

INDEX

- adducing evidence, 24
- admissibility of evidence, 90–1
 - admissions, 218–19
 - discretionary exclusions.
 - See* discretionary exclusion of evidence
 - mandatory exclusion.
 - See* mandatory exclusion of evidence
- admissions
 - admissibility in common law, 218–19
 - authority to make statements, 234–5
 - compared to hearsay, 208
 - conduct that amounts to, 236–43
 - definition, 205–6
 - discretions to exclude, 244–5
 - distinguished from confessions, 205
 - electronic recording while in police custody, 209–17
 - exception to hearsay and opinion rules, 206–7
 - exclusion of records of oral questioning, 234
 - formal admissions, 15–16
 - Haddara* case, 254–6
 - implied admissions in civil proceedings, 237
 - implied admissions in criminal proceedings, 238–43
 - in the course of official questioning, 217–18
 - influenced by violence or other conduct, 219
 - no application against third parties without consent, 208
 - personal knowledge, 207–8
 - proving, 236
 - reliability, common law assessment of, 218–19
 - reliability, inducements and, 220–34
 - reliability, outside circumstances and, 227–34
 - reliability, subjective test for, 227
 - silence at pre-trial, 238–41
 - silence at trial, 241–2
 - statements that amount to, 236–43
 - unfairness discretion, 245–54
 - voluntariness in common law, 218–19
- advance rulings and findings, 19
- affirmations, 44
- ancillary provisions
 - affidavits, 535
 - foreign law, 535–7
 - requests, 534–5
- appeals, 19–20
- asserted facts, 123
- bail, 261
- basis rule, expert opinion, 194–7
- Browne v Dunn* rule, 71, 79–81
- burden of proof, 10
 - civil proceedings, 10
 - criminal proceedings, 10
 - evidential burden of proof, 10
 - legal burden of proof, 10
- business records, exception to hearsay rule, 170–7
- cautioning of persons, 515–16
- character evidence
 - character in a particular respect, 373–8
 - co-accused, 378–9
 - common law position, 362–4
 - directions on good character evidence, 366–73
 - key provision, 364–6
 - leave to cross-examine about character, 379–84
 - rebuttal of evidence of good character, 378–84
 - relationship with credibility evidence, 364
 - relevance, 364–6
- child witnesses
 - alternative arrangements for giving evidence, 32–6
 - competence, 29–31
 - warnings regarding reliability of evidence, 521–2
- circumstantial evidence
 - alternative hypotheses derived from, 92–4
 - coincidence evidence as, 325
 - relevance, 92–4
 - results of forensic techniques as, 388
 - tendency evidence as, 325

- civil proceedings
 - burden of proof, 10
 - coincidence reasoning in, 266
 - compared to criminal proceedings, 8
 - hearsay, exceptions to rule, 138–40
 - implied admissions, 237
 - procedural requirements, 7–8
 - rebuttal and reopening, 82
 - standard of proof, 11
 - tendency reasoning in, 265
 - waiver of evidential rules, 18
- client legal privilege, 413–14
 - common law, 414–16
 - communication distinguished from documents, 428–9
 - confidentially, definition of, 423–4
 - copy documents, 429
 - dominant purpose test, 424–8
 - employee or agent, definition of, 422–3
 - general loss of, 432
 - invoking, 431–2
 - lawyer, definition of, 417–22
 - legal advice privilege, 428–30
 - litigation privilege, 430–1
 - other causes of loss, 437–8
 - waiver, 432–7
- cognitively impaired witnesses
 - alternative arrangements for giving evidence, 32–6
 - competence, 29–31
- coincidence evidence, relevance, 94
- collusion over evidence, 318–20
- common knowledge rule, 200–1
- compellability of witnesses, 36
 - defendants, 36–7
 - defendant's family, 37–40
 - presumption of, 25–6
- competence of witnesses
 - child witnesses, 29–31
 - cognitively impaired witnesses, 29–31
 - determination of, 26–9
 - exceptions to hearsay rule, 136–7
 - presumption of, 25–6
 - special hearings for certain classes of witnesses, 32–6
- concoction of evidence, 318–20
- confessions
 - distinguished from admissions, 205
 - electronic recording while in police custody, 209–17
 - in the course of official questioning, 217–18
 - religious confessions, 446
- confidentiality, in client legal privilege, 423–4
- contamination of evidence, 318–20
- continuance, presumption of, 530
- convictions, evidence of, 538
- corroboration of evidence
 - common law approach, 516–18
 - under the Act, 518
- court proceedings
 - civil. *See* civil proceedings
 - criminal. *See* criminal proceedings
 - invoking of privileges, 474–7
 - order of, 8
- credibility evidence
 - adduced in cross-examination, 342–5
 - adduced in cross-examination of accused, 345–6
 - admissibility, 333, 336
 - coincidence evidence as, 261
 - collateral nature of, 333–5
 - credibility rule, 341–2
 - definition, 335–7
 - exceptions to rule, 342–55
 - expert opinion on witness's credibility, 353–5
 - non-witnesses, 355–8
 - person who has made a previous representation, 355–6
 - previous representations of accused, 356–8
 - rebutting denials of, 347–50
 - redefining, 337–41
 - re-establishment of in re-examination, 350–3
 - relationship with character evidence, 364
 - relevance, 94, 333, 335
 - sexual offence cases, 333
 - tendency evidence as, 261
- credibility of evidence, reliability and probative value, 488–97
- criminal proceedings
 - burden of proof, 10
 - coincidence evidence. *See* similar fact evidence—criminal proceedings
 - compared to civil proceedings, 8
 - cross-examination of credibility evidence, 345–6
 - exclusion of evidence. *See* mandatory exclusion of evidence
 - hearsay rule, exceptions to. *See* hearsay exceptions—criminal proceedings
 - implied admissions, 238–43
 - pre-trial silence, 238–41
 - procedural requirements, 6–7
 - silence at trial, 241–2
 - standard of proof, 11

