Children's Legal Service Conference 2015

Exclusion of evidence- Thinking strategically

Andrew Haesler SC [1]

Introduction

I want to address one of a number of strategies that must be adopted when preparing a case for trial in any court. Given my audience, I do so from the perspective of those who appear for the defence in the Children's Court.

A general rule of defence practice is 'less is more'! Effective advocacy in an individual case requires greater discernment. At every stage of trial preparation the question must be asked – what will I achieve by doing this?

Today I want to focus, by asking such questions and suggesting answers, on ways of excluding part or all of the evidence sought to be presented at trial. I had originally intended to focus on sections 90 and 135 and 138 **Evidence Act** 1995. However discussions with Children's' Court practitioners suggested it would be more useful if I also addressed both the key **Evidence Act** provisions and some specific issues, such as s 13 **Children (Criminal Proceedings) Act** 1987; what to do if a child is unfit to plead and the common law doctrine of *doli incapax* or age incapacity. But before I do, can I sound a note of caution.

A lot of court time and defence preparation time is lost in speculative attempts to exclude admissible evidence. If everyone knows a competent judge must admit the evidence and that the Court of Criminal Appeal will support them - why bother? If the evidence you don't want is properly tested at trial sometimes a better result might be achieved for the accused. For example the witnesses' credibility might be damaged and take the prosecution case down. At times it is unfortunately obvious that if the effort spent on fruitless legal challenges had been spent on trial preparation, reviewing the evidence and on how the defence case was to be presented, a different result might have been achieved.

Ask a few fundamental questions –

i. Is it worth making the application?

[1] A Judge of the District Court of NSW; the remarks set out are my personal views and not those of the Court.

ii. Could I use the proposed evidence to the accused's advantage?

iii. Is my time better spent preparing to deal with more important issues, including how best to present the defence case?

After that digression, can I return to the topic of the paper? My aim here is to provide a practical guide to how you, as advocates, can give practical assistance to trial courts and enable the fact finder, whether it be a Magistrate, Judge or jury to rationally evaluate the admissible evidence. My aim is to give some practical guidance in a difficult area.

Evaluating what potential evidence should be excluded from a criminal trial, whether that trial is summary or indictable, heard by a Magistrate or Judge, or a Judge with a jury, requires thinking tactically and preparation! Remember the rule of the 5 P's – Preparation Prevents Piss Poor Performance!

Evidence Act applications

Relevance

Often this necessary first question is missed. Only evidence that is relevant in a proceeding is admissible in the proceeding: s 56 **Evidence Act**.

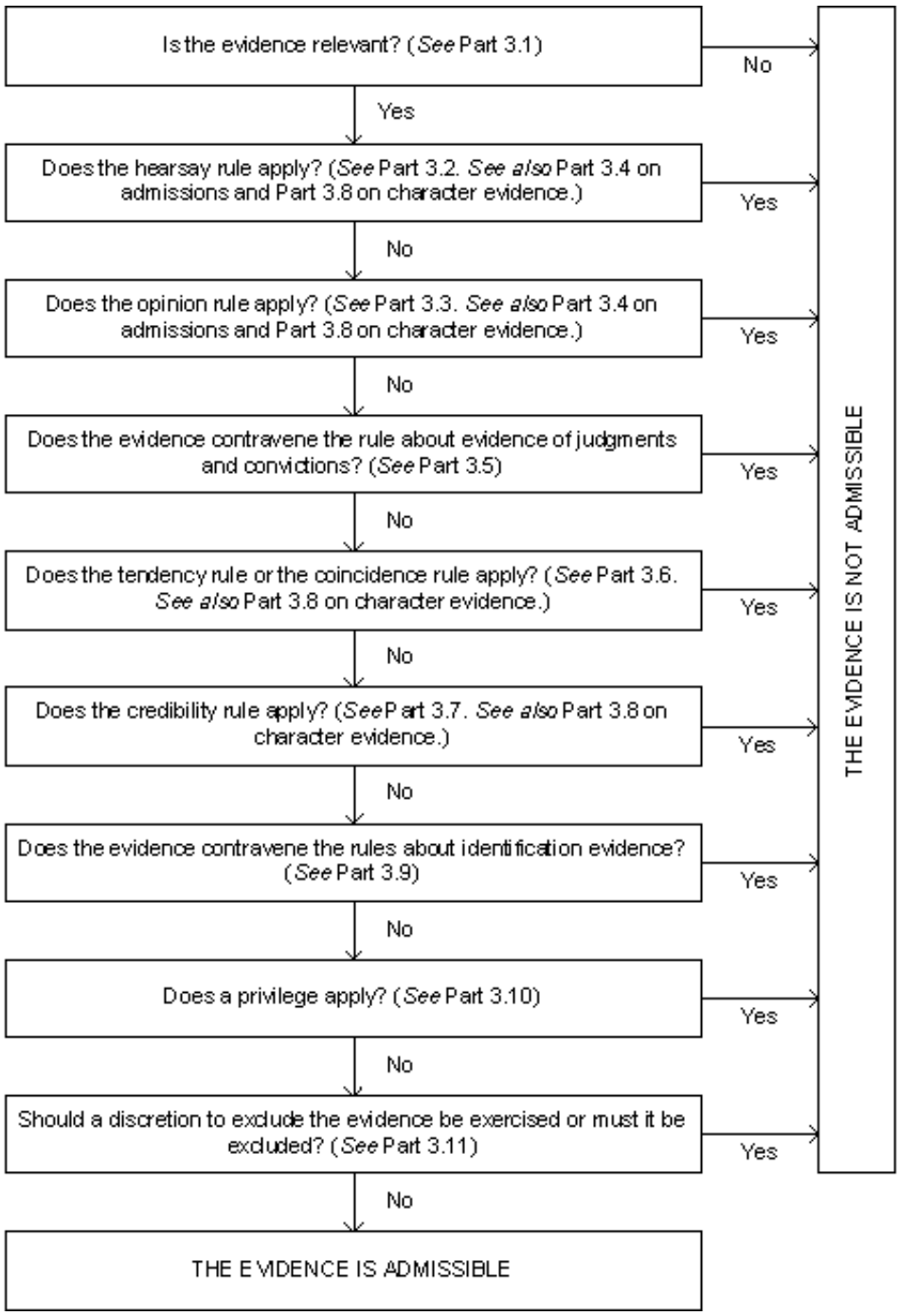
Evidence that is relevant in a proceeding, "is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding:" s55 (1).

