**RELEVANCE**

Evidence must be directly or indirectly relevant to a fact in issue (*Wilson / Smith*)

* *Circumstantial* evidence may be relevant (*Plomp v R / Shepherd v R*)

**s55:** Relevant evidence (*Wilson / Smith*)

1. The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
2. In particular, evidence is not taken to be irrelevant only because it relates only to-

(a) the credibility of a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

**s56:** Relevant evidence is generally admissible, and irrelevant evidence is inadmissible (*Wilson / Smith*)

s55(1) only requires a minimal connection between the evidence and the fact in issue. If the fact in issue is made more likely or less likely by the evidence, however slightly, it is relevant evidence.

The test is clearly now one of logical relevance (*Smith / Papakosmas;* butcf *Stephenson*), where under the common law it was seen as one of legal relevance (or sufficient relevance).

But, the notion of legal relevance is not lost though because s55 is read in conjunction with **s135**, the general discretion to exclude evidence.

**s135**. General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might-

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

**COMPETENCE & COMPELLABILITY**

**s12 -** Competence and compellability

1. Competency to give evidence is assumed unless specifically excluded by the Act

**NB:** A witness is competent if they may lawfully be called to give evidence

1. a competent person is compellable to give that evidence (Co-accused not compellable: s17)

**s13(1) -** Incompetent witnesses are persons who (can't be understood or) don't have capacity to understand questions about a fact in issue (and that capacity cannot be overcome), like:

* *Accused* (legal incompetence) - **s17** prohibits the accused from being called to give evidence in chief. But cross examination (in respect of character evidence) is permitted under **s112** (*Zurita*). Crown may also generally cross examine the *Accused* under **s27** where Counsel calls *Accused* for evidence in chief. (Co-accused not compellable **unless tried separately**: s17)
* *Children*:  **BUT** for jury direction purposes (Civil/Criminal), **s165A** prevents regarding children's testimony as being unreliable; irrespective of their age

**[HOWEVER:** as with jury directions for 'unreliable' adult testimony/evidence (s165), s165A allows parties to apply for jury warning that the child's testimony is 'unreliable' in other aspects (not age)**]**

* *Mentally impaired* - may lack capacity to understand or be understood
* *Deaf and mute* - although s30 and s31 overcomes this by permitting use of interpreters

But **s13(2)** recognises that while persons may be *incompetent* for one fact in issue, they may be *competent* for other facts in issue

**s13(3)** - *competent* persons will be deemed *incompetent to give sworn evidence* if they don't have capacity to understand their obligation to give **truthful evidence**

**s13(4) & s13(5)** - persons deemed *incompetent to give sworn evidence* [under s13(3)above] may give *unsworn evidence* where the court advises them about:

* the importance of telling the truth
* their obligation to advise the court when they can't remember or don't know the answer to a question
* their obligation to truthfully agree/disagree with statements put forward to them

**s13(7) -** Evidence given by witnesses before they die or become incompetent is generally admissible

**s21 -** Requirement to give sworn evidence: under oath / affirmation

* A witness giving sworn evidence must take an oath **OR** make an affirmation (*choice provided under* **s23**)
* A person called merely to produce a document or thing to the court need not take an oath or make an affirmation.

**s24** - Swearing of evidence under oath does not require actual religious belief or understanding of nature/consequence of oaths; hence religious texts not required.

**s24A** - Alternative Oaths: no need to believe or make references to *God*

**s359-s387 *Criminal Procedure Act 2009* (Vic)** - prescribes alternative forms of testimony available for children, cognitively impaired witnesses, sexual offence cases, assaults, injury, threat etc: **s366**

**s368 -** notice requirement & reasnbl opportunity for defendant/counsel to review testimony b4 trial

**s370: WHOLE OF EVIDENCE** INCLUDING CROSS-EXAMINATION/RE-EXAMINATION TO BE PRESENTED TO COURT AT SPECIAL HEARING. **s372 - PROHIBITS PRESENCE OF UNAUTHORIZED PERSONS @ SPECIAL HEARING**

* **s 367 Use of recorded evidence-in-chief …**
  + Witness (child or witness with cognitive impairment)
  + Sexual offence/serious assault
  + Evidence-in-chief *may* be recorded
  + Witness must be available for cross-/re-examination
* **s 360 Alternative arrangements for giving evidence …**
  + Witness (inc. complainant)
  + Sexual offence/family violence/indecent behaviour in public
  + Alternative arrangements *may* be made
* **ss 363-365 When alternative arrangements must be made …**
  + Apply *only* to complainant in proceedings re. a sexual offence
  + Alt. arrangements *must* be made unless complainant does not wish
* **s 370 Pre-recording evidence at special hearing**
  + Sexual offences
  + Complainant (child or witness with cognitive impairment)
  + Evidence *must* be taken and recorded at a special hearing unless complainant elects otherwise
* **s 374 Use of pre-recorded evidence**
  + Recording admissible as if direct testimony
  + Complainant need not attend unless leave given to cross/re-examine

OBJECTION RIGHTS OF WITNESSES - **CRIMINAL PROCEEDINGS ONLY**

**s18 -** Family of the accused (spouses, de facto partners, children, parents) **may object** to be a witness for the prosecution if called to give evidence against or about a dealing in which the accused was involved. ***R v Khan***

**NB:** s18applies only to relationships existing at the time of giving evidence. No spousal privilege existed at common law (HCA in *Stoddart*)

**s18(4) -** Court must satisfy itself that accused's family are aware their objection rights

**s18(3) -** Objection to be made before giving evidence; and judge to decide on 'objection' in jury's absence: **s18(5)**

**18(6) -** Family not required to give evidence where **court** thinks:

1. they are likely to be harmed / jeopardizes relationship between accused & family **AND**
2. harm/jeopardized relationship outweighs desire to demand evidence

