

Client Legal Privilege

In Victoria, Part 3.10 of the ***Evidence Act 2008 (Vic)*** contains 4 divisions, the focus of the following slides will be in respect to Division 1 – ‘Client Legal Privilege’ (ss 117 – 126).

Background

- Privileges allow a party to a proceeding or a witness to refuse to disclose certain confidential (and privileged) communications and documents – *Odgers 13th edition, page 959*.
- The common law legal professional privilege which is renamed under the UEA ‘client legal privilege’ is based on the principle that it is desirable for the administration of justice that clients be free to make full disclosure to their legal representatives for the purpose of obtaining legal advice, or for the actual or anticipated conduct of litigation. Under the UEA privileges were extended to third parties. The Act requires judicial decision makers to balance this against the desire to have all of the relevant information before the court to assist in decision-making.

Summary of Division 1

- Division 1 creates a privilege for confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice (s 118) or providing legal services relating to litigation (s 119). Section 120 extends the privilege to unrepresented parties to legal proceedings. Sections 121- 126 provide various ways in which the privilege may be lost – *Odgers 13th edition, 960*.
- The public interest in assisting and enhancing the administration of justice supports the privilege in both the advice (s 118) and litigation (s 119) situations. The existence of the privilege in the latter situation is also supported by the need to protect the confidentiality of documents and communications coming into existence for the purpose of litigation conducted in an adversary system. The latter policy concern (as well as fairness – see ALRC 26:1 at [883]) also underlies s120 which provides protection for communications and documents prepared for the dominant purpose of an unrepresented litigant preparing for or conducting proceedings.

s 117 Definitions

(1) In this Division—

client includes the following—

- (a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is—
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a **law** of the Commonwealth or a State or Territory;
- (d) if, under a **law** of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a **confidential communication** was made;

confidential communication means a communication made in such circumstances that, when it was made—

- (a) the person who made it; or
- (b) the person to whom it was made—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under **law**;

confidential document means a **document** prepared in such circumstances that, when it was prepared—

- (a) the person who prepared it; or
- (b) the person for whom it was prepared—

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under **law**;

lawyer means—

- (a) an **Australian lawyer**; and
- (b) an **Australian-registered foreign lawyer**; and
- (c) an **overseas-registered foreign lawyer** or a natural person who, under the **law** of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c);

Summary of s 117 - Definitions

Section 117 defines 'client', 'confidential communication', 'confidential document', 'lawyer' and 'party' .

The important takeaways from these definitions are:

'Client' – includes a lawyer who engages or employs a lawyer and it is not essential there be a valid contract of retainer between the lawyer and 'client' – *Hawksford v Hawksford* [2008] NSWSC 975 at 6 – 8 per White J.

'Confidential communication/document' – the obligation (whether express or implied) of confidentiality had to exist at the time the communication or document was made or prepared (although subsequent circumstances may result in loss of privilege). It will not be inferred from a mere failure to give permission to disclose – (*Drabsch v Switzerland General Insurance Co Ltd* [1999] NSWSC 975 at [6]-[8] per Hamilton J).

The presence of a third party at the time a communication is made may indicate the communication was not intended to be confidential – *R v Sharp* [2003] NSWSC 1117 at 34 – 37 per Howie J.

'Lawyer' – a person who is admitted to the legal profession in an Australian jurisdiction or any other jurisdiction. A practicing certificate is an important indicator but not conclusive on the issue of whether legal advice was sufficiently independent to constitute legal advice for purposes of claiming privilege under the Act – *Commonwealth v Vance* (2005) 158 ACTR 47; [2005] ACTCA 35; work by a lawyer that doesn't meet the dominant purpose test will not be covered by the privilege.

ss 118 and 119 (legally represented parties) and s 120 (unrepresented)

118 – Legal advice	119 – Litigation	120 – Unrepresented parties
<p>Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—</p> <p>(a) a confidential communication made between the client and a lawyer; or</p> <p>(b) a confidential communication made between 2 or more lawyers acting for the client; or</p> <p>(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—</p> <p>for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.</p>	<p>Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—</p> <p>(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or</p> <p>(b) the contents of a confidential document (whether delivered or not) that was prepared—</p> <p>for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.</p>	<p>Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of—</p> <p>(a) a confidential communication between the party and another person; or</p> <p>(b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party—</p> <p>for the dominant purpose of preparing for or conducting the proceeding.</p> <p>(2) * * * * *Expressions defined in the Dictionary are identified in bold print.</p>

