

PART 1 – Condensed Notes

TOPIC OVERVIEW

- 1) Relevance
- 2) Examination in chief
- 3) Admissibility of documents
- 4) Cross examination
- 5) Opinion evidence
- 6) Hearsay
- 7) Confessions / right to silence / discretions (*SA only*)
- 8) Propensity (*SA only*)
- 9) The Shield (*SA only*)
- 10) Unreliable testimony and corroboration (*SA only*)

RELEVANCE (SA)

Describes relationship between evidence and MFs in issue
Not concerned with value or weight of evidence

- 1) **All relevant evidence is admissible:** Smith v R
- 2) **Real, Testimonial or Documentary?**
 - a. Real = documents / observables
 - b. Testimonial = observations reported through W
 - c. Document = type of real evidence, includes books, maps etc s 34G
- 3) **Direct or Circumstantial?**
 - a. Direct (e.g. eyewitness)
 - i. 1 inference
 - ii. Direct connection to MF
 - b. Circumstantial
 - i. >1 inference
 - ii. No direct connection to MF
- 4) **How is it relevant to MF in issue?**
 - a. Analyse
 - b. *If necessary*, provisionally relevant?
 - i. Received conditionally on assurance that more info will be tendered to show relevance: R v Elsom
- 5) **Discretion to exclude?** Where insufficient relevance
 - a. Throws so little light on the existence of MFs in issue: R v Stephenson
- 6) Next...
 - a. *If irrelevant, it is inadmissible*
 - b. *If relevant, go on to admissibility*

RELEVANCE (Cth)

*Describes relationship between evidence and MFs in issue
Not concerned with value or weight of evidence*

- 1) **All relevant evidence is admissible: s 56**
- 2) **Real, Testimonial or Documentary?**
 - a. Real = documents / observables
 - b. Testimonial = observations reported through W
 - c. Document = type of real evidence, anything on which there is writing etc: UEA Dictionary
- 3) **Direct or Circumstantial?**
 - a. Direct (e.g. eyewitness)
 - i. 1 inference
 - ii. Direct connection to MF
 - b. Circumstantial
 - i. >1 inference
 - ii. No direct connection to MF
- 4) **How is it relevant to MF in issue?**
 - a. Analyse
 - b. Must rationally affect (directly or indirectly) the assessment of probability of the existence of a fact in issue in the proceeding: s 55(1)
 - c. Consider: Not irrelevant only because it relates to: s 55(2)
 - i. Credibility of W
 - ii. Admissibility of other evidence
 - iii. Failure to adduce evidence
- 5) Next...
 - a. *If irrelevant, it is inadmissible*
 - b. *If relevant, go on to admissibility*

EXAMINATION IN CHIEF (SA)

Evidence should be human testimony so that it can be examined and tested

1) Is W competent and compellable to give evidence?

- a. A person is presumed to be capable of giving sworn evidence: s 9(1)
- b. May be sworn by oath s 6(1) or affirmation s 6(3)
- c. Does W not have sufficient understanding of obligation to tell truth? s 9(2)
 - i. Judge must: s 9(2)
 1. (a)(i): Be satisfied That W understands difference between truth and a lie
 2. (a)(ii): Tells the person the importance of the truth
 3. (b): Person indicates they will tell the truth
 - ii. Judge must then give **directions** to jury: s 9(4) [*Criminal*]
 1. (a) **must** explain to the jury the reason the evidence is unsworn
 2. (b) **may**, and **if a party requests must**, warn jury of the need for caution in determining whether to accept the evidence and the weight given
- d. **Exceptions**
 - i. Parties, their wives and husbands: s 16 [*Civil*]
 - ii. Accused is competent witness for D: s 18 [*Criminal*]
 1. (a) Accused must **choose** to be called
 2. (b) if no evidence is given, P **shall not comment** on Accused's failure to give evidence
 - iii. Close relative: s 21(1) [*Criminal*]
 1. s 21(7): Close relative = spouse, domestic partner, parent or child
 2. s 21(2): Close relative may apply for exemption
 - a. s 21(3): Factors judge considers
- e. **Unreliable W?**
 - i. Judge has residual discretion to exclude evidence where grave doubts about reliability of W testimony: R v Horsfall
 1. Horsfall: Child complainant incompetent as had undergone hypnotherapy after alleged assault
 - ii. Only where judge is persuaded to exclude unreliable testimony altogether on the basis that to admit would be prejudicial: Rozenes v Beljajev
- f. **Special W? Protections may be afforded**
 - i. Young children: s 12
 1. May be accompanied by someone who can provide emotional support: s 12
 2. Young child = < 14: s 4
 - ii. Ws likely to suffer embarrassment, distress, intimidation: s 13(1)
 1. Special arrangements can be made: s 13(2)
 2. In *Criminal* case judge must **warn** the jury not to draw any inference adverse to the defendant, or influence the weight to be given to the evidence: s 13(7)
 - iii. Vulnerable W: s 13A(1) [*Criminal*]
 1. Special arrangements can be made: s 13A(2)
 2. Vulnerable = < 16, suffering mental disability, alleged V of the offence, subject to threats of violence: s 4
 - iv. Vulnerable Ws: s 13B [*Civil* + *criminal*]

