SAMPLE PAGES

# Evidence Law

## Complete Bundle

LAWS2016 / LAWS5013 · University of Sydney · Semester 2, 2026
Evidence Act 1995 (NSW) · 258 pages in four documents

*Eight real pages taken straight from the bundle, so you can see exactly how the notes look and work before you buy.*

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## What's in the full bundle

### Exam Steps 127 pages
161 step questions across all 13 topics, provisions in full under each step, the key cases where they decide the issue, and 34 "Write it like this" model sentences.

### Long Notes, All Topics 65 pages
Full topic notes from types of evidence to proof part 2, with the statute and key cases under each step.

### Exam Checklist 15 pages
A 17-question landscape checklist for working through any problem question, with the section numbers beside each question.

### Essay Scaffolds 51 pages
Five big-picture essay questions, each with the provisions, cases, ALRC material and arguments on both sides.

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## In this sample


Page 2 Exam Steps: title page and contents
Page 3 Exam Checklist: quick steps 1 to 10
Page 4 Exam Steps: hearsay, choosing the exception
Page 5 Exam Steps: "Write it like this" for first-hand hearsay, plus the essay angle
Page 6 Exam Steps: "Write it like this" for prior inconsistent and consistent statements
Page 7 Long Notes: credibility, step by step
Page 8 Long Notes: tendency, McPhillamy v The Queen (2018) in full
Page 9 Essay Scaffolds: question 1, the rights of the accused


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# EVIDENCE LAW

## Ultimate Exam Steps

Evidence Act 1995 (NSW) · USyd Winter 2026

**Contents**


**0. The Route Through Any Evidence Problem** **6**
(1) Read the problem twice and set up the four headings 6
(2) What type of evidence is it? (routes the item to the right provision) 6
(3) Classification flowchart: from item to section 8
(4) Run the pipeline for every item of evidence, in the order a trial happens 8
(5) Ask the Act's admissibility questions in the Act's order (Chapter 3 flowchart) 9
(6) Finish every issue with what follows 9

**1. Introduction to Evidence Law** **10**
(1) What must ultimately be proved, and what do the key terms mean? 10
(2) Does the Evidence Act apply to this court and this hearing? 11
(3) Does the EA displace another Act or the common law? 12
(4) Can the rules of evidence be dispensed with? 13
(5) Is there a preliminary question to decide on a voir dire, and must the jury leave? 13
(6) Can the court give an advance ruling? 14
(7) Is leave, permission or a direction sought, and on what terms? 14
(8) Was there a failure to object, and can the point be taken on appeal? 14

**2. The Adversarial Trial and Calling Witnesses** **16**
(1) Who decides what in the adversarial trial? 16
(2) Essay angle: does the adversarial trial serve factual accuracy? 16
(3) Will an appeal court interfere with the decision below? 16
(4) What governs the calling of witnesses? 17
(5) Can the court call a witness in civil proceedings? 18
(6) Criminal: has the prosecutor called all the witnesses it should? 18
(7) Expert witnesses: must the Crown call experts who favour the defence? 19
(8) Can the jury draw an adverse inference from a failure to call a witness? 19

**3. Proof (Part I): Burden, Standard, Prima Facie Case** **20**
(1) Is this a civil or criminal proceeding, and who bears the legal burden? 20
(2) Does a statute place the legal burden on D? 20
(3) Who bears an evidential burden, and has it been discharged? 21
Write it like this: burden 22
(4) Civil: has the case been proved on the balance of probabilities? 22
(5) Criminal: has P proved its case beyond reasonable doubt? 24
(6) What standard applies to the facts on an admissibility question? 25
(7) Does the jury need a Liberato direction? 25
(8) Is the Crown case circumstantial, and is there an indispensable intermediate fact? 25
(9) Is there a case to answer? 26

## QUICK STEPS

### 1 CIVIL OR CRIMINAL?

→ WHAT ACTION OR OFFENCE IS THIS?

→ WHAT FACT / ELEMENT(S) ARE IN ISSUE?

→ WHAT EVIDENCE IS AVAILABLE FOR / AGAINST THAT FACT IN ISSUE?

→ WHO BEARS THE ONUS, TO WHAT STANDARD? **s 140** · **s 141**

### 2 WHO HAS CALLED THE EVIDENCE?

→ **P or D?** It decides **s 17**, **s 65(8)**, **s 66(3)**, **s 137**.

