Topic 11: Cross-Examination of the Accused and The Shield

Proposition:	Authority
The accused is only a competent witness for the defence.	SAEA s 18(1)(a)
- An accused may be asked questions in cross-examination which tend to incriminate him or her of the offence	(c)
charged (even where they implicate the accused in other crimes at the same time).	Cornwell
 Can decline to answer if tends to incriminate of another offence not charged. 	(d)
- Questions which tend to show that the accused is of bad character, or has committed, been charged with or	(d)
convicted of any offence are forbidden. (CCCBC) Extends to the voir dire.	R v Vuvkov
 Accused gives evidence from witness box/wherever other witnesses give their evidence. 	(e)
The right to silence and self-incrimination	
 Prosecutor cannot comment on failure to give evidence (but judge and co-accused can). 	18(b)
 But must not suggest this failure emanates from a consciousness of guilt. 	R v Tran and Ta
- Comments a judge may make:	Weissensteiner
- No adverse inference of guilt from silence drawn. Silence not used to fill gaps in the prosecution case.	
Issue Cross-Examination:	Sections 18(1)(c) and (d)(i)
- Legislation only seeks to limit cross-examination as to credit – questions re offence charged admissible.	
 Permitted to show that the accused is guilty of the offence charged; establishing MF in issue. 	Jones v DPP
- Issue cross-examination relating to prior 'charges':	
 Questions cannot reveal CCCBC for the first time. If already known, admissible. 	Corak & Palmer
- Where the cross-examination is not directed at proving the guilt of the accused being cross-examined, but	
directed at proving the innocence of the co-accused:	
 Questions relevant to issue: proof of D's defence – admissible. 	
Cross-Examination as to Credit: Note – Accused has full benefit of any acquittals. Must state acquitted.	Garret v R. Storey: can't present to imply guilty.
- Leave required to XXN on CCCBC. Prejudice is risk of propensity reasoning. Probative to rebut D's new defence.	Phillips v R. Court has discretion to exclude if prej: Watts
Losing the Shield:	77410
- Following evidence of good character:	Section 18(1)(d)(ii)
- Where he has personally or by his advocate asked questions of the witnesses for the prosecution with	
a view to establish his own good character or has given evidence of his good character;	
- Asked witness for the prosecution, or D has given, evidence of D's good character.	
- Accused must act purposively to put their character in issue. Evidence given or question asked 'with	R v Fuller
a view' to giving evidence of good character.	
- It is sufficient that the question is asked, irrespective of the response (discretion to exclude).	Donnini v R
- Good character disclosed gratuitously by a witness; or adduced for the legitimate purpose	R v Redd
of establishing facts relevant to the accused's defence, will not bring exception into play.	R v Ellis
- The question is whether the defence intended to put character in issue by referring to conduct,	Donnini v R
disposition or reputation, either to suggest it is unlikely that the accused committed the crime, or to	
suggest the accused is a credible witness, or both.	
 Consider the impression broadly, not just analysing the actual words used in questions. 	Crabbe.

 Where good character arises through implication – decide on facts. 	PvR
- Asked about work – mentioned charity. Shield down if details, not if title.	
- Following an imputation against the character of a prosecution witness:	Sections 18(1)(d)(iii) and (2)
- Where –	(2)
- The nature or conduct of the defence is such as to involve imputations of the character of	(a)
the prosecutor or witness for the prosecution; and	
 The imputations are not necessarily arising from a proper presentation of the defence 	(b)
 Must be gratuitous attacks upon the credibility of the prosecutor or witnesses for the prosecution. 	P v R; Phillips
- The shield is not lost if the imputations arise from evidence of the conduct of the prosecutor	(3)
or witness' for the prosecution.	
 For example: ask – if the imputation is excluded, is D's explanation complete? 	PvR.
- Where accused said discipline because of stealing explained allegations by	
daughter – resentful of being disciplined: necessary for proper conduct of defence	
- Later: wouldn't force daughter to have sex with anybody, caught her doing so	
many times, kicked them out of house. Comment on promiscuity; not his defence.	
- Evidence against a co-accused charged with the same offence:	18(1)(d)(iv)
 Must be the same offence in all material respects (same one act, time occurred, title charged with) 	Commissioner for Metro Police v Hills
- Giving evidence against a co-accused: mere denial of guilt insufficient. Must be:	Corak and Palmer
- Direct evidence against them; or, any evidence tending to undermine the others' defence.	
- Although co-accused entitled to leave to XXN here, prosecutor may make an application only in	Corak v Palmer, Matusevich v The Queen
extreme circumstances where the co-accused takes no issue of XXN to credit.	
Evidence revealing the accused's good character:	
- Prosecution must be given an opportunity to rebut such evidence once given:	R v Perrier
 By calling a witness to give evidence of general bad reputation (testimony limited to that); 	R v Rowton
 By cross-examining any witness called to establish good character to discredit them; 	
 Can put to them conduct of the accused. Rumours may be put, if not discounted. 	R v Wood and Parker, R v Savoury
 By tendering evidence of previous convictions are relevant to negating the good character claimed. 	R v Redd
- Where the accused does not testify at all, then the character evidence can only be relevant to the question of	Cf Melbourne v R
the accused's guilt or innocence and not to his credit as a witness.	
- Rebutting evidence must be like for like – relating to the character trait the accused put in issue.	
 Where accused chooses to testify, then evidence of good character becomes relevant to the accused's credit. 	Cf Winfield
 No reason to restrict XXN to the character trait initially put in issue by the accused. 	
Directions which should be given to a jury where good character is raised and met:	Melbourne v R
- Where the accused does not testify:	
 1. For jury alone to determine whether the accused has a good character raising doubt about P's case. 	
- 2. If so, D receives benefit of good character in determining guilt of crime charged. No belittling this.	
- 3. Any bad character elicited only used to discredit or cf good character evidence given. No propensity	
- Where the accused does testify, jury should be additionally directed:	
 4. If D found of good character, that must be taken into account in determining belief of testimony. 	
- 5. If D found of bad character, meets evidence of good character and assessing D's credit, but not to	
infer criminal tendency.	
- Failure to advise of 5. will generally give rise to a successful appeal.	BRS v R.
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