**General Sections**

*Discretion to Exclude*

1. **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—

1. be unfairly prejudicial to a party; or
2. be misleading or confusing; or
3. cause or result in undue waste of time.
4. **General discretion to limit use of evidence**

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

1. be unfairly prejudicial to a party; or
2. be misleading or confusing.
3. **Exclusion of prejudicial evidence in criminal proceedings**

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

*Court Granting Leave*

1. **Leave, permission or direction may be given on terms**
2. If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
3. Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account—
	1. the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
	2. the extent to which to do so would be unfair to a party or to a witness; and
	3. the importance of the evidence in relation to which the leave, permission or direction is sought; and
	4. the nature of the proceeding; and
	5. the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

***s 189*** *– The voir dire*

**Relevance**

**Definition**

**s 55(1)** – ‘Evidence which, if accepted, could rationally affect (directly or indirectly) the assessment of a fact’s existence in the proceeding’

* **(2)** May still be relevant even if evidence relates purely to witness credibility, admissibility of other evidence, or failure to adduce evidence

**Types of Evidence**

* **Direct** – evidence proves/disproves a fact, no additional reasoning needed.
	+ E.g. Oral evidence of witness, documentary evidence depicting facts, D’s admissions.
* **Circumstantial** – just to engage in **extended reasoning process**.
	+ *Smith v The Queen* – ‘facts relevant to facts in issue’
	+ *Plomp v R* – Must be no other reasonable explanation and process of reasoning must include all facts/matters that make intelligible the course of conduct passed.
	+ *Shepherd v The Queen* – Guilt should be only rational inference, ultimate inference must be drawn from some **intermediate factual conclusion**

**Determining Relevance**

Common sense, related to **fact in issue**.

**Once evidence reviewed?**

**s 56** – Relevant evidence admissible, irrelevant evidence inadmissible.

* Now check other admissibility rules.
	+ Don’t forget ss 135-7 general discretions to exclude!

**Competence and Compellability**

**Starting Position**

**s 12** – Everyone is *prima facie* considered competent and compellable to give evidence –

**s 21** – Must take **oath** or **affirmation**

* Witnesses’ choice (**s 23**).
* Oath binding once made, **no matter what**.

**Competency**

**General**

**s 13(1)** – Person not competent if they cannot:

* **(a)** Understand question about a fact; or **(b)** Be understood giving an answer.
* **(2)** Can still give evidence about **other facts**.

**s 13(3)** – Person not competent to give **any evidence** if doesn’t understand obligation to give truthful evidence.

* **(5)** Can give unsworn evidence instead.

**The impaired, children**

**s 189(1)(c)** – Judge makes preliminary assessment on witness competency.

* **s 13(8)** – Assess competence as thinks fit, use expert evidence if needed.

**s 165A** – Care regarding children assessment, shouldn’t warn jury that kids unreliable/lack credibility (unless necessary).

***Criminal Procedure Act* ss 366-75** – Kids can give CCTV evidence if vulnerable witness.

**Compellability (Criminal Proceedings)**

**Defendant**

**s 17(2)** – Competent for own defence, **not competent** for prosecution case.

* **(3)** Not compellable to give evidence for associated D in joint trial (but compellable if trialled separately).

**Defendant’s Family**

**s 18(2)** – Spouse/de facto/parent/child of defendant can object to giving evidence.

* **(6)** Not compellable if harm might be caused to witness or their relationship with D, or harm outweighs benefit of receiving evidence.

**Examination of Witnesses**

**Three Steps** – (i) Examination-in-chief, (ii) Cross-examination, (iii) Re-examination.

* **s 28** – CE cannot take place before EIC; RE only occurs after all parties who want to have cross-examined witness (*unless court directs otherwise*).

**Examination-in-chief**

**s 37(1)** – Ask open-ended questions, **avoid** leading questions or encroachments (i.e. hearsay evidence).

* Exceptions if (a) court gives leave; (b) introductory question; (c) opposing counsel doesn’t object; (d) matters not in dispute; (e) expert witness adducing expert opinion.

