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 in PEL to sections, schedules and the Dictionary are to those in the Act unless otherwise indicated.

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) (JDA), 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 JDA.

UEL was intended to make substantial changes to the rules of evidence (*Hughes* [13], *IMM* [35], *Papakosmas* [10]). Reference to the common law in trying to interpret it may be unhelpful (*Papakosmas* [8], cf *PNJ* [8-9]). The HCA has cautioned trial judges against using their powers under Pt 3.11 of the Act to re-instate the common law rules of evidence (*Papakosmas* [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 are to be found in the *Criminal Procedure Act 2009 ("CPA"),* eg, s 387 which permits the admission for a hearsay purpose of a recording of evidence given by V in a sex case.

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 [59]). The party who is questioning a W (whether in XN or XXN) is adducing the evidence at that point in time (ALRC 26 [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* [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* [53], *Nicholls* [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 JDA 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* [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* [9]).The broad view is that

unfavourable simply means "not favourable", as opposed to "adverse" (*McRae* [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]). In *Saddick* at [86] and *Deacon* at [92], the VSCA affirmed the broad view.

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),192; *Meyer* [182]). Contrary to the position in NSW (eg, *Hogan* [73]), the court in considering whether to grant leave under s 38 is not obliged to have regard to ss 135 and 137 (*Garrett* [79]; cf *Murillo* [100]), 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* [18-19], *Aslett* [71], *McRae* [20]).

As regards the scope of cross examination under s 38, it is not "at large" (*Murillo* [96]) 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* [182], *Power* [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* [75-76]). 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* [51-53]). The scope of cross examination under s 38 may be regulated by Pt 3.7 if the evidence to be adduced is "credibility evidence" as defined by s 101.

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* [182]; note also s 38(4)).

The greater capacity of P under s 38 to cross examine an unfavourable W makes it more difficult for P to justifiably decline to call a material W (*Kanaan* [84-85]). Further, where P intends to impeach a W called by P in P's final address, the failure of P to utilize s 38 may be a breach of the rule in *Browne v Dunn* and may constitute a substantial miscarriage of justice, even where D's trial counsel failed to object (*Saddik* [91, 115], *Deacon* [94], *cf Tiba* [81-82]).

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* [74-78]) but, if that happens, strong directions to the jury may cure the impropriety (*Reeves* [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 irrelevance rule (s 56(2)), the hearsay rule (s 59) and the opinion rule (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* [19]). It must also survive the exercise of the discretions in Pt 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.

PT 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 way or, better still, ways in 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 (cf *IMM* [37]).

In short, the test of relevance (s 55) is whether the evidence, if accepted, could (not would) rationally make a fact in issue more or less likely, however slightly: relevance connotes a minimal logical connection (*IMM* [40], *Paulino* [17, 65-68]), especially where the evidence is adduced by D (*Green* [34]).

In s 55, "a fact in issue" refers to an ultimate fact in issue (*Smith* (2001) [7], *Wannouch* [50]). 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. The ultimate facts in issue are not limited to facts in dispute (ALRC 26 [641]). But if a fact constituting an element is formally admitted (ss 184, 191), evidence bearing upon it may be a waste of time and may be excluded under s 135(b).

Evidence which "relates only" to the credibility of a witness (s 55(2)) may be relevant but only if it could affect the probability of a fact in issue.

The relevance of a piece of evidence must be assessed in the context of the evidence as a whole and not in isolation (*Evans* [177], *Paulino* [22, 67]).

In assessing relevance, one assumes the evidence will be accepted by the jury("if it were accepted": s 55) unless no reasonable jury could accept the evidence (*IMM* [39]). There are conflicting views as to what the assumption involves when assessing the relevance of evidence of previous representations (PRs). One view is that one assumes that the jury will accept not only that the PR was made but also the fact(s) asserted in the PR (*Adam* [22-23, 44]). An alternative view is that one merely assumes that the jury will accept that the PR was made (*Papakosmas* [31], [52-58]) but this view seems at odds with the principle that one take the evidence at its highest in assessing relevance.

Although the test of relevance is not a demanding one (*Smith* (2001) [24]), careful analysis is required (*Evans* [23]). Evidence which is merely consistent with P or D's case is not relevant (*Paulino, Wise*; *cf Ramaros* [30-47], *Volpe* [40-46]). One must be able to identify a logical line of reasoning by which the evidence could make the existence of a fact in issue more or less likely (*Washer* [5], *Evans* [23]); "plausible conjecture" is insufficient (*Wannouch* [57-58]).

S 56 – Relevant evidence to be admissible

S 56 consists of an inclusionary rule (s 56(1)) for relevant evidence and an exclusionary rule (s 56(2)) for irrelevant evidence. In s 56(1), "admissible" does not

mean "will be admitted": relevant evidence may be excluded pursuant to an exclusionary rule or discretion (*Haddara* [60-63]). It is not settled whether the phrase "not admissible" in s 56(2) (and other exclusionary rules) is to be understood as "not admissible over objection" (*Aytugrul* [39], *Velkoski* [200]).

In a joint trial, evidence adduced in the proceeding by "a party" is admissible against each accused, unless it is excluded pursuant to an exclusionary rule or discretion (*McNamara* [67, 69, 81] but note [73] regarding previous representations by a co-accused).

PT 3.2 - HEARSAY

Pt 3.2 begins with the relevant exclusionary rule (59(1)) and is followed by numerous exceptions to that rule. As the notes to s 59 indicate, there are hearsay exceptions in other parts of the Act as well as in Pt 3.2. The broadest statutory exception is found in s 60 but that only comes into play where the relevant previous representation (PR) is first admissible for a non hearsay purpose. The exceptions set out in ss 65 and 66 are now the main gateways for complaint evidence but, in that connection, s 108(3) is also important. Common law hearsay exceptions are no longer available (*Schanker* [48-49]).

