PRIVILEGE

<ASK: DOES ANY PRIVILEGE APPLY TO THE EVIDENCE?>

<SELECT 1. CLIENT PRIVILEGE OR 2. PROFESSIONAL PRIVILEGE>

1. CLIENT LEGAL PRIVILEGE

1A. Dominant purpose – What is the dominant purpose of the evidence?

<CHOOSE EITHER: ADVICE OR LITIGATION>

- *Dominant purpose = ADVICE*
  - On the facts, the ruling, prevailing or most influential purpose for which the <INSERT EVIDENCE> is brought into existence, is for the lawyer, or one or more of the lawyers, to provide legal advice (*Spotless Services Ltd* 1996). The <INSERT EVIDENCE> therefore meets the CLP dominant purpose test (*Esso* 1999).

<OR>

- *Dominant purpose = LITIGATION*
  - On the facts, the ruling, prevailing or most influential purpose for which the <INSERT EVIDENCE> is brought into existence, is for the client being provided with professional legal services relating to litigation (*Spotless Services Ltd* 1996). The <INSERT EVIDENCE> therefore meets the CLP dominant purpose test (*Esso* 1999).

1B. Definitions – Does the scenario meet the definitions (s 117 EA?)

<CHOOSE ONE OF THE FOLLOWING DEFINITIONS>

- *'Client'*
  - On the facts, the <INSERT PERSON> is clearly a 'client' for the purposes of s 117 EA, as they are:
    - A person or body who engages a lawyer to provide legal services or who employs a lawyers: s 117(1)(a) EA; <OR>
    - An employee or agent of a client: s 117(1)(b) EA; <OR>
    - An employer of a lawyer if the employer is, or is a body established under, Commonwealth, State or Territory: s 117(1)(c) EA;

- *'Lawyer'*
  - On the facts, the <INSERT PERSON> is clearly a 'lawyer' for the purpose of s 117 EA, as they are:
    - An Australian lawyer; <OR>
    - An Australian registered foreign lawyer (*Kennedy* 2004); <OR>
    - An overseas registered foreign lawyer or natural person permitted to engage in legal practice in that country.

- *'Confidential communication'*
  - Pursuant to s 117(1) EA, the <INSERT COMMUNICATION> is clearly a confidential communication as it was made in circumstances where <INSERT PERSON> was under an express or implied obligation not to disclose its contents (*Kennedy* 2004).

- *'Confidential document'*
  - Pursuant to s 117(1) EA, the <INSERT EVIDENCE> is clearly a confidential document as <INSERT PERSON WHO PREPARED IT> was under an express or implied obligation not to disclose its contents.

<NOW CHOOSE EITHER LEGAL ADVICE OR LITIGATION>

1C. Legal advice – s 118 EA

- Pursuant to s 118 EA the <INSERET EVIDENCE> is not to be adduced, as it would result in disclosure of:
  - Lawyer / Client:
    A confidential communication made between <INSERT CLIENT> and a lawyer (*Kennedy* 2004);

    <OR>
  - Two Lawyers:
    A confidential communication made between 2 or more lawyers acting for the client;

    <OR>
  - Confidential Document:
    The contents of a confidential document prepared by the <CLIENT, LAWYER OR ANOTHER PERSON> (applies to third parties);

    ... for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice <INSERT CLIENT>. This CLP cannot be overridden (*Daniels v ACCC* 2002).

1D. Litigation – s 119 EA

- Pursuant to s 119 EA the <INSERET EVIDENCE> is not to be adduced, as it would result in disclosure of:

  - A confidential communication between the <INSERT CLIENT> and another person <INSERT THIRD PARTY>, or between a lawyer <INSERT LAWYER> acting for the client and another person <INSERT THIRD PARTY>, that was made;

    <OR>

  - The contents of a confidential document (whether delivered or not) that was prepared;

  ... for the dominant purpose of the lawyer, or one or more of the lawyers, providing the client with professional legal services relating to litigation <INSERT CLIENT>. This CLP cannot be overridden (*Daniels v ACCC* 2002).

