

A Working Guide to the Evidence Act(s)

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This paper is not a treatise on evidence law. It is not the definitive word on Evidence Law. There are more than enough resources, at varying degrees of detail, which can give you that detailed information. I recommend, as a starting point, the following resources:

1. Stephen Odgers, *Uniform Evidence Law*
2. John Stratton, *Criminal Law Survival Kit – Evidence*
<<http://www.criminallawssurvivalkit.com.au>>
3. Judicial Commission of NSW, *Criminal Trial Courts Bench Book*
<<http://www.judcom.nsw.gov.au/publications/benchbks/criminal/>>

The genesis for this paper was my experience of the way evidence law is taught at universities. My teacher, as a professional evidence law enthusiast, thought the only way to know evidence law was to know all of it. Her advice (or command) was that we read every word of every case, and then turn up for lectures and tutorials, to be grilled on the fine points. That was both excruciating, and useless.

The purpose of this paper is to give the reader an *overview* of the law of evidence. Often, in practice, an evidence law issue presents itself. That issue may arise while your sitting at the bar table, or working up a brief, the day before a hearing. Or you may have the luxury of some time. Half the battle is to understand exactly what the problem is, and all too frequently, you need to understand the issue quickly. So what I hope to impart, as an amateur enthusiast for evidence law, is a conceptual understanding of how the Acts fit together. I hope that this will help you to understand what sort of a problem you are dealing with.

Structure

There is an underlying structure to the Act. It's partially represented in the flowchart in Chapter 3 of the Act. But that flowchart has 2 problems, for present purposes. One is it only covers part of the Act. Secondly, it doesn't really capture (for me at least), the hierarchical nature of the admissibility provisions.

So the structure I prefer to approach the Act from looks like this:

1. Jurisdiction
2. Adducing evidence
3. Admissibility
4. Discretions

Which, funnily enough, is how the act is organised.

Jurisdiction

On one level, this is a strange issue to have to deal with up front, given that we are talking about the *Uniform Evidence Acts*. But as you might expect, given that the task of implementing this uniform regime fell to a number of different parliaments, who all think they knew better than each other. So they are perhaps more appropriately known as the *Almost Uniform Evidence Acts*. The differences are subtle, and there aren't that many of them, but it's best to play it safe, and at least consider the issue.

The question is then, "Which Act?" The short answer is, "Probably NSW". For criminal practitioners in NSW, most of your time will be spent in a NSW court. And even where that involves Commonwealth crimes, s68 *Judiciary Act 1903* (Cth) picks up the local procedural and substantive law provisions, ie, the NSW *Evidence Act*.

But importantly, the Commonwealth Act may well apply in part. Where you are dealing with the records of Commonwealth Government agencies, s5 of the Commonwealth Act pushes in on the NSW Act. So if you've got an ATO document, or a Centrelink document as part of your brief, you need to look at the definitions in the Commonwealth Act.

Also relevant under this heading is the first question off the pool of seen questions on the NSW Bar Exam:

In a hearing on sentencing shortly after the trial, the judge asks if either party is seeking a direction in relation to the application of the Act? What is the judge referring to?

What HH is referring to is whether he or she should direct that the Evidence Act apply to sentencing proceedings. Because as we all know, s4 provides that it *doesn't apply* unless HH directs. Section 4(3) gives some guidance as to when the court will make such a direction. The court *must* direct where proceedings involves proof of a fact, and that fact will be significant in determining sentence. In addition, note s4(4) provides that the court must direct the act applies if it is in the interests of justice to do so.

So, the jurisdictional issue includes the question of whether *any* Act applies. The Act notably doesn't apply in civil interlocutory proceedings, or child-related proceedings in the Family Court, and also, more relevantly to criminal practitioners, in the Drug Court.

Adducing Evidence

Where does evidence come from? There are 2 sources of evidence:

- Witnesses

- Documents

Each source has its own unique advantages and disadvantages. So each have their own unique considerations, which I will deal with in turn.

Witnesses

To be able to take the affirmation or oath, and start answering questions, a witness has to be both competent to give evidence, and compellable. The starting point is section 12, which says, simply, that *everyone* is competent and compellable. So, what you might be looking for are exceptions.