1. D can't personally XN a W who is the alleged victim of a serious offence against or of a breach of a domestic violence restraining order allegedly committed by D: s 13B
 - a. s 13C: Court can make video recording of W's testimony
 - i. **Must** where W is < 16 and alleged V to sexual offence: s 13C(1)(a)
 - ii. **May** for other vulnerable Ws: s 13C(1)(b)
- v. Protected W
 1. Testimony can be admitted for a **hearsay use**: s 34LA
 - a. Admits generally the prior statements of protected Ws (young children and witnesses with cognitive impairment)
 - i. C must be satisfied that the statement has sufficient probative value to justify its admission
- vi. Poor English?
 1. May be permitted an interpreter where not 'reasonably fluent' in English: s 14
- 2) **Testifying from memory?**
 - a. **OOO refreshing memory**
 - i. W may use any sort of material to refresh memory OOC: R v Richardson
 - ii. Opposing counsel may call for any doc used before trial to revive memory: Collaton v Correl
 - b. **In-Court refreshing memory**
 - i. May only refresh memory
 1. With *leave* of C (determined at voir dire)
 2. Where he/she is *no longer able to testify from memory*: Hetherington v Brooks
 3. Where document is *made by W contemporaneously*: R v Van Beelen
 - ii. May only be used as aide memoire: Hetherington v Brooks
 - iii. May use without tendering
 - c. **In-Court admitting document**
 - i. General – oral testimony admitted, not document
 - ii. Exceptions
 1. In XN if established PIS in doc
 - a. Opponent tenders to prove truth of inconsistency: s 29
 2. In XN if refers to part of document
 - a. If XN refers to parts of document not used to refresh memory
 - i. Party calling W can insist the whole doc be tendered as hearsay evidence: R v McGregor
 3. If W merely reads document
 - a. Opposing counsel may request the party calling W to tender the doc: R v Alexander & Taylor
 - b. Tendered only as **hearsay evidence** of W's observations
- 3) **Bolster rule**
 - a. Parties cannot tender evidence in support of W's credibility during XN!
 - i. BUT W's credibility may be of crucial/obvious significance to determining MFs in issue that it is appropriate/necessary to lead in XN
 - ii. HML v R: History/context leading up to charged acts of sexual assault
- 4) **Prior consistent statement?**
 - a. Is there an OOC statement tendered to be corroborative of story?
 - i. Inadmissible as offends both the **bolster** and **hearsay** rules
 - b. Exception #1 – Prior statement tendered to rebut allegation of recent invention

- i. Where opponent in XXN alleges W has invented testimony for a particular reason, the party calling W can, in ReXN, adduce evidence of PCS: Nominal D v Clements
- c. Exception #2 – Prior statement in which W identified D
 - i. The ID of D by W must be done in court in front of the trier of fact – evidence that W ID'd the suspect prior to trial is *prima facie hearsay*: Alexander
- d. Exception #3: Initial complaints in sexual cases
 - i. s 34M(3): Evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence
 - 1. Includes:
 - a. When the complaint was made and to whom
 - b. Content of complaint
 - c. How complaint was solicited
 - d. Why complaint was made to *that* person at *that* time
 - e. Why alleged victim did not make the complaint earlier
 - ii. s 34M(4): Judge **must** give **directions**
 - iii. s 34LA(1): C may admit statement made outside C by protected W (young children and witnesses with cognitive impairment affecting their capacity to testify)
 - 1. Exception to **bolster** and **hearsay** rule
 - iv. Where no prior complaint
 - 1. Failure or delay in making complaint not of probative value: s 34M(2)

5) Adverse W?