### 3 WHAT TYPE OF EVIDENCE?

→ **Witness · Documentary · Real · Digital · Expert**

### 4 IS IT RELEVANT? s 55, s 56

→ Name the **fact in issue**. State the **chain**.

→ **If not relevant, STOP.**

### 5 WHAT IS THE USE?

→ Run every step **per item AND per use**, not per witness.

→ Hearsay use or non-hearsay use?

### 6 IF WITNESS

→ Competent? **s 12, s 13** Compellable? **ss 14 to 19**, **s 18** objection

→ Chief: **s 37** leading · **s 32** revive · **s 33** police · **s 38** unfavourable

→ Cross: **s 41** improper · **s 42** leading · **s 43** PIS · Browne v Dunn

→ Re-examination: **s 39** Credit: **s 102**, **s 103**, **s 106**, **s 108**

### 7 IF DOCUMENT

→ Is it a document? **Dictionary Pt 1**

→ Prove the contents: **s 48** Original rule abolished: **s 51**

→ Authenticity: **s 58**, **s 183** Machines: **s 146**, **s 147**

→ **A document in under s 48 does NOT answer hearsay. Still run s 59.**

### 8 IF REAL / VIEW

→ In court? **s 53 does NOT apply** → **s 55** + **ss 135, 137**

→ Out of court? **s 53(2)** preconditions · **s 53(3)** factors · **s 54**

### 9 IS IT HEARSAY? s 59

→ A **previous representation** by a **PERSON**, to prove an **asserted fact** they **INTENDED** to assert.

→ Non-hearsay purpose? **s 60** then opens the truth → answer with **s 136**.

→ First-hand? **s 62** Competent maker? **s 61**

→ Maker available? **Dictionary Pt 2 cl 4**

→ Civil: **s 63** not available · **s 64** available

→ Criminal: **s 65** not available · **s 66** available AND called · **s 66A** state of mind

→ Notice: **s 67** Remote: **ss 69 to 75** Admissions: **ss 81 to 90**

### 10 IS IT OPINION? s 76

→ An inference from observed data? A plain fact does not engage **s 76**.

→ Lay: **s 78** perceived AND necessary · **s 78A** traditional laws and customs

→ Expert: **s 79** specialised knowledge · training, study or experience · wholly or substantially based, reasoning exposed

→ **s 77** other purpose · **s 80** ultimate issue no bar · in a hearsay statement: **s 59** AND **s 76**

# 6.2 Hearsay: The Exceptions

## Steps

1. Which exception is open? Four choosing questions; reliability plus need (Lee)
2. Admitted for a non-hearsay purpose, so it also proves the asserted fact? (s 60; brake s 136; Lee; Quick v Stoland; Jango)
3. Gateways: competence s 61, first-hand s 62, notice s 67
4. Is the maker available? (Dictionary Pt 2 cl 4; Caterpillar)
5. Civil: maker not available s 63, or available s 64; objections s 68
6. Criminal, maker not available: P s 65(2), s 65(3); D s 65(8), s 65(9) (Williams; Harris; Munro; Sio)
7. Criminal, maker available and called: fresh in the memory? (s 66(2), (2A); Graham; XY; LMD; Pate)
8. Contemporaneous representation about the maker's own state? (s 66A)
9. Remote hearsay: business record (s 69; *Capital Securities) or another exception (ss 70 to 75)?
10. Exclude or limit anyway? (ss 135, 136, 137)

## Part A: Choosing the route

### (1) Which exception is open for this hearsay?

Overview: The organising principle: "some guarantee of reliability" together with a "need" for admissibility (Lee v The Queen (1998)). An admission by a party: s 81 may apply and should be assessed first (Topic 8).

