

LAWS2016 Evidence

Study Notes — Uniform Evidence Law (NSW)

Updated for Semester 2, 2026

Colour key

Smith v The Queen

Case names — plum, italics

s 55 Evidence Act 1995 (NSW)

Legislation — navy

evidence must be relevant to be admissible

Key principles — teal

NOT beyond reasonable doubt

Critical points — deep red, soft rose tint

Structure follows the 2026 Unit of Study Outline (Topics 1–15). References to the Evidence Act are to the Evidence Act 1995 (NSW) unless stated otherwise.

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Topic 1: Introduction to Evidence Law

1. Introduction

1. **Definition: Evidence law** pertains to the **rules applied in courts relating to the receipt of material to prove facts**. It is procedural law, not substantive law.
2. **Purpose:** Facilitates fact finding on *rational* basis, **limits** evidence to that which is *relevant* to the facts in dispute, exclusion of unduly *prejudicial* material, **exclusion** material that may be *unreliable*, *confines* evidence relied upon by parties, limits the *basis for fact finding* by judge or jury, **protect** rights of defendants in criminal cases, to achieve *economic and efficient* proceedings.
3. **Problems/Disadvantage:** Complexity, ongoing legal uncertainty in some areas, vague/discretionary provisions of uncertain application, lack of clarity between legislative and common law provisions, etc.
4. **Judge v Jury in Adversarial Trial:**
 - (a) Trial judge controls **admissibility** and use of evidence under law instructs jury on evidence, fact and law
 - (b) Tribunal of fact (jury) weighs evidence in accordance with judicial directions, and reaches **verdict**

2. Background to the Evidence Act

1. **Jurisdictions:** Evidence law was traditionally based on common law but after a comprehensive review of the law of evidence, a **Uniform Evidence Law** was introduced across multiple jurisdictions: Cth, NSW, Tasmania, Norfolk Island, Victoria, ACT and Northern Territory.
 - (a) **Jurisdictions that have not adopted:** Queensland and South Australia. **Western Australia has now enacted the Evidence Act 2025 (WA)** (assented 25 September 2025), adopting most of the uniform evidence law — check its commencement before relying on the old WA position.
2. **Federal Jurisdiction Matters use State/Territory Evidence Laws in State Courts:** Under s 79 of the *Judiciary Act 1903* (Cth), the **laws of each state** or territory including the laws relating to **procedure, evidence** and the competency of witnesses are **binding on all courts exercising federal jurisdiction in that state** or territory.
 - (a) The state applies their own evidence laws rather than the *Evidence Act 1995* (Cth), except for those provisions that have a wider reach.
3. **Federal Courts exercising Federal Jurisdiction:** These courts will use the *Evidence Act 1995* (Cth).
4. **Structure of the Evidence Acts:**
 - (a) Chapter 1: Jurisdictional and other matters
 - (b) Chapter 2: **Form** of evidence
 - (c) Chapter 3: **Admissibility** of evidence
 - (d) Chapter 4: **Standards** of proof
 - (e) Chapter 5: Miscellaneous

3. Relationship between Evidence Act and the common law and other statutes

1. **Does not affect operation of other acts:** It does not affect the operation of other acts (s 8 *Evidence Act* (NSW)), though the Commonwealth provision is more complex.
2. **Not a code:** The act is **NOT a code**. It does not affect the operation of common law or equity **UNLESS** done **expressly or by necessary intendment** (s 9 *Evidence Act*).
 - (a) **Exception: BUT** it has been **held to cover the field** (expressly) and be a **code** in relation to:
 - (i) Chapter 3 **Admissibility** (per *Telstra Corp v Australis Media Holdings (No 2)*; Branson J in *Quick v Stoland Pty Ltd* referring to s 56(1) *Evidence Act*)

(ii) Odgers says that the weight of authority supports Chapter 3 being a code, and says that this should be considered settled, **but there is ongoing controversy**.

- **Dissent:** Dissenting voices come from Heydon J in *Dasreef*, who states that the common law “basis rule” requires “that the facts and assumption... be proved before the evidence was admissible” continues to survive.

4. Taking Objections

1. **General Rule:** General rule is that trial judges should **rule upon objections as soon as possible** (*Dasreef* at [19]). **However:**
 - (a) **Civil:** In civil cases, **failure** to object to evidence will usually **prevent the point being raised on appeal** as it has been waived.
 - (b) **Criminal:** In criminal appeals, r 4 of the *Criminal Appeal Rules* (NSW) provides that there can be **no appeal after a failure** to object to evidence at trial **without leave** of the Court of Criminal Appeal.
 - (i) **Leave provided when:** Leave will only be provided where the appellant can demonstrate that the error led to a **miscarriage of justice**, where appellant has lost a real chance of being acquitted (*Picken v The Queen* at [19] per Mason P).