- criminal proceedings (cont.)
 - tendency evidence. *See* tendency evidence—
 - criminal proceedings
 - waiver of evidential rules, 17
- cross-examination
 - argumentative questions, 74
 - Browne v Dunn* rule, 79–81
 - character evidence, 379–84
 - compound questions, 73
 - controversial assumptions underlying
 - questions, 73–4
 - credibility evidence, 342–5
 - credit, as to, 66
 - cutting off answers before completion, 73
 - improper or disallowable questions, 68–75
 - inappropriate comments by counsel during, 72–3
 - issue, as to, 67
 - judges' role, 74
 - leading questions, 67–8
 - objectionable questions, 67
 - offensive questioning, 72
 - prior consistent statements, exceptions to rule
 - against, 76–7
 - prior consistent statements, rule against, 75–6
 - prior inconsistent statements, 77–9
 - unfavourable witnesses, 54–66
- defendants, compellability, 36–7
- delays in prosecution, impact on reliability of evidence, 522–6
- direct evidence, 20
- directly relevant evidence, 91
- disallowable questions, cross-examination, 68–75
- disciplinary principle, 4
- discretionary exclusion of evidence
 - general discretion to exclude evidence, 482–5
 - general discretion to limit use of evidence, 485–6
 - misleading or confusing evidence, 483–4
 - relevance, 103–12
 - undue waste of time, 484–5
 - unfairly prejudicial evidence, 483
- documentary evidence, 21
 - adducing, 83–5
 - definition of documents, 83
 - relevance, 91
- dual relevance of opinion evidence, 186
- electronic communications, 177, 533–4
- electronic recording of admissions and confessions, while in police custody, 209–17
- evidence
 - adducing of, 24
 - admissibility of, 90–1
 - defining, 2–3
 - forms, 20–1
 - types, 20
- evidence law
 - disciplinary principle, 4
 - libertarian principle, 4
 - nature of, 3
 - principles versus rules, 3–4
 - reliability principle, 3
 - statutes. *See* legislation
- evidential burden of proof, 10
- examination-in-chief, 46
 - prohibition of leading questions, 46–8
 - reviving memory, 48–53
 - unfavourable witnesses, 54–66
- exclusion of evidence.
 - See* discretionary exclusion of evidence; mandatory exclusion of evidence
- expert opinion
 - basis and hearsay, 197–8
 - basis rule, 194–7
 - concurrent expert evidence, 198–9
 - distinguished from lay opinion, 193
 - exception to opinion rule, 191–4
 - expert certificates, 198, 537–8
 - procedural issues, 198–9
 - on witness's credibility, 353–5
- express assertions, 118–20
- foreign law, proof of, 535–7
- formal admissions, 15–16
- hearsay
 - asserted fact, 123
 - contemporaneous mental and physical states, 167–70
 - documentary evidence, 21
 - exceptions to rule. *See* hearsay exceptions
 - expert opinion basis in, 197–8
 - express and implied assertions, 118–20
 - hearsay purpose, 126–30
 - hearsay rule, 117, 121–2
 - intention to assert, 123–6
 - non-hearsay purpose, 131–6
 - non-hearsay purpose at common law, 120–1
 - oral evidence, 20
 - previous representations, 122–3
 - prior consistent statements, 75
 - representations, 122
 - representations made by a person, 123
- hearsay exceptions, 138
 - admissions, 206–7

