PRACTISING
under the
UNIFORM EVIDENCE ACTS

A Paper
delivered by
The Hon. P. D. Cummins

at the
National Public Sector Legal Officers' Forum

in
Canberra, A.C.T.
on
6 March 2013

I[1]

In a crisp and delightful article entitled "Hearsay Evidence" published in the 1927 *Australian Law Journal* – yes, 1927 – Mr. Justice Ferguson of the New South Wales Supreme Court painted a picture worthy of a 1920ies movie. He wrote (at 195):

> Everyone with experience in the Courts is familiar with incidents of this kind. The witness in the box is proceeding to give his plain, straightforward account of the transaction under inquiry: - "Joe says to me: 'Give him one in the jaw, Bill,' he says, so I hits him and knocks him down." But no sooner does he get out the words: "Joe says to me – ," than he is interrupted by an anguished protest from the bar table: "We can't have what was said." "No," says the examining counsel, tolerantly, "don't tell us what he said, just tell us what you did. He said something, and then – ?" "Yes, he says to me – ." "No! no! no!" At length the bewildered witness is made to understand that he must say: "Joe said *something*, and then I knocked the other man down," and peace reigns. The great rule of law that a witness must not repeat anything that was said behind the back of the opposing party has been once more triumphantly upheld.
>
> Now there is no such rule of law, and there never was.[2]

His Honour, with admirable clarity, proceeded to demolish the misconception that statements out of court are of themselves inadmissible, and concluded with a true statement of the underlying principle:

> Whether the evidence in any particular instance is admissible or not depends upon the question what fact it tends to prove. If, for example, the question is who was driving a certain car when an accident took place, a witness cannot give evidence that somebody told him A. was driving it. But if the question is who told A. to drive the car, the evidence of a witness who heard the instructions given, whether in the presence of the opposing party or not, stands on a quite different footing. That fact is one about which he can speak from his own knowledge.[3]

The basal lesson from Mr. Justice Ferguson's analysis is that a touchstone for admissibility is the purpose for which the evidence is sought to be adduced. Purpose is central to the law of admissibility, both then at common law and now in the Uniform Evidence Acts (UEAs).

All this in an article a page and a half in length. Writers on evidence could learn from its brevity.

---

[1] The views expressed are those of the speaker only.
[2] Mr Justice Ferguson, 'Hearsay Evidence' (1927) *Australian Law Journal* 195, 195.
[3] Ibid 196.

II

The first word of the title of this Paper – *Practising* – is a signifier of the purpose of the Paper. It is to assist you in your practices. I hope that it does so. You come to Canberra from across Australia and from New Zealand and Singapore and principally are public sector lawyers. Given the nature of your practices, I shall concentrate upon preparation for litigation rather than matters arising on your feet in court. You have knowledge of, and work under, the common law and the Uniform Evidence Acts (UEAs).[4] So it is prudent to note two matters. First, the UEAs are not a codification of the common law but supplant it where their provisions speak. Reservations of the common law are set out in section 9 of the UEAs, with the NSW and Victorian reservations being significantly wider than those of the Commonwealth. However, as to admissibility, the UEAs act as a code, by reason of section 56(1) which provides:

> Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

Second, while the UEAs are substantially consistent, there are some significant differences between them. They particularly relate to certain forms of privilege – professional confidential relationship privilege (Division 1A of Part 3.10), sexual assault communications privilege (deriving from the NSW *Evidence Amendment (Confidential Communications) Act 1997* as amended in 1999 but which are similarly provided in Division 2 of Part II *Evidence Act 1958* (Victoria)), privilege in respect of self-incrimination (section 128A) which in NSW is extended to orders under Part 25 *Uniform Civil Procedure Rules 2005*, and privilege in preliminary court proceedings (section 131A) wherein the Commonwealth provision is more limited than the NSW and Victorian provisions. These differences are conveniently summarised in Stephen Odgers *Uniform Evidence Law* (8th ed., 2009) at 14-16.

Bearing in mind your practices, in this Paper I shall address particularly the matters of hearsay, specialised knowledge opinion, and client legal privilege. These are matters which are important in preparing evidence for litigation, and can be difficult. I am happy at the conclusion of the Paper to answer your questions on any part of the UEAs.

I shall conclude the Paper with a look to the future.

[4] The titles and dates of assent to the Acts which constitute the Uniform Evidence Acts are: *Evidence Act 1995* (Cth) (assented to on 23 February 1995); Evidence Act 1995 (NSW) (assented to on 19 June 1995); *Evidence Act 2008* (Vic) (assented to on 15 September 2008); *Evidence Act 2001* (Tas) (Assented to on 17 December 2001); *Evidence Act 2011* (ACT) (notified on 13 April 2011).

