

CLANT Uniform Evidence Act Intensive

Session 1 - Overview of the Evidence (National Uniform Legislation) Act (NT)



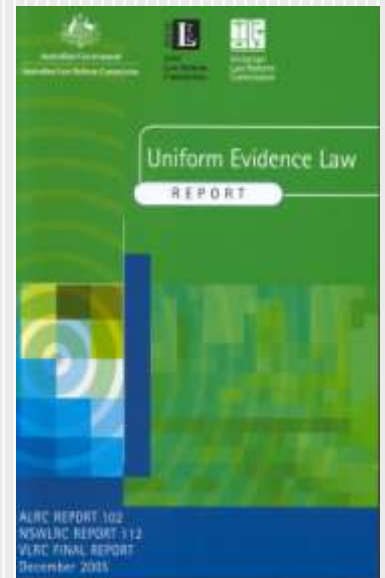
Focus of Discussion



- Policy of the UEA
- Adducing evidence
- Is the UEA a Code?
- Structure of the UEA
- Ch 3, Pt 3.1 Relevance

Genesis of the UEA

- The UEA is based primarily on 3 law reform commission reports:
 - ALRC 26, *Evidence (Interim)* (1985)
 - ALRC 38 *Evidence* (1987)
 - ALRC 102; NSWLRC 112; VLRC FR, *Uniform Evidence Law* (2005)



All available online at: www.alrc.gov.au

Policy Framework

The key elements of the UEA policy framework are:

- *Fact-finding* – the UEA should allow the parties to produce the probative evidence available to them;
- *Civil and criminal trials* – differ in nature and purpose that this is taken into account in the UEA;
- *Predictability* – use of judicial discretions should be minimised, esp in relation to admissibility;
- *Cost and time* – clarity and simplicity are the objectives

ALRC 38, *Evidence* (1987), [46]

Is the UEA a Code?

- The UEA, in its entirety, is not a code of the law of evidence.
- Eg, s 9(1) of the NT UEA:
This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

However . . .

- All issues of admissibility of evidence (UEA, Ch 3), and issues of competence and compellability of witnesses (UEA, Ch 2, Pt 2.1, Div 1) are to be governed by the UEA provisions.
- In other words, any rules of common law or equity relating to these issues, even if consistent with the provisions of the UEA, have no application.

Structure of the UEA (NT)

- Chapter 1 – Preliminary
- Chapter 2 – Adducing Evidence
- Chapter 3 – Admissibility of Evidence
- Chapter 4 – Proof
- Chapter 5 – Miscellaneous
- Dictionary



Adducing Evidence

- Focus of discussion
 - Competence and compellability of witnesses
 - Improper questions



Competence and Compellability

- Competence and compellability of witnesses is governed by Ch 2, Pt 2.1, Div 1, ss 12-20 UEA.
- Focus on ss 12, 13, 17 and 18.
- **Competence** – can a witness give evidence in court
- **Compellability** – can a witness be forced to give evidence in court

- **General proposition** - all witnesses are both competent and compellable to give evidence in court – see s 12 UEA
- Exceptions to the general proposition:
 - Lack of capacity – s 13
 - Reduced capacity – s 14
 - Defendants in criminal proceedings – s 17
 - Spouses and others in criminal proceedings – s 18