5. Dispensing with the Rules / Flexibility with Evidence Rules / Waiver by Consent

1. **Some flexibility:** Some rules **can be dispensed with by consent** (s 190(1) *Evidence Act*) and these are captured in Part 2.1, Divisions 3, 4, 5; Part 2.2, Part 2.3; Part 3.2 - 3.8
 - (a) **Criminal — consent limited:** In criminal proceedings, a defendant's consent is only effective if the defendant was advised to consent by their Australian legal practitioner or legal counsel, or the court is satisfied that the defendant understands the consequences of giving consent (s 190(2) *Evidence Act*).
 - (b) **Civil more flexible:** Court can dispense these provisions in civil proceedings (s 190(3) *Evidence Act*) if the matter is not genuinely in dispute, OR if the application of the provisions would cause or involve unnecessary expense or delay.

6. Voir Dire

1. **Principle of deciding whether witness is trustworthy:** Sometimes, it is necessary for a court to determine a **factual question** when deciding whether a witness is **competent or compellable** or an item of evidence is admissible, or if evidence should be used against a person (s 189(1) *Evidence Act*)
 - (a) For example, was the making of an admission influenced by violent conduct (s 84)?
2. **Section 189 Evidence Act 1995 (NSW)** establishes preliminary questions of whether evidence should be heard:
 - (a) In criminal proceedings jury is not to be present if it relates to an **admission or potentially improperly obtained evidence** (s 189(2) *Evidence Act*)
 - (b) **Truth of an admission disregarded:** On a voir dire about whether a defendant's admission should be admitted, **the truth or untruth of the admission is to be disregarded** unless the defendant introduces that issue (s 189(3) *Evidence Act*).
 - (c) In other cases, the jury is **not to be present unless the court orders** (s 189(4) *Evidence Act*).
 - (d) Court may take into account **factors** when making an order: whether evidence to be adduced is likely to be **prejudicial to the defendant**, and whether the evidence concerned will be adduced in the course of the hearing to **decide the preliminary question**, and whether it **would be admitted if adduced at another stage of hearing** (s 189(5) *Evidence Act*)
 - (e) Can be used in civil and criminal proceedings.

Topic 2: Relevance

1. Relevance — Threshold Question

1. **Relevance Definition:** Evidence is relevant **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 (*s 55 Evidence Act*).
 - (a) Does not need to make a fact 'probable', **just more or less probable** than it would be without the evidence
 - (b) **Indirect connection** is sufficient
 - (c) It will be derived from **pleadings** (civil case) or **elements** of the offence (criminal)
 - (d) Evidence can be "relevant" in different ways, **might** only be admissible for one of those uses
2. **Threshold Question:** If it is relevant, then it is **admissible** (*s 56(1) Evidence Act*), and if it is **not relevant** then it is **not admissible** (*s 56(2) Evidence Act*).
3. **Must Always be Asked:** In *Smith v The Queen* (2001) 206 CLR 650 (at [6]), it was held that the question **must always be asked and answered** — with **each piece of evidence MENTION its relevance and EXPLAIN**.
 - (a) **Need to know what issues:** Fundamentally important to identify what the issues are at the trial.
4. **Not irrelevant just because...:** It relates only to the **credibility** of a witness, or the **admissibility** of other evidence, or a **failure** to adduce evidence (Not only has to relate to the specific facts in issue, etc.) (*s 55(2) Evidence Act*).

APPLICATION: Illustration of Relevance on Appeals in Criminal Cases

1. **Juror more familiar than police evidence — evidence could not rationally affect jury's assessment/probability and thus irrelevant:** *Smith v The Queen* (2001) 206 CLR 650
 - (a) **Principle:** The **police** were in **no better position** to make a comparison than the **jurors** observation of the defendant in dock with observation of photos. Therefore police's evidence **could not rationally affect the jury's assessment** of whether defendant was the person in the photographs (at [9])
 - (i) The fact that **someone else has reached a conclusion** about identity **does not** provide any **logical basis** for **affecting the jury's assessment** **when** it is based on material **no different** to what was before the jury (at [11]).
 - (ii) **Exception — Scenario Alterations to be Aware of:** **May be different if the defendant's appearance at trial differ** in some significant way from time of the crime, e.g. had a beard on then, does not now. Or if there is a distinctive feature revealed by photos (e.g. manner of walking) that would not be apparent to jury in court (at [15]).
 - (b) **Facts:** Smith was convicted of robbing a bank. The bank security cameras captured the event. Prosecution said he was keeping a lookout while co-offenders took the money.
 - (i) **Evidence:** Police officers gave evidence that they knew Smith and that he was the person in the photos.
 - (c) **Fact in Issue:** Was the person in the dock (*Smith*) the person in the photos?
 - (d) **Issue:** The question on appeal was whether the evidence was properly admitted. The High Court considered whether evidence was **relevant**?
 - (e) **Held:** Evidence **NOT** relevant
 - (i) The only evidence led against defendant — evidence of police officers and evidence that demonstrated the photos tendered in evidence had been taken by bank's security cameras during robbery. The **only basis** for the police officer's conclusion was their **earlier encounters** with witness (at [9])
 - (ii) **No suggestion** that his **physical appearance** had **changed materially** or that the police were at some disadvantage due to prior interactions (at [9])

