LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

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"EVIDENCE RULES… OK?"

HYPOTHETICALS ON EVIDENCE

HYPOTHETICAL 1

An accused Grant Stanforth is indicted for wounding with intent to cause grievous bodily harm to Trent James *(Section 33(1)(a) Crimes Act)*. The offence occurred in Sydney on 2nd September 2013. The victim will say that the accused came up suddenly behind him with a knife demanding that he present his wrists to be handcuffed with cable ties. He turned and struggled to get the knife. He was unsuccessful and was stabbed a number of times. The accused fled the scene. Some DNA was recovered on a cable tie at the scene which was consistent with that of the accused. The profile being found in fewer than 1 in ten billion in the general population.

For the first time just prior to trial the defence counsel tells the prosecutor that her client intends to run self defence *(Section 418 Crimes Act)* saying that the victim Trent James approached him with a knife and demanded his wallet and mobile phone. He will say that he feared for his life and struggled desperately to get the knife, in the course of which James was stabbed four times. The accused will say that he was not injured at all.

The accused now aged 30 has a criminal record including three separate entries at ages 19 to 21 for serious stabbing offences in circumstances where each victim had allegedly sexually interfered with him on earlier occasions.

1. **As a prosecutor how might you use this criminal record?**

The victim has a long criminal record himself for offences committed when acting as a debt collector standover man. He was well known in the community as someone to be feared and the accused claims that he knew the victim and was well aware of his reputation. These offences include kidnapping, assault occasioning actual bodily harm and recklessly inflict grievous bodily harm.

2. As defence counsel how might you use this criminal record?

James was never able to identify his attacker and it was only when the DNA results became available three months later that the police spoke to Stanforth. At that time they suspected he was the stabber and before speaking to him face to face indicated that he should have a lawyer present. The accused came into the police station with a solicitor and was cautioned as follows:

"We wish to speak to you about the stabbing of Trent James on the 2nd September 2013. You are not obliged to answer our questions, you do not have to do or say anything, but anything you do say may later be used in evidence against you and it may harm your defence if you do not mention now something that you may wish to rely upon later when and if this matter comes to court."

The accused is asked about the offence and refuses to answer any of the questions. He is then charged.

3. How might the fact that he mentions nothing of his presence at the scene and of self defence be used in his trial?

AUTHORITIES

Tendency cases

R v Cittadini (2008) 189 A Crim R 492, paras 22 to 23

"Put another way, tendency evidence is tendered to prove (by inference) that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceedings, acted in a particular way (or had a particular state of mind)."

Dawson v The Queen[1] *Dixon CJ said (at 16):*

"It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction

[1] (1961) 106 CLR 1

amounting to the crime, and are not inferred from the character and tendency of the accused."

R v Harker* [*2004] NSWCCA 427 at [57],

R v Ford [2009] NSWCCA 306 at para 41

R v Li *[2003] NSWCCA 407,* *Dunford J* ***(****with whom Spigelman CJ agreed****)*** *said at [11]*

"*10 His Honour found that the evidence had significant probative value* (s 97(1)(l)) and *its probative value substantially outweighed its prejudicial effect (s 101(2)), noting that the Gold Coast incident shortly before the final incident was "probably admissible" as part of the relationship evidence. I consider these findings were open to his Honour and I would not upset them, adding only that in my view all the evidence his Honour admitted as tendency evidence was properly admissible as relationship evidence and was therefore before the Jury in any event.*

11 I am also satisfied that the evidence was admissible as tendency evidence on the first count notwithstanding that it did not tend to establish a tendency or propensity to detain. Section 97 is not directed only at evidence showing a tendency to commit a particular crime but showing a tendency "to act in a particular way". In this case it was directed to showing that the appellant had a tendency to use violence to the complainant and to seek to control her in stressful marriage situations, and was relevant to whether he did by his actions on the night in question effectively "detain" her; but it was not necessary for this purpose to show that he had detained her on any other occasion. "

R v PWD [2010] NSWCCA 209

"79 The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour. By contrast, coincidence evidence is based upon similarities. Section 98 provides in terms that two or more events occurring is not admissible to prove that a person did a particular act, on the basis that, ***having regard to any similarities*** *in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless, the evidence has significant probative value*