1. Four choosing questions: (1) Already admissible for another purpose (credibility, the basis of an expert opinion)? → s 60. (2) First-hand (s 62)? If not, the Division 2 exceptions are closed. (3) Civil or criminal, and is the maker available? Civil: ss 63, 64. Criminal, unavailable: s 65. Criminal, available and testifying: s 66. (4) Contemporaneous statement of the maker's own state? s 66A, any proceeding. Remote hearsay: ss 69 to 75.
2. The first-hand map: Civil: maker available → s 64; not available → s 63. Criminal: maker available → s 66; not available → s 65. Any proceeding: s 66A.
3. Can it go in as a document by itself?: Ask whether the provision has a document limb or only a perceiver limb. Crown under s 65(2): perceiver only, no document limb (*Conway v The Queen (2000)), but once a perceiver gives evidence the statement or recording may go in through them (*R v Suteski (2002)). Defence under s 65(8): perceiver or the document itself. s 65(6): transcript of evidence in an earlier proceeding. s 66(2): maker or perceiver; a document only after evidence in chief (s 66(4)). No perceiver needed: ss 69, 70, 71; s 60; s 81. Civil: both sides under ss 63(2)(b), 64(2)(b).

### (2) Is the evidence admitted for a non-hearsay purpose, so it can also prove the asserted fact?

Statute: s 60 (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.

## (11) Even if an exception applies, should the evidence be excluded or its use limited?

1. Rule: An exception only makes evidence admissible; ss 135 to 137 can still exclude it, or s 136 limit its use (Papakosmas): s 136 on s 60 material (Quick v Stoland; Jango); s 137 on s 65 and s 66 hearsay (Munro; Pate); s 135 on s 63 and s 69 evidence (Topic 12). An unreliable evidence warning may be needed (s 165(1)(a), Topic 13).

**Write it like this: first-hand hearsay in a criminal trial**

1. [Maker] had personal knowledge of [fact], having [seen / heard] it, so the representation is first-hand (s 62); [maker] was competent when it was made (s 61).
2. [Maker] is [not available because (cl 4(1)(a) to (g)) / available and will be called].
3. Not available, Crown: the representation was made [shortly after / under a duty / in circumstances making it highly probable it is reliable / against interest] (s 65(2)( )), applied representation by representation (Sio); Williams / Harris / Munro analogy. Defence: s 65(8) applies, but beware s 65(9). Notice must be given (s 67).
4. Available and called: [fact] was fresh in [maker]'s memory having regard to the nature of the event, [her] age and the time elapsed (s 66(2A); XY / Pate); [the Crown is not barred by s 66(3) because ...].
5. The evidence is therefore admissible to prove [fact], subject to s 137 and any warning under s 165.

**Essay angle: has the hearsay rule been swallowed by its exceptions?**

1. For: s 60 and its extension to remoter hearsay (s 60(2)), the generosity of ss 63, 64, s 65(8) for the defence, the reach of s 69, s 66A.
2. Against: the s 60(3) carve-out, the first-hand confinement in s 62, the rigour of s 65(2) in Williams and Sio, s 66(3), s 69(3), notice (s 67), and s 136.
3. Take a position: the Act trades a blanket rule for "reliability plus need" (Lee); test it against the counter-case.

**Write it like this: proving a prior inconsistent statement (PIS)**

1. Chapter 2, getting it before the court. If W may simply have forgotten, seek leave to revive memory from the document (s 32; s 32(2), s 192; Stanoevski). If W is your own witness and unfavourable, seek leave to cross-examine on the PIS (s 38(1)(c); s 38(6), s 192); credibility-only questions need s 38(3) leave (Le). Cross-examine on the PIS (s 43(1)); if W does not admit it, inform W of enough of the circumstances to identify it and draw attention to the inconsistent part before proving it from another source (s 43(2)).
2. Relevance. The PIS is relevant to the facts in issue (s 55) and to W's credibility (s 55(2)(a)).
3. Hearsay. For its truth it is a previous representation adduced to prove the asserted fact (s 59). Does an exception apply? W is available and testifying: was the fact fresh in W's memory (s 66(2), (2A)) and, if the Crown adduces it, was it not made to indicate W's evidence for proceedings, unless about identity (s 66(3); a statement to police usually is)? If an exception applies, it proves the facts and also goes to credibility (it is not s 101A evidence).
4. Credibility. If no exception applies, it is credibility evidence under s 101A(b) (relevant to credibility and to a fact, but inadmissible for the latter because of s 59), so s 102 excludes it unless an exception applies.
5. Exceptions. In cross-examination it could substantially affect W's credibility (s 103(1), having regard to s 103(2); El-Azzi; a PIS ordinarily does: Col). If W denies its substance, prove it from another source; no leave is needed for a PIS (s 106(2)(c); Col). [HD tension: whether the document itself comes in under s 103 (*McMahon; Col) or only s 106 (*Ryan (No 7); Odgers).] If W is the accused, the Crown needs no leave for a PIS (s 104(3)(c)).
6. Then s 60. Being admitted for the non-hearsay credibility purpose, the PIS also proves the truth of what it asserts (s 60(1); Lee), unless an admission in a criminal proceeding (s 60(3)), and subject to a s 136 limiting direction if that use would be unfairly prejudicial (s 192(2)).