So when preparing for trial, ask: is the proposed evidence relevant? If it is not it cannot, and should not, be led unless the defence see some forensic advantage in it.

Care needs to be taken. Judges and Magistrates know that relevance often requires an appreciation of the whole case. Unless clearly it is irrelevant, the parties, especially the prosecution, will be allowed considerable latitude. As was noted in *Elomar & others v R* [2014] NSWCCA 303 at [239], the impugned evidence should not be isolated from other evidence, especially in a circumstantial case. Such a case "creates a mosaic of sometimes apparently tiny items of evidence that, when put together, make up a whole picture. The tiniest fragment of evidence might, on completion of the mosaic, be shown to have significant relevance."

Read the Evidence Act

Another obvious but necessary task! Something often forgotten is that Chapter 3 of the **Evidence Act** is headed "Admissibility of Evidence". Chapter 3 is introduced by the following chart:



The chart's questions in the left column request an answer.

If the answer is "No" to the first s 55 question, or "yes" to the remainder, the answer in the middle column then points to only one answer: "THE EVIDENCE IS INADMISSIBLE."

Read the commentaries! This paper is no substitute for what is set out in *Uniform Evidence Law* 11th edition, Stephen Odgers SC, 2014; *The New Law of Evidence: Annotation and Commentary on the Uniform Evidence Acts* - Second Edition, J Anderson, N Williams and L Clegg, 2009; *Cross on Evidence*, 10th edition, Heydon, J, 2014

Exclusion Rules

The **Evidence Act** creates powers and duties to exclude evidence: sections 84 85, 90, 101, 135, 137 and 138(3) - all in Chapter 3. It also includes the specific provisions relating to compellability of family members and exclusion of their evidence in certain circumstances if objection to giving evidence is taken: sections 13 -18, discussed below.

At common law a special body of rules developed allowing for the rejection of otherwise admissible evidence. Most have been picked up by the **Evidence Act**. The genesis in common law of the various exclusion discretions , and so far as s 137 is concerned, mandatory provisions were reviewed very recently by the High Court in *Police v Dunstall* [2015] HCA 26 from [26] - [33]. They are:

1. The fairness discretion relating to admissions or confessions: *R v Lee* (1950) 82 CLR 133; *Foster v The Queen* (1993) 67 ALJR 550; *R v Swaffield* (1998) 192 CLR 159 - section 90.
2. Discretionary exclusion of non-confessional evidence where the probative value of the evidence is outweighed by the risk of prejudice to the defendant: *R v Christie* [1914] AC 545 - section 137, although it has become a mandatory provision.
3. Discretionary exclusion of non-confessional evidence where the evidence has been tainted by illegality or impropriety on the part of the law enforcement authority: *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22 - section 138. The rationale for the latter discretion is "not so much a concern with fairness to the defendant as with the public policy of not giving the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law": see also *Ridgeway v The Queen* (1995) 184 CLR 19.
4. And "a residual common law discretion to exclude admissible evidence on the ground of unfairness": *R v Edelsten* (1990) 21 NSWLR 542 at 554; *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231; *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533 at [549]; *Haddara v The Queen* [2014] VSCA 100.

The Police Interview or ERISP

The **Evidence Act**, in particular sections 90, 137 and 138[2]. Section 138 must be read in conjunction with s 139 as breach of a s139 provision may render a confession improperly obtained for s138 purposes. Each section has particular relevance when a court is asked to determine the admissibility of the records of interview containing confessions, admissions or other representations against the accused's interests; in so far as any of the circumstances in which they were obtained may give rise to questions as to whether their truth was adversely affected, or to questions as to whether there would be any unfairness if they were used, or of them having been obtained improperly, illegally, or in circumstances of oppression.

The burden of proving that the Electronically Recorded Interviews with Suspect Persons (ERISPs) qualify for admission rests upon the Crown. The standard of proof specified is on the balance of probabilities: s 142 **Evidence Act.** Section 139 spells out some special rules that apply to questioning.

When preparing a matter for hearing where an ERISP or other recorded interview with a child or young person might be detrimental if tendered ask, in the context of your instructions, whether:

1. There was any non-compliance with the relevant legislation;
2. Was the caution communicated to the person so that they were aware that if they spoke what was said may be given in evidence; [3]
3. Was a support person present;
4. When was the arrest or when was the detention warrant obtained;
5. Was the accused given an opportunity to select for him/herself a support person;
6. Was the support person advised or not advised in relation to his/her role and allowed to perform the duties and rights expected of him/her;
7. Was the accused given the requisite assistance by the custody manager;
8. Was the interview conducted at a time when the accused was tired, or affected by previous drug ingestion or withdrawal, rendering him/her unable to properly concentrate on the task in hand;
9. Was any advice given or not given to him/her concerning his/her entitlement to communicate with a friend or relative or legal practitioner;

[2] But also sections 84, 85, and 135.
[3] R v Deng [2001] NSWCCA 153 at[17]

10. Whether the accused was detained beyond the relevant permitted investigation period, as calculated in accordance with **Law Enforcement (Powers and Responsibilities) Act** 2002 (**LEPRA** Act);
11. Was the need for the accused to have an interpreter considered;
12. Were adequate records kept by the custody managers;
13. Whether any necessary cautions and summary of advice was given to the accused by the Custody manager.[4]

When it comes to interviews of children, and particularly those in custody following arrest, the rules, including section 13 **Children (Criminal Proceedings) Act** 1987(discussed below), are designed to protect them from any disadvantage inherent in their age, as well as to protect them from any form of police impropriety.

