

UniCramNotes.com  
Ace your exams in style with UniCramNotes in town!

# Evidence Law Cram Notes

1<sup>st</sup> Edition



UniCramNotes.com



**TABLE OF CONTENTS**

**1. INTRODUCTION ..... 5**  
 A. How to use Cram Notes..... 5  
 B. Abbreviations..... 5

**2. THRESHOLD QUESTION – IS THE EVIDENCE RELEVANT?..... 5**  
 A. Background and relationship evidence..... 6  
 B. Evidence of state of mind..... 6

**3. CAN THE EVIDENCE BE EXCLUDED? ..... 6**  
 A. General discretion to exclude evidence ..... 6  
 B. Mandatory exclusion of prejudicial evidence ..... 7  
 C. Definition of “unfairly prejudicial” ..... 7  
 D. Discretion to exclude improperly or illegally obtained evidence..... 7  
     i. Considerations as to desirability/undesirability.....8  
         1) Probative value – s 138(3)(a).....8  
         2) Importance of evidence – s 138(3)(b) .....8  
         3) Nature of relevant offence – s 138(3)(c).....8  
         4) Gravity of the police impropriety – s 138(3)(d) .....8  
         5) Recklessness – s 138(3)(e).....8  
         6) Considerations under the ICCPR – s 138(3)(f).....8  
         7) Whether other actions will be taken – s 138(3)(g) .....9  
         8) The difficulty of obtaining evidence without impropriety – s 138(3)(h).....9  
 E. General discretion to limit use of evidence ..... 9

**4. ARE THERE PROCEDURAL PROBLEMS WITH WITNESS TESTIMONY? ..... 10**  
 A. Motives to lie and interest in outcome of the case..... 10  
 B. Competence and compellability ..... 10  
     i. Lack of capacity ..... 10  
     ii. Defendants in criminal proceedings ..... 10  
     iii. Reduced capacity ..... 10  
     iv. Compellability of spouses and others in criminal proceedings generally..... 10  
 C. Examination in chief ..... 11  
     i. Leading questions..... 11  
 D. Cross-examination ..... 11  
     i. Leading questions..... 11  
     ii. Unfavourable witness ..... 12  
         1) Not making genuine attempt to give evidence ..... 12  
         2) Prior inconsistent statement..... 12  
     iii. Improper questions..... 12  
     iv. Procedural fairness..... 13  
         1) The rule in *Browne v Dunn* ..... 14  
 E. Re-examination ..... 14  
 F. Other procedural elements..... 14  
     i. Reviving witness’ memory ..... 14  
     ii. Granting leave..... 15  
     iii. Judicial notice ..... 15

**5. CHALLENGING THE WITNESS’ CREDIBILITY ..... 15**  
 A. credibility evidence ..... 15



B. Prior inconsistent statements.....	16
C. Exceptions to admissibility.....	16
i. Cross-examination.....	16
1) As to credibility .....	16
2) Rebutting denials .....	16
3) Indirect rehabilitation of witness credibility .....	17
4) Leave .....	17
ii. Re-examination.....	17
1) General exception to credibility rule .....	17
2) Specific exception for prior consistent statement .....	17
iii. Examination in chief.....	18
1) Suggestion of fabrication and/or reconstruction.....	18
iv. Expert evidence.....	18
v. Attacking credibility of someone not called as witness .....	18
<b>6. ADDUCING AND CHALLENGING CHARACTER EVIDENCE.....</b>	<b>19</b>
A. Has character evidence been raised?.....	19
i. Circumstances .....	19
ii. Emphatic denial of guilt .....	19
1) Responsive .....	19
2) Unresponsive .....	19
B. Rebuttal - general or particular character evidence?.....	20
C. Is leave needed?.....	20
D. Is there a need for a judicial direction? .....	21
i. Judicial direction.....	21
ii. Standard direction.....	21
<b>7. ADDUCING AND CHALLENGING TENDENCY EVIDENCE.....</b>	<b>21</b>
A. Admissibility.....	21
i. Elements .....	21
ii. Has there been notice?.....	21
1) Exceptions to notice requirement for responsive evidence .....	21
iii. Is there significant probative value?.....	21
1) Factors for significant probative value.....	22
iv. Non-responsive evidence.....	22
1) Prosecution - Probative value must outweigh prejudicial effect .....	22
2) Defendant – exception.....	23
v. responsive evidence.....	23
1) Rebuttal by Prosecution .....	23
2) Defendants.....	23
B. Limited use for other purposes, even if relevant.....	23
<b>8. ADDUCING AND CHALLENGING COINCIDENCE EVIDENCE .....</b>	<b>24</b>
A. Admissibility.....	24
i. Elements .....	24
1) 2 or more events .....	24
ii. Has there been notice?.....	24
1) Exceptions to notice requirement for responsive evidence .....	24
iii. Is there significant probative value?.....	24
iv. Non-responsive evidence.....	25
1) Prosecution - Probative value must outweigh prejudicial effect .....	25
2) Defendant – exception.....	25
v. Responsive evidence .....	25



