

WEEK 1 - RELEVANCE

1.1 - INTRODUCTION

WHAT IS EVIDENCE LAW

- it is procedural law to resolve disputes, ascertain facts and determine legal responsibility through litigation
- The ALRC has described the law of evidence 'as part of adjectival law-the body of principles and rules which deal with the means by which "*people's rights and duties may be declared, vindicated or enforced, or remedies for their infraction secured.*"'
- tends to prove or disprove a factual proposition a ground for believing something
- **Legal notions of "evidence"**: information or data presented in court used for determining facts in issue between parties to litigation

GENERAL PRINCIPLES BEHIND THE EXCLUSION OF EVIDENCE

- The Reliability Principle eg: hearsay
- The Libertarian/Protective Principle eg: *privilege against self-incrimination*
- The Disciplinary Principle eg: exclusion of illegally-obtained evidence
- All three are used eg: confessions and admissions

EVIDENCE ACT 2008 (VIC)

The Act is divided into five chapters:

- **Chapter 1:** Preliminary
- **Chapter 2:** Adducing Evidence
- **Chapter 3:** Admissibility
- **Chapter 4:** Proof
- **Chapter 5:** Miscellaneous
 - There is also a Dictionary which forms part of the Act (s 3)
- The Act applies to all proceedings in a Victorian court (s 4) – Victorian Court is defined in Act
- Rules and principles of common law and equity as well as the courts' general powers continue to apply except to the extent the Act provides otherwise expressly or by necessary intendment (ss 9 and 11)
- The Act is not a code
- The common law and rules of equity operate alongside the Act

Haddara v R [2014] VSCA 100

- **S 56:** except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding
- **S 56** refers only to express provisions which render evidence inadmissible
- They do not affect provisions that allow for the exclusion of admissible evidence

What does 'beyond reasonable doubt' mean?

- One of the most common questions asked by juries.
- At CL, the jury was told to give BRD its ordinary meaning, without further elaboration - **Green v R (1971) 126 CLR 28**

JURY DIRECTIONS ACT 2015 (VIC)

Section 63

When trial judge may explain "proof beyond reasonable doubt"

- (1) A trial judge may give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge—
 - (a) a direct question about the meaning of the phrase; or
 - (b) a question that indirectly raises the meaning of the phrase.
- (2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt".

Section 64

How explanation may be given in response to jury question

- (1) If the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt", the trial judge may—
 - (a) refer to—
 - (i) the presumption of innocence; and
 - (ii) the prosecution's obligation to prove that the accused is guilty; or
 - (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
 - (c) indicate that—
 - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
 - (ii) the prosecution does not have to do so; or
 - (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
 - (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

VOIR DIRES

Section 189 Evidence Act 2008 (Vic)

- Questions of admissibility, the use to which evidence may be put and competence and compellability are determined on a 'voir dire'
- The voir dire usually takes place in the absence of the jury

LEAVE, PERMISSION AND DIRECTIONS

- In some cases, a judge may direct a jury as to how they should approach certain forms of evidence, and/or may warn them about the dangers of certain types of evidence. Such directions/warnings may have a significant impact on the outcome of a trial, and are a common ground of appeal.
- In general terms, a direction on law is binding whereas a warning/comment is advisory.
- **Leave, permission:** s 192 Evidence Act 2008 (Vic)
- **Identification evidence:** s 36 Jury Directions Act 2015 (Vic)
- **Unreliable evidence:** s 31, 33 Jury Directions Act 2015 (Vic)

DIRECTIONS TO EXCLUDE

Section 135 Evidence Act 2008 (Vic)

General discretion to exclude evidence

- The court may **refuse** to admit evidence if its probative value is substantially outweighed by the danger that the evidence might -
 - (a) be unfairly prejudicial to a party; or
 - (b) be misleading or confusing; or
 - (c) cause or result in undue waste of time.