In *R v Phung and Huynh* [2001] NSWSC 115, Wood CJ at CL said;

> "The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them, is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law": at [39].

Section 90 – Discretion to exclude admission

Section 90 is the principle safety net if impropriety or unfairness is alleged in relation to confessional statements.

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution, and
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

Section 90 is a reformulation of a long line of authority best summarised by Dixon J In *McDermott v The Queen* (1948) 26 CLR 501 at [511]: "If he speaks because he is overborne, his confessional

[4] A similar list was applied by Adamson J in *R v FE* [2013] NSWSC 1692, discussed below.

statement cannot be received in evidence and it doesn't matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, it cannot be voluntary."

The section is designed to deal with potential abuse of the power to arrest and detain given police. "The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of an accused person. … This unfairness relates to the right of an accused to a fair trial … It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted": See in a common law context *The Queen v Swaffield; Pavic v The Queen* (1998) 192 CLR 159, at[52] & [54].

Section 137

Section 137 is the final safety net if impropriety or unfairness is alleged in relation to any evidence adduced by the prosecution in a criminal hearing. It is a mandatory provision.

> 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.

Sections 138 and 139

As the High Court noted in *Police v Dunstall* at [26], s 138 picks up common law discretion, not so much a concern with fairness to an accused "as with the public policy of not giving the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law." Where the section is being considered in order to exclude confessional statements or representations the terms of s 139 must also be considered.

Section 138 – Discretion to exclude improperly or illegally obtained evidence

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law, or
> (b) in consequence of an impropriety or of a contravention of an Australian law,
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during, or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and
(b) the importance of the evidence in the proceeding, and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
(d) the gravity of the impropriety or contravention, and
(e) whether the impropriety or contravention was deliberate or reckless, and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights* , and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Section 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.

Probative value

Sections 137 and 138 require an assessment of the probative value of the evidence. The **Evidence Act** Dictionary reads:

> ***""Probative value"*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

What is probative value? Step one involves identifying the fact in issue that the evidence seeks to go to or prove. The value of the evidence can be derived from the extent to which the proposed evidence could rationally affect the assessment of the probability of the existence of a fact in issue. As the law now stands in NSW a Court assessing probative value for admissibility purposes does not, in fact must not, determine the ultimate issue or even decide whether the evidence should be accepted. Rather, it must assess the capacity of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue: see *Ali v R* [2015] NSWCCA 72 at [66].

How we came to this point and where the law may go when the High Court considers s 137 in detail requires some explanation. In doing so I make no apology for the repetition of the phrase "could rationally affect the assessment of the probability of the existence of a fact in issue" or for my continued insertion of the term into this narrative.

In Evidence's *actual* probative value is dependent on many things:

1. The credibility and reliability of the witness through whom the evidence is given.

2. The evidences' relationship with other evidence, particularly other evidence that is accepted.

3. The existence of competing inferences. Where an item of evidence is capable of different interpretations, or is susceptible of "competing inferences", its actual probative value will depend upon what interpretation is placed on it, or what inferences are actually drawn from it: *Burton* [2013] NSWCCA 335 at [60].

4. The challenges made to the evidence. And ultimately

5. The interpretation placed on it by the fact finder when they come to determine if it could rationally affect the assessment of the probability of the existence of a fact in issue.

Now the point made by Spigelman CJ in *Shamouil v R* [2006] NSWCCA 112, Simpson J and most NSW judges is that when considering probative value at the *admissibility* stage the court is *not* concerned with its actual probative value because that assessment must be left for the trier of fact. Admissibility questions require the Judge or Magistrate, even if they ultimately must decide the issues, to act as gate keeper and apply the section according to its terms.

The function of the Judge or Magistrate, acting as a gate keeper, is to assess the extent to which the evidence has the **capacity** to bear upon the proof of the fact or facts in issue: *Burton* at [60].Her Honour's emphasis. At the admissibility stage it is no part of the Judge's or Magistrate's function to determine the actual probative value of the evidence or what the jury or fact finder might make of it when all the evidence is complete. Rather, the Magistrate or Judge it is what believes its capacity to be; that is to what extent they believe it *could* rationally affect the assessment of the probability of the existence of a fact in issue.

> "The exercise necessarily requires that the assessment of probative value, in that sense, be made on the basis that the evidence will be accepted as reliable and credible - that is, at its most favourable for the tendering party, or, as has been said, "at its highest" (for example, *Shamouil* at [87]). That is in accordance with a long line of authority." *Burton* at [162].

This point is the consistent theme in the NSW authorities on this point and the application of s 137: see also *R v XY* [2013] NSWCCCA 335. If only it was so simple!

The Victorian Court of Appeal in *Dupas v R* [2012] VSCA 328, have taken issue with the "long line of authority" bit. They said the long line of authority did *not* compel this conclusion and *Shamouil* was fundamentally flawed as a result.