1) Rebuttal by Prosecution .....	25
2) Defendants.....	25
vi. Distinguishing coincidence evidence and tendency evidence .....	25
vii. Limited use for other purposes, even if relevant.....	25
<b>9. ADDUCING AND CHALLENGING OPINION EVIDENCE .....</b>	<b>26</b>
A. Is it an opinion? .....	26
B. Exceptions.....	26
i. Alternative use .....	26
ii. Lay opinion (eyewitness).....	26
iii. Expert opinion .....	26
1) Specialised knowledge.....	26
2) Wholly or substantially based .....	27
3) Discretionary exclusions for expert evidence.....	27
<b>10. ADDUCING AND CHALLENGING IDENTIFICATION EVIDENCE .....</b>	<b>28</b>
A. Definition of identification evidence .....	28
B. Visual identification .....	28
i. Definition.....	28
ii. Was an identification parade held? .....	28
iii. Reasonable excuse for not holding parade?.....	28
C. Picture identification .....	29
i. Definition.....	29
ii. Not admissible if .....	29
1) Picture in police custody .....	29
2) Could have held identification parade.....	29
D. Mandatory warning & directions to the jury .....	30
<b>11. ADDUCING AND CHALLENGING HEARSAY EVIDENCE .....</b>	<b>30</b>
A. Definitions .....	30
i. Previous representation .....	30
ii. Representation.....	31
iii. Asserted fact .....	31
B. Admissibility.....	31
i. Is there a 'previous representation'? .....	31
ii. How is the representation relevant? What fact is it being adduced to prove? ...	31
iii. Is the fact to be proved (purpose of tender) what the declarant intended to assert? .....	32
1) Express and implied assertion.....	32
2) Intended and unintended assertions .....	32
iv. Is there another purpose to adducing the evidence of the previous representation? .....	32
C. Does it fall within an exception?.....	33
i. Relevant for a non-hearsay purpose (first & second hand hearsay).....	33
ii. First Hand Hearsay .....	33
1) Maker had personal knowledge of asserted fact .....	33
2) Maker available .....	34
3) Maker unavailable.....	34
iii. Contemporaneous statements (first hand hearsay).....	36
iv. Business records.....	37
v. Character of and expert opinion about accused persons.....	37
<b>12. WERE JUDICIAL WARNINGS AND DIRECTIONS GIVEN?.....</b>	<b>37</b>



A. Comment on accused’s failure to give evidence..... 37  
 B. Unreliable evidence ..... 38  
     i. Evidence of a kind that is unreliable ..... 38  
     ii. Warning to the jury ..... 38  
     iii. Exception ..... 39  
 C. Delay in prosecution..... 39  
 D. Children’s evidence ..... 39  
 E. Common law warnings..... 40  
     i. Longman (mandatory) warning..... 40

**1. INTRODUCTION**

**A. HOW TO USE CRAM NOTES**

The Evidence Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn’t one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

**B. ABBREVIATIONS**

The Evidence Cram Notes will refer frequently to the *Evidence Act 1995* (Cth) using the abbreviation **EA**.