**s18(7) -** to determine subsection 18(6)(b), court should consider (*non-exhaustive*):

1. nature/gravity of offence in question
2. substance/importance of evidence likely to be given (and weight to be attached to it)
3. other avenues to collect required evidence reasonably available (to prosecutor)
4. nature of relationship between accused & family (likely harm for children?)
5. was the matter disclosed to the family IN-CONFIDENCE

**s18(8) -** prosecutor cannot comment about the objection or its determination and family's failure to give evidence

**EXAMINATION OF WITNESSES**

**s26** - the Court generally controls:

1. the way in which witnesses will be questioned (eg leading / non-leading)
2. production of documents/things relating to witness questioning (eg statements to refresh memory, prior in/consistent statements)
3. which party calls/questions first, second, etc [also see courts discretion in **s28**: regarding order of conducting Evidence-in-chief / Cross examination / Re examination]
4. persons present (and their behaviour) during the questioning of witnesses

Reviving Memory **IN COURT**

**s32:** Attempts to revive memory in court

1. witness needs leave to revive their memory in court
2. Court to consider witness's ability to revive memory without document and the relevant portion of document was authored by witness at a time when the incident was fresh in their mind or found to be accurate
3. with leave, witness may read aloud from document
4. court **may** give other party access to the relevant portion of document

**s33:** special rules for **Police Officers in Criminal proceedings**

1. Police officer can read from their statement during Evidence-in-chief where
2. it was made at the time or soon after the incident provided it was signed when made and a copy was provided to the defendant

Reviving Memory **OUT OF COURT (***DaSilva***)**

**s34** - Attempts to revive memory out of court

1. A party may request the Court to direct their opponent(s witness) to provide documents or things used to revive their memory out of court; and
2. the court may refuse to admit the evidence if the opponent fails to comply with the court's request (without reasonable excuse)

**Use of the Document by Opposing Counsel**

**s35 -** tendering/adducing documents 'produced' by opponent/third party

1. party receiving furnished/inspected documents has no obligation to tender them in evidence
2. opponent/third party has no right to tender such documents where the party fails to do so

**Cross Examination and Exception to Rule Against Prior CONSISTENT Statements**

**Common law**: prior consistent statements cannot be used to strengthen witness testimony *(Corke v Corke and Cook*) and such evidence would generally be in breach of **s101A** and **s102** (credibility rule)

**s101A** - defines '**credibility evidence**' as evidence that is *relevant* ***only*** *because it affects a witness's credibility* (and may sometimes also affect the credibility of other evidence that is rendered inadmissible due to hearsay or tendency/coincidence rules).

**s102 -** 'credibility evidence' about witnesses **is prima facie inadmissible** (subject to exceptions)

**s103** - is an exception to the rule in s102 and allows the prosecution to damage witness credibility by introducing a prior inconsistent statement to challenge their testimony (during cross-examination).

Although **s103** does not require leave, it requires persuasive arguments which will **'substantially'** impact the witness's credibility, such as by showing (*non-exhaustively*):

1. - witness knowingly/recklessly made false representations when obliged to tell truth
2. - significant amount of time elapsed since the occurrence of relevant incident/event

In such situations (subject to leave) **s108(3)** maypermit a witness to use their prior consistent statement:

1. to re-establish their credibility; or
2. in attempt to invalidate any express or implied allegations of them fabricating / reconstructing their testimony

**Finality principle -** Generally,the cross examiner is bound by answers given in respect of questions that solely relate to credibility and cannot later lead contradictory evidence.

**s106(1) -** If during cross examination a witness denies facts/assertions relating to their credibility, then depending on nature/importance of fact/assertion denied, party wanting to lead evidence to rebut such denial **may** be granted leave. **(s106** is an *exception to the* ***finality principle*)**

**s106(2) -** But **LEAVE NOT REQUIRED** where evidence being led to show witness:

1. has motive for being biased or untruthful,
2. was convicted of an offence
3. has made prior inconsistent statements
4. was unable/unlikely to have knowledge of details/matters given as evidence
5. knowingly/recklessly made false representations when obliged to tell truth

Prior INCONSISTENT Statements

**s43(1)** - A witness can be cross examined about an alleged prior inconsistent statement even where the examiner doesn't provide the witness with complete particulars / document of their statement.

**s43(2)** - where witness doesn't admit to making the prior inconsistent statement, the examiner can't adduce evidence of the statement **unless** sufficient attempt made to assist witness in identifying their prior statement **AND** the examiner draws the witness's attention by highlighting the inconsistent portion of their statement

***BROWNE v DUNNE* rule:** party seeking to contradict witness testimony must highlight the contradictory/inconsistent substance of evidence when cross-examining the witness (*Allied Pastoral*)

Improper Questioning

**s41(3) -** 'Improper questioning' means question(s) or series of questions which are:

1. misleading or confusing; or
2. unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
3. put to the witness in a belittling, insulting or otherwise inappropriate tone/manner; or
4. has no basis other than a stereotype (about witness's sex, race, culture, ethnicity, age, mental, intellectual or physical disability)

**s41(1) -** court ***may*** disallow improper question(s) put to a witness during cross examination, or inform witness that it need not be answered.

**s41(2) -** court ***must*** disallow improper question(s) put to vulnerable witnesses during cross-examination, or inform witness that it need not be answered, ***unless*** court is satisfied that the question needs to be put due to all relevant circumstances of the case.

**s41(4)** - defines 'vulnerable witnesses' - as persons cognitively impaired/intellectually disabled, persons under 18, or other persons who court thinks are 'vulnerable'.

