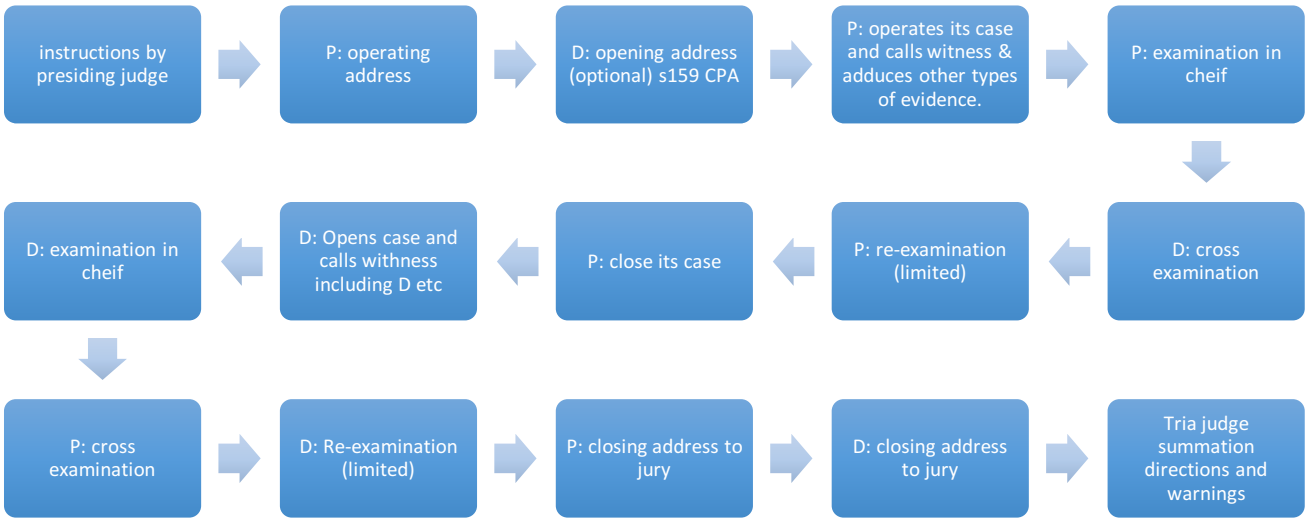
Week 2 class 2 Framing the Criminal Trial

Reading:
- Framing the Criminal Trial: fairness, the presumption of innocence: theory and practice
  - Ch 4, pp101 – 110
  - Optional or skim reading: Ch 4, pp111-128
- The Criminal Defendant in Court; right to silence and inferences from silence; competence/compellability of accused; ss 17, 20 (s108B)
  - Ch 10, pp 376 - 381; 389-405

The Structure of a jury trial



- Civil litigation, parties are treated as equally resourced, thus do need to address imbalance in the relationship between the partis.
  - This is reflected in the civil standard of proof: s140
- The goal of a trial: A sound trial outcome is one that is fair to the accused and promotes the dignity of all concerned in achieving a verdict that conforms to the adage.
- Better than then guilty persons escape than that one innocent suffer
- The goal of evidence law: balance the defendant's rights, enhance a complete and fair testing of all the evidence before the court as well as the avoidance of irrelevant evidence
  - Excluded evidence: irrelevant, dangerously unreliable (hearsay), carries 'the danger of unfair prejudice to the defendant' to an unacceptable level: s135, 136,137

Fairness:

- A fair trial means fair to the defendant, not the victim or the public.
- Fairness discretion applies in relation to confessions and admissions.
  - ***Pearse v Pearse (1846) UK***: *'The discovery and vindication and establishment of truth are main purposes… of the existence of Courts of Justice.'*
- However, truth-seeking is not without boundaries.
- Truth should only be pursued with moderation, fairness and by fair means. 'Prevailing community standards' set the standards of fairness and what are fair means.
  - *'Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal periods.' (R v Swaffield; Pavic v R (1998) HCA)*

Right to a Fair Trial

- The common law has developed its own jurisprudence on the right to a fair trial and comprehensive Human Rights legislation.

International covenant on civil and political rights

- The right to a fair trial is a bundle of rights, including the right of an accused to be present at a trial, to be legally represented, to test the prosecution case and 'equality of arms' etc.
- The right to a fair trial pivots upon the obligation to be fair to the accused.
- What about the witness and the victims?
  - Any loss of privacy or dignity they might suffer through the way they were questioned was seem as collateral damages, its goal is secure a fair trial for the accused
  - Should require greater respect be afforded to witnesses' treatment in court, especially vulnerable ones.
- Equality of arms rights address individual vulnerabilities of the defendant
  - e.g. they might be very young, have poor English skills or cognitive deficiencies, mental and physical health issues, educational or intellectual deficits.