When considering the probative value of evidence for the purpose of sections 97, 98 and 101 **Evidence Act**, a five judge bench of the Court of Criminal Appeal in *DSJ v The Queen [2012] NSWCCA 9*, took into account the existence of competing inferences as did some of the Judges in *XY* [2013] NSWCCA 121. Now this seems inconsistent with" assessing the evidence at its most favourable to the tendering party". However, as Simpson noted in *Burton*, the Court in *DSJ* was assessing probative value for the purposes of sections 97, 98 and 101, it therefor also had to consider the word "substantial" in those sections. This allowed for competing inferences to be considered.

Further, as Simpson herself recognised in *R v Cook* [2004] NSWCCA 52, and Spigelman noted in *Shamouil* at [56], there are some cases where the proposed evidence's probative value must be undermined by the credibility of its maker. There is no, "blanket rule… There will be occasions when an assessment of the credibility of the evidence will be inextricably entwined with the balancing process".

Basten JA, in a number of decisions, has said there is not much difference in the end, as the protective factors inherent in the balance with potential unfairness required by s 137 will even things out. I am not so sure. For example: Probative value is also problematic when section 137 is read in conjunction with section 79 **Evidence Act** which relates to the admissibility of expert opinion evidence. To be credible scientific evidence must be reliable, however despite strong academic criticism both the Victorians and NSW agree reliability is not a s 79 criteria. The Victorians in *Tuite v R* [2015] VSCA 148, following *Dupas*, say it is assessed when s 137 is considered. In NSW, following S*hamouil*,[5] absence of reliability will never be a factor justifying exclusion.

However given what was said by Her Honour in *Burton,'* in most cases neither credibility, reliability, nor weight are to be factored in when probative value is assessed for s 137 purposes.

Returning to s 137. When asking a NSW court to assess probative value in the context of section 137, the way around the problem it appears is to take a staged approach.

[5] G. Edmond and Mercer, Keeping "Junk" History , Philosophy and Sociology of Science out of the courtroom, (1997) 20 UNSWLJ 48; G Edmond, Specialised knowledge, the exclusionary discretion and Reliability (2008) 31 UNSWLJ46; G. Edmond, Expert Evidence in reports and courts, Australian
Journal of Forensic Science (2013) Vol 45 at [248]; G. Edmond, What Lawyers should know about the Forensic 'Sciences'; forthcoming publication, Adelaide Law Review, 2014.

1. Section 137 involves a Judge or Magistrate balancing two incommensurables – 'probative value' and the 'risk of unfair prejudice'.
2. A Judge is not to put him or herself in the place of a jury or ultimate trier of fact, even it is themself. He or she must make a predictive assessment looking at the capacity of the evidence to support a particular finding.
3. When assessing the proposed evidence's probative value the Judge or Magistrate's focus must be on the weight the jury, acting reasonably, could give to the evidence.
4. In NSW this assessment of probative value is not made by reference to the Judge or Magistrate's assessment of its credibility or reliability.
5. That said, when the Judge comes to assess the other side of the scales - unfair prejudice, the Judge or Magistrate can consider where the prosecution evidence falls on a scale of probative value ranging from strong to weak. At this point the potential unreliability of the evidence is a factor to be weighed together with the likely effectiveness of warnings about the nature of such unreliability. So must too must the impact any caution direction or warning that could or should be given.[6]

As a consequence a NSW lawyer making a s 137 submission should direct a Judge or Magistrate to these questions:

1. Is this evidence relevant? That is, if accepted would it rationally affect the assessment of a fact in issue in the proceedings? If not, it is inadmissible; as to be admissible the evidence must have some probative value.
2. What is that evidence's probative value? The Judge or Magistrate must be taken to what the evidence is capable of establishing, assuming it is accepted as truthful.
3. What is the risk of unfair prejudice? A Judge or Magistrate is not to presume that the complexity of the evidence makes it impossible to assess properly, rather they have to consider; whether they or a jury, as ultimate arbiter of fact, will give the evidence disproportionate weight (reasoning prejudice); or whether its emotional impact may destroy the fact finders' objectivity (emotional prejudice).[7] In doing so the Judge or Magistrate is also obliged to consider the extent to which unfairness could be lessened by proper direction to themselves or a jury.

[6] Odgers, 11th Edition at page 847 paragraph [1:3:1470] set outs some of the warnings commonly given.
[7] See *The New Law of Evidence*, 2nd Edition 2009, J Anderson, N Williams, L Clegg, at 101-103.

Until the High Court resolves the problems brought about by the difference of opinion between the Judges of the Victorian Court of Appeal and the New South Wales Court of Criminal Appeal, New South Wales lawyers must follow our appeal courts. We should not be optimistic even if the High Court visits the issue. Sadly, with few notable exceptions the declaratory statements by appellate courts rarely offer assistance to those conducting hearings at first instance.

Section 13 Children (Criminal Proceedings) Act 1987

The section provides for an absolute prohibition on the admission of, "Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings unless there was present at the place where, and throughout the period of time during which, it was made or given:

(i) a person responsible for the child,

(ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,

(iii) in the case of a child who is of or above the age of 14 years—an adult (other than a member of the police force) who was present with the consent of the child, or

(iv) an Australian legal practitioner of the child's own choosing.

The rule applies unless the Court is:

(i) "satisfied that there was proper and sufficient reason for the absence of such an adult and

(ii) the Court considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings."

The section raised a number of critical issues.

1. What is meant by statement confession admission or information?

2. Who falls into the categories noted in s 13 (1) (a) and in what circumstances will the specific provisions not be met?
3. What are proper and sufficient reasons for the absence of a support person?" s 13(1)(b)(i).
4. What particular circumstances could then lead to the admission of the evidence? s13(1)(b)(ii).
5. Do other exclusion rules apply?