**Unfavourable Witnesses (***R v Le***)**

Unfavourable = 'Not Favourable'. Doesn't have to be 'hostile' or 'adverse' to party's case: ***McRae***

**s38(1)** - Subject to leave, the party who called the witness to give evidence-in-chief, can use leading questions as appropriate as if they were cross-examining the witness about -

1. the witness's unfavourable statements against the party **OR**
2. information with which witness should be reasonably familiar ***and*** court thinks they are trying to withhold such information **OR**
3. the witness's prior inconsistent statement

**s38(2)** - does not permit the party to re-examine an unfavourable witness

**s38(3)** - With leave, the questioning may extend to matters relevant only to credibility (subject to rules regarding admissibility of credibility evidence)

* **Relevant to leave is**:
  + whether notice of intention to seek leave was given at the earliest opportunity; and
  + the nature of likely questioning of the witness by another party *(****DPP v McRae***)*.*

**Also consider other discretions/obligations:**

**s192** (leave subject to certain terms depending on whether adjournment necessary, avoid undue delay, unfair prejudice depending on importance of evidence and nature of case) - ***Hogan****:* leave should be granted to avoid shifting focus of trial on 'collateral'matters

**s135** (General discretion to exclude unfairly prejudicial/confusing/misleading evidence, or to avoid undue waste of time)

**s137** (Court obligation to exclude unfairly prejudicial evidence in **criminal cases**)

**HEARSAY**

***  
 STEP 1 -* Is the "previous representation"[[1]](#footnote-1) relevant? *[s55]***

Evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

***STEP 2 - Consideration of the Hearsay Rule: [s59][[2]](#footnote-2)***

* Under s59, evidence of a 'previous representation' made by a person is prima facie inadmissible where it is expressly or implicitly intended[[3]](#footnote-3) to be used to prove the existence of a fact

**[NB:** the party seeking admission of the 'previous representation' has burden of proof to show that it was not an 'intentional assertion'**]**

1. **Where "previous representation" is relevant, how will it be used?**
   1. **Non-hearsay purpose (as 'circumstantial' or 'original' evidence / 'other purpose') -**hence admissible =>Also CHECK STEP 3 after the following:
      1. *Subramaniam* - the evidence was merely being used to prove "*the fact that the 'previous representation' was made*" and NOT to prove "*the truth in it*" **[**Representations used as evidence of their effect on another person**]**
      2. *Ratten - "the victims words were not a statement of a fact – but together with her tone of voice, they were relevant evidence of her state of mind"* **[**the **state of mind[[4]](#footnote-4)** being the other purpose**]**
      3. *Walton* - the child intended to '*greet his father*' and NOT to '*assert or disclose that the person who he spoke with was his father*'
      4. *Van Beelen* - statements used as 'original evidence' where it is relevant to prove that '*the statement was said/made*' - eg: defamation cases, contracts (*Firman, McRaild*)
      5. *Kamleh*: where 'previous representation' used to infer '*consciousness of guilt*'
      6. *Woon*: person's responses/reactions relevant to a 'previous representation'
      7. *Welsh*: a doctor's reliance on 'previous representation' of patient's health history to prove the basis of the medical advice/treatment given. Factual foundation of expert opinions (Welsh) e.g. doctor's opinions, valuers, accountants, scientists, engineers, technical experts, drug identification experts, etc
      8. *Papakosmas*: prior 'consistent' statements were called upon in a trial for another purpose - i.e. 'previous representation' admitted to prove witness/complianant's credibility. cf *Hannes*
      9. *Lee*: prior 'inconsistent' statements were called upon in a trial for another purpose
   2. **Hearsay purpose (as 'testimonial' evidence / 'factual purpose') -** hence inadmissible
      1. *Hannes* - argued that his 'previous representation' in the document were not intended'*to assert the existence of Mark or M Booth*' and hence the document was not hearsay and hence admissible.

Spigelman CJ: Distinction between '*intended*'[[5]](#footnote-5) implied assertions and '*unintended*'[[6]](#footnote-6) implied assertions. Result: s59 modified by inserting words "*it can reasonably be supposed*" to change the test from requiring '*subjective intent*' to requiring '*objective intent*'

1. **Hence four strikes (**to prove it is "testimonial"**), and it’s out (**inadmissible => but CHECK STEP 4**):**
   1. A previous representation; **WHICH**
   2. Asserts the existence of a fact; **WHICH**
   3. The person intended to assert; **AND WHICH**
   4. Is used to prove the asserted fact.

***STEP 3 - s60 'hearsay purpose' use of evidence (except admissions in criminal cases)***

1. Once a 'previous representation' is admitted, **s60(1)** allows it to be used for 'hearsay purpose' (i.e. 'hearsay purpose' - factual existence or truth can be inferred from the 'previous representation').
   1. s60(1) applies to evidence admitted for 'non-hearsay' purpose (see above list),
   2. s60(2) also allows admitting evidence that is 'second-hand' or more 'remote' hearsay (including first-hand hearsay 'admissions'/confessions - s81(1) and s82),
   3. but not where the 'admission'/confession relates to a criminal proceeding: s60(3)

**[NB:** jury direction to exclude evidence on basis of being unreliable under s165**]**

1. **Consider s136 discretion to limit application of s60(1)&(2)**

The trial judge may exercise discretion under s136 limit the use of the evidence[[7]](#footnote-7) to its 'non-hearsay' use where:

* the other party may otherwise be 'disadvantaged' (*Roach v Page*)
* misleading / confusing evidence - where the evidence contains 'genuinely disputed, conflicting or unreliable facts' (*Quick v Stoland Pty Ltd*)

***STEP 4 - Consider exceptions to the s59 Hearsay Rule***

1. **Is it 'First-Hand' hearsay? if yes,**

**General[[8]](#footnote-8) exception for 'First-Hand' hearsay (s62) applies -** has the effect that s59 will not apply where:

* The witness (or maker of a 'previous representation') saw, heard or otherwise perceived the representation being made; **AND**
* The maker of the 'representation' had personal knowledge of the asserted fact – i.e. knowledge based on something the person saw, heard or otherwise perceived (but not other hearsay); **AND**
* The party seeking to adduce the 'previous representation' gives a **notice (under s67)** to all other parties of their intention to adduce the 'representation' as evidence under s63[[9]](#footnote-9), s64[[10]](#footnote-10) and s65[[11]](#footnote-11). No notice is required under s66[[12]](#footnote-12).