COMMENTARY

Legal advice privilege – s 118

This section provides a privilege for confidential communications made for, and confidential documents prepared for, the *dominant purpose* of a lawyer (or lawyers) providing legal advice to a client. It covers:

- confidential *communications* made between a client and a lawyer (or between two or more lawyers acting for a client) (s118(a) and (b)); and
- confidential *documents* prepared by a client, lawyer or third party (for example, a proposed expert witness or an accountant) (s118(c)).

Litigation privilege– s 119

This section provides a litigation privilege for:

- confidential *communications* between the client and another person, or the client's lawyer and another person, made for; and
- confidential *documents* prepared for (whether delivered or not),

the *dominant purpose* of providing the client with legal services which relate to an Australian or overseas proceeding (current, pending or anticipated) in which the client is, or might be, a party.

Application –

While the terms of s118 and s119 apply only to the adducing of evidence, due to s131A both also apply to specified pre-trial disclosure requirements, e.g. the production of documents pursuant to a subpoena or notice to produce (*Matthews v SPI Electricity Pty Ltd & Anor (No 5)* [2013] VSC 285 at [23] per Derham AsJ, citing *Priceline Pty Ltd v JHY Nominees Pty Ltd & Ors* [2010] VSC 61).

Discussion of ss 118, 119 and 120

- Sections 118 and 119 largely reflect the **common law doctrine of legal professional privilege** which is based on the rationale in *Baker v Campbell* (1958) 153 CLR 52 at 128 per Dawson J that “*the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice...*”
- Both sections 118 and 119 **prohibit the adducing of evidence if it would result in the disclosure of confidential communications or documents** that were made or prepared for the dominant purpose of providing legal advice to a client (s 118) or providing professional legal services to a client regarding a proceeding in which the client is or may be or was/might have been a party (s 119).
- Both ss 118 and 119 apply to specified **pre-trial disclosure requirements**, e.g. the production of documents pursuant to a subpoena or notice to produce (s 131A; *Matthews v SPI Electricity Pty Ltd & Anor* (No 5) [2013] VSC 285 at [23]).

- **The party claiming the privilege bears the onus.** The onus can be met by evidence which allows the court to infer the reasons why a communication was made (*Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 at [29], [31] – [34]). In this case a letter of engagement had been found to be privileged and the court having regard to the evidence that establishes the nature of the report namely a report prepared by “a firm who provides independent reporting, compliance advice and independent accounting and auditing services” and the circumstances in which it was prepared being “in response to the engagement letter”, it was held that the report was privileged. The report was an expert report prepared and provided to a prospective litigation funder.
- **Section 119 is broader than s 118** in that it captures confidential communications made between the client or lawyer and another person (**third party**) rather than just between the lawyer and client and **all confidential documents** prepared for the purpose of providing legal services to a client in relation to a proceeding the client is or may be or was/might have been a party.
- The key difference with **s 120** is that the dominant purpose is ‘preparing for or conducting *the* proceeding’ whereas s 119 says it is ‘the client being provided with professional legal services’ relating to a proceeding, or an anticipated proceeding.

The Judicial college breaks down sections 118 and 119 further by defining the terms and phrases ‘on objection by a client’; ‘disclosure’, ‘communication’, ‘legal advice’, ‘purpose’ and ‘dominant purpose’:

‘On objection by a client’	In the absence of instructions to waive a legal advice or litigation privilege, a lawyer retains the normal obligation to claim the privilege on behalf of the client – Joint Report (ALRC 102).
‘Disclosure’	Austin J in <i>Re Southland Coal Pty Ltd (rec and mgrs appts) (in liq)</i> [2006] NSWSC 899 notes there must be a definite and reasonable foundation to a claim that confidential communications or docs would be disclosed: ‘disclosure does not occur if what is adduced in evidence merely causes the reader to ‘wonder or speculate whether legal advice has been obtained and what was the substance of that advice’.
‘Communication’	Odgers notes that for the purpose of determining whether client legal privilege attached to a particular communication: <ul style="list-style-type: none">- If a communication refers to an earlier communication, each communication must be considered separately; and- Non-privileged material does not become privileged by later being included in a privileged communication. (i.e. the actual opinion of an expert consulted by a party to litigation will not be privileged even if a report containing that opinion is the subject of privilege.)
‘Legal advice’	Interpreted broadly to include advice as to what can ‘prudently and sensibly be done in the relevant legal context’ – <i>Workcover Authority of NSW, General Manager v Law Society of NSW</i> (2006) 65 NSWLR 502; [2006] NSWCA 84 at [77], citing <i>Balabel v Air India</i> [1988] Ch 317.
‘Purpose’	Is a question of fact - (<i>Esso Australia Resources Ltd v Commissioner of Taxation</i> (1999) 201 CLR 49; [1999] HCA 67); is to be determined at the time the communication was made or document was created – <i>Pratt</i> 136 FCR 357; must be determined objectively; cannot be proved by mere assertion of a third party, as distinct from a mere possibility, but it does not have to be more likely than not - <i>NSW v Jackson</i> [2007] NSWCA 279 at [67 – 69].
‘Dominant purpose’	The dominant purpose of the communication must be determined objectively, with regard to all of the circumstances in which it was made and its nature – <i>Grant v Downs</i> (1976) 135 CLR 674 at 689. It is necessary to take an objective view of all of the evidence and to take into account the evidence of not only the author but also that of the person or authority under whose directions the document was prepared. If the document would have been prepared irrespective of the intention to obtain professional legal services, then it will not satisfy the test – at 688 of <i>Grant v Downs</i> .

s 122 - Loss of client legal privilege: consent related matters

- (1) This Division does not prevent the adducing of evidence given with the consent of the **client** or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the **client** or party concerned has acted in a way that is inconsistent with the **client** or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.
- (3) Without limiting subsection (2), a **client** or party is taken to have so acted if—
 - (a) the **client** or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
 - (b) the substance of the evidence has been disclosed with the express or implied consent of the **client** or party.
- (4) The reference in subsection (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the **client** or party or of a lawyer of the **client** or party unless the employee or agent was authorised by the **client**, party or lawyer to make the disclosure.
- (5) A **client** or party is not taken to have acted in a manner inconsistent with the **client** or party objecting to the adducing of the evidence merely because—
 - (a) the substance of the evidence has been disclosed—
 - (i) in the course of making a **confidential communication** or preparing a **confidential document**; or
 - (ii) as a result of duress or deception; or
 - (iii) under compulsion of **law**; or
 - (iv) if the **client** or party is a body established by, or a person holding an office under, an **Australian law**—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the **law**, or part of the **law**, under which the body is established or the office is held; or
 - (b) of a disclosure by a **client** to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the **client** and the other person; or
 - (c) of a disclosure to a person with whom the **client** or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an **Australian court** or a **foreign court**.
- (6) This Division does not prevent the adducing of evidence of a **document** that a **witness** has used to try to revive the **witness's** memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in

Commentary

Loss of client legal privilege generally (s 121) if:

- The evidence is relevant to a question concerning the intentions, or competence in law, of a client or a party who has died (s 121(1));
- The court would be prevented from enforcing an order of an Australian court without the privileged evidence (s121(2)); or
- The evidence is of a communication or document that affects a right of a person (s 121(3)).

Loss of client legal privilege - consent and related matters (s 122)

Section 122 **permits** the adducing of evidence which would otherwise attract client legal privilege if a client or party:

- consents (s 122(1); or
- has acted inconsistently with the maintenance of the privilege (s122(2)).

Exceptions:

- Sections 122(4) and (5) provide exceptions to the waiver rule; and
- s 122(6) provides client legal privilege does not apply to docs used by a witness to revive memory pursuant to s 32 or s 33.

‘Consent’ - s 122(1)

- Although s 122(1) refers only to ‘consent’, it has been held to include implied or imputed consent - (*Perpetual Trustees (WA) v Equuscorp Pty Ltd* [1999] FCA 925; see also *Avanes v Marshall* [2006] NSWSC 191 at [30]-[31] per Gzell J).

‘Acted in a way that is inconsistent’ - S 122(2)

- The underlying rationale for this provision is that client legal privilege ‘should not extend beyond what is necessary and...voluntary publication by the client should bring the privilege to an end’.
- ‘[I]t is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver’ – *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
- The Court continued, ‘[w]aiver may be express or implied’ and ‘what brings [it] about is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large’ - at [29] of *Mann*.

