POCKET EVIDENCE LAW

by

C.W.Beale

Member of the Victorian Bar

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INTRODUCTION

This paper provides an overview of the *Evidence Act (Vic) 2008* ("the Act") as it operates in criminal proceedings in Victoria, concentrating on the rules regarding the admissibility of evidence.

For brevity's sake, the following approach has been adopted. Only the main sections of the Act are covered. Those sections have not been reproduced, so have a copy of the Act to hand. Only leading cases are cited and, wherever possible, the emphasis is on decisions of the HCA, VSCA & VSC. Full citations are set out in the Table of Authorities at the end of the paper. All section references are to the Act unless otherwise indicated. References to the Dictionary are to the Act's Dictionary.

HISTORY

The Act makes Victoria a uniform evidence law ("UEL") jurisdiction. One needs to know something about the history of UEL for several reasons: (a) to understand the relevance of various Law Reform Commission reports in interpreting UEL; (b) to be aware of sources of case law on UEL; & (c) to appreciate the need for caution in using that case law because of recent amendments to UEL and some variations in UEL legislation from one jurisdiction to another.

In 1979, the Federal Government asked the Australian Law Reform Commission ("ALRC") to review the laws of evidence. The ALRC published an Interim Report in 1985 (ALRC 26) and the Final Report in 1987 (ALRC 38). In 1995, both the Federal and NSW governments passed Evidence Acts that were essentially uniform. These acts operated in federal courts across Australia and in courts in the A.C.T. and NSW. In 2001, Tasmania passed a version of UEL which is sufficiently similar to be called UEL but it contains many dissimilarities. In 2004, Norfolk Island passed its version of UEL. In 2005, the ALRC published the Joint Report (ALRC 102) which was co-authored by the NSW Law Reform Commission and the Victorian Law Reform Commission ("VLRC"). ALRC 102 reviewed the performance of UEL after 10 years of operation and recommended certain amendments. In 2006, the VLRC published a report on implementing UEL in Victoria. In 2008, Victoria enacted our UEL, which incorporated amendments recommended in ALRC 102. On 1.1.2009, the amendments recommended by ALRC 102 to UEL commenced operation at the federal level and in the A.C.T and NSW. On 1.1.2010, our version of UEL commenced operation. In 2011, the A.C.T., rather than continuing to operate under federal UEL, enacted its own home grown version of UEL. The Northern Territory also enacted UEL legislation in 2011 and it is expected to commence operation sometime in 2012.

INTERPRETING UEL

UEL was intended to make substantial changes to the rules of evidence (*Papakosmas,* [10]). Reference to the common law in trying to interpret it may be unhelpful (*Papakosmos,* [8]; cf *PNJ,* [8-9]). The High Court has cautioned trial judges against using their discretionary powers under Part 3.11 of the Act to re-instate the common law rules of evidence (*Papakosmos,* [97]).

CHAPTER 1 – PRELIMINARY

S2 - Commencement

In general, the Act applies to "hearings" that commence on or after 1.1.2010, regardless of when the "proceedings" commenced (Schedule 2 of the Act; *Darmody*,[14-21]).

S4 - Courts & proceedings to which Act applies

The Act applies to all proceedings in "Victorian courts", a term which is given an expansive definition in the Dictionary. Bail hearings, however, are not constrained by the Act's rules regarding the admissibility of evidence because of the combined operation of s8 of the Act and s8(e) of the *Bail Act 1977*. For sentencing hearings, the Act only applies if the court directs (s4(2),(3),(4)).

S8 – Operation of Acts

By virtue of s8, it is clear that the Act is not a code in that provisions of other Acts dealing with evidentiary issues continue to operate, eg, s464H of the *Crimes Act 1958* governing tape recordings of confessions. Nor does the Act attempt to deal comprehensively with every matter that might be considered part of evidence law, eg, the rule in *Browne v Dunn* regarding "puttage", which is only partially addressed by s46.

The old *Evidence Act 1958* has been filleted and rebadged as the *Evidence (Miscellaneous Provisions) Act 1958* but it remains an important source of evidence law in Victoria.

Some significant evidentiary provisions have been inserted in the *Criminal Procedure Act 2009 ("CPA"),* eg, s377 which permits evidence of complaint in child sex cases to be used as evidence of the truth of the complaint.

S9 – Application of Common Law & Equity

While the Act is not a code, it does however displace the common law with respect to competence & compellability (s12) and, most importantly, the admissibility of evidence (s56(1)).

CHAPTER 2 – ADDUCING EVIDENCE

Chapter 2 is chiefly about procedure – how one "adduces" (ie, leads or tenders) evidence, the admissibility of which is determined by the application of the rules in Chapter 3. One should note that parties "adduce" evidence whereas witnesses "give" evidence (ALRC 38, [59]). Evidence which is adduced may or may not be admitted.

S12 - Competence and compellability

The Act operates as a Code in relation to competence and compellability. S12 is an inclusionary rule – in summary, everyone is presumed competent & therefore compellable. Sections 13 to 19 create exceptions to this general rule. Perhaps surprisingly, it is not a precondition for competence to give unsworn evidence that one understands the obligation to

tell the truth: it is enough if one can understand the question(s) and give an answer that can be understood (s13).

S18 – Compellability of spouses & others in criminal proceedings generally

Under s18, the spouse, defacto partner, parent & child of an accused ("D") are compellable by the prosecution ("P") but they can seek exemption from giving evidence.

"Defacto partner" includes a homosexual partner. "Parent" and "child" are defined broadly, eg, a person "in loco parentis" could be considered a parent (Dictionary, Pt 2, cl 10).

If a witness has been excused from giving evidence under s18 (eg, a complainant in a domestic violence case), P may still be able adduce evidence of what the complainant told police pursuant to one of the exceptions to the hearsay rule set out in s65 (*Nicholls*,[21-22]).

S20 – Comment on failure to give evidence

The trial judge may now comment on the failure to give evidence by D or a person excused from giving evidence under s18. But such comment must not suggest that the failure to give evidence was because D was guilty or thought to be guilty (*RPS*, [18-21]; *Azzopardi*, [53-56]; *Miller*, [4], [30-39]). NSW authority suggests that permissible comment by a trial judge includes comment to the effect that D's self-serving answers in a record of interview were not given on oath and not tested by cross examination (*Kovacs*, [42-43]*; Wilson (2005)*, [7], [12]).