Section 136 Evidence Act 2008 (Vic)

General discretion to **limit** use of evidence

- The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might -
 - (a) be unfairly prejudicial to a party; or
 - (b) be misleading or confusing

Section 137 Evidence Act 2008 (Vic)

Exclusion of **prejudicial evidence in criminal proceedings**

- In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

APPEALS IN CRIMINAL CASES

- Trial court to Full Court of the Supreme Court of the relevant State
- Appeal allowed: **Section 276 Criminal Procedure Act 2009 (Vic)**
 - (a) Verdict unreasonable/not supported by evidence;
 - (b) Error or an irregularity in relation to the trial where there has been a substantial miscarriage of justice;
 - (c) For any other reason there has been a substantial miscarriage of justice
- In any other case the appeal must be dismissed

TYPES OF EVIDENCE

- Oral
- Documentary
- Real
- Hearsay
- Direct
- Circumstantial

1.2 - RELEVANCE

RELEVANCE

An item of evidence must be relevant to a **fact in issue** in order to be admissible

- **Facts in Issue:**
 - facts which the plaintiff or prosecutor and the defence or accused must prove in order to be successful and are established by reference to substantive rules of law
- **Relevant Facts:**
 - facts which tend to prove or disprove the facts in issue
- **Directly relevant:**
 - to a fact if it affects the probable existence or non- existence of that fact.
- **Indirectly relevant:**
 - if it bears upon the probative value of evidence which is itself directly relevant
- **Probative value:**
 - the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue
- **Prejudicial effect:**
 - the undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force:
Pfennig v R

Section 55 Evidence Act 2008 (Vic) → Threshold for Relevance

- (1) The evidence that is relevant in a proceeding is 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.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to—
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.

Section 56 Evidence Act 2008 (Vic) → Rules of Exclusion

- (1) Except as otherwise provided by this Act, evidence that is **relevant** in a proceeding is **admissible** in the proceeding.
- (2) Evidence that is **not relevant** in the proceeding is not **admissible**.

Admissibility of evidence from special hearing

- A recording is admissible in evidence as if its contents were the direct testimony of the witness.
- The court may rule as inadmissible the whole or any part of the contents of a recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.

SUMMARY OF ALTERNATIVE ARRANGEMENTS

Adults	Apply where (s 359 CPA): (a) sexual offence, or (b) family violence offence OTF. Includes CCTV (s 363 CPA), screen blocking accused from view (s 364 CPA), derobing counsel (s 365 CPA), emotional support (s 366 CPA), seating of practitioners when examining witnesses (s 360(f) CPA).
Children/ Cognitive Impairment	Apply where (s 366(1) [<i>children</i>] and s 366(2) [<i>cognitive impairment</i>] CPA): (a) sexual offence, (ab) family violence offence, (b) indictable offence involving assault, injury or threat of such, or (d) assault. Includes giving evidence in chief via recording (s 367 CPA), or if the complainant is the witness, special hearing if sexual offence OTF (s 369 CPA).

EXAM SCRIPT – RELEVANCE OF EVIDENCE

STEP 1: START WITH THE PRESUMPTION

- Under the Evidence Act 2008 (Vic) s 12:
 - (a) Every person is competent to give evidence
 - (b) A competent witness is also compellable
- Unless an exception applies.

~ COMPETENCE ~

STEP 2: DETERMINE WHETHER THE WITNESS LACKS CAPACITY

- Under s 13(1), a person is not competent if they cannot:
 - Understand a question, OR
 - Give an answer that can be understoodand this incapacity cannot be overcome.
- Possible reasons include:
 - intellectual disability
 - mental illness
 - young age
 - physical impairment
- The presumption of competence applies unless the contrary is proved.

STEP 3: DETERMINE WHETHER SWORN EVIDENCE CAN BE GIVEN

- Under s 13(3) a witness is not competent to give sworn evidence if they do not understand the obligation to tell the truth.
- However, they may still give unsworn evidence.

STEP 4: UNSWORN EVIDENCE

- Under s 13(5) the witness may give unsworn evidence if the court explains:
 - the importance of telling the truth
 - that they may say if they do not know or remember
 - that they should not agree with statements they believe are false.
- Failure to give these directions may render the evidence inadmissible (e.g. *SH v R*).
- The High Court in *R v GW* confirmed that unsworn evidence is not automatically unreliable.
 - *Sworn evidence is testimony given under oath or affirmation, carrying legal penalties for perjury, while unsworn evidence is provided without this solemn promise, often by children or those not understanding the oath. Sworn evidence is considered more reliable, whereas unsworn evidence may require judicial caution to a jury, if a judge is asked to provide jury directions and proceeds to do so at their discretion.*

STEP 5: VOIR DIRE

- Questions regarding competence are preliminary questions determined on a voir dire under s 189 Evidence Act.
- This typically occurs in the absence of the jury.

~ COMPELLABILITY ~

STEP 6: GENERAL RULE

- Under s 12(b), a person who is competent is generally compellable to give evidence. However, exceptions exist.