**Refreshing Memory**

*Out of Court*

* **s 34** – Court has discretion to produce documents to witness to refresh memory.

*In Court*

* **s 32** – **(1)** Court leave needed if witness to refer to document; **(2)** Court to consider if witness can remember without doc, whether doc accurate; **(3)** If leave granted, witness can refer to statement.
	+ **s 192(2)** – **Court must also consider** trial length, unfairness to parties, importance, nature of proceeding.
* **s 33** – Police officer **(1)** can read/be led through previous statement they made, if **(2)** statement made at time/soon after events, signed and copy already given to D.

**Prior Consistent Statements**

Has evidence been adduced by a party that only affects the credibility of a witness? (**s 101A**)

* **s 102** – Credibility evidence about a witness is not admissible.
* **s 108** – Exception, may be used to **re-establish credibility**, if court grants leave (**s 192**).

**Unfavourable Witnesses**

**s 38** – Can seek leave under **s 192** to cross-examine.

* **(1)** Allowed if evidence witness giving is unfavourable to party; **(b)** matter is about something witness should reasonably know and is not genuinely giving evidence, or **(c)** witness has made prior inconsistent statement.
* **(2)** If allowed, questioning deemed to be cross-examination for purposes of Act (except s 39).
* **(6)** Court to consider whether party has given earliest possible notice, and matters on which, and extent, the witness has been/likely to be questioned by other party.
	+ **s 192(2)** – **Court must also consider** trial length, unfairness to parties, importance, nature of proceeding.
	+ Also consider ramifications of granting leave to prevent wholesale attack (***R v Hogan***).

**Cross-examination**

**s 42(1)** – Can ask leading questions, but can be disallowed **(2)** after court consideration of:

* How unfavourable witness evidence is towards party calling witness, witness/cross-examiner (CE) consistent interest, witness sympathy for CE, witness age/disabilities affecting answer.
* **(3)** Must disallow leading questions if answer better ascertained without.

**Questions that discredit witness**

* **s 103** – Allowed if evidence can prove witness knowingly/recklessly made false representation, or long delay since incident occurred.
* **s 43** – Can question prior inconsistent statement, failure to recall, motives to lie.
* Can show witness’s bad character generally – **civil proceedings only**.

**Impermissible Questions**

* **s 41(3)** – No ‘improper’ questions, e.g. misleading, confusing, annoying, insulting, intimidating, stereotypical, etc.
	+ **s 41(1)** Judge may disallow/advise witness not to answer, but **(2)** must do so if vulnerable witness.
* High threshold though, must be very bad to be miscarriage of justice (*Libke v The Queen*).
* Improper to suggest to accused that, by denying complainant allegations, is implying complainant a liar (*Picker v R*).

**Browne v Dunne Rule**

Should put to each opponent’s witness:

* The extent of the party’s case **as concerns** that particular witness.
* What party suggests about a witness’s evidence (e.g. it’s not the truth) so that the witness can respond.

**s 46** – If not doneHigh party who failed to comply may recall witness, or judge will direct jury to accept unchallenged evidence of witness.

**Privilege**

**Self-incrimination**

**s 132** – If it appears to a court that a witness will make claim of privilege, must make witness aware of obligations.

* **s 187** – Corporations can’t claim privilege.
* **s 131A** – Privilege can only be invoked when witness giving evidence in court.

**s 128(1)** – Applies if witness objects to giving evidence that may tend to prove witness has committed an offence, or liable for a civil penalty.

* **(2)** Court decides if there are reasonable grounds for objection.
* **(3)** If reasonable grounds:
	+ **(a)** Witness’s choice to give evidence.
		- **NOTE:** If witness gives evidence waives right to privilege! Must answer all questions relevant to ‘facts in issue’ in proceeding **(10)**
			* Includes circumstantial evidence (*R v Cornwell*)
	+ **(b)** Court requires witness to give evidence if interests of justice require it (N/A to foreign law).
		- **Examples:** importance of evidence to case, nature of charges, interests of witness to own trial (if applicable), adequacy of certificate immunity, reliability of material evidence, interests of accused in obtaining fair trial (*R v Lodhi*).

