(1) Principles

- **Leave, permission or direction**: Court grant leave/permission/direction on terms as think fit ***(s192(1).s192(2)*** factors
  - **Grant:** (A) argues leave be granted as ***(a)*** brief questioning cause minimal delay; ***(b)*** necessary to prevent unfairness to (A) by allowing (important evidence to be tested); ***(c)*** evidence is important to (FII); ***(d)*** nature & stakes of (criminal/civil) proc favour allow & ***(e)*** any unfairness addressed via (limited qs, recall W, directions)
  - **Refuse:** (B) counters leave be refused as ***(a)*** prolong proc via (XXN, collateral disputes); ***(b)*** unfairly prejudice (D/W) as (no notice) ***(Stanoevski)***; ***(c)*** evidence is collateral, cumulative or of limited importance; ***(d)*** nature of proc not justify additional prej/delay & ***(e)*** safeguards not adequately cure unfairness or procedural difficulties

- **Discretionary & mandatory exclusions:** Here court … ****s135 = civil + crim ; s136 = civil + crim ; s137 = crim***
  - **s135: MAY exclude** if PV subs outweighed by danger of ***(a)*** unfair prej, ***(b)*** mislead/confuse ***(c)*** undue waste time
    - **Satisfied:** (A) argues (X) has limited PV as (remote), but risks (jury improperly inferring guilt from prior misconduct, misunderstanding ambiguous ev, collateral disputes). So danger substantially outweigh PV
    - **Counter:** (B) argue (X) proves (FII/identity), prej is legitimate than unfair & risks addressed by (redact, limit)
  - **s136: MAY limit use** of (X) where particular use risk **unfair prej or mislead/confusing effect**
    - **Satisfied:** (A) argues (X) admitted for (cred/character rebuttal) risks jury improperly using to (infer ten/guilt)
    - **Counter:** (B) counters little risk of misuse, particularly if appropriate jury directions given
  - **s137 (crim): MUST exclude** prosecution evidence (X) if PV is **outweighed by danger of unfair prej to (D)**
    - **Satisfied:** (D) argues (X) has limited PV as (remote/weak/cumulative), but risk jury (infer guilt from prior misconduct, punishing D for uncharged acts, overvaluing emotive allegations). So, unfair prej outweighs PV
    - **Counter:** (P) counters (X) establishes (FII/identity) & any prej is legitimate or manageable by directions

- **Unreliable evidence**: ***hearsay, admission, unreliable, accomplice, prison informer, delayed/inconsistent accounts***
  - **Civil:** (A) argues (X) may be unreliable under ***s165(1)*** as ***(a)*** **hearsay/admission** (maker unavailable, unrecorded); ***(b)*** **identification evidence** (W saw D briefly); ***(c)*** **reliability affected by age/illness/injury** (W's concussion, coma). In a **civil jury trial**, on request, TJ must ***(a)*** warn evidence may be unreliable, ***(b)*** identify reasons (W's coma), ***(c)*** caution jury about acceptance/weight ***(s165(2)),*** unless good reasons not to ***(s165(3))***
    - **Child:** Here, (W) is a child aged (X). Judge cannot suggest children are generally unreliable, less credible than adults, or (W) unreliable solely due to age ***(ss 165(6), 165A(1) EA).*** **BUT** (A) may request cautionary warning if cics particular to (W), beyond age (MI, injury), affect reliability and warrant caution (***s 165A(2)***)
  - **Criminal:** (D/P) argues (X) may be unreliable under ***s31 JDA*** as ***(a)*** **hearsay/admission** (maker unavailable, unrecord); ***(b)*** **reliability affected by age/illness/injury** (W's MI); ***(c)*** **(W) criminally involved** (co-D); ***(d)*** **prison informer**; ***(e)*** **unacknowledged police questioning**. Thus, (D/P) may request unreliable-evidence direction ***(ss 12, 32(1)),*** identifying significant reliability concerns ***(s32(2)).*** If given, TJ must ***(a)*** warn ev may be unreliable, ***(b)*** identify reasons (coma) & ***(c)*** caution jury on acceptance & weight ***(s32(3)).*** TJ must give requested direction unless good reasons not to ***(s14)***; w/o request, required if substantial & compelling reasons ***(s16)***
    - **Child witness:** Here, (W) is child. Under ***s33 JDA***, judge/parties cannot suggest children are generally unreliable, less credible than adults, require greater scrutiny, or (W) unreliable solely due to age, nor that uncorroborated child evidence makes conviction dangerous merely due to age. **BUT** (D/P) may request a ***s32*** direction for significant reliability concerns beyond age (e.g. injury, memory impairment).