STEP 7: THE ACCUSED (criminal proceedings)

- Under s 17 Evidence Act in criminal proceedings:
 - (2) The accused is not competent to give evidence for the prosecution
 - The accused may choose to give evidence for their own defence
 - (3) An associated accused is not compellable to give evidence if tried jointly, but compellable for the Prosecution or Accused if they are being tried separately.

STEP 8: SPOUSES AND FAMILY MEMBERS

- Under s 18 Evidence Act, a person who is the:
 - Spouse or de facto partner
 - parent
 - child
- of the accused may object to giving evidence for the prosecution.
- The court must determine the objection in the absence of the jury.

STEP 9: BALANCING TEST

- Under s 18(6) Evidence Act, the court must consider whether:
 - Harm may be caused to the person or the relationship if evidence is given; and
 - That harm outweighs the desirability of the evidence being given.
- Factors include:
 - seriousness of the offence
 - importance of the evidence
 - availability of other evidence
 - nature of the relationship.
- This provision replaces any suggestion of spousal privilege, which was rejected in *Australian Crime Commission v Stoddart*.

~ ALTERNATIVE ARRANGEMENTS FOR WITNESSES IN CRIMINAL PROCEEDINGS ~

Where a witness is vulnerable, the court may allow alternative arrangements under the *Criminal Procedure Act 2009 (Vic)*. These measures are particularly relevant in cases involving: sexual offences, family violence, or child or cognitively impaired witnesses (including the complainant themselves).

WEEK 3 - PRIVILEGE

3.1 - CLIENT LEGAL PRIVILEGE (AKA LEGAL PROFESSIONAL PRIVILEGE)

Exists to protect those seeking legal advice or engaging in actual or contemplated litigation. It allows for frank discussion without fear that prejudicial information will be disclosed to allow for provision of accurate advice.

TWO LIMBS TO PRIVILEGE

1. **Provision of legal advice** → s 118 Evidence Act 2008 (Vic)
 - Lawyer/client communication
 - Lawyer/lawyer communication
 - Confidential document (client/lawyer/another person)
2. **Provision of legal services**
 - s 119 Evidence Act 2008 (Vic)
 - Lawyer/third party communication
 - Client/third party communication
 - Confidential document
 - s 120 Evidence Act 2008 (Vic)
 - Unrepresented party/third party communication
 - Confidential Document (by or at request of party)

PROVISION OF LEGAL ADVICE

Section 118 Evidence Act 2008 (Vic)

Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—

for the *dominant purpose* of the lawyer, or one or more of the lawyers, providing legal advice to the client.

PROVISION OF LEGAL SERVICES

Section 119 Evidence Act 2008 (Vic)

Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared—

for the *dominant purpose* of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Section 120 Evidence Act 2008 (Vic)

Unrepresented parties

- (1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the party and another person; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party—

for the dominant purpose of preparing for or conducting the proceeding.

RATIONALES

- The privilege is regarded as a fundamental common law right: **Baker v Campbell**
- Its rationales include:
 - promoting the administration of justice and an effective adversary system; and
 - ensuring the protection of other fundamental rights.

SCOPE OF THE PRIVILEGE

- Application to pre-trial proceedings (s 131A)
- Applies to confidential communications and documents; not 'observed facts'
- A communication/document is confidential if made/prepared in such circumstances that the maker/recipient was under an express or implied obligation not to disclose its contents (s 117)
- There must be a lawyer-client relationship: **Waterford v Cth**; cf: **Rich v Harrington**
 - **In house advice** → could be advising regarding business activities rather than legal advice BUT in-house counsel can still have a lawyer-client relationship

Section 117 Evidence Act 2008 (Vic)

Definition: Lawyer

- (a) an Australian lawyer; and
- (b) a non-participant registered foreign lawyer; and
- (c) a foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c);

An 'Australian lawyer' is a person who is admitted to the legal profession under the **Legal Profession Act 2004 (Vic)** or corresponding law.

Section 117 Evidence Act 2008 (Vic)

Definition: Client

- (a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is—
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made

DOMINANT PURPOSE

The current test:

- The communication/document must have been made for the 'dominant purpose' of providing legal advice/services: **Esso Aust v Federal Commissioner of Taxation**
- A dominant purpose is one that predominates over other purposes, it is the prevailing or paramount purpose: **Hodgson v Amcor**

DOCUMENTS

Sch 2 Evidence Act 2008 (Vic) → Dictionary, Pt 2, Cl 8

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.