Tomasevic v Travaglini (Vic): 'captured the essential injustice of treating unequal people equally'

France: 'the principle of the fair trial in its modern conception recognize that people are not all equal in relevant respects and some suffer from particular disadvantages that impede their equal access to justice.'

- Equality of arms requires measures to address systemic disadvantage between most defendants and the prosecution.

Common law right to a fair trial

- It represents as a right not to be tried unfairly, rather than as a right to a fair trial.
- The common law method is difficult to establish the content and presence of right.
- The common law can be responsive to changing needs and values.
    - Right to know the charges with sufficient particularity to meet those charges.
    - A fair trial is not impeded by the changing practice of the prosecution.
    - Disclosure rights
    - Avoid delay which prevents a fair trial
    - The obligation of the judge
    - The prosecutor must act fairly in court
    - Serious offence, there must be legal representation.
    - The right to an interpreter
    - If defence counsel is flagrantly incompetent, a court will quash a conviction.

Rectitude of Verdict/ Truth-seeking

- Within the prism of accusatorialism, criminal trial process and the rules of evidence seek to ensure that fact-finding supports an accurate verdict.
- The common law prefers to articulate the truth-seeking goal as one of 'procedural truth'

'Procedural truth'

- The determination of whether the prosecution has proven its case beyond reasonable doubt and in doing so acknowledging the presumption of innocence.
- In contrast to objective truth, truth-seeking is an objective, but not solely objective.
- Adjudication was based on a logical appreciation of the best evidence available.

Truth-enhancing court processes include:

- Excluding unreliable evidence (such as hearsay evidence)
- Soft management measures (such as witnesses having to wait outside the court before they give evidence, avoiding they collude)
- Core evidentiary obligations (e.g. making witnesses take an oath before giving evidence to increase the likelihood of truthfulness)
- The process for questioning witnesses and the use of judicial directions that alert jurors to possible frailties 弱点 in evidence

Presuming Innocence – Accusatorial Trials

International Covenant on Civil and Political Rights s 14(2): 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.'

- Adversarial trials are a process by which a party's version of the facts is tested through cross examination, the calling of witnesses and the presentment of evidence. This means that criminal trials are uneven battlefields. Hence, the presumption of innocence, the privilege against self-incrimination and the right to silence are important elements in shaping the trial.
    - The prosecutor has a heavy burden of proof, however they also have the resources of the state and the spoils of police investigations.
    - Defence resources depend on the personal resources of the accused, and whether they are able to gain legal aid.
- However, the accused has a presumption of innocence, meaning that there is no legal obligation on them to explain themselves, offer evidence or assist the prosecution case.

Theory

Court's sensitivity to subtle impact of the presumption in criminal trials.

Robinson v R*:* Jurors were told they should consider how much interest a witness (the defendant) has in a case when weighing up their testimony, instructed to look more closely at Robinson's evidence rather than anyone else's evidence – implying a defendant has a motive to lie was held to offend the presumption of innocence.
Palmer v R (1998) HCA: The court held that a defendant's inability to explain a complainant motive to lie in court 'is entirely neutral' – it is irrelevant and a distraction from the jury's fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt.
Azzopardi v R (2001) HCA: The trial judge gave an inappropriate direction in telling the jury that they might consider 'the fact the accused did not deny or contradict matters which were within his personal knowledge'. This failed to acknowledge the accused's right to remain silent and to be presume innocent.
Hargraves [2011] HCA: raised the question of whether the presumption might be disturbed because the trial judge had directed jurors attention to considerations relevant to assessing witnesses' credibility, including 'self-protection' and 'lies'.

