

# EXCLUDING ERISPS OF CLIENTS WITH AN INTELLECTUAL DISABILITY <sup>1</sup>

## Intellectual disability

When considering a definition of intellectual disability, most lawyers consider it by reference to intelligence quotient (IQ). However, IQ alone does not diagnose intellectual disability and all current definitions of intellectual disability incorporate the dual concepts of cognitive skills and adaptive behaviour.<sup>2</sup>

Prior to the publication of DSM-V in 2013, diagnostic criteria for “Mental Retardation” (as it was in the DSM-IV) required that an individual be assessed as having an IQ of approximately 70 or less, and have deficits in at least 2 areas of adaptive behaviour. Additionally, the onset must have been before 18 years of age. The DSM-IV classified intellectual disabilities as mild (IQ 50-70), moderate (IQ 35-49); severe (IQ 20-34) or profound (IQ less than 20).

However, in the DSM-V IQ scores have been deemphasised. There is no longer a threshold IQ score for establishing a diagnosis – rather scaled IQ scores are evaluated in context of individual’s entire clinical picture.

The DSM-V categorises intellectual disability (a new term for the Manual) as a neurodevelopmental disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains.

Diagnostic criteria for intellectual disability in the DSM-V are:

- Criterion A: Deficits in intellectual functions, such as reasoning, problem-solving, planning, abstract thinking, judgment, academic learning and learning from experience, and practical understanding confirmed by both clinical assessment and individualised standardised intelligence testing.
- Criterion B: Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation and independent living, and across multiple environments such as home, school, work and recreation.  
[NB: To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. (DSM-5, p. 38)]
- Criterion C: The onset of intellectual and adaptive deficits must occur during the developmental period.

It appears the new diagnostic criteria have more flexibility than those in the DSM-IV: the criteria now focus more on adaptive behaviours than IQ; further the onset must

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<sup>1</sup> A paper prepared by Elizabeth Nicholson (Barrister, Sir Owen Dixon Chambers) presented on 2 May 2015 at the ALS Central South Eastern Regional conference

<sup>2</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

occur during “the developmental period”, as opposed to before the age of 18 (being a fixed/rigid chronological age cut-off).

Understanding intellectual disability is important for the reason that several studies have indicated that people with an intellectual disability are over-represented in the prison population and in criminal justice proceedings.<sup>3</sup>

In 2012, approximately 3% of the Australian population had an intellectual disability.<sup>4</sup> However (as at 2005) figures indicated about 20% of the prison population had an intellectual disability.<sup>5</sup> A study of juvenile offenders in NSW shows that 17.7% have an intellectual disability.<sup>6</sup>

This level of over-representation of persons with intellectual disability appears especially so in remote rural areas. A study in 1996 across two remote courts revealed that 36% of subjects in the sample obtained a standard IQ score less than 70 and could be described as intellectually disabled, and a further 20.9% of subjects obtained a standard IQ score in the borderline category of intelligence.<sup>7</sup>

Further, it appears Aboriginality is an important variable. A higher rate of intellectual disability has been found amongst Aboriginal or Torres Strait Islander young offenders.<sup>8</sup>

## **Categories of intellectual disability**

### *Mild intellectual disability (IQ 50 – 70)*

It is important to note the term mild denotes a comparison between the levels of intellectual disability – it does not mean that the individual is mildly affected. An individual with mild intellectual disability:

- may live in their own accommodation, but will require support from family or service providers in learning and performing the tasks of daily living;
- usually have to be taught skills that non-disabled people are able to pick up by themselves, and will take significantly longer to learn a skill;
- will need assistance with complex decisions about budgeting, changing employment, moving house, health care;
- tends to be concrete in their thinking and reasoning and take longer to solve simple problems and learn new tasks;

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<sup>3</sup> Hayes SC, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report No 4, New South Wales Law Reform Commission, 1993); Hayes SC, “Minorities – As Victims and Offenders” in KM Hazlehurst (ed), *Crime and Justice. An Australian Textbook in Criminology* (LBC Information Services, 1996); Hayes SC, *Manual for Administration of the Hayes Ability Screening Index (HASI)* (Centre for Behavioural Sciences, Department of Medicine, University of Sydney, 2000); Hayes SC “A review of non-custodial interventions with offenders with an intellectual disability” (2005) 17 (No 1) *Current Issues in Criminal Justice*

<sup>4</sup> Australian Bureau of Statistic 2012 Survey of Disability, Ageing and Carers (SDAC)

<sup>5</sup> Hayes SC “A review of non-custodial interventions with offenders with an intellectual disability” (2005) 17 (No 1) *Current Issues in Criminal Justice*

<sup>6</sup> Hayes SC, *Manual for Administration of the Hayes Ability Screening Index (HASI)* (Centre for Behavioural Sciences, Department of Medicine, University of Sydney, 2000);

<sup>7</sup> Hayes SC, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (Research Report No 5, New South Wales Law Reform Commission, 1996)

<sup>8</sup> Frize M, Kenny D and Lennings C, “The Relationship between Intellectual Disability, Indigenous Status and Risk of Reoffending in Juvenile Offenders on Community Orders” (2008) 52 (No 6) *Journal of Intellectual Disability Research* 510; Hayes SC “A review of non-custodial interventions with offenders with an intellectual disability” (2005) 17 (No 1) *Current Issues in Criminal Justice*

- will have some memory difficulties;
- will have some deficits in communication;
- tends to be suggestible and easily led by peer group;
- Difficult to foresee long-term consequences of their actions.

#### *Moderate intellectual disability (IQ 35 – 49)*

Individuals with moderate intellectual disability:

- Require greater support and are less independent;
- Might be able to travel on public transport;
- Could live in a group home with supervision and assistance with tasks such as shopping, preparing meals, domestic chores;
- More impaired reasoning skills;
- Tend to be impulsive and not think through consequences of their actions;
- Communication skills tend to be noticeably impaired;
- Find it difficult to remember dates and times.