WEEK 7 - TENDENCY AND COINCIDENCE

7.1 - TENDENCY AND COINCIDENCE EVIDENCE IN PROCEEDINGS

COMMON LAW

- At common law such evidence was known as propensity and similar fact evidence
- Evidence that an accused has a propensity to commit crimes of the sort with which he is charged is relevant to the question of whether he committed the offence in question.
- It is circumstantial evidence that is highly prejudicial but also extremely probative
- Examples:
 - **Makin v AG (NSW) [1894] AC 57** (Baby Case); **DPP v Boardman [1975] AC 421** (School Boys Case)

Part 3.6 Evidence Act 2008 (Vic) – Tendency and Coincidence

- Applies in **both civil and criminal proceedings**
- Does not apply to evidence relevant only to the credibility of a witness → s 94(1)
- Does not apply where character/reputation/conduct or tendency is a fact in issue → s 94(3)
- Where evidence is not to be adduced to prove a particular matter, it must not be used to prove that matter even if relevant for another purpose → s 95

Section 94 Evidence Act 2008 (Vic)

Application

- (1) This Part does not apply to evidence that relates only to the credibility of a witness.
- (2) This Part does not apply so far as a proceeding relates to bail or sentencing.
- (3) This Part does not apply to evidence of—
 - (a) the character, reputation or conduct of a person; or
 - (b) a tendency that a person has or had—if that character, reputation, conduct or tendency is a fact in issue.

Section 95 Evidence Act 2008 (Vic)

Use of evidence for other purposes

- (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
- (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

TENDENCY AND COINCIDENCE EVIDENCE

- In both tendency and coincidence cases in order to be admissible for a tendency/coincidence purpose the evidence must have 'significant probative value'.
- '*Significant*' is not defined.
 - It has been held to mean 'important' or 'of consequence': **R v Lockyer (1996)**
 - It requires 'far more' than 'mere relevance'
- '*Probative value*' means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue

Section 97 Evidence Act 2008 (Vic)

The tendency rule

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

- (2) Subsection (1)(a) does not apply if—
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.
- Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about an accused (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.*

Section 98 Evidence Act 2008 (Vic)

The coincidence rule

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

EXAM NOTE: '2 or more events' may include the event charged

- (2) Subsection (1)(a) does not apply if—
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

Section 101 Evidence Act 2008 (Vic)

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence **substantially outweighs any prejudicial effect** it may have on the accused.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the accused.
 - *E.g., if the evidence that the defendant adduces is credibility or character evidence (e.g., "I am a wonderful parliamentarian, I would never do something like that"), then the prosecution is going to call in and adduce and explain tendency evidence that you have a tendency to abuse parliamentarian staffers. It's a tit for tat provision.*
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the accused.

See **Ellis v R**

Notes

- In NSW & ACT: E.g: **Evidence Amendment (Tendency and Coincidence) Act 2020** amended **Evidence Act 1995 (NSW)** commencing 1 May 2020.
- **Sections 97 & 98** threshold removed "substantially"
- Significant changes in NSW & ACT in response to the Institutional Responses to Child Sexual Abuse that removes common law principles, provides a specific section for child sex offences, lowers the threshold in **s 101**. Will wait to see if Victoria follows

ASSESSING PROBATIVE VALUE

IMM v R [2016] HCA 14 (French, Kiefel, Bell & Keane JJ)

- Differing approach between NSW where credibility/reliability not relevant to assessment of probative value, and Victoria where such factors are taken into account.

Kamleh v The Queen [2005] HCA 2

- K convicted of murder, co-offender Zappia convicted of manslaughter
- Killings alleged to have happened between 1.16 AM and 4 AM 3 April 2000
- Defendants' alibi was that they were at a nightclub between 11 PM on 2 April until 4 AM on 3 April.
- **1** – Conversation between Zappia and Simoniuk on the early morning of 3 April. Zappia had told him about the shootings, and that he had turned the TV up really loud while in the room to conceal the gun shots.
 - **Held:** Not tendered to prove the truth of the assertion. Tendered to prove state of knowledge by Zappia, which was consistent with the crime scene.
- **2** – Numerous telephone calls between Zappia and K after K was interviewed by police. Prosecution sought a tender record of interview in which Zappia gave details of his movements almost identical to that given by K.
 - **Held:** not hearsay as not adduced for the purpose of proving truth but to prove statements made in concert with K which could be shown to be false.
- **3** – Conversation with Simoniuk prior to alleged offence stating that he and K planned to catch up with [deceased] because 'he owed them something or they had something to settle with him'
 - **Held:** Evidence of intention to meet. Admissible applying **Walton** as original evidence of state of mind.
 - Alternatively, in UEA jurisdictions evidence of intention under **section 66A** (see below)