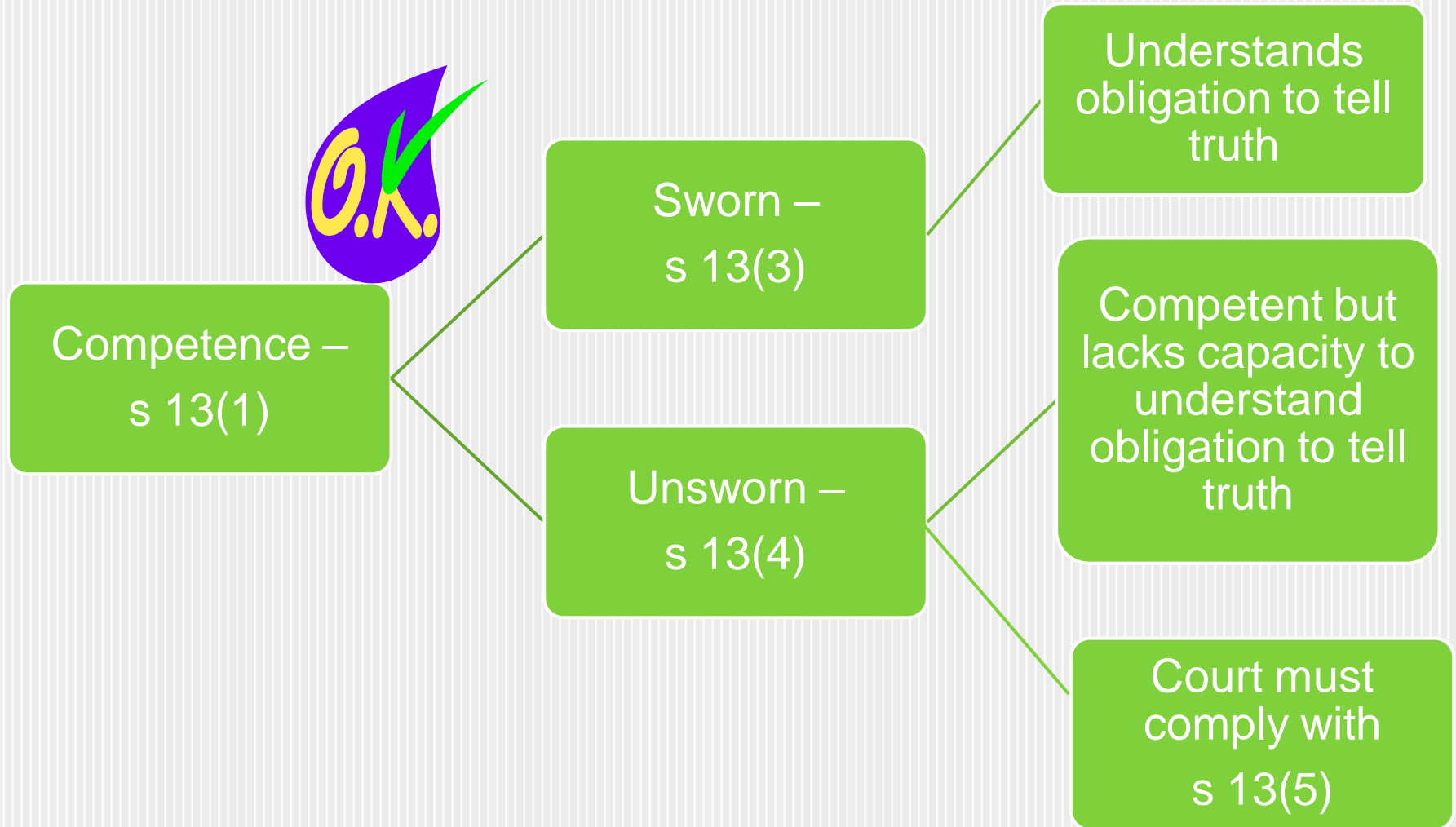
New Test of Competence

- **Common law test** – calls for an awareness of truth and the importance of telling it before evidence can be given on oath or affirmation.



- **UEA (NT) test s 13(1)** – focus on understanding and capacity to give an answer that can be understood.
- Test ‘focuses on the ability of the witness to comprehend and communicate. ... It increases the possibility that a witness’ evidence is heard, requiring mainly that they understand and answer simple questions and communicate what happened’. [ALRC 102 at [4.57]]
- Test based on *Youth Justice and Criminal Evidence Act 1999* (UK) s 53.

Capacity to Give Sworn/Unsworn Evidence



Defendants in Criminal Proceedings

- **Section 17** – a defendant in a criminal proceeding is not competent to give evidence for the prosecution.
 - Such lack of competence is an absolute bar.
- **Section 17(3)** – deals with the compellability of an associated defendant.
 - Effect – an associated defendant in a criminal proceeding can choose to give evidence for the prosecution, but cannot be compelled to do so **unless** she/he is being tried **separately** from the defendant.
 - ‘Associated defendant’ is defined in the Dictionary to the UEA.

Compellability of Spouses and Others

Common law –
Spouse, de facto partner, parent and child are competent and compellable to give evidence against an accused.