The evidence sought to be relied upon, if accepted by the jury, would demonstrate that the respondent was a person who was sexually attracted to young male students and acted upon that predilection in various ways and at different times, but in a setting where the students to whom he directed his sexual attentions were boarders, who were homesick, did not fit in with the normal pattern of school life in various ways, for example, by not developing friendships or by having discipline problems, and who were thus vulnerable"

R V Cakovski 149 A Crim R 21 at para 36-37

<u>Unfavourable inference from the suspect's silence</u>

Section 89A Evidence Act

R v Webber [2004] 1 WLR 404

Article by Latham J, " How will the new cognate legislation affect the conduct of criminal trials in NSW ?" (2013) 25(7) JOB 57

Special Bulletin 21- August 2013 Judicial Commission of NSW

"*It will be a matter for the jury to determine the significance, if any, to be attributed to the failure to mention a fact. The Judicial Studies Board (UK), Crown Court Bench Book(<www.judiciary.gov.uk/publications-and-reports>, accessed 27 August 2013), suggests (at p 261) that the available inferences arising are:*

1. the fact relied on is true but the defendant, for reasons of his own, chose not to reveal it

2. the fact now relied on is irrelevant

3. the "fact" now relied on is of more recent invention

4. the defendant's present answer to the prosecution case is fabricated

5. the defendant is guilty. "

"The Judicial Studies Board (UK), Crown Court Bench Book Companion (2011) suggests (at pp 117–118) that the following matters should be identified with the parties before addresses and in the summing-up: the fact(s) which the defendant failed to mention but is relying upon at the trial; the reasons, if any, given for not mentioning the fact(s); the conclusion(s) which it is suggested may be drawn from the failure to mention the fact(s), usually that it is not true and has been fabricated since the interview."

HYPOTHETICAL 2

Karl Frazer agreed to drive James Moir and Ken Smith to the house of James Reynolds in order for them to bash Reynolds. There was evidence linking Frazer to the car which drove the them to the house. He gave a record of interview to police in which he admitted driving them to the Reynolds residence and watched them go into the house. He said that he and Moir agreed that the deceased was only to be bashed and nothing more. The deceased was shot dead. Frazer said that when they returned to the car Moir said *"the prick attacked me and I had to shoot him. Where will we get rid of the gun?".*

A DNA profile was found from a swab in the house which strongly linked Smith to the scene. All three gave ERISPS. Moir and Smith denied ever going there whilst Frazer made admissions as indicated.

Frazer offered to plead guilty to manslaughter and this was accepted by the Crown in full satisfaction. In addition Frazer agreed to give evidence at the murder trial of Moir and Smith in accordance with his interview. He was sentenced and received the usual discounts for guilty plea and offer to give assistance.

At the trial Frazer asked to speak with the prosecutor before he gave evidence. At this conference he said that he had lied in his interview and that he had driven a different person there that night and had not seen Moir or Smith at all on the evening of the murder. He says that this is the evidence he will give.

1. **You are the prosecutor. What would you do?**

The Crown also called a witness Mason who had been a cellmate of Moir whilst on remand. Mason gave a statement that Moir admitted he had shot the deceased. Mason will give evidence of this. The defence inform you that they have some TV footage that they wish to use in the cross examination of Mason. Prior to going into custody Mason had been a used car salesman. The TV footage was of a current affairs program in which Mason is seen representing to a bogus purchaser that the car he was selling had only travelled 50,000 kms. In fact it had travelled 500,000 kms and it could be established that Mason was aware of this fact at the time he had made the representation.

2. **Defence wish to use this footage in the cross examination of Mason. What course should the Crown take in relation to this?**

There was some evidence of motive, in that Moir had an affair with the deceased's wife two years earlier. The wife had called it off and the Moir had contacted her by phone repeatedly in an attempt to rekindle the relationship, with no success. After the killing the police had organised for Mrs Reynolds to telephone Moir in an attempt to elicit some admissions from him. The telephone call is as follows;

"R. Why couldn't you just let it lie James?