**Write it like this: proving a prior consistent statement (PCS)**

1. Chapter 2. Usually few procedural issues (a sympathetic witness); no leading questions in chief or re-examination (s 37); revive memory with leave if needed (s 32).
2. Relevance and hearsay. The PCS is relevant to the facts (s 55) and to credibility (s 55(2)(a)); for its truth it is hearsay (s 59). If W is available and testifying, was the fact fresh in W's memory (s 66(2), (2A)) and is s 66(3) no bar? If so it proves the facts and supports credibility (not s 101A evidence).
3. Credibility. If no exception, it is s 101A(b) evidence and s 102 excludes it. There is no exception in chief (Ngo).
4. Exceptions. In re-examination, arising out of cross-examination, the credibility rule does not apply (s 108(1); ss 37, 39). From any source, with leave: a PIS has been admitted, or it is suggested that W's evidence was fabricated, reconstructed or the result of a suggestion (s 108(3)(a), (b)); a bare denial is not enough (Whitmore); unmistakeable suggestions are (Nikolaidis); leave under s 192, which the Crown must seek.
5. Then s 60: once admitted to support credibility, it also proves the truth of what it asserts (Lee), subject to s 136.

## CREDIBILITY EVIDENCE FLOWCHART

**STEP 1) WHAT IS CREDIBILITY?**

1) **"Credibility" is defined in the Evidence Act Dictionary**
   - **credibility of a witness** means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.
   - **credibility of a person who has made a representation that has been admitted in evidence** means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation.
     - **Dupas v The Queen (2012) (credibility imports notions of both truthfulness and reliability)**
   - Note also that tendency evidence supporting credibility, such as someone's history of lying or telling the truth, is **not caught by the tendency rules** due to s 94(1).
2) **TYPES OF EVIDENCE WHICH MAY BE RELEVANT TO CREDIBILITY**
   - Evidence relevant to credibility includes matters going to:
     a) **honesty**: prior perjury or dishonesty convictions, bias, motive to lie, knowing or reckless false representations under a legal or moral obligation, and coaching
     b) **memory and reliability**: drug or alcohol use, brain damage, immaturity, displacement effects such as extensive media exposure, intellectual capacity, age, illness, injury or physical attributes affecting awareness or recall
     c) **accuracy of observation or account**: inconsistencies, ambiguities, direct contradictions with other evidence, prior inconsistent or consistent statements, and surrounding circumstances such as lighting, distance, angle, obstructions, noise or W's eyesight
   - Demeanour while giving evidence may also be relevant.
   - Evidence can support or discredit credibility.
   - Significant convictions for non-dishonesty offences have been held not capable of affecting credit (though they may go to character if the accused).
3) **USE OF CREDIBILITY EVIDENCE**
   - Fundamentally, this kind of evidence is **indirectly relevant** to the facts in issue, because it undermines (or supports) the evidence given by W, rather than necessarily bearing on the facts in issue themselves.
   - If a witness has poor credibility, he will be less likely to be believed, and so his evidence of the facts will be given less weight by the judge or jury.