#### *Severe (IQ 20-34) and profound (IQ < 20) intellectual disability*

Individuals with severe and profound intellectual disability comprise only about 5% of all persons with an intellectual disability. These individuals:

- Require constant supervision and assistance with almost every activity of daily life, such as dressing and personal hygiene, feeding themselves, etc;
- May have mobility problems;
- Severe communication deficits, may use gestures to indicate their needs and speech limited to few words.

A further issue in the diagnosing and categorising of intellectual disability is that intelligence testing distinguishes between verbal and non-verbal skills. A client may have significant disparity between verbal and non-verbal skills. It is fundamental to understand the different aspects of assessment and the nature of the testing when considering admissions obtained by police. In such situations, clients are utilising verbal skills. It may be that a slightly higher global composite IQ score belies a significantly lower result in the verbal skills testing, the global result having been “boosted” by non-verbal skills

#### **Identifying intellectual disability in a client.**

*“Identification of intellectual disability is one of the most difficult issues for personnel . . . [as] disability is not necessarily obvious from a person's appearance and some people with an intellectual disability attempt to conceal their disability or deny its existence” . . .*

NSW Law Reform Commission, Report No. 80, 1996

The statistics reveal that it is likely that many persons with intellectual disability are not identified until they are in custody, despite having had several interactions with lawyers and other service providers. There are multiple reasons for this: persons with intellectual disability will not always be aware that they have an intellectual disability, and may never have been diagnosed. Some who are aware that they have an intellectual disability will deny its existence or attempt to conceal their cognitive impairments and the impact of their disability on their functioning.

However the possibility that vulnerable persons with intellectual disability are going unidentified should be of concern to practitioners. Practitioners should be alert to the possibility of intellectual disability and, where the client presents with some signs of having an intellectual disability, need to investigate further.

Common signs of intellectual disability include:

- Client has difficulty in responding to questions or avoids responding to questions; or the client responds inconsistently or inappropriately to questions asked;
- Client has difficulty making him or herself understood;
- Client has a restricted vocabulary;
- Client has difficulty following instructions;
- Client has poor concentration and/or is easily distracted;
- Client acts younger than their stated years;
- Client has difficulties with memory or recall.

If a practitioner suspects that a client has an intellectual disability, the first step is to directly ask the client. However if the client does not know, or denies or conceals their disability there are other questions that might assist a practitioner to determine if further assessment is warranted:

- What school do you / did you go to? Were you ever in a special class? Do you know why you were in a special class? Were you in an IM class? (Note – some people might not have had their intellectual disability diagnosed at school and may not have been placed in special classes; equally some clients may not have completed a lot of education and there may not have been the opportunity to have an intellectual disability diagnosed; some students may have been in schools which encouraged integration etc)
- Did you have trouble learning at school? Did you get extra help with your lessons?
- Do you receive a Disability Support Pension (DSP)? Do you know why?
- Do you get help from any disability services? Do you have a case worker? Do you get help from ADHC?
- Do you get help with housing or employment?

A strong indicator of intellectual disability is difficulty understanding abstract concepts (such as the right to silence). One suggestion is that where a client is suspected of having an intellectual disability, practitioners should explain an abstract concept (in age or education appropriate language), and then ask the client to explain the concept back to the practitioner in his or her own words. If the client is able to successfully demonstrate understanding and articulate the abstract concept in their own words, then it is unlikely that they have an intellectual disability (although if there are enough other signs it may still warrant investigation).

However, if the client is unable to do so, it may be an indicator of intellectual disability. If the practitioner tries this several times during the conference with different abstract concepts, and on each occasion the client is unable to comprehend or explain the abstract concept in their own words then it is a strong indication that further assessment is warranted.

## **The impact of intellectual disability on making admissions**

There are a number of ways a client's intellectual disability might impact on admissions that are obtained by police.

### *Police training*

Police generally receive little training about interviewing suspects with an intellectual disability. This, combined with the fact that people with an intellectual disability can become adept at disguising it, can create substantial problems in terms of the reliability, accuracy and fairness of the admissions obtained.

Police may not be aware of a suspect's intellectual disability, and thus may not alter their usual language or questioning techniques. Persons with intellectual disability will have receptive and expressive language difficulties and may misinterpret the question being asked, or may provide an answer that is misunderstood by the police. Police may rely on certain answers as admissions because of the interpretation they attribute to the answer, when the client may not have understood his or her answer would lead to that interpretation. Police may ask leading questions, or questions containing multiple propositions. These types of questions create difficulties for persons with intellectual disability.

Where police are aware of the suspect's intellectual disability, the absence of proper training in interviewing suspects with intellectual disabilities means that police often do not have the skills or knowledge to understand how their questioning needs to change; or how their procedures should be adapted. For example the caution (and the Part 9 document) would need to be explained to the suspect in very different terms before an interview even began. Police could ask clarifying questions to confirm whether the suspect has understood what is being conveyed. Police would need to alter their questioning to ensure that they confirm their interpretation of answers; to use very simple (primary school) language; to only ask questions that contain one proposition or idea; to allow a suspect to answer in narrative form rather than be asked leading questions. However the limited training given to police has the result that, on most occasions, even where police are aware of a suspect's intellectual disability they often do not possess the knowledge or experience to understand the manner in which their questioning should be altered.

### *The terms of the caution*

The terms of the standard police caution ("*you are not obliged to say or do anything, but anything you do say will be recorded and may be used in evidence*") are at a comprehension level of upper high school. If a client has receptive and expressive language skills at a functional age equivalent less than this, the client will not understand the caution.

Persons with an intellectual disability who do not understand the terms of the caution are clearly more vulnerable to making admissions in a police interview. They cannot use the basic information of the caution to safeguard themselves and consider their rights.