UEA (NT) s 18 – Spouse, de facto partner, parent and child may object to giving evidence or evidence of a communication as a witness for the prosecution.

Compellability – Spouses and others

S 18 – spouse, de facto partner, parent or child of defendant may object to giving evidence, or evidence of a communication with the defendant, as a witness for the prosecution in a **criminal proceeding**

Test - s 18(6) - there is a likelihood that harm would or might be caused to the person or the person's relationship with the defendant if the evidence is given;

- The nature and extent of that harm outweighs the desirability of having the evidence given

S 18(7) – non-exhaustive list of matters that must be taken into account by the court for the purpose of the test in s 18(6)

- Definition of ‘children’ and ‘parent’ found in the Dictionary to the UEA (NT) – see Dictionary, Pt 2, cls10
- De facto partner has the same meaning as the term is defined in the *De Facto Relationships Act* (NT) s 3(1) – includes same-sex relationships
- **Note:** s 19, which stipulates the offences to which s 18 does not apply
 - ie, in relation to such offences, a spouse, de facto partner, parent or child is compellable

Improper Questions – s 41

- Section 41 empowers the court to disallow a question put to the witness in cross-examination.
- The UEA (NT) provides that the court **may** disallow a question if it falls within one or more of the categories in s 41(3)(a)-(d), but **must** disallow a question of this type put to a vulnerable witness in cross-examination.
 - ‘vulnerable witness’ is defined in s 41(4).