<IS THE CLIENT SELF-REPRESENTED?>

1E. Self-represented clients

Despite <INSERT CLIENT> being a self-represented litigant, under s 120 EA, CLP applies to self-represented litigants and extends to communications between self- represented litigants and a third party.

<HAS THE PRIVILEGE BEEN LOST?>

1F. Has CLP been lost?

<CHOOSE FROM THE FOLLOWING>

From the facts, it appears that <INSERT CLIENT> may have lost this legal privilege due to the fact that:

- Loss of CLP – s 121 EA
  - Pursuant to s 122(1) EA, the CLP has been lost because...
    - <INSERT CLIENT> has died; s 121(1) EA
    - The court would otherwise be prevented from enforcing an order of an Australian Court; s 121(2) EA
    - The evidence affects the rights of another person; s 121(3) EA (e.g. acts of bankruptcy, defamation, threats, misleading/deceptive conduct)

- Loss by Consent (NOT by mistake) – s 122 EA
  - Pursuant to s 122(2) EA, <INSERT CLIENT> has seemingly waived their CLP or consent to losing it as they have acted in a way that is inconsistent with the privilege.

  - However, on the fact it seems as though <INSERT CLIENT> mistakenly or accidentally waived their CLP. Pursuant Armstrong [2012], a mistaken waiver of CLP is not effective under s 122(2) EA. Therefore, <INSERT CLIENT> would retain their CLP.

- Fraud, Crime, Abuse of Power – s 125 EA
  - Under s 125 EA, as the <INSERT DOCUMENT/COMMUNICATION> is made in the pursuit of a fraud, crime or abuse of power, CLP will not apply.

2. PROFESSIONAL LEGAL PRIVILEGE

EXAM SCENARIO: Accused person has gone to see counsellor. We are only concerned about the harm to the confider (the person who made the disclosure) NOT the confident (the person who received the information - don't worry about their reputation). It is the harm done to protected confider that we're worried about.

2A. Exclusion of evidence of protected confidence – s 126B EA

- Under s 126B(1) EA (in NSW only) the court may direct that <INSERT EVIDENCE> not to be adduced if it finds that it would disclose a protected confidence, the contents of a document relating to protected confidence or protected identity information.

<FIRSTLY APPLY APPROPRIATE DEFINITIONS>

2B. Definitions – Does the scenario meet the definitions? – s 126A EA

- *'Harm'*
  - Pursuant to s126A EA, <INSERT CLIENT/CONFIDER> has suffered harm, as they have experienced <INSERT HARM i.e. emotional or psychological harm such as shame, humiliation and fear>, resulting from their disclosure.

- *'Protected confidence'*
  - Pursuant to s 126A EA, the communication made by <INSERT CONFIDER> to the <INSERT CONFIDENT> was in the court of a relationship in which <INSERT CONFIDENT> was acting in a professional capacity and was there under an express or implied obligation not to disclose its contents.

- *'Protected confider'*
  - Pursuant to s 126A EA, <INSERT CLIENT/CONFIDER> is the "protected confider" as he/she was the person who made a protected confidence.

- *'Protected identity information'*
  - Pursuant to s 126A EA, <INSERT INFORMATION> meets the definition of "protected identity information" as it is information about, or enabling a person to ascertain, the identity of <INSERT CONFIDER> the person who made a protected confidence.

* NOTE: The ALRC has recommended that contemplated relationships include:
- Doctor / patient
- Psychotherapist / client
- Social worker / client
- Journalists / sources (see *NRMA v John Fairfax* for journalists).

<NOW APPLY DISCRETION / BALANCING ACT>

2C. Exclusion of evidence of protected confidence – s 126B EA

- However pursuant to s 126B(3) EA, the court must give such a direction if it is satisfied that harm would or might be caused to a <INSERT CLIENT/CONFIDER> if <INSERT EVIDENCE> is adduced, and the nature and extent of the harm outweighs the desirability of the evidence being given. In essence it's a judicial balancing act. To determine this, the court will look at the following matters as per s 126B(4) EA:

- **Probative value of the evidence;**
- **The importance of the evidence in the proceedings;**
- Nature and gravity of the cause of action, offence or defence and the nature of the subject matter of the proceedings;
- **Availability of other evidence;**
- **Effect or harm of admitting the evidence;**
- Means of limiting the harm likely to be caused if evidence is disclosed;
- In criminal proceedings, whether the party adducing the evidence is a defendant or the prosecutor;
- Whether the substance of the evidence has already been disclosed by the protected confider or any other person;
- The public interest in preserving the confidentiality of the confidences;
- The public interest in preserving the confidentiality of protected identity information where the substance of the confidence has already been disclosed elsewhere.