- a. Cannot ask own W leading questions, but no prohibition on calling later W to contradict testimony: R v Welden
 - i. BUT where W is adverse, may apply to C to **declare W hostile** and then XXN W using leading Qs and PIS to **discredit** W
- b. Forgetful/confused W?
 - i. Process
 - 1. Allow them to refresh their memory; or
 - 2. Judge may permit counsel to put previous statement in W's hands and ask leading questions about the statement to get W back on track: R v Thynne (*W need not be declared hostile*)
- c. Hostile W?
 - i. Unwilling to tell truth: R v Hayden and Slattery
 - ii. Establish hostility
 - 1. If demeanour is obviously hostile ruling may be made immediately in open court: R v Hadlow
 - 2. If doubt about demeanour OR determination is based on **PIS**, seek leave to have W declared hostile on the voir dire: s 27; Price v Bevan
 - 3. s 27: If the judge is of the opinion the witness is adverse, party calling W may
 - a. (a) contradict W by other evidence
 - b. (b) with judge's permission, prove W has made a statement inconsistent with present testimony
 - iii. Discredit W
 - 1. If hostility established, XXN permitted to discredit adverse testimony
 - 2. Proving PIS may be only done for credit, NOT hearsay

PART 2 – Extended Notes

BURDEN and STANDARD OF PROOF

- 1) **Evidential burden:** Adducing relevant evidence of MFs
 - a. Failure to satisfy entitles opponent to submit no case to answer – *see below*
- 2) **Persuasive burden:** Persuading the court to accept the material facts in issue
 - a. Failure to satisfy means the facts are not proven – *see below*

	<u>CIVIL</u>		
	Prosecution	Defendant	Exceptions
Burden	Both burdens in relation to MFs essential to establishing the CoA	Both burdens in relation to MFs essential to establishing defence or counterclaim	<u>Purkess v Crittenden</u> Evidential burden on D to allege injuries were pre-existing <i>Once met</i> Persuasive burden on P to show injuries resulted from accident
Standard	<i>Common law</i> BOP: <u>Briginshaw</u> <i>UEA</i> BOP: <u>s 140</u>	<i>Common law</i> BOP: <u>Briginshaw</u> <i>UEA</i> BOP: <u>s 140</u>	
	<u>CRIMINAL</u>		
	Prosecution	Defendant	Exceptions
Burden	Both burdens in relation to MFs of the crime charged – due to presumption of innocence: <u>Woolmington</u> P bears persuasive burden to negative defence	D bears evidential burden to raise defence and adduce credible evidence of its possibility	<i>Mental Impairment</i> D bears both burdens (BOP) due to presumption of mental competence: <u>s 269D CLCA</u>
Standard	<i>Common law</i> BRD: <u>Woolmington</u> <i>UEA</i> BRD: <u>s 141(1)</u>	<i>Common law</i> BOP: <u>Everard v Opperman</u> <i>UEA</i>	

DEFENCE SUBMISSIONS

Type	Submission	Test	Is J obliged to consider submission?	Can D be put to election on whether to call evidence?	Result
No case to answer <i>Legal</i>	No evidence on at least 1 MF Considering evidence existence, NOT its strength <i>Evidential burden not satisfied</i>	<i>CRIMINAL</i> Has P adduced evidence which, taken at its strongest is capable of persuading a reasonable ToF BRD that each MF exists: <u>Queen v Bilick & Starke</u> <i>CIVIL</i> Is there evidence from which the ToF could find the MF proved to civil standard: <u>May v O'Sullivan</u>	Yes -> it is a right	No -> J cannot force D to elect whether they are going to call evidence	J directs Jury to find not guilty (verdict by direction - <i>binding</i>) Weight and credibility not considered
Prasad (sufficiency) <i>Factual – weighing evidence</i>	There is some evidence, but too weak to convince fact finders Considering evidence strength <i>Legal burden not satisfied</i>	<i>CRIMINAL</i> Evidence adduced by P satisfies evidential burden but is too weak to persuade a reasonable ToF BRD or it lack weight/reliability making it unsafe to convict: R v <u>Prasad</u> <i>CIVIL</i> C generally won't consider unless all evidence is in: <u>Copper Industries v Hill</u>	No -> J has a discretion	Yes -> as evidence is being weighed, J may seek to have more evidence	J would give advice to jury as there is still some evidence (cannot be verdict by direction – <i>not binding</i>) Involves weighing of evidence