**STEP 2) IS THIS 'CREDIBILITY EVIDENCE'?**

1) **Is it credibility evidence? s 101A**
   - **s 101A** – Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:
     (a) is relevant **ONLY because it affects the assessment of the credibility of the witness or person**, or ⇒ IT'S SOLE PURPOSE IS CREDIBILITY
     – E.g. eye witness to fatal car accident ⇒ u were convicted of perjury 5 yrs ago weren't u 'yes i was' ⇒ the ANSWER is the evidence, it can only be relevant to his credibility, it has nothing whatever to do with the facts of the case. = easy eg
     (b) is relevant: ⇒ IT HAS OTHER PURPOSE TOO BUT IT IS NOT ADMISSIBLE FOR THAT PURPOSE
     (i) because it affects the assessment of the credibility of the witness or person, and
     (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.
     ⇒ **2nd category: EVIDENCE WITH A DUAL RELEVANCE!** Classic e.g. = hearsay purpose.
     – E.g. PIS/PCS = relevant both to a witness's credit and fact in issue (hearsay).
     – It must be inadmissible for that other purpose: Parts 3.2 to 3.6, that is ss 59 (hearsay), 76 (opinion), 91 (admissions), 97 and 98 (tendency and coincidence)
     – **Process for admitting it for its second purpose = s 103 + s 106 ⇒ s 60** = to prove the truth of its contents, because it has now been admitted, assuming it is also relevant for a hearsay purpose. ⇒ THAT IS WHEN S 60/77 FOR HEARSAY + OPINION APPLY; SO U CAN GET OVER THOSE RULES!!
   - Note 1: Sections 60 and 77 will not affect the application of paragraph (b), because they **cannot apply to evidence that is yet to be admitted.**
     ⇒ bc those 2 provisions only work where the evidence is already ADMISSIBLE for another purpose
2) **IF YES ⇒ the credibility rule · s 102**
   - **s 102 – Credibility evidence about a witness is not admissible.**

**STEP 2A) CREDIBILITY OR FACT IN ISSUE?**

1) **How to tell the difference**
   - **If the relevance of the evidence is dependent on the contingency that a particular person is a witness, or has given particular evidence, then it is likely that the evidence is only relevant to the credibility of that witness.**
   - **If the evidence would be relevant even if that witness was not involved, it might relate to the facts in issue.**
     - **Palmer v The Queen (1998) (pre-Evidence Act case: XXN of D on the complainant's motive to lie blurs credibility and the ultimate facts; allowed, but the risk of reversing the onus must be met by directions)**
       – **F:** Palmer was convicted of sexual offences against a 14 year old.
         - Palmer's counsel suggested to the complainant in XXN that she had accused him to pay him back for an unreciprocated crush.
         - Palmer **was asked in XXN by the Crown to suggest a motive for the complainant's accusation. He could not do so.**
       – **Brennan CJ, Gaudron and Gummow JJ:**
         - They queried the propriety of cross-examining the accused about the complainant's motive to lie.
         - An accused's lack of knowledge of any fact from which a motive might be inferred is generally irrelevant, since it simply means his evidence cannot assist in determining whether the complainant has a motive to lie.
       – **H:** Here the victim's motive, or lack of it, for fabricating the allegations could fairly influence the belief of the jury as to the probability of the occurrence of the alleged offences.
         - Motive assumes particular importance in sexual assault cases where it is often word against word.
         - However, if he has no such knowledge, it may invite the jury to **reverse the onus of proof**, that is, inability to come up with a motive equals guilty.
         - **P was entitled to cross-examine the accused about motive, because failure to reveal facts that might provide a basis for the complainant concocting her complaint might assist the jury to find that her evidence was true.**
         - The judge's directions overcame the risk that the jury might reverse the onus.

**STEP 3) WHICH s 102 EXCEPTION?**

1) **ASK: is the evidence being adduced in cross-examination? If yes, s 103, and in a criminal proceeding s 104 as well. ⇒ STEP 4**
2) **ASK: did W deny it, and do you have that evidence from another source? If yes, s 106, after complying with s 43 for a prior**

### 7.7 McPhillamy v The Queen (2018)

**Facts and issue**

**SUMMARY FACTS: Accused charged with six sexual offences against an 11-year-old altar boy ("A") in the mid-1990s while D was an acolyte, for events on two occasions between 1 November 1995 and 31 March 1996 in the public toilets of the St Michael and St John's Cathedral, Bathurst.**

- Issue: evidence admitted under **s 97(1)** to support the tendency that A had a sexual interest in young teenage boys under his supervision and a tendency to act on that interest.

**NSWCCA**

- A majority of the NSWCCA upheld admissibility on the basis that there was an overriding similarity from which differences between the cases did not detract: **McPhillamy v The Queen [2017] NSWCCA 130* [127].

**HC**

- The HC preferred Meagher JA's dissenting judgment in the NSWCCA in which he referred to the generality of the tendency and the absence of sufficient similarity. Referred to ***Hughes*** as the authority re TE.

