Evidence revision

General exam tips re evidence

- Past papers have clearly labelled the subject matter of the question (eg, “Evidence”)
- Read the call of the question very carefully and answer the question or questions asked
- Cite the law, state the law, apply each element to the facts of the case, and reach the conclusion; if there is a link to another area of law (eg expert evidence requires disclosure in accordance with the Criminal Procedure Act) state that clearly and briefly, then move on
- Adhere slavishly to the time limit for each question, eg if you have 180 minutes and 100 marks, you have 1.8 minutes per available mark, and not another second
- The more practice problems you attempt before the exam, the more fluent and efficient you will become at stating the law quickly and accurately, which will leave more time for factual analysis
- The answer does not need to be perfect in order for you to pass this exam

Relevance problems

- You may be asked a problem that does not seem to evoke any of the specific exclusionary rules; this may be a problem that relates to the preliminary issue of relevance
- Or, you may be told for instance that the trial Judge has ruled that the evidence is sufficiently relevant, then you are asked to explain what this means
- Relevance issues require identification of ss 55 and 56 and consideration of how those rules apply to the facts of the case
- Note you will need to engage with the facts in issue of the specific case – ie, how does this evidence make the facts in issue any more or less likely
- (is it direct or circumstantial evidence?)
- (else it could be relevant to credibility)

Ss 135, 136, 137

- Be able to recite what probative value is, and identify what the probative value of a particular piece of evidence is
- Be able to recite what prejudicial effect is, and identify what the prejudicial effect of a particular piece of evidence is
- Consider whether limits may be placed on admissibility via s 136 – eg evidence in for a credibility purpose, but not a hearsay purpose
- In managing prejudicial effect, be conscious of noting “available jury directions which may serve to mitigate prejudice”

Questioning of witnesses

- Competence: s 12
- Lack of capacity: s 13
  - Recall three options:
  - Competence to give sworn evidence
  - Competence to give unsworn evidence
  - Not competent
- Accused in a criminal case: s 17
- Accused’s spouse, parents, children in a criminal case: s 18

Examination in chief

- S 37 – no leading questions (which (a) directly or indirectly suggests a particular answer to the question or (b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked)
- Except if :
  - the court gives leave; or
  - the question relates to a matter introductory to the witness' evidence; or
  - no objection is made to the question and each party (other than the party conducting the examination-in-chief or re-examination) is represented; or
  - the question relates to a matter that is not in dispute; or
  - the question is asked of a witness who has specialised knowledge based on his or her training, study or experience and the question is asked for the purpose of obtaining the witness' opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given (s37(1)).
  - See also s 33, evidence from police witnesses

Refreshing memory rules

- Out of court:
  - W may, without leave, refer to any “document or thing” to refresh their memory but must produce it for inspection if directed (s 34) on pain of the evidence being excluded.
- In court:
  - my be referred to (s 32(1)) and read aloud (s 32(3)) with leave if it was produced when the events in question were fresh in W’s memory or it if later found by them to be true (s 32(2)). With leave, W may read from the document if their memory is not revived (s 32(3)).
  - The document must be produced if ordered (s 32(4)).
  - Inspection of a document or thing so used does not require its tender (s 35).

Unfavourable witness rules

- S 38(1) A court may grant leave for a party to question its own witness as though the party were cross-examining the witness, about the following:
  - evidence given by the witness that is unfavourable to the party; or
  - a matter 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
  - whether the witness has, at any time, made a prior inconsistent statement.
- The party questioning the witness may, with leave of the court, also question the witness about matter relevant only to the witness' credibility.
- Recall how this links with credibility rules, eg with a PIS
  - Step 1: ? Unfavourable s 38
  - Step 2: s 106 in proper application of Browne v Dunn
  - Step 3: exception to the hearsay rule: s 60

Failure by party to call witnesses: Jones v Dunkel

- In a civil case, if there is an unexplained failure by a party to give evidence, to call witnesses or to tender documents or other evidence. In appropriate circumstances, this may lead to an inference that the uncalled evidence would not have assisted the party – if there is a jury, this would take the form of a jury direction: *Jones v Dunkel* (1959) 101 CLR 298
- Criminal case, prosecution: where the prosecution fails to call or question a witness without providing a reasonable explanation, the defence may now only seek a direction under Jury Directions Act 2015, s 43 (a ‘section 43 direction’).
- This direction informs the jury that it may conclude that the witness would not have assisted the prosecution’s case (Jury Directions Act 2015, s 43).
- Does not apply to an accused in a criminal case

Cross-examination

- Not limited to non-leading questions
- Improper questions, ie questions that are misleading or confusing; or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or have no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability), are not permitted (**s 41**)
- PIS procedure: s 43 requires the witness be asked about the facts and, if there is inconsistency between what they say about them in Court and the contents of an earlier statement by that W, the latter may be proved through W, or if W does not admit the earlier statement, another witness (s 43(2)) – and then cross reference credibility rules

Browne v Dunn

- Where a party proposes to lead evidence that contradicts or discredits an earlier witness, how and why that later evidence will be led/its essential features and the factual inferences to be drawn from it must be put to the witness in XXN so they have an opportunity to offer an explanation and lead evidence in rebuttal.
- Breach may affect the weight given to W’s evidence and often leads to curative jury direction. Significant breaches may require discharge of the jury. Further, submissions or evidence led in breach of the rule may be rejected on appeal.