**2. THRESHOLD QUESTION – IS THE EVIDENCE RELEVANT?**

The evidence must firstly be relevant in order to be admissible (s 56). Note however that relevance is not a discretion (*Smith*).

Section 55 provides the threshold test for relevance of evidence. Evidence is relevant where if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. Facts in issue are the factual elements of crime and any defence.

Section 57 provides that evidence may be provisionally relevant if the ultimate relevance of the evidence is subject to further evidence being admitted later (*Nye*). Circumstantial evidence will often fall within the domain of provisional relevance. It has been held that unless evidence



leave must first be sought to adduce the evidence of the prior consistent statement (s 192).

### **iii. EXAMINATION IN CHIEF**

The witness' credibility may be rehabilitated in advance if there is an anticipation of an attack to the witness' credibility by the other side.

#### **1) Suggestion of fabrication and/or reconstruction**

Section 108(3)(b) may also be used in situations where there will be a suggestion of fabrication and/or reconstruction. This could be in the course of the witness's examination in chief or via another witness. Such evidence may include admissions made by the witness before the murder is known, to show that there was no fabrication (*Martin*).

### **iv. EXPERT EVIDENCE**

Section 108C provides a specific exception to the credibility rule in relation to expert evidence. The credibility rule does not apply to credibility evidence given by a person concerning another witness if:

- the person has specialised knowledge based on the person's training, study or experience (s 108C(1)(a)) and
- the evidence is evidence of an opinion of the person that is wholly or substantially based on that knowledge (s 108C(1)(b)(i)) and
- the evidence could substantially affect the assessment of the credibility of the witness (s 108C(1)(b)(ii))

Note that leave must first be sought from the court to adduce the evidence (s 108C(1)(c))

### **v. ATTACKING CREDIBILITY OF SOMEONE NOT CALLED AS WITNESS**

If evidence of a previous representation has been admitted in a proceeding, and the person who made the representation has not been called to give evidence in the proceeding, then credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility (s 108A(1)).

In deciding this question, the court may have regard to:

- whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth (s 108A(2)(a)) and
- the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation (s 108A(2)(b))
- Note that these factors are not exclusive (s 108A(2))

However, if the person referred to in s 108A is a defendant, the credibility evidence is not admissible unless the court gives leave (s 108B). Section 108B is necessary for the protection of an accused's right to silence by limiting the prosecution's ability to adduce adverse credibility evidence.

Leave must not be given unless evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and is relevant solely or mainly to the witness's credibility (s 108B(4)).

However note that leave is not required if the evidence is about whether the defendant:

- is biased or has a motive to be untruthful (s 109B(3)(a)) or



- is or was unable to be aware or recall matters to which his evidence relates (s 108B(3)(b))  
or
- has made a prior inconsistent statement (s 108B(3)(c))

## 6. ADDUCING AND CHALLENGING CHARACTER EVIDENCE

### A. HAS CHARACTER EVIDENCE BEEN RAISED?

Section 110(1) provides that the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

Character evidence goes to show that a person is of a good character, in either a general or particular respect. In the case of *Fuller*, the accused raised his good character by conveying the clearest suggestion that he was not the kind of person who would or could do serious physical violence to an elderly woman and he was therefore unlikely to be involved in the commission of the offence.

The prosecution cannot unilaterally raise character evidence until the defence has under s 110.

*Melbourne v R*

- Evidence of good character is readily admitted because it is regarded as tending to prove that the accused is unlikely to have committed the crime in question. Evidence of bad character is admitted only in exceptional circumstances even where the courts regard it as tending to prove that the accused is likely to have committed the crime in question.

#### i. CIRCUMSTANCES

Where the defendant raises character evidence in examination in chief, it is taken to be more likely that such evidence was intended to be raised by the accused. However, under intense cross-examination, there may be doubts as to whether good character was raised by the accused, such as where the accused is forced to raise character evidence to rebut accusations (e.g. in the form of emphatic denials of guilt).