Competence

So what is important here, is whether any of the exceptions apply. Exceptions as to competence fall into three categories (s13):

1. Those who can't understand questions
2. Those whose answers can't be understood
3. Those who can't understand the obligation to tell the truth

If we take the example of people who don't speak English as a first language, we can imagine variations on the first two themes. For example, a person may not understand enough English to understand the questions being asked of them. Or they may understand enough English to understand the question, but not be able to express themselves in English, and thereby make themselves understood. Note that this is an example of a "reduced capacity" which can be overcome by having an interpreter in court (so look at s14).

Note also, that a person may be competent in some areas, but not in others: s13(3). It is not an all-or-nothing proposition. For example, I remember watching a witness in a trial, whom I later found out had an intellectual disability. He was borderline in both categories (only the transcribers could clearly understand what he was saying). But in particular, it was apparent, from his cross-examination, that he couldn't draw a distinction between what he had told police about an earlier incident, and his recollection of the incident itself. So it quickly became apparent that it would be impossible to cross-examine him about prior inconsistent statements – he was not capable of understanding the questions.

Note also, a lack of competence to give sworn evidence does not prevent the witness giving unsworn evidence, so long as the requirements of s13 are met.

Compellability

Sections 14 to 19 give you a laundry list of exceptions to compellability. I've mentioned s14 already. The judges and jurors exception isn't likely to come up all that often. But as we're in a criminal law context, ss17-19 do require some attention, particularly for those of us unfortunate enough to have clients charged with contravening AVOs.

Section 17 is so fundamental, you might not have even considered it. The accused can't be compelled by the prosecution to give evidence. Or as a witness for an

associated defendant, unless they are tried separately. Where it can get interesting, is where the accused's family are sought as witnesses.

Section 18 makes a spouse, de facto partner, parent or child of a defendant/accused the right to object to giving evidence, against the defendant/accused. It's worth noting though, that by virtue of s132, if it appears to the court that a witness might fall within the s18 exception, the court must satisfy itself that the witness is aware of the effect of s18.

On objection, the court is then to determine whether the harm to the relationship between the proposed witness, and the defendant, outweighs the desirability of their giving evidence: 18(6)(b).

In order to arrive at that determination, the court must take into account, the matters listed in s18(7), (and, as with all applications for leave, the matters in section 192: see *Stanoevski*¹).

Section 19 brings in s279 of the *Criminal Procedure Act*² which provides a different approach to determining the compellability of spouses in domestic violence offences.

Now, before we leave the issue of witnesses, there is one final set of considerations. If the witness is competent, compellable, has taken the affirmation, and is sitting ready and waiting, there are some limitations on questions that can be asked, which are worth passing reference:

First, there are to be no leading questions in examination in chief (s37). The evidence is supposed to be theirs, not yours. There are exceptions for introductory questions, and for non-contentious matters. But even if you get away with it because your opponent is asleep at the bar table, it reduces the effectiveness of the witnesses evidence, so it's a bad idea.

Second, in cross-examination, you are permitted to ask leading questions (s42). Just a tip – you should, almost always, use leading questions. It is your evidence, not theirs. So give your evidence, and after each sentence, tack on "isn't it?" or some such thing. We're getting away from evidence, and into issues of style, so I'll leave it there.

Third and finally, be aware of the limits on improper questions (s41). Often times, questions stray into this area, not because of malice, but because of inadvertence. It's easy, when you're subsumed in the law, to turn what could be simple, effective questions, into long, complicated, confusing double-propositions. I have heard a judge stop a prosecutor's cross-examination because it was "annoying" (to him, as much as to the witness). It will be a rarer occasion where a question is "harassing, intimidating, offensive, oppressive, humiliating, repetitive, put in a tone which is belittling, insulting, or otherwise inappropriate, or has no other basis other than a stereotype", but does happen.

¹ *Stanoevski v R* (2001) 202 CLR 115.

² The other sections listed in s19 have been repealed.

Authenticity

Authenticity is a funny beast. Essentially the issue with authenticity is:

Is it what it purports to be?