S33 - Evidence given by Police Officers

Under certain circumstances, police may give evidence in chief by simply reading out their statements if made "soon after" the events described. "Soon after" might extend to days but not weeks after the events described (*Orchard v Spooner*, p119).

S38 – Unfavourable witnesses

S38 replaces the common law rule in relation to hostile witnesses. Its operation in conjunction with s60 (a broad exception to the exclusionary hearsay rule) is arguably the most significant change effected by UEL. S38 creates an exception to the rule in s37 that a party may not normally ask leading questions of its own witness. The exception has the following elements:

- the evidence of the witness is "unfavourable" to the party or the witness is not making a genuine attempt to give evidence or the witness has made a prior inconsistent statement; &

- the Court gives leave to ask leading questions.

There is conflicting authority as to the meaning of "unfavourable" in this context. The narrow view is that the witness' evidence must detract from the case of the party who called the witness: it cannot be merely neutral (*Hadgkiss v CFMEU*, [9]).The broad view is that unfavourable simply means "not favourable", as opposed to "adverse" (*McRae*, [24]). ALRC 102, which was co-authored by the VLRC, favours the broad view ([5.46]).

The court must have regard to certain criteria in deciding whether to grant leave to the party to cross examine its own witness (ss38(6)(a),(b),192). It must also have regard to the "discretions" (ss135, 137) to exclude otherwise admissible evidence.

P may seek an advance ruling as to whether leave will be granted to cross examine its own witness should the witness' testimony prove unfavourable to P (s192A; *McRae*) Indeed, it is no bar to P utilising s38 that it expects that the witness' testimony in response to non-leading questions will be unfavourable (*McRae*, [20]; *Adam*; *Aslett*). In *McRae*, P planned to compel two co-offenders who had already been dealt with to give evidence at D's murder trial, if leave was given to P to cross examine them about their initial out of court statements which implicated D. Their later statements exonerated D. Curtain J ruled in advance that, if their answers to non-leading questions proved unfavourable to P, she would give leave to P to cross examine them under s38 and that, pursuant to s60, P would be able to rely on the initial statements as evidence of the truth of their contents. P was also permitted to tender the tape recordings of the initial out of court statements which comprised the co-offenders' police interviews and a conversation intercepted by a listening device.

As regards the scope of cross examination that may be permitted under s38, it is noteworthy that in the murder trial of *Bourbaud* ([8],[37]), Lasry J permitted P to cross examine two unfavourable prosecution witnesses, who had earlier pleaded guilty to assault charges arising from the fatal incident, about inconsistencies between the summary of facts on their pleas and their subsequent accounts of the incident.

The scope of cross examination under s38 may be regulated by s103 (*Anyang (Ruling 1)*, [20]) which only permits cross examination as to credibility if it will "substantially affect" the assessment of the witness'credibility.

The greater capacity of P under s38 to cross examine its own unfavourable witnesses makes it more difficult for P to justifiably decline to call material witnesses (*Kanaan*, [84-85]).

S42 – Leading Questions

D may be precluded from asking a prosecution witness leading questions in cross examination if the facts would be "better ascertained" by non-leading questions (s42(3)).

CHAPTER 3 – ADMISSIBILITY OF EVIDENCE

The scheme of Chapter 3 involves an inclusionary rule ("Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding": s56(1)) followed by numerous exclusionary rules (eg the hearsay rule in s59 and the opinion rule in s76) followed by exceptions to the exclusionary rules. Sometimes the exclusionary rules and the relevant exception appear in discrete sections: other times they are rolled up together in the one section.

Chapter 3 is divided into 11 parts, commencing appropriately with relevance.

PART 3.1 - RELEVANCE

S55 – Relevant Evidence

Relevance is the key to applying the rules of evidence in Chapter 3 of the Act. If one is able to articulate the basis or bases on which a piece of evidence is relevant, one has done much of the work required for determining whether any exclusionary rules are engaged and, if so, whether any exceptions are available.

S55 sets out the test for relevance. In short, the test is whether the evidence, if accepted, logically makes a fact in issue more or less likely.

In s55, "a fact in issue" refers to an ultimate fact in issue (Odgers (9th ed), [1.3.180]). One identifies the ultimate facts in issue by reference to the elements of (a) the offence(s); (b) any mode of complicity relied upon by P; (c) any defence(s) "open" to D.

In assessing relevance, one assumes the evidence will be accepted by the trier of fact ("if it were accepted": s55). There are conflicting views as to what that assumption involves when assessing the relevance of evidence of out of court statements (Odgers (9th ed), [1.3.120]). The narrow view is that one merely assumes that the statement was made and considers whether the making of the statement, in the circumstances in which it was made, logically makes the existence of an ultimate fact in issue more likely (*Papakosmos,* [31] & [52]). The broad view is that one assumes that the statement was made and that what was asserted in it will be accepted by the trier of fact and then asks whether it logically makes the existence of an ultimate fact in issue more or less likely (*Adam,* [23]).

PART 3.2 - HEARSAY

S59 – The hearsay rule – exclusion of hearsay evidence

Section 59 is only engaged if evidence of the prior representation by the representor ("R") is adduced to prove the truth of the fact asserted in the representation.

The statutory hearsay rule is narrower than its common law equivalent because R must have intended to assert the fact or, more precisely, there must be reasonable grounds for supposing such an intention existed.

The word "representation" is used instead of "statement" because a person can assert something by conduct. "Representation" & "previous representation" are defined in the Dictionary.

S60 – Exception – evidence relevant for a non-hearsay purpose

If evidence of a previous representation is admissible for a non hearsay purpose (eg complaint evidence adduced for a credibility purpose), it is admissible for a hearsay purpose, that is, as evidence of the truth of its contents. As mentioned above, s60 assumes particular importance when it operates in tandem with s38.

S62 – Restriction to "first hand" hearsay

There are several exceptions to the hearsay rule (relevantly, the exceptions created by ss65, 66, 66A) in respect of first hand hearsay ("FHH").

The test under the Act for FHH is whether the facts asserted by R were facts allegedly seen, heard or otherwise perceived by R: in other words, facts within R's personal knowledge (see s62(1)).

Section 62(1) does not require the witness giving hearsay evidence of R's previous representation to have heard (or otherwise perceived) the representation being made by R but this requirement, which most people would associate with the concept of first hand hearsay, is usually picked up by the wording of the exceptions (see, eg, the opening words of s65(2) & 66(2) but cf s65(3)).