In *R v Cotton* (1990) 19 NSWLR 593[8], Hunt J made the point that the section was designed to protect the child against themselves not necessary from police impropriety. However, it is obvious that a support person is meant to be there to ensure that there is no unfairness or unconscionable conduct by police.

In *R v H* (a child) (1996) A Crim R 481[9], police initially interviewed H with his father and sister present. The father was ordered out of the room for interfering, the sister was not a person within s 13(1)(b)(ii) – a person responsible for the child. Nor was consent for her fulfilling this role ever sought from H as required by s 13(1)(b)(iii). H was never given an opportunity to nominate an adult who could help protect his interests. The tender of the police interview was rejected.

During the interview H's father was told by police he must remain silent. Hidden J observed this was hardly consistent with the section and although a support person could be removed for obstructing the interview, if this occurred another person had to be found.

In *Cotton*, Hunt J noted the person responsible for the child includes any parent entitled by law to custody of the child whether or not they had immediate care and control of the child. His Honour also noted having an adult co-accused present would not remove the disadvantages present in the section but exacerbate them. So despite compliance with s 13, s 137 **Evidence Act** would mandate exclusion of the evidence.

His Honour recommended better training of police about the obligations in finding an acceptable person. He noted a total stranger to a 17 year old young person, who is a retired head master, is not the sort of image that immediately leaps up as someone to whom that young person could relate.

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[8] See also *Warren* (1982) 2 NSWLR 360; by Roden J in *Williams* NSW Supreme Court 9 August 1982; Carruthers J in *Dunn* NSW CCA 15 April 1992 and *R v Phung and Huynh* [2001] NSWSC 115.

[9] The case was from the NSW South Coast where I practiced for many years. His Honour did not find conscious impropriety on the part of the police concerned. He obviously did not know them as well as I did.

He also noted the support person did not seem to understand he was *in loco parentis* and that he might intervene to warn the child against making damning of admissions.

Returning to H *(a child)* Hidden J noted:

> "The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence." at [486].

Please note these important qualifications:

1. A photograph is not an admission or information: *R v G* [215] NSWCCA 291;
2. A refusal to participate in an identification parade is not an admission or information: *Ah See v Heilpern: Re A (a child)* [2000] NSWSC 627.
3. Proceedings seeking DNA or other forensic procedures pursuant to the **Crimes (Forensic Procedures) Act** 2000 do not fall within the section because they are not "criminal proceedings": *R v Lyons* (2002) 56 NSWLR 600.

4. In *R v FE* [2013] NSWSC 1692 the defence relied on section 13 but Justice Adamson noted that technically the section had been complied with, although the support person did not appreciate the significance of her role as a support person and was not able to protect her daughter's rights, since she herself was insufficiently aware of them, and insufficiently acquainted with the terms in which to express them, to be of real assistance in their assertion.

Two Examples

Can I illustrate the use of the **Evidence Act** exclusion provisions by reference to two specific cases *R v Cortez, R v LT* and others, unreported, SC NSW, 3 October 2002 and the more recent case of *R v FE* [2013]NSWSC 1692 heard by Justice Adamson.

R v Cortez (2002)

In *R v Cortez, R v LT* and others, unreported, SC NSW, 3 October 2002 at [35] and at [38], Dowd J, said that the obligation to young people includes the obligation to make it known to them that the

Legal Aid hotline is available. He held that a failure to make the Hotline available to the children was a clear breach of the Act and regulations and, “more importantly, in breach of the requirement of fairness to the young person.”

His Honour held that the evidence was inadmissible by virtue of both sections 90 and 138 **Evidence Act**.

R v FE [2013]

FE, a 15-year-old girl, was on trial for murder. She had been interviewed initially as a “witness.” At her trial the Crown sought to use what she said to police both as admissions and by seizing on what they said were deliberate lies to impugn her credibility. It was successfully argued the evidence contained in two recorded interviews was improperly obtained because of the police’s failure to caution FE, that that interview was continued notwithstanding her initial refusal to answer questions and that she had been deprived of the right to silence because the police had taken advantage of her as a vulnerable person.

> The accused was led upstairs from the reception area to the investigation manager's office. Once she was inside the office, the door was partly closed. When she was told, "Don't leave the office" and "Stay in the office", she believed that she was not allowed to leave. She left the office only once to call her mother, whom police required to attend to act as a support person. The accused had to wait about an hour for her mother to arrive.

Justice Adamson accepted much although not all of FE’s evidence, including the following:

> Q. . . . Why did you answer all the questions you were asked in that interview?
>
> A. I thought we had to cause the cops asked us questions and I thought we're supposed to answer them.

> The accused was not cautioned and no warning was given because police claimed she was treated as a witness rather than as a suspect. FE was given the opportunity to speak to a solicitor on the Juvenile Legal Aid Hotline. FE was told “black and white … she should not be interviewed, she not participate in an interview, she should not go on the ERISP, say no to that. There was no grey area in a situation like this. There is no grey area."

> The Solicitor communicated these instructions to a Detective. Her Honour set out in her judgment what occurred next. It bears repeating:

"She told him that not only did the accused not wish to be interviewed but that she did not want to go on tape. She told him that she would sign an entry in the police notebook: "I don't wish to be interviewed." He responded to her suggestion by saying that he was still going to put the accused on ERISP "in fairness so that he could put the allegations to her". Ms Hopgood told him that the accused did not want to go on tape and he could not compel her to do so. Ms Hopgood explained her approach in the following terms:

> Q. And why did you find it necessary to advise him of those things?
>
> A. Because unfortunately we've had situations where, and again it's the same "in fairness" line that's been used, that the police have said they want to give a young person the opportunity to hear the allegations and to put their refusal on tape. However, once a young person is in the interview room, allegations are put to them, pictures have been shown to them, and young persons have inadvertently, or without any further legal advice, ended up either doing a full interview or making comments, statements."