III

But before admissibility comes relevance. Relevance is the prior matter. Evidence that is not relevant is not admissible. Relevant evidence is defined by s. 55(1) UEAs thus:

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

The words "if it were accepted" involve that relevance is to be determined on the assumption that the court accepts the evidence: *Adam v The Queen*.[5]

Relevance is assessed by rational, not discretionary, considerations. In *Smith v The Queen*[6] Gleeson CJ and Gaudron, Gummow and Hayne JJ stated at [6]

> although questions of relevance may raise nice questions of judgement, no discretion falls to be exercised. Evidence is relevant or it is not.

However, do not overlook the residuary discretion for exclusion of relevant evidence provided in section 135:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

Section 136 provides a general discretion to limit the use of evidence in the circumstances there set out and section 137 provides for the exclusion in criminal proceedings of evidence adduced by the prosecution the probative value of which is outweighed by the danger of unfair prejudice to the defendant.

In *Washer v Western Australia*[7] Gleeson CJ and Heydon and Crennan JJ observed in relation to the words "could rationally affect" in section 55(1):

> In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.

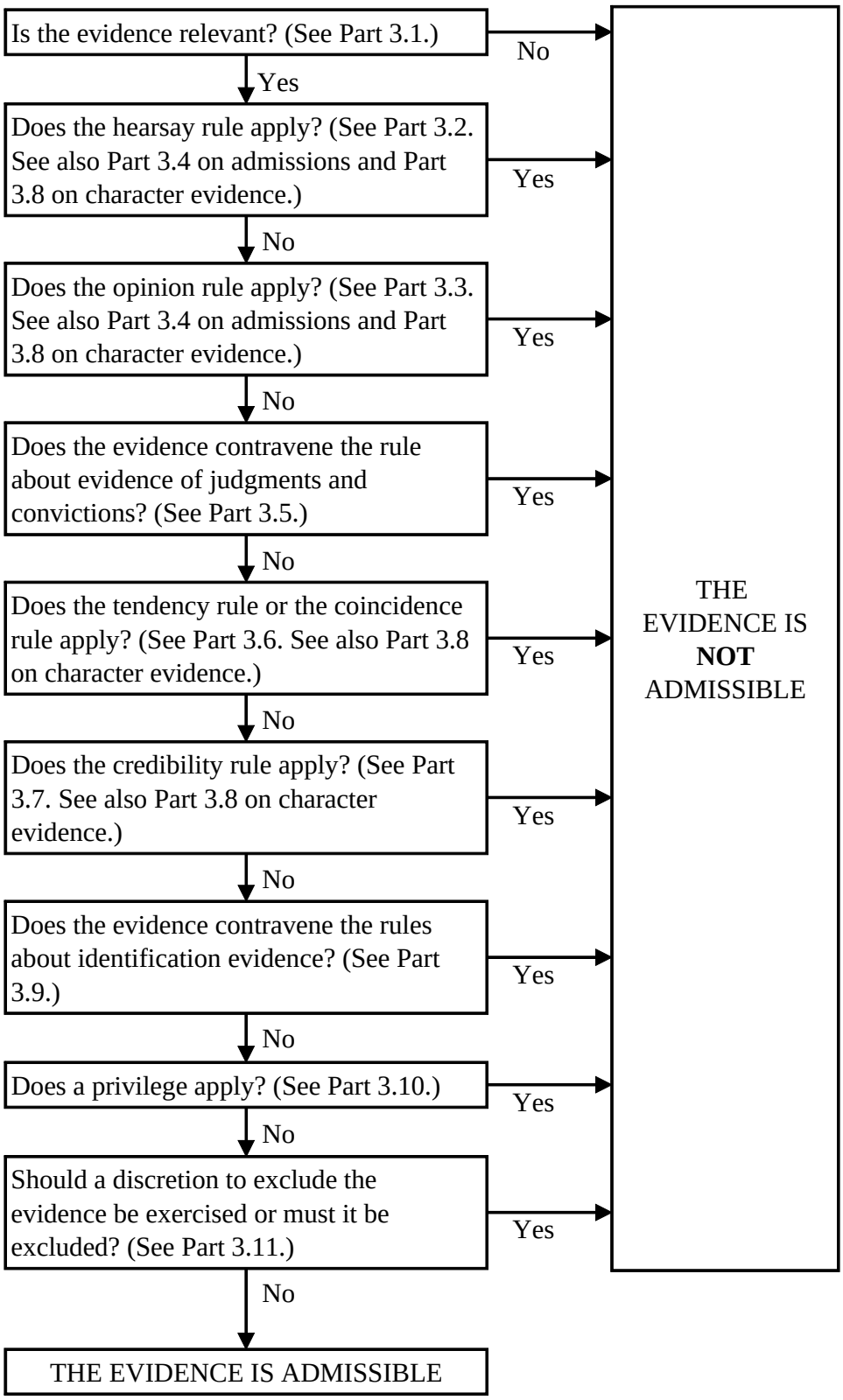
[5] (2001) 207 CLR 96.
[6] (2001) 206 CLR 650.
[7] (2007) 82 ALJR 33.

