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UNIFORM EVIDENCE LAW

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Stephen Odgers KC has added the following updates to the service Uniform Evidence Law:

Chapter 1A

Introduction- updated commentary and references

- Obligation of trial court to act in the absence of objection; *Perish v R* (2016) 92 NSWLR 161; [2016] NSWCCA 89 at [272]; *Restricted Judgment* [2024] NSWCCA 85.

Chapter 2: Adducing Evidence

- [EA.43.180] Adducing evidence of prior inconsistent statement, updated commentary. *Moore v Goldhagen* [2024] VSCA 25
- [EA.44.120] Application of s 44(3) updated references
- Definitions: updated commentary; *Schulz v The Queen* [2019] VSCA 179
- Section 5 Commentary- Definitions- updated references and commentary; *Incollingo v Tax Practitioners Board* [2023] FCA 878

Chapter 3

Adducing Evidence – updated references and commentary

- Updated reference: *Lehrmann v Network Ten Pty Limited (Cross-Examination)* [2023] FCA 1477.
- [EA.26.150] “the way in which witnesses are to be questioned”; *Wild v Meduri* [2024] NSWCA 230
- [EA.27.60] General comments; *Kapeli v Secretary, Department of Home Affairs* [2024] FCA 1246
- [EA.27.120] Questioning by court; *Becker v The King* [2023] VSCA 332 at [114]-[124]; *Constantinou v The King* [2024] VSCA 79

Chapter 4A

- Part 3.1 commentary
- New insert, [EA.55.370] Disbelief of a witness
- S 57 updated references and commentary: *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2023] FCA 1117 at [33].

- [EA.55.60] General comments; *Fergusson v The King* [2024] SASCA 63
- [EA.55.90] “a fact in issue” *BQ v The King* [2024] HCA 29

Chapter 4B

- [EA.59.120] “previous representation”
- Updated references and commentary; *Hillen v The King* [2023] NTCCA 9
- *DPP v Hicks* (a pseudonym) (No 4) [2024] ACTSC 39 at [35].
- *Restricted Judgment* [2024] NSWCCA 38 at [261].
- It has been held that proceedings for a “garnishee order” and proceedings to set that order aside are both an “interlocutory proceeding” for the purposes of this provision
- [EA.66.60] General comments; 302 A Crim R 445
- [EA.69.120] “part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business” (s 69(1)(a)); *Hassan v Minister for Home Affairs* [2024] FCA 527
- *Jens v The Society of Jesus in Australia Limited (Evidence Ruling)* [2024] VSC 330 at [26]-[28].
- *CPB Contractors Pty Ltd v Construction, Forestry and Maritime Employees Union* [2024] FCA 459 at [55].

Chapter 5

- s 88 Updated commentary; admission of an alleged admission
- [EA.81.60] General Comments: updated references and commentary.
- [EA.87.120] In furtherance of common purpose; updated references and commentary: Discretionary exclusion or limits on use are permissible pursuant to the provisions of Part 3.11
- Insert New Section: [EA.81.300] Other provisions; *The Jury Directions Act 2015* (Vic), s 19(1), provides that that, in a criminal trial, the prosecution must give advance notice of “evidence of conduct that it proposes to rely on as evidence of incriminating conduct
- [EA.87.120] “in furtherance of a common purpose” (s 87(1)(c));]; *Audish v R* [2024] NSWCCA 196 at [86]-[87] (“s 87(1)(c) ... should be construed as requiring that the common purpose relied upon is a common purpose embraced by the offence charged ... a common purpose to deceive the police

... was a different purpose from the joint criminal enterprise to commit the offences”).

- Insert new section: [EA.87.230] Appellate review; LH v R [2024] NSWCCA 165

Chapter 5A

- section 92 commentary; updated commentary, conviction for an offence may be used to prove the facts that constituted the elements of the offence; Osbourne v Butler (a Pseudonym) [2024] VSCA 6
- [EA.91.60] section 91- general comments; updated references and commentary; Restricted Judgment [2024] NSWCCA 38
- Chevalley v Industrial Court of New South Wales (2011) 82 NSWLR 634; 217 A Crim R 240; [2011] NSWCA 357 at [58]; Restricted Judgment [2024] NSWCCA 38 at [205].

Chapter 5B

- s 97 Commentary, updated; new insert: Joint Trial
- Evidence of character or reputation; updated commentary and references: conduct showing a tendency to jealousy and aggression may have significant probative value. Restricted Judgment [2024] NSWCCA 33 at [124].
- [EA.101.120] Coincidence Evidence; updated references and commentary: in Restricted Judgment [2024] NSWCCA 37, La Rocca was distinguished on the basis that, in that case, the prosecution sought to use the evidence in question as “evidence of a tendency to have an interest in the acquisition of a chemical related to a prohibited drug.
- [EA.101.360] Jury Directions; updated references and commentary: Director of Public Prosecutions v Benjamin Roder (a pseudonym) [2024] HCA 15; such a direction may be necessary where the trial judge considers that there is “a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt”.
- [EA.97.120] “significant probative value” (s 97(1)(b)); Coskun v R [2024] NSWCCA 67; Lincoln v R [2024] NSWCCA 173
- [EA.97A.60] Application [NSW/ACT/NT Acts only]; The requirement that it be “about ... the sexual interest the defendant has or had” or “about ... the defendant acting on a sexual interest the defendant has or had” suggests that

s 97A only applies where the court is satisfied that the evidence tends to show that the defendant did have a sexual interest in children.

