) and/or uncharged acts. T&C evidence often concerns incidents before the charged act but it may concern subsequent incidents (*Thu* at [35-36], *Page* at [28], *Lancaster* at [89]). It will usually be P that seeks to adduce T&C evidence but D may wish to do so at times, eg, where D relies on self defence and wants to adduce evidence that V had a tendency to be aggressive.

Methodology when assessing probative value

According to the Dictionary, the "[p]robative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue." In *Dupas,* a bench of five of the VSCA decided unanimously (see especially [63]) that, when assessing probative value, one generally assumes credibility (ie, that W is honest) but not reliability (ie, that W is accurate). In other words, the risk of mistake is a relevant consideration. Although *Dupas* was concerned with assessing probative value for the purpose of applying s 137 of the Act, the VSCA indicated that this approach to assessing the probative value of evidence applies wherever that term appears in the Act (that is, ss 97, 98, 101, 135, 137, 138)

(*Dupas* at [153 - 174]). This broad approach to assessing probative value departed from the narrow approach followed in NSW (*XY [2013], DSJ*, *Shamouil*), Tasmania (*KMJ*) and previously in Victoria (*KRI* [2011] at [53], *PG* at [62] & [76]) that one generally assumes both the credibility and reliability of the evidence, unless no reasonable jury could accept the evidence. In *Dupas* (see especially [63]), the VSCA considered the narrow approach to be plainly wrong and based on a mistaken view of the common law. In *IMM,* the High Court decided 4/3 in favour of the narrow approach. The majority said that the VSCA in *Dupas* was led astray by an over-emphasis on the common law at the expense of the text of the Act (*IMM* at [54]). In *Bauer* [2018] at [69] & [95], the HCA unanimously affirmed the narrow approach. Indeed, in *Bauer* [2018], as discussed below, the HCA made the narrow approach even narrower: first, with respect to V's evidence of uncharged acts in a single V case and, second, with respect to the issue of contamination.

Significant probative value

Until *Hughes*, the principles to be applied in Victoria in determining whether T&C evidence had significant probative value were set out in *Velkoski* (especially at [165-179]), as explained in *Rapson* (especially at [16-20]), although both cases were concerned with tendency evidence. Pursuant to the *Velkoski* approach, similarities (between the conduct/circumstances the subject of the T&C evidence and the charged conduct/circumstances) were the touchstone of admissibility for tendency evidence (*Velkoski* at [82]) and coincidence evidence (*PNJ* at [8]), even though the tendency rule (s 97), unlike the coincidence rule (s 98), does not refer to similarities. In the absence of unusual features, the *Velkoski* approach called for close similarities in the conduct and/or surrounding circumstances (*Velkoski* at [118-120]).

In *Hughes*, a multiple V sex case, the HCA rejected the *Velkoski* approach to similarities in cases where the issue is simply whether an offence occurred, not whether D was the offender (*Hughes* at [29 - 39]). Pursuant to *Hughes,* whilst similarities may have a bearing on whether tendency evidence has significant probative value, similarities are not essential if identity is not in issue. But in rejecting the *Velkoski* approach, the HCA failed to acknowledge that *Velkoski* only required close similarities in a multiple V case in the absence of 'unusual features.'

Hughes identifies two questions as fundamental to an assessment of whether tendency evidence has significant probative value: first, does the evidence, by itself or together with other evidence, strongly support proof of a tendency?; second, does the tendency strongly support the proof of a fact that makes up the offence charged ? (*Hughes* at [41]). Both questions were answered in the affirmative in *Hughes*. In *McPhillamy*, on the other hand, the HCA, in applying this two stage test, determined that the tendency evidence lacked significant probative value. In *McPhillamy*, the different circumstances surrounding the conduct evidencing the tendency (D, then working as

a boarding house master, abusing teenage boys who came to his room seeking comfort) and the charged conduct (D, then working as an acolyte, abusing an altar server in a church's public toilet before mass) was particularly important to the HCA's determination (see [31]), more so than the 10 year gap between the conduct evidencing the tendency and the charged conduct, though that too was a factor.

Where there is a difference in the conduct and or the surrounding circumstances, it is all a question of degree. *Hughes* (especially at [56]) affirms the proposition that dissimilarity between the conduct/circumstances evidencing the tendency and the charged conduct/circumstances may not be fatal to the admissibility of tendency evidence (see also *Alexander* at [30], *Page* at [59], *Rapson* at [17-18]).