- business records, 170–7
- civil cases. *See* hearsay exceptions—civil proceedings
- competency, dependence upon, 136–7
- criminal cases. *See* hearsay exceptions—criminal proceedings
- electronic communications, 177
- emotional state of mind, 168–9
- first-hand hearsay, 137–8
- knowledge, 169
- res gestae, 167–9
- state of mind, 168
- statements of intention, 168
- tags, labels and writing, 176–7
- hearsay exceptions—civil proceedings
 - maker of statement is available, 139–40
 - maker of statement is not available, 138
- hearsay exceptions—criminal proceedings
 - against the interests of the person, 146–54
 - fabrication of statement unlikely, 140–3
 - maker of statement is available, 157–67
 - maker of statement is not available, 140
 - previous representation adduced by defendant, 154–7
 - reliability of representation highly probable, 143–6
- identification evidence
 - common law and identification parades, 391–4
 - definition, 388–9
 - displacement effect, 404–9
 - exclusion of picture evidence, 401
 - exclusion of visual identification evidence, 396
 - formal identification procedures, 390–1
 - forms, 388
 - identification parades, 388–9, 391–4, 396
 - in-court identification, 389, 396–8
 - judicial directions, 401–4
 - judicial warnings, 401
 - out-of-court identification, 389–90
 - picture identification evidence, 389, 399–401
 - pictures of people in police custody, 400–1
 - potential unreliability of, 401
 - probative value versus unfair prejudice, 406–8
 - 'reasonableness' condition, 396–9
 - relevance, 109–12
 - results of forensic techniques, 388
 - types, 389–91
 - visual identification evidence, 389, 394–9
 - voice identification, 388
- illegally obtained evidence. *See* improperly or illegally obtained evidence
- implied admissions
 - in civil proceedings, 237–8
 - in criminal proceedings, 238–43
- implied assertions, 118–20
- improper questions, cross-examination, 68–75
- improperly or illegally obtained evidence
 - cautioning of persons, 515–16
 - common law approach to exclusion, 501–9
 - exclusion under the Act, 509–16
- in-court identification, 389, 396–8
- indirect evidence, 20
- indirectly relevant evidence, 91–100
- Jones v Dunkel* rule, 25
- journalist privilege, 446
- judges
 - exclusionary powers, 481
 - functions of, 9
 - responsibilities during cross-examination, 74
- judicial directions
 - distinguished from warnings, 18
 - on good character evidence, 366–73
 - on identification evidence, 401–4
 - on silence of accused, 242–3
 - standard of proof, 12–14
 - tendency and coincidence evidence, 325–8
- judicial leave, 18
- judicial notice, 14–15
- judicial reasons, 453–4
- judicial warnings
 - on picture evidence, 401
 - on potentially unreliable identification evidence, 401
 - on reliability of children's evidence, 521–2
 - on unreliable evidence, 518–21
- juries, functions of, 9–10
- law, matters of, 14–15
- lay opinion, 187–91
- leading questions
 - circumstances where allowable, 48
 - in cross-examination, 67–8
 - prohibition of, 46–8
 - types, 46
- legal advice privilege, 428–30
- legal burden of proof, 10
- legislation
 - development of uniform evidence legislation, 4–5
 - practical effect of uniform legislation, 5–6
 - structure of the Act, 5
 - uniformity across jurisdictions, 5
- legislative facts, 14–15
- libertarian principle, 4
- litigation privilege, 430–1
- logical relevance test, 100, 102, 113, 481

- mandatory exclusion of evidence
 - in criminal proceedings, 486–7
 - probative value, 487–97
 - unfair prejudice, 104, 497–501
- memory, reviving of, 48
 - in court, 48–51
 - out of court, 53
 - police officers, 51–3
- miscellaneous matters, 538–9
- misleading evidence, 483–4

- native title claims, evidence on traditional laws and customs, 199
- non-hearsay purpose, 131–6
 - at common law, 120–1