- **Voie dire:** Judge determines preliminary questions of admissibility/use or (W's) competence/compellability ***(s 189(1)).*** Questions re; admissions or ***s138*** heard without jury ***(s 189(2));*** other preliminary qs also w/o jury unless

court orders otherwise ***(s 189(4)).*** For admission admissibility, truth/falsity disregarded unless D raises it ***(s 189(3)).***

(2) Relevance

CCTV not show incident, object at D's house, D near scene, prior argument, W argues 'unhelpful' if gives evidence

- **Introduction:** (A - P) seeks to adduce (**X – DNA ev from knife at D's house**) to prove (**FII –** whether D killed V, if D knew/ought to have known V's age). Evidence is **relevant if, it accepted**, could **rationally affect, directly or indirectly the probability of FII** ***(s55(1).*** Relevant evidence is PF admissible ***(s56(1))***; irrelevant evidence is inadmissible ***(s56(2))***

- **Fact in issue (FII):** FII is smth relevant to allegation that is disputed **SO** must be proved/disproved
  - **Main FII:** Here, **crim proc** so FII is (whether D intentionally assaulted A, whether D was offender, whether D acted in self-defence) ***(HML, Smith)*** **OR** **civil proc** so FII is (whether D breached DoC, if D caused P's loss) ***(HML)***
  - **Collateral FII:** Here, evidence relates to **credibility of a witness** as (W's prior inconsistent statement); ***(s55(2)(a);*** **admissibility of other evidence** as (evidence affecting admissibility of another item) ***(s55(2)(b))***; **failure to adduce evidence** as (…) ***(s55(2)(c)).*** This is **not** irrelevant under ***s55(2)*** & can still be considered

- **Rational connection:** (A) argues (X), if accepted, has rational connection to (FII – whether D offender), as (threat suggests hostility), making that fact more probable than w/o evidence. Thus, relevant ***(s55(1), Papakosmas; Smith).***
  - **Counter:** (B) counters **no rational connection** as evidence of (X - cannabis) has no apparent logical connection to (D's comm with V, knowledge of V's age, sexual intention). Thus can't rationally affect assessment of (FII) & inadmissible ***(s56(2). Stephenson*** - evidence 1 passenger had high BAC not assist in proving **who drove**
    - **No contribution:** (B) argue (X) add nothing capable of rationally affecting (FII) as (jury has same material, W has no superior basis). ***Smith***-police identification ev from CCTV add nothing beyond what jury can assess

- **At highest:** At relevance, evidence is assessed assuming it is accepted as true, w/o ordinarily determining credibility or reliability ***(s55(1)).*** So arguments of **(stress, lighting)** concern weight than relevance. Only where evidence is inherently incredible, fanciful or preposterous such that it could not rationally affect FII may it fail relevance ***(IMM)***

- **Direct/indirect relevance:** ****direct = W ACTUALLY SAW D commit, RECORDING, ADMIT (eg: W saw leave house - in)***
  - **Direct:** (A) argues (X – **identification**, oral evidence from **firsthand witness**, CCTV clearly depicts the assault) directly establishes (FII - D committed assault, D was offender) w/o further inference. So direct evidence
  - **Indirect:** (A) argues that (X – D's DNA on knife, W observed D angry) is **circumstantial evidence** indicating (contact w/ weapon, motive). This supports inference (D used knife), making (FII – D committed offence) more probable. Thus, evidence is indirectly relevant (***s55(1)) (Plomp*** - ev of motive support inference of guilt)
    - **Too speculative:** (B) argues (X – DNA on knife, possession of images) is too speculative to connect (D) to offence (not say why/when D touched knife). Evidence may be too equivocal or circular if incriminating only by assuming allegation to be proved (***French CJ's*** dissent in ***BBH).*** **BUT** (A) counters considered alongside (other ev - threats, timing), (X) provides rational inferential connection to (FII), satisfying ***s55(1)***