S65 – Exception – criminal proceedings if maker not available

There are actually seven different exceptions to the hearsay rule in s65, each with their own criteria or elements. The exception under s65(8), which has the least onerous criteria, is only available to D.

"Unavailability"

For all these exceptions in s65, R must be "unavailable", a term which is broadly defined (Dictionary, Pt 2, cl 4(1) (a) to (g)).

Darmody indicates the breadth of the term "unavailable". A complainant in an assault case was in jail (sic) & refused to testify at D's trial, though warned by the trial judge that he could be punished for contempt. He claimed he would be willing to testify when paroled, which he expected to occur in a few weeks. P sought an adjournment until after the complainant was paroled but D successfully opposed it. P then argued, successfully, that the complainant was unavailable under clause 4(1)(f) of Part 2 of the Dictionary and was given permission by the trial judge under s65(3) to lead evidence of the complainant's testimony at committal in which he had sworn that his police statement was true and correct. D brought an interlocutory appeal but the Court of Appeal upheld the trial judge's rulings.

Another example of "unavailability" is to be found in *Nicholls.* Beach J found that a complainant who was excused under s18 from giving evidence against D (her defacto) was "unavailable" for the purposes of s65.

But the test of "unavailability" will not always be easy to satisfy. *ZL* indicates that where a prosecution witness is claimed to be unavailable pursuant to Clause 4(1)(e) – namely, P asserts that all reasonable steps have been taken to find the witness or secure his or her attendance but without success – the courts will demand proof of strenuous attempts to find the witness, especially where the witness is important to the prosecution case (*ZL*,[32]).

"The circumstances in which the previous representation was made"

In relation to the exceptions in s65(2)(b), (c) & (d), there are conflicting views as to the circumstances which may be taken into account in determining whether the out of court representation is (b) "unlikely to be a fabrication", (c) "highly reliable" or (d) "reliable".

The narrow view is that only circumstances or events existing at the time of the representation may be taken into account (*Mankotia*, BC pp10-12). The broad view, which has the least support, is that all circumstances & events bearing on the reliability of the representation, whenever occurring, may be considered. The third or middle view, which has the most support, is that some prior or subsequent circumstances or events (such as other representations made by R) may be considered insofar as they bear on the circumstances that existed at the time the representation was made (*Ambrosoli*, [36]; *Conway*,[145]; *Williams* (2000), [50-54]).

Notice requirements

There are written notice requirements if P or D plans to adduce hearsay evidence where R is unavailable (s67). The required contents of notices are set out in the regulations. A court may waive the notice requirements (s67(4); *Darmody*).

Unfair Prejudice

If prosecution hearsay evidence is admissible under s65, D may nonetheless seek exclusion of the evidence under s137. It may be submitted that because R is unavailable to be cross examined, the evidence will not be properly tested and the jury, despite directions by the trial judge, may overvalue the evidence. While each case has to be assessed on its own facts, such submissions have been rejected by the VSCA in *Darmody* and *BB & QN*, both cases where D had an opportunity to cross examine R, the complainant, at committal. In *BB & QN*, Bongiorno JA said at [21] that:

> "Whilst the inability to cross-examine a witness at trial is a factor to be taken into account in determining whether the admission of evidence taken in an earlier proceeding will lead to unfair prejudice to an accused, it can never be determinative. Its weight on that issue in any particular case must take into account the legislative intent expressed in s 65(3) that the hearsay rule is not to apply to such evidence and the fact that the trial judge can always accompany its admission with appropriate directions to the jury." (footnotes deleted)

S66 – Exception – criminal proceedings if maker available

Availability

This exception only applies if R is available to give evidence about an asserted fact. If R does not fit one of the statutory categories of "unavailability" (Dictionary, Pt 2, cl 4(1)(a) to (f)), R is deemed to be available to give evidence about the "asserted fact(s)" (Dictionary, Pt 2, cl 4(2)).

In *Singh* ([15]), the complainant, R, was treated as "available" to give evidence about the fact asserted in her proximate complaint to her son (namely, that she had been raped by a taxi driver), even though she subsequently had no recollection of the alleged rape, having been intoxicated at the time of the taxi ride. Evidence of her complaint to her son was admitted under s66.

A complainant will be treated as available to give evidence about a fact asserted in an out of court complaint, even if h/she makes no mention of the complaint in giving evidence and there is a disjunct between the content of the complaint and the complainant's viva voce evidence. In *Miller* ([48-51]), where the complainant gave no evidence of having complained, the complaint evidence given by her sister was held to be admissible under s66 even though the gist of the complaint evidence was an allegation that D had merely touched her whereas her viva voce evidence was that D had penetrated her.

Fresh in the memory

This exception to the hearsay rule requires the occurrence of the asserted fact to have been "fresh" in R's memory when the representation was made (s66(2)). The passage of time is now only one consideration re freshness (s66(2A), inserted after ALRC 102). The NSWCCA in *XY* at [105] said that, given the nature of the event & having regard to s66(2A), a complaint of sexual abuse made 4 years after the event in question could pass the test of "freshness."

Section 66(3) limits the operation of s66(2) by wholly or partially shutting out "proofs" of evidence , formal (eg police statements) or informal (as in *Esposito (p34)*, where answers in a record of interview were treated as an informal "proof" of evidence caught by the qualification in s66(3) because the suspect said repeatedly that what he was telling police was evidence he would be prepared to give against D.

S66A – Exception – contemporaneous statements about a person's health etc

This section is particularly useful where a party wishes to adduce evidence of a person's declarations of intention to ground an inference that they acted on that statement of intent.

PART 3.3 - OPINION

Part 3.3 contains one exclusionary rule (s76) and, relevantly, three exceptions to that rule (ss77,78,79).To paraphrase s76, an opinion about a fact is not admissible to prove the fact. The three relevant exceptions are for certain lay opinions (s78), expert opinions (s79) and opinions (lay or expert) which are admissible for another purpose (s77: cf s60). As indicated in the notes to s76, there are more exceptions to the opinion rule elsewhere in the Act.

Opinion evidence, like any other evidence, must first pass the test of relevance. If the observed & assumed facts on which an opinion is based are not proved by admissible evidence, it will fail that test. If the facts proved are dissimilar to the facts assumed, but not too dissimilar, the evidence might be relevant but the weight of the opinion could be significantly reduced.