There is a thicket of learning on relevance and admissibility, but there are two laser beams that illustrate it. They are the questions:

1. What precisely does the evidence purport to prove? And
2. By what probative nexus does it do so?

IV

The commencement of Chapter 3 UEAs contains a useful diagram of steps of admissibility under the Acts. This is it:



There are no other diagrams contained in the UEAs. However, flowcharts – I regard them as navigational charts – have most helpfully been created by the Victorian Law Reform Commission and the Judicial College of Victoria and published in their joint *Introduction to the Uniform Evidence Acts in Victoria: Significant Changes* (2009). They directly relate to the Victorian Act but I shall note for you any significant differences with other Acts. I shall refer to these navigational charts when tracing the provisions of the UEAs in relation to the chosen topics of hearsay, specialised knowledge opinion and client legal privilege.

V

The hearsay rule is defined by s. 59(1) UEAs as follows:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

This essentially reflects the common law so clearly stated by Mr. Justice Ferguson. But the next section turns this on its head.

Section 60(1) provides:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

By section 60(1) once a statement is admitted pursuant to its terms it is admitted at large, but subject to requirements and exceptions. Having thus turned yourself on your head, you commence to spin, because there are myriad exceptions. These are premised on the principle of competency (section 61) and the entity "first-hand hearsay" – "a previous representation that was made by a person who had personal knowledge of an asserted fact": section 62(1) – which entity is provided for in Part 3.2, Division 2.

Basal to the common law prohibition upon hearsay use of out-of-court statements was that they were not reliable because their accuracy could not be tested in court. To take Mr Justice Ferguson's example of the question of who was driving the car when the accident occurred, the examination would proceed:

> Q: Who was driving the car?
> A: I was told A was driving.
> Q: Yes, but was he?
> A: I don't know. I was only told he was.

Thus "hear-say". This prophylactic common law rule has been replaced by section 60(1). As a consequence Part 3.2 makes extensive provision for assessment of the availability of hearsay evidence, the principal of which is the "first-hand" hearsay provision of section 62. A statement of the reasoning underlying this fundamental change is contained in the ALRC Report *Evidence* (1985) no. 26 vol. 1 para 685, and the Commission's Report *Uniform Evidence Law* (2005) no. 102 at para 7.81 where it was stated:

> The focus will be on the weight to be accorded to the evidence, not on admissibility.

Helpful analysis of the hearsay provisions (in the NSW UEA) and of relevant principle is contained in *Papakosmas v R* (1999) 196 CLR 297 in the joint judgement of Gleeson C.J. and Hayne J. at [23] – [26] and in the judgement of McHugh J. at [81] – [87]. Likewise the analysis by Heydon J. (in a separate but not dissenting

judgement) in *Baker v R* (2012) 289 ALR 614 (not yet reported in the CLRs) at [113] – [119] is of value on the interface of the UEA provisions and the common law.

I stated at the outset that purpose is central to the law of admissibility, both at common law and under the UEAs. Purpose does not mean the intention of the party seeking to adduce the evidence; it means the use to which the evidence if admitted would be put.[8]

As to criminal proceedings, section 60(3) states that section 60 does not apply in a criminal proceeding to evidence of an admission. Part 3.4, headed "Admissions", sets out the requirements for receipt in evidence of admissions. Sections 81 and 82, the opening sections of Part 3.4, provide that an admission can be admissible if it is "first-hand" hearsay, so long as the other requirements of the Part are met. "Admission" is defined in the Dictionary as:

> …a previous representation that is
> (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
> (b) adverse to a person's interest in the outcome of a proceeding