M. You know that I have never stopped loving you and found it so hard to think you would stay with him, knowing how I feel. Now the way is open and we can be together again.

R. We can never be together again. I made that clear when I told you it was ended.

M. I know you said that, but the reason was always because you could not leave your husband and while he was alive you had to stay with him

R. Yes but did you have to come to the house that night?

M. What night do you mean?

R. You know what night I mean.

M. I have been to your house many nights and just stayed in the car outside thinking of you being inside with him. Now that is no longer the case. Please come back to me.

3. Is this available to the prosecution? What arguments might the Defence rely upon to exclude it ?

At the trial the Moir gives evidence consistent with his ERISP. Smith does not give evidence. The prosecutor in final address says the following:

""Ladies and gentlemen, I now move to the defence case and the evidence of Mr Moir, and his record of interview. The first thing that I must tell you, and it's most important, Mr Moir did not have to give evidence in this trial. Mr Moir does not have to prove his innocence. He and Mr Smith are presumed innocent, unless and until they are proven to be guilty. They don't have to prove anything in this trial, and they don't have to give evidence and Mr Moir didn't have to give evidence. Indeed, his Honour will tell you that you cannot draw any adverse inference about an accused person if they don't give evidence.

But once an accused person steps into the witness box and gives evidence, you are entitled to assess that person, as you would any other witness. That is, to assess whether they're telling you the truth, whether they're reliable, in precisely the same way you treat any other witness."

4. Defence counsel asks for a discharge of the jury, relying upon Section 20(2) Evidence Act. The trial judge refuses and gives the standard Azzopardi direction in relation to Smith. Smith is convicted and Moir is acquitted. Smith appeals. How would you argue this?

AUTHORITIES

ALRC Report 26 Volume 1 par 819

"819. Witnesses Generally—Proposals. Evidence of reputation or opinion should not be admitted to show a tendency to untruthfulness except to rebut evidence of good character adduced by an accused.[114] As for other evidence, the proposals distinguish between the cross-examination of witnesses about their credibility and the adducing of evidence from one witness about the credibility of another. Different restrictions are imposed. It is consistent with the approach of the existing law.

• Cross-Examination. A witness should no longer be open to cross-examination on any negative aspect of character or misconduct on the basis that it is relevant to credibility. The research of psychologists suggests that emphasis should be placed on evidence of conduct which is similar to testifying untruthfully (ie involves false statements) and which took place in circumstances similar to those of testifying (ie the witness was under a substantial obligation to tell the truth at the time). Consideration was given to including a proposal to that effect but it was thought to be too limiting for the exercise of cross-examination. At the same time, the present law, despite judicial powers of control does not adequately limit such cross-examination. It is proposed, therefore, to include a general rule having the effect of prohibiting cross examination as to credibility unless it has substantial probative value on the question of credibility.[115] To assist in the use of the clause, a further clause is included which refers to matters relevant to the probative value of such evidence. It will be permissible to cross-examine a witness with respect to bias, or motive to be untruthful, with respect to mental and physical capacity, about his ability to perceive the relevant events and about prior inconsistent statements.

• Adducing Evidence. A witness should not be questioned about another's reputation (for honesty) or his (non-expert) opinion about another's honesty, because this evidence is of minimal probative value, and open to dangers of misestimation of probative value, prejudice and confusion.[116] It is further proposed that the existing law's collateral facts rule should not be retained in its present form. It should be possible for opposing counsel to prove that a witness has, although he denied it on cross-examination, done an act which impugns his credibility.[117] This change is justified because of the risk of the court being misled but any provision must be carefully defined because of the risk of time and cost being increased. The proposal limits such evidence to evidence of a false representation made knowingly or recklessly and in circumstances where the witness was under a legal obligation to tell the truth and to evidence of bias, lack of opportunity to observe, mental and physical capacity and prior inconsistent statements. In addition, evidence can be led in rebuttal of any evidence so adduced.[118]"

R v RPS NSWCCA 13/8/97 p29

R v XY [2013] NSWCCA 12

"167The actual probative value to be assigned to any individual item of evidence lies in the province of the tribunal of fact - in most criminal trials, the jury. It is not ordinarily possible to