- (iii) Acknowledged by Crown that by time evidence in the hearing had concluded, the jury had spent more time observing defendant than the length of time that the Police had previously spent with him (at [9])
 - (f) **Kirby J (separate judgment)**: Kirby J agreed the appeal should be allowed but held the police evidence was relevant; it was nevertheless inadmissible because it was opinion evidence not covered by the lay opinion exception — neither officer was present at the 'matter or event' (the robbery) for the purposes of s 78.
2. **Dressing up as robber / saying the phrase to compare to eyewitness description is relevant evidence**: *Evans v The Queen* (2007) 235 CLR 521
- (a) **Facts**: Security cameras showing man wearing overalls, sunglasses, balaclava. The defendant was **required to wear this in front of the jury**, for purposes of comparing his appearance. Also asked to speak words "give me the serious cash" and walk around in front of jury.
 - (i) The defence objected to this on the basis that it was **unfair to dress him up** as a robber, but did not raise relevance.
 - (b) **Issue/Argument**: Defendant argued that it was irrelevant because it was not asserted to be the balaclava worn by the offender
 - (c) **Held**: Kirby, Heydon and Crennan JJ held that it was **relevant for the defendant to say what was instructed, and to dress up**. **If** attired in a balaclava, and he looked very different to the description given by eyewitnesses, that would have been **material capable of raising reasonable doubt**. **If** he looked similar, then that would support a conclusion of identity (at [102], [184]).
 - (d) **Principle**: Relevance does not depend on its capacity by itself to prove prosecution's case on a particular issue or raise reasonable doubt — effect must be assessed with other evidence admitted by the time the evidence is tendered or to be called (at [177]).
 - (e) **Outcome**: The High Court allowed the appeal 3:2 and ordered a new trial. Gummow and Hayne JJ held that having the accused model the balaclava, overalls and sunglasses did not assist the jury to decide whether he was the robber, and dressing him as a robber may have damaged his credibility; Kirby J held the evidence relevant but **unfairly prejudicial** (s 137). Heydon and Crennan JJ dissented. (The wrongful exclusion of alibi evidence also contributed to the miscarriage of justice.)
3. **Cross-admissibility of facts between different sexual assault charges is irrelevant evidence**: *Phillips v The Queen* (2006) 225 CLR 303
- (a) **Facts**: Appellant stood trial on 8 counts of sexual assault and rape claims. The court also noted the trial judge in Phillips had identified five points of universal similarity in regard to the evidence of the first five complainants (at 312).
 - (b) **Held**: It was held to be irrelevant, as it was **impossible to see how the other complainant's evidence** that they did not consent was cross-admissible as it only **proved** what mental state each of the other complainants had **ON A PARTICULAR occasion AFFECTING THEM**, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her." (at [47])
4. **Evidence that a criminal defendant had taken drugs intravenously, four months after the robbery with which he was charged is irrelevant evidence**: *R v Merritt* (at [31])
5. **Evidence from a defendant that he could not recall his brother's date of birth 15 years after the brother died (to bear on the nature and quality of the relationship between defendant and his brother) is irrelevant evidence**: *Gilham v The Queen* (at [429])

1A. Provisional Relevance

1. **Provisional relevance**: If the determination of the question whether evidence adduced by a party is relevant **depends on the court making another finding** (including a finding that the evidence is what the party claims it to be), the court **may find it relevant IF** (s 57(1) *Evidence Act*):
 - (a) If it is **reasonably open** to making that finding (s 57(1)(a) *Evidence Act*) **OR**

Topic 6: Documents, Real Evidence

1. Documents

1. Definitions:

- (a) **Document:** Means any record of information and includes: (a) anything on which there is **writing**, or (b) anything on which there are **marks**, figures, symbols or perforations having a meaning for persons qualified to interpret them; or (c) anything from which **sounds, images**, or writings can be reproduced with or without the aid of anything else; or (d) a **map, plan, drawing** or photograph (*Dictionary Evidence Act*)
- (b) **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 (*Dictionary Evidence Act*)
- (c) **Document in Question:** A reference to a **document in question** is a reference to the **contents** of which it is sought to adduce evidence (*s 47(1) Evidence Act*)
- (d) **Copy of document:** A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact **copy of the document** in question but is **identical** to the document in question in all relevant aspects (*s 47(2) Evidence Act*)

- 2. **No need for original document:** The principles and rules of the common law that relate to the means of proving the contents of documents (the 'original document' / best evidence rule) are abolished (*s 51 Evidence Act*).