- **Probative value:** extent to which **evidence** could **rationally affect assessment** of **probability of a FII** ***(EA Dictionary)***
  - **High PV:** Here, (X - admission, CCTV) has high PV as strongly supports (FII), esp when considered w/ other circs
  - **Low PV:** Here, (X - general anger, mere opportunity, presence near scene) has limited PV as only weakly supports (FII), esp as (alternative explanation, uncertainty about timing). **BUT** counter low PV not = irrelevance

- **Exclusion:** Here, (A) argues (X - prior misconduct, disturbing images, ambiguous evidence) be
  - **s135:** excluded as PV substantially outweighed by danger of (**unfair prej**, **mislead/confusing**, **undue waste time**)
  - **s136:** limited to (permitted pur - context), as using (X) to (improperly infer guilt) risks unfair prej/mislead jury **s137:** excluded as creates danger of unfair prejudice as (jury morally condemns D, improperly infers guilt). Given (X's PV - strong or weak connection to FII), if danger outweighs PV, court must exclude prosecution evidence

- **Conclusion:** (X) is (directly/**indirectly**) relevant ***(s55(1))*** & PF admissible ***(s56(1))*** suj to exclusionary rules ***(ss135-137)***

(3) Competence & Compellability

child, autism/intellectual disability, can't understand qs, cannot rmbr, failing memory** **child – see if competent!

- **Introduction:** For (W) to be able to give evidence they must be both competent and compellable

Competence

- **Introduction:** (W) is **presumed competent to give evidence** (***s12(a) EA, s13(6))*** unless contrary proved. Whether (W) is competent to give ev is determined at voir dire ***(s189(1)(c))*** on BoP ***(s 142(1)).*** Burden on (A - allege incompetent)

- **Capacity:** (W) must ***(a)*** understand a q about that fact **AND** ***(b)*** give an answer that can be understood to a q about that fact, & that incapacity can't be overcome ***(s 13(1)).*** Assessed at the time the evidence is given ***(Hawker)***
  - **Requirements:** Here ***see if gave PO statement WITHOUT assistance, have NDIS, issue w/ memory, child w/MI**
    - **Understand the question:** (A) argues due to (W's) (young/old age, MI), (W) can't understand questions about (fact) as (becomes confused, misunderstands, no compound qs). Thus, (W) lacks capacity ***(s13(1)(a))***
      - ✓ **Uncertain capacity:** court may inform itself as it thinks fit in determining (W's) competence, incl by obtaining expert evidence like (psych, derm, speech path) w/ relevant specialised knowledge ***(s13(8))***
      - ✓ **Understand qs:** (B) counters that (W) can understand simple, concrete and age-appropriate questions about (what W saw, who was present, what occurred), suggesting (W) retains sufficient capacity
    - **Give understandable answer:** (A) argues due to (MI), (W) can't give answer capable of being understood as (responses incoherent, W can't communicate, unintelligible) - (W) lacks capacity (***s13(1)(b)***)
      - ✓ **Still communicate:** (B) counters (W) communicate (short intelligible ans, gestures, simple descriptions)
      - ✓ **Fact-specific**: (B) counters competence is fact-specific. So, even if (W) can't give evidence on (fact A – technical detail), (W) still competent to give evidence on (fact B – who was present) ***(s 13(2) EA)***
  - **Overcome:** Even if (W) has difficulty understand qs or give intelligible ans, (W) **only incompetent** if **incapacity can't be overcome**. Thus, court consider if reasonable accommodation enable (W) to understand & respond
    - **Can:** (B) argues (W's) difficulty of (unable to hear adequately - ***s31(1)***); unable to speak adequately - ***s31(2)***); unable to understand/speak English properly - ***s30***) can be overcome by (simplify qs, written qs, communication aid, interpreter, more time). Thus concerns manner of testimony, not competence
    - **Cannot:** (A) argues even w/ (simplified qs, interpreter), (W) (continues to misunderstand qs, can't provide intelligible ans) thus incapacity can't be overcome & (W) incompetent ***(s13(1))*** **AND** overcoming (W's) incapacity involve substantial cost & delay, as (interpreter arranged, proceedings delayed) &

adequate ev about same matter available from (diff witness) ***(s14 EA)*** **BUT** (W) counters (assistance readily arranged)