For a long time, *NAB v Rusu* held sway, holding out authenticity as a precondition to admissibility, and suggesting that judicial inferences can't assist in determining authenticity (despite s58). But, more recently, see *ACCC v ANZ*. Odgers rightly notes that there is nothing in the Act which specifically requires that authenticity be established, and that it is particularly hard to reconcile with s57, but it comes from tactical pressures.

Since this is a working guide though, let's put aside the academic issue. The fact is that authenticity can be easily established. Put the witness from whom the document comes (or who knows something about it), and say the following:

1. "I show you a document"
2. "Do you recognise that document?"
3. "What is it?"
4. "How do you know that?"
5. "I tender the <label>."

Admissibility

I said earlier in this paper that I didn't think that the flowchart in Chapter 3 quite captured the structure of the admissibility provisions. Really, my complaint is that it doesn't quite show how important relevance is as a starting point.

It is good practice, for every matter, to sit down with a blank piece of paper, or word document (I prefer paper). You then build up a table like this (not to scale):³

Element	Their Evidence	Our Evidence	Documents
Intention to permanently deprive			
Some degree of force putting person in fear			
Taking from person			
Defence: claim			

³ Note that I've skipped a very important step here – you need to know, having looked at the evidence, what your case theory is. All those elements in the left hand column might not be in issue. You might concede that the evidence establishes all those facts, but that *it was not your guy*. Then the only fact in issue is the identification of the perpetrator.

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Then, sort through the evidence in your brief, then your instructions, until you've got the evidence into the categories. Then look at what you've got in those boxes. Why are they there? How does that evidence establish that element of the offence? When you're trying to understand that, you're looking at relevance.

Here's the highlights package of what s55(1) says:

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

Broken down that is:

1. could ...
2. rationally affect ... probability ...
3. fact in issue

Having extracted those key words, let's translate them out of lawyerese:

1. Low bar
2. Logical connection
3. Fact in issue

First, note that the test isn't trying to predict what the jury will actually make of it, it's a low threshold – if it could prove the element, that's enough.

Then let's deal with the third aspect – the fact in issue. Note that if a fact is not in issue, then the evidence is not relevant *to that issue*.⁴ For example, if there's an admission, or an agreed fact, then tendering a document to prove the same thing is not going to work.

Last, the second aspect. I think perhaps the most important aspect is the logical connection. How is it that the piece of evidence you is connected to that element. It is very important to spell that out, because that will tell you if any of the exclusions are relevant. Put another way, if you understand relevance, you will understand why hearsay, tendency, credibility, opinion exclusionary rules come into play.

Hearsay

We have an oral evidence tradition in our courts, and a great faith in the ability of cross examination to get at the truth. Because of that tradition, courts are guarded about out of court statements. With that in mind there are, two broad categories of hearsay:

⁴ It might still be indirectly to another issue.

- Documents
- Things not “heard, seen or otherwise perceived” by a witness

It is worth remembering that all documents are hearsay. That means, the starting point with a document is that it is first hand hearsay (or worse), and therefore *inadmissible*. Courts (and lawyers) tend to love documents, because they don’t change their evidence, and can’t be cross-examined into irrelevance. But you need to start from the proposition that a document is inadmissible, and talk yourself through how it becomes admissible.

With witnesses, the key thing to look or listen out for is “told me”. Is what they “told me” supposed to establish that it is true? If so, it’s hearsay.

For example, in the statement of an officer in charge:

I left the male person who I now know to be Mr X with the custody manager, and completed my shift. When I arrived the next morning, the custody manager told me that the Mr X had become agitated when told he would be bail refused, and urinated in the dock.

That was the only evidence offered in support of a malicious damage charge. And it was totally inadmissible. An easy win for the client, you might think. Also note the layering effect at work there – hearsay (“told me”) upon hearsay (document). With each step, the statement has less connection to oral testimony, less ability to be tested through cross examination, and is less likely to be admissible. In fact, one you get beyond the first step, aka first hand hearsay, then what you’ve got is basically inadmissible. That’s what *Lee’s* case is all about.

Exception: dual relevance

In a marked change from the common law, s60 allows the use of hearsay material, for a hearsay purpose, where it is relevant and admissible for another purpose.