- 3. **How content of documents may be adduced in court:** A party **may** adduce evidence of the **content** of a document in question by tendering the document in question or by any one or more of the following methods:

- (i) **Evidence of admission regarding content in document:** Adducing evidence of an admission made by another party to the proceeding as to the content of the document in question (*s 48(1)(a) Evidence Act*)
 - This kind of evidence may **ONLY** be used:
 - **Used against the other party:** In respect of **party's case against the other party** who made the admission concerned, **OR** (*s 48(3)(a) Evidence Act*)
 - **Against other party who adduced the evidence in that way:** In respect of the other party's case against the party who **adduced the evidence in that way** (*s 48(3)(b) Evidence Act*)
- (ii) **Copy of document:** Tendering a document that:
 - Is or **purports to be a copy** of the document in question, **AND** (*s 48(1)(b)(i) Evidence Act*)
 - Has been produced, or purports to have been **produced, by a device** that reproduces the contents of documents (*s 48(1)(b)(ii) Evidence Act*)
- (iii) **Transcript of sound:** Document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as **sound**, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a **transcript** of the words (*s 48(1)(c) Evidence Act*)
- (iv) **Stored information (computers etc.):** If the document in question is an article or thing on or in which information is stored such that it cannot be used by the court unless a device is used to retrieve, produce or collate it — tendering a document produced (or purporting to have been produced) by use of the device (*s 48(1)(d) Evidence Act*).

- (v) **Business document:** Tendering a document that

- Forms part of the **records of or kept by a business** (whether or not the business is still in existence), **AND** (s 48(1)(e)(i) *Evidence Act*)
 - Is or purports to be a copy of, or an **extract from or a summary** of, the document in question, or is or purports to be a copy of such an extract or summary (s 48(1)(e)(ii) *Evidence Act*)
- (vi) **Public document:** If the document in question is a **public document**—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed—
- **Authorised government person printer:** By a person authorised by **or** on behalf of the government to print the document **or** by the Government Printer of the Commonwealth **or** by the government or official printer of another State or a Territory, **OR** (s 48(1)(f)(i) *Evidence Act*)
 - **Authority of Government:** By the authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country, **OR** (s 48(1)(f)(ii) *Evidence Act*)
 - **Authority of Parliament:** By authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament (s 48(1)(f)(iii) *Evidence Act*)
- (b) **Applies to documents available or not:** Subsection (1) Applies to a document in question whether the document in question is available to the party or not (s 48(2) *Evidence Act*)
- (c) **Methods adducing evidence that is not available:** 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—
- (i) **Tendering a copy:** **Tendering a document** that is a copy of, or an extract from or summary of, the document in question, or (s 48(4)(a) *Evidence Act*)
 - (ii) **Witness evidence:** **Adducing from a witness evidence** of the contents of the document in question (s 48(4)(b) *Evidence Act*)
- (d) **Document in foreign countries require exception:** **No** paragraph of section 48 (1) (**OTHER** than paragraph (a)) applies to a document that is in a foreign country **UNLESS** —
- (i) **At least 28 days' notice:** The party who adduces evidence of the contents of the document in question has, **not less than 28 days** (or such other period prescribed by regulations/court) before the day on which the **evidence is adduced**, served on each other party a copy of the document proposed to be tendered, **OR** (s 49(a) *Evidence Act*)
 - (ii) **Court directs:** The **court directs** that it is to apply (s 49(b) *Evidence Act*)
- (e) **Proof of voluminous or complex documents:**
- (i) **Court can ask for summary:** Court may, on the application of a party, **direct** that the party may **adduce evidence** of the contents of **2 or more documents** in question in the form of a **summary** if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question (s 50(1) *Evidence Act*)
 - (ii) **Above is conditional on:** The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has—
 - **Disclosing name and address of person who prepared summary:** Served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary, and (s 50(2)(a) *Evidence Act*)
 - **Reasonable opportunity provided:** Given each other party a reasonable opportunity to examine or copy the documents in question (s 50(2)(b) *Evidence Act*)

