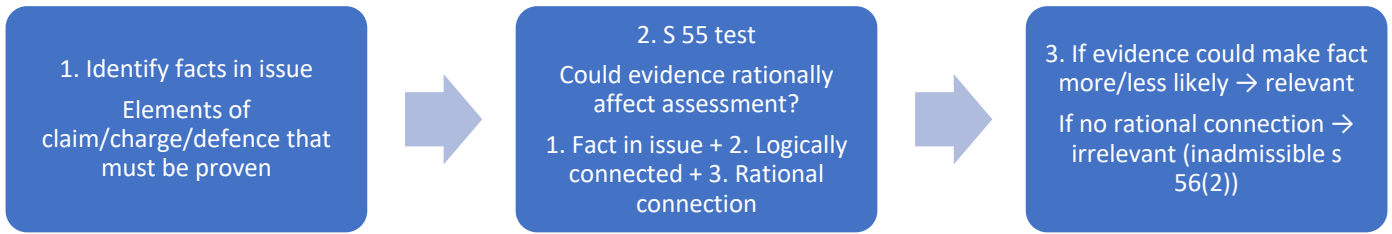


Table of Contents

1. Admissibility Framework	3
Types of Evidence	3
Purposes for Admitting Evidence	4
EA Structure and Context	4
Adducing Evidence (Brief Reference Only).....	4
General Definitions	4
Key Principles for ALL Questions	5
Traps – Things to Remember	6
2. Relevance (s 55)	7
S 55 Relevance Test.....	7
Common Issues for Hypo	8
Important Principles	8
3A Hearsay (Pt 3.4)	9
Hearsay Rule (s 59).....	9
Exceptions	10
Competence Limitation (s 61).....	13
BEWARE Notice Requirement (s 67)	13
Important Principles	13
3B Opinion (Pt 3.3)	14
Opinion Rule (s 76).....	14
Exceptions	14
Discretionary Exclusions and Warnings	16
Important Principles	16
3C Admissions (Pt 3.4)	17
Is It An Admission?.....	18
Civil Admissions (s 81)	18
Criminal Admissions (s 82)	18
Key Exclusions/Limitations (ss 84-90)	19
Consciousness of Guilt - Edwards Directions.....	20
Restrictions on Use (ss 91-93).....	20
Important Principles	20
3D Tendency and Coincidence (Pt 3.6)	21
Tendency vs Coincidence Evidence.....	21
Pt 3.7 Application and Limitations.....	22
S 95 Use Rule (Gateway Provision)	22
The Two-Step Test (Identical for ss 97 and 98).....	22

Further Restrictions	23
NON-APPLICATIONS (When ss 97/98 Do NOT Apply).....	24
Important Principles	24
3E Credibility (Pt 3.7).....	25
Credibility Rule (ss 101A and 102)	25
Exceptions	26
Credibility vs Propensity.....	27
Important Principles	27
3F Character (Pt 3.8).....	28
What is Character Evidence?	28
D Adducing/Admitting Good Character (s 110).....	29
Did D Raise Good Character?.....	29
Rebuttal of Good Character (s 110(2)-(3)).....	30
Cross-X About Character (s 112)	30
Co-Accused Character Evidence (s 111)	30
Important Principles	30
3G Identification (Pt 3.9)	31
Does Pt 3.9 Apply?	32
Visual ID Evidence (s 114).....	32
Picture ID Evidence (s 115)	32
Exclusions	32
Important Principles	33
4. Judicial Discretions/Exclusions/Warnings	34
Court Control Provisions	34
Other Discretions Overview	34
Warnings	36

2. Relevance (s 55)



S 55 Relevance Test

- FIRST admissibility test
- **S 55(1):** Evidence is **RELEVANT** if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.
- **Three elements:** 1) There must be a **fact in issue**; 2) Evidence must be **logically connected** to that fact; 3) Connection must be **rational** (not tenuous/remote)
- **"Could rationally affect":** If evidence could make fact more/less likely
- **Low threshold:** Even slight probative value sufficient
- *Festa v The Queen (2001) HCA* - Gleeson CJ: "If evidence is of some even though slight probative value then it is admissible unless some principle of exclusion comes into play... The strength of the evidence doesn't come into it at this stage."
- **s 56(2):** If NOT relevant → inadmissible
- **Application:** Ask "could this evidence make fact in issue more or less likely?" If yes → relevant. Strength assessed later (weight not admissibility).