### *Right to silence*

The right to silence is complicated legal concept, which can be difficult for clients to understand even if they do not have an intellectual disability. However it is also an abstract concept, being a "right" that persons in the community have. "Rights" in

general are abstract concepts, and the right to silence is even more theoretical as silence (in a legal sense) is also an abstract concept.

Abstract concepts are particularly difficult for clients with an intellectual disability, whose levels of cognitive functioning are usually limited to concrete concepts. Most clients with an intellectual disability will not have the capacity to understand the abstract right to silence.

#### *Acquiescence and suggestibility*

Clients with mild intellectual disabilities will be much more susceptible to leading questions; more likely to confabulate and generally are more vulnerable during interrogation.<sup>9</sup>

Acquiescence (that is, the tendency to answer a question or statement in the affirmative, regardless of the content) is strongly associated with low IQ.<sup>10</sup> During police questioning a person with an intellectual disability is more likely to answer questions in the affirmative irrespective of their content.<sup>11</sup> In addition they have a greater tendency to be misled by leading questions.<sup>12</sup>

Lower IQ scores (below 100) correlate significantly with suggestibility<sup>13</sup> and researchers have indicated that these findings suggest that people with lower intelligence (and intellectual disabilities) have limited abilities in adequate coping strategies and cognitive appraisal during interrogation. However, there is an interesting negative correlation between suggestibility and the number of previous convictions a person had – possibly indicating that the experience of having had previous convictions allowed the person to gain coping mechanisms and be aware of the outcome of yielding to leading questions by police, reducing the tendency to do so.<sup>14</sup> Thus prior convictions can to some extent mitigate the limitations of low IQ. However it is important to note this research considered persons with IQ scores less than 100 (not specifically persons with an intellectual disability being less than 70).

#### *Failure to understand the significance of the admissions being made*

A further concern is that a person with an intellectual disability might fail to understand the seriousness of their arrest or the charge they face, and they may fail to understand the possible outcome of an interview with police. The limitations of their understanding can extend to being relatively unconcerned about the long-term implications and consequences of making a false confession.<sup>15</sup>

A person with an intellectual disability may place less importance on the need for legal advice or representation during an interview with police.<sup>16</sup> A person with an intellectual disability who is innocent of an offence may be particularly vulnerable because of a concrete belief that innocence will be obvious and there will be no necessity in “fighting for their rights”.<sup>17</sup>

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<sup>9</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>10</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>11</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>12</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>13</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>14</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>15</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>16</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

<sup>17</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

### *Expressive and receptive language*

The language abilities of people with an intellectual disability are very significant in ERISPS and police questioning. The language capability of a person with an intellectual disability is relevant to:

- whether the person can understand the police caution;
- whether the person can understand the Part 9 document (this applies whether the person read it or if it is read aloud to them);
- whether the person can understand the advice that is given to them by a lawyer (if any);
- whether the person can articulate their choices about whether to participate in an interview (in circumstances where the person in fact understands there is a choice);
- whether the person can understand each question being asked;
- whether the person can articulate their answers in a way that they are not open to misinterpretation by police or the court;
- whether the person can understand the information being given to them by police – this includes the information police give them about what is alleged, or any statements witnesses have made, etc.

A person with an intellectual disability may have discrepancies in their language skills between receptive language skills, expressive language skills and articulation skills. For example, Professor Susan Hayes gives an example of how this may function in a police interview: if a person has clear articulation skills, a non-expert listener such as a police officer might reach the erroneous conclusion that the person is not impaired. However, the same person might have severe deficits in receptive language (meaning the ability to understand and follow what is being conveyed to the person) or expressive language (that is, a simplistic ability to communicate thoughts or information or to echo what others say). The outcome is that although an answer is clearly articulated, it may not be responsive to what was in fact being asked; or it may not convey what the person was trying to convey.

### *Memory*

Answering questions requires accessing memory in complex ways – from recognising words and phrases, labeling interactions and recalling information required for an accurate answer.

Clients with an intellectual disability are likely to have difficulties with memory. Many memory processes are verbally based – this is particularly difficult for individuals with limited verbal skills. Clients with an intellectual disability will have a more accurate memory for events in a narrative that they produce spontaneously,<sup>18</sup> as opposed to the question / answer style of police ERISPS.

## **RELEVANT PROVISIONS OF THE EVIDENCE ACT**

There are four significant sections of the Evidence Act 1995 that are useful in excluding ERISPS made by clients with an intellectual disability:

- Section 85 (reliability of admissions)
- Section 90 (fairness of admissions)
- Section 138 (improper or illegally obtained admissions)
- Section 137 (unfair prejudice arising out of admissions)

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<sup>18</sup> Hayes SC “Intellectual Disability” *Expert Evidence* (Thomson Reuters. Looseleaf service, update 50)

In reality there will be substantial overlap in the submissions to exclude admissions by intellectually disabled clients pursuant to s.85, s.90 or s.137 in particular.

Section 138 is likely to arise primarily in circumstances where the police were on notice that the client had an intellectual disability. Of course, there may be other unrelated s.138 objections to the admissions in any particular case; but for the purpose of this paper the author has considered objections taken pursuant to s.138 where the impropriety/illegality related to the intellectual disability of the client.

## Section 85

Section 85 provides as follows:

### **85 Criminal proceedings: reliability of admissions by defendants**

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

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

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

*(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.*

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

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

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

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

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

(emphasis added)

Section 85 is concerned with the reliability of admissions. The question is generally accepted to be an objective one, i.e. the objective likelihood that the conduct of investigators or circumstances of the admission being made would affect reliability – not whether in fact it did. The focus is directed to the circumstances in which the admission is made, excluding evidence that would substantiate or contradict the admission.<sup>19</sup>

However, on a practical level, the truth of the admission, if made, could be relevant to the issue pursuant to s.85(2): if an admission is shown to be untrue, this would tend to support an argument that the circumstances were likely to adversely affect the truth of the admission. However, practitioners seeking to take this course should be

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<sup>19</sup> *R v Ye Zhang* [2000] NSWSC 1099 at [52]



aware that if the defence raise the truth of the admission, the prosecution are entitled to adduce evidence on that question.<sup>20</sup>

Importantly, for the purposes of this paper, a suspect's vulnerabilities and personal characteristics must be taken into account in consideration of s.85. Intellectual disability is specifically mentioned in s.85(3)(a) as a characteristic the court must consider when determining if the circumstances in which the admission was made are such as to make it unlikely that the truth of the admission was adversely affected.