Ms Hopgood arranged for a letter to be faxed to Detective Gibson at Parramatta Police Station. It confirmed her telephone advice. Justice Adamson noted, "She was methodical and meticulous about recording what had occurred on the hot line."

Her Honour had also regard to **s**ection 13 of the **Children (Criminal Proceedings) Act** 1987 and Part 9 of **Law Enforcement (Powers and Responsibilities) Act** 2002 (**LEPRA**) and the **LEPRA Regulations** noting a child, defined as a person under 18 years, is a "vulnerable person": LEPRA Regulation 24. LEPRA Regulation 25 imposes an obligation on the custody manager for a vulnerable person to assist the person in exercising the person's rights under Part 9, including any right to make a telephone call to a legal practitioner. A child may not waive the right to have a support person present during an investigative procedure, including an interview: LEPRA Regulations 21 and 29.

Her Honour, at [78,] reiterated that the role of a support person for a detained person who is a child is not merely to act as an observer, but to assist and support the child, observe whether the interview is being conducted properly and fairly and identify communication problems with the child: LEPRA Regulation 30.

Her Honour's consideration of the probative value of the evidence and its importance in the proceedings in the context of s 138(3)(a) and (b) *Evidence Act* is instructive. She noted that the more serious the offence, the more likely it is that the public interest requires the admission of the evidence but cautioned that to treat cogency of evidence as a factor favouring admission, where the

illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it.

She found the various improprieties were very grave and directed to FE who was practically helpless in the hands of an over-zealous police officer whose position of superiority is so great and so overpowering that admissions may be made which, if the girl knew her legal rights, would not be made.

Doli Incapax

The problem: A child under 14 is charged with an offence. Can they be prosecuted or should the proceedings be discontinued?

As the English and Australian common Law has developed, children under 10 are not punishable in any criminal proceedings. This rule is picked up by s 5 **Children (Criminal Proceedings) Act** 1987.

The **Children (Criminal Proceedings) Act** makes no mention of children aged 10 to 14. As it is not a code the common law applies. Over time the common law developed a presumption that children aged 10 -14 were presumed not to be criminally responsible for their actions. This principle of age incapacity - traditionally expressed as a presumption - is part of the common law of Australia: see R *v M* (1977) 16 SASR; *BP v R* [2006] NSWCCA 174. In *R v ALH* [2003] VSCA 129, Cummins AJA traced its history back to the enactment of Aethelstan, the 1338 Year Book and Lambard's Eirenarcha, third edition, published in 1588. In 1994 the Queen's Bench Division in *C (a minor) v Director of Public Prosecutions* [1994] 3 W.L.R. 888, held that the presumption of *doli incapax* was "unreal", "divisive and perverse", and "is no longer part of the law in England." Although it was upheld by the Court of Appeal, the decision was eventually reversed by the House of Lords in *C (a minor) v Director of Public Prosecutions* [1996] A.C.1.

In *ALH* Cummins AJ followed *C (a minor)* noting, “The ancient sense of justice and modern cognitive psychology come together properly to protect children in their development to adulthood. The "intermediate zone" between 10 and 14 years is one of significant psychological, moral and personal development in children. The law should not be blind to its quality and character.”

The common law also recognises that capacity to commit crime was measured not in years but understanding and judgment. Accordingly in parallel with this presumption the law allowed for it to be rebutted by "strong and pregnant evidence of mischievous discretion:" Archibald 1:36.

The following principles can be derived from the authorities. They have developed on conventional lines:

i. The prosecution must first prove beyond a reasonable doubt a child committed the offence, including for crimes of specific intent proof that the child had that intent or guilty knowledge required.[10]

ii. Prosecution evidence is required to rebut the presumption.

iii. The closer the child is to age 10 the stronger the evidence required.

iv. Evidence of bad character and otherwise prejudicial could be led. So too could evidence of good character that the child was properly brought up and taught to know right from wrong.

v. The evidence had to go beyond showing the child knew the consequences or knew what they did was naughty or mischievous.

vi. It has to be shown the child knew at the time what they were doing was seriously wrong.

The prosecution do not have to show the child knew the act done was a crime or contrary to law. It is enough they show the child knew their act was seriously wrong as a matter of morality.

In *R v M,* Bray CJ asked the question "what is meant by knowing that the act was wrong?" He answered it by reference not to English decisions that it was "contrary to law", but by reference to how the Australian Courts had dealt with a similar expression in the McNaughton rules relating to the defence of mental illness relying on *Stapleton v The Queen* (1952) 86 CLR 1 "knowing that it was wrong according to the ordinary principles of reasonable men". His Honour rejected the notion that "wrong" meant, according to the child's own subjective and possibly idiosyncratic ethical standard. However his honour did say any reasonableness test must relate back to, and can be used to gauge, the subjective state of mind of the child at the time.

Bray CJ noted two potential problems:

[10] An *"offence of specific intent"* is an offence of which an intention to cause a specific result is an element: s 428B **Crimes Act** 1900.

1. The risk the child's past being put into evidence in a trial of a child under 14 than one over 14, and
2. The paradox that a child who has been brought up with sound moral instruction is more likely to have the presumption met than "a waif who has no such advantages".

