

Relevance

- Relevant = renders the existence of a disputed fact more or less probable than it would have been if that evidence had not been heard
 - Material is legally relevant if it's logically relevant and not too remote [Hollingham] [Stephenson]
 - Facts in issue = directly supports/undermines disputed element
 - Circumstantial evidence = inferences drawn that supports/undermines disputed element
- Exclusionary rules:
 - Unreliability – hearsay & opinion
 - Tendency to mislead – SFE
 - Public policy – privilege & unlawfully obtained evidence
- Discretions:
 - Christie – prejudicial effect outweighs probative value
 - Fairness – unfair to accused to use evidence obtained
 - Bunning v Cross – material obtained illegally or improperly by public authority.Consider:
 - Deliberate, reckless or negligent breach of procedure
 - Probative value of evidence
 - Ease which law could've been complied with
 - Nature of offence (seriousness)

Competence and Compellability

- General rule – everyone who is competent is compellable [Hoskyn v Metropolitan Police Commissioner]
- Competence = allowed to give evidence
 - S6 – previously convicted person or persons with an interest in the case are still competent to give evidence
- Compellability = obliged to present evidence by effect of law under threat of charge of contempt (s130)
- S97 – unless exempted, witness must give oath
 - S4(2) Oaths, Affidavits and Statutory Declarations Act – lack of religious belief at the time of taking an oath doesn't affect the validity of the oath
- S100A – may be able to give unsworn evidence, but witness is required to speak the truth, tell everything s/he knows about the matter (if compellable witness) under threat of charge of contempt
 - For people who may not understand the nature or obligation of oath
 - Weight and credibility of evidence will be assessed if it's unsworn

Children

- [Brown] child is competent if s/he is capable of understanding the nature and effect of an oath
- S106A – at the time presenting evidence, person under 18

- Age 13-17 are treated as adults
- Age < 12 – may give **sworn** evidence if they know that giving evidence is a serious matter and that they have an obligation to tell the truth (s106B(3))
 - Whether conditions under s106B have been met – judicial inquiry conducted in presence of jury, assessing the child’s demeanour in deciding the credibility of child’s evidence [Hamilton]
 - Inquiry must be tailored to the age, culture, background and ability of child [GWD v WA]
 - Jury will not be present if child is an affected witness
- If conditions not met under s106B, TJ can consider child giving **unsworn** evidence if they can give an **intelligible account** of events they experienced or observed (s106C) [Revesz]
 - Intelligibility rather than the accuracy or reliability [GO v WA]
 - Identifying Frozen as TV show rather than movie did not mean she could not give intelligible account of events
 - Weight and credibility of evidence will be assessed if it’s unsworn
 - Also applicable to mentally impaired witness
- S106D – cannot give corroboration warning on evidence of child because of the general unreliability of children’s evidence
- S106E – child witnesses are entitled to support (someone to accompany and be near them in court)
- S106F – child or affected child are entitled to assistance (support person at witness box, a child interpreter)
- S106HA-HB – children and persons with mental impairment can give evidence through visual recording of interviews

Witness with disability or intellectual impairment

- S100A – person with disability or intellectual impairment can give unsworn testimony
- S102 – interpreter for people with physical disabilities should be under oath, unless dispensed under s103
- S106A & s8 Criminal Law (Mentally Impaired Accused) Act – mental impairment:
 - **Mental impairment** = intellectual disability, mental illness, brain damage or senility
 - **Mental illness** = underlying pathological infirmity of the mind, short or long duration, permanent or temporary, but doesn’t include a condition that results from reaction of a healthy mind to extraordinary stimuli
- Mental impairment – also governed by s106B & s106C:
 - S106B(3) – may give **sworn** evidence if they know that giving evidence is a serious matter and that they have an obligation to tell the truth
 - Whether conditions under s106B have been met – judicial inquiry conducted in presence of jury, assessing the witness’s demeanour in deciding the credibility of evidence [Lau] [Hoogwerf]
 - Inquiry must be tailored to the age, culture, background and ability of witness
 - Jury will not be present if affected witness