As outlined above, there are a multitude of ways that the circumstances of the police questioning might have adversely impacted on the reliability (or truth) of the admission made by a client is adversely impacted. The police questioning may not have taken into account the intellectual disability (or it may not have been known by police that the client had an intellectual disability) and the questioning may have included double questions, or leading questions, or the absence of opportunity for spontaneous narrative.

Equally, the client may have particular deficits in receptive language skills, or expressive language skills. There may be a significant risk that the answers as heard or read do not, in fact, reflect the information that the client was trying to convey to police. The client may have misinterpreted questions and provided answers which, although superficially seem to "match", might lead to inferences that the client did not mean to convey.

Where there are significant deficits in receptive and expressive language skills, it will almost always be the case that the circumstances of the formal ERISP process or interrogative questioning might adversely affect the truth of the admissions obtained (or said to be obtained, given the ambiguity surrounding what a client may have meant by a particular comment).

In circumstances where the evidence suggests that the client was not understanding what he or she was being asked, or that the accuracy of his or her answers to critical questions should be regarded as being in doubt, there would ordinarily be grounds for exclusion under s.85.<sup>21</sup>

Importantly though, these issues are not "assumed knowledge" for a judicial officer hearing a voir dire on the issue of excluding admissions. Evidence will have to be obtained – usually from a psychologist by way of an assessment or report as to the functioning of the particular client, and the impact of that functioning in the circumstances of the police interview and the difficulties the client may have had in understanding questions or expressing answers. The question of adducing evidence on a voir dire is dealt with in detail later in this paper.

Be alert to the possibility of unreliability in ERISPS of clients with intellectual disabilities caused by:

- leading questions (and problems with suggestibility and acquiescence as above);
- where there are multiple questions within a proposition put by police, the client may agree if only one of those propositions is true (e.g. "So it's the case you decided to stay in the car, because you that they were going to rob someone" – a client with an intellectual disability may answer yes to this proposition if it is true that he or she remained in the car. They may not

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<sup>20</sup> See *R v Donnelly* (1997) 96 A Crim R 432; *R v Ye Zhang* [2000] NSWSC 1099 at [52]

<sup>21</sup> See discussion in *Doklu v R* [2010] NSWCCA 309 at [36]

- understand the nuance of the second aspect of the question; they might consider it irrelevant; they might not understand that in simply understanding yes they are admitting the second part of the question to be true also);
- client misunderstanding the question that the police have asked and providing an answer to that question; which may not be a reliable answer to the question in fact asked;
  - client may have difficulty articulating or expressing an answer to a question, the result being that the answer heard by the police (and the tribunal of fact) is not the answer that the client meant to convey;
  - hypothetical questions and abstract questions will be difficult for the client to meaningfully answer;
  - the client may not understand the nuance or interpretation of a question, and will provide a literal answer; equally the client will not necessarily understand the likelihood of nuance or interpretation being given to their answers when heard by police (or the tribunal of fact);
  - The questioners and client might regularly be, or appear to be, at cross-purposes;
  - The client may be willing to please authority figures, or be inclined to just want to “get it over with” which can lead to inaccurate or untruthful answers.

Procedurally, on a voir dire as to excluding admissions under s.85, the defence must satisfy the court as to s.85(1). If, at that point, a question legitimately arises as to whether the circumstances were such that the truth of the admission might have been adversely affected,<sup>22</sup> then the prosecution will bear the burden of proof as to s.85(2) on the balance of probabilities.<sup>23</sup> In order for the question to legitimately arise, there will ordinarily have to be some evidence that indicates through legitimate reasoning that there is a reasonable possibility of the circumstances adversely affecting the truth of the admission.<sup>24</sup>

## Section 90

Section 90 provides:

### 90 Discretion to exclude admissions

*In a criminal proceeding, the court may refuse to admit evidence of an admissions, 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 / an accused] to use the evidence.*

This provision reflects the common law rule that a trial judge can exclude an admission if, having regard to the conduct of the police in obtaining it, and all the circumstances of the case, it would be unfair to admit it against the defendant.<sup>25</sup>

It is important to note that the terms of the section are that the court may exclude evidence (but need not). The onus will fall on the party seeking to exclude the ERISP to persuade the court that it should not be admitted.

<sup>22</sup> *R v Esposito* (1998) 105 A Crim R 27 at [44]

<sup>23</sup> Evidence Act 1995 (NSW) s.142(1)

<sup>24</sup> See *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34 at [234] when considering the same question regarding s.84 of the Evidence Act 1995.

<sup>25</sup> *Em v The Queen* [2007] HCA 46 at [108]; *R v Lee* (1950) 82 CLR 133 at 154

Section 90 is somewhat of a 'catch-all' provision. There is, to some degree, an absence of guidance in the authorities about what will come within the provision. The High Court has stated that "*the language in s.90 is so general that it would not be possible in any particular case to mark out the full extent of its meaning*"<sup>26</sup> and the circumstances when it might be unfair to use an admission against a defendant "*cannot be described exhaustively*"<sup>27</sup>

It is difficult then to comprehensively state all relevant characteristics of the admission for the court to consider. Further, there are contradicting authorities as to whether the probative value of the admission is a relevant criteria in determining fairness under s.90.<sup>28</sup>

It is clear there is some overlap between s.90 and s.85, in that police conduct leading to unreliability of the admission may be a good reason to exercise the common law rule reflected in s.90.<sup>29</sup> It may be that if s.85 is not engaged for some reason, s.90 will offer some relief. It is worth noting that ordinarily a party would run the objection under s.85 first, for the reason that the onus in that section falls on the prosecution to establish the circumstances were not such as to render the admission unreliable, whereas the onus in s.90 falls on the party seeking to exclude the ERISP to establish unfairness.