**Client Legal**

**Legal Advice (s 118)**

* Use if attaching privilege to pure legal advice.
* Invoked if evidence would disclose:
	+ **(a)** Confidential communication between client and lawyer; or
	+ **(b)** Confidential communication between client’s lawyers; or
	+ **(c)** Contents of confidential document prepared by client/lawyer/another person.
* Definitions (**s 117**):
	+ ‘Confidential communication’ – Where person made it/person to whom made under express/implied obligation not to disclose contents.
	+ ‘Client’ – person engaging lawyers, person employing ‘in-house’ lawyer, employee/agent of client.
	+ ‘Lawyer’ – Australian/foreign lawyers, or their employees/agents.

**Litigation (s 119)**

* Use if attaching privilege to confidential communications concerning litigation.
* Invoked if evidence would disclose:
	+ **(a)** Confidential communication between client and lawyer; or
	+ **(a)** Confidential communication between client’s lawyers and another person; or
	+ **(b)** Contents of confidential document.

**Extra considerations**

* **s 131A** – Can extend outside courtroom to include pre-trial procedures (e.g. summons, discovery, search warrant).
* **s 122** – Parties can waiver by **(1)** express consent, or **(2)** if act inconsistently with maintenance of privilege, i.e. implied waiver.
	+ **(3)** Implied waiver example - Party knowingly discloses evidence to another, substance has been disclosed with express/implied consent of party.
* **s 125** – Privilege won’t apply if comm/doc made in furtherance of abuse of power/fraud.
	+ i.e. If client admits that his ‘murdered’ wife is alive in a rural area, lawyer can disregard privilege and call the authorities.

**Settlement Negotiations**

**s 131(1)** – Evidence of such negotiations not to be adduced, except when:

* **(2)** Consent given to do so by both parties, necessary to enable proper understanding of other evidence, it contradicts/qualified evidence already admitted about settlement attempts, etc.
* ***Fielding v Commissioner for Railways*** – Evidence may not be protected by privilege if information not reasonably incidental to negotiations, or not properly connected to a settlement attempt.

**Religious Confessions**

**s 127** – **(4)** must be done in professional capacity, **(2)** not for furtherance of a crime.

**Evidence excluded in the public interest (‘Crown Privilege’)**

**s 130(1)** – If public interest in open information outweighed by preserving secrecy/confidentiality, state documents can be protected by privilege.

* **(4)** Matters of national security, high-level policy documents, internal law enforcement documents, commercially sensitive material.
* **(5)** Courtto consider importance of doc, who needs information, nature of offence, likely effect of adducing document.

**Character and Credibility**

**General Credibility of Witnesses**

**s 101A, 102** – If evidence only relevant for credibility purpose, **inadmissible**.

* Exceptions where credibility rule does not apply:
	+ **s 103(1)** – Cross-examination of witness if evidence substantially affects assessment of witness credibility.
		- **(2)** Court to regard whether witness knowingly/recklessly made false rep, period elapsing since acts/events to which evidence relates occurred.
	+ **s 108(1)** – Evidence adduced in re-examination of witness to re-establish cred.
		- **(3)** CR not applicable to evidence of prior consistent statement if **(a)** evidence of prior inconsistent statement admitted, or **(b)** it was suggested that witness fabricated/reconstructed evidence, and court gives leave to adduce such evidence**.**
	+ Evidence with dual relevance (e.g. direct evidence, tendency, opinion, etc.)

**Character of a Victim**

**General**

* **s 41** – Improper questioning prohibited.
	+ **(3)** Includes harassing, insulting, confusing, stereotyping or intimidating questioning.
	+ **(2)** Vulnerable witnesses must have IP disallowed.
		- **(4)** Vulnerable can be a minor, disabled, mentally ill, education, gender, cultural background, etc.

**Rape Cases – *Criminal Procedure Act* 2008**

* **s 341** - Complainant cannot be questioned about chastity.
* **s 342** - Cannot be cross-examined about sexual activities without court leave.
	+ **s 349** – Only granted if substantially relevant and in interests of justice. Must balance probative value with distress/privacy/discrimination issues/etc.