COURT'S FACT-FINDING POWERS (SA)

1) Calling W

- a. Generally prohibited
- b. Exception – *CIVIL*
 - i. Judge may call W with parties' consent
 - ii. C examines, and then parties XXN
 - iii. Sharp v Rangott
 - 1. Judges can be more acting in calling W where it appears necessary to seek truth
- c. Exception – *CRIMINAL*
 - i. P has absolute discretion in relation to calling W BUT
 - 1. P has an overriding duty to the fair administration of justice by calling all material witnesses
 - ii. C has no right to insist in calling a particular W and should not interfere in adversarial system: Apostilides
 - iii. The issue is whether absence of W caused a miscarriage of justice
 - 1. Apostilides: absent W was complainant to sexual assault = appealable

2) Directing party to call W

- a. C has no power to insist party call W
 - i. *CIVIL*: Briscoe v Briscoe
 - ii. *CRIMINAL*: R v Sullivan

3) Asking questions of W

- a. A judge may by own motion or on jury request, put questions to W: Yuill v Yuill
- b. Should not
 - i. Interfere with party's strategy
 - ii. Raise issues not raised by party
- c. Should be used to clear up ambiguities or uncertainties

4) Judicial notice

- a. May take judicial notice where facts are beyond dispute and simply ascertainable
- b. Common law
 - i. Where information is notorious and indisputable and would be a waste of time to insist upon adversarial proof
 - ii. No definitive limit to knowledge that might be seen as indisputable
- c. SAEA
 - i. Matters of public history, literature, science or art: s 64
 - 1. May refer to published books, calendars, maps, or charts as such courts consider to be of authority on the subject
 - a. **Allows Ps to tender hearsay evidence contained in published works of authority to prove certain matters: Cavanett v Chambers – *hearsay connection*
 - b. Potentially applies to both indisputable and controversial facts
 - c. BUT if disputable, both parties must consent otherwise must be ordinarily proven at trial: Cavanett v Chambers
 - ii. Legislative instruments: s 35
 - 1. Court **MUST** take notice of these
 - iii. Dispensing with formal proof in general: s 59J(1)
 - 1. (1) A court may at any stage of civil or criminal proceedings—
 - a. (a) Dispense with compliance with the rules of evidence for proving any matter that is *not genuinely in dispute*; or
 - b. (b) where compliance might *involve unreasonable expense or delay*

2. (2) May, eg, dispense with—
 - a. (a) a document or the execution of a document;
 - b. (b) handwriting;
 - c. (c) the identity of a party;
 - d. (d) the conferral of an authority to do a particular act

5) **Court's own knowledge**

- a. ToF rely upon experiences of life to decide whether
 - i. To believe W
 - ii. To draw inferences from tendered evidence
- b. Use of generalized knowledge is not an exercise in judicial notice

COURT'S FACT-FINDING POWERS (Cth)

1) Calling W

- a. UEA s 26: C may make orders it considers just in relation to
 - i. (a) Way in which Ws are questioned
 - ii. (b) production and use of documents in connection with questioning W
 - iii. (c) order which parties may question a Q

2) Directing party to call W

- a. C has no power to insist party call W
 - i. **CIVIL**: Briscoe v Briscoe
 - ii. **CRIMINAL**: R v Sullivan

3) Asking questions of W

- a. A judge may by own motion or on jury request, put questions to W: Yuill v Yuill
- b. Should not
 - i. Interfere with party's strategy
 - ii. Raise issues not raised by party
- c. Should be used to clear up ambiguities or uncertainties