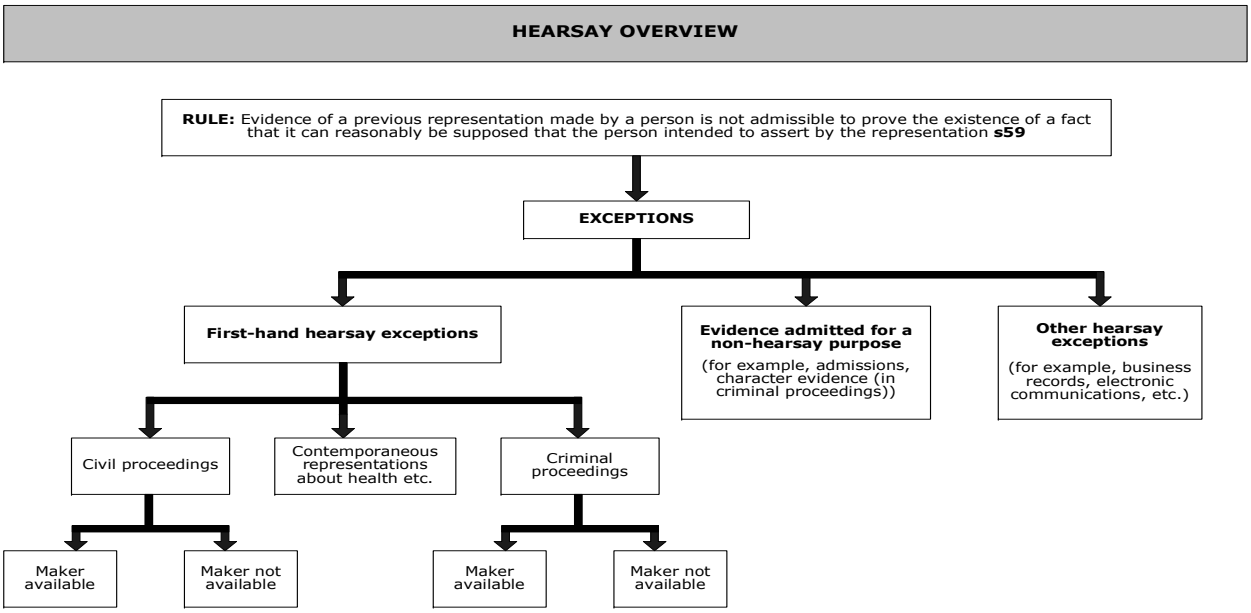
- These considerations are in a list of matters the jury might consider.
- By stating that the victims might have self-preservation motives to lie (i.e. to stop themselves from being found guilty), it was argued that the direction offended the presumption of innocence.

The High Court distinguished Hargraves with previous cases, finding that the directions were permissible.

Week 6 – Week 7: Exception of hearsay rules

- **Hearsay exceptions: rationale, first hand, ss 61, 62, 65, 67**
  - Ch 9, pp 328 - 362
- **Hearsay exceptions: 2nd hand/remote hearsay, ss 69, 72**
  - Ch 9, pp 362 - 370

- The rationales for the exception to the hearsay rule are based on situations where there is no reason to doubt the reliability of the evidence or the unreliability could not or would not be exposed by cross-examination. In these cases, the interests of 'efficient investigation' may tip the balance towards the admission of hearsay evidence.



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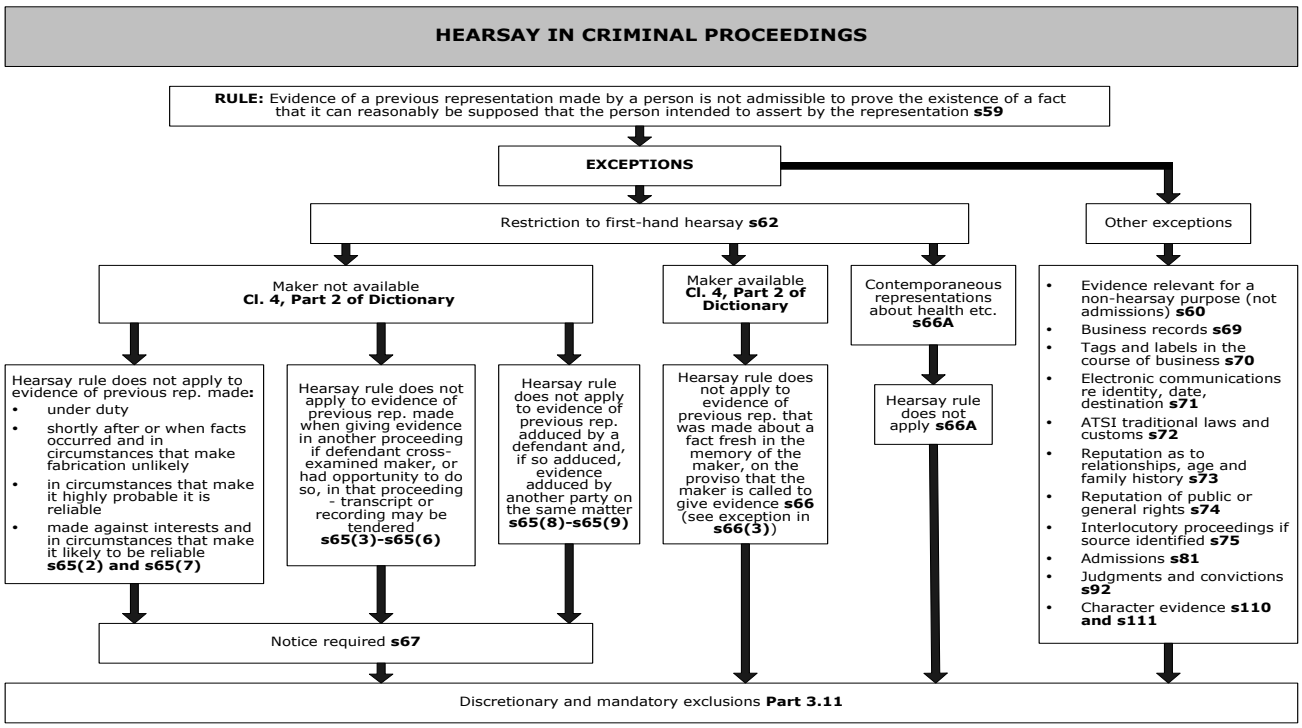