*(cont.)*

* **Sexual history with accused or anyone else:**
	+ **s 343** – Not admissible to support an inference that complainant is the type of person more likely to have consented to the sexual activity.
		- If admitted for another reason (e.g. complainant’s state of mind), judge must direct jury to not draw inferences of consent (*Bull v The Queen*).
	+ **s 352(a)** – Not substantially relevant to facts in issue b/c inferences to complainant’s general disposition.
	+ **s 352(b)** – Not a proper matter for cross-examination as to complainant’s credit, unless special circumstances.
* **Jury warnings by judge (*Crimes Act* 1958):**
	+ **s 61(1)** – Cannot warn that complainant is unreliable, should note that delays are justifiable.
		- Though can create ‘forensic disadvantage’ (**s 61(1)**; ***Evidence Act* s 165B**).

**Character of Accused**

**Accused in Criminal Proceedings**

* Prosecutor:
	+ Can’t adduce evidence showing that a defendant has bad character (see **ss 97, 101** [Tendency]**, 101A, 102** [Credibility]).
* Defendant:
	+ **s 110(1)** Can adduce evidence showing good character generally (judge direction depends on probative value – *Melbourne v the Queen*) or in particular respect.
	+ **(2), (3)** However, prosecutor can then rebut D’s good character evidence. Exclusion rules no longer apply, though scope dependant on evidence D uses (e.g. *R v Zurita*).
	+ **s 112** – D cannot be cross-examined about character evidence without court leave.
		- **s 192** considered by court, also **ss 135-7** discretionary exclusion rules.
	+ **s 192A** – If concerned about loss of character shield, D may be able to get advance ruling/finding before evidence adduced if court finds it appropriate.

**Cross-examination of Accused as to credit**

**Exception to Credibility Rule**

* **s 103(1)** – Potentially allows cross-examination of witness on prior convictions/other misdeeds unrelated to criminal proceeding.
	+ **(2)** Court considers if witness lying, or period elapsed since alleged events.

**Additional Defendant Protection/Shield**

* **s 104(2)** – D cannot be cross-examined about credibility matter unless leave granted.
	+ However, leave not required if credibility evidence is about:
		- **(3)** Whether D is biased/has motive to lie, has awareness/recollection of relevant facts, or has made prior inconsistent statement.
		- **(4)** Evidence tends to prove witness has tendency to be untruthful and is related mainly to witness credibility.

**Rebutting Denials by Defendant**

* **s 106** – If D lies about previous convictions, can use this to call rebuttal evidence showing otherwise.

**Tendency and Coincidence Evidence**

**Tendency s 97(1) – *prima facie* inadmissible**

* However, admissible if:
1. Reasonable notice given by party, and
2. The court thinks that the evidence has significant probative value (either alone or with other adduced evidence).
* Equivalent to propensity evidence at CL.

**Coincidence s 98(1) – *prima facie* inadmissible**

* However, admissible if:
	1. Reasonable notice given by party, and
	2. The court thinks that the evidence has significant probative value (either alone or with other adduced evidence).
* Equivalent to similar fact evidence at CL. Guidelines to consider:
	+ Admissible only if relevant in some way other than to infer that accused has propensity to commit that crime. Must be **exceptional** similarities with **strong probative** force (***Sutton v The Queen***).
		- In *Sutton*, threats of death or attacking victim not ‘exceptional’, but method of abduction or type of rape can be.
	+ If alternative rational view of similar fact evidence, SF evidence should be excluded (***Hoch v The Queen***).
		- In *Hoch*, complainants had sufficient relationship to each other and had opportunity/motive to concoct complaint; therefore evidence lacked necessary degree of probative value.

**General CL Considerations**

* Evidence admissible, even if it tends to show the commission of other crimes, if it relates to whether alleged criminal acts were designed or accidental, or could rebut an accused’s defence (***Makin v Attorney-General***).
* Must be ‘strikingly similar’ evidence (***DPP v Boardman***), and ‘sufficiently cogent’ evidence (i.e. not adequate if evidence only raises suspicions; ***Perry v The Queen***).
	+ May include whether accused has previously committed crimes in unusual manner, or frequency with which set of circumstances have occurred.