Section 80 expressly abolishes the common law exclusionary rules known as the ultimate issue and common knowledge rules but this does not open the floodgates. The exceptions to the opinion rule control the inflow of opinion evidence, along with the "discretions" in Part 3.11 of the Act.

There is much greater scope under the Act for adducing evidence from experts on the impact of sexual abuse on child development and behavior (ss79(2), s108C). The abolition of the common knowledge rule by s80 (and the advent of s108C, introduced after ALRC 102) also raises the prospect of D adducing expert evidence about the difficulties associated with identification evidence (*Smith* (2000)), a prospect flagged several times by the ALRC (ALRC 26, vol.1, [743]; ALRC 102, [9.125], [9.127], [9.128])

S76 - The opinion rule

The elements of the exclusionary rule created by s76 are: (i) the evidence is an opinion; & (ii) it is relied upon to prove a fact asserted in the opinion.

"Opinion" is not defined in the Act. Wigmore's definition of an "opinion" is quoted in ALRC 102 at [9.2], that is, an opinion is "an inference drawn or to be drawn from observed & communicable data". ALRC 102 at [9.2] also speaks of an opinion as "a conclusion, usually judgmental or debatable, reasoned from facts." Statements of fact and opinion form a continuum. It is not always easy to distinguish one from the other (eg "That's the man I saw"). If a statement is not an opinion, the opinion rule is not engaged.

S78 – Exception – lay opinions

The elements of the exception created by s78 are: (i) the witness' opinion is based on what he or she saw, heard or perceived about a matter or event; & (ii) admission of the witness' opinion is <u>necessary</u> to understand his or her perception.

Examples of opinion evidence covered by this exception include opinions as to age, sobriety, speed, identity. A striking example of the breadth of s78 is *Harvey*, a sexual assault case. The witness gave evidence that when she entered D's office, she saw the complainant standing near D who had what the witness described as "a look of like sexual gratification – that's the best way I can express it." The NSWCCA held this evidence was admissible pursuant to s78.

In *Smith* (2001), a case in which the High Court decided that evidence of two police officers identifying D from CCTV footage of a bank robbery was irrelevant (because their minimal prior dealings with D made them no better equipped than the jury to say whether it was him in the footage), Kirby J treated the evidence as relevant opinion evidence caught by the exclusionary opinion rule in s76. He then turned to consider the exception for lay opinion evidence under s78. He said that ALRC 26 "makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses". In his opinion, the words "matter or event" in s78(a) referred to the bank robbery (which the police did not witness), not stills from the CCTV footage. ALRC 102 at [9.14] noted that Kirby J's analysis has attracted criticism but the ALRC did not reject it or recommend any change to s78. If Kirby J's interpretation gains acceptance (see, similarly, Simpson J's analysis in *Leung & Wong*), it will mean a significant narrowing of the scope of the s78 exception.

S79 – Exception – opinions based on specialised knowledge

The elements of the exception created by s79 are: (i) the witness possesses specialised knowledge; (ii) the witness acquired that knowledge through training, study or experience; & (iii) the witness' opinion is wholly or substantially based on that knowledge.

In *Makita (Australia) Pty Ltd v Sprowle,* a case in which a woman sued her employer after injuring herself at work on what her expert (a physicist) asserted was an unacceptably slippery stair, Heydon JA, discussing s79, said at [85]:

> "In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

"Specialised knowledge"

The parameters of "specialised knowledge" are unclear. "Knowledge" is more than subjective belief or unsupported speculation (*Tang*, [138]). "Specialized knowledge" is more than ordinary or common knowledge (*Velevski*,[82] per Gaudron J). Neither is reliability enough: Spigelman CJ remarked in *Tang* at [137] that "the focus of attention must be on the words

"specialised knowledge," not on the introduction of an extraneous idea such as "reliability."" But the breadth of "specialised knowledge" is perhaps best indicated by the cases dealing with ad hoc "experts" , for example, voice identification cases where witnesses (eg police, interpreters) opine as to the identity of speakers heard on telephone intercepts or listening devices, based on repeated listening to the tapes and comparison with undisputed recordings of D's voice (eg in a record of interview) (*Leung & Wong;Li*).

"Wholly or substantially" based on specialised knowledge

"Substantially" is not defined. In the draft Bill included in ALRC 26, the proposed wording in the draft provision (cl 68) was "wholly or partly" which was changed to "wholly or substantially" in the draft Bill included with ALRC 38 (cl 67) but the meaning to be given to "substantially" was not discussed in ALRC 38 (cf [151]) or in ALRC 102. "Substantially" must mean more than "partly" but it is unclear whether it means "mainly" or "predominantly." OED definitions of "substantially" include "in the main" & "strongly". It may be that the juxtaposition of "substantially" &"wholly" in s79 implies that "substantially" in s79 means "predominantly" or "in the main": this was the view of the Federal Court in *Commissioner for Superannuation v Scott* with regard to the phrase "wholly or substantially dependent" in superannuation legislation.

PART 3.4 - ADMISSIONS

"Admission" is defined in the Dictionary (Pt 1). The weight of authority favours the view that an "admission", as defined by the Act, includes a statement which, on its face, may appear exculpatory but actually inculpates D (eg a false alibi) (*Esposito* ; cf *GH* per Spender J)

Four major exclusionary rules relevant to admissions are to be found in ss 84, 85, 137 & 138. In summary, these rules exclude any admission which:

- may have been "influenced by" violent, oppressive, inhuman or degrading ("V.O.I.D.") conduct (s84);
- was made to or in the presence of an investigating official or "caused" by a person capable of influencing D's prosecution (s85(a)) & may be unreliable;
- is more prejudicial than probative (s137);
- was illegally or improperly obtained and public policy considerations favour exclusion (s138).

Sections 90 also gives a court a discretionary power to exclude evidence of an admission which it would be unfair to use against D. (*EM*).

S84 – Exclusion of admissions influenced by violence and certain other conduct.

When s84 is properly raised (s84(2)), the onus is on P to establish, on the balance of probabilities (s142), that the making of the admission was not "influenced by" V.O.I.D. conduct (or the threat thereof) towards D or another. The conduct in question need not have been carried out by the police. "Influenced by" connotes a minimal causative link (Odgers (9^{th} ed) p379, [1.3.5020]).