Exceptions: First hand hearsay

Now you know hearsay is inadmissible, and why, you should keep in mind the main exceptions. The two main exceptions in criminal proceedings depend on whether the maker of a statement is “available”. A person will be unavailable, according to the definition in the Dictionary (cl 4, Pt 2) where:

- (a) the person is dead;
- (b) the person is not competent to give evidence;
- (c) the person is mentally or physically unable to give evidence;
- (d) it would be unlawful for the person to give evidence;
- (e) the Act prohibits the evidence being given;
- (f) all reasonable steps have been taken to find the person or secure their attendance, without success; or
- (g) all reasonable steps have been taken to compel the person to give evidence, but without success.

Maker unavailable

s66(2) provides that where the person who made a previous representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation given by (a) that person; or (b) a person who saw, heard or otherwise perceived the representation, so long as when the representation was made, the occurrence of the fact asserted was “fresh in the memory” of the maker.

s66(2A) sets out the factors relevant to determining whether a matter was “fresh in the memory”, and includes:

- (a) the nature of the event concerned;
- (b) the age and health of the person; and
- (c) the period of time between the occurrence of the asserted fact and the making of the representation.

Maker available

Where the maker of the statement is available, the exception does not apply unless:

- (a) the maker was under a duty to make it; or
- (b) the representation was made when or shortly after and in circumstances that make it unlikely that it was a fabrication; or
- (c) was made in circumstances that make it highly probable that the representation is reliable; or
- (d) was an admission, made and made in circumstances that make it likely the representation is reliable.

Notice requirements

Section 67 imposes a notice requirement in respect of ss63,64, and 65. The notice must be reasonable, which goes to the timing and content of the notice. See for example *Puchalski*,⁵ where it was held that the notice given 5 minutes before a hearing would not be reasonable.

However, where there has been a failure to comply with the notice requirement, the court may give leave to admit the evidence anyway: s67(4). In determining whether to grant leave, s192(2) matters must be taken into account: *Stanoevski*.⁶ In particular, prejudice, expense and delay are likely to be relevant: *Tsang Chi Ming*.⁷

Business records

Where a document can be classified as a business record, it will afford a greater degree of flexibility in relation to both its admission as an exclusion to the hearsay rule, an also to the form in which it can be admitted (see the section on summaries above).

⁵ *Puchalski v R* [2007] NSWCCA 220.

⁶ *Stanoevski v R* (2001) 202 CLR 115.

⁷ *Tsang Chi Ming v Uvanna Pty Ltd t/as North West Immigration Services* (1996) 140 ALR 273

“Business” is defined in cl 1 Pt 2 of the Dictionary, and should be construed widely. “Records” is not defined, but has been interpreted as meaning “a history of events that is not evanescent”: XXx. Records of the business can be contrasted with “products” of the business, such as, for a publishing company, books and magazines (see *Hansen Beverage*).

s182 (in combination with s5) of the Cth Act extends the operation of the business records provisions to Commonwealth records.

Under s68, a representation contained in a document will be admissible if it forms part of the records of a business. It was said in *Lewis v Nortex* that the scope of this inclusory definition was of wide import and to be construed accordingly.

Business is defined in the Dictionary but record is not (see above section on Summaries). It is a requirement that the information contained in the business record be sourced to a person with personal knowledge of the facts asserted: s68(2). However, there is no need to identify the person with such knowledge.

The s68(1) exclusion will not apply where the record was made in contemplation of civil proceedings, or as part of a criminal investigation: s68(3).

Lay opinion

So what is an opinion? In *Allstate v ANZ (No 5)*,⁸ it was described as an inference drawn or to be drawn from observed and communicable data. That draws a distinction between facts, and opinion. With that in mind, we turn to lay opinion. A lay opinion is generally inadmissible (s76), unless it is (s78):

- (a) based on what the person saw, heard or otherwise perceived; or
- (b) tied up in the witness’ perception of the event

You can see that distinction between facts and data here – although, as (b) suggests, sometimes the opinion is “tied up” in the perception of the event. Take the following examples of an observation by a bystander (not in the car):

- “The car was going really fast”
- “The car was doing 110km/h”
- “The car was doing 110 in 3rd gear”

The first probably falls within (b). The second might fall within (a), although you’d have to lead some evidence of their experience of driving, and speeds, to make it OK. The third, is probably going too far, and strays into expert evidence.