- **W has issue:** (W's) (old age/kid) affects reliability/weight of testimony **(judicial warning – s165(2)) UP)**

- **Evidence:** (W) is competent to give sworn evidence if **have capacity to understand that, in giving evidence, they are under obligation to give truthful evidence** ***(s13(3)).*** Obligation is morally or legally bound ***(GW)***
  - **Sworn:** Here, (W) **can** understand obligation to tell truth when giving evidence & been established to be competent, so able to give **sworn evidence**. (W) must make oath or affirmation ***(s21(1)).*** Both have same effect ***(s21(5)).*** (W) may choose either but be informed by court of choice ***(s23).*** Not necessary religious text be used in taking oath ***(s24(1))*** & oath is effective even if the person did not have a religious belief ***(s24(2)(a)),*** or if their religious beliefs do not include a belief in existence of a god ***(s24A(1))*** (here W is atheist so give ev by affirmation than religious oath)**.** If (W) refuses to choose whether to make oath or affirmation, or not reasonably practicable for them to take appropriate oath, court direct to make affirmation ***(s23(3), Seymour)***
  - **Unsworn:** Here, (W) **can't** understand obligation to give truthful evidence as (children, MI) so can't give sworn evidence under ***(s13(3))*** but may still give **unsworn evidence** ***(s13(4).*** The EA is 'neutral in its treatment of weight accorded to sworn or unsworn evidence (***GW).*** Court must tell (W) under ***s13(5)*** that ***(a)*** it is important to tell truth; ***(b)*** (W) may be asked questions where (W) not know/cannot remember answer & should tell court if happ; and ***(c)*** (W) should agree only with statements (W) believes are true & feel no pressure to agree with statements (W) W believes are untrue ***(s13(5)).*** Here, (satisfied/not…). Failure to provide these ***s13(5)*** instructions make evidence inadmissible & render (W) not competent to give unsworn evidence, on the basis that they do not have sufficient capacity to understand their obligations to tell the truth (as in ***SH)***
    - **Die/cease competent:** (W) dies/cease to be competence before end of give ev – still admissible ***(s13(7))***

- **Conclusion:** (W) competent to give ev about (fact) (***ss 12-13 EA)***. However, **mandatory & discretionary exclusions may apply (UP)*****(ss135-137).*** If **child** – (W) is child, unreliability warnings apply ***(ss165-165A; ss31-32 JDA)*** **(UP)**

Compellability

****W give evidence against partner/sister/parent/child (first see RELEVANCE – ABOVE)***

- **Introduction:** As (W) competent to give evidence, (W) is **prima facie compellable** under ***s12(b) EA***, unless exception applies ***(ss 14, 17–18).*** Compellability concerns whether (W) can be legally required to give evidence ****if CLP applies***

- **Defendant:** Here, (W) is accused in a **criminal proceeding** ***(s17(1).*** The accused is NOT competent to give evidence as a witness for the prosecution ***(s17(2)).*** However, (D) is competent to give evidence in their own defence, but cannot be compelled to do so. Thus, (D) may elect to give evidence or remain silent.