Pt 3.2 may regulate opinion evidence and identification evidence (*Tiba* [67-68]*)*.

S 59 – The hearsay rule – exclusion of hearsay evidence

S 59(1) is a purpose based rule and is only engaged if evidence of a previous representation (PR) is adduced to prove an asserted fact (AF), that is, a fact that it can reasonably be supposed that the representor (R) intended to assert (s59(2)). Intention is determined objectively. While many implied assertions are not AFs, some can be.

The words "representation" & PR are defined in the Dictionary. The word "representation" is used instead of "statement" because R can assert something by conduct, eg, a gesture. As well as out of court representations (eg, police statements), a representation made by W at an interlocutory hearing (eg, at committal) is a PR vis a vis the trial.

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* [84]). Whether evidence of a PR is admissible for a non-hearsay purpose is to be determined objectively (*Schanker* [100]). As mentioned above, s 60 assumes particular importance when it operates in tandem with s 38; eg, in *Abbas,* ss 38 and 60 facilitated the use by P of a co-offender's plea of guilty to, first, discredit the co-offender's testimony at the trial of his brother D &, second, as some evidence of D's guilt (*Abbas* [52-87]).

S 61 – Exceptions to the hearsay rule dependant on competency

It is an element of each of the hearsay exceptions in Part 3.2 (except the s 66A exception) that R was competent (s 13) at the time of making the PR. Competence, however, is a rebuttable presumption (s 61(3)).

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 the PR made by R 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 Pt 2 of the Dictionary.

If R is excused under s 18 from giving evidence against D, R is "unavailable" for the purposes of s 65 (*Fletcher* [53], *Nicholls*) because R cannot be compelled to give evidence. But in a joint trial, although D1 cannot compel D2 to give evidence (s 17), D2 is not therefore considered "unavailable" should D1 wish to adduce evidence, via s 65, of PRs made by D2 (*Abernethy & Hawkins* [84-94]).

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* [50]): s 66 may be the gateway if D testifies (*Constantinou* [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 because P is unable to find R, the courts will demand proof of strenuous attempts to find R, especially where R is important to P's case (*Rossi* [26], *ZL* [32]).

Notice requirements

There are written notice requirements if P or D plans to adduce hearsay evidence where R is unavailable (s 67) (*Azizi* [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*).

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 was made in circumstances which make it (b) unlikely to be a fabrication, (c) highly probable to be reliable or (d) likely to be 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* [46-50], *Thomas* [29-35]). In *Moore*, the VSCA said that for other PRs by R to form part of the circumstances in

which the relevant PR was made, they must have "a degree of contemporaneity" with that PR, not be made "weeks or months after" (*Moore* [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]). If the court is not provided with at least a "substantial understanding" of the circumstances in which the PR was made, the court should not admit the hearsay under these exceptions (*Madina* [59]).

Sio, like *Asling* and *Madina*, concerned the exception under s65(2)(d). *Sio* 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 *Madina*) and ascribed the major role in a joint criminal enterprise with D to R.

S 65(2)(b)

To be admissible hearsay under s 65(2)(b), the PR must have been made at or "shortly after" the occurrence of the AF. This temporal requirement is to minimize the risk of concoction (*Moore*, [44]). In *Moore*, R made complaints of being assaulted by her ex-partner to her mother, the 000 operator, paramedics and police approximately 6 to 9 hours after the alleged assaults; the VSCA said the PRs were made under the "proximate pressure" of the asserted facts, and were thus made "shortly after", even though R had an opportunity to concoct her complaints. In *Bufton*, R witnessed a running down. He signed his police statement approximately 3.5 hours later and participated in a video recorded "walk through" with police approximately 22.5 hours after the incident. R died before D's committal hearing. The VSCA held that the PRs of R in the "walk through" were made shortly after the AFs and were admissible in D's trial. In *Huici* , where a 90 year old V had made a VARE approximately 56 hours after an alleged rape, the VSCA overturned the TJ's ruling that the PRs in the VARE were made "shortly after" the AF.

"Fabrication" in s 65(2)(b) means "deliberate concoction" (*Huici* [57], *Thomas* [20]).

S 65 (2)(c)

The fact that a 90 year old V in *Huici* had dementia did not prevent her VARE, made approximately 56 hours after the alleged rape, from being considered highly probable to be reliable by the TJ. The VSCA held that it was open to the TJ to so find (*Huici* [68 – 77]).

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, Snyder*). It may be submitted that because R is unavailable to be cross examined at trial, 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 *BB & QN* (see especially [21]), *Bray, Darmody* and *Snyder*, all cases where D had an opportunity to cross examine R at committal. In *Snyder*, the VSCA held that the TJ was correct not to exclude evidence of PRs at committal by V (who suicided pre-trial) even though the cross examination of V at committal was inept and material casting doubt on V's reliability only came to light post committal. In *Bufton,* R died before the committal hearing but the attitude of the VSCA was the same. See also *Huici*.

Jury Directions

In *Bufton*, the VSCA strongly suggested at [61] that if evidence of a video recorded PR is admitted, the TJ should caution the jury against relying on R's demeanour on the video recording since the jury will not be able to assess R's demeanour under cross examination.

S 66 – Exception – criminal proceedings if maker available

In respect of evidence of a PR adduced in criminal proceedings where R is available to testify, s 66 now contains two exceptions to the hearsay rule. The first exception applies to a PR made when the AF was fresh in the memory of R. The second exception, introduced in 2017, applies where the PR was made by V when V was under 18.