Evidence called to rebut the presumption can include evidence which would ordinarily be inadmissible because it goes solely to credibility and not a fact in issue on the first point: s 55 and s 102 **Evidence Act**. However if admitted in the proceedings to rebut the presumption it can be used for any purpose: s 60 **Evidence Act** unless it is an admission, in which case s 60 does not apply: s 60(3).

Care must be taken to ensure that bad character type evidence if admitted be subject to a restriction that it is *only* to be used on the presumption *doli incapax* point: s 136 **Evidence Act**. Close analysis of the circumstances behind any earlier offending or misbehaviour is required.

The courts have, and will, allow evidence of previous findings of guilt AND facts in relation to other matters as well as medical, Family and Community Services or Juvenile Justice Records and School Reports.

Tender of any document or record relating to a child must comply with the Evidence Act – see in particular sections 47 -50. Any admissions made (and otherwise admissible: see s 13 **Crimes (Sentencing Procedures) Act** 1999; sections 90, 137 & 138 **Evidence Act**) can also be used on this point.

In the UK, it has been held that while the older the child and the more obviously wrong the act done are relevant factors for the court to consider the prosecution cannot rely simply on proof of the act charged no matter how horrifying or obviously wrong the act: See *R v C* (a minor) [1996] 1 AC 1, citing *R v Smith* (1945) 1 Cox CC 260. This passage was approved in *R v CRH,* NSWCCA unreported, 18/12/1996. The Victorian Court of Appeal has however taken a different view.

Cummins AJ in *R v ALH* while accepting the general principles set out in *C (A minor*) was critical of that part of the House of Lords decision which said that the presumption could not be rebutted by reference just to the nature and incidents of the act charged, concluding "there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge."

To be clear however NSW courts still follow *C (a minor) v DPP.*

An excellent example of how the various principles are applied can be found in the decision of Lerve DCJ in *R v GW* [2015] NSWDC 52.

Unfitness due to mental or intellectual incapacity

The problem: A child charged with a crime suffers an intellectual disability or mental illness such that it is impossible to get instructions and /or it is apparent they do not understand the court proceedings.

Any accused needs:

1. to be able to understand what it is that s/he is charged with;
2. to be able to plead guilty or not guilty to the charge;
3. to exercise her/his right to challenge members of the jury panel;
4. to understand generally the nature of the proceedings, namely that it is an inquiry or trial as to whether s/he did what s/he is charged with;
5. to be able to follow the course of the proceedings so as to understand what is going on in a general sense, though s/he need not understand the purpose of all the various court formalities;
6. to be able to understand the substantial effect of the evidence to be given against her/him;
7. to be able to make her/his defence or answer the charge;
8. to be able to do this through her/his counsel and solicitor by giving any necessary instructions and letting her/his lawyers know what her/his version of the facts is;
9. if necessary to be able to tell the Court what her/his version of the facts is (although s/he need not be conversant with court procedure or have the mental capacity to make an able defence).

These rules or criteria apply in all courts. They were first set out in *R v Presser* [1958] VR 45. They have been adopted in the High Court of Australia and the New South Wales Court of Criminal Appeal: see *R v Ngatayi* (1980) 147 CLR 1, *Kesavarajah v The Queen* (1994) 181 CLR 230, *R v Mailes* (2001) 53 NSWLR 251 and *R v Rivkin* [2004] NSWCCA 7. In *Ngatayi* the High Court in the majority judgment said that the test of capacity or fitness needs to be applied in a *"common sense fashion"*

and that the accused *"need not have the mental capacity to make an able defence or to act wisely in his own best interests".*

Generally in the Children's Court where a child has a mental condition or is unfit (whether due to mental illness, a mental condition or intellectual disability) resort is had to s 32 **Mental Health (Forensic Provisions) Act** 1990. However there are cases where Magistrates do not believe a s 32 disposal is appropriate. Examples include domestic violence matters, traffic matters or allegations which are deemed too deemed too serious to be diverted from the criminal justice stream; applying *DPP v El Mawas* (2006) 66 NSWLR 93.

An interesting example is *Police v AR*, a decision of President Marian reported in **Children's Law News** 18 November 2009.

AR was charged with detain with the intention of obtaining an advantage, take and drive conveyance without consent of the owner and robbery and also being in custody of property, which may be reasonably suspected of being stolen and possession of 15.3 grams of cannabis and assault a police officer and entering a railway corridor. *AR* had appeared regularly before the court since he turned fourteen years of age. He has a number of s 32 dispositions and two bond probation dispositions

A considerable body of expert medical evidence clearly established that under the tests *AR* was unfit to plead. His junior barrister also swore an affidavit saying that she has had numerous conferences with AR for the purpose of obtaining instructions, that she has not been able to do so and that AR had not been able to follow her advice or respond appropriately when questioned. The defence submitted that *AR* be dealt with under s 32 of the **Mental Health (Forensic Provisions) Act** on the grounds that he was unable to understand and participate in the proceedings due to a developmental disability.

The prosecution argued that with respect to the more serious charges the court should commit the defendant for trial in the District Court and that court could determine the issue of the defendant's fitness to plead.

Judge Marien discharged *AR* with respect to the serious offences and dealt the less serious ones under s 32 **Mental Health (Forensic Provisions) Act**. He held based on the *Presser* tests that *AR* was not capable of understanding and participating in proceedings in the Children's Court and accordingly that where a child is unfit to plead there was no statutory procedure or regime in the Local Court or the Children's Court, a hearing to be conducted to determine whether a defendant is

fit to plead. He contrasted this with the procedures that exist in the District Court and the Supreme Court, with respect to trials on indictment.