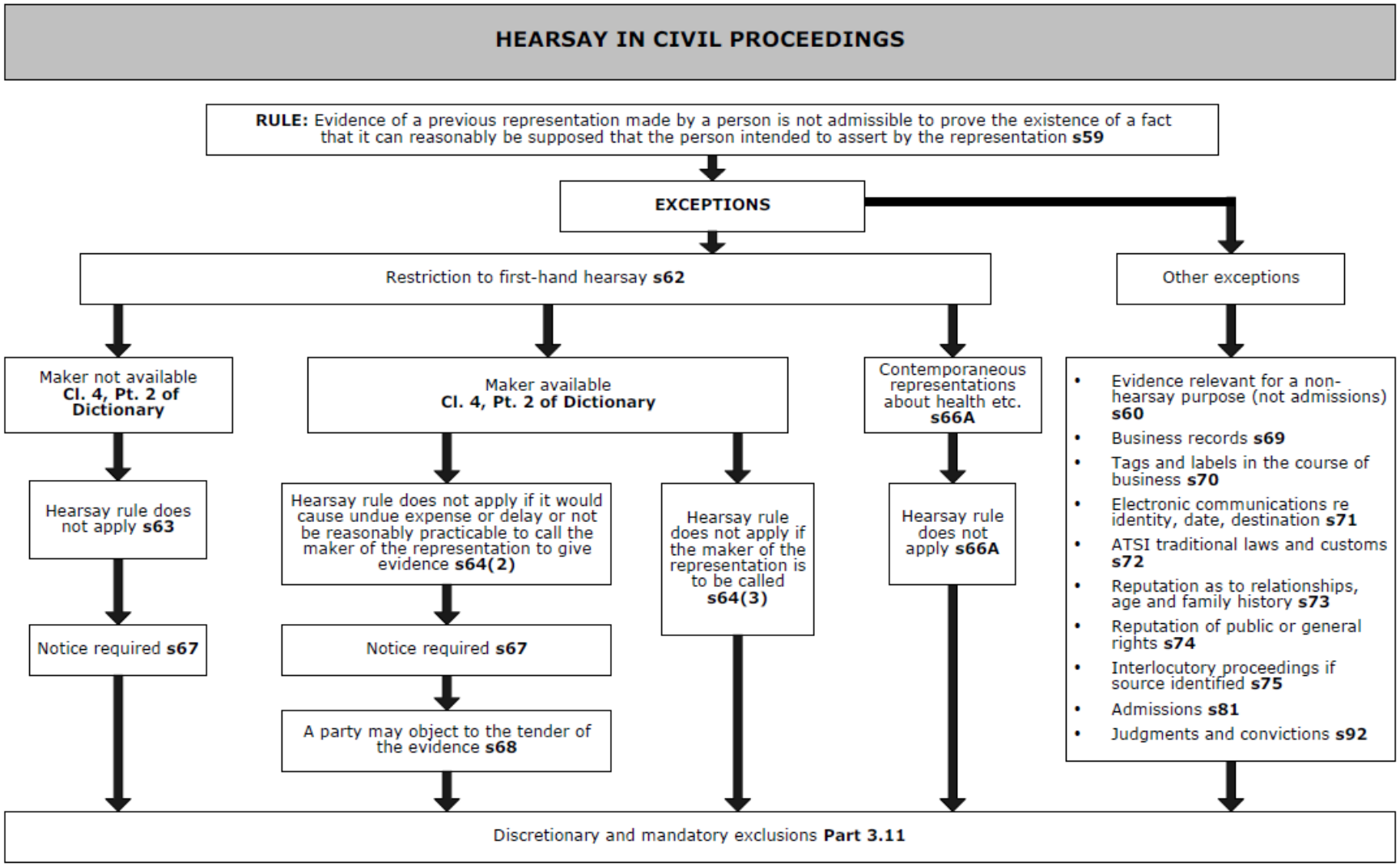
thus reflecting the common law rationale of receiving out of court admissions by defendants because they are against interest.

Thus there are many exceptions to the hearsay rule stated in section 59. They are set out in a Note to section 59 and are:

> evidence relevant for a non-hearsay purpose (section 60)
> first-hand hearsay-
> civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)
> criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
> contemporaneous statements about a person's health etc. (section 66A)
> business records (section 69)
> tags and labels (section 70)
> electronic communications (section 71)
> Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
> marriage, family history or family relationships (section 73)
> public or general rights (section 74)
> use of evidence in interlocutory proceedings (section 75)
> admissions (section 81)
> representations about employment or authority (section 87(2))
> exceptions to the rule excluding evidence of judgments and convictions (section 92(3))
> character of and expert opinion about accused persons (sections 110 and 111).

Thankfully the Victorian Law Reform Commission and Judicial College of Victoria navigational maps provide assistance in charting one's course. They are as follows:

[8] *R v Adam* (1999) 47 NSWLR 267 at [116]. The case went to the High Court – *Adam v The Queen* (2001) 207 CLR 96 - but not on this point.