- oaths, 44
- objective improbability evidence, 260
- opinion
 - common knowledge rule, 200–1
 - defining, 182–4
 - dual relevance exception, 186
 - exceptions to exclusionary rule, 185, 206–7
 - exclusion, 3
 - expert opinions. *See* expert opinion
 - lay opinions, 187–91
 - opinion rule, 184–6
 - other admissible opinions, 199–200
 - ultimate issue rule, 200
- oral evidence, 20
 - relevance, 91
- out-of-court identification, 389–90

- Pfennig* test, 307, 311–18
- picture identification evidence, 389
 - exclusion, 401
 - judicial warnings, 401
 - pictures of people in police custody, 400–1
- police officers
 - recording of admissions and confessions, 209–17
 - testimony relying on written statements, 51–3
- prejudicial effect of evidence
 - risk of unfair trial, 320–4
 - versus probative value, 104, 307–18
- previous representations, 122–3
- prior consistent statements
 - as credibility evidence, 75, 350–3
 - exceptions to rule against, 76–7
 - rule against, 75–6
- prior inconsistent statements, cross-examination, 77–9
- privileges
 - against self-incrimination. *See* self-incrimination, privilege against
 - client legal privilege.
 - See* client legal privilege
 - definition, 412
 - journalist privilege, 446
 - judicial reasons, 453–4
 - legal advice privilege, 428–30
 - legal professional privilege. *See* client legal privilege
 - litigation privilege, 430–1
 - loss of, 412
 - medical communications between doctor and patient, 439–41
 - pre-trial, trial and non-judicial proceedings, 474–7
 - procedural issues, 477
 - professional confidential privilege, 438–41
 - public interest immunity.
 - See* public interest immunity
 - religious confessions, 446
 - settlement negotiations.
 - See* settlement negotiations privilege
 - sexual assault communications privilege, 441–4
 - spousal privilege, 37–40
 - ‘without prejudice’ rule.
 - See* settlement negotiations privilege
- probability evidence, 260
- probative value of evidence
 - approaches to interpreting, 487
 - assessment, 270–5
 - assessment taking account of reliability and credibility, 487–97
 - coincidence evidence, 304–6
 - definition, 270
 - mandatory exclusion of evidence, 487–97
 - significant value distinguished from substantial value, 270
 - tendency evidence, 94–100
 - versus prejudicial effect, 104, 307–18, 406–8
- procedural unfairness, 501
- professional confidential privilege, 438–41
- proof, facilitation of
 - matters of official record, 532
 - post and communications, 532–4
 - presumptions in the Act, 530–2
- propensity evidence.
 - See* tendency evidence
- provisional evidence, relevance, 112–13
- public interest immunity
 - class claims, 454–63
 - common law, 454–63
 - contents claims, 454
 - differences to privileges, 454, 463
 - exclusionary rule in matters of states, 463–4
 - matters of state, 464–6

- questioning of witnesses
 - in adversarial system, 45–6
 - by counsel, 46
 - cross-examination.
 - See* cross-examination
 - examination-in-chief.
 - See* examination-in-chief
 - judicial involvement, 46
 - by parties, 45
 - re-examination.
 - See* re-examination
- real evidence, 20
 - relevance, 91
- recording of admissions and confessions
 - whilst in police custody, 209–17
- re-examination, 81
 - civil cases, 82
 - rebuttal and reopening, 81–3
 - re-establishment of credibility, 350–3
- relationship evidence, 92
- relevance
 - alternative hypotheses, 92–4
 - character evidence, 364–6
 - circumstantial evidence, 92–4
 - coincidence evidence, 94
 - common law definition, 100–2
 - complainant evidence in sexual assault cases, 104–9
 - credibility evidence, 94, 333, 335
 - directly relevant evidence, 91
 - documentary evidence, 91
 - exclusion of evidence, 103
 - exclusion of prejudicial evidence, 104
 - identification evidence, 109–12
 - indirectly relevant evidence, 91–100
 - judicial discretions, 103–12
 - legal relevance, 100–2
 - limits on use of evidence, 104
 - logical relevance, 102–3
 - oral evidence, 91
 - propensity evidence, 94
 - provisional evidence, 112–13
 - real evidence, 91
 - relationship evidence, 92
 - similar fact evidence, 94
 - statutory definition, 102–3
 - tendency evidence, 94–100
- reliability of evidence
 - credibility and probative value, 487–97
 - delays in prosecution, 522–6
 - see also* unreliable evidence
- reliability principle, 3
- religious confessions, 446
- representations, 122
 - previous representations, 122–6
- requests, 534–5
- res gestae, 167–9
- scientific instruments, presumption of accuracy, 530
- self-incrimination, privilege against
 - common law, 446–9
 - legislation, 449–53
- sentencing, 261
- settlement negotiations privilege
 - common law, 466–72
 - exceptions, 468–9
 - requirements for privilege, 467–8
 - under the Act, 472–4
- sexual assault cases
 - arrangements for complainants giving evidence, 32–6
 - credibility evidence, 333
 - relevance of complainant evidence, 104–9
- sexual assault communications privilege, 441–4
- similar fact evidence, 94, 260
 - admissibility requirements, 263
 - bail, 261
 - as circumstantial evidence, 325
 - coincidence reasoning distinguished from tendency reasoning, 306
 - coincidence reasoning in civil cases, 266
 - coincidence rule, 260, 266
 - competing with other inferences, 325
 - as credibility evidence, 261
 - in criminal cases. *See* similar fact evidence—criminal proceedings
 - fact in issue, 261–2
 - judicial directions, 325–8
 - non-application of coincidence rule, 260–3
 - notice, 267–70
 - overlaps with tendency evidence, 325
 - purpose, evaluation of, 263–7
 - regulation of admission, 260
 - sentencing, 261
 - significant probative value, 304–6
 - truthfulness and reliability of, 306–7
 - use for other purposes, 262–3
- similar fact evidence—criminal proceedings
 - coincidence reasoning, 267
 - collusion, concoction or contamination, 318–20
 - Pfennig* test, 307, 311–18
 - prejudicial effect, 320–4
 - probative value versus prejudicial effect, 307–18
- specialised knowledge, expert opinion based on, 191–4