APPROACH TO ALLOW 'FIRST-HAND' HEARSAY EVIDENCE: '**CIVIL**' CASES vs. '**CRIMINAL**' CASES

* + **Specific provisions which allow 'first-hand' hearsay for CIVIL proceedings**

s 59 does not apply to the 'representation' or 'document' where:

* maker of the representation is not 'available' to give evidence: **s63**
* maker of the representation is 'available', but it would cause undue expense or delay, or would not be reasonably practicable, to call them as a witness: **s64(2)**
* the maker is called as a witness and can give evidence themselves, or ‘first-hand,’ but document cannot be tendered until end of examination-in-chief: **s64(3)&(4)[[13]](#footnote-13)**

**[NB** - the maker is not 'available' if they are **dead**, **incompetent** or **cannot be compelled** to testify, or it is **unlawful for them to testify**.

The **Onus of proof** that the maker is 'unavailable' (s63) lies with the party alleging so; as is the onus to prove that it would cause undue expense or delay (s64) to do so or that all reasonable steps were taken to **find** or **compel** the maker (*Caterpillar v John Deere #2*)**]**.

**NB: a party can apply for a jury warning that the hearsay use of the evidence is unreliable (s 165:** adults **/ s165A:** children**) - even if unreliability relates to 'identification' evidence**

* + **Specific provisions which allow 'first-hand' hearsay for CRIMINAL proceedings**

s 59 does not apply to the 'representation' where:

* **s65:** maker of the representation is not 'available'[[14]](#footnote-14) to give evidence
* **s65(2)**: prosecution (or defendant) can use first-hand evidence of:
  + Representation made under a duty (i.e. within the course of someone's employment e.g. public-servants, police officers, procurement officers' delivery records): *Price v Torrington* and *Dromore Fresh Produce*
  + Representation made when or shortly after the asserted fact occurred, **AND** the circumstances of making the representation (*R v Ambrosoli*) suggest an unlikelihood of fabrication (*Williams v R / Harris v R*) or concoction (*Ratten,* cf. *Bedingfield / Brown*)
  + Representation made in circumstances that make it **highly probable** (such as from a spontaneous response when caught off guard[[15]](#footnote-15) - *R v Benz*) that the statement is a reliable (*R v* *Ambrosoli*) - **very strict test** compared to ss(2)(b) above (*Conway*)
  + Representation against interests[[16]](#footnote-16) (*R v Lee / R v Suteski*) of person who made it **AND** in circumstances that make it likely to be reliable - **less strict** than ss (2)(c) above
* evidence of testimony in other proceedings: **s65(3)-(6) -** e.g. where the accused (or their counsel) cross examined the maker or did not have a reasonable opportunity to cross examine the maker in another proceeding

* defendant can use 'first-hand' hearsay evidence or a document: **s65(8) -** leniency to the accused
* retaliatory hearsay exception of **s65(9)** allows other parties (particularly prosecution) to lead additional[[17]](#footnote-17) 'first-hand' hearsay relating to matters raised by the defendant under the lenient provision of ss(8) above
* **s66:** where the maker is available to give evidence and is called as a witness
  + they can give evidence themselves, or even give ‘first-hand’ hearsay evidence but documents cannot be tendered until end of examination-in-chief; **AND PROVIDED -**
  + The maker's 'representation' was made when the occurrence of the event/fact was fresh in their memory (*Graham v R*); **AND**
  + **s66(2A)** - allows the court to take into account other relevant matters (apart from 'time') including nature of the event/fact and the age and health of the maker

**NB: a party can apply for a jury warning that the hearsay use of the evidence is unreliable (s 165:** adults **/ s165A:** children**) - even if unreliability relates to 'identification' evidence**

1. **Exception under s66A - contemporaneous representations -**

**s66A:** a person's contemporaneous statements about his own health, feelings, sensations, intentions, knowledge or state of mind are admissible even if the maker is not called (*Perry* / *Walton*) (1981) 28 SASR 95, Walton (1989) 166 CLR 283, 63 ALJR 226.

NB. ‘State of mind’ is a matter of fact, so can fall within the hearsay rule (**s66A is an exception to s59**)

1. **Exception under s69 - Business Records**

**PROVIDED** the statement is not made for or in contemplation of legal proceedings or made in connection with (*Vitali v Stachnik*) an investigation relating to or leading to a criminal investigation: **s69(3),** a 'representation' in a document is admissible if:

* it is part of a record made in the course of or for the purpose of business: **s69(1)**
* by a person who might be thought to have personal knowledge: **s69(2)**

**TENDENCY - applies to Civil & Criminal cases**

* + **Tendency evidence (s97) –** evidence used to show that a person has or had a tendency to act in a particular way.

**Step 1** - Determine Relevance

1. Would a trial judge regard the evidence (*of a person's conduct, character, reputation or tendency*) as 'rationally' affecting the 'probability' of existence of a fact in issue?