Topic 8: Hearsay

1. Theory

1. **Rationale for exclusion;**
 - (a) **Public Policy:** In criminal cases, it will be wrong to deny the accused the opportunity of cross-examining the maker of the statement, even if the cross-examiner is unlikely to test anything. Hence the hearsay rule is necessary
 - (b) **Procedural Objections:** Admission of hearsay would lead to numerous adjournments to investigate reliability; admission of hearsay can unfairly catch the other party by surprise
 - (c) **Over-reliance:** Admission of hearsay might tempt police to rely on secondary and less reliable evidence
 - (d) **Ruins judicial process:** Desperate persons might fabricate exculpatory statements that would be difficult to discredit
2. **Counter-Arguments / Exceptions:**
 - (a) Excluded statements that went beyond its rationale:
 - (i) Excluded relevant evidence of innocence (*Sparks v The Queen* [1964] AC 964)
 - (ii) Excluded relevant evidence of superior reliability: *Myers v DPP* [1964]
 - (b) Doctrinal indeterminacy: Unclear whether the rule excluded 'implied assertions' and if so, what type
3. **Uniform Evidence Legislation:** Uniform evidence legislation retains principles of common law systems which excludes all hearsay evidence unless such evidence is very reliable or essential, but it also retains elements from the civil legal systems, which admit all hearsay evidence, where relevant, however where provides warnings for jury and judge for certain kinds of evidence.

2. Hearsay Rule

1. **Rule:** Evidence of a **previous representation** made by a person is **NOT admissible** to prove the **existence of a fact** that it can reasonably be supposed that the person intended to assert by the representation (*Evidence Act s 59(1)*).
 - (a) **Circumstances:** In determining that issue the court may have regard to the circumstances in which the representation was made (*Evidence Act s 59(2A)*).
2. **Burden of proof:** The party seeking to adduce the evidence must establish, on the balance of probabilities, the facts necessary for its admissibility (*s 142*) — e.g. that it is not hearsay because it is tendered for a non-hearsay purpose, or that an exception applies.
 - (a) **Result:** If it cannot be established, it will be **inadmissible** as hearsay unless a particular statutory exception applies in Division 2 of Part 3.2. Different rules apply for civil and criminal proceedings. In civil proceedings, hearsay frequently admitted so long as a party complies with notice requirements under section 67.
3. **Key elements:**
 - (a) **A previous representation:**
 - (i) **Definition:** Evidence of a **previous representation** means a representation **made otherwise than in the course of giving evidence** in the proceeding in which evidence of the representation is sought to be adduced (*Dictionary, Evidence Act*). This incorporates:
 - **Express or implied representations:**
 - Express: e.g. "daddy is on the phone"
 - Implied: e.g. "Hi Daddy" = implied Dad is person on phone; "Is the shop open today" = implied representation that the shop is going to open

- **Representations inferred from conduct:**
 - e.g. victim pointing to a photograph to indicate their attacker
- **Representations not intended to be seen or communicated**

(ii) **Includes:**

- **All statements/conduct:** Encompasses **all** that those **statements** or that **conduct** would **convey** to the **listener, reader or observer**: *Lee v The Queen* (1998) at [21]–[22].
- **Silence:** **Silence in the face of an allegation** can amount to a representation that the allegation is true where in the circumstances it is **reasonable to expect** that the allegation would be **answered** by an explanation or denial; such an expectation would **not be reasonable where** the allegation is made to a suspect who has been warned that he has the **right to remain silent**: *R v Rose* (2002) at [260]–[261].
- **Previous court proceedings:** Representations made in **previous court proceedings** would be caught
- Includes previous statements made by the witness who is testifying in court where they are being adduced to prove the facts they assert rather than to support or impeach credibility
- **Interlocutory Phase:** Also covers statements made in interlocutory phase of the same proceedings

(iii) **Does NOT include:**

- Statements made on affidavit in relation to current proceedings

(b) **Made by a person:**

- (i) *Interpretation Act 1987* (NSW) s 21(1): **Applies to a corporation, individual, body corporate or politic** but does not apply to machine-generated information (see the presumption in s 146 *Evidence Act*)

(ii) **Does not include:**

- **Not Machines:** Excludes representations made by machines (e.g. cameras at traffic lights) or animals (e.g. dogs barking at time of a murder)

(iii) **Includes:**

- Would apply if a **person yelled** 'he just went through a red light' or 'murder'
- Human-machine composite statements from **lab experiments** can be included — computer print outs admissible to prove results, but technicians would have to be called to testify as to the origin of the data (c.f. *R v Wood*)

(c) **Containing what can reasonably be supposed to be an intended assertion of fact:**

- (i) **Objectively determined:** Intention is defined objectively with reference to the circumstances (*Evidence Act* s 59(2A)) —> What can reasonably be supposed that the person intended to assert, taking into account the circumstances in which it was made (s 59(2A) *Evidence Act*). The ALRC stated (at 7.61) that this test is "**external**" to the maker of the representation, and that an investigation into the **subjective mindset of the representor is "not required"**.