<HAS THE PRIVILEGE BEEN LOST?>

2D. Has PLP been lost?

- From the facts, it appears that <INSERT CLIENT/CONFIDER> may have lost this professional legal privilege due to the fact that:

<CHOOSE FROM THE FOLLOWING>

- Loss by Consent (NOT by mistake) – s 126C EA
  - Pursuant to s 126C EA, <INSERT CLIENT> has seemingly waived their PLP or has given consent for the material to be disclosed.
  - However, on the fact it seems as though <INSERT CLIENT> mistakenly or accidentally waived their CLP. Pursuant Armstrong [2012], a mistaken waiver of CLP is not effective under s 122(2) EA. Therefore, <INSERT CLIENT> would retain their CLP.

- Fraud, Crime, Abuse of Power – s 126D(2) EA
  - Pursuant to s 126D(2) EA, as the <INSERT DOCUMENT/COMMUNICATION> is made in the pursuit of a fraud, crime or abuse of power, PLP will not apply.

- Ancillary Orders – s 126E EA
  - Pursuant to s 126E EA, it is necessary for the court may make ancillary orders that the evidence be heard in camera, and make orders relating to the suppression of publication of all or part of the evidence given before the court as necessary to protect the safety and welfare of <INSERT CONFIDER> the protected confider. Therefore <INSERT CONFIDER> looses <HIS/HER> right to PLP.

3. Sexual Assault Communications Privilege

- Law: As a response to *R v Young*, sections 295 to 298 create protections for certain confidences in sexual assault prosecutions. Under section 295-298 of the Criminal Procedure Act, the court has the discretion to consider whether the harm in disclosing such information will outweigh its probative value. The judge will look at the notes themselves and make a determination.

Lecture 2: Types of evidence: Documentary evidence and real evidence

Documents generally

- Understanding how documents can be used in Court / Litigation is an important skill for a lawyer to possess. Can be a very potent tool when handled correctly.
- Many forms of litigation rely heavily on documents being adduced as evidence.
- EA made significant changes to the Common Law about how documents can be adduced. Common Law was very strict on the notion of only using original documents.
- **Part 2.2 of the EA deals with how the contents of documents can be adduced. Deals with how originals, copies, extracts, summaries etc can be tendered in order to bring the contents of the document before the Court.**
- Should be noted that proving the content of a document is a different issue to how the content of the document is used / assessed in evidence.
- Getting the content of the document into evidence should be considered the first step.

Definition of "document"

In the Dictionary of the EA "***document***" means any record of information, and includes:

(a) anything on which there is writing, (e.g. written on a napkin) or
(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, (e.g. brail) or
(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, (e.g. voice recording/memo) or
(d) a map, plan, drawing or photograph.

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of "document".

Clause 8 Part 2 of the Dictionary:

References to documents
A reference in this Act to a document includes a reference to:
(a) any part of the document, or
(b) any copy, reproduction or duplicate of the document or of any part of the document, or
(c) any part of such a copy, reproduction or duplicate

- The definition of "document" is very broad
- It doesn't need to be the entire document
- The beauty of the EA means we have much more freedom to use copies, duplicates, parts of etc.

Proof of Contents of Documents

- Main guidance as to the various ways that the contents of a document can be brought into evidence are dealt with under **s 48 EA.**
- Under the EA, it is possible to:
  - Tender the document itself – s 48(1)
  - Tender a copy of it – s 48(1)(b)
  - Adduce evidence as to its contents – s 48(1)(a)
  - Tender a transcript of it – s 48(1)(c)
  - For voluminous documents, it is also possible to tender a summary (with leave) – **s 50**
- S 48 also provides a way of utilising the contents of a document even though the document in question is not available to the party. (ss 48(2) and 48(4) refer)

Section 48(4) Proof of Contents of Documents

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:
(a) tendering a document that is a copy of, or an extract from or summary of, the document in question, or
(b) adducing from a witness evidence of the contents of the document in question.