Consider: case of ***Makin****:*

* evidence could not be used to prove 'tendency' of killing children (***tendency purpose***) **=>** hence **inadmissible**
* but evidence could be used to rebut defendant's claim of accidental death (***other purpose***) **=>** hence **prima facie admissible**

1. **s94(1):** If the **'purpose'** of adducing evidenceis to only determine 'witness credibility'
   * tendency rule inapplicable
   * hence **cannot** be used for **'tendency purpose': s95**
   * *BRS*: cautious jury direction required (s165) to ensure evidence only used for *credibility*
2. **s94(3):** If the evidence is also being used for other facts in issue (*character / reputation / conduct / another tendency*)
   * tendency rule inapplicable
   * hence **cannot** be used for **'tendency purpose': s95**
   * *BRS v R*: cautious jury direction required (s165- adults / s165A- children) to ensure evidence only used for *character / reputation / conduct / another tendency*

**Step 2** - Significant Probative value - **requires more than mere 'Relevance'**

1. Does the court regard the evidence (*by itself or along with other adduced evidence*) to be of significant probative value? ***Significant probative value*** *is likely to be:*

* *(Lock / Lockyer) -* more than '***mere relevance***' inferred in **s55**, but less than a '***substantial***' degree of relevance (per *criminal cases like: Ellis / Pfennig*)
* *(Lockyer) -* evidence must be '***important***' or '***of consequence***'
* it **MAY** turn to the question of whether there is '***striking similarity***' (*Boardman*) in surrounding circumstances, behavioural pattern or modus operandi
* Persuasive strength of inference drawn from evidence of a person's conduct (*Jacara*)
* Regard should be had where evidence is being disputed (*Pfennig / Ellis*)
* Less probative where the Defendant has no control over the circumstances (*PNJ*)
* Likelihood and motives for Concoction or Contamination (*Hoch* / *PNJ / AE*)
* Extraordinary circumstances: coincidence evidence used for tendency purpose (*Straffen*)

**Step 3** - Notice requirements (*Zhang*)

1. Upon establishing relevance, ensure *one* of the following is met:
   1. the party has given notice about their intention to lead 'tendency evidence': **s99**

**OR**

* 1. the court has dispensed the notice requirements: **s100**

1. If notice requirement under **s99** or **s100** are not satisfied, evidence is inadmissible for its 'tendency purpose'. Caution with jury directions in such cases to ensure that such evidence is not led for 'tendency purpose' (*BRS v R*)
2. Notice not required to contradict tendency evidence already adduced by other party: **s97(2)**

**Step 4** - *Probative value*  **substantially outweighs** *prejudicial effect* (**SKIP IF NOT** **CRIMINAL CASE**)

1. To admit tendency evidence in criminal cases, s101 requires the probative value of evidence to **substantially outweigh** any prejudicial effect to the accused

Meaning of '**substantially outweigh**' its 'prejudicial effect':

* Common law (*Pfennig*) test - "*no rational explanation other than incrimination of accused*"

* s101(3) test (*Ellis -* which **may** include the *Pfennig* test in some cases) - requires 'balancing exercise' for each case in its own merits. But generally, consider:
  + Will jury directions sufficiently mitigate risk of unfair prejudice (*R v* *Cook*)
  + risk of jury misusing evidence in an unfair way (*R v BD / Papakosmas*)
  + evidence provokes some irrational, emotional or illogical response (*Suteski*)
  + risk of jury overestimating probative value of evidence (*Suteski*)
  + is the evidence likely to influence the jury to make a wrong decision/conviction
  + risk of jury being too readily accepting of prosecution evidence (*Papakosmas*)
  + risk that evidence may cause a distraction from issues central to trial (*R v Watkins*)

**Step 5** - *s135 discretion* (**CIVIL PROCEEDINGS**) (*R v Ngatikaura*)

135. General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might-

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

**Step 5** - *s137 discretion* (**CRIMINAL PROCEEDINGS**) (*R v Ngatikaura*)

137. Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by

the prosecutor if its probative value is outweighed by the danger of unfair

prejudice to the accused.

**Result - EVIDENCE IS ADMISSIBLE TO PROVE TENDENCY**

**(IMPROBABLE) COINCIDENCE - applies to Civil & Criminal cases**

* + **'Improbable Coincidence' evidence (s98) –** evidence used to prove that two or more events must be related, because of the improbability of the events occurring coincidentally

**Step 1** - Determine Relevance

1. Would a trial judge regard evidence of improbable coincidence of occurrences of 2 or more related events as 'rationally' affecting the 'probability' of whether a party did a particular act or had a particular state of mind?

Points to consider*:*

* Are the **similarity** in circumstances or eventsbeyond the defendant's control and hence are not 'relevant similarities' (*PNJ / Sutton*). Without 'relevant similarities' evidence is pure 'tendency' evidence => hence **inadmissible** forits ***improbable******coincidence purpose***.
* *Makin:* evidence could be used to prove improbable coincidence of killing children (***improbable******coincidence purpose***) hence **prima facie admissible.** Evidence could be used to rebut defendant's claim of accidental death (***other purpose***) **=>** hence **prima facie admissible**
* improbable coincidenceused to prove **identity**: *Sutton / Pfennig*
* improbable coincidenceused to prove **intent**: *Makin/ Perry*
* improbable coincidenceto prove **reliability of witness statements**: *Boardman / Hoch*

1. **s94(1):** If the **'purpose'** of adducing evidenceis to only determine 'witness credibility'
   * coincidence rule inapplicable
   * hence **cannot** be used for **'*improbable******coincidence purpose*': s95**
   * *BRS v R*: cautious jury direction required to ensure evidence only used for *credibility*
2. **s94(3):** If the evidence is also being used for other facts in issue (*character / reputation / conduct / tendency*)
   * tendency rule inapplicable
   * hence **cannot** be used for **'*improbable******coincidence purpose*': s95**
   * *BRS v R*: cautious jury direction required to ensure evidence only used for *character / reputation / conduct / tendency*

**Step 2** - Significant Probative value - **requires more than mere 'Relevance'**

1. Does the court regard the evidence (*by itself or along with other adduced evidence*) to be of significant probative value? ***Significant probative value*** *is likely to be:*