- **Rationale:** Lack of intention to assert meant the asserted fact contained in the previous representations are more reliable

(ii) **This requirement highlights a distinction between:**

- **Express** previous representations — where intention to convey asserted fact is obviously present e.g. Daddy's on the phone; and
- **Implied** previous representations — where intention to convey asserted fact is arguable, e.g. Hello Daddy...

(iii) **Factors:**

Topic 14: Self-Incrimination (Privilege Against Self-Incrimination and Right to Silence)

0. Background

1. PSI connects with Burden of Proof, Rights of Silence, Voluntariness Rule [Confessions/Admission]
 - (a) **Redmayne:**
 - (i) Right to silence applies principally during investigative states (for **suspects**);
 - (ii) Whereas PSI occurs during trial (for **witness**, not accused; Burden of Proof requires prosecution to prove its charge)
 - (iii) Voluntariness — Trial right when prosecution seeks to admit a coerced confession (reflects aspects of PSI and Rights of Silence, though again distinct). When you make a voluntary admission, you are **waiving** your PSI and RS and no longer put the State to proof.

1. Privilege Against Self Incrimination (PSI)

1. General Principles:

- (a) **Privilege** against self-incrimination **protects** a person suspected or accused of committing a crime from **being required to provide testimonial evidence against themselves**.
 - (i) The person **cannot be compelled** to testify at their own trial
 - (ii) The person **cannot be required** to make any statement to the investigating authorities at any point in the process
 - (iii) If the person is required to testify in some other proceeding, any incriminatory evidence given in that proceeding **cannot be used against them** at their own trial
- (b) **Fundamental element:** Privilege against self-incrimination is a fundamental element of common law embedded in the Australian criminal procedure
 - (i) *Lee (No 1) [2013] HCA 39, French CJ*: The privilege against self-incrimination reflects the **long-standing antipathy** of the common law to compulsory interrogations about criminal conduct
 - (ii) *Lee (No 2) [2014] HCA 20*: Convictions on firearms charged quashed, as prosecution had relied on information supplied by NSW Crime Commission which the commission had obtained illegally (D had been examined before Crime Commission and required to produce documents). HCA held unanimously unauthorised disclosure by NSWCC removed the defendant's PSI and altered their trial in a 'fundamental respect', so **violate right to fair trial**

2. Defendants and their Privilege against Self-Incrimination:

- (a) **D not competent/compellable testify against themselves:** In a criminal proceeding (s 17(1) *EA*) the defendant is **not** a **competent or compellable** witness for the prosecution (s 17(2) *Evidence Act*). **PSI only applies if it is a compellable witness.**
- (b) **Associated defendant not compellable:** An associated defendant is **not compellable** to give evidence for or against a defendant in a criminal proceeding, **unless** the associated defendant is being tried separately from the defendant (s 17(3) *EA*)
 - (i) **Exception:** Where the defendant testifies on its own behalf, D **waives** right to privilege (in cross-examination)

3. Witness and Privilege Against Self Incrimination (s 128 *Evidence Act*):

- (a) Witness must be '**compellable**' (*Song v Ying (2010)*) — examination can be 'in chief', cross or re-examination