[See ***R v Cassar and Sleiman (No 28)*** **[1999] NSWSC 651**]

Definition of "unavailable"

Part 2 of the Dictionary: 5 Unavailability of documents and things
For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:

(a) it cannot be found after reasonable inquiry and search by the party, or
(b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person, or
(c) it would be impractical to produce the document or thing during the course of the proceeding, or
(d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence, or
(e) it is not in the possession or under the control of the party and:
  (i) it cannot be obtained by any judicial procedure of the court, or
  (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding, or
  (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.

R v Cassar & Sleiman **[1999] NSWSC 651**

- D's claimed that on the night of the incident they were driving around in a car. P was given leave to adduce evidence in reply that would show car was elsewhere on that night. Police had evidence that car was at a motel at the time. What was this evidence and how was it adduced?
- Evidence was contained in a motel registration form which recorded name, address, car rego, check in date and room charge. Problem was that the registration form could not be found and therefore could not be produced as evidence, at trial.
- Evidence regarding existence of such registration forms and their general content was given by the motel employee, on duty that night.
- Evidence as to the content of the registration form was given by police officer who had inspected the original registration form and recorded the name, address, vehicle registration and payment details etc on a piece of paper. This information was then faxed to another police officer who recorded it on a 'running sheet'. Sadly, the piece of paper and the fax of it could not be found at trial.
- Only remaining evidence was the police running sheet. The question was whether that was admissible to prove the contents of the original motel registration form?

Court held that:

1. Section 48(4)(a) provides that a party may adduce evidence of the contents of a document that is not available by tendering a document that is a summary of, or an extract from, the document in question. The running sheet was therefore admissible (it incorporated the salient details) pursuant to s48(4)(a).
2. The police officer should have leave, pursuant to s 32 EA, to use the running sheet to try to revive his memory.
3. The police officer could then give oral evidence of what he saw recorded in the original registration form pursuant to s 48(4)(b), using the running sheet to refresh his recollection.

4. The registration form was a business record of the kind referred to in s 69EA and that proof of the contents of the form would be evidence of the fact.

Real Evidence

- Under the EA there are two categories of Real Evidence identified.
  - Exhibits (physical object tendered as evidence)
  - Views (demonstrations, experiments or inspections of locations).
- EA makes it possible to adduce evidence other than through witness testimony or through documents - this includes physical, tangible objects such as the murder weapon. (s 52)
- The other type of Real Evidence (generally referred to as Views) allows for the conduct of experiments, demonstrations and location inspections. (s 53)

- Demonstrations / experiments / inspections can be very powerful evidence so the Court needs to be satisfied that the evidence gained will assist the Court in it deliberations and will not be unfairly prejudicial to the parties (particularly to the Defendant in a Criminal matter).
- Important to ensure procedural fairness is observed and that the evidence is able to be tested or commented upon like all other pieces of evidence.
  - Neither the Judge or any member of the Jury is permitted to conduct a View outside of the rules in s 53 (*Bilal Skaf's* case)
- The factors that the Judge needs to consider when contemplating whether to conduct a View are set out in s 53(3).
- S 53 does not apply to in-court demonstrations: *Evans v The Queen* (2007) 235 CLR 521
- Under s 54 the Court may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

Section 53 – Views

(1) A judge may, on application, order that a demonstration, experiment or inspection be held.
(2) A judge is not to make an order unless he or she is satisfied that:
(a) the parties will be given a reasonable opportunity to be present, and
(b) the judge and, if there is a jury, the jury will be present.
(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:
(a) whether the parties will be present,
(b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence,
(c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time,
(d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated,
(e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.
(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.
(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

Views:

- *R v Milat* (1996) (unreported)
- *R v Bilal Skaf, R v Mohammed Skaf* [2004] NSWCCA 37
- *Evans v R* [2007] HCA 59

***R v Bilal Skaf, R v Mohammed Skaf* [2004] NSWCCA 37**

- Note - The Court is not permitted to go outside the evidence presented and to act upon information privately obtained which the parties have no chance of combating or commenting upon.
- In a Sexual Assault (Rape) case the Trial Judge gave his usual warning to the members of the Jury at the conclusion of the Trial. As part of this warning, the Judge instructed the Jury not to "go and do your own research".
- But despite the warning, the 64-year-old Jury Foreman rang another Juror the night before the verdict was delivered and they went to the park where the alleged rape occurred.