The High Court in *Em v The Queen*<sup>30</sup> took a restrictive view of the circumstances in which evidence of an admission that has survived the tests in ss.84, 85 and 138 should be excluded under s.90.

However, reliability is not the only criterion of fairness.<sup>31</sup> Having an intellectual disability, being mentally ill, or being intoxicated by drugs and alcohol are all circumstances that may be relevant to the assessment of s.90, although there is no governing rule that in any of those circumstances the admissions should be excluded as a rule.<sup>32</sup> Each case will turn on its own circumstances – where there is a real danger of confabulation, lack of awareness, or a lack of capacity to make a rational decision between speaking and remaining silent, or to give rational answers, exclusion under s.90 may be appropriate.<sup>33</sup>

It is clear that intellectual disability will be a circumstance that is relevant to the assessment of whether it is unfair to admit an ERISP against a defendant/accused. However, the mere fact of intellectual disability will not be sufficient. There must be some evidence that the intellectual disability of the client impacted upon either:

- the lack of capacity of the client to make a rational decision about speaking or exercising their right to silence; and/or
- the lack of capacity of the client to give rational answers or understand questions; and/or
- the danger of confabulation (or acquiescence or suggestibility).

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<sup>26</sup> *Em v The Queen* [2007] HCA 46 at [56] per Gleeson CJ and Heydon J.

<sup>27</sup> *Em v The Queen* [2007] HCA 46 at [109] per Gummow and Hayne JJ.

<sup>28</sup> *R v Em* [2003] NSWCCA 374 at [110]; compare with *R v Phan* (2001) 123 A Crim R 30 at [56]-[58]

<sup>29</sup> *Cleland v The Queen* (1982) 151 CLR 1 at 34

<sup>30</sup> [2007] HCA 46

<sup>31</sup> *Foster v The Queen* (1993) 67 ALJR 550 at 554-557

<sup>32</sup> For example see *R v Helmout* [2000] NSWSC 208 at [39] per Bell J; *R v Nelson* [2004] NSWCCA 231 at [22]-[23].

<sup>33</sup> *R v Medcalfe* [2002] ACTSC 83 at [24]

This will ordinarily require evidence, usually of an expert nature, as to the characteristics of intellectual disability and the dangers of admissions made in particular circumstances of police questioning.

It is worth considering also that in *Riley v The Queen*<sup>34</sup> McClellan CH at CL (Hoeben J and Grove AJ agreeing) at [155]-[158] considered that there would not be unfairness arising from potential unreliability if the tribunal of fact was in a position to assess and evaluate the reliability of the admission (in the case of a jury, with the benefit of appropriate directions from the trial judge).

This raises the possibility of the trial judge allowing the admissions to be admitted if the tribunal of fact can assess the reliability issues. This may lead to the view that if the defence can call expert evidence on the issue of the reliability of the admissions, there is no need for their exclusion pursuant to s.90 on the grounds of reliability.

This is another reason it is worthwhile pursuing s.85 exclusion first. Although *Riley* has been interpreted not to be prohibitive – that is, it does not necessarily require that the admissions be admitted, but rather that a trial judge need not exclude them if the reliability issue can be addressed.

However, the most fundamental issue under s.90 for clients with an intellectual disability will be whether they had the capacity to make a rational choice whether to speak or remain silent.

A person with an intellectual disability is unlikely to understand the terms of the police caution, which is at upper high school levels. If they do not understand the caution, there is little chance of the person understanding the effect of it – that is, that they need not answer questions or assist.

A person with an intellectual disability is unlikely to be able to understand the abstract concept of the right to silence, and the prohibition against any adverse inference that comes with the exercise of that right. These are concepts that are beyond the levels of abstract thinking for clients with an intellectual disability.

The strongest argument under s.90 to exclude ERISPS of clients with an intellectual disability is that, in almost all cases, the client will not have understood the basic rights of a defendant in the criminal justice system – and the idea of taking advantage of that lack of capacity such as to use the admissions to advance the prosecution against that client is completely at odds with the principles of our criminal justice system.

## **Section 138**

In circumstances where the police are aware that a person has an intellectual disability, they are required to take account of that intellectual disability in particular ways.

The provisions of the LEPRA Regulations and the provisions of CRIME (NSW Police Code of Conduct for Custody, Rights, Investigation, Management and Evidence) require the police to modify the way they conduct investigations, questioning and interviews where they are aware that the person has an intellectual disability.

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<sup>34</sup> [2011] NSWCCA 238

In the event that police either deliberately or recklessly fail to apply the provisions of the legislation or of CRIME, this may give rise to an objection to the entire ERISP on the grounds of illegal or improper police conduct.

## LEPRA

*Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA Act)* provide that the *Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW) ("LEPRA Regulations")* can modify the provisions of the LEPRA Act in respect of persons who have an intellectual disability: s.112 of the Act.

The LEPRA Regulations provide additional protections for people who have an intellectual disability. A person with "impaired intellectual functioning" is a "vulnerable person": Reg 24. This term is defined further in Reg 23, and would include persons with an intellectual disability.

### *Additional duty to assist them to understand the caution*

If a person with an intellectual disability is given a caution, the custody manager (or other person giving the caution) must take appropriate steps to ensure the person understands the caution: Reg 34(1).

The provision is not limited to custody managers, nor is it limited to the explanation of the Part 9 document. According to the Regulations, it applies to any person giving the caution. The effect of this is that when considering an ERISP for a client with an intellectual disability, where police were aware that the client had an intellectual disability, it should be apparent from the ERISP that wherever interviewing police caution the client, there are some additional steps taken by those officers to confirm or ensure the level of understanding of the client.