Evidence of complaint by V, and not just in sex cases, is often adduced under s 66. Evidence of complaint by V even in response to leading questions may be admissible under s 66 (*Bauer* [92]). Evidence of a PR by D consistent with innocence may also be adduced under this exception, provided D testifies (*Ashley* [53-55], *Constantinou* [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 , the V, gave no evidence of having complained to her sister, W, W's evidence of the PR was held to be admissible under s 66 even though the AF in the PR to W was that D had touched her whereas R's testimony was that D had penetrated her (see also *Velkoski* [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)(a), *Constantinou* [183]). Evidence of the PR may be given by R or a person who perceived the PR being made.

First s 66 exception

The s66(2)(b)(i) exception to the hearsay rule requires the occurrence of the AF to have been "fresh" in R's memory when the PR was made.

As for assessing freshness, the passage of time is now only one consideration (s66(2A)). In *Bauer* at [89-100], the HCA 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 at [92] said that, in the circumstances, the AFs could be expected to remain fresh in V's memory for 'years to come'. 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]; see also *Barrow* [59-60]). 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." In *Barrow*, where the VSCA helpfully traced the history of the case law on s 66

"freshness" ([44-60]), complaints made approximately 13 to 16 years after the event were considered fresh, even though V was only aged 5 or 6 at the time of the alleged isolated offence.

Second s 66 exception

The s 66(2)(b)(ii) exception applies to a PR made by V when V was under 18. Many of the cases referred to above that grappled with the fresh in the memory exception would now fall under this exception, introduced in 2017.

Proofs of evidence

S 66(3) limits the scope of both s 66(2) exceptions by excluding most "proofs" of evidence (eg, police statements). In *Esposito*, R's answers in a record of interview were treated as an informal "proof" of evidence caught by the limitation in s 66(3) because R said repeatedly that what he was telling police was evidence he would be prepared to give against D (*Esposito*, p34).

Documentary proof of a PR

S 66(4) regulates the timing of the adduction of documentary proof of a PR admissible under s 66(2). Without leave, it may not be adduced prior to the end of R's examination in chief.

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

The s 66A exception (formerly 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 contains two hearsay exceptions for PRs contained in (s 69(2)) or suggested by (s 69(4)) "business records, a term which is broadly defined (s 69(1); Dictionary, Part 2, cl 1). 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* [14-19]). Remote hearsay contained in such records may be admissible under s 69(2) (*Lancaster* [22-27]). S 48 facilitates the proof of documents, including business records.

PT 3.3 - OPINION

Pt 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* [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 Pt 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* [21], *Patrick* [39], *Lithgow City Council v Jackson* [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 necessary 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 [41-42], thus significantly limiting the scope of the exception in s 78 (cf *Kheir* [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* [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] (see also *Lang* [11, 222-223) but, in practice, the degree to which an expert must make "all these matters explicit" will vary depending on the field of expertise, the nature of the opinion and the importance of the issue about which the opinion is expressed (*Lang* [228, 433 -434]).

Reliability

It is not a precondition for the admissibility of expert opinion evidence that the opinion is correct (*Lang* [16, 436]).

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* [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 but the *Tuite* approach does not sit well with the High Court's statement in *IMM* at [54] that, vis a vis admissibility, only ss 65(2) (c) & (d) and 85 raise questions of reliability (cf *Lang* [17, 221, 436]). However, *IMM* at [57] left open the possibility of considering reliability issues when assessing the "danger of unfair prejudice" (*Xie* at [301]).

Specialised knowledge

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

PT 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 Pt 3.4 of the Act to try and exclude the interview (*Haddara* [2,127 – 131]). Nor is D's PR an admission if it relates to a matter which is not actually in dispute (*Abernethy & Hawkins* [54 -61])

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 81 – Hearsay and opinion rules – exception for admissions and related representations

A record of interview which contains a mixture of inculpatory and exculpatory statements by D will normally be admissible hearsay under s 81 or, alternatively, if D consents, under s 190 (*Nguyen* [21, 43]). If D's statements in a police interview are entirely exculpatory, P's obligation of fairness may nonetheless require P to adduce the interview under s 190 with D's consent (*Nguyen*).

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 (*Hou* [150]).

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.

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, Lyon* [18-19], *TJF*) Whether others qualify, such as a parent of a young V (*FMJ* [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 86 – Exclusion of records of oral questioning

Where evidence of an admission is not required to be electronically recorded under s 464H of the *Crimes Act 1958* (Vic) or s 23V of the *Crimes Act 1914 (Cth)* (eg, because the admission relates to a summary state offence), the exclusionary rule in s 86 provides some protection to an accused: documentary evidence of the alleged admission (eg, police notes) is excluded unless D acknowledged the document as a true record (eg, by signing the notes). But the s 86 exclusionary rule does not prevent 'verballing' per se: oral evidence of the alleged admission may still be given (*Explanatory Memorandum*).

By virtue of s 8, the limited protection afforded by s 86 to D may be overridden by other legislation (eg, ss 83 & 84 of the *Criminal Procedure Act 2009* (Vic) which concern summary criminal proceedings conducted in D's absence).

S 87 – Admissions made with authority

S 87(1)(c), in combination with s 57(2), reflects the common law co-conspirators rule (*Beqiri & Hajko* [90-93]). S 87(1)(c) deems a PR by another person, X, to be an admission by D if it is reasonably open to find that X made the PR in furtherance of an agreed common purpose with D. But the phrase "the court is to admit the representation" in the chapeau of s 87(1) is potentially misleading. It does not mean that the court is to admit the PR in the substantive proceedings; it simply means the court is to treat the PR by X as an admission by D. The deemed admission may yet be excluded by various exclusionary rules such as ss 84, 85 or 137 (*Dolding* [23-25, 58]).