WEEK 9 - HEARSAY EXCEPTIONS

9.1 - EXCEPTIONS TO THE HEARSAY RULE

REPRESENTATIONS RELEVANT FOR A NON-HEARSAY PURPOSE

Section 60 Evidence Act 2008 (Vic)

Exception—evidence relevant for a non-hearsay purpose

- (1) The hearsay rule does not apply to evidence of a previous representation that is admitted, because it is **relevant for a purpose other than proof of an asserted fact**.
- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2))
- (3) However, this section **does not apply in a criminal proceeding to evidence of an admission**.

Compare this provision to: **Lee v The Queen [1998] HCA 60**

- "Don't bother me I have just done job, I fired two shots ...and the other guy with me bailed out."

Section 61 Evidence Act 2008 (Vic)

Exceptions to the hearsay rule dependant on competency

- (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13(1).
- (2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.
Note: For the admissibility of such contemporaneous representations, see section 66A.
- (3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

EXCEPTIONS FOR FIRST-HAND HEARSAY

Section 62 Evidence Act 2008 (Vic)

Restriction to "first-hand" hearsay

- (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had **personal knowledge** of an asserted fact.
- (2) A person has **personal knowledge** of the asserted fact **if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.**

- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

EXCEPTIONS: WITNESS AVAILABLE/UNAVAILABLE

WHERE A WITNESS (REPRESENTATION MAKER) IS UNAVAILABLE

Section 63 Evidence Act 2008 (Vic)

Exception—civil proceedings if maker not available

- (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) *The hearsay rule does not apply to—*
- (a) *evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or*
 - (b) *a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.*

Notes

1. Section 67 imposes notice requirements relating to this subsection.
2. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Section 65 Evidence Act 2008 (Vic)

Exception—criminal proceedings if maker not available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) *The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—*
- (a) *was made under a duty to make that representation or to make representations of that kind (e.g., police officers, doctors); or*
 - (b) *was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication (e.g., dying declarations → see below Williams); or*
 - (c) *was made in circumstances that make it highly probable that the representation is reliable (contentious context); or*
 - (d) *Was—*
 - (i) *against the interests of the person who made it at the time it was made; and*
 - (ii) *made in circumstances that make it likely that the representation is reliable.*
- See Sio below

NOTE:

- Section 65(2)(d)(ii) requires a trial judge to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character.
 - Evidence by an accomplice against his or her co-offender has long been recognised as less than inherently reliable precisely because of the perceived risk of falsification. Statements by an accomplice afford a classic example of a case where a "plan of falsification" may be expected to be formed, given the obvious interest of one co-offender to shift blame onto his or her accomplice, especially where the circumstances also include the opportunity to seek to curry favour with the authorities. That the evidence of accomplices is evidence apt to be unreliable.
 - Section 65(2)(d) is directed to the objective circumstances in which the representation was made, not the apparent truthfulness of the person making it.
- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—
- (a) cross-examined the person who made the representation about it; or
 - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Example of ss 90; 138 discretion to exclude: *DPP v Natale (Ruling) [2018] VSC 339* → failure to provide an interpreter

11.2 - OPINION EVIDENCE (EXCEPTION TO HEARSAY RULE)

Section 76 Evidence Act 2008 (Vic)

The opinion rule

Evidence of an opinion is **not admissible** to prove the existence of a fact about the existence of which the *opinion* was expressed.

DEFINITION OF 'OPINION'

- **Not** defined in the Act.
- *Lithgow City Council v Jackson*: “an inference drawn from observable and communicable data”
- *Sidaros v The Queen [2020] ACTA 11*: Undercover officers in a cell to obtain admissions was obtained at a price unacceptable to community standards
- **Facts vs. Inferences**: Difficult to distinguish between a fact and an opinion.
 - It becomes more factual if there is less doubt
 - What is evidence of a police officer identifying someone in a photo?: *R v Smith*

SPECIFIC EXCEPTIONS TO THE OPINION RULE

- Summaries of voluminous or complex documents: s 50(3)
- Evidence relevant otherwise than as opinion evidence: s 77
- Lay opinion: s 78
- Aboriginal and Torres Strait Islander traditional laws and customs: s 78A
- Expert opinion: s 79
- Admissions (above): s 81
- Exceptions to the rule excluding evidence of judgments and convictions: s 92(3)
- Character evidence and expert opinion about accused persons
- Other provisions of this or other Acts may operate as further exceptions

WHY DO WE HAVE THIS EXCLUSORY RULE?