4) Judicial notice

- a. UEA
 - i. Legislative instruments: s 143
 - 1. (1) Proof not required of legislative instruments
 - 2. (2) Judge may inform themselves in any way they think fit
 - ii. Matters of common knowledge: s 144
 - 1. (1) Proof is not required about **knowledge that is not reasonably open to question** and is:
 - a. (a) **common knowledge in the locality** in which the proceeding is being held or generally; or
 - b. (b) **capable of verification** by reference to a document the **authority** of which cannot reasonably be questioned
 - 2. (2) The judge may acquire knowledge of that kind in any way the judge thinks fit
 - 3. (4) The judge must give a party the opportunity to make submissions, re acquiring knowledge to ensure that the party is not unfairly prejudiced
 - iii. **CIVIL** Dispensing with formal proof in general: s 190(3)
 - 1. C may order this where:
 - a. (a) the matter to which the evidence relates is not genuinely in dispute; or
 - b. (b) the application of those provisions would cause or involve unnecessary expense or delay

5) Court's own knowledge

- a. ToF rely upon experiences of life to decide whether
 - i. To believe W
 - ii. To draw inferences from tendered evidence
- b. Use of generalized knowledge is not an exercise in judicial notice

RELEVANCE (SA)

- 1) **State:** All relevant evidence is admissible: Smith v R
 - a. Evidence is relevant if it tends to prove or disprove an MF in issue: Smith v R
- 2) Real, Testimonial or Documentary?

Real	Testimonial	Documentary
<ul style="list-style-type: none"> – Documents / observables – Must be authenticated with witness testimony 	<ul style="list-style-type: none"> – Observations reported through a witness – Witnesses called to stand 	<ul style="list-style-type: none"> – Document includes books, maps, plans, drawings and photographs: <u>s 34G EA(SA)</u> – Type of real evidence – Authenticated with testimony

- 3) Direct or Circumstantial?
 - a. Direct
 - i. Direct connection to MF
 - ii. E.g. eyewitness
 - iii. 1 inference
 - b. Circumstantial
 - i. >1 inference
 - ii. No direct connection to MF
- 4) Relevant? How?
- 5) **If necessary:** provisional relevance?
 - a. May be provisionally relevant
 - i. Received conditionally on assurance that more info will be tendered to show relevance: R v Elsom
- 6) **Consider:** discretion to exclude for insufficient relevance?
 - a. Where it throws so little light on the existence of MFs in issue: R v Stephenson
 - b. *Analogies*

- i. Smith v R: Testimony from police identifying D as culprit photographed on CCTV was irrelevant
 - ii. – Police had no knowledge beyond jury
 - iii.
 - iv. Evans v R: dressing D in disguise to compare him to security video was irrelevant
 - v. – Revealed nothing about wearer that was not already apparent to jury
- 7) Next...
 - a. *If irrelevant, it is inadmissible*
 - b. *If relevant, go on*

RELEVANCE (UEA)

- 1) **State:** Relevant evidence is admissible: s 56
 - a. Must rationally affect (directly or indirectly) the assessment of probability of the existence of a fact in issue in the proceeding: s 55(1)
 - i. Logical connection between evidence and fact in issue: Papakosmas
- 2) Real, Testimonial or Documentary?

Real	Testimonial	Documentary
<ul style="list-style-type: none">– Documents / observables– Must be authenticated with witness testimony	<ul style="list-style-type: none">– Observations reported through a witness– Witnesses called to stand	<ul style="list-style-type: none">– Document includes books, maps, plans, drawings and photographs: <u>s 34G EA(SA)</u>– Type of real evidence– Authenticated with testimony

- 3) Direct or Circumstantial?
 - a. Direct
 - i. Direct connection to MF
 - ii. E.g. eyewitness
 - iii. 1 inference
 - b. Circumstantial
 - i. >1 inference
 - ii. No direct connection to MF
- 4) Relevant? How?
 - a. **Consider:** Not irrelevant only because it relates to: s 55(2)
 - i. Credibility of W
 - ii. Admissibility of other evidence
 - iii. Failure to adduce evidence
- 5) Next...
 - a. *If irrelevant, it is inadmissible*
 - b. *If relevant, go on*

EXAMINATION IN CHIEF (SA)