1. Facts in Issue

- **Definition:** Ultimate facts that must be determined in legal cause of action/defence/charge
- **Also includes:** Primary/basic facts nec to prove other facts (circumstantial cases)
- **Application in hypo:** Identify elements of claim/charge/defence first. These are your facts in issue.

2. Logically Connected – Direct vs Indirect Relevance

- **Directly Relevant:** Evidence logically connected to fact in issue itself. Makes fact more/less likely by direct connection. Connection may be strong/weak but must be rational.
 - **Example:** Eyewitness "I saw D stab victim" → directly relevant to fact in issue (D stabbed victim)
- **Indirectly Relevant:** Evidence logically connected through intermediate facts/other evidence. Goes to credibility, reliability, collateral matters.
 - **Example:** Evidence of bias → affects witness credibility → affects weight of witness testimony → affects fact in issue
 - **Application:** Identify chain of inferences. Each link must be rational.
- **s 55(2) clarifies:** Evidence not irrelevant only because it relates to: (a) credibility of witness, OR (b) admissibility of other evidence, OR (c) failure to adduce evidence

3. Rational Connection – *Smith* Test

- **Must add something factfinder lacks**

- *Smith v The Queen (2001) HCA* - Police officer ID'd D from security photos after robbery. Officer had NO advantage over jury (jury saw D daily in court). Evidence couldn't rationally affect assessment → failed relevance.
- *R v Marsh (2005) NSWCCA* - Sister ID'd D from CCTV. Lifelong familiarity w/ D's stance, gait, features, mannerisms. Knowledge gave advantage jury lacked → passed relevance.
- **Application:** If factfinder can make same assessment without evidence (no advantage) → irrelevant. Common in identification evidence.

Common Issues for Hypo

- **Remote evidence:** Logically connected but connection too weak/speculative
 - *Hollingham v Head (1858)* - Evidence of similar contracts "too remote". Under EA: probably passes s 55 but excluded s 135 (substantially outweighed by confusion).
 - **Application:** If connection extremely tenuous → may be irrelevant OR relevant but excluded s 135.
- **Evidence of characteristics:** May/may not be relevant depending on facts
 - *R v Stephenson (1976)* - Other driver's blood alcohol inadmissible. Connection to D's conduct "extremely tenuous". Under EA: likely inadmissible s 135 (substantially outweighed by confusion), not relevance itself.
 - **Application:** Check if characteristic actually relevant to fact in issue or just bg.
- **Competing inferences:** Evidence may support multiple inferences (some favourable, some unfavourable)
 - **Application:** If evid could rationally support inference to fact in issue → relevant (even if other inferences possible). Competing inferences go to weight.

Important Principles

- **Gateway provision:** If not relevant → inadmissible (s 56(2))
- **Low threshold:** Slight probative value sufficient (*Festa*) - strength goes to weight
- **"Could rationally affect":** Would evid make fact more/less likely? If yes → relevant
- **Identify facts in issue first:** Elements of claim/charge/defence
- **Direct vs indirect:** Direct = to fact itself; Indirect = through intermediate facts
- **Smith test:** Must add something factfinder lacks (common in ID evidence)
- **Remote ≠ irrelevant:** Remote evidence may pass s 55 but excluded s 135
- **Competing inferences OK:** If one rational inference to fact in issue → relevant (weight not admissibility)
- **Always apply first:** Check relevance before any other rule

Contemporaneous Statements (s 66A)

- Hearsay rule doesn't apply to contemporaneous representation about person's: **health, feelings, sensations, intention, knowledge, state of mind**
- **Two Limits:** 1) **Present tense only** ("I feel sick" ✓ NOT "I was sick" X); 2) **Infers state not conduct** (proves person angry, NOT why/what caused anger)
- **s 62(3):** Person has personal knowledge of own state when representation made
- **Uses:** Explain actions (*Baker* - fear), indicate intention (*Walton*)

Facilitative Exceptions

- **s 69:** Business records - kept in course of business by person with personal knowledge. Beware **s 69(3)** qualification.
- **s 70:** Tags/labels - attached in business describing identity/nature/ownership/destination
- **s 71:** Electronic communications - identity of sender, date/time sent, destination/addressee
- **s 72:** Aboriginal/TSI traditional laws and customs
- **s 73:** Reputation - marital status, age, family relationships
- **s 74:** Public rights - reputation about existence/nature/extent of public/general right