- The opinion rule can be regarded as a requirement that the witness have personal knowledge of the information he or she is relating to the jury
- A witness is supposed to state what he knows, not to repeat what he has heard others say, what he thinks, or what he imagines from conjecture
- “*Mere opinion*” does not give the jury the basic information
- It offers inferences and conclusions without providing the observed data
- It is therefore considered “*improper and irrelevant in the mouth of a witness*” (Lord Mansfield, 1796)
- *So which opinions are the most reliable?*
 - The ones based on first-hand observation or perception

THE BASIC RULE

- Opinions are **not admissible** to prove their content
 - **The direct consequence to that rule is**: when an opinion is offered for some other purpose (not to prove its content), the exclusionary rule does not apply
- See section 77 below

TO IDENTIFY OPINION EVIDENCE, ASK THE FOLLOWING:

1. What is the fact asserted in the opinion?
2. What is it being offered to prove? (i.e. what is the relevance of the opinion?)
3. Are 1 and 2 the same?

→ If **so**, the opinion is **inadmissible** – unless an exception applies

→ If **not** (i.e. 1 and 2 are different) section 77 operates to allow the evidence because it is relevant for a purpose other than proof of the fact about the existence of which the opinion was expressed

EXAMPLES

Example 1: Ben has just testified for the plaintiff in a civil trial. The defence calls Hart to undermine Ben's credibility. Hart says: "I think Ben is a liar. Therefore he is."

1. What is the fact asserted in the opinion?
 - That Ben is a liar.
2. What is it being offered to prove?
 - That Ben is a liar.
3. 1 and 2 are the same, so the opinion is **excluded** by the **section 76** rule – unless an exception applies.

Example 2: Ben sues Helen for defamation after Helen published an article saying that Ben made up the data for his recent article. To prove his damages, Ben calls Hart. She says she read Ben's article and then says "I think Ben is a liar. Therefore he is."

1. What is the fact asserted in the opinion?
 - a. That Ben is a liar.
2. What is it being offered to prove?
 - a. That Ben's reputation has been damaged.
3. 1 and 2 are NOT the same, so the opinion is **NOT excluded** by the **section 76** rule.

Examples the Act provides:

- P sues her doctor for negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.
- P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

MAIN EXCEPTIONS TO THE OPINION RULE

- **Dual purpose / evidence relevant otherwise than as opinion evidence:** s 77
- **Lay opinion:** s 78
- **Expert opinion:** s 79

DUAL PURPOSE / EVIDENCE RELEVANT OTHERWISE THAN AS OPINION EVIDENCE

If opinion evidence admitted for another purpose, it is admissible → s 77

Section 77 Evidence Act 2008 (Vic)

Exception—evidence relevant otherwise than as opinion evidence

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

Examples: **R v Whyte**: to establish credibility

Section 110 Evidence Act 2008 (Vic)

Evidence about character of an accused

- (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by an accused to prove (directly or by implication) that the accused is, either generally or in a particular respect, a person of good character.
- (2) If evidence adduced to prove (directly or by implication) that an accused is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not generally a person of good character.
- (3) If evidence adduced to prove (directly or by implication) that an accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not a person of good character in that respect.

OUTLINE OF EVIDENCE TOPICS

TOPIC 1	RELEVANCE ☐ JDA ss 63-64: explanations as to BRD ☐ EA ss 135-137: Discretions to exclude ☐ EA ss 55-56: threshold and rules for relevance
TOPIC 2	COMPETENCY AND COMPELLABILITY ☐ EA s 12: presumption of competency ☐ EA s 13: competency – lack of capacity ☐ EA ss 21-24: sworn evidence/oaths and affirmations ☐ EA ss 165-165A: unreliable evidence ☐ JDA s 33: prohibited statements/suggestions re reliability of children's evidence ☐ EA ss 17-18: compellability of accuseds/spouses/partners of accused ☐ CPA div 4-6: alternative arrangements for witnesses in criminal proceedings
TOPIC 3	PRIVILEGE ● Client-legal privilege: ☐ EA s 131A: application of rules to preliminary proceedings of courts ☐ EA s 132: court to inform of rights to make objections ☐ EA ss 118-120: client-legal privilege ☐ EA ss 122-126: loss of client-legal privilege ☐ 122: consent and related matters (implied waiver) ☐ 123: co-accused's ☐ 124: joint civil clients ☐ 125: misconduct ☐ 126: related communications and docs ● Confidential communications in reaction to sexual offences: ☐ EMPA s 28: confessions to doctors ☐ EMPA ss 32AB-32E: confidential communications in relation to sexual offences (can compel production with leave, but note restrictions on leave) ● Self-incrimination: ☐ EA s 128: privilege in respect of self-incrimination