Competence and compellability

1) Presumptions

- a. A person is presumed to be capable of giving sworn evidence: s 9(1)
 - i. UNLESS judge determines W does not have **sufficient understanding** of the obligation to be truthful

2) Sworn evidence

- a. W may
 - i. take oath: s 6(1) or
 - ii. make affirmation: s 6(3)

3) Unsworn evidence

- a. SAEA s 9(2) If the judge determines that W does not have **sufficient understanding** of the obligation to be truthful the judge may permit unsworn evidence if—
 - i. (a) the judge
 - 1. (i) is satisfied that the person understands the difference between the truth and a lie; and
 - 2. (ii) tells the person that it is important to tell the truth; and
 - ii. (b) the person indicates that he or she will tell the truth.
- b. If **CRIMINAL** with jury – **directions**
 - i. s 9(4) If unsworn evidence is given under this section in a criminal trial, the judge—
 - 1. (a) **must** explain to the jury the reason the evidence is unsworn; and
 - 2. (b) **may**, and **if a party so requests must**, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it

4) Exceptions

- a. Parties, their wives and husbands **CIVIL**
 - i. s 16: Parties, their wives and husbands ARE competent and compellable
- b. Accused **CRIMINAL**
 - i. s 18: Accused is competent witness for **D**
 - 1. (a) Accused must **choose** to be called
 - 2. (b) if no evidence is given, P **shall not comment** on Accused's failure to give evidence
- c. Close relatives **CRIMINAL**
 - i. s 21(1): Close relative competent and compellable to give evidence for P or D
 - 1. s 21(7): Close relative = spouse, domestic partner, parent or child
 - ii. s 21(2): Close relative may apply to C for exemption to give evidence against Accused
 - 1. s 21(3): Factors C considers
 - 2. (a) if W were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of—
 - a. (i) **serious harm to the relationship** between the prospective witness and the accused; or
 - b. (ii) **serious harm of a material, emotional or psychological nature** to the prospective witness; and
 - 3. (b) considering the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is **insufficient justification** for exposing the prospective witness to that risk

5) Unreliable Ws?

- a. Judge has residual discretion to exclude evidence where grave doubts about reliability of W testimony: R v Horsfall

- i. R v Horsfall Child complainant incompetent as had undergone hypnotherapy following alleged assault

- b. Only where judge is persuaded to exclude unreliable testimony altogether on the basis that to admit would be prejudicial: Rozenes v Beljaev
- c. Should seldom be used where ToF can determine reliability

6) Protection for special Ws

a. Young children

- i. Young child = <14: s 4
- ii. Young child who testifies may be accompanied by someone who can provide emotional support: s 12

b. Ws likely to suffer embarrassment, distress, intimidation

- i. C should where necessary make special arrangements for W, where necessary to protect W from embarrassment, distress, intimidation: s 13(1)
- ii. s 13(2): includes testimony by:
 - 1. Video link
 - 2. Pre-recorded testimony
 - 3. Screens blocking them from view
 - 4. Exclusion of D while evidence is taken
 - 5. Relative or friend for support
- iii. **Direction** – **CRIMINAL**
 - 1. s 13(7): judge must warn the jury not to draw from special arrangements any inference adverse to the defendant, or influence the weight to be given to the evidence

c. Vulnerable Ws **CRIMINAL**

- i. Vulnerable W = < 16, suffering mental disability, alleged V of the offence, subject to threats of violence: s 4
- ii. s 13A(1): Court must, wherever vulnerable W is to testify in **criminal** proceedings, make special arrangements to take evidence
 - 1. Wherever a plausible and reasonable application is made: R v WS
- iii. s 13A(2): Includes taking testimony by
 - 1. Video link
 - 2. Pre-recorded testimony
 - 3. Screens blocking them from view
 - 4. Exclusion of D while evidence is taken
 - 5. Relative or friend for support
- iv. s 13A(12): Jury must be **warned** not to draw adverse inference from the special arrangements, or allow them to influence the weight given to the evidence – **directions**

d. Vulnerable Ws **CIVIL** or **CRIMINAL**

- i. s 13B: D cannot personally XN a W who is the alleged victim of a serious offence against the person or of a breach of a domestic violence restraining order allegedly committed by the defendant
- ii. s 13C: Court can make video recording of W's testimony
 - 1. **Must** where W is < 16 and alleged V to sexual offence: s 13C(1)(a)
 - 2. **May** for other vulnerable Ws: s 13C(1)(b)
- iii. s 13D: Court may admit evidence taken in earlier proceedings if relevant and W is –
 - 1. Dead
 - 2. Too ill to give evidence