**Further restrictions on use of such evidence**

**s 101(2)** – Both **tendency** and **coincidence** evidence cannot be used in criminal proceedings unless their probative value **substantially outweighs** any prejudicial effect on the accused

* ***PNJ v DPP*** – No single criterion to determine ‘significant probative value’ – not necessarily to demonstrate ‘striking similarity’, ‘common modus operandi’ or ‘pattern of conduct’
	+ In sex crime cases, many ‘similar’ features are unremarkable given how commonplace they would be in this sort of offending.
* ***R v Ellis*** – Alternate Rational View test from *Pfennig* inapplicable to this statute, **s 101** indicates a balancing exercise conducted on facts of case.
* **ss 135-7** – Discretionary and Mandatory Exclusions.

**Hearsay**

**s 59 – Hearsay is *prima facie* excluded. Four characteristics:**

1. Previous representation containing an asserted fact:
* An earlier statement/conduct made outside court.
* Asserted fact – ‘Tim told me that Joanne said she had robbed the bank’
1. Person made the representation.
2. PR being adduced to prove the asserted fact:
* If used for another purpose, not hearsay and therefore admissible.
	+ **s 60(1)** – If admissible for non-hearsay purpose then also admissible for hearsay purpose.
* Example CL cases: *Subramaniam v Public Prosecutor;* *Ratten; Walton*.
	+ Ultimately, jury must reach conclusion of guilt independently of opinion within representation.
1. Person who made representation intended to assert the existence of that fact:
* **s 59(1)** – Implied representations **fall outside the hearsay rule**
	+ Examples: ‘Hello Daddy’ (***Walton***), ‘My mother’s feeling sick’ – (***Benz***)
* **s 59(2A)** – Court can objectively assess circumstances in which representation made if reasonably supposed person intended to assert a fact.
	+ If the court thinks D may have fabricated a letter giving him an alibi for crime (e.g. *R v Hannes*), can dismiss the subjective intentions of D and decide objectively if the alibi is an express or implicit representation.

**Hearsay Exceptions**

**s 60 – General**

**(1)** If admissible for non-hearsay purpose then also admissible for hearsay purpose.

* May apply to show evidence of prior inconsistent/consistent statement, previous representation to expert.

**(2)** 2nd hand or more remote hearsay can be admitted *generally* for a non-hearsay purpose.

**(3)** Admissions in a criminal proceeding not covered by s 60 (*Lee v the Queen* decision good law on the facts).

**First Hand Hearsay**

**s 62 – General**

* **(1)** Person making previous representation has personal knowledge of fact asserted.
	+ **(2)** Personal knowledge – when person perceives something, eyewitness.
* **s 67** – Must give **reasonable notice** to other party to use such hearsay evidence.

**Civil Proceedings (s 63 – not available; s 64 – available)**

* **Not admissible** if representation-maker not called to testify, even though it is possible/cheap/speedy/practical.
* **Admissible** if the representation-maker (**s 64(3)**)testifies; (**s 63(2)**) is not available; or (**s 64(2)**) available but impractical/delay/expensive to get to testify.
	+ ‘Not available’ definition (Evidence Act Dictionary Pt 2, cl 4):
		- Person dead; not competent to give evidence (excluding s 16 provisions); unlawful for person to give evidence; Act provision prevents giving evidence; cannot reasonably locate person or get them to attend court; cannot reasonably make person give evidence; or person mentally/physically unable to give evidence, and not reasonably practicable to overcome this inability.

**Criminal Proceedings: Prosecution Admissible Hearsay**

* **s 66 – Representation-maker available:**
	+ **(2)** Representation made when the fact was ‘fresh in the memory’.
		- **(3)** Prosecution can’t have witnesses tender statements made to police.
	+ **(2A)** To determine ‘fresh in memory’ court must regard nature of event, age/health of person, period of time between asserted fact and making of representation.
* **s 65 – Representation-maker not available:**
	+ **(2)(a)** Representation-maker under duty to make representation.
	+ **(2)(b)** Representation made shortly after occurrence of fact, and unlikely to be fabricated.
		- Latter point most important, often show by spontaneous statements by a person (*Harris v The Queen*).
	+ **(2)(c)** High probability representation reliable.
	+ **(2)(d)** Representation against interests of person, making it reliable.
	+ **(3)** Representation-maker already been cross-examined by defendant (or D had opportunity to do so) in earlier proceedings.