⁸ *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75.

Expert opinion

There are basically three preconditions of admissibility in s79 which must be met before expert opinion can be admitted. They are:

1. That the person has specialised knowledge
2. That the specialised knowledge is based on training, study or experience
3. That the opinion is “wholly or substantially based” on that knowledge.

Usually the first two aren't issues. The issues have turned around the third point. There are 3 big cases on this, *HG*,⁹ *Makita*¹⁰ and *Dasreef*. Read them late at night if you have trouble sleeping. For present purposes, discussion will be limited to the following potential grounds of objection:

(1) Expertise?

There are a couple of aspects to this. Expertise depends on specialised knowledge. In the US they talk about the reasoning or methodology is scientifically valid.

Also under this heading we have the *ad hoc* expert: see for example *Leung*.¹¹ That was where a police officer became an expert on voice identification on the basis of time spent listening to surveillance tapes.

(2) Within expertise?

In some instances, expert evidence may be thought to stray beyond the realm of expert knowledge. Where this occurs there is a real risk of unfair prejudice, in that the expert's status may lend an undeserving air of authority to their non-expert opinion, encouraging the tribunal of fact to divert their attention from the need to properly scrutinise the evidence and come to their own conclusion. (This may bring to mind the discretionary exclusions in ss135 & 137, discussed below).

(3) Exposed reasoning?

In the civil context, there are procedural preconditions to the admission of expert evidence contained in the Uniform Civil Procedure Rules (see Schedule 7), being the Expert Code of Conduct, which are designed to make transparent the process of reasoning from facts to conclusion: see *HG v R* per Gleeson CJ.

An unresolved issue arises as to how to deal with expert opinion based on unreliable evidence. In **HG**, the evidence of an expert based on secondary evidence as to the credibility of witnesses, ... was rejected by the High Court as not being "wholly or substantially based" on the expert's specialised knowledge and therefore inadmissible. This followed the reasoning of Heydon J when on the

⁹ *HG v The Queen* (1999) 197 CLR 414.

¹⁰ *Makita v Sprowles* (2001) 52 NSWLR 705.

¹¹ *Leung* (1999) 47 NSWLR 405.

bench of the Court of Appeal of the Supreme Court of NSW in *Makita v Sprowles* requiring that evidence be "intelligent, convincing and tested" before it be admissible. However, in *Dasreef v Hawchar*, the High Court appear to have taken the view that the reliability of the foundation for expert opinion was a matter that went to weight rather than admissibility.

Tendency & Coincidence

These were both known as similar fact evidence at common law. In some ways, that is a more helpful label, because it emphasises the importance of *similarity*. I'll return to that in a moment. But first, let's have a look at the schematics of both, in turn.

Tendency

Here's the executive summary. If you say evidence is relevant in this way:

A person who does this, is likely to have done that

Then you're talking about tendency evidence. s97 holds that tendency evidence is not admissible unless to conditions are met:

(1) reasonable notice in writing

As to what constitutes reasonable notice, see cl5(2) of the Regulations which sets out exactly what must be included in the notice.

(2) significant probative value

The probative value of tendency evidence turns on the degree of similarity between the tendency act(s) and the charged act. Where the acts are "strikingly similar", they are likely to satisfy s97: *Fletcher*.

What constitutes significant probative value is not defined, although the term significant has been characterised as more than mere relevance, but less than substantial probative value. It has also been described as meaning important or of consequence: *Lockyer*.¹²

Once you've made it through s97, in criminal proceedings you have to then negotiate the s101 balancing act. It is necessary to demonstrate that the probative value of the evidence substantially outweighs its prejudicial effect. The latter term has the same meaning as "unfair prejudice" in s137, and turns on the real risk of misuse of the evidence by the jury: *BD*.¹³ An example would be that the jury might punish the accused for uncharged tendency acts, by convicting them of the charged offence.