#### ii. EMPHATIC DENIAL OF GUILT

Note however that emphatic denials of guilt do not amount to the raising of good character evidence, especially where the emphatic denial was a result of an unfair question during cross examination. (*Bartle*).

##### 1) Responsive

Responsive emphatic denials of guilt refer to good character which is raised as a response to scathing questions posed by the cross-examiner. This is because the accused is generally unable to defend themselves from the inference of bad character (as implied by the cross-examiner's questions) unless he/she raises evidence of good character (*Eastman*). However, if good character is raised which is misleading to the jury and factually wrong, the prosecution can correct it (*Eastman*).

##### 2) Unresponsive

Unresponsive emphatic denials of guilt are denials that are not deliberate, and do not respond to the question posed by the cross-examiner.



#### *Gabriel's Case*

- Facts: the cross-examiner asked 'Do you need a reason to attack people, do you?' and Gabriel responded 'I suggest that I don't go round attacking people'.
- It was held that the cross-examiner's question invited the accused to affirm or deny that he was the sort of person who would need a reason to attack people. The question was both inadmissible and unfair, it should not have been asked or answered.
- A prosecution who cross-examines by suggesting to the accused that he or she had the opportunity and tendency to commit the type of crime charged, can hardly be surprised if the accused chooses to deny emphatically that the opportunity was taken or the tendency was realised as regards the offence charged.

#### *R v Bartle*

- Diez's answer in the context was no more than an emphatic denial of the guilt which he was entitled to perceive as having been strongly hinted at by the cross-examination leading up to the answer in question.
- The questions that immediately followed only tend to reinforce the objective reality of the critical answer "because I never been involved in any importation, been selling any drugs".

#### *R v El-Kheir*

- This case dealt with whether the raising of bad character by the accused could constitute the raising of good character (in the sense that the accused has come clean and is telling the truth)
- The accused's admission of Centrelink fraud was bad character, but it could not be considered that such honesty raised good character.
- However, the accused's deliberate, unresponsive responses which emphatically suggested he was telling the truth as he had taken an oath were held to be the raising of good character, especially since they were raised in examination in chief.

### **B. REBUTTAL - GENERAL OR PARTICULAR CHARACTER EVIDENCE?**

If the defendant has raised general evidence of their good character, the prosecution can only rebut with evidence that the defendant is not generally a person of good character (s 110(2)).

Likewise, if the defendant has raised particular evidence of their good character, the prosecution can only rebut with evidence that the defendant is not a person of good character in that respect (s 110(3)).

The relevant test to consider is:

- What kind of character evidence has been raised by the defence?
  - o Is it general or particular?
- Has the Crown raised the same kind of retaliatory character evidence in rebuttal?
  - o For example, if the defence raised general character evidence, the Crown must only rebut with general character evidence.

### **C. IS LEAVE NEEDED?**

A defendant must not be cross-examined about character evidence unless the court gives leave (see s 192, discussed previously)





## D. IS THERE A NEED FOR A JUDICIAL DIRECTION?

### i. JUDICIAL DIRECTION

Where there is a danger that the jury will use the character evidence for its tendency value, and that there is an added danger that the jury will convict on the tendency aspect, a direction may be needed to restrict its use for character purposes only. The judge may restrict the use of the evidence for its credibility or character purpose only under s 136. In addition, s 135 and s 137 may be relevant to exclude the character evidence if it may be unfairly prejudicial.

### ii. STANDARD DIRECTION

In *Melbourne v R*, it was held that the judge has a discretion as to whether to direct the jury on evidence of good character. However, where bad character has been elicited, it is prudent to give bad character warning (*El-Kheir*). The *Telfer* standard direction should be given if the judge wishes to direct on character evidence, as follows:

*The jury should take into account that the accused has never committed a serious offence. But the fact that the accused has never committed a serious offence cannot prevail over or provide a defence to evidence of guilt if you are satisfied that the Crown has proved the accused's guilt beyond reasonable doubt.*

## 7. ADDUCING AND CHALLENGING TENDENCY EVIDENCE

### A. ADMISSIBILITY

#### i. ELEMENTS

Section 97 provides that evidence of the character, reputation, conduct or tendency of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind.