- The two Jurors went to Gosling Park for about 20 minutes to check the lighting conditions (obviously an issue that had been causing some concern to the Jury).
- At the Trial, the two Jurors had not told the Judge or anybody else what they had done.
- At a BBQ some time later, the Foreman told a Solicitor that he and another had gone to the park. The Foreman said he only went to the park to `clarify something for my own mind'. Quite correctly, the Solicitor reported the conversation to the NSW Sheriff.
- As a result, the matter went to Appeal and the Judges in the NSWCCA found the experiment was a miscarriage of justice.
  - "In our view there must, regrettably, be a new trial because of this ground," the judges said.
- They also ordered that in future more specific orders be given to Juries to ensure further trials were not miscarried because of 'Jury misconduct'.
- NSWCCA stated that orders should include:
  - not making private visits to the crime scene;
  - not asking other Jurors to conduct experiments; and
  - informing the Trial Judge if they discover fellow Jurors making independent inquiries into the case.
- The NSWCCA decision to order a retrial led to the NSW Government to amend the Jury Act – amendment allows for the punishment of those who conduct unauthorised experiments away from court.

Lecture 3A: Witnesses: Competence and compellability

Overview

- Who can give evidence?
- Who must give evidence?
- Evidence – Sworn / Affirmed / Unsworn
- Child Witness

Who can give evidence?

- The legal ability to give evidence is referred to as 'competence'.
- Competence = ability to give a rational reply to questions about facts.
- Except as otherwise provided by the Evidence Act:
  - every person is presumed to be 'competent' to give evidence unless some form of exception applies. (s 12(a) EA)
- Exceptions to the rule:
  - Those lacking capacity to give evidence about a fact owing to a mental, intellectual or physical disability (s 13 EA)
  - The Accused is not competent to give evidence for Prosecution (s 17(2) refers)

s 13 – Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact; or
(b) the person does not have the capacity to give an answer that can be understood in relation to a question about the fact;

and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

Who must give evidence?

- A person who is competent to give evidence about a fact is compellable to give that evidence. (s 12(b) EA)
- If a person is a compellable witness they may be legally forced to give evidence despite being reluctant to do so.
- Various exceptions to compellability may apply:
  - The Accused in his own Trial – s 17(1)
  - Co-Accused (if not given separate Trial) – s 17(3)
  - Sovereign / Governor-General / Governor – s 15(1)
  - Members of Parliament (if sitting) – s 15(2)
  - Close relatives of the Accused (e.g. Spouse) – s 18 & s 19*
  - Judges / Jurors (in trial in which they were acting) – s 16

Compellability – Close Relatives

- In criminal proceedings a close relative of A may object to being compelled to give evidence for P (s 18 EA).
- If there is an objection, the W must not give evidence if the Court finds that:
  (a) There is a likelihood of harm to either W or the relationship; and

(b) The nature / extent of the harm outweighs the desirability of having the evidence (s 18(6) refers).

- When undertaking this balancing exercise, the Court is to have regard to the matters set out in s 18(7).
- *** s18 does not apply in relation to certain offences in relation to children (see s 19 EA)

s 18 – Compellability of spouses and others in criminal proceedings generally

s 18(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted;
(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
(d) the nature of the relationship between the defendant and the person;
(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

Sworn evidence

- A Witness who is competent to give evidence is required to give 'sworn' evidence.
- Before giving evidence, the Witness must take an 'Oath' or make an 'Affirmation' that they will tell the truth (s21 EA).
  - I swear by Almighty God that the evidence I shall give will be the truth, the whole truth and nothing but the truth.
  - I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

s 21 – Sworn evidence to be on oath or affirmation

(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.
(2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.
(3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.
(4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.
(5) Such an affirmation has the same effect for all purposes as an oath.