¹² *Lockyer* (1996) 89 A Crim R 457.

¹³ *R v BD* (1997) 94 A Crim R 131.

Coincidence

Again, an executive summary of when relevance is based on coincidence reasoning:

It can't be a coincidence that both these things happened.

Here's a simple example. Two facts:

- Bank robbery, robber shot
- Hospital records show the accused was treated for gunshot wound that day

As with tendency, it is the degree of connection, or the "similarity" which will be important.

The same hurdles, namely, substantial probative value (s98) and then the probative value vs unfair prejudice balancing test (s101) apply.

Credibility

Generally inadmissible (s102)

BUT

Can rebut denials: s106

Beware the character shield: s104(4)

Privilege

Client legal privilege

Client legal privilege is a protection against disclosure which attached to confidential communications made, and confidential documents prepared for the purposes of (a) legal advice (s118); or (b) providing legal services for the purposes of litigation (s119).

In order for either of the privileges in s118 or s119 to protect against admissibility, it is necessary to show the following:

- obligation of confidentiality: *NSW v Jackson*
- privileged purpose for creating the document was the dominant purpose: *Esso v Federal Commissioner for Taxation*
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Sections 121-126 set out various exceptions to client legal privilege:

- s121 - for reasons connected to the administration of justice
- s122 - waiver (see for example **Mann v Carnell**)
- s123 - where adduced by a defendant in criminal proceedings
- s124 - joint clients
- s125 - misconduct
- s126 - related communications

Sexual Assault Communications Privilege

The SACP is governed by the *Criminal Procedure Act* (Division 2 of Part 5 of Chapter 6). s126H of the Evidence Act extends the application of the provisions to civil proceedings.

For a particularly acerbic criticism of the CPA provisions relating to the privilege, see *R v Markarian* [2012] NSWDC 197 per Berman DCJ (wherein his Honour described the legislation as "bad policy, badly implemented": at [5]).

The starting point is to determine whether the material in issue falls within the definition of a "protected confidence", as defined in s296, namely a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence. A "counselling communication" is defined as a communication made in confidence by a person to a counsellor, suitably trained, in relation to harm suffered by that person. (The definition goes on, like so many Russian dolls). Practical procedural limitations are set out in s299B.

Having determined that a protected confidence exists, s298 provides a prohibition on compelling production of such a document, including by subpoena, in a criminal proceeding, unless the court gives leave. s299D sets out the requirements which must be satisfied before leave is given, namely:

- the document will have substantial probative value
- that other evidence of the communication is not available
- the public interest in protecting the confider from harm is substantially outweighed by the public interest in admitting the material into evidence.

s299D(2) also sets out factors relevant to whether leave ought be granted, inter alia:

- the need to encourage victims to seek counselling
- that the effectiveness of counselling depends on confidence
- the public interest in ensuring that victims receive counselling
- the disclosure of protected confidence is likely to undermine the counselling relationship.

s299C sets out various notice requirements.

Exceptions are provided. s301 excludes evidence of protected confidences adduced by consent; and s302 excludes documents produced in the furtherance of a fraud, or the commission of an act giving rise to a civil penalty.

Self-incrimination privilege

The witness must first object to answering the question. There are no blanket objections, each question must be objected to. However, if it appears to the court that such an issue might arise, then by virtue of s132, the court is to satisfy itself that the witness understands the effect of s128, and their right to object.

Once an objection is made to made to answering, the court must determine whether there are reasonable grounds for the objection: s128(2). Once so satisfied, the court is to explain to the witness that there is no need to give the evidence unless directed to do so under subs(4), but that if the witness chooses to give evidence, a certificate will be issued: 128(3).

Once the certificate is issued, it will protect the witness in all subsequent proceedings. However, in *Crosswell v R* it was held that a retrial is not a "proceeding", and therefore the protections ordinarily afforded by s128 do not apply.

Settlement Negotiation Privilege

This privilege in s131 is designed to uphold the public interest in settling litigation. As such, it protects communications made and documents prepared in connection with attempts to settle a dispute.

Typically, such documents are marked "without privilege". However, there is no magic in this phrase, and it is neither necessary (*Rogers v Rogers*), nor determinative (*Seven v News Ltd*).