Bearing in mind that the test is whether "it is open to find…", a number of questions arise when applying s 87(1)(c). Was there an agreed common purpose between D & X? Was that common purpose the same as that alleged by P in the proceedings against D? (*Dolding* [32-33]) Was the common purpose on foot at the time X made the PR? Was X's PR made in furtherance of that common purpose?

Although the text of s 87(1)(c) does not mention it, according to the VSCA in *Lindsey* (see especially [11-12]) there must be "reasonable evidence" of D's *participation* in the common purpose (in other words, of D also doing something in furtherance of the common purpose) before a PR by X in furtherance of the common purpose is deemed to be an admission by D under s 87(1)(c).

S 90 - Discretion to Exclude Admissions

D has the onus of proof in relation to s 90 (*Em* [63], *Myles* [30]) which operates as a "safety net"; that is, other relevant provisions of the UEA are to be applied first and matters specifically dealt with under those provisions (eg, reliability under s 85) are not to be taken into account in applying s 90 (*Em* [109], *Haddara* [3] *Hinton* [5-7], *Myles* [29]). Whether reliability issues may be considered under s 90 when s 85 is not engaged is unsettled: some authorities suggest that the potential unreliability of an impugned admission may be considered under s 90 (eg, *Em* [73], [191]) but this does not sit well with the High Court's statement in *IMM* at [54] that, vis a vis admissibility, only ss 65(2) (c) & (d) and 85 raise questions of reliability. The unfairness of which s 90 speaks is a highly fact specific concept (*Em* [56], *Myles* [27]). *House* principles apply on an appeal against a ruling under s 90 (*Myles* [33]).

PT 3.6 - TENDENCY AND COINCIDENCE

Sections 97, 98 and 101 contain exclusionary rules in respect of tendency and coincidence (T&C) evidence. They also contain exceptions to those exclusionary rules.

Reasonable Written Notice

To be admissible, reasonable written notice must be given if a party wishes to rely on tendency or coincidence evidence (ss 97(1)(a) & 98(1)(a)), unless it is led in rebuttal of the opponent's tendency or coincidence evidence (ss 97(2) & 98(2)). Provision of a proper notice is "no minor matter"(*Andelman* [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).

Significant probative value

T&C evidence, whether adduced by P or D, must have significant probative value (ss 97(1)(b)) & 98(1)(b)) which is to say it must have the capacity to be considered 'important' or 'of consequence' or 'influential' by the trier of fact regarding a fact in issue (*IMM* [46]). It is easier for D to satisfy the test of significant probative value because D only has to raise a reasonable doubt (*Campbell (Ruling 1)* [41].*)* As when assessing the relevance of impugned evidence, one assesses the probative value of T&C evidence in the context of the other evidence in the case, not in isolation (*Hughes* [40]).

Probative value must substantially outweigh prejudicial effect

S 101 contains further exclusionary rules, and exceptions, for tendency or coincidence evidence adduced by P about D. To be admissible, the tendency or coincidence evidence adduced by P must substantially outweigh its prejudicial effect (s 101) unless it is led in rebuttal of tendency or coincidence evidence adduced by D (s 101(3) & (4)).

T&C rules are purpose based

The T&C rules in Pt 3.6 are purpose based, not disclosure based. Only evidence which is led for the purpose of tendency or coincidence reasoning is regulated by Pt 3.6 (*Ivanoff* [19-20]). Evidence led for another purpose is not regulated by Pt 3.6, even though it discloses other misconduct by D. Such evidence includes: context evidence (*Ashley* (VSCA) [83], *Hothnyang* [20], *Martin* [102-107], *WFS* [38]); evidence of a continuous state of mind (*Davies* [99 – 112], *Higgins* [2016] [20]); evidence of the acquisition of knowledge from other misconduct (*Ivanoff* [19-20]); evidence of a business practice *(Di Paolo* [30-31]); and evidence of D operating a drug trafficking business where the issue is whether, on a particular occasion, he possessed drugs for sale (*Falzon* [42]). Evidence of an adult's sexual interest in a child could be considered evidence of motive rather than tendency but in practice it is viewed as tendency evidence and is regulated by Pt 3.6 (*Ritchie* [33-43]), unless it is adduced solely for context.

Differentiating T&C reasoning

T&C evidence involve different forms of reasoning, even though there is an overlap (*Dempsey* [63], *Murdoch* [81], *Rhodes* [52], *Page* [42-66]). Strictly speaking, similarities are not essential for tendency reasoning (*Hughes* [34]) but, unsurprisingly, such reasoning commonly (*Hughes* [39]) relies on similarities in a person's conduct and/or the circumstances surrounding their conduct to show that the person had a propensity to act or think in a particular way, thus supporting the inference that they

acted or thought in that way on the occasion in question. Coincidence reasoning relies on the degree of similarity between relevant events and/or their surrounding circumstances to rebut mere coincidence as an innocent explanation: the improbability of coincidence in turn supports the inference that the relevant person acted or thought as alleged on the occasion in question. In many cases, both T&C reasoning may be open but not always (ALRC 26, Vol 1, [400-401]).

Similarities & Dissimilarities

The probative value of similarities in both T&C reasoning is a matter of quality, not quantity. A single unusual similarity may be worth a dozen commonplace ones (*Page* [57]). Whether a feature is viewed as unusual may depend on whether one has regard to the spectrum of deviant behaviour (as the VSCA did in *PNJ* [22] & *Velkoski* [73-74]) or the spectrum of behaviour generally (as the HCA did in *Hughes* [57]). In *Hughes,* a multiple V sex case, much weight was given by the HCA to what were said to be the "unusual" features of the case – firstly, an adult male having a sexual interest in underage girls and, secondly (& more importantly), that male acting on that interest despite a high risk of being caught (*Hughes* [57-58]).