- **Co-defendants: **consider unreliability warnings under ss31-32 JDA**
  - **Tried jointly:** Here, (W) is an associated accused being tried jointly with (D). Thus, (W) is not compellable to give evidence for or against (D) ***(s17(3)).*** Although (P/co-D) seeks to call (W) to (incriminate D/support D's defence), (W) cannot be forced to testify. If (W) gives evidence voluntarily, competence and other admissibility rules must still be satisfied. Court must ensure (W) understands protection under ***s17(4),*** in jury's absence if applicable.
    - **Called by defence:** If (W) is called by defence, she may be competent to give evidence concerning defence if she chooses to do so. However, she is not compellable merely because the defence wishes to call her.
  - **Tried separately:** Here, (W) is being tried **separately** from (co-D), so ***s 17(3)*** protection not apply & (W) is PF compellable in (co-D's) proceeding, subj to other applicable objections/privilege (eg ***s128*** self-incrimination)

- **Family of defendant:** In **crim proc**, (W), as (D's spouse/de facto partner/parent/child), may object as **prosecution witness** to ***(a)*** giving evidence generally or ***(b)*** giving evidence of communications with (D) ***(ss 18(1)–(2)).*** Objection must be made before giving evidence or as soon as practicable after awareness of right, whichever is

later ***(s18(3)).*** Court must ensure (W) understands right ***(s18(4))*** & determine objection w/o jury ***(s18(5)).*** ***PASI**, **RELEVANCE***

- **Test:** (W) must not be compelled if **giving evidence *(a)* would or might cause harm to him or his relationship with (D) AND *(b)* that harm outweighs the desirability of (W's) testimony** ***(s18(6)).*** See ***s18(7)*** factors. Here…
  - **Seriousness:** (P) argues (murder, SV) is serious (5 homes destroyed), increasing public interest in evidence before court - compel (W). Like ***Khan*** - murder case, 67 stab wounds serious crime ***(a)***
    - ✓ **Even if serious:** (W) counters although serious - does not itself outweigh substantial harm to (W)/relo
    - ✓ **Not serious:** (W) counters offence is (minor, low-level, limited consequences), so public interest in compel (W) is correspondingly weaker & no justify causing substantial harm to (W/W's relo with D)
  - **Importance:** (P) argues (W's) evidence is (crucial evidence, direct evidence, circumstantial evidence identifying weapon) – important - desirable – likely carry substantial weight – compel (W) ***(b)***
    - ✓ **Unimportant**: (W) counters (W's) evidence is (cumulative, uncertain). Like ***Khan*** - Mrs K's evidence was regarded as limited weight. **BUT** counter (any other evidence – Y etc) unreliable so (W) important
  - **Other evidence:** (P) argues (W) is **only available source** of (D's admission, crucial, what occurred inside home) & no other evidence proves matter (Y's ev is unreliable), so testimony desirable – compel (W) ***(c)***
    - ✓ **Only source:** (W) counters **same matter reasonably be proved** via (knife from D's house, DNA) - reducing need to compel (W). ***Khan***, aspects of wife's evidence be established via other Crown ev
  - **Relationship**: (W) argues (W) & (D) have (marriage, parent-child relo) so compelling testimony cause serious harm through (loss of trust, conflict, family breakdown). Like ***Khan*** – enduring marriage, had children & remained together - compelling evidence risked relo harm outweighing desirability ***(d)***
    - ✓ **Not affect:** (P) counters relationship is (estranged, already broken, hostile, recently formed, little continuing dependence), so requiring testimony is less likely to cause meaningful additional harm
  - **Confidential:** (W) argues evidence disclose (D's priv confession) received in confidence from (D)- protect ***(e)***
    - ✓ **Not confidential:** (P) counters evidence concerns (W's independent observations of D taking knife/matters not received in confidence from D), so factor carries limited weight
- Overall, factors for compulsion are (serious…); factors against compulsion are (young, vulnerable…). Court find **harm (DOES/ NOT) outweigh desirability of (W's) evidence** so (W/P) has stronger argument & (W) (is/NOT) required to be compelled (s18(6)). If obj is determined, (P - prosec) must not comment on (s 18(8) EA): (a) the objection; (b) decision of the court in relation to the objection; or (c) failure of the person to give evidence

- **Conclusion:** (W) is (compellable/not compellable) under ***s12(b),*** subject to applicable exceptions ***(ss 17-18 EA).*** If **compelled** – (W) would have to take an oath or affirmation per ***s21(1)*** before giving evidence