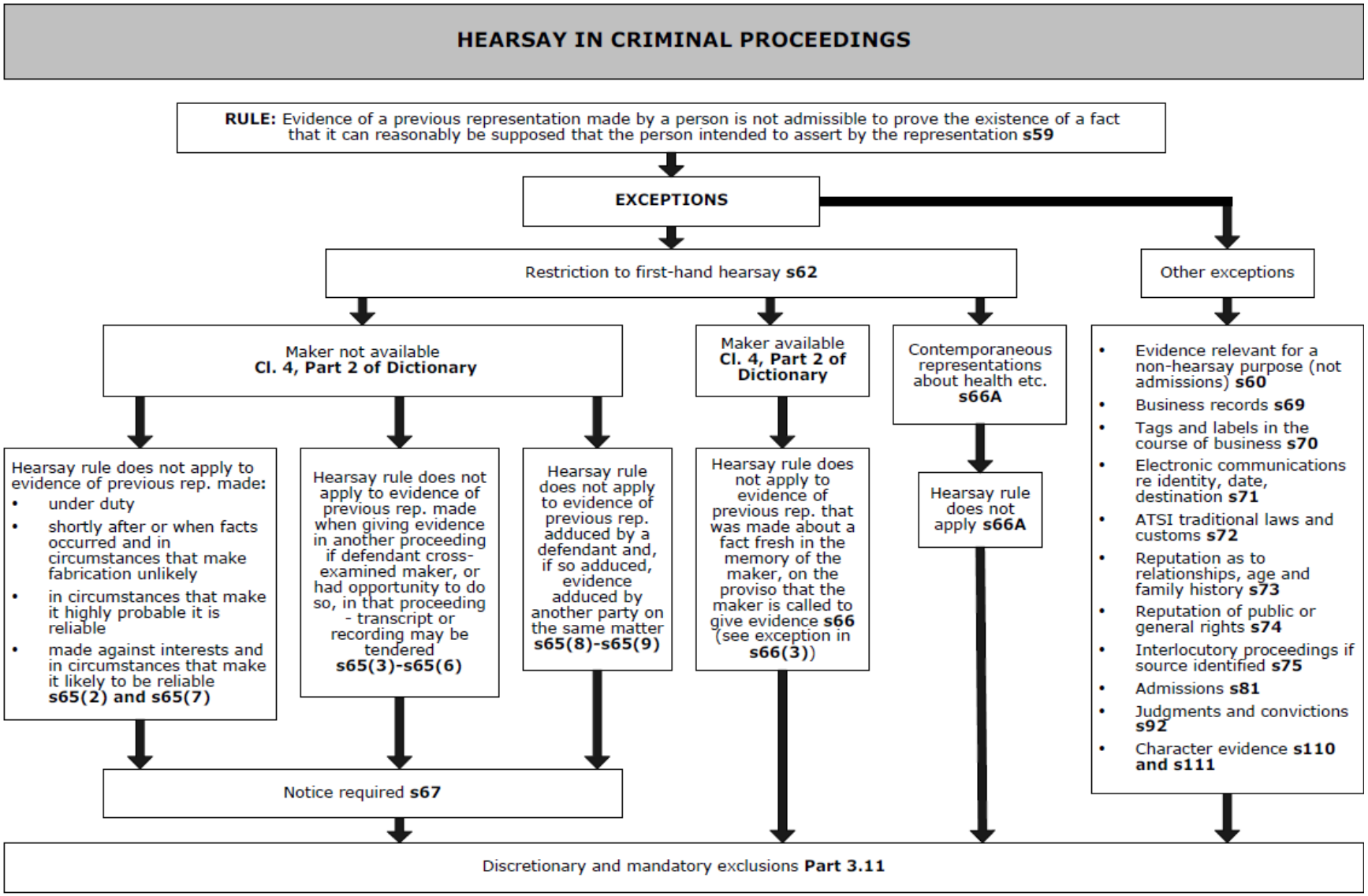


Note: The maker of a representation must have been competent for the evidence to be admissible **s61** (but note **s66A**)

The court may waive the hearsay rule in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

Evidence relevant to the admissibility of evidence to which s63, s64, s69, s70 or s71 applies can be given by affidavit or written statement **s170-s173**



Note: Evidence relevant to the admissibility of evidence to which s65, s69, s70 or s71 applies can be given by affidavit or written statement **s170-s173**
See also notes to Hearsay in Civil Proceedings diagram above

I hope that these navigational maps assist you. I have found that if you have a true understanding of principle, and a true sense of direction, you will chart a true course in litigation. Be encouraged.