‘Knowingly and voluntarily disclosed’ - s122(3)(a),(4), (5)

- To determine if the person “knowingly” made the disclosure, evidence of that person’s state of mind may be relevant and admissible - *QUBE Logistics (Vic) v Wimmera* [2013] VSC 659 at [96]. ‘Voluntary’ has been interpreted to mean something other than ‘under compulsion of law’ and disclosure that is not made by way of mistake (except in circumstances of formal discovery).
- For privilege to be lost under this limb, the disclosure must be both knowing and voluntary. ‘Knowing’ could include by way of mistake, but this would be likely to impugn ‘voluntary’. Inadvertent disclosure would not cause a loss of privilege (but would still be subject to the other provisions of this section).

‘Disclosed with express or implied consent’ – s 122(3)(b), (5)

- For there to be effective consent under s 122(3)(b), that consent must be given knowingly and voluntarily.

s 123 – accused	s 124 – joint clients	s 125 – misconduct	s 126 - related communications and docs
<p>In a criminal proceeding, this Division does not prevent an accused from adducing evidence unless it is evidence of—</p> <p>(a) a confidential communication made between an associated accused and a lawyer acting for that person in connection with the prosecution of that person; or</p> <p>(b) the contents of a confidential document prepared by an associated accused or by a lawyer acting for that person in connection with the prosecution of that person.</p>	<p>(1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.</p> <p>(2) This Division does not prevent one of those parties from adducing evidence of—</p> <p>(a) a communication made by any one of them to the lawyer; or</p> <p>(b) the contents of a confidential document prepared by or at the direction or request of any one of them— in connection with that matter.</p>	<p>(1) This Division does not prevent the adducing of evidence of—</p> <p>(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or</p> <p>(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.</p> <p>(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that—</p> <p>(a) the fraud, offence or act, or the abuse of power, was committed; and</p> <p>(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power— the court may find that the communication was so made or the document so prepared.</p> <p>(3) In this section, power means a power conferred by or under an Australian law.</p>	<p>If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.</p>

Commentary

s 123 – accused

- Creates a statutory exception to the privilege established by ss118 and 119 which broadly corresponds with the common law exception, unlike the common law, the Act preserves a co-accused's entitlement to claim client legal privilege even where the accused has possession of the document or information.
- This section enables 'an accused to use what would otherwise be privileged information if he has possession of it, but it does not in its own terms provide a vehicle for enforced production of such material' – (*R v Wilkie* [2008] NSWSC 885 at [4] per Grove J, cited with approval in *DPP (Cth) v Galloway (a pseudonym) & Ors* (2014) 46 VR 809; [2014] VSCA 272). Section 131A excludes the operation of this section in preliminary proceedings.

s 124 – joint clients

- This provision applies only in civil proceedings. Client legal privilege is lost if two or more parties have jointly retained a lawyer in relation to the same matter and evidence is adduced of a 'communication' made by any one of the parties to the lawyer or relating to the contents of a 'confidential document' prepared at the direction of any one of the parties.

s 125 - misconduct

- The UEA retains the common law approach whereby privilege is lost by reason of fraudulent or criminal conduct of the client or the lawyer, and expands it to include by reason of an act that renders a person liable to a civil penalty.
- The UEA also clarifies what is a deliberate abuse of statutory power.
- By s125, client legal privilege is lost for confidential communications made, and documents prepared:
 - in furtherance of a fraud, offence, or act that renders a person liable to a civil penalty; or
 - for a deliberate abuse of statutory power.

s 126 – related communications and doc's

- If client legal privilege is lost over a communication or document, then any such privilege over other, related communications or documents is lost if those other communications or documents are reasonably necessary to enable a proper understanding of the first communication or document (s126; see also *Matthews v SPI Electricity Pty Ltd & Ors (No 7)* [2013] VSC 553 at [16], citing *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577; [2007] NSWSC 859 at [45]-[46]).