Hughes casts doubt on a proposition central to the *Velkoski* approach, namely, that in cases involving multiple Vs, similarity of relationship between D and the Vs (eg parent/child, teacher/pupil) will not of itself ordinarily suffice for tendency evidence to have significant probative value (*Velkoski* at [168] and *Rapson* at [16]). On the *Velkoski* approach, such relationships do not reach the level of an "unusual feature." The *Velkoski* approach to "unusual features, however, is informed by the spectrum of deviant behaviour (*Velkoski* at [73-74]; *PNJ* at [22]) whereas in *Hughes* the HCA's classification of "unusual features" at [57] was clearly informed by the spectrum of behaviour generally. This opens up the possibility of evidence of certain relationships between D and Vs (eg parent/child, teacher/pupil) sufficing with respect to the requirement of significant probative value.

In *Hughes,* much weight was given by the HCA to what were said to be the "unusual" features of the case – first, an adult male having a sexual interest in underage girls and, second, that male acting on that interest despite a high risk of being caught (*Hughes* at [57]). In *Bauer (No 2)*, the VSCA said that the outcome of *Hughes* in the HCA turned on the unusual feature of the offender's high risk taking behaviour ([62]). In *Bauer [2018],* the HCA overturned the decision in *Bauer (No 2)* but did not gainsay the VSCA's analysis of *Hughes* in particular and the importance of "unusual features" in general in the context of multiple V cases (see, eg, *Bauer [2018]* at [58]). As indicated above, the HCA appear to take a more expansive view of what constitutes unusual features.

In *Hughes* at [31-32], the HCA rejected the VSCA's criticism of prosecutors in *Velkoski* at [173(f)] for relying on D's tendency to have a sexual interest in a particular class of victims rather than a tendency to act on that interest. But in *McPhillamy* at [27], the HCA, without referring to what was said in *Hughes* at [31-32], was more in tune with the *Velkoski* approach, stating "Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value." In sexual cases, prosecutors should consequently allege a tendency to act rather than a tendency to have a state of mind wherever possible.

With respect to single V sexual assault cases, where the issue is simply whether the alleged conduct occurred, the HCA indicated in *Bauer [2018]* at [48 & 57], contrary to what the plurality indicated in *IMM* at [62 & 63], that, evidence from V of D's uncharged acts against V disclosing D's sexual interest in V and willingness to act on it will generally be admissible as tendency evidence in proof of D's charged acts against V, whether or not the uncharged acts contain special (cf *IMM* at [62]) or unusual (*Hughes* at [57]) features. Logically, the same must be true regarding V's evidence of charged acts also relied on as tendency evidence in a single V case. The HCA in *Bauer No 2* did not say *IMM* was wrongly decided but said at [55] that it is to be confined to its facts; in *IMM* there was just one comparatively minor and temporally remote uncharged act relied on as tendency evidence.

Hughes was not concerned with coincidence evidence. Since similarities are mentioned in s 98 but not s 97, the *Velkoski* approach should still be applied to such evidence unless and until the HCA or the VSCA says otherwise. Of course, prosecutors will now be much more attracted to tendency evidence, where that form of reasoning is open.

One difficult aspect of the *Velkoski* approach is the notion of irrelevant similarities: what are described as circumstances beyond D's control are not to be taken into account in determining whether T&C evidence has significant probative value (see *Velkoski* at [79-82] and *Rapson* at [35] endorsing *PNJ* at [19-20]). *PNJ* was a coincidence case. One of the circumstances said to be beyond D's control was the setting of his alleged sexual offending, namely, the youth detention centre where he worked as a youth supervisor. *PNJ* has attracted criticism (eg, *Hughes* at [101]).

When determining whether coincidence evidence adduced by P has significant probative value, on the current authorities one must have regard to whether any competing hypothesis consistent with innocence is open. This, however, is not a throwback to the *Pfennig* test: *DSJ* makes it clear, especially at [9] & [81], that P does not have to establish that its hypothesis is the only reasonable hypothesis or even that its hypothesis is more probable than the alternative hypothesis suggested by D (*DSJ* at [10], [78-82]). Further, *CV* at [21 -22] indicates that the court does not have regard to evidence that may be adduced by D in support of any hypothesis consistent with innocence. In *Bauer [2018]* at [69], the HCA said in the context of tendency evidence that considering competing inferences is "unhelpful and likely to lead to error", since the evidence must be taken at its highest. It is likely that the HCA will take the same approach in relation to coincidence evidence.

Risk of Contamination

In multiple V cases, and even in a single V case (*Bauer* [2018] at [67]), an issue may arise as to whether the similarities in the W's multiple accounts of D's misconduct may be attributable to joint concoction or innocent infection ('contamination'). Under

the *Velkoski* approach, if P failed to negate the reasonable possibility of contamination, the evidence was inadmissible for a T&C purpose (*Velkoski* at [173]). In *IMM*, the majority of the HCA, in obiter dicta, cast doubt on the correctness of this all or nothing approach (*IMM* at [59]). The issue did not arise in *Hughes*. In *Bauer [2018]* at [69, 70], the HCA said that contamination is a jury issue, unless the risk of contamination is so great that it would not be open to the jury to rationally accept the evidence. In other words, the mere fact that there is a reasonable possibility of contamination does not make contamination an admissibility issue when applying ss 97, 101 and, presumably, 98.