Additionally, the custody manager should be able to show something in their conduct that demonstrates proactive steps taken to ensure understanding - whether it be asking clarifying questions, or having the person repeat back to them what the terms of the caution are.

If the person with an intellectual disability has been given the caution in the absence of the support person, it must be given again in the presence of any support person that attends: Reg 34(2).

### *Assisting the person to exercise their rights*

There is a duty on a custody manager to assist a person with an intellectual disability in exercising the person's rights under Part 9 of LEPRA: Reg 25.

This would include assisting the person to understand what those rights are, to choose or contact a support person and to make a telephone call to a legal practitioner. Arguably it involves the custody manager taking practical and tangible steps to assist the person to exercise those rights.

Custody managers should be able to show that they assisted a person with an intellectual disability in some way over and above what they might have done for a person who was not vulnerable.

### *Support Person*

A person with an intellectual disability is entitled to have a support person when being questioned by police, or for any other investigative procedure: Reg 27(1). The custody manager must tell a person with an intellectual disability that they are entitled to have a support person: Reg 27(3). It is worth noting that this would be one of the areas where a custody manager would have a duty under Reg 25 to assist a person who has an intellectual disability to exercise their right to a support person.

The support person can be a guardian or person responsible for the care of the person with the intellectual disability, or a relative/friend, or any person that the person with the intellectual disability consents to being the support person: Reg 26(b)(i) and (ii). If none of these people are available to be a support person then the support person can be a person who has expertise in dealing with people with intellectual disabilities: Reg 26(b)(iii)

If the person wishes to have a support person, the custody manager must give the person reasonable facilities to enable them to arrange for a support person to be present and allow the person to make those arrangements in circumstances which, as far as practicable, do not allow the communication to be overheard: Reg 27(4). Again, a person with an intellectual disability may have difficulties in being able to make arrangements for a support person to attend. It depends on their level of intellectual disability whether they would be able to independently make a phone call to a guardian and explain the situation. This might be especially true if a guardian is not available – a person with an intellectual disability might simply ‘give up’ on trying to find a support person. It is incumbent on the custody manager to assist the person in these circumstances considering the terms of Reg 25.

The interview must be deferred for a reasonable period, up to 2 hours, until a support person is present (unless the right to a support person has been expressly waived): Reg 27(5) and (6).

There are some exceptions to the requirement of custody managers to comply with Regulation 27 (in Reg 27(7)) but the circumstances where they apply would be rare.

The custody manager has a duty to inform the support person that they are not restricted to acting as an observer and can assist and support the person during the interview, identify communication problems and observe whether the interview is being conducted properly and fairly: Reg 30.

### *Contact person responsible for their welfare*

The custody manager also has a duty to, as soon as practicable, ascertain the identity of the person responsible for the welfare of the person with an intellectual disability and contact the person responsible and advise the whereabouts and grounds for the detention of the person with an intellectual disability.

### CRIME

The NSW Police Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) makes provision for how police should deal with a person who has an intellectual disability.

It is worthwhile being across the provisions of CRIME, as failure to follow the provisions may ground a submission of impropriety. To some extent the provisions of CRIME mirror the legislation, but where there has been a failure to observe the provisions it is worthwhile pointing out the failure is a double one – not only the legislation but the internal Code of Practice has been disregarded.

CRIME provisions include:

- If an officer has a suspicion someone might be a vulnerable person they will be treated as such for the purposes of this Code.
- Before questioning suspects be satisfied they understand the caution and implications of actions following it.
- Where you feel they do not understand the caution, ask clarifying questions and record the answers in full:
- If you suspect the person is a vulnerable person take immediate steps to contact a support person.
- If you caution a vulnerable person in the absence of their support person repeat it in front of the support person. Give a copy of the *Caution and Summary* form to the support person and any interpreter who attends.

### Balancing Test

Where impropriety or unlawfulness can be established, there remains a discretion for the evidence to be admitted, where the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which the evidence was obtained: s.138(1).

The probative value and importance of the admissions made in the ERISP will, of course, be relevant to this balancing test. However where ERISPS of intellectually disabled clients are concerned, there are also a number of particular arguments that weigh against the exercise of the discretion:

- The degree to which the impropriety or contravention was deliberate: given that s.138 objections will only arise where the police were aware the client had an intellectual disability, there will have to be some level of deliberateness on the part of police to not fulfil their obligations to a vulnerable person. Even if deliberateness cannot be established, the contravention is more negligent than reckless – it is incumbent on police to know their duties when it comes to the most vulnerable people that they deal with;
- The gravity of the impropriety must be affected by the subject of the impropriety – in these cases persons with an intellectual disability are often already at a disadvantage in dealing with the criminal justice system and police. The importance of protecting the provisions about vulnerable persons and ensuring they are given more than lip service is a relevant factor in considering the gravity of the impropriety

### **Section 137**

Section 137 provides:

137 *Exclusion of prejudicial evidence in criminal proceedings*

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

This provision is perhaps of least assistance when trying to exclude an ERISP by an intellectually disabled client – if objections under s.85 have been unsuccessful, then it must be assumed that the prosecution have been able to establish that the circumstances are such as were unlikely to adversely impact the truth of the admissions. If s.90 has been unsuccessful then the court has found there is no unfairness in the admission, or has declined to exclude the ERISP having found there is unfairness. In such circumstances it seems unlikely the court would s.137 would find a danger of unfair prejudice to the person in connection with the person's intellectual disability (as opposed to other unrelated reasons that there may be grounds to object under s.137 of course).

However, s.137 differs from s.90 in the mandatory nature of the exclusion – there is no discretion to allow the evidence to be admitted. Therefore it may be that – in circumstances where the probative value of the admissions is particularly low – there are grounds for an argument that such a low probative value is outweighed by the danger of unfair prejudice (the danger of unfair prejudice being the risk that the ERISP may be misused in circumstances where there is ambiguity about meaning arising from the intellectual disability of the client).