The precise boundaries of "oppressive conduct" are unclear. It is not limited to physical or threatened physical conduct but includes psychological pressure (*Higgins* (2007)). Unlike the common law notion of "oppression", it is not necessary for D's will to be 'overborne' in order for the admission to be inadmissible under s84 (*Ul-Haque*, [119]).

"Inhuman conduct" is conduct contrary to the human rights recognised in the International Covenant on Civil and Political Rights. "Degrading conduct" is conduct which involves significant humiliation (Odgers (9th ed), p378, [1.3.5020]).

S85 – Criminal proceedings - reliability of admissions made by accused

S85 deals with possibly unreliable admissions made to investigating officials or persons capable of influencing the prosecution (s85(1)(a) & (b)).

Despite the absence of a provision equivalent to s84(2), D must discharge an evidential burden that there is a real issue as to the reliability of the admission before s85 is engaged (*FMJ*, [48]). S85(3) lists some matters that bear on the question of reliability.

In relation to s85(1)(a), 'investigating official' is defined in the Dictionary and specifically excludes a police officer engaged in covert investigations under the orders of a superior.

In relation to s85(1)(b), the Act does not define who is a person "capable of influencing the decision whether a prosecution should be brought or continued" (herein called "a person of influence"). The concept is obviously broader than investigators as they are covered by s85(1)(a). Complainants will in most cases fit the description (*Lieske; TJF*) Whether others qualify, such as a parent of a young complainant (*FMJ*,[40]), is likely to depend on the degree of influence in each case. D must also show that he or she "knew or reasonably believed" that the individual who caused the admission to be made was a person of influence: in *FMJ*, the mother of the complainant held herself out to D as capable of influencing whether the prosecution was instigated.

Under s85(1)(b), there must also be a causal link between the conduct of the person of influence and the making of the admission by D, a link more substantial than that required under s85(1)(a).

PART 3.6 - TENDENCY AND COINCIDENCE

Part 3.6 of the Act replaces s398A of the *Crimes Act (Vic) 1958* (now repealed) which previously regulated the admissibility of "propensity evidence" & was disclosure based. The tendency and coincidence (T&C) rules in Part 3.6 of the Act are purpose based. T&C evidence refers only to evidence which is led for the purpose of proving a tendency or rebutting coincidence: evidence which discloses other criminal or discreditable conduct but is led for some other purpose (eg relationship evidence adduced for context: *WFS*, [38]) is not T&C evidence.

It will usually be P which seeks to adduce T&C evidence but D may wish to do so at times, for example, where he or she relies on self defence and wants to adduce evidence that the victim had a tendency to be aggressive.

T&C evidence must, by itself or in combination with other evidence, have significant probative value to be admissible (s97(1)(b) & s98(1)(b)). If the T&C evidence is adduced by P, its probative value must also substantially outweigh its prejudicial effect (s101) unless it is led in rebuttal of T&C evidence adduced by D (s101(3) & (4)).

Assuming reliability

An issue which impacts on a number of provisions of the Act which refer to "probative value", including those in Part 3.6, is whether a trial judge should assume or, alternatively, assess the reliability of evidence when determining its "probative value". In NSW until *Shamouil* (2006) and in Tasmania until *KMJ (2011)*, there was considerable support for the latter approach, which was also championed by Smith & Odgers in their 2010 article (34 Crim LJ 292), noted in *KMJ* (footnote 42). But from the outset of UEL in Victoria, the VSCA (*JLS*, [18] & [26]; *PG*, [62] & [76]; KRI, [53]; DR, [80]) has preferred the approach articulated in *Shamouil*, now also followed in Tasmania, that one assumes the reliability of the evidence (including its credibility), unless no reasonable jury could accept it.

Contamination

There is, however, an exception to the *Shamouil* approach recognized in Victoria (eg *PNJ*,[26]&[29]; *DR*, [81]*; cf RHB*, [27]) & NSW (*AE*,[44]; *BP*,[110-111]) - an exception which usually falls for consideration in multi complainant sex cases. If D contends that various prosecution witnesses have not made their statements independently, the trial judge should consider whether there is a real chance of joint concoction or innocent infection ("contamination") when assessing the probative value of T&C evidence.

I note that in Tasmania in *KMJ* ([34]), the validity of this exception was questioned (see also Nettle JA in in *PG* at [77]) and it may be observed that the origin of the exception – the NSW case of *AE* – failed to refer to *Shamouil*.

The decision in *AE* suggests it is not difficult to have T&C evidence excluded because of the risk of contamination but, since *AE* & *PNJ*, both the VSCA (*DR*, [76] to [81]) and the NSWCCA (*BP*, [110]; *FB*, [35]) have emphasized the need for a real (as opposed to speculative) chance of contamination to justify exclusion. The burden of proof is on P to negate the chance of contamination (*BP*, [110]).

"Significant probative value"

There is no single test for determining whether T&C evidence has <u>significant</u> probative value (*PNJ*, [12]) but the VSCA has relied heavily on the test formulated under the old law, namely, whether there is a "common modus operandi", "pattern of conduct" or "underlying unity" disclosed by the evidence (*CGL*, [29-30]). Whether the standard is satisfied in a given case is no easy question and reasonable minds can differ as to the answer. "Underlying unity" is a vague concept and attempts to pin it down (*RJP*, [46]) have not eliminated uncertainty. While the VSCA has consistently said that it is not necessary to show "striking" similarities (eg *CGL*, [28 -29]; *CW*, [22]), it virtually set the bar as high in some of its early T&C decisions by insisting on "remarkable," "unusual" or "distinctive" features in the evidence: commonplace instances of sexual abuse of minors were not regarded as passing the test (*CGL*, [31]; *PNJ*, [22]: *NAM*, [10] & [13]; *GBF*, [29] & [32]). Subsequent decisions have

watered down this requirement (*PG*, [69 - 71]; *NAM*, [27]; *GBF*, [27]; *JLS*, [13]; *KRI*, [58]; *RHB*, [18]; *DR*, [88]). They have done so in a variety of ways. In some cases, they have expressly disclaimed the necessity of such features (*RHB*, [18]). In other cases, they have applied a different and less demanding notion of what constitute remarkable, distinctive or unusual features: that is, instead of assessing what is unusual by reference to the spectrum of deviant behaviour, as was the approach in *CGL* & *PNJ*, more recent cases appear to assess it against the spectrum of normal behaviour (*RHB*, [18]; *DR*, [88]). Seeming inconsistencies between earlier and later decisions of the VSCA have been downplayed by dicta to the effect that each case falls to be determined on its own facts and only limited assistance can be gained from a comparison of one case with another (*RHB*, [18]; *KRI*,[58]). In summary, there appears to have been a considerable shift by the VSCA in the direction of admissibility of T&C evidence led by P.