Prejudicial effect

In applying s 101(2), a judge must weigh the probative value of evidence adduced by P against the prejudicial effect the evidence may have on D: the former must substantially outweigh the latter for the evidence to be admissible. "Prejudicial effect" refers to the risk of unfair prejudice, that is, the risk that the jury may overvalue or misuse the evidence (*Bauer [2018]* at [73]). In *Hughes* at [17], there is a helpful discussion of how tendency evidence may be overvalued or misused, even though that case was not concerned with s101.

In *Dupas*, the notion of unfair prejudice was considered in the context of s 137. At [175], the VSCA said:

> *"The Evidence Act does not define the term 'unfair prejudice'. Consistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt 'an illegitimate form of reasoning' or 'misjudge' the weight to be given to particular evidence. An inability to test the reliability of evidence may carry with it the danger of such misjudgment. Evidence is not unfairly prejudicial because it inculpates the accused."*

In *Papakosmos*, McHugh J at [92] cited an oft quoted passage from ALRC 26, Vol 1, ([644]) which vividly describes prejudice arising from the misuse of evidence:

> *"By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required."*

In assessing prejudice, regard must be had to the directions that may be given to the jury to ameliorate the risk. As a general rule, it is to be assumed that juries will follow directions (*Dupas* at [114] & [177])

On Appeal

The principles in *House* apply to an interlocutory appeal against a ruling made under Part 3.6 (*KJM (No2)*, [9-14]). In other words, the issue is whether the judge's decision was reasonably open, not whether it was correct. On a conviction appeal, the issue, in relation to whether the T&C evidence has significant probative value, is whether the trial judge was correct in so deciding (*Bauer* [2018] at [67]). Presumably, given what the HCA said in *Bauer [2018]* at [67], the same approach would govern a conviction appeal regarding the application of s 101(2).

PART 3.7 – CREDIBILITY

S 101A – Credibility evidence

Credibility is broadly defined in the Dictionary (Part 2). It is not limited to a person's veracity: it includes reliability of perception and recollection (*Audsley* at [30], *Dupas* at [261-265]). Further, credibility evidence may be evidence that undermines or bolsters a person's credibility. But the mere fact that the evidence in question impacts upon a person's credibility does not make it credibility evidence under s 101A. If such evidence is relevant and admissible for a purpose other than the assessment of a person's credibility, it is not credibility evidence as defined in s 101A and, consequently, Part 3.7 of the Act is not engaged.

Note the reference in s 101A to "other person." At trial, credibility can be an issue not only in relation to a W but also in relation to a non-W, ie, the maker of a previous representation who is not called but whose previous representation is admitted into evidence (eg, under an exception to the hearsay rule).

"Credibility evidence" as defined by s 101A is regulated by the exclusionary rules and exceptions in Division 2 of Part 3.7 (ss 102 to 108) if it relates to the credibility of W & by the exclusionary rules & exceptions in Division 3 of Part 3.7 (ss 108A to 108B) if the evidence relates to the credibility of a non-W who made an admissible previous representation. The exclusionary rules and exceptions in Division 3 mirror those in Division 2.

S 102 – The Credibility Rule

S 102 excludes credibility evidence in relation to a W at the trial. Credibility evidence can come in various forms. Some forms, which were permitted by the common law, have been displaced by Part 3.7 of the Act. In *BA* at [21-25], the VSCA found that Part 3.7, and in particular s 102, overturned the common law rule which permitted a W to give evidence that another W's reputation for lying was such that he would not believe him on his oath.

S 103 – Cross examination as to credibility

Under the s 103 exception to the credibility rule, the evidence to be adduced in the cross examination of W must be capable of "substantially" affecting the assessment of W's credibility, which is a change from the common law. In determining whether a question may be asked pursuant to s 103, the trial judge must assume that W will answer the question in a way most favourable to the questioner (*Beattie,* pp162-163).

S 104 – Further Protections – Cross examination as to credibility

The exclusionary rule contained in the opening words of s 104 prohibits the adducing of credibility evidence in cross examination of D. There are several exceptions set out in s 104. Pursuant to s 104(3), P may cross examine D about: prior inconsistent statements made by D; D's "bias or motive to be untruthful" (which refers to some interest over and above the particular interest that every D has in the outcome of proceedings); & D's inability to have observed or recalled matters about which D has given evidence. There is a further "catch all" exception in s 104(2), namely, P may cross examine D about matters bearing on D's credibility (eg prior convictions) if leave is given.