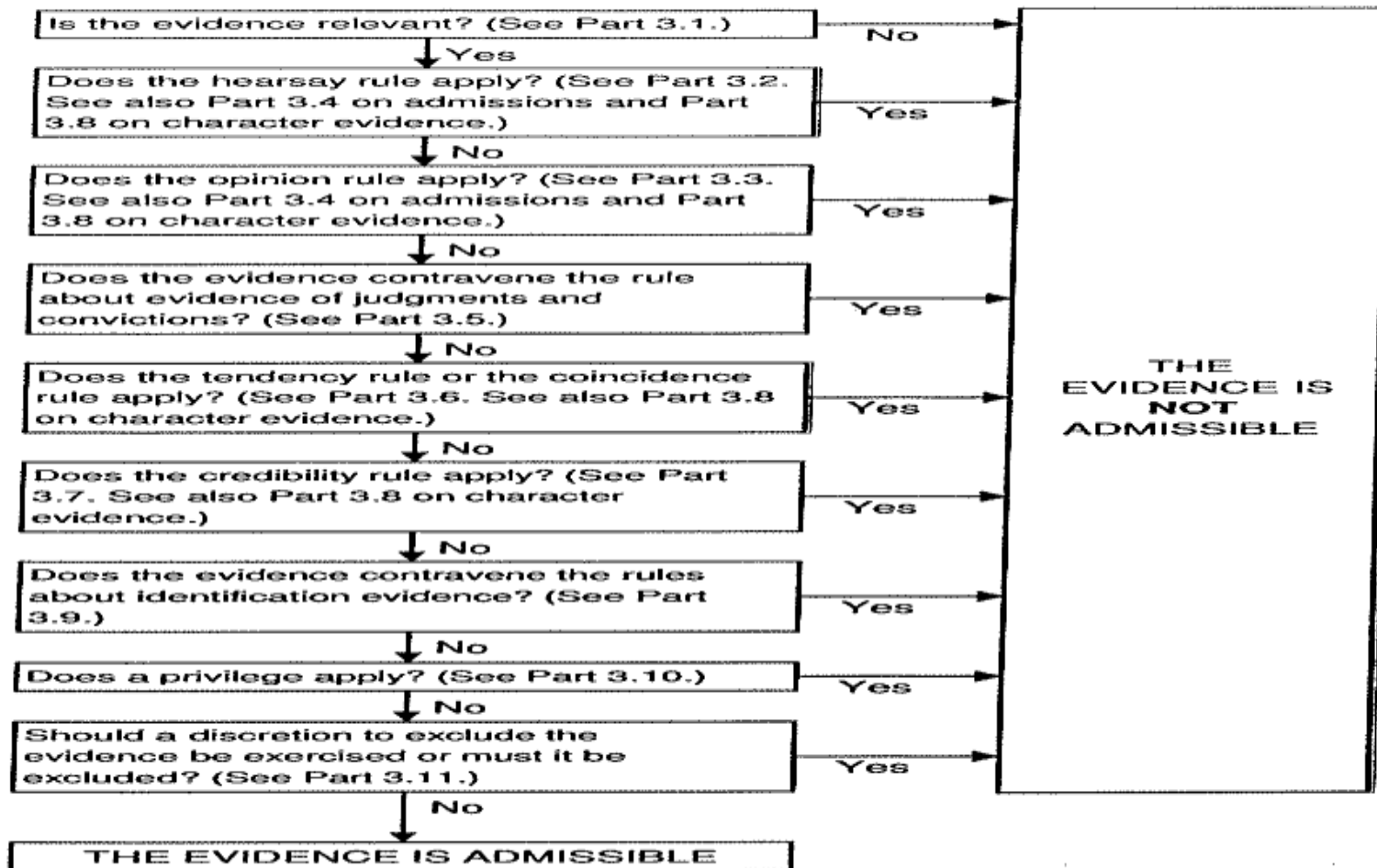
Approach to Admissibility

‘The uniform Evidence Acts adopt the same basic structure as the common law for determining the admissibility of evidence: the test of relevance is the threshold consideration; the exclusionary rules and their exceptions are then applied; and finally, the residual ‘discretions’ to exclude [evidence] on policy grounds are applied. However, within this basic structure the uniform Evidence Acts have effected significant changes.’

ALRC 102; NSWLRC 112; VLRC FR, Uniform Evidence Law (2005) at [16.2]

Ch 3 UEA – Admissibility of Evidence

Chapter 3 Admissibility of evidence



Relevance

Rule: Section 56 Relevant Evidence is Admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

‘Except as otherwise provided by this Act’

- In the context of admissibility of evidence, this phrase is critical. It means that admissibility of evidence in UEA jurisdictions is governed by the statutory provisions in Ch 3 of the UEA. It follows, therefore, that common law rules relating to the admissibility of evidence are abrogated.

What is Relevant Evidence?

s 55

- (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*

Definition of 'relevance' in s 55 embraces two concepts:

- 'the logical connection between evidence and facts; and
- the requirement that the matter on which the evidence ultimately bears is a matter in issue in the trial. Whether or not a matter is in issue is a question of law, determined by substantive law and pleadings. It is not necessary that it be disputed by the parties.'

See ALRC 26, *Evidence (Interim)*, (1985) at [641]

Common Law vs UEA

Common law – ‘the common law distinguishes between evidence that is logically relevant and evidence that is legally relevant, with only legally relevant evidence being admissible. Legal relevance incorporates consideration of matters such as procedural fairness, case management considerations, probative value and reliability.’
(Anderson, Williams, Clegg, *The New Law of Evidence* (2nd ed, 2009) at [55.2])

UEA (NT) – ‘Section 55 sets an undemanding definition of relevance. It merely requires the court to ask: Could the evidence, if accepted, affect the probability, even indirectly, of the existence of a fact in issue in the proceedings? There need only be a ‘minimal logical connection’ [*Papakosmas v R*] between the evidence and a fact in issue. It is important not to confuse relevance with sufficiency or weight.’
(Anderson, Williams, Clegg, *The New Law of Evidence* (2nd ed, 2009) at [55.2])