***Proof of A's sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of SPV for admission as TE. Generally, it is the tendency to act on the sexual interest that gives TE in sexual cases its PV.**

- The evidence demonstrating that tendency was that of the other boys, of events that occurred in 1985.

**THE KEY PARA/PRINCIPLE: Different complainants require more special features. Also follows the position in ***Bauer*, that if the TE is sexual misconduct towards others (that is, uncharged or charged acts of the defendant against other people) which is being used to prove the tendency, it is usually necessary to have some feature which links the two together. [31]**

> *"Moreover, where, as here, the tendency evidence relates to sexual misconduct with a person or persons other than the complainant [THAT'S THE POINT, THE COMMON THREAD IS NOT THE SAME CHILD, THEY ARE DIFFERENT], it will **usually be necessary to identify some feature of the other sexual misconduct and the alleged offending** which serves to link the two together. [U WILL HAVE TO FIND ANOTHER LINK, SOME COMMONALITY & HERE THERE WASN'T] The **suggested link in this case is the appellant's tendency to act on his sexual interest in young teenage boys who were under his supervision**. [31]" → THE RESULT WILL BE DIFF NOW S 97A. BUT IF CASE NOT INVOLVING CHILDREN, SAME PRINCIPLE APPLIES.*

- The TE did not meet the threshold requirement of **s 97(1)(b)**. Appeal allowed, new trial ordered.

**Step 1 – Does the evidence support the asserted tendency?**

- B's and C's evidence was capable of establishing that D had a sexual interest in young teenage boys. That interest is of a kind likely to be enduring. However, the prosecution case relied not merely on the interest, but on a tendency *to act on* that interest re boys under his supervision.
- There was no evidence that this tendency to act had manifested itself in the decade between the 1985 incidents and the alleged offending against A. This made the inference that he still possessed the operative tendency in 1995–96 weak.

**Step 2 – Does the tendency make the charged offending more likely?**

- The suggested link here (tendency to act on sexual interest in young teenage boys under his supervision) was weak: Supervision as assistant housemaster over vulnerable, homesick boarding-school boys in the privacy of his bedroom had little in common with supervision as an acolyte over an altar boy at the Cathedral. A was not shown to be vulnerable in the same way as B and C. The circumstances of the alleged offending (following A into a public toilet) differed markedly from the earlier incidents.

**Conclusion: unnecessary to consider s 101.**

**The questions**

**Would it be decided differently now because of s 97A?**

**Very likely yes**, if the same facts were a **CSO** trial today.

s 97A **presumes** significant PV for:

- a sexual interest in children (even unacted-on); and
- acting on that interest

whether the interest/act was directed at **this C, another child, or children generally**.

The HCA's "different victims need a linking feature" and "10-year gap / different setting kills SPV" points are exactly the kind of differences s 97A(5) says you **must not** use (unless exceptional circumstances): different circumstances, different relationship, time gap, no distinctive features, high generality

### 7.8 TL v The King [2022] HCA → another single victim case

**Facts**

- Only 1 of 3 could have done it (no qn of whether it was murder, just of who). Central issue: whether the Crown had excluded the possibility that the mother or D's 14-year-old nephew (both in the household) inflicted the injuries.

**The two types of TE**

- (1) TL's **tendency to act in a particular way, namely to deliberately inflict physical harm on the child, that is, the victim.** This was evidence from various sources that he was responsible for **placing the victim in scalding hot water on the morning of 10 April 2014, 10 days before the murder, resulting in burns to the sides of her feet and buttocks**. The trial judge rejected the defence arguments that this was accidentally inflicted and that TL enjoyed a good relationship with the victim, such that the evidence did not have SPV; and that the probative value of the evidence did not substantially outweigh any prejudicial effect it may have on him per **s 101**: [18].
- (2) TL's tendency to behave towards the victim in an inappropriately physical and violent fashion. This was based on **three hearsay sources of evidence that he had bruised and hurt the victim on several occasions. [so issues may intersect in exam]**

**NSWCCA ⇒ A's appeal failed**

- Adamson J held that it was not necessary for the TE to bear particular hallmarks which could identify a perpetrator (by distinguishing him or her from others) on the basis of similarity of conduct, as long as the TE was significantly probative of the alleged tendency. [25] The Court also dismissed the appeal against the TE of the complaints [26], [27].