Competence Limitation (s 61)

- **s 61(1):** ss 63/64/65 don't apply if maker not competent when representation made
- **s 61(2):** Doesn't apply to **s 66A** (contemporaneous statements)
- **s 61(3):** **Presumption maker was competent unless contrary proved**

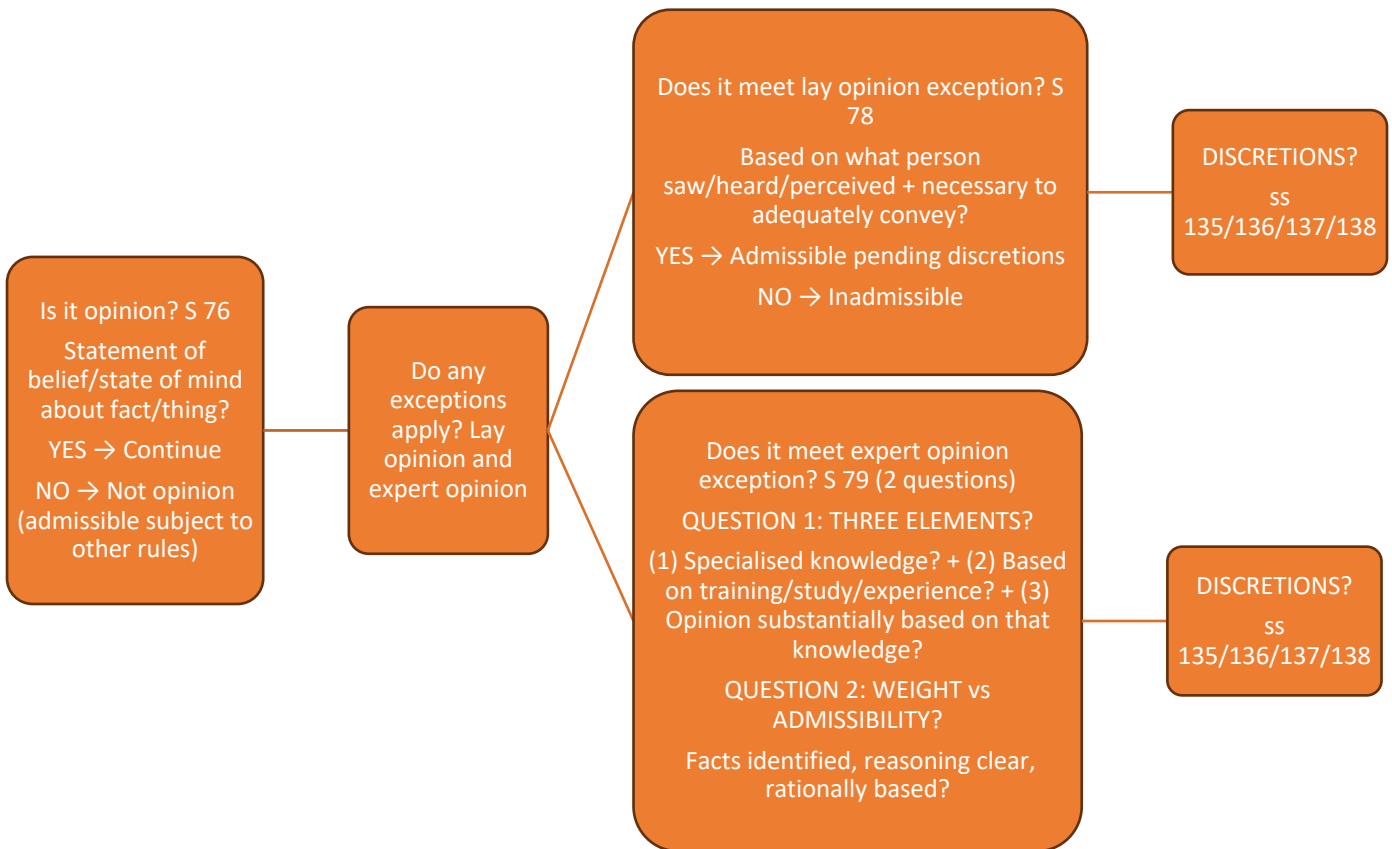
BEWARE Notice Requirement (s 67)