Unusual similarities are not essential for T&C evidence to have significant probative value but the more commonplace the similarities, the weaker the probative force of the evidence (*Rhodes* [55]).

In multiple V cases, P may invoke 'coincidence reasoning', arguing that it is improbable that the Vs would have independently made such similar allegations against D unless they were all true. The more specific the similarities in the Vs' accounts, the more cogent the reasoning. However, the greater the number of Vs making similar complaints about D, the less specific the similarities in their accounts may need to be *(Page* [57], *Rhodes* [55], *Velkoski* [175]*).*

Some decisions of the VSCA support the proposition that similarity of relationship between D and the Vs (eg parent/child, teacher/pupil) will not of itself ordinarily suffice for T&C evidence to have significant probative value (*Rapson* [16],*Velkoski* [168]) but in *Harris*, the VSCA took the contrary view, describing the relationship between D and the three Vs (parent or carer/child) as the "critical underlying feature" (*Harris* [68-70]).

Another difficult aspect of the case law is that not all similarities are considered relevant. What have been described as circumstances beyond D's control are not to be taken into account in determining whether T&C evidence has significant probative value (*PNJ* [19-20], *Rapson* [35], *elkoski* [79-82]). *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* [101]).

If there are sufficient similarities (qualitatively speaking), dissimilarities will not render T&C evidence inadmissible (*Alexander* [30], *Feng* [76-77], *Hughes* [56], *Page* [59], *Rapson* [17-18]).

Methodology for assessing probative value

The correct methodology for assessing the probative value of T&C evidence has also excited considerable controversy. According to the Act's 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." The restrictive approach to assessing probative value, preferred by the NSWCCA (*XY [2013], DSJ, Shamouil),* assumed the credibility (veracity) and reliability (accuracy) of the evidence, unless no reasonable jury could accept it. The broad approach, ultimately preferred by the VSCA (*Dupas*), assumed credibility but not reliability. The HCA settled the controversy in *IMM,* a majority of the court endorsing the restrictive NSW approach. In *Bauer* at [69] & [95], the HCA unanimously affirmed the restrictive approach. Indeed, in *Bauer,* as discussed below, the HCA made the restrictive approach even more restrictive: first , with respect to the issue of contamination (eg, joint concoction) in T&C cases and, second, with respect to V's evidence of uncharged acts in a single V tendency case.

Consistent with the restrictive approach, one takes the evidence at its highest when assessing its probative value (*IMM* [44, 47], *Bauer* [95]).

Risk of Contamination

In multiple V cases, an issue may arise as to whether the similarities in the multiple accounts of D's misconduct may be attributable to joint concoction or innocent infection ('contamination'). Previously, if P failed to negate the reasonable possibility of contamination, the evidence was inadmissible for a tendency or coincidence purpose (*Velkoski* [173]). In *IMM* at *[59]*, the majority of the HCA cast doubt on the correctness of this approach. The issue did not arise in *Hughes*. In *Bauer* at [69, 70], the HCA said, in the context of a tendency evidence case, 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. Presumably, the same goes for s 98.

Miscellaneous aspects re T&C evidence

One event may be capable of establishing a tendency (*Dempsey*, *Reeves* [56]; *cf Larsen* [32]) but two or more events are required for coincidence evidence (s 98). T&C evidence may be constituted by charged (*Gentry* [42]) and/or uncharged acts (*Bauer* [51]). Whether charged acts or uncharged acts are relied on as tendency evidence, ss 61 and 62 of the *Jury Directions Act 2015* precludes a TJ from directing the jury that they must be satisfied beyond reasonable doubt of their occurrence before they can use them for tendency reasoning (*Bauer* [86], *Roder* [2, 16 - 17, 19, 27-29, 37]). The same presumably goes for coincidence evidence. In a multiple V case, where the occurrence of the charged acts and consent is in dispute, the TJ should direct the jury that they may only use the T&C evidence in deciding whether the acts occurred (*Matthews* [37 - 52]). T&C evidence often concerns incidents before the charged act but it may concern subsequent incidents (*Dempsey*, *Di Natale* [32], *Lancaster* [89], *Page* [28], *Thu* [35-36]). It will usually be P that seeks to adduce tendency or coincidence 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.

On Appeal

The principles in *House* apply to an interlocutory appeal against a ruling made under Pt 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, not whether it was open to the trial judge (*Bauer* [61]). Presumably, given what the HCA said in *Bauer* at [61], the same approach would govern a conviction appeal regarding the application of s 101(2).

S 97 The tendency rule

See the discussion of T&C evidence above in the introduction to Pt 3.6.

Degree of similarity required

There has been considerable controversy over the degree of similarity required for tendency evidence to have significant probative value. In *Velkoski,* the VSCA was critical of a number of decisions of the NSWCCA in which tendency evidence was admitted despite modest similarity. In *Hughes*, the High Court endorsed the approach of the NSWCCA where the issue is whether the offending occurred, as was the case in *Hughes*. Where identity is the issue, the HCA said that "the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence" (*Hughes* [39]). In *TL*, a murder case where identity was the issue, the HCA considered [39] of *Hughes* and interpreted it as only requiring close similarity when "there is little or no other

evidence of identity (*TL* [30]).” Critically in *TL*, other evidence indicated that D was one of only three persons who could have committed the offence (*TL* [30, 37]). Further, the tendency evidence concerned proximate acts of serious violence committed by D against V, his 2 year old stepdaughter. Consequently, the tendency evidence had significant probative value in establishing the identity of the offender.