Pursuant to s 104, the discretion to grant leave is only enlivened if D has adduced (and had admitted) evidence which has certain qualities. The evidence must impugn the veracity of P's W (s104(4)(a)) and it must relate solely or mainly to W's credibility (s 104(4)(b)), for example, evidence that P's W has a prior conviction for a dishonesty offence. Further, the evidence must not concern W's conduct regarding the events for which D is on trial (eg, if the W impugned was a co-offender, D will not have thrown away his "shield" by adducing evidence of W's dishonest conduct in the course of the alleged joint criminal enterprise.) Nor will D have thrown away his shield if D adduces evidence of W's conduct in the investigation of the alleged offence (eg, D gives evidence that the Informant "planted" evidence during the investigation)(s 104(5)(b)). If the pre-conditions for a grant of leave exist, the trial judge may (not must) grant leave.

It should be stressed that evidence having these qualities must be <u>admitted</u> as a precondition to a grant of leave: the mere fact that D's counsel puts questions to P's W impugning W's veracity is not enough if W rejects the imputation (Odgers (12th ed) at [EA.104.180], fn 42), which is a major change from the old law. In considering whether to grant leave, the court must have regard to the considerations listed in s 192, s 135 and s137, and the common law unfairness discretion.

S 106 – Exception – Rebutting denials by other evidence

Suppose a party cross-examines W about a matter which is relevant and admissible only on a credibility basis. W denies the assertion(s) put to him. Prima facie, the credibility rule prevents the party from leading evidence from another W to contradict W. If, however, the matter comes under one of the five heads set out in s 106(2), the most important of which are antecedents and prior inconsistent statements, the party may lead "rebuttal" evidence as of right, provided there was adequate "puttage" to W about the matter (s 106(1)(a) & (b)). If none of the five heads in s 106(2) are

applicable, the party may seek leave to adduce rebuttal evidence. The fact that leave may be given is a significant departure from the old finality rule.

S 108 – Exception – re-establishing credibility

A party may wish to re-establish or bolster the credibility of W during re-examination of W and/or through the testimony of another W. In the former case, the credibility rule does not apply to evidence adduced in re-examination of W (s 108(1)) though s 39, which regulates the scope of re-examination, must be borne in mind. In the latter case, the party may adduce from the other W evidence of a prior consistent statement of the first W if the preconditions of s 108(3) are satisfied. S 108(3)(b) is an important gateway for the admissibility of complaint evidence. If, as often happens in sex cases, D suggests (or will suggest), expressly or impliedly, that V has fabricated or reconstructed V's allegations, P can seek leave to adduce evidence of V's prior complaint: once that evidence is admitted for a credibility purpose under s 108(3), P can then rely on the complaint evidence for a hearsay purpose pursuant to s 60 (*Pavitt* at [92-110]), unless a limiting order is made under s 136 (*ISJ* at [57-67]).

S 108C Exception – Evidence of persons with specialised knowledge

Expert evidence may be adduced under s 108C to impeach or bolster the credibility of a W. Leave is required under s 108C(1)(c) but in *Audsley,* the VSCA said at [45-47] that it will only be in a rare case that a court should refuse leave to adduce evidence which satisfies the other criteria for admissibility under s 108C. In *Audsley*, D sought to impeach the credibility of P's chief W, who was a drug addict. The trial judge wrongly refused leave for D to adduce expert evidence from a clinical neuropsychologist as to the effects on memory of drugs, alcohol and sleep deprivation.

In sex cases, attacks on V's credibility may be based on mistaken assumptions as to how Vs of sexual abuse commonly behave. In *MA* [2013], P was able to neutralize such an attack using expert evidence admitted under s 108C (see also s 388 of the CPA).

PART 3.8 - CHARACTER

S 110 – Evidence about character of an accused

Good character evidence can be very significant, especially in an oath against oath case (*Saw Wah* at [41]). A major change under UEL is that a person's character is not treated as indivisible. Thus, if D leads evidence of his good character in a particular respect (eg, that he has no priors for dishonesty), P is not entitled under UEL to lead evidence that he is of bad character in other respects (eg, that he has priors for violence) (s 110(3), *Bishop* at [7] – [8]). In other words, Part 3.8 affords D a considerable "shield" against bad character evidence. But in a rape case involving violence, if D leads evidence that he has no priors for sexual offending, P may lead evidence that he has priors for violence (*Omot* at [20-24]).

P's interest in ensuring that D receives a fair trial supports the view that P should warn the defence that it may seek leave to adduce evidence of bad character if the defence continues down a certain path (*Huges* at [52 - 53]). Indeed, it will often be prudent for

the issue to be the subject of an advance ruling under s 192A (*Huges* at [52]). Whenever the court is invited to rule on such an issue, it should have regard not only to Part 3.8 of the Act but also the discretions (Part 3.11) and the considerations set out in s192 (*Huges* at [20-21]).