3. Has not been found after diligent search
 4. Is a vulnerable W
- e. **Protected Ws**
- i. Testimony can be admitted for a **hearsay use**
 1. s 34LA: Admits generally the prior statements of protected witnesses (young children and witnesses with cognitive impairment) as hearsay if the court is satisfied that the statement has sufficient probative value to justify its admission
- f. **Poor English?**
- i. May be permitted an interpreter where not 'reasonably fluent' in English: s 14

Testifying from memory? Is someone having trouble recalling

1) OOC Refreshing memory

- a. W may use any sort of material to refresh memory OOC: R v Richardson
- b. Opposing counsel may call for any doc used before trial to revive memory: Collaton v Correl
 - i. BUT failure to produce only goes to credit and not admissibility of evidence

2) In-Court refreshing memory

- a. **W may only refer to a doc in C to refresh memory
 - i. (a) with **leave** of C (determined at voir dire)
 - ii. (b) where he/she is **no longer able to testify from memory**: Hetherington v Brooks
 - iii. (c) where document is **made by W contemporaneously**: R v Van Beelen
- b. General rules
 - i. May only be used as an aide memoire – cannot read out, unless no revival of memory: Heatherington
 - ii. May use without tendering
 - iii. Must be given to opponent on request: R v Harrison
 - iv. Standard practice for police: O'Sullivan v Waterman

1. O'Sullivan v Waterman: police officers entitled to refresh memory from jointly prepared report

3) In-Court admitting document

- a. Where W is permitted to testify using a doc – oral testimony is admissible evidence and doc is not admitted
 - i. Opponent may use doc without putting into evidence: R v Pachonik
- b. **May tender
 - i. In **XXN** if established PIS in doc
 1. If opponent finds inconsistency between doc and W's oral testimony and W denies statement in doc -> tender to prove truth of inconsistency: s 29
 2. Opponent may use inconsistency only to discredit W: Dairy Farmers v Acquilina
 - a. Not as evidence of truth of assertion
 3. **If D admits inconsistency** doc has served discrediting purpose and need not be tendered
 - ii. In **XXN** if refers to part of doc
 1. If XXN refers to parts of doc not used to refresh memory -> party calling W can insist the whole doc be tendered as hearsay evidence: R v McGregor
 - iii. If W merely reads doc

1. Opposing counsel may request the party calling W to tender the doc:
R v Alexander & Taylor
2. Tendered only as **hearsay evidence** of W's observations

Bolster rule? Is opposing counsel trying to make Q's credibility look good?

- 1) Parties cannot tender evidence in support of W's credibility during XN!
 - a. BUT W's credibility may be of such crucial and obvious significance to determining the material facts in issue that it is appropriate/necessary to lead in XN
 - i. HML v R: History/context leading up to charged acts of sexual assault

Prior consistent statement? Has someone made an OOC that is intended to corroborate story?

