

# LAW5012

## PRINCIPLES OF EVIDENCE

EXAM NOTES

*2019*

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## TOPIC 1: INTRODUCTION

### 1.2.2 EVIDENTIARY PROCEDURE (VOIR DIRE & JUDICIAL LEAVE)

When evidentiary issues arise before or during legislation, a voir dire may be conducted to determine the admissibility and scope of the evidence sought to be adduced – This typically occurs at the very beginning of a trial without the jury (*section 189*)

Assuming the evidence is deemed relevant, the judge may:

1. Declare it admissible
2. Admit the evidence but warn the jury about how the evidence should be considered
3. Admit the evidence but limit the use that may be made of it
4. Declare it inadmissible

In some cases, judicial leave may be required before a certain type of evidence is admitted, requiring the judge to turn their mind to the following considerations: *Section 192(1)*

<i>Section 192(2)(a)</i>	The extent to which granting leave would be likely to add unduly or to shorten, the length of the hearing
<i>Section 192(2)(b)</i>	The extent to which granting leave would be unfair to a party or to a witness
<i>Section 192(2)(c)</i>	The importance of the evidence in relation to which the leave, permission or direction is sought
<i>Section 192(2)(d)</i>	The nature of the proceeding
<i>Section 192(2)(e)</i>	The power (if any) of the court to adjourn the hearing or to make another order to give a direction in relation to the evidence

### 1.2.3 BURDEN AND STANDARD OF PROOF

In all cases, questions of admissibility are determined on the balance of probabilities (section 142)

Criminal Proceedings:

- The burden of proof falls on the prosecution to establish liability, beyond a reasonable doubt *per section 141(1)*
- The burden of proof falls on the defence for most defences, on the balance of probabilities *per section 141(2)*

Civil Proceedings:

- The burden of proof falls on the plaintiff to establish a cause of action, on the balance of probabilities *per section 140(1)*
- The burden of proof falls upon the respondent to establish defences, on the balance of probabilities *per section 140(2)*
- Compelling evidence is required to satisfy the standard if the allegations are serious such as fraud *per section 140(2)*

### 1.2.4 JUDICIAL NOTICE AND FACILITATION OF PROOF

If a party's counsel does not object to certain evidence being adduced, some judges take the view that the evidence can be admitted and considered despite the prima facie violation of an evidential rule

<i>Sections 143-145</i>	Judicial notice permits a court to accept that certain laws, well known facts, and international states of affairs exist without formal proof
<i>Sections 146-159</i>	Court may presume copies of certain documents, and certain public/official records and their contents to be authentic and correct in the absence of proof to the contrary
<i>Sections 160-162</i>	Court may presume that certain communications sent (e.g. letter by post, fax, etc) were received at a certain time
<i>Section 190</i>	Parties may agree to waive evidential rules/Court may dispense with rules without consent

## TOPIC 3: COMPETENCE & COMPELLABILITY

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### 3.1 PRESUMPTION OF COMPETENCE AND COMPELLABILITY

There is a rebuttable presumption that every person is both competent and compellable to give sworn evidence (*section 12 EA*)

### 3.2 WHEN IS A PERSON COMPETENT?

A person is not competent to give evidence if they do not have capacity to:

- Understand a question about a fact: *section 13(1)(a) EA*
- Be understood in giving an answer to a question about a fact (intelligible; not necessarily 'rational'): *section 13(1)(b) EA*

Unsworn Evidence (bears the same weight as sworn evidence *per R v GW*)

If a witness is competent to give evidence about a fact but does not understand the obligation to tell the truth, they are not competent to give sworn evidence *per section 13(3) EA*, but may instead give unsworn evidence (includes children *per SH v R*) (*section 13(5) EA*)

Disability or Children

Adults with mental, intellectual or physical disability, or children may not be competent witnesses

Note:

- A witness may be competent for some facts, but not others (*section 13(2) EA*)
- Most adults will be competent presumed competent (*section 13(6) EA*)
- Witnesses who do not speak English, are deaf or mute, are rendered competent by an interpreter (*sections 30 and 31 EA*)