- **Required for:** ss 63(2), 64(2), 65(2), 65(3), 65(8)
- Must specify: provisions relied on, particulars (substance, date, time, place, circumstances), maker/witness name/address

Important Principles

- **Purpose determines admissibility** - always identify hearsay vs non-hearsay purpose first
- **Multiple purposes common** - same evidence may serve multiple purposes (*Papakosmas*)
- **s 60 dual use** - if admitted for non-hearsay → also hearsay (EXCEPT admissions in criminal)
- **First-hand requirement** - must establish personal knowledge (**s 62**) before using ss 63-66
- **Maker available vs unavailable** - different thresholds (prosecution highest under **s 65(2)**)
- **Fresh in memory flexible** - **s 66(2A)** considers nature of event, age/health, time (*Graham/R v XY*)
- **Discretions always apply** - **s 135** may refuse, **s 136** may limit, **s 137** (criminal) must refuse if outweighed
- **Warnings available** - **s 165(1)(a)** for hearsay/admissions

3B Opinion (Pt 3.3)



Opinion Rule (s 76)

- **s 76(1)**: Evidence of opinion NOT admissible to prove existence of fact about which opinion expressed
- **Opinion**: Statement of belief/state of mind about fact in issue or relevant fact (not direct observation) – 'an inference drawn from observed and communicable data.' (*Allstate Life Insurance v ANZ*)
- The more a statement relies on inferences, the more likely it is opinion rather than fact (ALRC position).
- Two exceptions: lay opinion (s 78) and expert opinion (s 79)
- NOTE: Opinion rule applies to prev reps; **must meet both hearsay exception AND opinion rule exception**. A prev rep that contains an opinion will have to meet the requirements of an exception to the opinion rule even where the prev rep itself being hearsay is admissible as a business record under the business record exception to the hearsay rule (*Lithgow*).
- Opinion multiple relevancy: s 77 – If evidence of an opinion is admitted for a non-opinion purpose, it may then also be admissible for its opinion purpose under (Key cases: *R v Whyte [2006]*; *Lakatoi Universal Pty Ltd v Walker [1999]*).

Exceptions

Lay Opinion (s 78)

- **s 78(a)**: Opinion based on what person **saw, heard or otherwise perceived** about matter/event
- **s 78(b)**: Opinion evidence **necessary** to obtain adequate account/understanding of person's perception of matter/event

Is It An Admission?

- **'Admission'** (Dictionary): Previous representation made by party to proceeding, adverse to party's interest in outcome of proceeding
- **Three elements** (ALL required):
 - **1) Previous representation** (out-of-court statement/conduct)
 - **2) Made by party** to proceeding (or authorised/adopted by party)
 - **3) Adverse** to party's interest in outcome
- **If any element missing** → NOT admission
- **Application:** Check if statement against party's interest. Neutral/favourable statements NOT admissions.

Types of Admissions

- **Express:** Direct statement adverse to interest ("I stabbed him", "I breached contract"). Most likely admitted - clear + unambiguous. May exclude ss 84-90.
- **Implied:** Conduct/statement from which admission inferred (flight, destroying evid, paying compensation, failure to deny). More contestable - alternative explanations possible. Apply ss 89-90 if ambiguous.
- **Silence** (context-dependent):
 - **Civil:** Adverse inferences CAN be drawn
 - **Criminal - 3 contexts:**
 - **(1) Pre-arrest:** May be admissible if circumstances called for response (Petty - D's silence when confronted. Subject to ss 89-90)
 - **(2) Post-arrest:** Protected (right to silence) - inadmissible (s 89)
 - **(3) Trial - s 20: Absolute protection** - cannot comment on D's failure to testify (*Weissensteiner*)
- **Lies ≠ silence:** False statements admissible - consciousness of guilt (*Edwards* direction: lies don't prove guilt, may lie innocent reasons, only if satisfied lied not mistaken)
- **Adoptive:** Party adopts another's statement as own. Must show affirmative adoption - mere presence/silence insufficient.
- **By Agents:** Agent/representative makes admission within authority scope. Usually admitted if clearly authorised. May exclude if exceeded authority/outside scope.