- 1) Is there a prior OOC statement tendered to be corroborative of story? Inadmissible
 - a. Prior consistent statements prima facie inadmissible as they **offends both the BOLSTER and HEARSAY rules**
- 2) **Exception #1: Prior statement tendered to rebut allegation of recent invention**
 - a. Where opponent in XXN alleges W has invented testimony for a particular reason, the party calling W can, in ReXN, adduce evidence of PCS: Nominal D v Clements
 - i. Rebutts allegation of recent invention
 - ii. Must have been made before alleged reason for invention arose: Mapp v Stephens
 - b. **Process:** Nominal D v Clements
 - i. (1) Has credit of W been impugned or attacked on the ground of recent invention?
 - ii. (2) Does the content of the statement rationally tend to answer the attack?
 - c. **Example**
 - i. Nominal D v Clements: suggestion P was coached by father rebutted by PCS made to police before any opportunity for coaching arose
- 3) **Exception #2: Prior statement in which W identified D**
 - a. The ID of D by W must be done in court in front of the trier of fact – evidence that W ID'd the suspect prior to trial is **prima facie hearsay**: Alexander
 - i. 1/2 court admitted it in exception to hearsay; other 1/2 said did not involve hearsay
 1. Only function of out-of-court evidence is to fill in details of in-court testimony
 - b. PCS of ID will be admitted in exception to hearsay and bolster rules because of its **vital importance to W's credibility**
 - c. **Scenarios**
 - i. W identifies accused in court
 1. Where W identifies D in court, the following are admissible to support credibility of in-court ID: Alexander v R
 - a. (a) W's PCS
 - b. (b) call independent W to identification
 - c. (c) associated docs/photos
 - ii. Cannot identify D but testifies to previously identifying
 1. Where W cannot identify D in court but testifies to identifying previously, PCS is hearsay BUT –
 - a. (a) independent W to identification; and
 - b. (b) associated photos/docs
 2. Are admissible to prove prior identification: Alexander v R
 - iii. Where D is well-known to W

1. Where D is well known to W, no need to confirm ID before trial
AND PCS of ID is inadmissible: R v Jansen
- 4) **Exception #3: Complaints in sexual cases**
 - a. **Previously recent complaint**
 - i. (1) Made spontaneously (not in response to leading questions)
 - ii. (2) At the first reasonable opportunity
 - b. **Now 34M – Initial complaint** (abolishes CL of recent complaint in sexual cases)
 - i. s 34M(3): Evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence
 2. Includes:
 - a. When the complaint was made and to whom
 - b. Content of complaint
 - c. How complaint was solicited
 - d. Why complaint was made to a particular person at a particular time
 - e. Why the alleged victim did not make the complaint at an earlier time
 - iv. s 34M(4): **directions** Judge MUST direct jury that:
 1. Evidence is admitted to inform the jury as to how the allegation first came to light and evidence of consistency of V's conduct
 2. Evidence is not admitted as evidence of the truth
 3. Otherwise a matter for jury to determine significance of the evidence
 - v. s 34LA(1): C may admit statement made outside C by protected W (young children and witnesses with cognitive impairment affecting their capacity to testify)
 1. **Exception to BOLSTER and HEARSAY rule**
 - b. **If no prior complaint**
 - i. s 34M(2): no suggestion or statement may be made to the jury that **a failure to make, or a delay in making**, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct

Adverse witness? Someone that is being difficult in the W box

- 1) General rule
 - a. Cannot ask own W leading questions, but no prohibition on calling later W to contradict testimony: R v Welden
- 2) BUT Where W is adverse, may apply to C to **declare W hostile** and then XXN W using leading Qs and PIS to **discredit** W
- 3) **Type of W**
 - a. **Forgetful/confused**
 - i. If W fails to come up to proof through seriousness forgetfulness or confusion:
 1. (1) Allow them to **refresh their memory**; or
 2. (2) Judge may permit counsel to put previous statement in W's hands and ask leading questions about the statement to get W back on track: R v Thynne (more limited than hostile XXN)
 - a. *W need not be declared hostile*
 - b. **Hostile**
 - i. "Hostile"?
 1. Unwilling to tell truth: R v Hayden and Slattery

2. Deliberately withholding evidence due to unwillingness to tell truth: R v Hutchinson
 - a. Can reveal itself through demeanour or through presence of **PIS**
- ii. Establish hostility
 1. **If demeanour is obviously hostile** ruling may be made immediately in open court: R v Hadlow
 2. **If there is doubt about demeanour OR determination is based on **PIS**, seek leave to have W declared hostile on the voir dire: s 27; Price v Bevan**
 - a. Ask W whether at some particular time and place an inconsistent statement was made
 - i. *W admits* -> no requirement to call other evidence to prove
 - ii. *W denies* -> PIS must be proved to discredit the witness
 3. s 27: If the judge is of the opinion the witness is adverse, the party calling the witness may –
 - a. (a) contradict W by other evidence
 - b. (b) with judge's permission, prove W has made a statement inconsistent with present testimony
- iii. Discredit W
 1. If hostility established, XXN permitted to discredit adverse testimony
 2. Proving PIS may be only done for credit, NOT hearsay (**unless exception applies**)