* *(Lock / Lockyer) -* more than '***mere relevance***' inferred in **s55**, but less than a '***substantial***' degree of relevance (per *criminal cases like: Ellis / Pfennig*)
* *(Lockyer) -* evidence must be '***important***' or '***of consequence***'
* Touchstone for **improbable coincidence** is similarity (*PNJ*). Unlike tendency, there **must** be a '***striking similarity***' (*Boardman*) in events or circumstances, conduct, behavioural pattern or modus operandi
* Alleged similarities must not be stated too generally (*Pfennig*)
* Persuasive strength of inference drawn from evidence of a person's conduct (*Jacara*)
* Regard should be had where evidence is being disputed (*Pfennig / Ellis*)
* Less probative where the Defendant has no control over the circumstances (*PNJ*)
* Likelihood and motives for Concoction or Contamination (*Hoch* / *PNJ / AE*)
* Extraordinary circumstances: coincidence evidence used for tendency purpose (*Straffen*)

**Step 3** - Notice requirements (*Zhang*)

1. Upon establishing relevance, ensure *one* of the following is met:
   1. the party has given notice about their intention to lead 'tendency evidence': **s99**

**OR**

* 1. the court has dispensed the notice requirements: **s100**

1. If notice requirement under **s99** or **s100** are not satisfied, evidence is inadmissible for its 'tendency purpose'. Caution with jury directions in such cases to ensure that such evidence is not led for 'tendency purpose' (*BRS v R*)
2. Notice not required to contradict tendency evidence already adduced by other party: **s98(2)**

**Step 4** - *Probative value*  **substantially outweighs** *prejudicial effect* (**SKIP IF NOT** **CRIMINAL CASE**)

1. To admit tendency evidence in criminal cases, s101 requires the probative value of evidence to **substantially outweigh** any prejudicial effect to the accused

Meaning of '**substantially outweigh**' its 'prejudicial effect':

* Common law (*Pfennig*) test - "*no rational explanation other than incrimination of accused*"

* s101(4) test (*Ellis -* which **may** include the *Pfennig* test in some cases) - requires 'balancing exercise' for each case in its own merits. But generally, consider:
  + Will jury directions sufficiently mitigate risk of unfair prejudice (*R v* *Cook*)
  + risk of jury misusing evidence in an unfair way (*R v BD / Papakosmas*)
  + evidence provokes some irrational, emotional or illogical response (*Suteski*)
  + risk of jury overestimating probative value of evidence (*Suteski*)
  + is the evidence likely to influence the jury to make a wrong decision/conviction
  + risk of jury being too readily accepting of prosecution evidence (*Papakosmas*)
  + risk that evidence may cause a distraction from issues central to trial (*R v Watkins*)

**Step 5** - *s135 discretion* (*R v Ngatikaura*)

135. General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might-

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

**Step 5** - *s137 discretion* (**CRIMINAL PROCEEDINGS**) (*R v Ngatikaura*)

137. Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by

the prosecutor if its probative value is outweighed by the danger of unfair

prejudice to the accused.

**EVIDENCE ADMISSIBLE TO PROVE ACT OR STATE OF MIND BASED ON IMPROBABLE COINCIDENCE**

**CHARACTER & CREDIBILITY**

Character of **Witness**

**Credit** of a person refers to whether they should be believed on oath. **Character** evidence is often used to impugn **credit** and ‘good’ or ‘bad’ **character** may be proved by:

* prior convictions;
* past behaviour / person's general reputation;
* personal opinion of witnesses; or

Using character evidence depends on number of factors including:

* Is it relevant to facts in issue and/or credit?
* Is it evidence of good character or bad character?
* Is it the character of a witness or the accused?
* Does it relate to special class of witness; e.g. *sexual offence complainants*?

**Sexual offence cases**

Due to *Criminal Procedure Act (Vic)*, **character evidence** cannot be used in **sexual offence** cases **IF** it:

* relates to the general reputation of the complainant's chastity: **s341** *Crim Proc Act (Vic)*; or
* relates to complainant's sexual history to prove their '***consent***': **s343** *Crim Proc Act (Vic)*

**s340** - defines '**sexual history**' evidence as evidence about the complainant:

1. being accustomed to engaging in *sexual activities*
2. participating in *sexual activities* with others or the accused (other than the charged offence)

**s342** - leave requiredto **cross-examine** complainant or **lead evidence** about their *sexual activities*

**s349 -** Before granting leave, the Court **must** satisfy itself that the evidence/cross-examination has **substantial relevance** or should be admitted/allowed in the **interests of justice**, by considering**:**

1. whether the probative value of evidence outweighs distress, humiliation or embarrassment of the complainant (having regard to their age, nature/number of questions to be asked)
2. whether jury is likely to become discriminatory, biased, prejudiced, sympathetic or hostile
3. the need to respect/protect the complainant's privacy/dignity
4. the accused's rights/interests to properly defend the allegations

**s352 -** sexual history evidence is **NOT** to be regarded as:

1. being **substantially relevant** if it relates to complainant's general disposition (*tendency*)
2. being a **proper matter** for cross-examination **unless** special circumstances suggest a high likelihood of complainant's evidence being **unreliable**

**s338 -** provides **Rationale** that **-** parliament intends Courts to take into account that sexual crimes:

1. have a high occurrence in society
2. are significantly underreported
3. are often committed against vulnerable persons (women, children, cognitively impaired)
4. often occur where the victim knows/trusts the offender
5. are not easily identifiable and can be difficult to detect

Character of **Accused -** CRIMINAL CASES ONLY (**s109**)

**s110(1) -** The hearsay / opinion / tendency / coincidence and credibility rules **do not apply** to evidence adduced by an accused to prove their good character

Accused can **lead** good character evidence by:

* calling witnesses,
* personally giving evidence (i.e. coming to the witness box - *sign of good faith*)
* cross-examining prosecution witnesses

***R v Zurita*** - trial judge **must** direct jury to take into account the 'character of the accused' in relation to their guilt, credit or otherwise.