Prejudice

In applying s101(2), a judge must weigh the probative value of evidence against the risk of unfair prejudice. In *Papakosmos*, McHugh J said at [91] that "(e)vidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted." He went on in [92] to cite an oft quoted passage from ALRC 26 ([644]) which vividly describes the relevant prejudice:

"By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required."

Notice requirements

Finally, reasonable written notice has to be given if a party wishes to rely on T&C evidence, although the Court may waive the notice requirement: s100. The Evidence Regulations 2009 (reg 7) stipulate the matters that must be addressed in a tendency or coincidence notice.

On Appeal

The principles in *House* apply to an interlocutory appeal against a ruling made under Part 3.6 (*KJM (No2)*, [9-14]). Whether that is also the case on a conviction appeal remains to be determined.

PART 3.7 - CREDIBILITY

S101A – Credibility evidence

Credibility is broadly defined in the Dictionary (Part 2). It is not limited to a person's veracity: it includes reliability of perception and recollection. Further, credibility evidence may be evidence that undermines or bolsters a person's credibility. But the mere fact that the evidence in question impacts upon a person's credibility does not make it credibility evidence under s101A. If such evidence is relevant and admissible for a purpose other than the assessment of a person's credibility, it is not credibility evidence as defined in s101A and, consequently, Part 3.7 of the Act is not engaged.

Note the reference in s101A to "other person." At trial, credibility can be an issue not only in relation to a witness but also in relation to a non-witness, that is, the maker of a previous representation who is not called but whose previous representation is admitted into evidence (eg under an exception to the hearsay rule).

"Credibility evidence" as defined by s101A is regulated by the exclusionary rules and exceptions in Division 2 of Part 3.7 (ss102 to 108) if it relates to the credibility of a witness & by the exclusionary rules & exceptions in Division 3 of Part 3.7 (ss108A to 108B) if the evidence relates to the credibility of a non-witness who made an admissible previous representation. The exclusionary rules and exceptions in Division 3 mirror those in Division 2.

S102 – The Credibility Rule

Section 102 excludes credibility evidence in relation to a witness at the trial. This rule does the work formerly done by such common law rules as the rule against bolstering the credit of one's own witness, the rule against prior consistent statements & the finality (or collateral evidence) rule.

S103 – Cross examination as to credibility

Under the s103 exception to the credibility rule, the evidence to be adduced in the cross examination of a witness must be capable of "substantially" affecting the assessment of the witness' credibility, which is a change from the common law.

In determining whether a question may be asked pursuant to s103, the trial judge must assume that the witness will answer the question in a way most favourable to the questioner (*Beattie*).

S104 – Further Protections – Cross examination as to credibility

The exclusionary rule contained in the opening words of s104 prohibits the adducing of credibility evidence in cross examination of D. There are several exceptions set out in s104. Pursuant to s104(3), P may cross examine D about prior inconsistent statements made by him or her; about D's "bias or motive to be untruthful" (which refers to some interest over and

above the particular interest that every D has in the outcome of proceedings); & about D's inability to have observed or recalled matters about which he or she has given evidence. There is a further "catch all" exception in s104(2), namely, P may cross examine D about matters bearing on D's credibility (eg prior convictions) if leave is given. Pursuant to s104, the discretion to grant leave is only enlivened if D has adduced (and had admitted) evidence which has certain qualities, both "positive" and "negative". As regards the "positive" qualities, the evidence must impugn the veracity of P's witness (s104(1)(a)) and it must relate solely or mainly to the witness' credibility (s104(1)(b)), for example, evidence that P's witness has a prior conviction for a dishonesty offence. It should be stressed that evidence having these qualities must be admitted as a precondition to a grant of leave: the mere fact that D's counsel puts questions to a prosecution witness impugning his or her veracity is not enough if the witness rejects the imputation (Odgers (9th ed), p509, fn32), which is a major change from the old law (s399(5)(b) of the *Crimes Act 1958* (Vic)). As regards the "negative" qualities of the evidence, it cannot be evidence concerning the witness' conduct regarding the events for which D is on trial (eg if the witness impugned was a co-offender, D will not have thrown away his "shield" by adducing evidence of that co-offender's dishonest conduct in the course of the alleged joint criminal enterprise.) Nor will D have thrown away his shield if he adduces evidence of the witness' conduct in the investigation of the alleged offence (eg D gives evidence that the Informant "planted" evidence during the investigation)(s104(5)(b)). If the pre-conditions for a grant of leave exist, the trial judge may (not must) grant leave.

S106 – Exception – Rebutting denials by other evidence

Suppose a party cross-examines a witness about a matter which is relevant and admissible only on a credibility basis. The witness denies the assertion(s) put to him. Prima facie, the credibility rule prevents the party from leading evidence from another witness to contradict the witness. If, however, the matter comes under one of the five heads set out in s106(2), the most important of which are antecedents and prior inconsistent statements, the party may lead "rebuttal" evidence as of right, provided there was adequate "puttage" to the witness about the matter (s106(1)(a) & (b)). If none of the five heads in s106(2) are applicable, the party may seek leave to adduce rebuttal evidence. The fact that leave may be given is a significant departure from the old finality rule.

S108 – Exception – re-establishing credibility

A party may wish to re-establish or bolster the credibility of its witness during re-examination of the witness and/or through another witness. In the former case, the credibility rule does not apply to evidence adduced in re-examination: see s108(1), though s39, which regulates the scope of re-examination, must be borne in mind. In the latter case, the party may adduce from another witness a prior consistent statement of the witness if the preconditions of s108(3) are satisfied.

In *McRae*, for instance, which we discussed above in relation to s38, D successfully obtained leave under s108(3) to put into evidence through the Informant the police statement of the perpetrator Flaherty (made during the *Basha* stage of the trial) as a prior consistent statement after P, during its s38 cross examination of Flaherty, had adduced evidence of prior inconsistent statements by Flaherty in a record of interview and intercepted conversion.