Consideration of whether to take an objection under s.137 will depend on the probative value of the ERISP in the particular circumstances of any case.

### **Useful cases**

A useful case in arguments concerning s.85 and s.90 and intellectual disability is *R v Patricia Anne Gallagher*.<sup>35</sup> The matter concerned an accused with verbal and non-verbal abstract skills of extremely low and borderline, and with impaired conceptual reasoning. There were vast differences between verbal and non-verbal abilities of the accused. The accused had made admissions to undercover operatives.

In excluding the admissions, Bellew J stated at [182]-[183]:

*“I am satisfied that the accused had some capacity to understand questions put to her. However I am also satisfied that as a result of her cognitive and intellectual impairment, her capacity in that regard was diminished.*

*Moreover the fact that the accused may have had some capacity to comprehend questions does not lead to the conclusion that her answers to those questions were responsive or, more importantly, reliable.”*

The necessity of understanding the caution and the concepts of voluntariness were dealt with in *R v Li*.<sup>36</sup> In this Victorian case, the accused was a young Vietnamese person with a basic command of English. During his interview with police, it became apparent that he did not understand the standard caution which was read to him. The

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<sup>35</sup> [2013] NSWSC 1102

<sup>36</sup> [1993] 2 VR 80



ERISP was ruled inadmissible both on the ground of involuntariness and by applying the unfairness discretion. The two main points of the court's reasoning were:

*“(1) The concept of voluntariness extended to and encompassed the situation where answers were given by an accused person who lacked understanding that such questions need not have been answered, and, as a result, felt compelled to participate in the interview process. In such circumstances, the interview would be non-voluntary. This was so even though the interview itself might be conducted in an ostensibly cooperative fashion;*

*(2) The lack of understanding of the accused of the nature of his rights resulted in his inability to determine whether to speak or remain silent or whether to seek legal advice, or whether to speak to a friend or relative. Had the accused understood his ability to avail himself of those rights, the course of the interview might have been very different. In all of the circumstances, the interview should also be excluded in the exercise of the fairness discretion.”*

A useful case in considering s.138 objections in circumstances where police have not fulfilled their obligations pursuant to the LEPRA Regulations is *R v Phung and Huynh*.<sup>37</sup> That case concerned the issue of exclusion pursuant to s.138 in respect of admissions made by juvenile offenders (also vulnerable persons under the legislation), but the remarks of Wood CJ are equally applicable to the same provisions as they concern persons with an intellectual disability. The investigating officers had not complied with the LEPRA Regulations concerning vulnerable persons. His Honour, in the circumstances of that case, found that the breaches of the Regulations had not been deliberate, and that *“the failure to comply with the legislative regime arose from an inadequate understanding of those concerned, of the specific requirements of that regime, and the importance of observing them.”*

However, his Honour excluded the ERISPS, stating at [39]:

*“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 produce of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.”*

His Honour also made clear that police should not assume that their obligations can be met by rote reading of the requisite cautions and advice (such as the Part 9 document), or handing over forms for an accused to read himself or herself, or by securing a signature that it has been read – there is a positive obligation under the legislation to ensure that a vulnerable person (including a person with an intellectual disability) can understand what is being said and to assist a vulnerable person in exercising his or her rights.<sup>38</sup>

Wood CJ was of the view that the onus of proving compliance with the regime fell on the Crown.<sup>39</sup> This, however, has to be seen alongside the general onus under s.138 for the party seeking exclusion to establish that it was improperly or illegally obtained.

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<sup>37</sup> [2001] NSWSC 155

<sup>38</sup> *R v Phung and Huynh* [2001] NSWSC 155 at [63]

<sup>39</sup> *R v Phung and Huynh* [2001] NSWSC 155 at [64]

## **PRACTICALITIES OF THE VOIR DIRE**

It is important to realise that all the possibilities for exclusion discussed above require that there be evidence before the court of the client's intellectual disability and its impact upon:

- his or her capacity to understand the caution
- his or her capacity to understand the right to silence (and other abstract concepts)
- his or her capacity to make an informed and rational choice whether to speak or be silent
- the reliability of any admissions in the ERISP

This will ordinarily require expert evidence.

The argument for exclusion is held as a voir dire: s.189.

### **Practicalities of diagnosing intellectual disability**

There are difficulties in identifying intellectual disability, as discussed above. Further, there are several challenges for a legal practitioner wanting to establish a diagnosis of intellectual disability if such a diagnosis is not already in existence.

Firstly, the diagnostic criteria require the onset of the intellectual disability must occur during the developmental period. If the client is still a child, then this does not provide a significant difficulty – but it does mean clinical assessment should be undertaken as soon as possible.

If the client is in the care of the Minister (or has been at some time) it may also be worthwhile issuing subpoenas to FACS or residential care providers for any assessments that form part of their records. It may be that there has already been a diagnosis, even if the client is not aware.

If the client is already an adult, it might be possible to establish the onset of the intellectual and adaptive deficits in other ways:

- An assessing clinician can, of course, base the assessment of the third criteria (time of onset) on information provided by the client. However this can become complicated if the client is a poor historian, which is usually the case if a client has an intellectual disability.
- If the client is supported by family, a clinician can obtain information from family members as to the onset of intellectual and adaptive deficiencies. Family members can often provide or corroborate a history as to when the client was first assessed as having a 'learning disability' or being placed in a special class at school; or when the client began demonstrating deficiencies in adaptive behaviours. This can be done by way of affidavits provided to the clinician with other supporting documentation, particularly in circumstances where there are multiple family members who could provide evidence of the date of onset of the deficiencies; the family live a significant distance away; or in circumstances where family are unable to travel to the appointment with the client.
- If possible, obtain school records – often school records will include IQ assessments or other school records establishing deficiencies with the

client's ability to learn, problem-solve, reason etc (intellectual deficiencies). Even if the records do not contain IQ assessments they might contain references to placement in IM classes or additional learning assistance being provided to the client.