#### 3.2.1 ASSESSING THE COMPETENCE OF A WITNESS

Assessing the competence of a witness is a preliminary question for the judge in voir dire (*section 189(1)(c) EA*)

The judge assess competence as they think fit, and may rely on expert evidence such as a psychologist who has examined the witness *per section 13(8) EA*

Children

The stereotype suggesting children are not competent has been rejected by the ALRC and codified in *section 165A EA* – This section is supplemented with *sections 30-33 JDA*

Note:

- In sexual offence cases, the cognitively impaired or children complainants give evidence via close-circuit TV *per sections 366-375 CPA*

### 3.3 DEFENDANT IN CRIMINAL PROCEEDINGS

A defendant in a criminal proceeding is NOT competent for the prosecution *per section 17(2) EA*

However, they are competent for their own defence

Note: *Section 17(3) EA*

- They are also not compellable to give evidence for/against an associated defendant if tried jointly
- If tried separately are compellable

## TOPIC 4: PRIVILEGE

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### 4.2.3 LIMITATIONS TO STATUTORY PRIVILEGE

The privilege may be claimed in quasi-judicial proceedings (Eg. Royal Commissions of Enquiry, hearings/investigations conducted by non-judicial bodies)

Note:

- Privilege may be abrogated by statutory provisions (*Pyneboard v Trade Practices Commission; Sorby v The Commonwealth*)
- The privilege is also unavailable to corporations (*section 187 EA*)

### 4.3 CLIENT LEGAL PRIVILEGE

The common law has long recognised 'legal professional privilege' which gives primacy to the client's need for confidence (*Waterford v Commonwealth*) – This has been codified in *Part 3.1, Div 1 EA (sections 117-126)*

#### 4.3.1 LEGAL ADVICE (SECTION 118)

*Section 118* may be invoked when:

1. A party seeks to adduce evidence in court
2. The evidence would disclose either:
  - A confidential communication between a client and lawyer: *section 118(a)*
  - A confidential communication between the client's lawyers: *section 118(b)*
  - Contents of a confidential document prepared by the client, lawyer or third party: *section 118(c); Pratt Holdings*
3. The confidential communication was prepared for the dominant purpose of giving legal advice to the client
4. The client objects to the evidence being adduced

Confidential Communication: *Section 117*

- Communication made in circumstances where the person who made it, was under an express or implied obligation not to disclose its contents
- Eg. Letters of advice; documents in the lawyers' file (drafts, research, file notes)

Dominant Purpose: *Hodgson v Amcor*

- A document may be made for multiple purposes – provided the dominant purpose is to give legal advice, *section 118* requirements will be satisfied

Note:

- Privilege attaches to a copy of an original document made to provide advice (even though the original is not privileged) *per Propend Finance*

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<i>Section 118</i>	Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of: <ul style="list-style-type: none"><li>(a) A confidential communication made between the client and a lawyer; or</li><li>(b) A confidential communication made between 2 or more lawyers acting for the client; or</li><li>(c) The contents of a confidential document (whether delivered or not) prepared by the client, the lawyer, or another purpose;</li></ul> For the dominant purpose of the lawyer, or one or more of the lawyers providing legal advice to the client
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## TOPIC 5: EXAMINATION OF WITNESSES

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### 5.3.4 ISSUES WITH REFRESHING MEMORY

Problems arise where a witness seeks to refer to a record that was not prepared by the witness, such as an assistant taking notes when the witness was in attendance, or the record is not the original (*R v Van Beelen*)

The witness will be permitted to refer to the record if:

1. It is demonstrated the witness had knowledge of and verified the contents of the original record; and
2. The accuracy of any copy is properly verified as being a substantial reproduction of what was said in the original