However, such evidence will be admissible if:

- notice given to other party of intention to adduce tendency evidence, and
- the evidence has significant probative value

#### ii. HAS THERE BEEN NOTICE?

Reasonable notice must be given by the party seeking to adduce the evidence of the party's intention to adduce such evidence (s 97(1)(a)).

##### 1) **Exceptions to notice requirement for responsive evidence**

Notice need not be given if the tendency evidence is adduced to explain or contradict tendency evidence adduced by the other party, i.e. responsive evidence (s 97(2)(a)). This is to prevent an ambush from the other side. The court may also dispense with notice under s 100.

#### iii. IS THERE SIGNIFICANT PROBATIVE VALUE?

The tendency evidence must have significant probative value (s 97(1)(b)). Significant probative value means more than mere relevance but less than a 'substantial' degree of relevance (*Lockyer*). It must be 'important' or 'of consequence'.



### 1) Factors for significant probative value

The following factors should be taken into account in determining significant probative value:

- other evidence has already been adduced;
- whether the tendency evidence is disputed or there is a chance of collusion;
- whether tendency evidence refers to a critical fact;
- 'time gaps' between purported acts showing tendency. Consider when the other conduct occurred. Conduct that occurred very long ago may be of low probative value;
- the number of incidents establishing tendency;
  - o In *Joiner*, three former incidents were sufficient.
- degree of similarity;
  - o *Jacara* – Significant differences between what each tenant had been told undermined the probative value.
  - o *Folbigg* – degree of similarity between each event increases probative value of coincidence evidence as a whole
  - o *Joiner* – clear inference available from the circumstances of the other incidents that they amounted to intentional and violent responses to minor irritations, even if intent to cause really serious bodily injury was not inferred beyond reasonable doubt in relation to the other incidents.
  - o *Li* – tendency to use violence to the complainant and to seek to control her in stressful marriage situations
- evidence discloses unusual features or an underlying unity or pattern;
  - o *Jacara* – Evidence that salespersons had been told to make some specific claim (as part of a system) would be more probative.
  - o *Fletcher* – Priest accused of grooming and assaulting young males. The acts of grooming were held to be a system or pattern of behaviour.
- the strength of inference drawn from the tendency in relationship to the fact in issue;
- the extent to which that tendency increases the likelihood that a fact in issue did, or did not, occur.

### iv. NON-RESPONSIVE EVIDENCE

Non-responsive tendency evidence is that raised unilaterally against the other party.

### 1) Prosecution - Probative value must outweigh prejudicial effect

Under s 101(2), tendency evidence about a defendant, that is adduced by the prosecution, cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect. Note that this section only applies to the prosecution.

Section 101 thus provides a similar protection to s 137, and in fact, overrides that protection due to its wider scope.

*Pfennig* per McHugh in dissent (followed in later cases)

- If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty.
- The evidence must be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused.

*Ellis* (follows McHugh J in *Pfennig*)

- Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion.



- had stabbed her (which was unlikely to be fabrication as it was made straight away)
- The defence sought to show that in the ambulance, the victim said she didn't know who it was that stabbed her. The defence argued that the whole situation must be taken into account.
  - The court limited the "circumstances" to be considered to the events that were happening at the time the representation was made.

The broad view was applied in *Ambrosoli*:

- The section is concerned with the unlikelihood of concoction, and not whether the maker of the representation might have been honestly mistaken.
- The relevant question is the reliability of the making of the previous representation, and not the reliability of the asserted fact in the previous representation.
- Evidence tending only to the reliability of the asserted fact should be ignored, but reliability of the previous representation will be relevant.
- In this regard, events surrounding the circumstances will be relevant as long as it touches the reliability of the circumstances.