If previous representation relevant for hearsay purpose

- **(1) identify each, different, asserted fact**
- **(2) divide asserted facts into 1st hand or 2nd hand hearsay**
- **(3) 1st hand:**
    - Marker available: s66 – fresh in memory
    - Marker unavailable to give evidence: s65

Exception – first hand hearsay

The definition of first hand hearsay

S 62 Restriction to 'first- hand' hearsay
(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had **personal knowledge** of an asserted fact.
(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.
(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

- NO Personal knowledge: Put simply, in a case of W giving evidence of what X told him that Y (the only one with personal knowledge of the facts) had said, and we are using W's evidence of X's previous representation to prove the existence of the facts asserted by Y, this is second hand hearsay. This was the case in ***R v Lee (1996)***; HCA where a Crown witness failed to testify at trial that the accused had made admissions to him. The witness, in a police statement, detailed this. The Crown attempted to adduce evidence of the witness's previous representations through the police officer but this was clearly inadmissible as second hand hearsay.
- Additionally, s 62(2) provides that adducing an embedded representation (that is contained in the previous representation) to prove a fact is a no go. It appears that s 62(2) actually says that in establishing that the evidence is first hand hearsay, it is not necessary to prove that the declarant had knowledge of the facts asserted. It is enough to establish that he or she might reasonably be supposed to have had such knowledge – the limitation of the declarant.
- In ***R v Vincent*** , Vincent was charged with robbery. He objected to the complainant's evidence of a conversation V had with a young woman at the shop where the robbery occurred when she said 'I've got the car number, rego it's RRB373, it's a red car.' V submitted that this evidence should have been rejected unless the trial judge was satisfied on the balance of probabilities that the young woman did have personal knowledge about the car.
    - No said Hodgson JA, Simpson J and Smart AJ – 'the very short lapse of time from the robbery to the conversation, the circumstances of the conversation, and the words actually used do make it more probable than not that the woman was asserting something that she herself had observed.'

Section 65 – criminal proceedings, maker of the representation unavailable

The most significant constraint on the admission of first hand hearsay in criminal proceedings are imposed on prosecution evidence where the maker of the previous representation is unavailable to testify.

Evidence Act s 65
s 65 Exception: criminal proceedings if maker not available
(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

Defination of unavaiability
cl 4 Unavailability of persons
(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:
(a) the person is dead, or
(b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or
(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or
(d) it would be unlawful for the person to give the evidence, or
(e) a provision of this Act prohibits the evidence being given, or
(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or
(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
(2) In all other cases the person is taken to be available to give evidence about the fact.

- In ***Suteski (No 4) (2003); NSWSC***, the principal Crown witness had been involved in a contract killing and refused to testify even after being told he could be found in contempt. He was judged 'unavailable' on the basis that all reasonable steps had been taken to compel him to give evidence without success. (his police statement is under section 65)
- This has been applied in later decisions including ***DPP v Nichols [2010];*** VICSC where Beach J held the unavailability in cl 4(1)(g) includes both a refusal to give evidence that is without legal foundation and a refusal to give evidence that is authorised by court order, witness exempt under s18 UEA.
- In ***R v Aujla and Singh*** [2012]; VICSC, Forrest J made the point that the legislation does not impose a requirement of perfection, but merely that the conduct be reasonable.