Questions and Comments



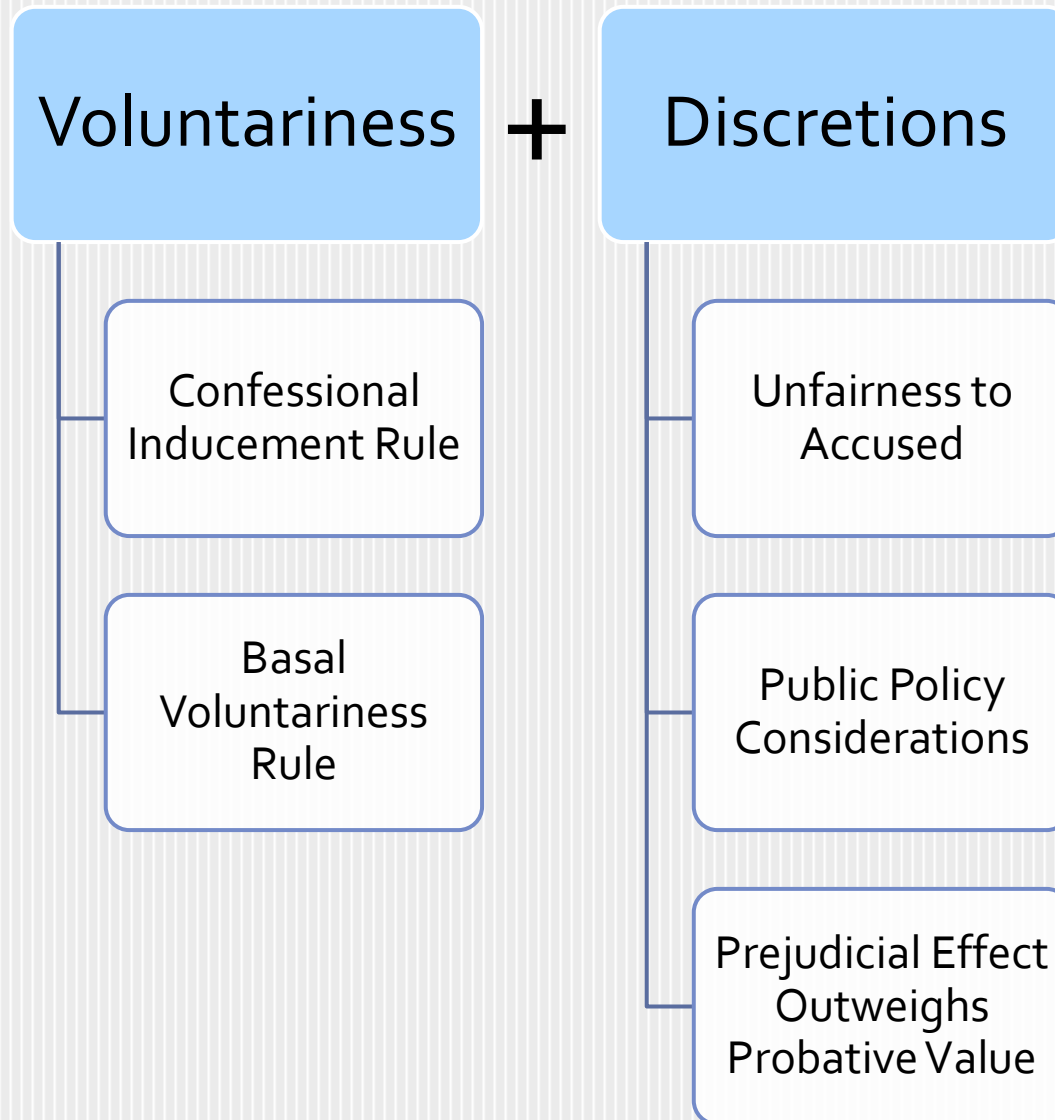
Admissions – Ch 3, Pt 3.4, ss 81-90 UEA



Focus of discussion

- Common law approach vs UEA approach
- Admissions provisions in UEA

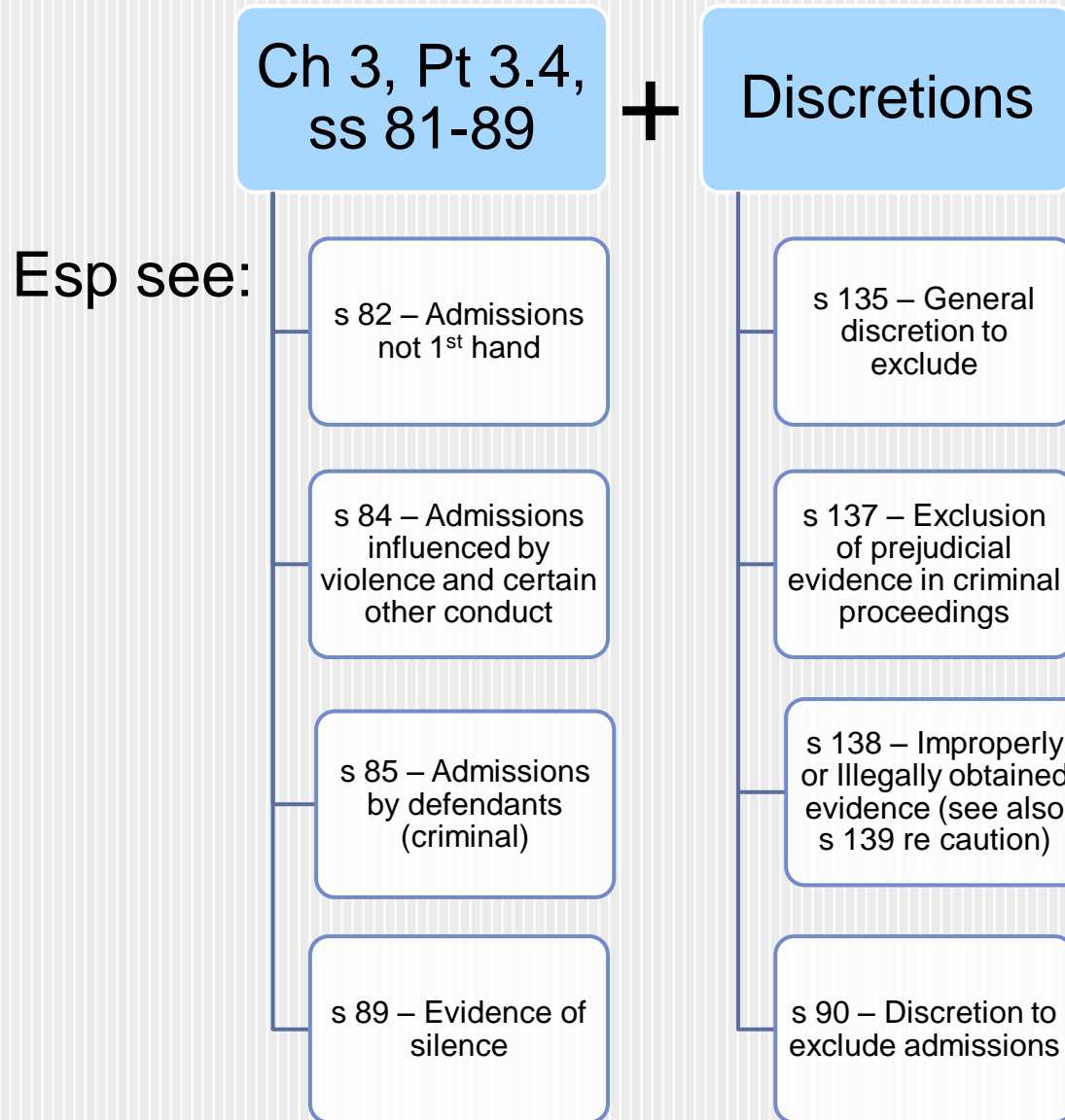
Common Law Approach to Admissions



UEA Approach to Admissions

- Focus of UEA provisions is **not** voluntariness
- UEA ‘shifts the focus of the fact finder to the likely reliability or truth of the admission, in light of all the circumstances in which it was made, and the onus of proof on that issue is on the party tendering the evidence of the admission’
[see ALRC 102; NSWLRC 112; VLRC FR, *Uniform Evidence Law* (2005) at [10.8]]

Admissions – Relevant UEA Provisions



Definition of 'Admission'



'Admission' means a previous representation that is:

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

Section 81 UEA – exception for admissions

Section 81

- (1) the hearsay rule and the opinion rule do not apply to evidence of an admission.*
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:*
 - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and*
 - (b) to which it is reasonably necessary to refer in order to understand the admission.*

Exclusion of Evidence of Admissions not 1st Hand

Section 82 provides that:

Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

- (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or*
- (b) it is a document in which an admission is made.*

Note: s 60 does not apply to evidence of an admission – s 60(3)

Example – s 82

I punched
Carol



Jane told me
that she
punched
Carol



Prosecution can lead evidence from Bob that Jane admitted to him that she punched Carol as proof of the truth of that admission (1st hand hearsay), but not from Sally as to what Bob told her (2nd hand hearsay).