**s 66A – Contemporaneous Representations**

* Hearsay doesn’t apply to previous representations if about a person’s health/feelings/sensations/intention/knowledge/state of mind.
	+ i.e. ‘I don’t feel good’, ‘I hate you’, ‘I’m going to town to meet John’.
	+ Similar to common law *res gestae* rule.

**Other exceptions (remote hearsay)**

* **s 69** – Business records, which is any document that can be deemed a record.
	+ Can be admitted if representation made by either:
		- **(2)(a)** A person who reasonably supposed to have had personal knowledge of the asserted fact; or
		- **(2)(b)** On the basis of information supplied directly/indirectly by person who might reasonably have personal knowledge of asserted fact.
			* **(5)** Personal knowledge – representation based on perception.
	+ However, excluded if representation prepared in relation to a legal proceeding (**s 69(3)(a)**),or in connection to investigation related to a criminal proceeding **(b)**.
* **s 70** – Contents of tags, labels and writing placed on an object.
	+ Must be in course of business **(a)** and for purpose of describing/identifying object characteristics/content **(b)**. Strict application.
* **s 71** – Electronic communications.
* **s 72** – Aboriginal and Torres Strait Islander traditional laws and customs.
* **s 73** – Reputation as to relationships and age, e.g. Person married, family history.
* **s 74** – Reputation of public or general rights.
* **s 75** – Interlocutory proceedings.

**Other hearsay considerations**

* **s 61** – Representation-maker must be competent to give evidence (s 61).
* **s 108A** – Party may adduce credibility evidence about person who made previous representation, even if said person not called to give evidence (s 108A).
* Judge can invoke discretionary rules:
	+ **s 165** – Admit evidence, warn give jury about reliability;
	+ **ss 135-7** – Limit or exclude evidence.

**Accused’s Right to Silence**

**Civil proceedings**

***Jones v Dunkel*** – If party fails to call witness, can draw adverse inference from silence.

* Adverse inference is drawn that party did not call witness because evidence would not assist their case.

**Criminal Proceedings**

**Pre-trial (*Crimes Act*)**

* **s 464A** – Investigating official must inform person in custody of right to silence.
* **s 464A** – Suspect has right to silence and can refuse to participate in investigations/answer questions.
	+ If silence broken, adverse inferences can be drawn (***Petty v R***).

**During proceeding**

* **s 89** – Unfavourable inference of guilt cannot be drawn from evidence that party fails/refuses to provide. Equivalent to ***Petty v R***.
	+ Includes **(a)** party not answering questions, and **(b)** responding to representation.
* **s 20; *Azzopardi*** – Judge cannot suggest that D failed to give evidence because guilty of offence.

**Admissions**

**General**

* **s 81** – Hearsay and opinion rules don’t apply to admissions.
	+ Practically, admission *prima facie* admissible if relevant to fact in issue, made by party to proceedings, and adverse to that party’s interests.
* Two ways to prove ‘first-hand’ admission (**s 82**):
	+ **(a)** Person giving evidence perceived admission being made; or
	+ **(b)** Admission in document – e.g. signed confession.

**Statements made in presence of accused**

Often needed to put accused’s response in context (e.g. ‘Did you kill Fred?’ – ‘Yes’).

* Admissible as evidence of truth of assertions contained in statement; or
* If assertions in statement expressly/impliedly admitted by accused (**s 81(2)**).
* Bare denial by accused not admissible (*Barca v The Queen*), but could still be construed as evidence of ‘consciousness of guilt’ (*Woon v The Queen*).

**Admissions by agents**

* **s 87** – Admissible if agent **(a)** had authority to make admission, **(b)** was employee of organisation, or **(c)** made in furtherance of common purpose person had with party.