"was against the interests of the person who made it" s 65(2)(d)

The representation is objectively against the interests of the person where the person is implicating themselves (*Suteski*).

Section 65(7) provides further guidance. A representation is against interests of a person if it tends to:

- damage the person's reputation, or
- show that the person has committed an offence for which the person has not been convicted, or
- show that the person is liable in an action for damages.

### **Concession for defendants**

The defendant has a huge concession under s 65(8) in relation to first hand hearsay. The defendant need not prove any of the elements in s 65(2), even where the maker the representation is unavailable.

Under s 65(8), the hearsay rule does not apply to evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made.

If the defendant wishes to rely on this section, notice of an intention to use such evidence must be given to the prosecution under s 67.

Note that if the defendant chooses to use this section, the prosecution is also given the same concession under s 65(9) in adducing evidence to counter the defendant's evidence under s 65(8).

### **Notice**

Section 67 requires notice to be given in relation to evidence adduced under s 65(2), s 65(3) and s 65(8). The notice must be in writing and given to the other party, alerting the other party to their intention to adduce such evidence.

### **iii. CONTEMPORANEOUS STATEMENTS (FIRST HAND HEARSAY)**

Note that s 62 (maker had personal knowledge of asserted fact) must be satisfied first before this section is applied.



Under s 66A, the hearsay rule doesn't apply to a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

The test is whether the maker of the representation had that feeling or intention at the time the maker made the prior representation.

- Evidence of statements made by the deceased to family/friends to the effect that she was in a relationship with the accused, was intending to break up with him and on the evening before she disappeared, was intending to meet up with him, were admissible (*Serratore*).
- Evidence by A, who read the complainant's diary entry, and gave evidence that it said "I wouldn't mind being screwed by him" was admissible, as it revealed the complainant's state of mind (which was relevant to the issue of consent) (*Van Dyk*).

#### **iv. BUSINESS RECORDS**

Section 69 provides an exception to hearsay in relation to business records.

- Includes representations contained in documents that form part of the records kept for the purposes of a business
  - o Business is defined expansively to include commercial, government, police, hospitals, and court business (*Seeley*)
- The records must be made or recorded in course of or for purpose of the business (*Prentice*)
- The records must be made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted facts, or they have been made on the basis of info supplied by such a person (*Daniel v WA*)
- The representation must not have been made or obtained in contemplation of or in connection with legal proceedings or a criminal investigation (s 69(3))
- Section 69(4) enables admissibility of evidence of the absence of a business record.

#### **v. CHARACTER OF AND EXPERT OPINION ABOUT ACCUSED PERSONS**

Sections 110 and 111 provide that character and expert opinion about accused persons do not fall under the hearsay rule.

## **12. WERE JUDICIAL WARNINGS AND DIRECTIONS GIVEN?**

Judicial warnings may be requested pursuant to s 165 (unreliable evidence), s 165A (evidence of children) and s 165B (forensic disadvantage due to delay). These are discussed further below.

### **A. COMMENT ON ACCUSED'S FAILURE TO GIVE EVIDENCE**

In a criminal proceeding for an indictable offence, the judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence.

However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned (s 20). Note that the word 'suggest' is of very wide application and the judge may not make any "reference, direct or indirect, and either by express words or the most subtle allusion" (*RPS*).



Note also that the prosecution cannot comment on the defendant's failure to give evidence while the co-defendants are free to comment on another defendant's failure to give evidence. However, the judge can comment on what the co-defendant has said.

It is acceptable to direct the jury that silence:

- is not an admission (*Azzopardi*)
- has no bearing on whether the prosecution has proved beyond a reasonable doubt (*Azzopardi*)
- cannot be used to fill in gaps in the prosecution's case (*RPS*)

Therefore it is unacceptable to suggest to the jury that the defendant's silence leads the jury to more readily accept the evidence of the prosecution (*RPS*). The judge should not comment on the failure to contradict the prosecution's case (*Azzopardi*).