TOPIC 4	EXAMINATION OF WITNESSES ● Examination-in-chief: ☐ EA s 37: no leading questions (not allowed without leave) ☐ EA s 32-34: refreshing memory (not allowed without leave) ☐ EA s 38: unfavourable witnesses (can x-examine with leave) ☐ EA s 192: leave, permission or direction given on terms ☐ JDA s 54D: direction on different in complainant's account ● Cross-examination: ☐ EA s 42: leading questions ☐ EA s 43: PIS of witnesses ☐ EA s 46: leave to recall witnesses (can be done with leave) ☐ EA s 41: improper questions ● Re-examination: ☐ EA s 37: no leading questions (can be done with leave) ☐ EA s 39: limits on re-examination (nothing new unless leave)
TOPIC 5	CHARACTER AND CREDIBILITY ● Credibility: ☐ EA s 101A: defines credibility evidence ☐ EA s 102: Credibility rule ● Exceptions to credibility rule: ☐ EA s 103: cross-examination as to credibility ☐ EA s 104: further protections for accused in cross-examination on credibility (cannot x-examine accused on credibility without leave) ☐ EA s 106: rebutting denials by other evidence (can be done with leave) ☐ EA s 108: re-establishing credibility (can be done with leave) ☐ EA s 108A: admissibility of evidence of credibility of person who made previous representation ☐ EA s 108B: protection - previous reps of accused who is not witness (leave) ● Character: ☐ EA s 110: evidence about character of an accused (leave) ☐ EA s 111: character of a co-accused (leave) ☐ EA s 112: leave required to cross-examine accused on character ☐ EA s 192A: expediting requests for leave

1 – CHARACTER AND CREDIBILITY EVIDENCE

1. Is the evidence credibility evidence?

WRITE: The first issue is whether the evidence constitutes credibility evidence within s 101A.

Credibility evidence is evidence relevant to the credibility of a witness or other person and includes evidence affecting the witness's honesty, reliability, powers of observation, memory or ability to recount events accurately.

Here, the evidence is tendered to show that:

- [witness is truthful]
- [witness is dishonest]
- [witness is mistaken]
- [witness is biased]
- [witness has poor memory]

Accordingly, the evidence appears to be credibility evidence.

2. Apply credibility rule

WRITE: S 102 provides that credibility evidence about a witness is not admissible.

Accordingly, the evidence is prima facie inadmissible unless an exception to the credibility rule applies.

3. Consider exceptions

A — CROSS EXAMINATION AS TO CREDIBILITY (s 103)

WRITE: S 103 provides an exception to the credibility rule for evidence adduced in cross-examination that could substantially affect the assessment of the witness's credibility.

Here, the proposed evidence concerns:

- Honesty or bias;
- Memory;
- powers of observation; or
- prior dishonesty.

Such matters could substantially affect the jury's assessment of the witness's credibility. Accordingly, the evidence is admissible under s 103.

SUMMARY

Rule: Credibility evidence may be adduced in cross-examination if it could substantially affect assessment of the witness's credibility.

Trigger phrase: "Attacking witness honesty, memory, perception or reliability in cross-examination."

Anchor example:

The witness says: "*I saw the accused stab the victim.*"

Cross-examination: "*You were convicted of perjury two years ago, weren't you?*"

The evidence attacks credibility.

s 103 engaged.

B — FURTHER PROTECTION FOR ACCUSED WITNESSES (s 104)

WRITE: S 104 provides additional protection where the witness is an accused.

Although the evidence may satisfy s 103, the prosecutor may not cross-examine the accused about matters relevant only to credibility without leave.

Leave will only be granted in limited circumstances, including where the accused has attacked the credibility of prosecution witnesses.

Accordingly, the court must determine whether leave is required and whether the statutory conditions are satisfied.

SUMMARY

Rule: In criminal proceedings the prosecutor generally needs leave before cross-examining an accused solely on credibility matters.

Trigger phrase: "Accused gives evidence and prosecution wants to attack credibility."