- If conditions not met under **s106B**, TJ can consider witness giving **unsworn** evidence if they can give an intelligible account of events they experienced or observed (**s106C**) [Revesz]
 - Intelligibility rather than the accuracy or reliability
 - Weight and credibility of evidence will be assessed if it's unsworn
 - Also applicable to mentally impaired witness

S106R(3) Special witness:

- (a) by reason of **physical disability** or **mental impairment**, unlikely to give evidence or give evidence satisfactorily; OR
- (b) be likely to suffer severe **emotional trauma** or to be so **intimidated** or **distressed** as to be **unable to give evidence** or give evidence satisfactorily...
 - **by reason of** age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence and **any other factor that the court considers relevant**
- **S106R** – Court may provide special assistance for witnesses classed as special witnesses (**s106R**)
 - **S106R(2)** – special arrangements can be applied by the party or by court order declaring the person as a special witness
- **S106R(4)** – measures to assist special witness:
 - Have support person (approved by the court) to be near the witness
 - Have a communicator with witness while s/he is giving evidence
 - Visually recording evidence (**s106RA**)
 - Video links or screening arrangements (**s106N**)

S106A Affected children:

- Anyone under age of 18 and an offence listed in **schedule 7 Part B** was committed against, or an offence in **schedule 7 Part C** was committed against by a person in a specified familial relationship to the child
- **Schedule 7 Part B** – sexual offences, procuring children for prostitution
- **Schedule 7 Part C** – GBH, common assault, assaults with intent + particular relationship:
 - Parent, step-parent, grandparent, step-grandparent, brother, sister, step-sibling, uncle, aunt, nephew, niece (all whole blood or half-blood)
 - Person living in the same household as the complainant at the time of offence
 - Person who had the care of or exercise authority over the complainant in the household on a regular basis
- Protections:
 - **S106I-s106MB** – pre-recording of child's evidence
 - **S106HA-HD** – visual recording of interviews with children
 - **S106N-s106P** – use of closed circuit television and screening arrangements
 - **S106H** – child's statement to another is admissible if the accused has been given a copy of the statement and statement is not recorded in writing or electronically, and accused is given the opportunity to cross-examine the affected child
 - **S106K** – child's evidence in full, special hearing to take and record

S106G protected witness:

- A child, or if proceeding is for a criminal organisation offence, the victim or any prosecution witness (irrespective of the person's age)
 - Child cannot be both protected and affected witness
 - Child can be protected witness just as being a child
- If accused is not represented by counsel & wishes to cross-examine a protected witness, the accused:
 - Is not entitled to do so directly, but may put any question to the protected witness by stating the question to the judge or a person approved by the court
 - That person is to repeat the question accurately to the protected witness

The Co-Accused

- **S8(1)** Co-accused only if both are tried together. Co-accused is:
 - For prosecution, neither competent nor compellable
 - For their own defence, competent but not compellable
 - If tried together, competent but not compellable to give evidence on behalf of co-accused
 - If separate trials, competent and compellable for prosecution or defence in trial of co-accused

Spousal

- Spouses are
 - For prosecution, the accused or any person tried jointly with accused, competent (**s9(1)(a)**)
 - On behalf of accused or any person tried jointly with accused, compellable (**s9(1)(b)**)
 - For prosecution, compellable if (**s9(1)(c)**):
 - Accused is charged with offence under **Second Schedule** (most serious criminal offences)
 - Accused is charged with attempting or conspiring to commit, or with inciting the commission of, an offence under **Second Schedule**
 - Accused is charged on the complaint of their spouse with an offence committed with respect to property of spouse
 - Spouse is compelled under another enactment
- Spouses include former spouses as competent and compellable to give evidence for prosecution, the accused or any person tried jointly with accused (**s9(2)**)

Interpreters

- If available interpreters are essential to enable a fair trial, TJ could delay trial or quash any conviction after an unfair trial [Dietrich]
 - Indispensable element of a fair trial for accused to be present in court, have their case heard and have opportunity to answer it [Sarava]

- Interpreters provide defendant with a right to be informed of the charge in a language they understand, and to have free assistance of an interpreter in court (art 14(3) international covenant on civil and political rights)
- WA Police should not assume Aboriginal Australian people can speak English fluently or fully comprehend conversation in English (WA Police Commissioner's Orders and Procedure Manual)