- spousal privilege, 37–40
- standard of proof, 10–11
 - admissibility of evidence, 11–12
 - balance of probabilities, 11, 17
 - beyond reasonable doubt, 11
 - civil proceedings, 11
 - criminal proceedings, 11
 - jury directions, 12–14
- state, matters of, public interest immunity, 464–6
- sworn evidence, oaths and affirmations, 44

- tendency evidence
 - admissibility requirements, 263
 - bail, 261
 - as circumstantial evidence, 325
 - competing with other inferences, 325
 - as credibility evidence, 261
 - in criminal cases.
 - See* tendency evidence—criminal proceedings
 - fact in issue, 261–2
 - judicial directions, 325–8
 - non-application of rule, 260–3
 - non-tendency purpose, 263–4
 - notice, 267–70
 - overlaps with coincidence evidence, 325
 - purpose, evaluation of, 263–7
 - regulation of admission, 260
 - relevance, 94–100
 - sentencing, 261
 - significant probative value, 270–1
 - tendency purpose, 263–4
 - tendency reasoning distinguished from
 - coincidence reasoning, 306
 - tendency reasoning in civil cases, 265
 - tendency reasoning in criminal cases, 265–6
 - tendency rule, 260, 264
 - truthfulness and reliability of, 306–7
 - use for other purposes, 262–3
 - use to prove good character, 263
- tendency evidence—criminal proceedings
 - collusion, concontion or contamination, 318–20
 - further restrictions, 307
 - Pfennig* test, 307, 311–18
 - prejudicial effect, 320–4
 - probative value versus prejudicial effect, 307–18
 - tendency reasoning, 265–6
- truthfulness of evidence, coincidence and
 - propensity evidence, 306–7
- ultimate issue rule, 200
- unfair prejudice
 - discretionary exclusion of evidence, 483
 - mandatory exclusion of evidence, 497–501
 - misuse of evidence by jury, 104
 - procedural unfairness, 501
- unfavourable witnesses, 54–66
- unreliable evidence
 - children's evidence, warnings regarding, 521–2
 - delay in prosecution, 522–6
 - identification evidence, warnings regarding, 401
 - types, 518
 - warnings in relation to, 518–21
- unsworn evidence, treatment of witnesses and
 - evidence, 44

- visual identification evidence, 389
 - exclusion, 396
 - 'reasonableness' condition, 396–9
- voice identification, 388
- voir dire, 16–17

- waiver
 - client legal privilege, 432–7
 - evidential rules, 17–18
- warnings. *See* judicial warnings
- 'without prejudice' rule.
 - See* settlement negotiations privilege
- witnesses
 - calling of, 24–5
 - compellability.
 - See* compellability of witnesses
 - competence.
 - See* competence of witnesses
 - cross-examination.
 - See* cross-examination
 - examination-in-chief.
 - See* examination-in-chief
 - questioning.
 - See* questioning of witnesses
 - re-examination.
 - See* re-examination
 - unfavourable witnesses, 54–66