PART 3.8 - CHARACTER

S110 – Evidence about character of an accused

A major change under UEL is that a person's character is not treated as indivisible. Thus, if D leads evidence of his good character in a particular respect (eg that he or she has a reputation for honesty), P is not entitled under UEL to lead evidence that he is of bad character in other respects (eg D has multiple priors for offences involving violence) (s110(3); *Zurita*, [19]).

PART 3.9 - IDENTIFICATION EVIDENCE

Part 3.9 of the Act deals with identification evidence. As explained in greater detail below, "identification evidence" is defined to include visual and non visual identifications (eg voice identification). But only visual identifications are subject to any exclusionary rules in Part 3.9 (see ss115 & 116) whereas both visual and non visual identifications "engage" s116, which deals with jury directions when identity is in dispute.

Under the common law, an ID parade was not a precondition to the admissibility of visual identification evidence whereas under UEL, it is a precondition unless an exception applies.

Definitions

There are three terms that require careful consideration at the outset– "identification evidence", "visual identification evidence" & "picture identification evidence". Only if the evidence in question is correctly categorised can one know which sections of Part 3.9 are engaged.

"Identification Evidence"

The lengthy definition of "identification evidence" in the Act's Dictionary covers in-court & out of court identifications. Though any summary of the definition has the potential to mislead, the following might serve as an aide memoire. Identification evidence is:

- an assertion by a witness (or a report thereof);
- that D (or someone resembling D) was in the "wrong place" (ie at or near the scene of the crime or an act connected with the crime) at the "wrong time" (ie at or about the time of the crime or connected act);
- based on what the witness perceived at that place and time.

The definition of identification evidence includes evidence of recognition (*Trudgett*). But "identification evidence", as defined, does not include the following: evidence of identifications of persons other than D; identifications of objects; evidence of description (because it is not an assertion that D was or resembles the person); evidence in the form of CCTV footage of a crime or connected act (because such evidence is not an assertion of a person); DNA or fingerprint evidence (ALRC 102, 13.25ff); & evidence of an exculpatory identification (because it is not an assertion that D was or resembles the person).

"Visual Identification Evidence"

The definition of visual identification evidence ("VIE") (s114(1)) has three elements:

- the evidence is "identification evidence";
- it is based wholly or partly on what a person saw;
- it is not "picture identification evidence".

"Picture Identification Evidence"

The definition of "picture identification evidence" ("PIE") in s115(1) has three elements also:

- the evidence is "identification evidence";
- the identification was made wholly or partly by the witness examining pictures;
- the pictures were pictures "kept for the use of police officers".

"Pictures" are defined to include photographs: s115(10)

Note that s114 rather than s115 will be relevant where the witness identified D from a photograph if the photograph was not one "kept for the use of police officers," for example, if the witness recognised D in a newspaper photograph.

S114 – Exclusion of visual identification evidence

In relation to VIE, the first part of s114(2) creates the exclusionary rule, namely, VIE adduced by P is not admissible. The rest of s114(2) creates three exceptions to the exclusionary rule which are all predicated on the witness not having been intentionally influenced to identify D. Under s114(2), VIE is admissible if:

- an ID parade involving D was held before the identification was made; or
- it was not reasonable to hold a parade; or
- D refused to take part in a parade.

The first and third bullet point exceptions above are straightforward. As regards the second exception, s114(3)-(6) provides inclusive criteria for determining whether it was reasonable to hold an ID parade.

S115 - Exclusion of evidence of identification by pictures

As regards PIE, three exclusionary rules are created by s115(2),(3) & (5).

The exclusionary rule created by S115(2) has two elements:

- P is adducing the PIE;
- the pictures suggest they are pictures of persons in police custody.

There is no exception to this rule (nor should there be!). Note that s115(2) is not just concerned with the propriety of the picture of D which the witness picks out.

The exclusionary rule created by s115(3) has four elements:

- P is adducing the PIE;
- the witness examined the pictures when D was "in the custody" of a police officer;
- that officer's police force was investigating the offence with which D has been charged;
- the picture of D examined by the witness was made before D was taken into that custody.

The courts have given a narrow meaning to the words "in the custody of". It means "under physical restraint" (*McKellar*, [37]). Hence, if D was not under arrest but just assisting police with their enquiries at the time the witness examined a photoboard and picked out D, this exclusionary rule is not engaged.

There are two exceptions to the rule created by s115(3): first, if D's appearance has changed significantly between the time of the offence and the time he or she was taken into custody; secondly, if it was not reasonably practicable to make a picture of D after he was taken into custody: (s115(4)).

Turning now to the exclusionary rule created by s115(5), which is the most important of the three exclusionary rules created by s115. It has three elements:

- P is adducing the PIE;
- the witness examined the pictures when D was "in the custody of" a police officer;
- that officer's police force was investigating the offence with which D has been charged.

There are three exceptions to this rule:

- D refused to participate in an ID parade (s115(5)(a)); or
- D's appearance had changed significantly from the time of the crime(s115(5)(b)); or
- it was not reasonable to hold an ID parade including D (s115(5)(a)).

The same inclusive criteria as mentioned in s114 apply to determining whether it was unreasonable to hold an ID parade involving D (s115(6)).

S116 – Directions to jury

Section 116 is only one of a number of relevant provisions concerning jury directions. Regard must also be had to ss115(7) & 165.

Note that s165 deals with potentially unreliable evidence generally. Even if an identification does not fall within the definition of "identification evidence" – a category which is specifically referred to at s165(1)(b) – s165 may apply (*Jamal*).

Section 115(7) relates to PIE only, and it is "triggered" by a request by D to the trial judge. It provides for directions to overcome any "rogues gallery effect."

Section 116 directions should only be given when ID is disputed (*Dhanhoa;Trudgett*). The obligation on a trial judge to give the directions is not dependent on a request from D.

Regarding s165, note that it refers to a request by a party for the trial judge to give the relevant directions: the party could be P. When might P request a s165 direction regarding an identification? When it is an exculpatory identification which has been adduced by P or D (eg an eyewitness identified someone other than D as the offender). P may want the jury cautioned about the possible unreliability of that witness' identification evidence (*Rose*, [283-298]).

PART 3.10 – PRIVILEGES

A discussion of "Privileges" could easily run to many pages. In this paper, it is proposed to deal only with the privilege against self incrimination.

S128 – Privilege in respect of self incrimination in other proceedings.