For D to throw away his "shield" against bad character evidence, it must be a conscious decision to assert good character (*Huges* at [23-24]). One should be slow to construe D's emphatic denial under cross examination, even one expressed in general terms, as involving such a decision (*Huges*). Where good character has been consciously asserted by D, the exercise of the discretion by the trial judge as to whether to permit P to adduce bad character evidence in rebuttal should be guided by, inter alia, considerations of "proportionality"(*Huges* at [33]) and the stage of the proceedings at which the issue arises (*Huges* at [46]).

As for bad character evidence which P seeks to adduce in rebuttal, mere rumour will not pass the test of relevance (*Saw Wah* at [27, fn 2]) and traffic priors will rarely do so (*Saw Wah* at [46, fn 12] & [81]). If bad character evidence is admitted, D may be entitled to a jury direction that it cannot be used for tendency reasoning but may only be used to rebut the good character evidence (*Saw Wah* at [84], fn 20)

PART 3.9 - IDENTIFICATION EVIDENCE

As explained in greater detail below, the UEL dictionary defines ID evidence to include identifications based on any of the senses but only ID evidence based on sight is subject to the exclusionary rules in Part 3.9 (ss 114 &115). Under the common law, an ID parade was not a precondition for the admissibility of ID evidence based on sight whereas it is a precondition under UEL, unless an exception applies.

Section 116, which dealt with ID directions in criminal trials, has been repealed by the JD Act. Save for s 115(7), provisions specifically regulating ID directions in criminal trials are now found in ss 35 to 37 of the JD Act.

Definitions

Three terms require careful consideration– "ID evidence", "visual ID evidence" & "picture ID evidence". Only if the evidence in question is correctly categorised can one know which sections of Part 3.9 are engaged, if at all.

The lengthy definition of ID evidence in the Dictionary covers in-court & out-of-court identifications. Though any summary of the definition has the potential to mislead, the following might serve as an aide-memoire. ID evidence is:

- an assertion by W (or a report thereof);
- that D (or someone resembling D) was in the "wrong place" (ie, at or near the scene of the crime or an act connected with the crime) at the "wrong time" (ie, at or about the time of the crime or connected act);

- based wholly or partly on what W perceived at that place and time.

The definition of ID evidence in the Dictionary includes evidence of recognition (*Trudgett*) but does not include: evidence merely describing an offender's physical features (because it is not an assertion that D was or resembles the offender) (*Bass* at [39]); evidence merely describing an offender's clothing, even if it matches clothing worn by D at the relevant place and time (*Bass* at [40]); evidence of an offender's name (*Bass* at [40]); evidence of identifications of persons other than D; evidence of identifications of objects; evidence in the form of CCTV footage of a crime or connected act (because such evidence is not an assertion of a person); DNA or fingerprint evidence (ALRC 102 at [13.25ff]); & evidence of an exculpatory identification (because it is not an assertion that D was or resembles the person) (cf the broader definition of ID evidence in s 35 of the JD Act).

The definition of visual ID evidence (s 114(1)) has three elements:

- the evidence is ID evidence;
- it is based wholly or partly on what a person saw; &
- it is <u>not</u> picture ID evidence.

The definition of picture ID evidence in s 115(1) also has three elements:

- the evidence is ID evidence;
- the identification was made wholly or partly by W examining pictures; &
- the pictures were "kept for the use of police officers."

"Pictures" are defined to include photographs (s 115(10)). If the photograph from which W identified D was not one kept for the use of police officers (eg, a photo on Facebook), s 114, which regulates visual ID evidence, will be engaged, rather than s 115 (*Peterson* at [46]).

S 114 – Exclusion of visual identification evidence

In relation to visual ID evidence, the first part of s 114(2) creates the exclusionary rule, namely, such evidence adduced by P is not admissible. The rest of s 114(2) creates three exceptions to the exclusionary rule, all predicated on W not having been intentionally influenced to identify D. Under s 114(2), visual ID evidence is admissible if:

- an ID parade involving D was held before the identification was made; or
- it was not reasonable to hold a parade; or
- D refused to take part in a parade.

The first and third bullet point exceptions above are straightforward. As regards the second exception, s 114(3)-(6) provides inclusive criteria for determining whether it was reasonable to hold an ID parade. If W has identified D from, say, a photograph

on Facebook, it may be reasonable for police not to hold a parade because of the "displacement effect" (*Peterson* at [47-48]).

S 115 - Exclusion of evidence of identification by pictures

As regards picture ID evidence, three exclusionary rules are created by s 115(2),(3) & (5).

The exclusionary rule created by s 115(2) has two elements:

- P is adducing the picture ID evidence;
- the pictures suggest they are pictures of persons in police custody.

There is no exception to this rule. Note that s 115(2) is not just concerned with the propriety of the picture of D which W picks out. In *Pace & Collins*, D unsuccessfully sought exclusion of picture ID evidence under s 115(2) in circumstances where the trial judge noted that some of the photographs in the collection had in the background "portions of a structure that could be consistent with a cell"([17]).