Privilege against self incrimination

- Steps in problem solving:
- S 128(1): W must (1) object to giving evidence on the ground the evidence may tend to prove (2) has committed an offence against or arising under an Australian law or a law of a foreign country; or is liable to a civil penalty.
- 128(2): court must determine whether or not there are reasonable grounds for the objection – if no reasonable grounds, W must answer
- If there are reasonable grounds, 128(3): the court is not to require the witness to give the evidence, and is to inform the witness that the witness need not give the evidence unless require by the court to do so under ss (4); and that the court will give a certificate under this section if W willingly gives the evidence without being required to do so under ss (4); or W gives the evidence after being required to do so under ss (4) and the effect of such certificate – some Ws will then give evidence without a 128(4) determination, and a certificate issues

Privilege against self incrimination - 2

- 128(4) If W refuses, the court may require the witness give the evidence if the court is satisfied that the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, law of a foreign country; and the interests of justice require that the witness give the evidence.
- 128(5): If the witness either willing gives the evidence without being required to do so under ss (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of that evidence.

Matters of state / public interest immunity

- S 130(1): If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document NOT be adduced as evidence.
- Identify competing public policies in circumstances of the case with precision
- Public interest in preserving confidentiality: evidence may prejudice the security, defence or international relations of Australia; damage the relations between the Cth and a State or between 2 or more States; prejudice the prevention, investigation or prosecution of an offence; prejudice the prevention or investigation of, or the conduct of proceedings for the recovery of civil penalties brought with respect to, other contraventions of the law; disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Cth or a State; or prejudice the proper functioning of the government of the Cth or a State.
- What is public interest in favour of disclosure?

Matters of state / public interest immunity 2

- S 130(5): Without limiting the matters the court may take into account for the purposes of ss (1), it is to take into account the following matters–

  - The importance of the information or the document in the proceeding;
  - If the proceeding is a criminal proceeding – whether the party seeking to adduce the evidence of the information or document is an accused or the prosecutor;
  - The nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
  - The likely effect of adducing evidence of the information or document, and the means available to limit its publication;
  - Whether the substance of the information or document has already been published;
  - If the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused – whether the direction is to be made subject to the condition that the prosecution be stayed.

Client legal privilege

- S 117: note meaning of client, lawyer, confidential communication, confidential document
- Under s 118: if the confidential communication or confidential document relates to communications between lawyer and client for dominant purpose of legal advice, privilege applies
- Under s 118: if a confidential document is prepared by a TP for dominant purpose of lawyer providing legal advice or instructions, privilege applies
- Under s 119: if the confidential communication between client and TP, or lawyer and TP, or confidential document, relates to dominant purpose of legal services relating to proceedings, privilege applies

Loss of client legal privilege

- S 122: allows for express waiver (1); or imputed waiver if a client knowingly and voluntarily discloses the substance of the evidence or acts in a way that is inconsistent with preserving the objection

- S 125 indicates that the privilege does not apply to a communication or document in furtherance of the commission of a crime or fraud, or in furtherance of a deliberate abuse of power

Credibility of witnesses

- Ss 101A, 102 – starting point – credibility evidence is generally inadmissible unless it falls within one of the exceptions
- S 103 – 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

Credibility of the accused in a criminal case

- Starting point – need some narrative provided by the accused for the jury to be tasked with assessing credibility, eg police interview, evidence in trial
- 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.

Exception – Rebutting denials by other evidence

- 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 who's 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 – 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.

Exception – re-establishing credibility

- S 108(1) – The credibility rule does not apply to evidence adduced in re-examination.
- 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 -
  - The court gives leave to adduce evidence of the prior consistent statement.

The character of the accused

- 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 in a particular respect.

- S 112: An accused must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.
- (any grant of leave under the Evidence Act is governed by s 192)

Tendency and coincidence

- Tendency:
- Evidence of character, reputation, conduct or a tendency that a person has or had, which is adduced to prove that (a) a person has a tendency to behave in a particular way, and/or (b) to have a particular state of mind, from which the jury may infer a fact in issue.
- Coincidence:
- Evidence of two or more similar events or circumstances, which is adduced to prove that, because the events or circumstances are so similar, it is improbable they occurred coincidentally, from which the jury may infer a fact in issue

Admissibility of tendency evidence

1. A tendency notice is filed and served (ss 97(1)(a))
2. The evidence has significant probative value (s 97(1)(b))
    - Assess using the two-step Hughes test:
    - 1. Evaluate the extent to which the evidence proves the tendency
    - 2. Evaluate the extent to which the evidence makes the facts in issue more likely
    - Does not require similarity (cf. Velkoski)
    - Consider factors such as the time-gap between the misconduct, unity between the misconduct, the specificity of the tendency
3. If the Prosecution adduces the evidence in a criminal case, its probative value substantially outweighs its prejudicial effect (s 101(2))
    - Consider what the prejudicial effect of the evidence is in the circumstances of the particular case, including such factors as whether the multiple similar allegations may encourage a jury to make assumptions, where the evidence is morally repugnant, where the evidence is weak
    - Consider relevant jury directions to mitigate prejudice