- As above, FACS records or records of other services that have assessments from when the client was a child may assist in establishing either a diagnosis or in establishing that adaptive behaviour deficits and cognitive deficits began at a point prior to 18 years old.
- Where the client is an adult, a complicating factor might be a history of any head injuries or drug/alcohol use. A history regarding these factors will be relevant to the assessing clinician.

A further difficulty for practitioners wanting to obtain a diagnosis of intellectual disability is that adaptive functioning may be difficult to assess in a controlled setting such as a correctional centre or detention centre. In such circumstances, if possible, corroborative information reflecting functioning outside those settings should be obtained. This might originate from the client, but could also come from family, support workers, juvenile justice officers/probation and parole officers etc.

### **Letter of instruction**

Once the decision has been made to have a client assessed, a letter of instruction will be sent to the psychologist who is to undertake the clinical assessment.

The importance of the letter of instruction cannot be overestimated. The issues identified by the solicitor when referring the client determine the nature of the assessment. If a letter of instruction requests a general assessment as to whether the client has an intellectual disability, or an assessment for fitness, or a s.32 report, it is unlikely to contain the required evidence to found the objections.

The letter of instruction must be particular, and should request an opinion as to whether:

- a) the client has an intellectual disability;
- b) the impact of the intellectual disability in particular on their verbal skills, and their receptive and expressive language abilities (and where appropriate to provide an opinion as to whether it is apparent from the ERISP that the client's intellectual disability may have been impacting the manner in which they comprehended or failed to comprehend questions; or gave answers that were misunderstood);
- c) whether the client has the capacity to understand the terms of the police caution that they were given (note - this will usually necessitate the provision of police statements to the assessing psychologist so that the opinion can be accurate as to the caution given in this instance);
- d) whether the client has the capacity to understand the abstract concept of the right to silence, including the prohibition against any adverse inference being drawn from the decision to exercise such right;
- e) any other way that their intellectual disability might have impacted on their ability to comprehend the questioning, or the procedures once they were arrested.

Depending on the circumstances of the particular matter, practitioners may wish to also request an opinion as to whether the client had the capacity:

- (f) to understand the procedure on arrest;

- (g) to understand the role of his or her support person;
- (h) to comprehend any legal advice given over the telephone (such as from the CNS solicitor);
- (i) to have understood the conceptual difference between the right to exercise the right to silence generally, as opposed to being required to answer certain mandatory questions (where the offence involves a Form of Demand, or where otherwise there is some legislative obligation to answer questions); and to have recognised when the questioning transitioned from mandatory questions to general questions;
- (j) to have understood that he or she was able to terminate the electronically recorded interview at any time he or she chose, even if questioning had begun.

It is important that the expert not address the actual circumstances of offending with the client in the report, as the report will be tendered on the voir dire.

Ensure the psychologist is provided with all relevant material. At the least this should include:

- the fact sheet for the offence;
- the criminal antecedents of the client;
- the ERISP (where possible both the video and the transcript);
- the statements of any police who dealt with the client at arrest or at the police station, or in the process of admissions being made;
- any previous assessments of the client by school counselors, or other psychologists or psychiatrists;
- any relevant statements of other witnesses (such as the support person).

It is often helpful if psychologists can provide information in the opinion as to functional age equivalents. The functional age equivalent can provide more significant information to a lay person, such as a Magistrate or Judge, as to why a person with an intellectual disability might act in a particular way, and can be meaningful in clarifying the level at which reasoning or vocabulary or comprehension will function at.

### **Calling evidence on the voir dire**

It is fundamental that there be evidence from which the court can draw the inferences, or make the findings, urged. The provisions of s.85, s.90 and s.138 will almost always involve evidence being adduced. Such evidence can be adduced through:

- a) the evidence of expert witnesses;
- b) the cross examination of police witnesses (for example as to s.138 issues);
- c) the evidence of the client or support person or other family member present as to the procedures on and after arrest, or the circumstances in which the admissions were made (for example as to s.138 issues, but also more generally, such as in circumstances where the client may have indicated a lack of understanding to a witness at the time of making the admissions).

It may be possible to tender the expert report of the psychologist without the requirement that they attend for cross-examination: If time allows, it is worth serving the report on the prosecution and requesting that they advise whether they require the expert witness to attend. It may be that the prosecution will simply not contest the evidence, but argue the discretions within the sections. If the expert witness is able to complete an expert certificate pursuant to s.177, the onus is shifted onto the prosecution to notify in writing that the witness is required.

The prosecution may brief its own expert. Be aware that there is no obligation on a client to make himself or herself available for examination by an expert for the prosecution – it is not analogous to a fitness hearing. However, the prosecution may provide the defence report together with relevant brief items to a psychologist for an opinion as to the apparent impact of any intellectual disability. This evidence will be limited by the inability of that witness to conduct any testing of the client and it will really be evidence commenting on the methodology and conclusions of the defence expert.

Depending on the circumstances of each individual case, there may be other evidence that needs to be called on the voir dire. This evidence may come from the client, or in some circumstances relevant evidence (such as about what police told the client about the right to silence or whether he or she had to participate) could be adduced from the support person or a family member that was present.

A practitioner should be aware of the provisions of s.189 if intending to call the client. The effect of s.189(3) is that in a voir dire in relation to an admission in a criminal proceeding the defendant cannot be cross-examined as to the truth of the admission (unless the issue of its truth has been raised by the defendant). The effect of s.189(6) is that a defendant testifying in a voir dire proceeding relating to an admission may rely on the privilege against self-incrimination. Finally, the effect of s.189(3) is that in a jury trial where the jury has not been present during a voir dire, evidence of the testimony of a defendant in the voir dire is not admissible in the trial proper unless the defendant gives inconsistent evidence in the trial.