C:\Users\Wize\Desktop\33696-2.gif **Danger of leading good character evidence** via s110(1) above

* **s110(2) & s110(3)** - The prosecution can lead evidence to **rebut** the accused's good character (or generally prove the accused is not of good character) without worrying about the application of hearsay / opinion / tendency /coincidence / credibility rules in respect of any such evidence to be led by the prosecution (provided the rebuttal is for the same level of generality/particularity)

Although no leave is required, the court **may** consider discretion to exclude such evidence where unfair prejudicial effect outweighs its probative force: **s135 / s137 (*TKWJ v R*)**

Credibility Evidence

**s101A** - defines '**credibility evidence**' as evidence that is *relevant* ***only*** *because it affects a witness's credibility* (and may sometimes also affect the credibility of other evidence that is rendered inadmissible due to hearsay or tendency/coincidence rules).

**s102 -** 'credibility evidence' about witnesses **is prima facie inadmissible** (subject to exceptions)

**s103** - is an exception to the rule in s102 and allows the prosecution to damage witness credibility by introducing a prior inconsistent statement to challenge their testimony (during cross-examination).

Although **s103** does not require leave, it requires persuasive arguments which will **'substantially'** impact the witness's credibility, such as by showing (*non-exhaustively*):

1. - witness knowingly/recklessly made false representations when obliged to tell truth
2. - significant amount of time elapsed since the occurrence of relevant incident/event

In such situations (subject to leave) **s108(3)** maypermit a witness to use their prior consistent statement:

1. to re-establish their credibility; or
2. in attempt to invalidate any express or implied allegations of them fabricating / reconstructing their testimony

**Finality principle -** Generally,the cross examiner is bound by answers given in respect of questions that solely relate to credibility and cannot later lead contradictory evidence.

**s106(1) -** If during cross examination a witness denies facts/assertions relating to their credibility, then depending on nature/importance of fact/assertion denied, party wanting to lead evidence to rebut such denial **may** be granted leave. **(s106** is an *exception to the* ***finality principle*)**

**s106(2) -** But **LEAVE IS NOT REQUIRED** where evidence is being led to show witness:

1. has motive for being biased or untruthful,
2. was convicted of an offence
3. has made prior inconsistent statements
4. was unable/unlikely to have knowledge of details/matters given as evidence
5. knowingly/recklessly made false representations when obliged to tell truth

Prosecution Delays in **CRIMINAL CASES**

* **s165B** - Where the defendant (*makes application and*) satisfies the Court that prosecution delay *causes* defendant to suffer significant forensic disadvantage, the court **must** inform jury about:
  + the nature of that disadvantage **AND**
  + need to take that disadvantage into account when considering the evidence (*Longman, Crofts, Tully*).
* **s61(1)(b) -** *Crimes Act* 1958 (Vic) - jury directions about complainant's delay in reporting sexual offences committed against them
  + there may be good reasons why complainants delay/hesitate to report sexual offences against them
  + judge shouldn't normally infer that evidence is less credible due to delay (cf *Graham v R*)

**PRIVILEGE**

CHARACTER OF ACCUSED - (**CRIMINAL CASES ONLY**) Part 2

**C:\Users\Wize\Desktop\33696-2.gif - Other dangers for the Accused under s110**

**s112** - Where the accused **chooses**[[18]](#footnote-18) to give sworn evidence,[[19]](#footnote-19) then (**subject to leave**: *Stanoevski*) they **open themselves** to being cross-examined (about their character) by the prosecution.

Subject to certain restrictions, **s27** operatesto permit cross examining the accused about other aspects of the case once they come in the witness box.

**Hurdles for prosecution**

While the LEAVE requirement in **s112** protects accusedfrom cross-examination about '**Character**', **s104(2)** protects them from being cross-examined about '**Credibility**' by also requiring LEAVE.

However, under **s104(3)** the prosecutor **does not need leave** to try to prove that the Accused:

1. has motive for being biased or untruthful,
2. can't be aware or recall certain matters relating to their testimony
3. has made prior inconsistent statements

**s104(4) -** Court **must only grant leave where** the accused gives evidence—

1. suggesting that the prosecution's witness has a tendency of being untruthful; **AND**
2. solely or primarily relevant to the witness's credibility.

**s104(6) -** The Court **must not** grant leave to a co-accused (who wants to cross-examine the accused) unless:

1. the accused gave *adverse* evidence against the co-accused, **AND**
2. the *adverse* evidence against the co-accused has been **admitted**

**s111(1) -** The hearsay and tendency rules don't apply to opinions about a defendant's character given by a co-accused/co-defendant who hasspecialized/expert knowledge (based on study, training or experience) **and their opinion is wholly based** on such knowledge (*Lowery v R*)

**RIGHT TO SILENCE**

**Pre-trial silence:** *Crimes Act* 1958

**s464J** *Crimes Act* 1958 - Nothing affects the Accused's right to silence in the absence of statute

**s464A(3)** - Investigating official must inform Accused about their right to silence prior to formal questioning (other than collecting name, address, etc)

**Pre-trial silence:** *Evidence Act* 2008 (Vic)

**s89** *Evidence Act* 2008 (Vic) -

In criminal proceedings, unfavourable inferences (*about a party's 'consciousness of guilt' or 'credibility'*) **must not** be drawn due to the fact that a person exercised their right to silence.