**HC: the principles affirmed ⇒** A's argument was that should have followed some obiter dicta HC had said in Hughes at [39]: where tendency evi is adduced to prove the identity of the offender for a known offence [this was such a case, only qn was of who], PV of the T evi will almost certainly depends on the close similarity of the conduct in the T and the offence. His argument that the scalding or bruising was not close to inflicting fatal force, that conduct killing the victim was so extreme that nothing from the past made it more likely.

**THE KEY PRINCIPLE: There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence. Such a rule is not required by the text of s 97. The authorities establish that similarity is relevant to, but not determinative of, PV. [29]**

- A more generally expressed tendency is less likely to have SPV. Specificity strengthens the inferential reasoning.

**Identity confined**

- Here that did not apply because there was important evidence of identity, including the evidence that A was one of only three persons who had the opportunity to inflict the fatal injuries and the evidence pointing against the likelihood that either the mother or the nephew was the perpetrator. [30]

**Reformulation of the tendency**

- The Court commented on the fact that the tendency was reformulated by the trial judge and the prosecution, who imported additional elements into the asserted tendency (that were not in the notice). [33]
- They held that reformulation of a tendency without providing a notice under **s 97(1)(a)** may render evidence inadmissible and should not be condoned. [33] To the extent that this is a criticism of the trial judge, is that inconsistent with what happened in ***Hughes***?

**The application**

- On the facts the Court held that the burns evidence clearly supported a tendency to deliberately inflict serious physical harm on the victim, and

# LAWS2016 EVIDENCE - Essay Scaffolds

## *(1) TO WHAT EXTENT DO THE RULES OF EVIDENCE ACCOMMODATE THE 'RIGHTS/INTERESTS OF THE ACCUSED'? / TO WHAT EXTENT DOES EVIDENCE LAW STRIKE THE RIGHT BALANCE BETWEEN THE 'RIGHTS OF THE ACCUSED' AND OTHER POLICY CONSIDERATIONS?*

**[MAINLY CRIMINAL]**

**AT A GLANCE: PROVISIONS AND TOPICS**

- Proof and the accusatorial structure. ss 141, 17(2), 20, 89. *Lee v The Queen* (2014), *Azzopardi*, *Kirk*.
- Rules that favour the defence. ss 65(8) and (9), 101(2), 104(4), 110 to 112, 116, 137.
- Admissions and police questioning. ss 84, 85, 90, 138, 139, 189. Full treatment in (4).
- Judicial control. ss 11, 41, 46, 144, 165, 192. Browne v Dunn in criminal trials (*MWJ*, *Hofer*).
- Limits and competing interests. ss 89A, 97A, 98(1A), 101(2) after 2020, *IMM* on s 137, s 138 balancing, s 41 for witnesses.
- Order for the essay. Structure and proof, then asymmetry, then judicial control, then limits.

**PRO-ACCOMMODATION POINTS**

**[STARTING PROPOSITION?]**

The ALRC Report 102 at [10.120] took the view (when discussing the s 90 unfairness discretion relating to admissions) that, "the combination of the obstacles to admissibility of certain categories of evidence, the discretionary and mandatory exclusions in Part 3.11, and the underlying concern for the fairness of the trial in the rules of evidence as a whole, make it highly likely that a court would be able to exclude a piece of evidence that would jeopardise the right of an accused to a fair trial under an existing provision in the uniform Evidence Acts.'

- Foundation (EA s 141 and the accusatorial structure): The exclusionary rules that follow rest on a more basic accommodation, which is the allocation of proof. Section 141(1) provides that the court is not to find the prosecution case proved unless it is satisfied that it has been proved beyond reasonable doubt, while s 141(2) allows a defendant's case to be proved on the balance of probabilities, so the risk of unresolved doubt is carried by the State. In *Lee v The Queen* (2014) the High Court treated that allocation as structural and not simply evidentiary. A father and son had been compulsorily examined by the NSW Crime Commission before charge and, in breach of a non-publication direction, the transcripts were given to the police and the DPP. The Court quashed the convictions without requiring proof of practical unfairness, because the system 'reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused' (at [32]) and its 'companion rule' is that 'an accused person cannot be required to testify' (at [33]). The trial 'was one where the balance of power shifted to the prosecution' (at [46]). The rights of the accused are therefore not always concessions carved out of a neutral search for truth. They define the conclusion a criminal court is entitled to reach, since