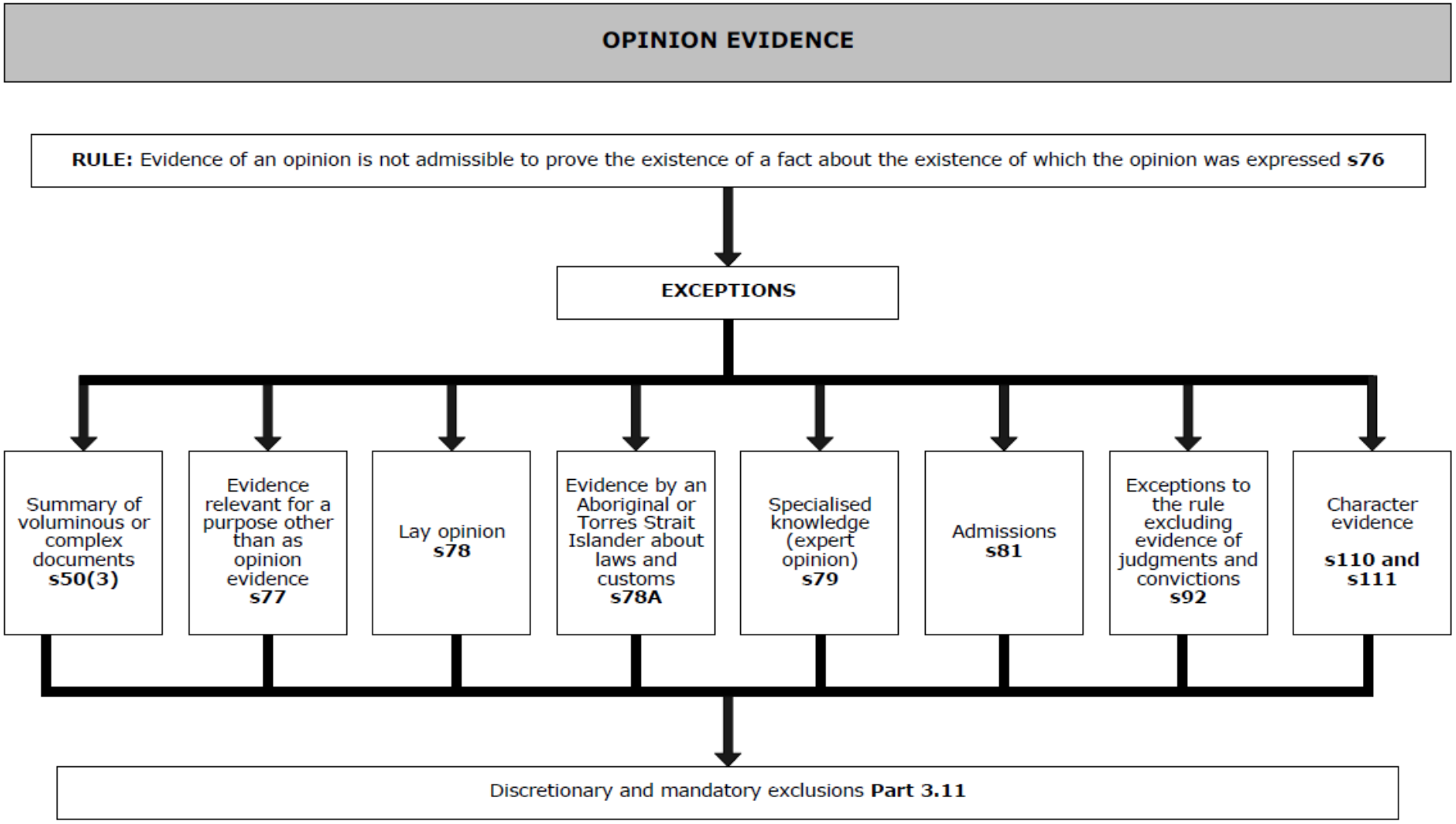
I turn to specialised knowledge opinion evidence and client legal privilege. These subjects are not as extensive as that of hearsay evidence but are important in preparation for litigation, which is the reason I address them.

VI

Part 3.3 of the UEAs, governs the admissibility of opinion evidence. The basal provision is section 76, headed “The opinion rule,” which by subsection (1) provides:

> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

As with the hearsay rule, so too with the opinion rule: it is qualified by numerous exceptions. But, thankfully, unlike those to the hearsay rule the exceptions to the opinion rule are neither voluminous or convoluted. The VLRC and JCA set them out as follows:



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

A party may request another party to call a specified person as a witness, or may request another party to give it access to a document or thing to examine, copy or test the document or thing for authenticity, identity or admissibility **s166-s169**

I wish to concentrate on specialised knowledge opinion, formerly known as expert evidence. This is a critical area in preparation for litigation. You all know of major cases of miscarriages of justice because of flawed expert evidence being adduced and accepted in court. Conversely, properly adduced and accepted expert evidence can be a major element in the successful advancement of litigation.

Admissibility of specialised knowledge opinion evidence is governed by section 79. Sub-section (1) states:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Subsection (2) relates to specialised knowledge evidence of child development and child behaviour including in relation to sexual abuse, because courts had been regrettably slow to receive evidence founded upon that area of established knowledge. The expression "specialised knowledge" in section 79 is not defined in the UEAs, nor are any criteria for the establishment of such knowledge stated by the Acts other than the foundation of "training, study or experience". Thus formal academic qualification is not required.[9]

Experience shows that in preparation for litigation, four questions should be addressed:

1. What qualifications does the witness possess for expressing the opinion;
2. Is the qualification relevant to the subject matter of the opinion;
3. Upon what facts or data is the opinion based; and
4. Is the witness objective and not biased or an advocate?

Each of these considerations is important.