A number of exceptions limit the operation of the privilege:

- consent
- aspects of settlement in issue
- to prevent misleading court
- relevant to costs
- affects rights

Identification Evidence

Sections 114 and 115 put in place a number of conditions which must be satisfied before identification evidence, classified as either visual identification or photographic identification, can be adduced by the prosecution.

Section 114 applies to visual identification evidence. Under this section, evidence of a visual identification will not be admissible unless:

- an identification parade, including the defendant, was held before the identification was made; or
- it was not reasonable to have such a parade; or
- the defendant refused to take part in such a parade.

A further condition is that there was no intentional influence of the identifier.

Section 115 applies to photographic identification evidence. The structure of the section is such that visual identification is to be preferred if possible. For example, under s115 photographic identification evidence will be inadmissible when the defendant is in custody, and an identification parade was not held, unless it was inappropriate or unreasonable to do so.

Where picture identification is allowed, further controls are placed on the pictures to be used. The evidence will not be admissible if the photographs suggest they are pictures of persons in custody. Also, the photograph of the defendant, if in custody, must not pre-date the defendant being taken into custody, except in limited circumstances (such as where the appearance of the defendant has changed between the time of the offence, and the time they were taken into custody).

Note that even where admissible, identification is a type of unreliable evidence listed in s165, and will require a direction as set out in s165.

Discretions

Section 137

This is the go-to discretion. As noted above in relation to tendency and coincidence evidence, it is a balancing act. On one hand, the probative value (so you need to understand and assess the evidence's relevance). On the other hand, unfair prejudice – which requires you to think about how the evidence might be used improperly. It is not unfair prejudice because it might result in your client's conviction.

Improperly obtained

This provision is given a workout in the context of admissions, usually in circumstances where an admission is made as a result of misrepresentation, trickery or mistaken assumptions. As a result there is an overlap with the following provisions:

- a failure to tape record admissions made in the course of official questioning (s281 Criminal Procedure Act)
- admissions unfair in all circumstances (s90; *Em's case*)

As with s137, it is a balancing act. Ts138(1) says the evidence is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in that way.

Unreliable evidence

As a backup plan, if you can't get something kicked out, you might like to see whether you can have it watered down. Where evidence is of a kind listed in s165(1), namely:

- (a) hearsay or admissions;
- (b) identification evidence;
- (c) age, ill health or injury of the witness;
- (d) criminally concerned
- (e) prison informer
- (f) unadopted questioning
- (g) deceased estate by person seeking relief

and at the request of a party, the judge must direct the jury in the terms set out in s165(3). This warning must (a) note that the evidence is of a kind that may be unreliable; (b) inform the jury as to the matters that may cause the unreliability; and (c) the need for caution in accepting the evidence, and in determining its weight.

s165(5) covers traditional common law warnings, such as the *Murray* direction; and the *Edwards* direction.

Of course, in the Local Court, you can ask a magistrate to direct themselves.

Objections

Preparation

I have taken a tip from practitioners in the Equity Division of the Supreme Court. They do all their evidence in chief by affidavit, and it is therefore common practice to file and serve a list of objections before the hearing. But there is no reason for not sitting down with the brief, and preparing a table like the one below:

OBJECTION NUMBER	WITNESS/DOCUMENT	PART OBJECTED TO	BASIS OF OBJECTION
1	Complainant	Par 1	Authenticity Hearsay Unfairness (137)

The benefit is that then, you can use that to remind you of the basis of the objection, when that evidence is given orally. I have tried it, and it makes you seem like an evidence expert.

Similarly, you can use such a table as the basis for a quick discussion with your opponent before a hearing, with a view to getting things knocked out. Then you don't have to trouble the judge about it. It buys a bit of credibility with HH, who doesn't have to hear submissions and make decisions, and allows everyone to focus on the real issues. You could use it in representations as well.

Closing remarks

I hope that this working guide has been of benefit to you. I don't suggest for a minute that it is complete, but it does cover most of the major areas. If you notice any omissions, or would like any assistance with anything, please don't hesitate to get in contact with me. I'm always happy to help.