- [EA.97A.150] “matters ... not to be taken into account ... unless the court considers there are exceptional circumstances ... to warrant taking them into account” (s 97A(5)) [NSW/ACT/NT Acts only]

Chapter 6

- [EA.106.210] “has made a prior inconsistent statement” s 106 (2)(c) updated commentary; Hillen v The King [2023] NTCCA 9
- “representation” is defined in the Dictionary to the Act to include: “(a) an express or implied representation (whether oral or in writing); or (b) a representation to be inferred from conduct; or (c) a representation not intended by its maker to be communicated to or seen by another person; or (d) a representation that for any reason is not communicated”.
- Examples: updated references; Restricted Judgment [2024] NSWCCA 33 at [182]-[183].
- [EA.106.60] General comments; 304 A Crim R 527
- Obian v The King [2024] HCA 18

Chapter 6B

- [EA.114.210] “without the person who made it having been intentionally influenced to identify the defendant s 114(2); updated commentary

Chapter 7

- Insertion of new section; [EA.127A.10] General Comments [NT Act Only]
- This provision in the Northern Territory Act is in largely the same terms as, in combination, s 126J and s 126K in the NSW and Victorian Acts.
- Insertion of new section; [EA.128A.190]: Certificates from different jurisdictions s 128A(11)-(13)
- EA.122.150 Loss of Privilege: issue waiver; updated commentary and references. GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd [2020] NSWCA 266

Chapter 7A

- [EA.135.270] Criminal Proceedings: In R v WE (No.13) [2020] NSWSC 225, defence evidence was excluded on the basis that the probative value of the evidence was substantially outweighed by the danger that the evidence might cause or result in undue waste of time.
- [EA.135.90] General comments; s 137, which only applies in respect of evidence adduced by the prosecution in criminal proceedings, there is no requirement that those dangers must “substantially” outweigh the probative value of the evidence. Nevertheless, the observations of the High Court in respect of s 137 are apposite; Steven Moore (a pseudonym) v The King [2024] HCA 30 at [18].
- [EA.135.150] “(a) be unfairly prejudicial to a party”
- the High Court in Steven Moore (a pseudonym) v The King [2024] HCA 30 has also accepted in relation to s 137 that unfair prejudice may arise from procedural considerations, such as an inability to cross-examine the person who made a hearsay representation

Chapter 8

- Moore v Goldhagen [2024] VSCA 25 updated commentary
- [EA.141.120] Updated references and commentary; in judge alone trials, it would be for the trial judge as the tribunal of fact to determine whether a particular intermediate fact was indispensable to the judge excluding any reasonable doubt as to guilt.
- Mathieson v The Queen [2021] VSCA 102 at [43] updated commentary: the jury should not be directed that “[i]f on the evidence that you do accept, you are of the view that there is a reasonable explanation or hypothesis [that] the Crown has not disproved, then you would have a reasonable doubt” because, to entertain a reasonable doubt about guilt, the jury do not positively have to “accept” any particular evidence
- Carbone v R (No 2) [2024] NSWCCA 7
- Director of Public Prosecutions v Benjamin Roder (a pseudonym) [2024] HCA 15 at [25]-[29]. Any risk that a jury may be confused regarding the requirement that the elements of an offence must be proved beyond reasonable doubt can be addressed with suitable directions to the jury
- [EA.141.210] updated references and commentary; Director of Public Prosecutions v Benjamin Roder (a pseudonym) [2024] HCA 15 at [17]-[20].

- S 178 updated references and commentary; Restricted Judgment [2024] NSWCCA 38 at [205].
- Other issues; Willmot v Queensland [2024] HCA 42; It is well accepted that “rectification will only be ordered in equity on the basis of clear and convincing proof of the parties’ common intention”, an analysis which may be explained on the basis that, in cases where there are lawyers on both sides of the transaction that “is a reason for caution in making the factual findings upon which a rectification order is based” since there is a “measure of inherent unlikelihood” in each of the lawyers being mistaken in the same way: Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603 at [461]; SABR Pty Ltd v AMA Group Limited [2024] NSWCA 175 at [138]-[142].
- [EA.141.240] Other provisions: NSW; Astill v R [2024] NSWCCA 118

Chapter 10

Updated references and commentary

Chapter 11

- [EA.Dict.Pt.2.60] Representations in document
- Hillen v The King [2023] NTCCA 9; it was held that amendments to the document must have been made prior to W signing the document, so that the amendments were representations that were made by W without any need for W to have initialled the amendments
- Updated references and commentary