Under the common law, the privilege against self incrimination, if claimed on reasonable grounds, gives a witness the right not to answer a question. The privilege against self incrimination under s128 gives much less. In most circumstances, it only confers a right to a certificate. The certificate provides use and derivative use immunity in respect of the answer (s128(7)). In other words, it protects the witness against the direct or indirect use of the answer in subsequent criminal proceedings brought against the witness. In very limited circumstances, namely, where the answer would expose the witness to liability for a crime or civil penalty under foreign law (s128(4)(a)), s128 gives the witness the right not to answer. The rationale for this new approach is that it will contribute to improved fact finding.

Application of s128

First, it only applies to humans - corporations cannot rely on s128 (s127; ALRC 102, [15.93]). Second, the wording of S128 indicates that it only applies in circumstances where a witness is testifying at a hearing (s128(1)). In that domain, s128 displaces the common law privilege against self- incrimination. The common law privilege continues to operate in all other contexts (s131A; ALRC 102,[15.109]). Third, if the witness seeking to rely on s128 is D, consideration must be given to the operation of s128(10), unless D is giving evidence on a voir dire (s189(6)).With regard to s128(10), *Cornwell* ([84]) is High Court authority for the proposition that if the evidence the subject of D's objection under s128 directly or indirectly tends to prove D's guilt of the offence for which he is standing trial (or tends to prove an element of that offence), he cannot rely on s128, even if his answer might tend to incriminate him of another offence.

There are three elements to the privilege under s128:

- the witness objects to answering;
- on the grounds it may incriminate him of an offence or make him liable to a civil penalty under Australian or foreign law; &
- the court determines there are reasonable grounds for the objection.

Pursuant to s132, the court is obliged to alert a witness to his rights under s128. The witness must "object" to giving the evidence in question. Then the court must determine whether there are reasonable grounds for the objection.

If reasonable grounds are established, then, pursuant to s128(4), the court can still require the witness to answer if two preconditions are satisfied:

- the witness is not liable to prosecution for a crime or civil penalty under a foreign law;
- the court is satisfied that it is in the interests of justice for the witness to answer.

If these preconditions are satisfied, the decision whether to require (to direct) the witness to answer is discretionary in nature (*Lodhi,* [54]). The inclusive criteria referred to in S192(2) should be considered by the court in exercising that discretion. The case law indicates that an assessment of the reliability of the evidence to be given is also an important consideration (*Collisson*; *Hore*, [175 -232]; *Lodhi).*

The certificate confers direct and derivative use immunity (s128(7)). The protection extends to the use of the evidence as a prior inconsistent statement (ALRC 102, [15.99]) because that is caught by the words "cannot be used against the person."

Section 128(7)(b) expressly provides for derivative use immunity in respect of certified answers. If a witness granted a certificate is subsequently prosecuted for an offence, and there appears to be a live issue as to whether the evidence relied on by P was derived from the certified answer(s), ALRC 102 suggests that P has to prove that the evidence was not derivatively obtained (ALRC 102, [15.99] & [15.140]). This view that the legal burden falls on P is supported by the Victorian decision of Warren CJ in *DAS* (especially at [159]), which concerned interpretation of a provision abrogating the common law privilege against self incrimination in the *Major Crime (Investigative Powers) Act 2004* and rights under the *Charter of Human Rights & Responsibilities Act 2006* ("the Charter") , namely, the right to a fair hearing (s24(1) of the Charter) & the right not to be compelled to testify against oneself (s25(2)(k) of the Charter). Placing a legal burden of proof on D to prove a derivative link between P's evidence and D's certified testimony at an earlier proceeding is likely to be seen as infringing the Charter: placing only an evidential burden on D will not.

PART 3.11 - DISCRETIONARY AND MANDATORY EXCLUSION

S137 – Exclusion of prejudicial evidence in criminal proceedings

Section 137 replaces the common law *Christie* discretion. The defence has to persuade the judge or magistrate that the danger of prejudicial effect outweighs the probative value of the evidence: if so, the Court must exclude the evidence.

The first step in applying s137 is to assess the "probative value" of the evidence. Although "probative value" is defined in the Dictionary as the extent to which the evidence "could" affect the assessment of the existence of a fact in issue, there has been a divergence of opinion in other UEL jurisdictions as to whether the probative value of evidence is to be

assessed taking it at its highest. The leading case in NSW, *Shamouil*, says one does assume the credibility & reliability of the evidence, unless no reasonable jury could accept it. This view, often referred to as the restrictive view, was arguably endorsed by ALRC 102 ([16.14 – 16.22, 16.47]), which preceded *Shamouil*. It also finds strong support in Victoria in the decisions of the Court of Appeal referred to above which discuss "probative value" in the context of T&C evidence. Curtain J in *McRae* at [38] also endorsed this view in the context of applying s137. I note that in Tasmania, until *KMJ* was decided in late 2011, courts (eg *Lynch*) looked at questions of reliability, and this approach appealed to Byrne J in the Victorian case of *Middendorp* ([23]) but such an approach has been superseded.

On appeal against a ruling under s137, *Singh* ([26]) & *MD* ([27-30]) indicate that the principles in *House* apply, that is, the appellate court is not to substitute its own view but considers whether the trial judge took into account an irrelevant consideration, failed to take into account a relevant consideration or made a decision that was not reasonably open.

S138 – Exclusion of improperly or illegally obtained evidence

S138 replaces the *Bunning v Cross* discretion under which evidence illegally or improperly obtained may be excluded in the exercise of discretion.

The major change from the old law is that once D discharges the burden of proving that there was an illegality or impropriety, the burden of proof then shifts to P to justify admissibility. There are also provisions which deem certain conduct to be improper (ss138(2), 139).

On appeal against the application of s138, the VSCA has assumed to date that the principles in *House* apply (*MD,* [27-30]; *Marijancevic*, [13])

Where a trial judge's exercise of the s138 discretion turned on a finding of fact based on an assessment of the credibility of a witness, the VSCA will be reluctant to interfere, even if the VSCA considers the fact "improbable." In *Marijancevic* the VSCA at [80-83] thought it improbable that a police officer knowingly contravened the requirement that affidavits be sworn but the trial judge's decision to exclude the evidence under s138 was not overturned.

The failure of police to properly swear affidavits used to obtain search warrants has caused much consternation in Victoria. In *Marijancevic*, the VSCA indicated at [92] that where the failure to swear an oath was found to be inadvertent, a trial judge might quite properly admit evidence.

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