Judge Marien relied on the analysis by the High Court in *Ebatarinja v Deland* (1998) 194 CLR 444. *Ebatarinja* was a deaf mute Aboriginal man incapable of communicating except by using his hands to ask for simple needs. The High Court held that committal proceedings on a charge of murder and other charges could not be validly conducted as they could not be conducted *"in the presence or hearing of the defendant"* as the defendant was incapable of having this understanding.[11] Accordingly, the magistrate had no authority to continue with the committal proceedings. However, the court said that this does not mean the law is powerless to deal with the case as the Crown could still proceed by way of ex officio indictment in the Supreme Court.

Judge Marien also relied on *Mantell v Molyneux* (2006) 68 NSWLR 46, where Adams J held in similar circumstances relating to an adult that he had no option but to stay the proceedings. Judge Marien process of reasoning involved the following steps:

1. Considering the appropriateness of a s 32 disposition with respect to the more serious charges.
2. Applying *DPP v El Mawas* (2006) 66 NSWLR 93, to reach the "clear view that with the exception of the goods in custody charge, because of the seriousness of the alleged offences … it would not be appropriate to deal with those offences under s 32 of the Act", because "the public interest in punishment being imposed for the protection of the community … the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the Act."
3. He also considered that a s 32 disposition was not appropriate for those serious offences because any order made under s 32 would only be enforceable for a period of six months.

He also noted that his dismissal of the charges did not preclude the Crown, should it see fit, from laying an ex officio indictment against the defendant with respect to those charges in the District Court, so that , if appropriate, the question of the defendant's fitness to plead can be determined in that court. The DPP did not elect to do so.

So what can we learn from *AR*?

[11] In New South Wales the requirement that committal proceedings be conducted in the presence of the defendant is contained in s 71 of the **Criminal Procedure Act** *1986*.

A section 32 application requires the defence to put information before the court to found one of a number of propositions:

> That at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate: that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate) either developmentally disabled, or suffering from mental illness, or suffering from a mental condition for which treatment is available in a mental health facility, but is not a mentally ill person, and that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law.

Generally a report must be obtained or records subpoenaed. That expert should also be briefed with the *Presser* criteria set out above. The Court *will* be helped by a chronology. If the child is unfit the choice is stark; utilise s32 or dismiss the charge.

If the child is mentally ill such that the defence of mental illness is made out the choice is even starker. As s 32 does not apply and the **Mental Health (Forensic Provisions) Act** does not apply to summary matters, the child *must* be found not guilty on the basis of mental illness and discharged without further order.

A recent example of the application of the necessary test where the accused must met the evidentiary onus of establishing a mental illness defence is *R v Stables* [2014] NSWSC 697. Hidden J cited Dixon J cited *King v Porter* (1936) 55 CLR 182 at [189] – [190], noting "Although couched in the language of a past generation, it would be difficult to find a more lucid explanation of [the test]"

> "... The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people."

Section 18 Evidence Act

It is not unusual that a parent or sibling will be called by the Prosecutor in a Children's Court hearing. They are often reluctant witnesses.

Section 18 provides that in a criminal proceeding, a spouse, de facto partner, parent or child of a defendant may object to being required to give evidence or to give evidence of a communication between the person and the defendant, as a witness for the prosecution.

A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

> (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and
> (b) the nature and extent of that harm outweighs the desirability of having the evidence given.

Section 18(7) sets matters that may be taken into account by the court

Section 18 does not apply in proceedings for an offence against or referred to in the following provisions of the **Children and Young Persons (Care and Protection) Act** 1998.

Where a successful application is made attempts are sometimes made to tender police statements or other evidence of what was said (prior representation) by the witness out of court or in other proceedings.

There are as far as I know only two decisions on the section.

In *R v BO (No 2)* (2012) 15 DCLR (NSW) 317, I held that a child who had previously given evidence against their father could not be compelled to give evidence at a re-trial and that the rule in s 18 prevented tender of the witness's prior representation pursuant to s 65 **Evidence Act** as that written statement involved the witness "giving" evidence. That case also involved exclusion of video recorded evidence given by the defendant's eldest son at the earlier trial. I relied on the policy provisions underpinning s 18, which I held did not evaporate once the order was made.

Without actually saying I was wrong the Victorian Court of Appeal in *Fletcher v The Queen* [2015] VSCA 146 held that the rules regarding competence and compellability do not govern criminal investigation processes. There the de facto partner of a defendant successfully objected to giving evidence as a witness for the prosecution, relying on s18. The Crown were allowed to tender her out of court police statement pursuant to s 65(2) as she was "unavailable" pursuant to Cl 4(1)(e) of Pt 2 of the Dictionary. The court found pursuant to s 65(2)(c) her statement was made in circumstances that made it highly likely to be reliable.

The applicant appealed his conviction. He submitted, based on my reasoning in *BO*, that s 18 still has work to do in considering whether a statement should be admitted under s 65 because a tendered statement is still evidence and to show effect to underlying policy of s 18, that is the risk of harming the relationship between the defendant and the witness.

The Court of Appeal in *Fletcher* (Dixon AJA, Weinberg JA agreeing, Priest JA agreeing with the orders but not determining the issue) held that once a witness has successfully objected under s 18 to giving evidence, the provision has no more work to do: [61]. Nothing in s 18, its underlying policy, or in Cl 4 of Pt 2 of the Dictionary operates to limit the application of s 65 as making a statement to police is neither a process of "giving evidence" nor a process in a criminal proceeding. At [58]. Therefore, when a statement is admitted under s 65 the maker of the statement is not "required to give evidence" and s 18 has no work to do. At [59].

I have no idea how this will play out in NSW superior courts. In the Children's Court both decisions have persuasive force, if, restricted to their specific fact situations.