The exclusionary rule created by s 115(3) has four elements:

- P is adducing the picture ID evidence;
- W examined the pictures when D was "in the custody of" a police officer;
- that officer's police force was investigating the offence with which D has been charged;
- the picture of D examined by W was made before D was taken into that custody.

The courts have given a narrow meaning to the words "in the custody of." It means "under physical restraint" (*McKellar* at [37]). Hence, if D was not under arrest but just assisting police with their enquiries at the time W examined a photo-board and picked out D, this exclusionary rule is not engaged. A person in custody in police cells or the Melbourne Custody Centre is in the custody of police: a person in custody in a prison is in the custody of Corrections (*Pham* at [9-11], *Byrne (No 2)* at [23 -27], *Corrections Act* 1986, ss 6A(1) 6D, 6E, 11).

There are two exceptions to the rule created by s 115(3): first, if D's appearance has changed significantly between the time of the offence and the time he or she was taken into custody; secondly, if it was not reasonably practicable to make a picture of D after he was taken into custody (s 115(4)).

Turning now to the exclusionary rule created by s 115(5), which is the most important of the three exclusionary rules created by s 115. It has three elements:

- P is adducing the picture ID evidence;
- W examined the pictures when D was "in the custody of" a police officer;

- that officer's police force was investigating the offence with which D has been charged.

There are three exceptions to this rule:

- D refused to participate in an ID parade (s 115(5)(a)); or
- D's appearance had changed significantly from the time of the crime (s115(5)(b)); or
- it was not reasonable to hold an ID parade including D (s 115(5)(c)).

The same inclusive criteria as mentioned in s 114 apply to determining whether it was unreasonable to hold an ID parade involving D (s 115(6)).

S115 (7) concerns jury directions about picture ID evidence (see also the Jury Directions Act 2015, especially ss 35 to 37)

S 116 – Directions to jury

S 116 was repealed by the JD Act, effective from 29.6.15. Save for s 115(7), provisions specifically regulating ID directions in criminal trials are now found in ss 35 to 37 of the JD Act.

PART 3.10 – PRIVILEGES

A discussion of "Privileges" could easily run to many pages. In this paper, it is proposed to deal only with the privilege against self-incrimination.

S 128 – Privilege in respect of self-incrimination in other proceedings.

Under the common law, the privilege against self-incrimination, if claimed on reasonable grounds, gives W the right not to answer a question. The privilege against self- incrimination under s 128 gives much less. In most circumstances, it only confers a right to a certificate which protects W against the direct or indirect use of the answer(s) in subsequent criminal proceedings brought against W (s 128(7)), save in respect of the falsity of the answers. In very limited circumstances, namely, where the answer(s) would expose W to liability for a crime or civil penalty under foreign law (s 128(4)(a)), s 128 gives W the right not to answer. The rationale for this new approach is that it will contribute to improved fact finding.

Application of s 128

First, it only applies to humans - corporations cannot rely on s 128 (s 127; ALRC 102, [15.93]). Second, the wording of s 128 indicates that it only applies in circumstances where W is testifying at a hearing (s 128(1)). In that domain, s 128 displaces the common law privilege against self- incrimination. The common law privilege continues to operate in all other contexts (s 131A; ALRC 102 at [15.109]). Third, if the

W seeking to rely on s 128 is D, consideration must be given to the operation of s 128(10), unless D is giving evidence on a voir dire (s 189(6)).With regard to s 128(10), *Cornwell* ([84]) is HCA authority for the proposition that if the evidence the subject of D's objection under s 128 directly or indirectly tends to prove D's guilt of the offence for which he is standing trial (or tends to prove an element of that offence), he cannot rely on s 128, even if his answer might tend to incriminate him of another offence.

There are three elements to the privilege under s 128:

- W objects to answering;
- on the grounds it may incriminate him of an offence or make him liable to a civil penalty under Australian or foreign law; &
- the court determines there are reasonable grounds for the objection.

W must object to giving the evidence in question. Then the court must determine whether there are reasonable grounds for the objection. If reasonable grounds are established and W is not willing to answer voluntarily under the protection of a certificate (s 128(3), then, pursuant to s 128(4), the court can still require W to answer if two preconditions are satisfied:

- W is not liable to prosecution for a crime or civil penalty under a foreign law;
- the court is satisfied that it is in the interests of justice for W to answer.

If these preconditions are satisfied, the decision whether to require W to answer is discretionary in nature (*Lodhi* at [54]). The inclusive criteria referred to in s 192(2) should be considered by the court in exercising that discretion. The case law indicates that an assessment of the reliability of the evidence to be given is also an important consideration (*Hore* at [175 -232], *Lodhi)*.