### 5.4 POLICE OFFICER'S GIVING EVIDENCE IN COURT (REVIVING MEMORY)

Police officers may give evidence in chief by reading aloud a previously made statement in the witness box – Police officers may also be 'led through' the statement by counsel through a series of leading questions (*section 33(1) EA*)

Statement Requirements:

1. Made at the time or soon after the relevant events ('fresh in the memory'): *section 33(2)(a) EA; Dodds v R*
2. Signed by the police officer at the time it was made: *section 33(2)(b) EA*  
-This imports the requirement that there be objective evidence that the police witness verified the statement at the time)
3. A copy given to the defendant/defendant's lawyer at a reasonable time before the case is heard: *section 33(2)(c) EA*

### 5.5 PRIOR CONSISTENT STATEMENTS

Prior consistent statements refer to statements made by the witness to a third party (such as family, friends, police, therapist etc.), made prior to the witness's presenting evidence in court, which are consistent with the witness' present evidence

Reasons to Lead Evidence of a Prior Consistent Statement

- It could be used to establish the truth of what it asserts (for a hearsay purpose)
- It could be used to make the witness' present evidence about the facts in issue more believable – The prior statement reaffirms and supports what the witness is now saying in court (credibility evidence)

#### 5.5.1 CREDIBILITY PURPOSES

A party generally cannot lead evidence that simply adds to the credibility of their own witness' otherwise admissible evidence (*sections 101A and 102 EA; Corke v Corke & Cooke*)

Exception to the Credibility Rule: *Section 108 EA; Nominal Defendant v Clements*

Opposing counsel attacks the credibility of the witness in cross-examination by getting the witness to admit they made a prior inconsistent statement or by suggesting the evidence is a fabrication

In re-examination, counsel may 're-establish' credibility by adducing evidence of prior consistent statements *per section 108 EA*, provided they have leave from the court under *section 192 EA*

## TOPIC 7: TENDENCY AND COINCIDENCE

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### 7.1 INTRODUCTORY PRINCIPLES

Tendency reasoning suggests that the person has a tendency to behave in a certain kind of way, and that tendency to behave in that way, manifested itself on this particular occasion

Coincidence reasoning suggests that it is highly improbable that the same problem arose twice in similar circumstances, where the same person was involved, and that person was not responsible on both occasions

#### Note:

-Evidence that is adduced for a non-tendency/credibility purpose cannot be used for tendency or credibility purposes (*section 95 EA*)

-If the evidence is sought to be adduced for a tendency or credibility purpose, then it must pass the below requirements (*sections 97 and 98 EA*)

#### 7.1.1 COMMON LAW PRINCIPLES

General principles developed at common law deemed tendency/coincidence evidence to be relevant, but inadmissible on the basis that it is likely to be unfairly prejudicial to the accused

However such evidence was admissible if it had a high degree of probative value (*Makin v AG (NSW)*)

Additional requirements included that the evidence revealed 'strikingly similar' facts, which were 'sufficiently cogent' (*DPP v Boardman; Perry v R*)

Note: Now the application of the Evidence Act prevails over the common law – However, as it was derived from the common law, common law principles will guide the courts in their application (*R v Ellis*)

#### Sexual Offence Cases and Similar Fact Evidence

This area of law developed particularly in sex offence cases where the focus was on whether the facts of each individual case was 'strikingly similar' versus what types of facts were common place in sex crimes (*Sutton v R*)

#### No Rational View Test:

In *Hoch v R* (following *Sutton v R*), the High Court addressed the possibility of concoction as a defence to similar fact evidence, holding that where there is a possibility of joint concoction, the possibility may act as an alternative rational view, rendering the evidence insufficiently probative

This view was affirmed in *Pfennig v R*, where the court applied the 'rational view of evidence consistent with the innocence of the accused' test, finding there was no rational explanation of innocence (Applies primarily to tendency cases)

However, the introduction of *sections 97 and 98* saw the rejection of the applicability of the 'no rational view' test in light of the requirements outlined in *section 101(2) EA*

Note: It was not suggested that the *Pfennig* test was never appropriate, there may be cases where on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied



## TOPIC 8: HEARSAY

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### 8.1 INTRODUCTORY PRINCIPLES

The common law defines hearsay as evidence of a statement made out of court, which is adduced to prove the truth of fact asserted in a statement

The statutory definition is found in *section 59(1) EA*, along with the general rule against hearsay

#### 8.1.1 RULE AGAINST HEARSAY

The common law now codified in *section 59 EA* creates a general rule against hearsay evidence

The overarching rationale for the rule is based upon the principle that it is difficult for the tribunal of fact to assess the weight to be given to the hearsay evidence – it is inherently reliable for the following reasons:

- Out of court statements are not made under oath
- In some cases, the evidence cannot be tested by cross-examination
- If the hearsay evidence is oral evidence, there are dangers of inaccuracy via repetition
- It is not as strong as direct evidence from an eyewitness

#### 8.1.2 RELEVANCE OF HEARSAY

Hearsay evidence must still pass the test of relevancy outlined in *section 55(1) EA*:

‘Evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding’

However, the asserted fact contained in the hearsay statement must logically bear on a fact in issue or a fact relevant to a fact in issue

### 8.2 ESTABLISHING HEARSAY

*Section 59 EA* creates a general prohibition against hearsay evidence

To establish evidence as hearsay evidence, the below elements must be considered and proven

If the above elements are satisfied, the evidence will prima facie be deemed hearsay evidence and will be inadmissible unless an exception to hearsay is established

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<i>Section 59</i>	<p>(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation</p> <p>(2) Such a fact is referred to as an asserted fact</p> <p>(2A) For the purposes of determining under subsection (1) whether it can reasonable be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made</p>
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#### 8.2.1 MAKER OF THE PREVIOUS REPRESENTATION

The representation made must come from a person – This element is generally established prima facie

Note: There is a general competency requirement for the maker of the representation (*section 61 EA*)

## TOPIC 10: ADMISSIONS

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### 10.5 REQUIREMENT FOR RECORDING

Admissions/confessions made by a defendant to police during interviewing must be recorded, for an indictable offence (audio/audio-visual recording) (*Section 464H EA*)

The recording of the interview (and typically a written transcript of it) must be tendered in court (*section 464H EA*)

If the admissions are not recorded, or the recording is not available to be tendered, the admissions are not admissible (*Section 464H EA*)

*Section 86 EA* regulates the admissibility of records of oral questioning by investigating officials requiring written documentation prepared by the official questioning with the defendant's signature acknowledging the admission (applies to criminal proceedings only)

However, section 86 has limited application given the more onerous requirements of *section 464H Crimes Act*

#### Note:

- Two separate instances of question may be interpreted by the court as part of the same questioning if circumstances, in particular proximity of time and place, are close (*Pollard v R*)
- The relationship between the separate occasions and the interrogations will be considered (*Heatherington v R*)
- Where there have been different periods of interrogation, the requirement that 'the questioning' be recorded, relates to the particular period of questioning when the confession was made (*Heatherington v R*)
- 'In the course of questioning' referring to police interviews, will be defined narrowly (*Kelly v R*)

### 10.6 RELIABILITY PROVISIONS

Both elements of the Crimes Act and Evidence Act work to provide additional protections for people in police custody

#### 10.6.1 CRIMES ACT PROTECTIONS

*Division 30A Crimes Act* provides the following protections:

- Persons can only be held for a 'reasonable time' for questioning: *section 464A(1); 464A(2)*
- Police are obligated to inform a person of their right to silence and that anything said or done can be used in evidence before questioning: *section 646A(3)*
- Police are obligated to inform a person of their right to communicate with a friend, relative or lawyer before questioning: *section 464C*
- Police are obligated to arrange an interpreter before questioning if necessary: *section 464D*
- Police are obligated to have a parent/guardian or independent person present when questioning a person under 18 years old: *section 464E*
- Police must record admissions via audio/audio-visual recording: *section 464H*