Two stage test

In *Hughes,* the HCA identified two questions as fundamental to an assessment of whether tendency evidence has significant probative value. First, does the evidence, by itself or 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* [41], *TL* [31])? In *Hughes,* both questions were answered in the affirmative. 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, allegedly 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.

A tendency to act is more probative

In *Velkoski* at [173(f)], the VSCA was critical of P relying on D’s tendency to have a sexual interest in a particular class of Vs rather than relying on a tendency to act on that interest. In *Hughes* at [31-32], the HCA was critical of the VSCA’s view. 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* view, stating “Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value”(see also *Erickson* [60-61]). In *Di Natal*e, where evidence of a sexual interest in a single V was found to have significant probative value, the VSCA discussed [27] of *McPhillamy* and said it did not lay down an “immutable rule”(*Di Natale* [35]). Nevertheless, in sex cases, especially where the alleged tendency relates to a class, P should allege, if possible, a tendency to act rather than a tendency to have a state of mind.

Single V cases

With respect to single V sex cases, where the issue is simply whether the alleged conduct occurred, the HCA indicated in *Bauer* at [48 & 57], contrary to what the plurality indicated in *IMM* at [62 & 63], that, evidence from V of D’s uncharged acts

disclosing D's sexual interest in V and a willingness to act on that interest 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* [62]) or unusual (*Hughes* [57]) features. Logically, the same must be true regarding V's evidence of charged acts relied on as tendency evidence in a single V case.

It should be noted that the HCA in *Bauer* did not say *IMM* was wrongly decided. Rather, it 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.

S 98 The coincidence rule

See the discussion of T&C evidence above in the introduction to Pt 3.6.

State of Mind of Vs

The evidence of multiple Vs that they did not consent to sex with D is not cross admissible to prove absence of consent by any particular V (*Jacobs* (2017) [5, 34]).

Competing hypotheses

On the current authorities, when determining whether coincidence evidence adduced by P has significant probative value, 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* [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* 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.

S 101 Further restrictions on T&C evidence adduced by P

In applying s 101(2), a judge must weigh the probative value of evidence adduced by P against its prejudicial effect: 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*

[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* [114] & [177]).

PT 3.7 – CREDIBILITY

S 101A – Credibility evidence

Credibility is broadly defined in the Act's dictionary (Pt 2). It is not limited to a person's veracity: it includes reliability of perception and recollection (*Audsley* [30], *Dupas* [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 also 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, Pt 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 representor who is not called but whose PR 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 Pt 3.7 (ss 102 to 108) if it relates to the credibility of W & by the exclusionary rules & exceptions in Division 3 of Pt 3.7 (ss 108A to 108B) if the evidence relates to the credibility of a representor who is a non-W. 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. Credibility evidence can come in various forms. Some forms, which were permitted by the common law, have been displaced by Pt 3.7 of the Act. In *BA* at [21-25], the VSCA found that Pt 3.7, and in particular s 102, overturned the common law rule which permitted W1 to give evidence that W2's reputation for lying was such that he (W1) would not believe W2 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, either by P or D2.

Dealing firstly with exceptions for P, under 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 to P 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. 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 W, the Informant ,"planted" evidence during the investigation)(s 104(5)(b)). If the pre-conditions for a grant of leave exist, and TJ has taken into account the mandatory considerations set out in s 192, TJ may (not must) grant leave.

It should be stressed that evidence having these qualities must be admitted 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, 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.

In relation to a credibility cross examination of D by D2, the preconditions for granting leave are that D has given evidence adverse to D2 which has been admitted into evidence (s104(6). Again, if the preconditions are satisfied the TJ must also have regard to s 192.

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 and W denies the assertion(s) put to him. Prima facie, the credibility rule prevents the party from leading evidence from W2 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 W2. 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 W2 evidence of a prior consistent statement of 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* [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. TJ 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) (see also *Woods*), P was able to neutralize such an attack using expert evidence admitted under s 108C (see also s 388 of the CPA) but in *Jacobs* (2019) ([32, 61-64, 132-143]), the VSCA held that such evidence was irrelevant essentially because no such attack was made on V's credibility.

PT 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* [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* [7] – [8]). In other words, Pt 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* [20-24]).

P's interest in ensuring that D receives a fair trial supports the view that P should warn D that it may seek leave to adduce evidence of bad character if D continues on a certain path in the conduct of D's defence (*Huges* [52 - 53]). Indeed, it will often be prudent for the issue to be the subject of an advance ruling under s 192A (*Huges* [52]). Whenever the court is invited to rule on such an issue, it should have regard not only to Pt 3.8 of the Act but also the discretions (Pt 3.11) and the considerations set out in s192 (*Huges* [20-21]).

For D to throw away his "shield" against bad character evidence, it must be a conscious decision to assert good character (*Huges* [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 TJ as to whether to permit P to adduce bad character evidence in rebuttal should be guided by, inter alia, considerations of "proportionality"(*Huges* [33]) and the stage of the proceedings at which the issue arises (*Huges* [46]). One expedient may be to withhold the good character direction that would normally be given rather than permitting P to adduce bad character rebuttal evidence (*Huges* [35]).

As for bad character evidence which P seeks to adduce in rebuttal, mere rumour will not pass the test of relevance (*Saw Wah* [27],fn 2) and traffic priors will rarely do so (*Saw Wah* [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* [84], fn 20).

PT 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 Pt 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.

Identification evidence may also engage Parts 3.2 (hearsay) and 3.3 (opinion).

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

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 Pt 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.