Pursuant to s 132, the court is obliged to alert W, in the absence of the jury, to his rights under s 128. The application for a certificate under s 128 should be determined in the absence of the jury (*Spence* at [55]). The jury may be informed of the granting of a certificate if it bears positively or negatively upon a W's credibility and the trial judge may need to give directions about it (*Spence* at [81-88]).

The certificate confers direct and derivative use immunity (s 128(7)). The protection extends to the use of the evidence as a prior inconsistent statement (ALRC 102, [15.99]) because that is caught by the words "cannot be used against the person."

S 128(7)(b) expressly provides for derivative use immunity in respect of certified answers. If a W granted a certificate is subsequently prosecuted for an offence, and there appears to be a live issue as to whether the evidence relied on by P was derived from the certified answer(s), ALRC 102 suggests that P has to prove that the evidence was not derivatively obtained (ALRC 102, [15.99] & [15.140]; see also *DAS* (especially at [159]).

PART 3.11 - DISCRETIONARY AND MANDATORY EXCLUSION

The commentary below focuses on the statutory "discretions" in Part 3.11 of the Act. It should, however, be noted that in *Haddara* the plurality expressed the view, in obiter dicta, that a broad discretion exists at common law to exclude evidence which would deny D a fair trial and that this discretion is still available in jurisdictions operating under uniform evidence law (see especially Redlich and Weinberg JJA at [53] & [65]; cf Priest JA at [162]). In *Bray*, the VSCA at [24] assumed the correctness of the view that the common law discretion subsists.

S 136 – General Discretion to limit use of evidence

This discretion may be exercised even though the risk of prejudice does not outweigh the probative value of the evidence (*ISJ* at [62]). In respect of complaint evidence which is technically admissible under Part 3.2 of the Act, s 136 should not generally be used to limit the use of the evidence to buttress V's credibility (*ISJ* at [57-61], *Papakosmas*). The capacity of directions to eliminate or mitigate any unfairness associated with the impugned use of the evidence should act as a brake on the application of s 136 (*Schanker* at [108]). The credibility of the impugned use of the evidence may be relevant to the application of s 136 (*Schanker* at [103-104])

S 137 – Exclusion of prejudicial evidence in criminal proceedings

S 137 replaces the common law *Christie* discretion but is expressed as a rule ("…must refuse to admit"). The onus is on D to show that the danger of unfair prejudice outweighs the probative value of the evidence: if so, the court must exclude the evidence.

The HCA & VSCA have considered the application of s 137 to the following types of evidence: hearsay (HCA – *Bauer [2018]*, *IMM, Papakosmas*: VSCA – *Schanker*, *Bray, ISJ*, *Singh, BB & QN, Darmody*); opinion evidence (HCA – *Aytugrul*: VSCA –*Ramaros*, *Paulino*, *Wise*, *Meade*, *Tuite*, *MA*, *DG*); admissions (VSCA - *WK)*; context evidence (VSCA - *Daniels*, *Martin*); identification evidence *(HCA – Dickman:* VSCA – *Wearn, Bayley, Peterson, Dupas, McCartney, DJC, THD*); credibility evidence (VSCA - *MA);* and character evidence (VSCA - *Huges).*

In applying s 137, one must assess the "probative value" of the impugned evidence, not in isolation, but in combination with the other evidence relied on by P (*Wearn* at [14]). As discussed above in relation to Part 3.6 of the Act (T&C evidence), the majority of the HCA in *IMM* rejected the broad *Dupas* approach to assessing probative value, preferring the narrow approach adopted in NSW and Tasmania: that is, one assumes credibility (ie, the honesty of W) and reliability (ie, the accuracy of W's evidence), unless no reasonable jury could accept the evidence (see also *Bauer [2018]* at [95]).

IMM was considered by the VSCA in *Bayley* with regard to suspect identification evidence which the VSCA ultimately found should have been rejected by the trial judge under s 137. Applying the narrow approach to assessing probative value did not preclude the court in *Bayley* from having regard to the weaknesses of the identification evidence (which included evidence of an out of court identification of D by V from a single photo on Facebook in circumstance where V knew D had been charged with the murder and rape of another woman). This lends some support for the view that assuming that evidence of a PR will be accepted (eg, evidence of an out of court identification) does not mean assuming that the AF (eg, that the person identified was the offender) will be accepted (see also *IMM* at [50] and *Dickman* at [43]). However the preponderance of authority favours the view that one assumes that the trier of fact will accept both that the PR was made and the AF (see *Shamouil* which was approved by the HCA in *IMM*) as this is consistent with taking the evidence at its highest. In *Wearn*, another case concerned with dubious identification evidence, the VSCA, whilst affirming *Bayley*, held that the trial judge, in applying s 137, was wrong to have taken into account 'internal inconsistencies' and 'inherent contradictions' in the identifier's successive statements to police. It remains unclear why, under the narrow approach, some evidentiary weaknesses may be taken into account in assessing probative value (*Bayley*), and some may not (*Wearn*).