*determine the actual probative value of any piece of evidence until the evidence in the proceeding is complete and the full picture can be seen. "Probative value" in the sections mentioned is plainly not used in that sense. It is used in the sense of the potential of the evidence to have the relevant quality. Where an assessment of probative value is a prerequisite to a decision to admit or not admit any particular item of evidence, the exercise for the trial judge is necessarily "predictive and evaluative" (**Fletcher**, at [35]). The prediction is of what use the jury **could** rationally make of the evidence, in the context of the trial evidence in its complete form. The evaluation is of the importance or significance of the evidence in the same context.*

171Nor is it appropriate that the exercise be partially undertaken - as the Victorian Court of Appeal appears to envisage in [63](d), where it said that the judge is required:

"... to make some assessment of the weight that the jury could, acting reasonably give to that evidence." (bold added)

None of the sections that call for assessment of the probative value as a precondition to admissibility give any indication that some exploration of credibility, reliability or weight ought to be conducted, or, if so, what limits are imposed on the extent of that exploration. To embark upon a partial assessment of weight could, in my opinion, be potentially productive of real injustice. No boundaries with respect to the extent to which the weight of the evidence is to be explored are discernible in any of the provisions that call for evaluation of probative value.

*175For these reasons, in addition to those given by Spigelman CJ in **Shamouil**, I maintain the view that questions of credibility, reliability and weight play no part in the assessment of probative value with respect to s 137. Although it does not call for present determination, it seems to me that the same must apply in all cases where admissibility depends upon such an assessment"*

R V Villar 2004 NSWCCA 302

EXTRACTS FROM EVIDENCE ACT (NSW)

20 Comment on failure to give evidence

(1) This section applies only in a criminal proceeding for an indictable offence.

(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or de facto partner, or

(b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:

(a) the defendant was guilty of the offence concerned, or

(b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

(a) 2 or more persons are being tried together for an indictable offence, and

(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

(a) evidence given by the witness that is unfavourable to the party, or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note. The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and

(b) the party is a witness in the proceeding.

55 Relevant evidence

(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.

59 The hearsay rule—exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note. Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359.

60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).

Note. Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note. The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Note. Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note. Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3),

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time, and

(b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

(a) the person to whom, or the court or other body to which, the representation was made, or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation, or

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note. Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party, and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

66A Exception: contemporaneous statements about a person's health etc

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised

knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

85 Criminal proceedings: reliability of admissions by defendants

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note. Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.

(2) 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.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or other inducement made to the person questioned.

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89 Evidence of silence

(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

(a) to answer one or more questions, or

(b) to respond to a representation,

put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section:

inference includes:

(a) an inference of consciousness of guilt, or

(b) an inference relevant to a party's credibility.

89A Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

(a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and

(b) that is relied on in his or her defence in that proceeding.

(2) Subsection (1) does not apply unless:

(a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and

(b) the special caution was given before the failure or refusal to mention the fact, and

(c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and

(d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:

(a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or

(b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

Note. See section 139 of this Act and section 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

official questioning of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

special caution means a caution given to a person that is to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and

(b) anything the person does say or do may be used in evidence.

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person, or

(b) is relevant:

(i) because it affects the assessment of the credibility of the witness or person, and

(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Notes.

102 The credibility rule

Credibility evidence about a witness is not admissible.

Notes.

[1] Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

[2] Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:

(a) in cross-examination of the witness:

(i) the substance of the evidence was put to the witness, and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence, and

(b) the court gives leave to adduce the evidence.

(2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:

(a) is biased or has a motive for being untruthful, or

(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

108A Admissibility of evidence of credibility of person who has made a previous representation

(1) If:

(a) evidence of a previous representation has been admitted in a proceeding, and

(b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth, and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

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135 General discretion to exclude evidence

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

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing, or

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

136 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:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

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

139 Cautioning of persons

(1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the person was under arrest for an offence at the time, and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the questioning was conducted by an investigating official who did not have the power to arrest the person, and

(b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and

(c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or

(b) the official would not allow the person to leave if the person wished to do so, or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.