In *Cope*, V's evidence that a photo of D in a police photoboard was a photo of one or other of two assailants who had raped her 30 years earlier, was correctly categorised as ID evidence; despite V's inability to say which assailant D was, V was clearly asserting that D was in "the wrong place" at "the wrong time" (*Cope* [30]).

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* [40]); evidence of an offender's name (*Bass* [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 [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 JDA).

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* [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* [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 (as opposed to other forms of custody: see *Wilson* at [22-23, 35, 66-74]).

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 TJ 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* [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* [9-11], *Byrne (No 2)* [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 JDA, 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 JDA.

PT 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 (*Peters* [88]). The common law privilege continues to operate in all other contexts (s 131A; ALRC 102 [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; the prospect of W perjuring themselves is not a reasonable ground (*Peters* [78, 115] . 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* [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* [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* [55]). The jury may be informed of the granting of a certificate if it bears positively or negatively upon a W's credibility and TJ may need to give directions about it (*Spence* [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]).

PT 3.11 - DISCRETIONARY AND MANDATORY EXCLUSION

The commentary below focuses on the statutory "discretions" in Pt 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 [53] & [65]; cf Priest JA [162]). In *Bray* at [24], the VSCA assumed the correctness of that view.

In a joint trial, an accused may invoke ss 135 or 136 to try and exclude or limit the use of evidence adduced by a co-accused (*McNamara* [62, 64, 78, 83, 90]).

S 135 - General discretion to exclude evidence

In criminal proceedings, s 135 is of more value to P than D. This is because D usually relies on the danger of unfair prejudice and s 137, which only D may utilize, is easier for D to satisfy ("outweigh" v "substantially outweigh").

In a joint trial, an accused may seek a ruling under s 135 to exclude evidence adduced by a co-accused (*McNamara* [62, 64, 78, 83, 90]).

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* [62]). In respect of complaint evidence which is admissible for a hearsay purpose and a credibility purpose, s 136 should not, as a general rule, be used to limit the use of the evidence to a credibility purpose (*ISJ* [57-61], *Papakosmas* [39, 96-97]). 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* [108]). The credibility (and possibly the reliability) of the impugned use of the evidence may be relevant to when assessing the danger of unfair prejudice under s136 (*Schanker* [103-104]).

In a joint trial, an accused may seek a ruling under s 136 to limit the use of evidence adduced by a co-accused (*McNamara* [62, 64, 78, 83, 90]).

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.

Cases decided by the HCA & VSCA considering the application of s 137 to various types of evidence include the following: hearsay (HCA – *Bauer*, *IMM, Papakosmas*: VSCA – *Asling, BB & QN, Bray, Bufton*, *Darmody, Huici, ISJ*, *Schanker*, *Singh, Snyder, Thomas*); opinion (HCA – *Aytugrul*: VSCA – *DG, MA, Meade, Paulino*, *Ramaros*, *Tuite*, *Volpe*, *Vyater*, *Wise*); admissions (VSCA – *Ebrahimi*, *WK)*; context (VSCA – *Aleski*, *Daniels*, *Martin*); identification *(*HCA – *Dickman:* VSCA – *Bayley, Dempsey, DJC, Dupas, Hague, McCartney, Peterson, THD, Wilson*); credibility (VSCA – *Abbas*, *MA);* character (VSCA - *Huges).*

Probative Value

In applying s 137, one assesses the "probative value" of the impugned evidence in the context of the other evidence relied on by P, not in isolation (*Hague* [14]). One takes the evidence at its highest (*Bauer* [95], *IMM* [44]) but that does not mean assuming that the evidence is "convincing" (*Lang* [17]). Evidence which is important to P's case (eg, because it is the only evidence of a particular element of the offence charged) may nonetheless be of slight probative value (*Volpe* [70]) and vice versa (*Kadir* [42]).

As discussed above in relation to Pt 3.6 of the Act (T&C evidence), the majority of the HCA in *IMM* (see also *Bauer* [95]) rejected the broad approach to assessing probative value, preferring the restrictive approach adopted in NSW and Tasmania: that is, one assumes credibility (ie, the honesty of W) and reliability (ie, the accuracy of the evidence).

For practical purposes, the approach of assuming credibility and reliability when applying s 137 should be treated as a general rule to which there are at least two established exceptions when assessing probative value and one arguable exception when assessing the danger of unfair prejudice.

The first exception is the requirement of rationality. If no reasonable jury could accept the evidence, it has no probative value; in fact, it fails the test of relevance (*IMM* [39]).

The second exception, which derives from the foggy evening hypothetical discussed in *IMM*, is where the "circumstances surrounding the evidence" render the evidence

"simply unconvincing" (*IMM* [50]). The scope of the "circumstances surrounding the evidence" has been considered by the VSCA in a number of ID cases and a sex case. In *Bayley,* the VSCA had regard to the following weaknesses of the ID evidence in holding that the TJ should have excluded it: V identified D from a single photo on Facebook in circumstance where V knew D had been charged with the murder and rape of another woman. Likewise in *Dempsey*, the VSCA had regard to such things as the lighting at the time of the offence (which may have impaired W's observations of the offender) and the fact that W's identification of D as the offender was made from a photo board, not at an ID parade ([128-134]). In *Hague*, however, the VSCA, whilst affirming *Bayley*, held that the TJ, in applying s 137, wrongly took into account 'internal inconsistencies' and 'inherent contradictions' in the multiple statements made to police by the ID witness. In *Dempsey* it was said that "matters that are essentially relevant to the credibility of…the witness" (*Dempsey* [127]) are not to be taken into account: in other words, matters bearing primarily on the veracity of W are off limits but not matters bearing on W's accuracy. Recourse to the latter was further constrained by the VSCA in *Snyder*, a sex case, where D's case was the V had "false memories" of being assaulted: the VSCA said at [62-63] that circumstances possibly affecting a person's perception of events could be considered in assessing probative value but not circumstances possibly affecting their memory.