Principles of Evidence

Character and credibility

The Credibility of Witnesses (ss 101A – 108C, *Evidence Act 2008* (Vic))

- Credibility evidence can impact on the reliability of a witness' evidence and may affect the fact-finding process.
- Such evidence is not directly or indirectly relevant to the facts in issue.
- Has the potential to be unfairly prejudicial and could affect the efficiency and cost-effectiveness of a trial.
- Admissibility is limited both at common law and under the Uniform Evidence Law (**UEA**)
- The dictionary of the Act provides a definition of “credibility of a witness”: ... includes the witness' ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence
- Examples: matters which affect memory – fatigue, drug or alcohol use at the time of incident. Passage of time. Prior criminal history. Motive to live, bias etc.

Credibility of witnesses – prima facie inadmissible

- S 101A – Defines credibility evidence as evidence in relation to a witness or other person that is relevant to:
 - Assess the credibility of a witness or person and is only relevant because it affects the assessment of credibility (s 101A(a)) or;
 - Relevant to assess the credibility of a witness or person and for another purpose for which it is not admissible (s 101A(b)).
- S 102 – ***The credibility rule*** – credibility evidence about a witness is not admissible (unless an exceptional applies)
- S 102 only applies if the evidence satisfied “credibility evidence” definition in s 101A.
- Note these principles relate to the **admissibility** of evidence, often adduced in xxn or rexn. They pair with the **procedures** of xxn which we have already looked at.

Exceptions – Answers in Cross-Examination

- S 103 – **Cross-Examination:** The credibility rule does not apply to evidence adduced in cross-examination of a witness (**ie the answers given to questions**) if the evidence could substantially affect the assessment of the credibility of the witness (s 103(1)).
- S 103 – The court, in determining that the exception applies, may have regard to whether:
 - the evidence tends to prove that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth; and
 - the period of time that has elapsed since that acts or events to which the evidence relates had occurred.

Exceptions – Cross-Examining the Accused in a criminal case

- S 104 – Applies in addition to s 103 for criminal proceedings. An accused must not be cross-examined about their credibility unless the court gives leave. It provides additional and different safeguards to s 103 so that an accused may not be cross-examined about matters going to his or her credibility unless the court gives leave or the cross-examination is directed to a specified matter.
- S 104 – Leave should not be granted unless evidence adduced by the accused that;
 - Tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and
 - Is relevant solely or mainly to the witness's credibility.
- S 104 – Evidence referred to above does not include reference to evidence of conduct relating to events which the accused is being prosecuted or the investigation into the offence leading to the prosecution.
- S 104 – Leave is not required for a prosecutor to cross-examine the accused about whether they;
 - are biased or have a motive to be untruthful; or
 - are, or were, unable to be aware of or recall matters to which their evidence relates; or
 - Have made a prior inconsistent statement.

Exceptions – Rebutting denials by other evidence (this moves past cross-examination and into the examiner calling evidence from another witness as to the matters first raised in cross-examination)

- S 106 – The credibility rule does not apply to evidence that is relevant to a witness' credibility and that is adduced otherwise than from the witness whose credibility is in question if;
 - In cross-examination of the witness the substance of the evidence was put to the witness and the witness denied or did not admit or agree to the substance of the evidence; and
 - The court gives leave.
- S 106: ordinarily, answers to questions put in cross-examination are final, but note the exceptions carefully: see next slide.

S 106 – When leave is not required to cross-examine on credibility

- S 106 – Leave is not required to cross-examine on rebuttal denials if the evidence tends to prove that:
 - the witness is biased or has a motive for being untruthful; or
 - has been convicted of an offence, including an offence against the law of a foreign country; or
 - has made a prior inconsistent statement; or
 - is or was unable to be aware of the matters which the evidence relates or has knowingly or recklessly made a false representation while under an obligation under Australian or foreign law to tell the truth.
- So, let's use the example of a PIS to work through this provision. You may recall the procedure for putting a PIS to a witness. In xxn – start with s 43. Then move to s 103, and then if the witness denies the statements, finally, move to s 106.
- Indeed, it also applies to an unfavourable witness where the examiner has been granted leave to xxn the witness under s 38. Move to s 43, then 103, then 106.
- And the last point – admissibility under the credibility rules means that the PIS is admissible without regard to the hearsay rule under s 60

Exceptions – Re-establishing credibility (re-xn)