The requirement of section 79(1) that the opinion be wholly or substantially based on the specialised knowledge was identified by Gleeson CJ in *HG v The Queen*[10] and by the majority (French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ) in *Dasreef Pty Ltd v Hawchar*.[11] In that case there were deficiencies in the conduct of the trial (majority at [19]) and in the specialist evidence given (majority at [42]) but for our purposes the observations of the majority at [37]-[42] on the scope and requirements of section 79(1) repay study. At [42] the majority noted:

> A failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on study or experience is a matter that goes to the admissibility of the evidence, not its weight.

Heydon J was in dissent on matters which are presently immaterial but his analysis of the common law and of the requirements of section 79(1) is salutary reading.[12]

---

[9] Going beyond the original thesis for the reception of expert evidence enunciated in *Folkes v Chadd* (1782) 3 Doug KB 157: 99 ER 989 (KB) and in *Clark v Ryan* (1960) 103 CLR 486.
[10] (1999) 197 CLR 414 at [39]-[45].
[11] (2011) 243 CLR 588.
[12] *Passim*, especially [56]-[59].

While each of the four questions posed above is important, the third is critically so. Opinion evidence often founders on an erroneous or inadequate factual base. Conversely, evidence of opinion from a relatively qualified specialist, properly founded on an established evidentiary base, and given impartially can constitute powerful evidence in the conduct of litigation.

VII

Client legal privilege is an important matter in litigation and, when issues arise as to it, can be a fraught one. Division 1 of Part 3.10 UEAs governs the matter of client legal privilege. Before turning to the statutory provisions it is apposite to note two matters not the subject of specific provision in the UEAs. First, the privilege is that of the client, not of the lawyer. It is for the client, not the lawyer, to waive. Second, the rationale underlying the privilege is the securing of access to the law. This was well stated by Dawson J in *Baker v Campbell*[13] at 128 as follows:

> [I]ts justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what had passed between them for the purpose of giving or receiving advice…The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser had a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of the relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.

As to the identification of the client, yesterday you had the substantial benefit of the Paper by Professor the Hon. Murray Kellam A.O. *Determining the 'client' – Distinguishing the dynamics within the agency*. Thus I shall say nothing further to that Paper upon the identification of the client.

Essentially, Division 1 of Part 3.10 UEAs reflects the common law of client legal privilege, adopting the dominant purpose test[14], with some extensions.

Section 118 provides:

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of-
>
> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person-
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

Section 119 provides:

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of-
>
> (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

[13] (1983) 153 CLR 52.
[14] *Grant v Downs* (1976) 135 CLR 674.

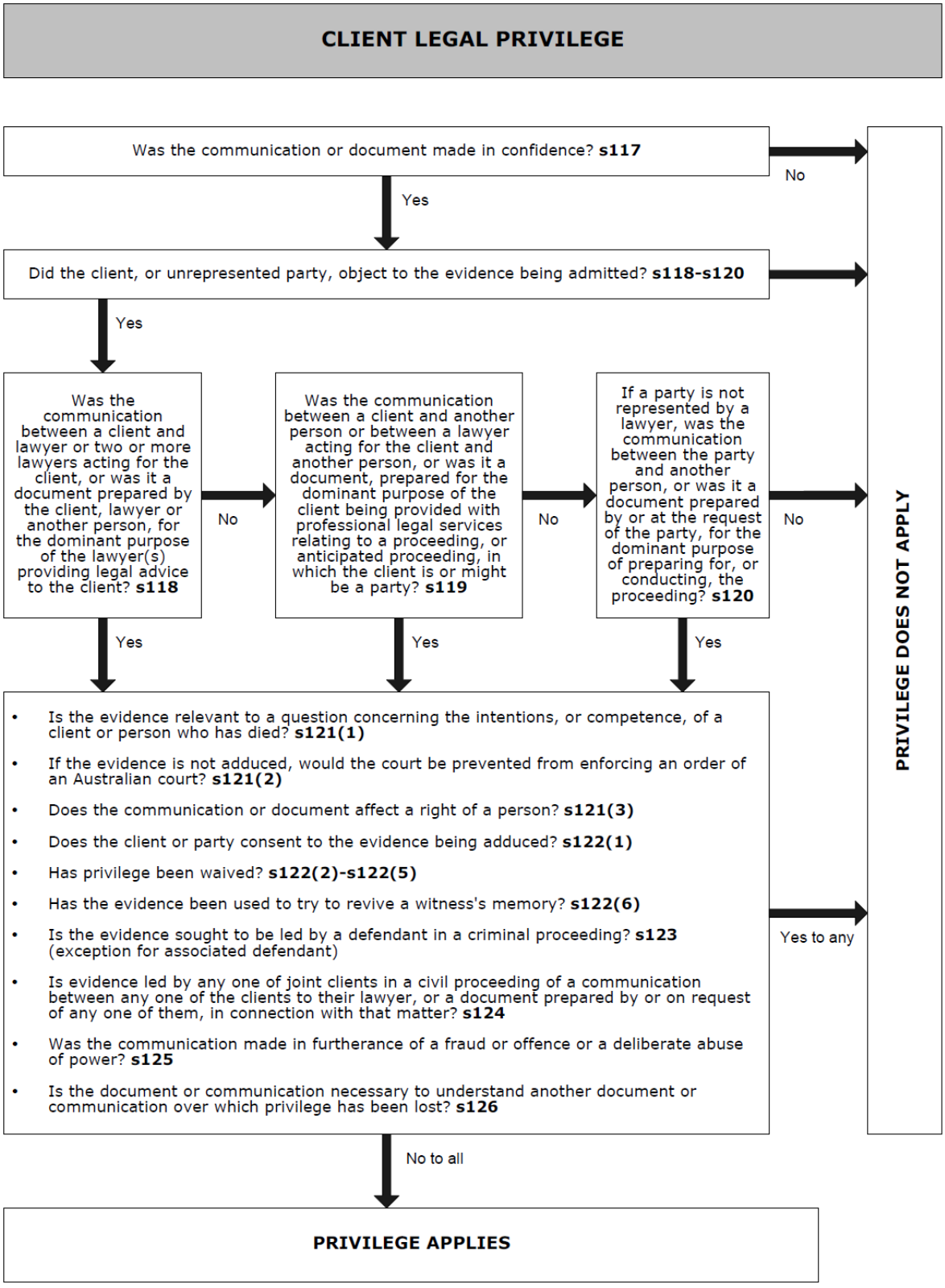
(b) the contents of a confidential document (whether delivered or not) that was prepared-