***Petty & Maiden v R :***

1. Adverse inference should not be drawn from silence (except rare cases: *Weissensteiner / Azzopardi*)
2. Less weight should not be given just because a defence raised only at trial stage
3. Although, less weight may be given where conflicting accounts are given at different stages

***Dyers v R*:**

1. Accused is not bound to give evidence. Crown must prove its case B.R.D.
2. Crown should call all material witnesses unless there are good reasons not to
3. Jury shouldn't speculate how the uncalled witnesses would testify

**At-trial silence:** *Criminal Procedure Act* 2009 (Vic)

**s66** Criminal Procedure Act 2009 (Vic) -

After the prosecution closes their case in a criminal proceeding, the accused can:

1. submit that there is no case to answer,
2. respond to the charge by giving evidence or calling witnesses
3. choose not to give evidence or call witnesses

**At-trial silence: INDICTABLE OFFENCES -** *Evidence Act* 2008 (Vic)

**s20(2)** *Evidence Act 2008 (Vic)* - only applies in Criminal Proceedings for Indictable Offences

* A judge or party (other than the prosecutor) may generally comment on the Accused's failure to give evidence
* Only a 'Co-accused' **can infer** a consciousness of guilt from the Accused's silence

**ADMISSIONS**

An admission is a previous representation:

* made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
* adverse to the person's interest in the outcome of the proceeding.’

**s87** - admission can be made via statement (written or oral), adoption of a statement or on behalf of a person who has given their authority

**s81** - Hearsay & Opinion rules don't apply to evidence of relevant previous representations surrounding[[20]](#footnote-20) an admissions where those representations are reasonably required to fully understand the admission.

Although **s82 -** Hearsay rule still applies where evidence relating to admissions are not 'first-hand'  
 **s83 -** Where a third party admits to something, the admission is inadmissible **without** their consent

Reliability of admissions

**s84 -** Court must be satisfied that the admission was made by the party's own volition and not under duress, threats, etc to anyone. Onus on defendant to raise this issue under **s189(3)** (***R v Zhang***)

**s85(2)-** unless there is reason to believe that an admission is not truthful, it is admissible if made in presence of an investigating official (or person with similar power: ***Kelly***)

**s85(3)** - The court must take into account the personal attributes (education, cognitive impairment, age, etc) of a person who makes an admission (***Moffat/McLaughlan***) as well as the manner /nature of questioning, incentive or inducement offered to make the admission

**s88** - Before admitting any evidence of an admission, **it is open to the court to find** whether or not the admission was actually made by a person

**s142 -** evidencerelating to admissions required to be proved on the balance of probabilities

**s135** (unfairly prej, waste of time, misleading), **s137** (unfair prej: crim) **s138** (illegally obtained)   
**s90 -** unfair to D(fairness discretion: ***Swaffield / Pavic***)

Consciousness of guilt is NOT an admission; rather it is circumstantial evidence.

Silence does not amount to a Consciousness of guilt **unless** the accused, by conduct or demeanour acknowledges truth of the statement (***Barca***)

1. The Dictionary in Part 1 states that a '**Previous representation'** is an out-of-court (proceeding) statement, express or implied from words or conduct (regardless of whether it was 'intended' or eventually 'communicated') [↑](#footnote-ref-1)
2. Remember, s 59 only applies to evidence used to prove the truth of what was said (i.e. for a 'hearsay purpose' ) [↑](#footnote-ref-2)
3. an implied representation is only hearsay if the person intended to assert the fact (*Hannes, Walton, Ratten, Immigration Minister v Capitly*) [↑](#footnote-ref-3)
4. See Step 4 below - There is now an exception to the hearsay rule in s 66A for contemporaneous (ie. ‘at the same time’) representations about own health, sensations, or state of mind [↑](#footnote-ref-4)
5. ‘Mark exists’ is necessarily contained in the intention to state that ‘there is a need to take Mark to the meeting’ [↑](#footnote-ref-5)
6. Walton - There is generally an ‘*extreme unlikelihood of concoction*’ in cases involving '*unintended implied assertions*' (Mason J). But cf approach of Wilson, Dawson and Toohey JJ: the child’s words (Hello Daddy) were ‘*no more than hearsay and must be excluded*' [↑](#footnote-ref-6)
7. cf s135 - which is the judge's discretion to exclude evidence [↑](#footnote-ref-7)
8. Applies to both 'Civil' & 'Criminal' proceedings [↑](#footnote-ref-8)
9. Exception-civil proceedings if maker not available [↑](#footnote-ref-9)
10. Exception-civil proceedings if maker available [↑](#footnote-ref-10)
11. Exception-criminal proceedings if maker not available [↑](#footnote-ref-11)
12. Exception-criminal proceedings if maker available [↑](#footnote-ref-12)
13. No s67 notice required under subsections 64(3) & 64(4) [↑](#footnote-ref-13)
14. **[NB** - the maker is not 'available' if they are **dead**, **incompetent** or **cannot be compelled** to testify, or it is **unlawful for them to testify**. The **Onus of proof** that the maker is 'unavailable' (s65) lies with the party alleging so; as is the onus to prove that it would cause undue expense or delay (s64) to do so or that all reasonable steps were taken to **find** or **compel** the maker (*Caterpillar v John Deere #2*)**]**. [↑](#footnote-ref-14)
15. as opposed to a pre-meditated response which can also be spontaneous [↑](#footnote-ref-15)
16. **s65(7) -** Statements contrary to the person's own interest whereby they risk damaging their own reputation, prosecution/conviction for an offence or expose themselves to risk of damages in tort. [↑](#footnote-ref-16)
17. perhaps with a view of 'completeness' and to establish proper 'context' of the defendant's claims in s65(8)

    **\*\*\*\*\*\*\*\*\*\*\*\*\*FIN\*\*\*\*\*\*\*\*\*\*\*\*\*\*** [↑](#footnote-ref-17)
18. Volition of the Accused to come to witness box as prosecution can't call them to give evidence-in-chief: **s17** [↑](#footnote-ref-18)
19. **NB:** Privilege against self-incrimination not available to the Accused: **s128(10)** [↑](#footnote-ref-19)
20. shortly before - shortly after [↑](#footnote-ref-20)