Civil Admissions (s 81)

- **s 81(1):** Hearsay rule does NOT apply to admission
- **Effect:** All admissions admissible in civil - first-hand OR second-hand
- **s 81(2) - "Party" includes:** Party, Person with authority to make admission on party's behalf, Person with personal knowledge, Employee/agent (if admission made within scope)
- **Application civil:** Broadly admissible - check if made by party/authorised person/employee in scope.

Criminal Admissions (s 82)

- **s 82(1):** Hearsay rule does NOT apply to admission made by D
- **s 82(2):** First-hand admissions only (unless benefits D)
- **Effect:** Criminal admissions must have **personal knowledge** (s 82(2) - maker saw/heard/perceived)

- **Key difference:**
 - **Tendency:** Probative value from **pattern/propensity** (pn tends to act this way)
 - **Coincidence:** Probative value from **improbability** (events too similar to be coincidence)
- **Application:** Identify which type, but use same two-step test for both.

Pt 3.7 Application and Limitations

- **s 94:** Part 3.6 applies to evidence of: Character of person; Reputation of person; Conduct of person (whether differential conduct or otherwise)
 - **Effect:** Broadly captures all character/conduct evidence used for tendency/coincidence reasoning
 - **"Conduct":** Includes acts, omissions, events, circumstances, state of mind

S 95 Use Rule (Gateway Provision)

- **s 95(1):** Tendency/coincidence evidence NOT admissible to prove person acted in particular way or had particular state of mind **UNLESS ss 97/98** requirements satisfied
- **Effect: Gateway provision** - tendency/coincidence evidence MUST go **through ss 97/98** two-step test. Cannot be used without satisfying that test.
- **Exceptions - s 95 does NOT apply to:** Cross-examination (**s 97(1)(b)**) - can use without notice AND Rebuttal evidence
- **Application:** s 95 prohibits use **UNLESS ss 97/98** satisfied. Check if exception applies (cross-x or rebuttal). If not → must satisfy two-step test below.

The Two-Step Test (Identical for ss 97 and 98)

- **s 97(1) Tendency & s 98(1) Coincidence:** Evidence NOT admissible unless:
 - **(a)** Court satisfied evidence has **significant probative value**, AND
 - **(b)** Notice given (except cross-x or not required)
- **Same test applies to both** - only difference is HOW significant probative value established

STEP 1: Significant Probative Value?

- **'Significant probative value'** (**Dictionary**): Probative value that is important or of consequence
- **Assessed assuming evidence accepted** (**IMM** - no credibility discount at admissibility stage)
- **Phillips v The Queen (2006) HCA** - **Probative value = rational persuasiveness**. Greater rational persuasiveness = higher probative value. Consider degree similarity, circumstances, relationship between tendency/coincidence + fact in issue.
- **FOR TENDENCY - Establish through specificity:**
 - **Hughes v The Queen (2017) HCA** - **Sufficient particularity required**. Must identify relevant tendency w/ precision. Generic tendency ("violent", "dishonest") insufficient. Must be specific tendency to do particular acts in particular way.
 - **TL v The King (2023) HCA** - **Specificity of tendency directly impacts strength of inferential reasoning**. More specific tendency = stronger probative value.
 - **Velkoski v The Queen (2014) HCA** - Prior domestic violence admissible. Showed D's **capacity for violence** toward complainant, **willingness override her autonomy**, **prepared use violence control her**. Specific tendency satisfied Hughes test.
 - **Single vs multiple complainants** - different specificity required:

- **Application:** Always apply s 101(2) to criminal Pr tendency/coincidence about D. Separate test from ss 97/98. Ellis approach - two separate questions, not Pfennig test.

s 110 - Character/Reputation/Opinion

- **s 110(1):** Evidence of character/reputation/opinion about person inadmissible to prove conduct/state of mind
- **s 110(2):** Exception - if **specific acts** proved establishing character/reputation
- **Effect:** Cannot use general character evidence ("he's violent") UNLESS proved by specific acts
- **Application:** Character evidence must be grounded in specific proven acts, not general reputation.