- (b) **Witness PSI against giving evidence proving own crime — NOT RETROSPECTIVE:** This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness —
- (i) **Committed an offence under law:** Has committed an offence against or arising under an Australian law or a law of a foreign country (s 128(1)(a) *Evidence Act*), or
 - (ii) **Civil penalty:** Is liable to a civil penalty (s 128(1)(b) *Evidence Act*).
- (c) **Court determines reasonable grounds:** The court determines whether or not there are reasonable grounds for the objection (s 128(2) *Evidence Act*). **Court is obliged to inform, but also may not know.**
- (i) **Only a privilege:** It is only a privilege — not a 'right' — court is granted the power to dispense with the privilege — though answer cannot be used against witness in future proceedings if certificate granted.
- (d) **If reasonable, witness not required to give evidence:** Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness:
- (i) **No need give evidence unless required by court:** That the witness need not give the evidence unless required by the court to do so under subsection (4) (s 128(3)(a) *Evidence Act*), and
 - (ii) **Court give certificate:** That the court give a certificate under this section if —
 - **Willingly:** The witness willingly gives the evidence without being required to do so under subsection (4) (s 128(3)(b)(i) *Evidence Act*), or
 - **Gives when required:** The witness gives the evidence after being required to do so under subsection (4) (s 128(3)(b)(ii) *Evidence Act*), and
 - (iii) **Effect:** of the effect of such a certificate (s 128(3)(c) *Evidence Act*)
- (e) **However, may still require evidence:** The court may require the witness to give the evidence if the court is satisfied that —
- (i) **Australian offence:** The evidence may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law (s 128(4)(a) *Evidence Act*), and
 - (ii) **Evidence is domestic offence:** The evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country (s 128(4)(b) *Evidence Act*), and
 - (iii) **Interests of justice:** The interests of justice require that the witness give the evidence (s 128(4)(c) *Evidence Act*).
- (f) **Must be given certificate if gives evidence:** If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence (s 128(5) *Evidence Act*).
- (g) **Court is to give witness a certificate:** The court is also to cause a witness to be given a certificate under this section if —
- (i) **Witness objection overruled:** The objection has been overruled, and (s 128(6)(a) *Evidence Act*)
 - (ii) **Reasonable grounds objection after given:** After the evidence has been given, the court finds that there were reasonable grounds for the objection (s 128(6)(b) *Evidence Act*)
- (h) **Cannot be used against person except criminal proceedings EXCEPT falsity:** In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence —
- (i) **Evidence given in respect of which certificate given:** evidence given by a person in respect of which a certificate under this section has been given, and (s 128(7)(a) *Evidence Act*)

Topic 15: Proof (ii) — Judicial Notice, Missing Evidence, Directions

1. Judicial Notice

Key Provisions — Chapter 4, ss 143-145 Evidence Act

Judicial notice here refers to the judge bringing in facts.

S 143 — Matters of Law

1. Judges can **freely bring in matters of law**. Proof is not required.
2. A judge **may inform himself or herself about those matters** in any that he/she thinks fit

S 144 — Matters of Common Knowledge

1. **Proof is not** required about **knowledge** that is **not reasonably open to question** and is
 - (a) **Common knowledge** in the locality in which the proceeding is being held or generally **or**
 - (b) **Capable of verification** by reference to a document the authority of which cannot reasonably be questioned
- (2) The judge **may acquire knowledge** of that kind in any way **he thinks fit**
- (3) The court (including jury if there is) is to take knowledge of that kind into account
- (4) The judge must give a party such opportunity to make submissions and to refer to relevant information relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced

S 145 — Certain Crown Certificates

This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

Answering Question

1. **Generally:**
 - (a) **Fact proved by admissible evidence:** Fact in issue or that **which is relevant** to a fact in issue must be proved by admissible evidence.
 - (b) **Exception — Judicial Notice:** But doctrine of judicial notice is an **exception** — facts which judge brings in and does not require proof
 - (i) **Whether the court can take into judicial notice the fact depends on whether s 144 requirements are satisfied:**
 - **What type of fact is it?:**
 - **Legislative facts** which are not particular to the parties of the case; go to determining the content of the principles of the law? —> **more leeway** for judicial notice at common law (*McHugh J, Woods c.f. Callinan J*); **or**
 - **Adjudicative facts** which determine the outcome of the case —> **less lenient** at common law
 - **Is the fact common knowledge?:**
 - Is it genuinely common knowledge known amongst the public?
 - If not, the judge may only use it to the extent in aid of his own general learning but not more
 - **View that judges should not be free to apply their own views and make own inquiries without requiring evidence or proof:** (*Callinan J, Woods*)
 - Parties **must be given an opportunity to deal with all matters** which the court regards as material; **and**

- Rarely is there any universal acceptance of what are history, politics and social ethics
- **Examples:**
 - **Could be used:** Concerning sporting accidents and statistics re: cost on society and consequences of sport accidents (*Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460)
 - **McHugh J at [62]:** it is legitimate to judicially note these statistics. Accident prevention is a major concern of Australian society – injuries often place enormous demands on health services. [63] It is legitimate to refer to these statistics. They fall into the class of ‘legislative’ facts that a court may note and use to define the scope of validity of a principle or rule of law (e.g. negligence). These matters are ‘not particular to the parties’ and assist in defining the content of the principles that govern this case.
 - **McHugh J at [64]-[65]:** Classification of the facts
 - Adjudicative facts: facts that go to the determination of the outcome of the case
 - Legislative facts: general fact, assist in determination of the appropriate policy, matters not particular to the parties.
 - At common law, rules for judicial notice are more lenient for legislative fact
 - However, doubts cast as to whether s 144 allows judicial notice for ‘legislative facts’
 - **Callinan J:** Concerned about procedural fairness, difficult to regulate, unconstrained research by judges (at [165]). s 144 narrower than common law.
 - **Psychology articles could not be used on judicial notice:** Human response to differently framed probability (*Aytugrul v The Queen* (2012) 247 CLR 170)
 - **Issue:** Whether it was appropriate for the expert to prove statistic of 99.9%
 - **HCA:** Noted on psychology and that people do take the 99.9% figure to be more certain. The problem of those submissions is that they are based on psychological studies which they do not have judicial notice of as it is not the field of law (at [20]). The common law rules which may relax the rules around legislative facts do not seem to be in play anymore because s 144 covers the field (at [21])
 - **This was not permissible judicial notice:** Social scientific articles about family violence (*Maluka v Maluka* [2009] FamCA 647)
 - **Facts:** Parenting order, which took into account the risk of family violence. Judge relies on social scientific articles he finds about family violence.
 - **Decision:** This was not permissible judicial notice