- S 108(1) – The credibility rule does not apply to evidence adduced in re-examination of a witness subject to ss 135-137 on admissibility. Leave is not required here, but the test for relevance (see ss 55-58) must be satisfied.
- S 108(3) – The credibility rule does not apply to evidence of a **prior consistent statement** of a witness if;
 - Evidence of prior inconsistent statement of the witness has been admitted; or
 - It is or will be suggested (either express or implied) that evidence given by the witness has been fabricated or re-constructed (deliberately or otherwise) or is the result of a suggestion; and (**NB:** Hearsay evidence under this section can still be admitted pursuant to s 66)
 - The court gives leave to adduce evidence of the prior consistent statement (see s 39).
- S 108 provides exceptions to support the credibility of a witness in two situations, one being where evidence is adduced in re-examination and the other being where new evidence relates to prior consistent statements which can only be lead if the court gives leave with the deciding factor being whether the evidence will rebut an attack on credibility.

The character of the accused

- Unsurprisingly, special rules apply
- Logical consistency between this topic and tendency and coincidence evidence
- Admissibility rules are found in part 3.8 – character (criminal trials); ss 109-112
- Read in combination with Part 3.7 – credibility (which we have dealt in relation to witnesses generally, but which may also have application to the accused), and Part 3.6 – Tendency and Coincidence

Character vs credibility

- Consider the difference – character relates to simple thinking of the accused's good character and/or the accused's bad character; credibility is different, it relates to believability of a witness
- Often the accused in a criminal case is not a witness, but if they are, or if they have given a pre-trial account such as a police interview or an account to an expert, credibility may be relevant

Good character

- Evidence of good character is not merely evidence as to credit. It is evidence that *'could rationally affect (directly or indirectly) the assessment of the probability' that the accused committed the offences charged* (TKWJ v R (2002) 212 CLR 124; [2002] HCA 46 at [35] and [94])
- S 110(1) – The hearsay, opinion, tendency and credibility rule do not apply to evidence adduced by an accused to prove (directly or implied) that they are, either generally or in a particular respect, a person of good character.
- S 110(2)-(3) – The hearsay, opinion, tendency and credibility rule also do not apply to evidence adduced to rebut any assertion that the accused is of good character, either generally or in a particular respect.
- S 110(2)-(3) – The hearsay, opinion, tendency and credibility rule do not preclude the prosecution from cross-examining the accused on evidence which has been admitted to regarding his good character, either generally or on one aspect.

- UEA changes common law so that character is divisible, meaning that accused can lead evidence of good character on one particular aspect which putting entire character in issue. This means that if good character evidence lead by accused in one particular respect, then attack can only be lead on this particular respect in return (see *Bishop v R* (2013) 39 VR 642; [2013] VSCA 273 at [7]).
- ‘In a particular respect’ has been interpreted to mean as relating to a particular characteristic, such as gentleness, generosity or good citizenship. It may also refer to a specific context in which the accused has acted in a particular way (see *Bishop v R* (2013) VR 642[; [2013] VSCA 273 at [8]). It may also be evidence of good character generally, expect in a particular respect, such as an accused adducing evidence that they have no prior criminal convictions similar to the one they are being prosecuted for.
- Melbourne: this evidence has dual relevance
 - 1. To improbability of D committing offence
 - 2. To D’s credibility
- BUT: TJ retains discretion as to jury directions as to one or both these matters

Form which evidence of good character may take

- Xxn of police officers: D is “not known” to police, or no record of D having been convicted of an offence
- Honest
- Not violent
- Kind and gentle person; family person
- Worthy acts

Rebuttal of evidence of good character

- S 112 - The court may only give the Crown leave to cross-examine the accused about his or her evidence of good character if the accused ***intentionally and deliberately*** adduced evidence of his or her character (see *Gabriel v R* (1997) 76 FCR 279; *Huges v R* [2013] VSCA 338 at [24]).
- Leave may be given under certain terms by the trial judge assuming witness is competent and compellable (see Ss 12, 192)
- Not necessarily via xxn, as the evidence may not necessarily have been adduced via D, if they do not give sworn evidence – could be adduced through other witnesses, in which case s 112 does not apply

Credibility of the accused

- Relevant if the accused participates in a police interview; and/or gives evidence at trial
- As a gentle reminder, we looked at this earlier: s 104 – moderates credibility rules for evidence at trial – see slides above