Danger of unfair prejudice

The concept of the danger of unfair prejudice was discussed above in relation to s101 (T&C evidence). In short, the concept refers to the risk that the jury may misuse or overvalue the impugned evidence (*Dickman* [48]; *Hughes* [17]; *Papakosmos* [92]; *Dupas* [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* [46]). The fact that potentially unreliable evidence (eg ID 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* [44-48],[57], *Hague; cf Wilson* [133-135]).

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, for example, evidence which suggests other wrongdoing by D (see *Ebrahimi* [44-45], *Hague* [30 – 33], *Wilson* [111 -114, 137]; cf *Snyder* [66]).

There is some judicial support for the view that the reliability of evidence may be a relevant consideration when assessing the risk of unfair prejudice (*Mundine* [44], XY [48], see also ALRC 102 [16.47]). The plurality in *IMM* at [57] referred to this

approach without criticism (*Xie* [301]). But it is hard to reconcile such an approach with what the plurality in *IMM* said at [54] about the "evident policy" of the Act that reliability is generally a jury issue and that only ss 65(2)(c) & (d) & 85 permit a TJ to consider reliability when determining admissibility. It is also an approach that seems to pay lip service to the principle of taking the evidence at its highest when applying s 137 (cf *Lang* [17]).

For the sake of completeness, I note that there may also be scope to assess, rather than assume, the reliability of impugned evidence when applying the *Haddara* discretion.

On appeal

On an interlocutory appeal in relation to a ruling under s 137, the principles in *House* apply (*Ebrahimi* [21], *McCartney* [47- 51], *Paulino* [52], *Singh* [26], *Tuite* [8]). 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 (*Ebrahimi* [21], *Dupas* [241], *McCartney* [32], *Vyater* [34]).

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 TJ should have excluded the impugned evidence under s 137 (*Arico* [144]).

S 138 – Exclusion of improperly or illegally obtained evidence

S 138 replaces the common law *Bunning v Cross* discretion with an exclusionary rule and an exception to that rule (*Wu & Phan* [72]).

S 138 is not concerned only with evidence obtained by police. In *Kadir,* an RSPCA prosecution, some of the impugned evidence (video surveillance) was obtained illegally by animal rights activists.

Under s138, D bears the burden of proving on the balance of probabilities that there was illegality or impropriety (ie misconduct) and that there was a causal link between such misconduct and the obtaining of the impugned evidence (*Khalil* [10, 42, 43]). If D discharges this burden, the burden then shifts to P to justify admissibility (*Willis* [104]).

There are provisions which deem certain conduct to be improper (ss 138(2), 139). S 138(2)(a), which is confusingly worded, is concerned with coercion and s 138(2)(b) with deception (ALRC 26.1, [965]). 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 by s 138(2)(b) (which he doubted), the public interest nevertheless favoured the admission of the evidence of the confession (see especially [64-70]).

S138(3) sets out a non-exhaustive list of considerations which inform the balancing process required by s 138(1). *Johnston* is a striking example of the application of s 138: notwithstanding the high probative value and importance of the impugned evidence (footage of the rape of an unconscious women), the high range illegality of the police search of private premises, which uncovered the impugned evidence, led to its exclusion on appeal.

Whether a consideration mentioned in s 138(3) favours exclusion or admission of the impugned evidence, or is neutral, may vary depending on the particular circumstances. In *Kadir* (see especially [21]), the HCA held that the parties and NSWCCA were wrong to assume that the difficulty of obtaining the impugned evidence legally (s 138(3)(h)) supported its admission.

Other considerations not mentioned in s 138(3) may be the "the degree of connection" between the illegality/impropriety and the impugned evidence (*Slater* [44]) and attempts to cover up the misconduct after the evidence has been obtained (*Slater* [56]).

The VSCA has assumed to date that, on appeal, the principles in *House* apply to a challenge to a s 138 ruling (*Slater* [2019] [40-41], *MD* [27-30], *Marijancevic* [13]). That approach has been adopted in a recent interlocutory appeal (*Johnston* [115-116]) but may not necessarily be adopted in conviction appeals where 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 TJ'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 TJ , 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 TJ's decision to exclude the evidence under s 138 was not overturned. In *Willis*, the VSCA at [104-105, 110-111, 222] indicated it was necessary for a party on a conviction appeal challenging the TJ's findings of fact regarding s 138 to persuade the VSCA that the findings were not open.

S139 – Cautioning of Persons

For the purposes of s 138(1), s 139 deems evidence of PRs by D during questioning by an investigating official to have been improperly obtained if no caution was given prior to the questioning and certain other preconditions are satisfied.

To the extent that there is any inconsistency between the provisions of other Acts (eg s 464A(3) of the *Crimes Act 1958*) and s 139 with respect to the obligation on investigating officials to caution suspects, the other Acts take precedence over s 139 *(s 8, Vyater* [26]*).*

TABLE OF ABBREVIATIONS

AF (asserted fact); CPA (*Criminal Procedure Act* 2009); D (defendant/accused); D2 (co-defendant/co-accused); FHH (first hand hearsay); JDA (*Jury Directions Act* 2015); P (prosecution); PR (previous representation); R (representor/maker of a PR); T&C (tendency and coincidence); TJ (the trial judge); V (alleged victim/complainant); V.O.I.D (violent, oppressive, inhuman, degrading); W (witness); UEL (uniform evidence law)

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