## **B. UNRELIABLE EVIDENCE**

In order to request a s 165 warning, the evidence must firstly be of a kind (i.e. a particular class of evidence) that may be unreliable. Section 165 covers evidence where the unreliability derives from the generic qualities of the kind of evidence, and not the unreliability 'at large' of the specific evidence or testimony. As provided by s 165(1), this includes:

- hearsay evidence,
- identification evidence,
  - o Note also the possibility of using a mandatory s 116 warning in this case. However the EA does not cover a range of identification evidence (see above sections)
- reliability affected by age, ill health (physical or mental) or injury
- evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding
  - o For example, an accomplice or a witness who is a prison informer. (*Pollitt*)
- Oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant (*McKinney*),

### **i. EVIDENCE OF A KIND THAT IS UNRELIABLE**

Specific examples of evidence that has been found to be of a kind that is unreliable includes:

- Disputed evidence found in a police search
- Police informant evidence (*Grey*)
- Demonstration evidence of the defendant's voice, appearance, clothing and handwriting which does not fall within EA's definition of identification evidence
- Police evidence where corruption findings exist
- Where the witness has been given a discounted sentence or indemnity (*Kanaan*)
- Tracker dog evidence
- Identification evidence outside the EA's definition
  - o Identification of non-defendant (whether by defence or by prosecution)
  - o negative identification evidence
- Evidence given by an 'unfavourable' witness.

### **ii. WARNING TO THE JURY**

Secondly, having satisfied that the evidence is of a kind that is unreliable, the party can request the judge to warn the jury that the evidence may be unreliable, inform the jury of matters that may cause it to be unreliable, and warn the jury of the need for caution in



determining whether to accept the evidence and the weight to be given to it (s 165(2)). The court must not only warn the jury that the evidence is unreliable but also of the reasons why it is unreliable.

### iii. EXCEPTION

The judge need not issue a warning if there are good reasons for not doing so (s 165(3)). This may be as a result of accumulated judicial experience (*Stewart*). The absence of a significant dispute with respect to a witness's evidence may also be a good reason (*R v Reardon*). Note the interplay between s 165 and s 165A. Section 165(6) provides that a judge cannot warn that the reliability of the child's evidence may be affected by the age of the child, unless it is made pursuant to s 165A(2) and (3).

### C. DELAY IN PROSECUTION

If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence (s 165B). However the judge need not issue a warning if there are good reasons for not doing so (s 165B(3)).

It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay (s 165B(4)).

Delay includes delay between the alleged offence and its being reported, and significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay (s 165B(6)).

In establishing forensic disadvantage, the court may take into account the fact that any potential witnesses have died or are not able to be located and the fact that any potential evidence has been lost or is otherwise unavailable (s 165B(7)).

### D. CHILDREN'S EVIDENCE

If evidence is given by a child, a judge must not warn the jury, or suggest to the jury, that children as a class are unreliable witnesses (s 165A(1)(a)), inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults (s 165A(1)(b)).

Furthermore the judge must not give a warning or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child (s 165A(1)(c)) or give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child (s 165A(1)(d)).

However a judge may still inform or warn the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information (s 165A(2)).



## **E. COMMON LAW WARNINGS**

The common law power of the judge to give a warning or to inform the jury remains preserved by s 165(5) and is useful where other evidence may give rise to the need for a warning beyond situations where the concerns go beyond unreliability.

### **i. LONGMAN (MANDATORY) WARNING**

A mandatory warning is needed where there has been a substantial delay in complaint and/or prosecution of a case involving allegations of sexual offences. Cases indicate that a two (*Collins*) or four (*Dixon*) year delay is not a substantial delay in the absence of evidence of disadvantage to the accused. However, in the case of *Robinson*, a delay of 3 years was a factor in considering the appropriate warnings.



We hope you have found the Evidence Law Cram Notes useful for your studies. Please feel free to contact us at [www.UniCramNotes.com](http://www.UniCramNotes.com) if you have any problems, comments or suggestions!