Anchor example:

The accused says: *"Every police officer in this case is lying."*

The prosecutor seeks leave to ask: *"You have previously lied under oath, haven't you?"*

s 104 engaged.

C – REBUTTING DENIALS (s 106)

WRITE: S 106 permits credibility evidence to be adduced from another source where:

- the matter was put to the witness;
- the witness denied it; and
- leave is obtained (unless an exception applies).

Here:

- the allegation was put;
- the witness denied it;
- the opposing party now seeks to call evidence contradicting that denial.

Accordingly, the evidence may be admitted under s 106.

1A – CHARACTER AND CREDIBILITY DECISION TREE - WITNESS EXAMINATION CROSSOVER (often appear alongside credibility questions)

Is evidence only relevant to credibility?

Yes → Apply s 102 to prevent evidence from being admitted.

No → Evidence will not be barred from the s 102 rule.

Does an exception to allow the credibility evidence be admissible?

- Cross-examination attack → s 103
- Accused witness → s 104
- Witness denies allegation → s 106
- Rehabilitation/recent invention → s 108
- Absent hearsay maker → s 108A
- Absent accused maker → s 108B
- Accused good character → s 110
- Co-accused character → s 111

Then check procedural provisions

- s 38: unfavourable witness
- s 43: prior inconsistent statement
- s 39: re-examination
- **Browne v Dunn** (contradictory evidence)
- s 192: leave factors

2 – COINCIDENCE (s 98) TEMPLATE SCRIPT

The prosecution seeks to adduce evidence of [insert series of events] to argue that it is improbable that the alleged [crime] occurred coincidentally. Accordingly, the admissibility of the evidence is governed by s 98 EA.

COINCIDENCE EVIDENCE

S 98 provides that evidence of two or more events is not admissible to prove that a person did a particular act because of the improbability of the events occurring coincidentally unless reasonable notice has been given and the evidence has significant probative value (**Perry v R (1982)**)

SIMILARITIES OF EVENTS

The prosecution would argue that the present allegations, together with the [past conduct/events], display a number of unusual similarities. All [two/three/four] incidents concern [similarity].

- Go through the similarities of each event in detail drawing on facts from the scenario (consider the current offending and previous offending to draw these similarities).

The prosecution would therefore contend that the recurrence of [similarities] across [events] makes it improbable that these similarities arose by chance.

The similarities are particularly significant because... [insert reason for significance]. This provides the basis for arguing that the events form part of a pattern rather than isolated occurrences.

	offence. The evidentiary value does not depend on the truth of the asserted fact. Rather, it relies on the fact that the statement was made as circumstantial evidence of knowledge and involvement. The relevant inference would be that the accused had knowledge consistent with participation in the offence. The prosecution does not rely on the statement to prove the truth of the asserted fact (that the television was turned up). Rather, it relies on the fact that the statement was made as circumstantial evidence of knowledge and involvement. On that analysis, the statement is not tendered to prove the truth of the assertion that the television was turned up. Rather, it is tendered as circumstantial evidence of guilty knowledge. Accordingly, s 59 is not engaged.
4 – EXCEPTIONS TO HEARSAY EXAM SCRIPT	
1. Consider exceptions	WRITE: As the evidence likely constitutes hearsay under s 59, it is necessary to consider whether an exception applies under the Evidence Act 2008 (Vic). The relevant exceptions must be considered in order of applicability, depending on the nature of the representation and the purpose for which it is tendered.
2. Identify the appropriate exception	WRITE: The applicable exception will depend on the circumstances in which the previous representation was made and the availability of the maker. The court should identify the most specific exception first: A. Non-hearsay purpose (note: not an exception) → s 60 B. Contemporaneous statements → s 66A C. Civil proceedings (maker unavailable/available) → ss 63–64 D. Criminal proceedings (maker unavailable/available) → ss 65–66 E. Business records → s 69 F. Electronic communications / reliability presumptions → ss 71, 146, 161 G. Preconditions to admissibility of hearsay exceptions → s 61 / s 62 Each must be assessed in turn.
4A – THE EXCEPTIONS	
A - s 60	NON-HEARSAY PURPOSE (s 60) <i>Note: this is a rule about permissible use of evidence already admitted for a non-hearsay purpose or under another provision</i> Where evidence is admitted for a non-hearsay purpose or under a hearsay exception, s 60 may operate to permit the evidence to be used to prove the truth of an asserted fact. Here, the evidence is adduced for the purpose of [state mind / knowledge / effect on listener / consciousness of guilt].