**Admissions against third parties**

* i.e. Joint bank robbers, D1 makes no admission but D2 says both did crime.
	+ **s 83** – Cannot use D2’s evidence without consent of D1.

**Requirement admissions recorded**

* Indictable offences:***Crimes Act 1958* s 464H** – If suspect questioned by police admission must be recorded.
* Summary offences: **s 86** – Records of oral confession by investigating officials must be signed by D to be admissible.
	+ Generally s 464H makes this section defunct.

**Other Provisions**

**Protections for persons in police custody**

Division 30A (ss 464 to 464ZL) ***Crimes Act 1958***.

* Police are entitled to question person in custody, but:
	+ person can only be held for “reasonable time” – i.e. limited time in which to question person (**s 464A(1), (2)**)
	+ police obligations include to:
		- inform person of right to silence and anything said/done can be used in evidence before questioning (**s 464A(3)**);
		- inform person of right to communicate with friend, relative or lawyer before questioning (**s 464C**);
		- arrange interpreter (if English difficulty) before questioning (**s 464D**);
		- have parent/guardian/independent person present when questioning person under 18 year old (**s 464E**);
		- record admissions on audio/audio-visual device (**s 464H**).

**Admissions influenced by threat/violence**

* **s 84(1)** – Inadmissible unless court satisfied admission not influenced by **(a)** violent/oppressive/inhuman/degrading conduct towards accused or another, or **(b)** a threat of such conduct.
* **(2)** Only invoked if D raises issue in proceeding about means of obtaining admission.
	+ Burden of proof on prosecution, court decision during voir dire (**s 189**).
	+ No discretion – if P can’t prove no influence it must be rejected (*R v Zhang*).

**Exclusion of unreliable admissions**

* **s 85(1)** – Criminal proceedings only, admission by D **(a)** to investigating official, or **(b)** as a result of an act of someone capable of influencing decision to prosecute.
* **(2)** Inadmissible if admission likely to be adversely affected by **(3)** personal characteristics of D, nature/manner in which questions put, threats/promises directed to D.
	+ Affected by alcohol (*R v Moffat*); mental issues (*R v McLaughlan*).

**Discretion to exclude for unfairness**

* **s 90** – Court can refuse to admit evidence if **(a)** P adduces it, and **(b)** it would be unfair on D having regard to circumstances in which it was made.
	+ **NOTE:** Unfairness dealt with by other discretions: e.g. s 84 (violence, threats, etc.), s 85 (unreliability), s 138 (illegally/improperly obtained admissions).
* **Primarily** concerned with admissions obtained by police using entrapment.
	+ ***Foster v R*** – Police conduct (no phone call, forced D into interview, no evidence to warrant charge) fundamental violation of rights.
	+ ***Em v R*** – Fairness of using evidence at trial, no when recorded (secret recording taken, approved by warrant).

**Proof of admissions in voir dire**

* On balance of probabilities (**s 142(1)**), party can seek to establish **ss 84, 85 or 90** in voir dire.
* However, note the following on questions of admissibility:
	+ If issue is taken as to whether the admission was actually made, the court must find that the admission was made “***if it is reasonably open to find***” that it was made: s 88;
	+ Court must not inquire into whether the admission is true in a criminal proceeding unless the issue raised by defendant (s 189(3)).

**Illegally and Improperly Obtained Evidence**

**General**

**s 138(1)** – Evidence obtained improperly or illegally is not to be admitted unless desirability of having evidence outweighs undesirability of means used to obtain evidence.

* **(3)** Court consideration includes **(a)** consideration of probative value, **(b)** importance of evidence, **(c)** nature of offence, **(d)** gravity of impropriety, **(e)** whether impropriety deliberate/reckless, **(f)** breaches ICCPR, **(h)** difficulty obtaining evidence without breach.

**Admissions receive special attention**

**s 138(2)** – Evidence obtained improperly or illegally if questioner (i.e. police):

* **(a)** Cause person to respond irrationally to questions;
* **(b)** Misleads person to get admission.
* **s 139** – Fails to caution person before questioning (i.e. informs of right to silence).

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**Relevance**