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Care always needs to be exercised by you in the receipt of and communication of client material and legal advice intended to be privileged. Be alert to your and your client's compliance with the process and criteria for maintaining confidentiality and client legal privilege. It is poor and unacceptable practice for client legal privilege to be lost inadvertently or, worse, negligently.

Loss of client privilege by consent and by client conduct is provided for by section 122.

The VLRC and JCV navigational map in relation to Division 1 is as follows:



Note: See also discretionary and mandatory exclusions **Part 3.11**

A provision of special significance is section 125(1). Paragraph (a) of that subsection reflects the common law[15] and paragraph (b) extends it. Section 125(1) provides:

> This Division does not prevent the adducing of evidence of -
>
> (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
>
> (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

Nor should it. As they sew, so shall they reap.

Bear this provision in mind, particularly when you seek to contend that client legal privilege has been lost by another party. Section 125(1) is operationally important in the preparation and conduct of litigation.

[15] *R v Cox and Railton* (1884) 14 QBD 153.

VIII

In conclusion, let us look briefly to the future. There are three developments I envisage.

First, there will continue to be an elimination of bullying from the methodology of cross-examination of witnesses. Cross-examination of witnesses is an important and proper technique and is the method of testing witnesses as to accuracy and truthfulness. However, testing should never descend into bullying. Section 41 UEAs[16] proscribes improper questions including a question which

(1)… (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

(c) is put to the witness in a manner or tone that is belitting, insulting or otherwise inappropriate…

The courts once set the bar much too low on the matter of bullying of witnesses – often under the rubric that it was 'robust' – but fortunately the culture is turning. May it continue to do so.

Second, there will be progressive development of the proper place of victims in the criminal justice process. Once, victims were strangers to the process; then, they were witnesses; now, they are participants in the sentencing process through victim impact statements; and I foresee the time when they will be active in the trial process itself. We have heard enough of the tired claim – the gendered language of which reveals its age – 'better that ten guilty men go free than one innocent man be convicted'. It is necessary that no innocent person be convicted. That is non-negotiable. But we can do much better than the imbalance propounded by that claim. I think that the trial process – not only the sentencing process – will by progressive legislative amendment come to secure not only the rights of the accused –as it should – but also the rights of victims. As it should.

Third, I envisage and commend the implementation of the Uniform Evidence Acts across Australian jurisdictions. We should always respect local culture and difference; but we have a national economy, are developing the common law of Australia[17], and are moving towards a national legal profession. National statutory uniformity of evidence law would be a cohesive and productive evolution. And that is an appropriate conclusion for this Paper, delivered on the eve of the centenary of this city's founding as the nation's capital, in this lovely setting on the shore of Lake Burley Griffin with its vision across the waters to the High Court of Australia.

[16] In different form in Victoria (s 41) but substantially similar.

[17] *John Pfeiffer Pty. Ltd. V Rogerson* (2000) 203 CLR 503 per Gleeson C.J., Gaudron, McHugh, Gummow and Hayne JJ at [2] and [15] and the authorities cited therein; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at [135].