Jane

Bob

Sally

Admissions Influenced by Violence and Certain Other Conduct – s 84

- ‘If interrogators engage in acts of violence, threats of violence, torture or inhuman, degrading or oppressive conduct, then an admission made subsequent to such conduct may be untrue, regardless of the characteristics of the suspect being interrogated’: (ALRC 26, *Evidence (Interim)* (1985) at [765]).
- Section 84 applies to both civil and criminal proceedings.
- Party seeking to rely on the section must raise the issue relating to conduct (s 84(2)). Burden then shifts to party seeking to adduce the evidence to satisfy the court, on the balance of probabilities (s 142), that the conduct did not influence the admission or the making of the admission.

Reliability of Admissions by Criminal Defendants – s 85

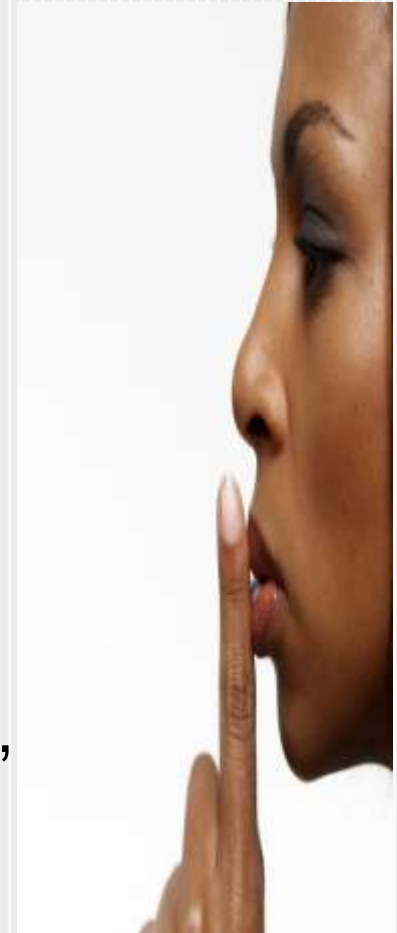
- Section 85:
 - only applies to criminal proceedings;
 - only applies to admissions made by a defendant; and
 - is limited to evidence of an admission made in the particular circumstances referred to in s 85(1)(a) & (b)
- Once the requirements in s 85(1) are satisfied, s 85(2) provides that:
 - ‘Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected’, taking into account the matters in s 85(3).
- Burden of satisfying the court that it is unlikely the truth was adversely affected is on the party tendering the admission – usually the prosecution.

Exclusion of Records of Oral Questioning – s 86

- A ‘documentary record of official questioning of a defendant (when a suspect) will not be admissible in criminal proceedings unless the defendant had acknowledged the record as a true record by signing, initialling, or otherwise marking it. “Document “ is broadly defined in the Dictionary [to the UEA]’. [Odgers, *Uniform Evidence Law* (9th ed, 2010) at [1.3.5380]]
- s 86(4) excludes sound or video recordings and transcripts from such recordings from the definition of ‘document’ in this context.
- This section must be read in conjunction with statutory provisions in each jurisdiction regulating police interrogation of suspects: eg, *Police Administration Act 1978* (NT), ss 142-143.

Evidence of Silence – s 89

- Silence when being questioned by an investigating official who at the time of questioning was performing functions in connection with the investigation of the commission, or possible commission, of an offence, whether total or selective, and whether or not a caution has been given, cannot be treated as an admission or consciousness of guilt.
- s 89(3) – if the failure or refusal to answer questions is a fact in issue in the proceedings – eg, if required by law such as under motor vehicle licensing legislation – s 89(1) does not apply.
- This section only applies to criminal proceedings.



Discretion to Exclude Admissions – s 90

- Section 90 – would be unfair to the defendant to use the evidence having regard to the circumstances in which the admission was made.
- The nature and extent of any infringement of the defendant's rights and privileges, and their impact on the defendant, would be relevant in determining whether it would be unfair in the circumstances to use the evidence.
- Courts take a restrictive view of the circumstances in which s 90 will apply. Evidence of the admission must survive the other admissibility provisions before s 90 will apply (*Doklu v The Queen* [2010] NSWCCA at [41], [46]; *Em v The Queen* (2007) 232 CLR 67 at [109]).

Questions and Comments