That lack of clarity is due in no small part to the foggy evening "hypothetical" discussed in *IMM,* by the plurality at [50] and by Gageler J at [92]. The plurality said the probative value of the evidence of an identification of a stranger made on a foggy evening in fading light would be low, regardless of whether one applied the narrow or broad approach to assessing probative value. Gageler J said its probative value would be high, taking the evidence at its highest. One could interpret the plurality's treatment of the foggy evening example as permitting consideration of surrounding circumstances which impact on the reliability of impugned evidence (as happened in *Bayley*) but it is difficult to reconcile this approach with the plurality's statement of principle about assuming credibility and reliability, unless no reasonable jury could accept the evidence. Interestingly, the HCA in *Bauer [2018]* ignored the foggy evening example.

The concept of unfair prejudice was discussed above in relation to s 101 (T&C evidence). In short, the concept refers to the risk that the jury may misuse or overvalue the impugned evidence (*Dickman* at [48]; *Hughes* at [17]; *Papakosmos* at [92]; *Dupas* at [175]). It must be a real risk of prejudice, not a mere possibility (*Arico* at [78]). In *Wise* ([70]), and again in *Paulino* ([102-104]), the risk of a jury, despite judicial directions, giving undue weight to DNA evidence (the "CSI effect") was discussed (cf *Ramaros* at [46]). The fact that potentially unreliable evidence (eg identification evidence) may have low probative value does not mean it should be excluded under s137: directions may cure any risk of unfair prejudice, especially if the weaknesses of the evidence would be apparent to the jury (*Dickman* at [44-48],[57]; *Wearn*).

In addition to evidence which may be misused or overvalued by a jury, unfair prejudice could arise from the evidence which D may need to adduce in rebuttal. In

Cook, for example, P relied on evidence of D hiding from police as indicating consciousness of guilt of the alleged offence but D claimed he hid because of other wrongdoing on his part: the NSWCCA held at [48] that s 137 applied and the evidence of D hiding should have been excluded (see also *Wearn* at [30 – 33]).

On an interlocutory appeal in relation to a ruling under s 137, the principles in *House* apply (*Paulino* at [52], *Tuite* at [8], *McCartney* at [47- 51], *Singh* at [26]). On a conviction appeal, where the facts are not in dispute, the appeal court can and should decide for itself whether the decision under s 137 was correct (*Dupas* at [241], *McCartney* at [32]).

Under the *Jury Directions Act 2015*, counsel have an obligation to seek directions to eliminate or reduce the danger of unfair prejudice. The failure of trial counsel to seek such directions may scuttle an appeal ground that the trial judge should have excluded the impugned evidence under s 137 (*Arico* at [144]).

S 138 – Exclusion of improperly or illegally obtained evidence

S 138 replaces the common law *Bunning v Cross* discretion but is expressed as a rule (" …is not to be admitted").

Under s138, D bears the burden of proving on the balance of probabilities that there was illegality or impropriety. If D discharges this burden, the burden then shifts to P to justify admissibility (*Willis* at [104]). There are provisions which deem certain conduct to be improper (ss 138(2), 139), including false statements during questioning (s 138(2)(b)). In *Weaven (Ruling No 1),* a police "scenario case" where D was tricked into confessing to murder, Weinberg J ruled that if the police false statements were deemed to be improper (which he doubted), he would nevertheless exercise his discretion to admit the evidence of the confession (see especially [64-70].

The VSCA has assumed to date that the principles in *House* apply (*MD* at [27-30], *Marijancevic* at [13]) to a challenge to a s 138 ruling on appeal. That is still likely to be the situation regarding interlocutory appeals but not conviction appeals if the facts are not in dispute. This follows from the approach taken by the VSCA in *McCartney*, which was a conviction appeal challenging a ruling under s 137.

Where a trial judge's ruling under s 138 turns on a finding of fact based on an assessment of the honesty of W, the VSCA will be reluctant to interfere, even if the VSCA considers the fact "improbable." In *Marijancevic,* a drug case in which illegally obtained evidence was excluded by the trial judge, the VSCA at [80-83] thought it improbable that a police officer knowingly contravened the requirement that affidavits in support of applications for search warrants be sworn but the trial judge's decision to exclude the evidence under s 138 was not overturned.

TABLE OF ABBREVIATIONS

AF (asserted fact); D (defendant/accused); FHH (first hand hearsay) JD Act (*Jury Directions Act* 2015); P (prosecution); PR (previous representation); R (representor/maker of a PR); T&C (tendency and coincidence); TJ (trial judge); V (alleged victim/complainant); W (witness); UEL (uniform evidence law)

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