s 13 – Competence: lack of capacity

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

Unsworn evidence

- Despite the fact that W may be able give a coherent / comprehensible answer to a question, there may be an issue regarding W's ability to understand their obligation to tell the truth.
  - In this situation W is unable to give sworn evidence under s 13(3). However, in certain circumstances W may still be able to give unsworn evidence.
- Pursuant to s 13(4) a person who is otherwise incompetent to give 'sworn' evidence may give 'unsworn' evidence if the matters in s 13(5) have been conveyed to W.

s 13 – Competence: lack of capacity

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
(a) that it is important to tell the truth; and
(b) that he or she may be asked question that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
[…]

*** *There is no longer a requirement for W to acknowledge that they understand the effect of s 13(5).*

- Procedurally, unsworn evidence given by W is treated in exactly the same way as sworn evidence.
- The Court has no discretion to prevent the Witness from giving his / her unsworn evidence. (*SH v The Queen* [2012] NSWCCA 79)
- There remains some question as to whether unsworn evidence should be given less weight – purely on the basis that it is unsworn (*R v GW* [2016] HCA 6, [54-57] refers).
- In NSW it is no longer permissible for the Accused to make an Unsworn Statement on his own behalf.

Child witnesses

- CL traditionally regarded children as an unreliable class of witness, requiring that trial judges warn juries that it is dangerous to convict on the uncorroborated evidence of a child - perception being that children are prone to fantasy, highly suggestible, and likely to give inaccurate accounts of events
- This position is no longer the case - research conducted in recent years demonstrates that children's cognitive and recall skills are not inherently less reliable than that of adults.
- In EA, the guidance relating to judicial warnings with respect to the evidence given by a Child Witness reflects current research.
- The EA now contains the following provisions in relation to judicial warnings and child witnesses:
  - s 165(6) provides that warnings in relation to the reliability of a child's evidence can only be given in accordance with s 165A.
  - s 165A prohibits trial judges from warning or suggesting to juries that children (as a class) are unreliable witnesses or that it is generally dangerous to convict on the uncorroborated evidence of any child witness.
- See - *Seen and Heard: Priority for Children in the Legal Process* (1997), ALRC 84:
  - http://www.austlii.edu.au/au/other/alrc/publications/reports/84/

Lecture 3B: Examination of witnesses

Trial Procedure (Criminal)

1. Accused has indictment (charge) read to him / her and then asked to enter his / her plea – this is called the 'arraignment' process.
2. Jury empanelled and sworn in.
3. Prosecution makes brief Opening Address outlining the elements of the offence and the evidence he / she will call in support of the Prosecution case.
4. Defence may make brief statement if wishes to do so.
5. Witnesses for Prosecution called to give evidence.
6. Opening Address by Defence.
7. Witnesses for Defence called.
8. Closing submissions by Lawyers (Prosecution goes first).
9. Judge summarises the evidence and law for Jury.
10. Verdict (Guilty or Not Guilty).
11. Sentencing (if needed).

How is evidence adduced?

- Testimonial Evidence may be given orally or in written form (Affidavit or Witness Statement)
- Documents and Real Evidence are tendered and if they conform to the Rules governing relevance and authenticity they will be admitted into evidence.
- Before evidence will be accepted, there must be a basis for finding that the evidence is what it purports to be. Very important requirement for Documentary Evidence, Real Evidence and Expert Evidence.
- **Court must not use information that was not part of the formal process of receiving evidence (Bilal Skaf case – Jurors undertaking 'unofficial' view)**

Questioning witnesses

Control of Examination by the Court

s 26 – Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned; and
(b) the production and use of documents and things in connection with the questioning of witnesses; and
(c) the order in which parties may question a witness; and
(d) the presence and behaviour of any person in connection with the questioning of witnesses.

s 29 – Manner and form of questioning witnesses and their responses

(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
(2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.
(3) Such a direction may include directions about the way in which evidence is to be given in that form.
(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.