NON-APPLICATIONS (When ss 97/98 Do NOT Apply)

- Three types admissible **without** ss 97/98 tests:
 - **Presumption of Continuance**
 - Prior existence indicates continued existence at later time (e.g., earlier speed proves later speed unless circumstances changed). NOT tendency - continuation of same act.
 - **Single Transaction**
 - *O'Leary v The King (1946) HC* - Series of events over time (prolonged drinking bout) may be single transaction. Earlier acts admissible as part of transaction, not tendency.
 - **Relationship Evidence**
 - *R v Lock (1997) NSWCCA* - Evidence showing relationship + nature (e.g., violent relationship) admissible for **context/background only**.
 - **Critical:** CAN use to show context. CANNOT use for tendency reasoning ("violent before so violent now"). Must have strong judicial warnings.
 - **Application:** Prior domestic violence/controlling behaviour may be relationship evidence without ss 97/98/101 IF used only for context, not tendency.

Important Principles

- **Tendency:** Pattern/propensity. **Coincidence:** Similarity + improbability
- **Same two-step test (ss 97/98):** (1) Significant probative value? (2) Notice?
- **Only difference:** HOW probative value established - Tendency (specificity), Coincidence (improbability)
- **Significant = important/consequential (Dictionary).** Ax assuming accepted (*IMM*)
- **Phillips:** Probative value = rational persuasiveness
- **⚠ s 101(2) CRITICAL:** If criminal + Pr adducing about D → probative value must **outweigh** unfair prejudice (NOT "substantially outweigh")
- **Ellis:** s 101 stands alone - Pfennig NOT applicable. Two separate questions: (1) probative value (evidentiary), (2) prejudice (policy)
- **s 101(2) lower threshold** than s 135 (which requires "substantially outweighs")
- **s 101(3)-(4):** Does NOT apply if Pr rebutting D's tendency/coincidence
- **s 110:** Character evidence needs specific proven acts
- **Notice exceptions:** Cross-x, rebuttal, court decides not required
- **Apply systematically:** (1) ss 97/98 test → (2) s 101(2) if criminal Pr → (3) Discretions

Does Pt 3.9 Apply?

- **STEP 1: Meet Dictionary Definition?**

- **EA Dictionary:** 'Identification evidence' = assertion D 'was, or resembles' person 'present at or near' place where offense/connected act, 'at or about the time', assertion 'based wholly or partly on what person making assertion saw, heard or otherwise perceived'
- **Three types:** Recognition ("I saw Bob"), Identification ("That's the man"), Resemblance ("Looks like")
- **NOT ID evid:** Describing characteristics, identikit, "someone introduced as Adam", DNA expert
- *Trudgett v The Queen (2008) NSWCCA* - "Assaulted by someone introduced as Adam" + description. NOT ID evid.

- **STEP 2: Meet Pt 3.9 Scope?**

- **ALL must be satisfied:** Criminal only (s 113); **About D** (not other people/animals/things/negative ID); **Eyewitness** (personal knowledge - not DNA expert, not secondhand); **NOT tendency** (prior unrelated crime)
- If fails ANY → Pt 3.9 doesn't apply

- **STEP 3: How Admitted?**

- **Direct** (dock ID in court)
- **Indirect** (previous representation via hearsay OR lay opinion)

Visual ID Evidence (s 114)

- **s 114(2):** Visual ID by Pr NOT admissible unless: (a) ID parade held before, OR (b) Not reasonable to hold, OR (c) D refused, **AND Not intentionally influenced**
- **s 114(3) - "Reasonableness" factors:** Gravity offense, importance evid, practicality (ID 'at or about time?'), appropriateness (relationship D + witness)
- *R v Marshall (2000) NSWCCA* - Victim saw photos (didn't ID), later saw Marshall in handcuffs, ID'd him. Inadmissible - **displacement effect**.

Picture ID Evidence (s 115)

- **s 115(2):** NOT admissible if pictures **suggest persons in custody**
- **s 115(3):** NOT admissible if BOTH: D **in custody** when pictures examined, AND Picture **made before** custody
- **Purpose:** Avoid rogue's gallery + displacement
- **s 115 doesn't cover:** Voluntarily cooperating, released on bail
- *R v McKellar [2000] NSWCCA* - Photo from earlier arrest. D released on bail when shown. s 115(3) didn't apply.
- **s 115(4)-(5) Exceptions:** D refused OR not practicable OR appearance changed OR not reasonable
- **s 115(7):** Judge must (on request) inform jury pic after custody OR warn not assume record

Exclusions

- **Key:** Faulty ID not inadmissible per se - affects weight, not admissibility
- **Two protections:**
 - **s 116 Mandatory Warning** (criminal jury)
 - Judge must warn: special caution + reasons (generally + case circumstances)