2. Missing Evidence — Failure to Call Witnesses or Give Evidence (Comments and Directions)

CIVIL

1. Comments on the parties’ failure to call a witness - civil:

(a) **Civil context — you can draw adverse inference in civil context:** *Jones v Dunkel* (1959) 101 CLR 298

(i) **Facts:** MV collision, allegation that Dunkel’s employee was driving on the wrong side of the road. Neither plaintiff nor defendant call the driver.

- Jury asks: “Rightly or wrongly I have it in my mind that the defendant could have come here today and given evidence

Case: Crofts v The Queen (1996) 186 CLR 427 — Kilby Warning not removed but must be balanced

1. **Kilby Warning:** In *Kilby v The Queen* (1973) 129 CLR 460, the High Court observed that evidence of recent complaint is not evidence of the facts alleged, but goes to the credibility of the complainant as it demonstrates consistency of conduct. However, the court also held as a corollary that where there has been a failure to make a complaint at the earliest available opportunity, this fact may be used to impugn the credibility of the complainant
 - (a) **Issue: Does s 294 FORBID a warning that jury may take delay into account?**
 - (i) **Facts:** 6 year delay. TJ gives equivalent of s 294 warning but refuses to give *Kilby* warning.
 - (b) **Principle:** The HCA held that the purpose of such legislation properly understood, was to reform the balance of jury instruction, not to remove the balance and as the *Kilby* warning can be provided.
However, there are 2 qualifications to the *Kilby* warning:
 - (i) **Circumstances don't need balancing:** Where the facts DO NOT SUGGEST the need for a warning to restore a balance of fairness
 - (ii) **Should not undermine in such a way:** Warning SHOULD NOT be expressed in such terms as to undermine the purpose of the amending Act by suggesting a stereotyped view that complaints in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false. So long as the objective of the legislation is kept in mind to rid of the law of such stereotype.

Prohibitions against warning: Where child is giving evidence — GENERALLY

Key Provision — s 165A *Evidence Act* – warnings in relation to child evidence (1) A judge in any proceeding in which evidence is given by a child before a jury **must NOT** do any of the following:

(a) **warn the jury**, or suggest to the jury, that children as a class are **unreliable witnesses**; (b) **warn the jury**, or suggest to the jury, that the evidence of children as a class is **inherently less credible or reliable**, or requires more careful **scrutiny**, than the evidence of adults; (c) **give a warning**, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child; (d) in the case of a criminal proceeding, **give a general warning** to the jury of the **danger of convicting on the uncorroborated** evidence of a witness who is a child

(2) Subsection (1) **does not prevent** the judge at the request of a party from

(a) informing the jury that the evidence of the **particular child may be unreliable** and the **reasons** why it may be unreliable; **and** (b) **warning or informing** the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;

If the party has **satisfied** the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning of the information

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

Obligations to Warn Where Delay in Prosecution

Key Provision — s 165B *Evidence Act* – Delay in Prosecution

1. **Criminal proceedings:** Applies in criminal proceeding in which there is a jury (s 165B(1) *Evidence Act*)
2. **Defendant suffered significant forensic disadvantage, delay, inform:** If the court, on application by a party, is **satisfied** that the **defendant** has **suffered a significant forensic disadvantage** because of the consequences of **delay**, the court **must inform the jury** of the nature of that disadvantage and the **need to take that disadvantage into account** when considering the evidence (s 165B(2) *Evidence Act*)
 - (a) **HOWEVER: Does not have to comply above if good reasons:** The judge need not comply with subsection (2) if there are good reasons for not doing so (s 165B(3) *Evidence Act*)
3. **Not necessary particular words, but cannot say dangerous to convict just because delay:** It is **not necessary that a particular form of words** be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, **but** the judge **must not in any way suggest** to the jury that it would be **dangerous or unsafe to convict** the defendant solely