Admissibility of coincidence evidence

1. A coincidence notice is filed and served (ss 98(1)(a))
2. The evidence has significant probative value (s 98(1)(b))
    - Assess by reference to similarity in events and/or circumstances
    - Consider weakening factors such as passage of time, dissimilarity, admissions of collusion, contamination
3. If the Prosecution adduces the evidence in a criminal case, its probative value substantially outweighs its prejudicial effect (s 101(2))
    - Consider what the prejudicial effect of the evidence is in the circumstances of the particular case, including such factors as whether the multiple similar allegations may encourage a jury to make assumptions, where the evidence is morally repugnant, where the evidence is weak
    - Consider relevant jury directions to mitigate prejudice

Identification evidence

- ‘Identification evidence’ means an assertion by a W that the A was or resembles (based on what the W saw, heard or perceived using any of the five senses) a person who was present at the commission of the offence or an act connected to the commission of the offence at the time that the offence or act was committed.
- Cross-reference s 36 of the Jury Directions Act for warnings
- In criminal proceedings, consider s 114 which provides for the exclusion of ‘visual identification evidence’ (“VIE”) which means identification evidence based wholly or partly on what a person saw (eg. solely hearing is excluded), but does not include picture identification evidence.
- VIE is not admissible unless the A participated in an ID parade, it was not practicable to participate in an ID parade or the A refused to participate in an ID parade, and the W was not influenced to identify A.
- In determining whether it was reasonable to conduct an ID parade, the court may take into account a number of factors, including (1) the kind of offence and the gravity of the offence, (2) the importance of the evidence, (3) the practicality of conducting a parade (including if the A failed to cooperate in the conduct of the parade and if the identification was made at the time of the commission of the offence), (4) and the appropriateness of conducting a parade having regard, among other things, to the relationship between the A and the W.

Identification evidence (cont)

- ‘Picture identification evidence’ (“PIE”) means an identification made wholly or partly by the person who made the identification examining pictures kept for use by police officers. It is not admissible if the pictures examined suggest that they are pictures of persons in police custody.
- PIE is not admissible if A in police custody, unless:
  - A refused to take part in an ID parade; or
  - A’s appearance changed significantly between the commission of the offence and being taken into custody; or
  - it would not have been reasonable to have held an ID parade that included A.
- If PIE is admitted, the trial judge must, at the request of the A, inform the jury that the picture was taken after A was taken into custody re: this matter (if applicable), or warn the jury that they must not assume that A has a criminal record or has previously been charged with an offence

Opinion evidence

- S 76: generally inadmissible
- Exceptions include:
  - lay opinion (section 78)
  - expert opinion (section 79)

- S 78: lay opinions:
  - The opinion rule does not apply to evidence of an opinion expressed by a person if—
  - (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
  - (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

Expert evidence

- S 79: 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.
- Evidence must satisfy two criteria to be admissible under s79(1). First, the witness must have specialised knowledge based on his or her training, study or experience. Second, his or her opinion must be wholly or substantially based on that knowledge.
- May still be subject to exclusion or limitation under ss 135, 136, 137
- S 80: ultimate issue rule abolished
- Cross reference criminal procedure and the need for notice

Admissions

1. How is the statement / assertive conduct an admission? (how is it against interest)?
    - Admissible as an exception to the hearsay rule: s 81, limited to first hand: s 82
- Here, aggregate all facts relevant to the following heads of exclusion, including factors relating to the accused, and factors relating to police or interrogators' conduct

2. Exclusion at law
    - S 84: admissions influenced by violent, inhuman or degrading conduct (all proceedings
    - S 85: reliability (criminal proceedings)

3. Exclusion in the exercise of judicial discretion
    - S 90: fairness to the accused (criminal proceedings)
    - S 138: improperly or illegally obtained evidence (nb this section also applies to real evidence) (criminal proceedings)

Hearsay

1. What is the previous representation? (who is the out of court declarant, what was the declaration, who is the in court reporter)?
2. What is the purpose of tendering the evidence?
    - To prove the existence of a fact that it can reasonably be supposed that the person intended to assert? If so, hearsay and prima facie inadmissible under s 59
    - For some other purpose? If so, prima facie admissible and the hearsay rule does not apply: s 60
        - Note, not limited to first hand repetition; note also if there are significant risks of misuse, consider s 136
3. If it is hearsay and inadmissible, do any of the exceptions to the rule apply?
    - Ss 63 and 64: first hand hearsay in civil proceedings
    - Ss 65 and 66: first hand hearsay in criminal proceedings
        - If more than first hand repetition, inadmissible
        - If out of court declarant is not competent, inadmissible: s 62
    - S 66A: contemporaneous representations as to intention, state of mind etc
    - S 69: business records
    - S 71: electronic communications
    - S 81: admissions
    - (not an exhaustive list)